Date and Time: Thursday, December 14, 2023 12:00:00 PM CST

Job Number: 212633841

Documents (30)

1. *Wm. Filene's Sons Co. v. Fashion Originators' Guild, Inc., 14 F. Supp. 353*

Client/Matter: -None-

Search Terms: "antitrust law"

Search Type: Natural Language

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Content Type	**Narrowed by**
Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: 1st Circuit > Maine District Court,Massachusetts District Court,New Hampshire District Court,Puerto Rico District Court,Rhode Island District Court

2. *United States v. Lake Asphalt & Petroleum Co., 1960 U.S. Dist. LEXIS 4801*

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: 1st Circuit > Maine District Court,Massachusetts District Court,New Hampshire District Court,Puerto Rico District Court,Rhode Island District Court

3. *United States v. Allied Chem. Corp., 1960 U.S. Dist. LEXIS 4741*

Client/Matter: -None-

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4. *United States v. Bituminous Concrete Assn., Inc., 1960 U.S. Dist. LEXIS 4812*

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: 1st Circuit > Maine District Court,Massachusetts District

Content Type	Narrowed by
	Court,New Hampshire District Court,Puerto Rico District Court,Rhode Island District Court

5. [Union Leader Corp. v. Newspapers of New England, Inc., 218 F. Supp. 490]

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: 1st Circuit > Maine District Court,Massachusetts District Court,New Hampshire District Court,Puerto Rico District Court,Rhode Island District Court

6. [United States v. Grinnell Corp., 236 F. Supp. 244]

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: 1st Circuit > Maine District Court,Massachusetts District Court,New Hampshire District Court,Puerto Rico District Court,Rhode Island District Court

7. [Stanton v. Texaco, Inc., 289 F. Supp. 884]

Client/Matter: -None-

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8. [Liquilux Gas Services, Inc. v. Tropical Gas Co., 48 F.R.D. 330]

Client/Matter: -None-

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9. [Truxes v. Rolan Electric Corp., 314 F. Supp. 752]

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: 1st Circuit > Maine District Court,Massachusetts District Court,New Hampshire District Court,Puerto Rico District Court,Rhode Island District Court

10. [Boston Professional Hockey Asso. v. Cheevers, 348 F. Supp. 261]

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: 1st Circuit > Maine District Court,Massachusetts District Court,New Hampshire District Court,Puerto Rico District Court,Rhode Island District Court

11. [Lang's Bowlarama, Inc. v. AMF, Inc., 377 F. Supp. 405]

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: 1st Circuit > Maine District Court,Massachusetts District Court,New Hampshire District Court,Puerto Rico District Court,Rhode Island District Court

12. [Anderson Foreign Motors, Inc. v. New England Toyota Distributors, Inc., 475 F. Supp. 973]

Client/Matter: -None-

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13. [Bass v. Boston Five Cent Sav. Bank, 478 F. Supp. 741]

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: 1st

Circuit > Maine District Court,Massachusetts District Court,New Hampshire District Court,Puerto Rico District Court,Rhode Island District Court

14. [Hew Corp. v. Tandy Corp., 480 F. Supp. 758]

Client/Matter: -None-

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15. [A. D. M. Corp. v. Sigma Instruments, Inc., 481 F. Supp. 1297]

Client/Matter: -None-

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16. [Transitron Electronic Corp. v. Hughes Aircraft Co., 487 F. Supp. 885]

Client/Matter: -None-

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17. [Allied Int'l v. International Longshoremen's Ass'n, 492 F. Supp. 334]

Client/Matter: -None-

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18. [Anderson Foreign Motors, Inc. v. New England Toyota Distributor, Inc., 492 F. Supp. 1383]

Client/Matter: -None-

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19. [Grendel's Den v. Goodwin, 495 F. Supp. 761]()

Client/Matter: -None-

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20. [Auburn News Co. v. Providence Journal Co., 504 F. Supp. 292]()

Client/Matter: -None-

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21. [Baldini v. New England Greyhound Asso., 1980 U.S. Dist. LEXIS 15408]()

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: 1st Circuit > Maine District Court,Massachusetts District Court,New Hampshire District Court,Puerto Rico District Court,Rhode Island District Court

22. [Barry Wright Corp. v. ITT Grinnell Corp., 1981 U.S. Dist. LEXIS 9432]()

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: 1st

Circuit > Maine District Court,Massachusetts District Court,New Hampshire District Court,Puerto Rico District Court,Rhode Island District Court

23. [Bradley Auto Wash Sales, Inc. v. BP Oil, Inc., 1981 U.S. Dist. LEXIS 10018]

Client/Matter: -None-

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: 1st Circuit > Maine District Court,Massachusetts District Court,New Hampshire District Court,Puerto Rico District Court,Rhode Island District Court

24. [Van Schaick v. Church of Scientology, Inc., 535 F. Supp. 1125]

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: 1st Circuit > Maine District Court,Massachusetts District Court,New Hampshire District Court,Puerto Rico District Court,Rhode Island District Court

25. [Barry Wright Corp. v. Pacific Scientific Corp., 555 F. Supp. 1264]

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: 1st Circuit > Maine District Court,Massachusetts District Court,New Hampshire District Court,Puerto Rico District Court,Rhode Island District Court

26. [Nesglo, Inc. v. Chase Manhattan Bank, N.A., 562 F. Supp. 1029]

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: 1st Circuit > Maine District Court,Massachusetts District Court,New Hampshire District Court,Puerto Rico District Court,Rhode Island District Court

27. [M & H Tire Co. v. Hoosier Racing Tire Corp., 560 F. Supp. 591]

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: 1st Circuit > Maine District Court,Massachusetts District Court,New Hampshire District Court,Puerto Rico District Court,Rhode Island District Court

28. *Interface Group, Inc. v. Gordon Publications, Inc., 562 F. Supp. 1235*

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: 1st Circuit > Maine District Court,Massachusetts District Court,New Hampshire District Court,Puerto Rico District Court,Rhode Island District Court

29. *Custom Auto Body, Inc. v. Aetna Casualty & Surety Co., 1983 U.S. Dist. LEXIS 14941*

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: 1st Circuit > Maine District Court,Massachusetts District Court,New Hampshire District Court,Puerto Rico District Court,Rhode Island District Court

30. *Cia. Petrolera Caribe, Inc. v. Avis Rental Car Corp., 576 F. Supp. 1011*

Client/Matter: -None-

Search Terms: "antitrust law"

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Cases	Practice Areas & Topics: Antitrust & Trade Law; Court: 1st Circuit > Maine District Court,Massachusetts District Court,New Hampshire District Court,Puerto Rico District Court,Rhode Island District Court

Wm. Filene's Sons Co. v. Fashion Originators' Guild, Inc.

District Court, D. Massachusetts

March 24, 1936

No. 4293

Reporter
14 F. Supp. 353 *; 1936 U.S. Dist. LEXIS 1312 **

WM. FILENE'S SONS CO. v. FASHION ORIGINATORS' GUILD OF AMERICA, Inc., et al.

Core Terms

manufacturers, retailers, co-operation, style, dress, garments, copies, percent, piracy, prices, declaration, anti-trust, pirating, regulations, ladies', evils, purposes, merchandise, registered, measures, restrain, by-laws, selling, preliminary injunction, interstate commerce, original design, conditions, injunctive, originator, provisions

Opinion by: [1]** BREWSTER

Opinion

[*353] BREWSTER, District Judge.

This bill in equity is brought under section 16 of the Clayton Act (title *15 U.S.C.A. § 26*), the plaintiff seeking injunctive relief against threatened loss and damage by violation of the anti-trust laws. The matter is before the court upon plaintiff's prayer for a preliminary injunction. It has been heard upon affidavits, filed on **[*354]** behalf of both plaintiff and defendants, upon which I base the following

Statement of Facts.

1. The defendant Fashion Originators' Guild of America, Inc. (hereinafter referred to as the Guild), is a New York corporation. A copy of the certificate of incorporation which issued March 7, 1932, together with a copy of its constitution and by-laws and certain rules and regulations adopted by the Guild, are attached to the affidavit of James M. Golby, its executive secretary. (These exhibits and all exhibits hereinafter referred to are by reference incorporated in this statement of facts.) The other defendants are members of the Guild, manufacturers of ladies' garments.

The purpose of the corporation, as shown in its certificate of incorporation and its by-laws, is to "protect the **[**2]** originators of fashions and styles against copying and piracy of styles of any trade or industry; to promote co-operation and friendly intercourse in the wearing apparel industries; to establish and maintain uniformity and certainty in the customs and commercial usages of trade; * * * to advance the trade and commercial interests of its members and to foster the industries of its members throughout the Americas and to promote the sale, identification and recognition of original style and merchandise of the industries of its members."

2. Prior to the organization of the Guild, the manufacturers of ladies' garments, particularly in the higher priced lines, had been confronted with a demoralizing and destructive practice in the trade, known as "style piracy." Manufacturers who produced original designs, oftentimes at considerable expense, were liable to have the value of the accepted style seriously impaired by pirating manufacturers or retailers who obtained copies of the garment and

manufactured, or caused to be manufactured, replicas made of cheaper material and of inferior workmanship which were sold in the market at a price much less than the originator was entitled to command **[**3]** for the original creation. This piracy was sometimes accomplished by means that could be said to violate no legal rights of the creator, but in many instances reprehensible methods were adopted by the pirating manufacturer. In either event, the piracy worked a substantial injury to the manufacturer who created the style. During 1930 and 1931 it was not unusual to find that a dress, sold by the originator for $89, or thereabouts, would be copied and sold by the pirating manufacturer for as little as $15.75. It is said that this pernicious practice of piracy contributed substantially to the demoralized condition of the industry in 1931 and 1932, resulting in the bankruptcy of many concerns engaged in original style creation.

This practice of pirating styles was especially detrimental to the dress industry by reason of the fact that the style life of a dress is relatively short. If a pirating manufacturer were able to place copies on the market at reduced prices at approximately the same time as the original creator, obviously the latter would be deprived wholly, or partially, of any opportunity to make an advantageous sale of the pirated article.

The chief value of a "quality" **[**4]** dress lies, not so much in the quality of the material, as in the smartness and originality of the design.

The ladies' ready-to-wear garment industry is divided into various classes according to the price ranges of the articles produced. For some years prior to the formation of the Guild, a more or less arbitrary line had been drawn dividing the manufacturers of garments selling at wholesale for $16.75 and up from those manufacturers who sold for less. Since the formation of the Guild, however, this line of division, by common usage and custom, has been constantly lowered, so that since the summer of 1935 the definition of "original creators" has been held to include those who produced merchandise selling for as low as $6.75.

The manufacturers of low priced dresses, generally speaking, do not create original styles but adapt or change existing styles. Some years ago the cheaper market copied most of its styles, but this predatory practice was decreased so that to-day, in proportion to the total production, relatively few garments are copied. The bulk of the copying now existing is found largely in the low priced field.

Pirating not only caused loss to the manufacturer and **[**5]** to the retailer who had been compelled to meet competition of retailers who bought from pirating manufacturers, but it caused resentment against the retailing store among the customers who had purchased the original garment at the higher price.

3. In order to remove, or at least mitigate, this evil, the Guild was organized **[*355]** to the end that the manufacturers of original styles could better protect the fruits of their labor.

The methods adopted by the Guild and its members to meet this situation may be summarized as follows:

In order to secure the necessary co-operation of the retail trade, though they were not admitted to membership in the organization, the retailers were asked to sign a so-called "declaration of co-operation" against style piracy. A copy of the original declaration is attached to the affidavit of Golby as Exhibit D. Retailers are not obliged to subscribe to this declaration, but if they do they agree to recognize the property rights of the manufacturer in styles created by it and to exact from the seller a warranty that the goods covered by the order are not copies of dresses originated by members of the Guild. The retailer further agrees that **[**6]** he will not knowingly or intentionally sell copies of Guild merchandise, and upon notification by the Guild he will exercise his right to return the garment to the manufacturer pursuant to the warranty above noted.

If a retailer declined to subscribe to this declaration of co-operation, or failed to comply with its provisions, the members of the Guild were so advised. The rules provide that members shall neither show nor sell their garments to retailers who have not signed or agreed to the declaration of co-operation, or, having signed, have breached its terms, and any member who willfully sells to a retailer after such member has been duly notified that such dealer has violated the "fair and reasonable standards and ethics of the Guild" is liable to an assessment of $100 for the first offense; $500 for the second, or expulsion or both; and for the third offense the member is liable to expulsion.

There were provisions in the by-laws for arbitration of disputes arising among members and, by an amendment to the by-laws, members, after eight weeks' notice in writing, were free to resign, in which event the member was required to state, before the board of governors, the reasons for **[**7]** his resignation.

4. To facilitate the operation of the program adopted by the Guild, it created a Style Registration Bureau and required each member, in order to secure the benefits of protection, to register each design with the bureau prior to releasing his dress for sale to the general public. A label was issued to him bearing the following legend, "This dress is a registered style of the Fashion Originators' Guild of America, Inc.," which label was attached to dresses manufactured by the original creators in accordance with the registered design. In the course of time, this label came to have a definite significance as indicating that the dresses bearing the label represented quality merchandise manufactured according to original designs by skilled workers. The Guild, in order to protect original designs of manufacturers who were not members, refused to register and issue labels to a member for any dress which was shown to be a copy of a dress created by a nonmember. Only original designs were eligible for registration.

Under the by-laws, the regulations, and practice of the Guild, so-called piracy committees have been set up composed of conforming retailers and, if any **[**8]** question is raised whether a dress is a copy of an original style, the dispute is referred to this committee who, after hearing and full investigation, determines whether the alleged copy is, in fact, a copy.

There is nothing in the affidavits to indicate that this administrative system of arbitration before the piracy committee has worked arbitrarily or unfairly to co-operating retailers. If the board of arbitration has determined that the article is a copy, the retailer is advised of the fact and requested to return the pirated copy to the manufacturer pursuant to the provisions of its warranty. If the retailer declines to comply, the members of the Guild are advised by means of a "red card," so called, of this violation on the part of the retailer. The member, after receipt of such information, then must refuse to sell any original registered design to the nonco-operating retailer or be subjected to the penalties above described.

5. At the outset approximately 2,500 retailers signed declarations of co-operation. Up to July 1, 1935, a total of approximately 6,000 retailers had signed and, as the influence of the Guild was extended to lower priced lines, the number of retailers **[**9]** joining increased to approximately 11,000 stores which are now acting in conformity with the spirit and purpose of the Guild.

6. In addition to style piracy, the Guild endeavored by formulating a code of fair trade practice to eliminate other practices which the industry deemed to be highly **[*356]** detrimental and inimical to their interests and the interests of the retail trade and consuming public as well. This code concerned itself solely and entirely with the eradication of unfair and excessive discounts, unwarranted returns of merchandise and cancellation of contracts, rebates by manufacturers to retailers, and subsidies exacted from manufacturers by retailers in the form of advertising and other evils which ran rife in the industry.

7. None of the measures adopted by the Guild to effectuate its purpose involved any attempt to regulate price, or control production, or allocate business between its members or their customers.

8. Plaintiff, in 1933, indicated its intention to co-operate with the Guild but with certain reservations which, after explanation, were found acceptable by the Guild. Copies of letters of June 29, 1933 (Exhibit H), and July 5, 1933 (Exhibit **[**10]** J), from plaintiff to the Guild, and letters of July 1, 1933 (Exhibit I), and July 7, 1933 (Exhibit K), from the Guild to the plaintiff, are incorporated with this statement by reference. (Exhibits referred to are attached to the affidavit of Golby.) Subsequently, plaintiff by other acts demonstrated its full approval of the aims and purposes of the Guild and the measures adopted to attain them.

9. In February, 1936, having received notice that copies of registered style dresses were being sold by R.H. White Company, a 100 per cent. subsidiary of the plaintiff, a representative of the Guild investigated and found such copies at White's and at one other store. Later, other copies appeared in the stores of Jordan Marsh Company and Chandler & Co., and upon being advised of the piracy these were all returned to the manufacturer. R.H. White &

Co. refused to comply with this request. On or about February 7, R.H. White & Co. was requested to sign a formal declaration of co-operation, a copy of which is attached as an exhibit to the affidavit of Edward J. Frost (filed March 12, 1936).

R.H. White & Co. refused to sign this declaration, whereupon the Guild caused to be sent to its members **[**11]** the so-called "red card," and shortly thereafter plaintiff wrote to members, who had accepted orders for dresses, threatening suit if the orders were not filled. To other members it gave notice that its relationship with the Guild had ended and asked whether it might resume business relations with such members. It received many replies, all substantially in the following language:

"We have been advised by our attorneys that a repudiation of your signed declaration of cooperation constitutes a breach of your basic agreement with the Fashion Originators' Guild, of which we are a member, and therefore, with us, and that we are justified in refusing to ship merchandise to you based upon such repudiation until such time as you may enter into a new agreement with the Guild and its members."

On February 27, 1936, the plaintiff wrote the Guild as follows:

"We have just been advised by our counsel that recent action on your part is clearly illegal and that for us to have any cooperation with you might subject us to the charge of cooperation in illegal activities. You will please note accordingly that there are to be no relations between us and the Guild or any of its members or those **[**12]** cooperating with the Guild in its activities."

10. The facts above recited are supported by affidavit and seem not to be seriously challenged by the parties.

There is, however, a sharp issue of fact respecting the extent to which the Guild, its members and affiliates, dominated the industry. The merchandise manager of the plaintiff has made affidavit that 75 per cent. in value of women's, 85 per cent. of misses', and 90 per cent. of juniors' daytime dresses, made in New York, are manufactured by the members of the Guild. It is impossible to reconcile these estimates with figures based on the reports appearing in affidavits offered on behalf of the defendants, unless there is some special significance to be given to the word "daytime," which renders a comparison impossible.

According to the reports of Harris & Serwer on the industry for 1934, which reports were widely distributed, the total money value of the volume of business of manufacturing ladies' garments from the lower prices to the highest was approximately $430,000,000. The value of the products sold at prices over $6.75 was $176,000,000, or about 40 per cent. of the aggregate total, of which the Guild members manufactured **[**13]** 30 per cent., or about $67,725,000. The value of the product priced between $6.75 and $16.75 was $133,000,000, or about 30 per cent. of the total, of which the Guild members manufactured **[*357]** 33 per cent. or about $44,088,000, and the value of products priced over $16.75 was $43,000,000 or 10 per cent. of the aggregate total, of which the Guild members manufactured 55 per cent. or about $23,639,000.

Moreover, although New York is undoubtedly the principal market for ladies' garments, there are supplementary markets in Philadelphia, Chicago, Los Angeles, Boston, and several other large cities; the more important being Chicago and Los Angeles. In both of these cities the plaintiff maintains buying agencies. Of the total number of concerns in New York manufacturing garments at wholesale, sold at prices of $16.75 and up, the Guild members constituted only 40 per cent. In the group between $16.75 and $10.75 there are 286 manufacturers in New York, of whom only 19 per cent. are Guild members. Below $10.75 there are 272 manufacturers, of whom only 14 per cent. are Guild members. And in Chicago, of 300 manufacturers the Guild has only 6 members; in Los Angeles, with 200 manufacturers, **[**14]** only one is a member of the Guild.

Attached to the affidavit of Golby as exhibits were copies of advertisements, put out by the plaintiff, showing Californiamade ladies' garments, indicating that the plaintiff availed itself of the Los Angeles market.

11. At the hearing before me the defendant Guild expressed its willingness to consent that all orders placed by the plaintiff with Guild members might be filled, and in accordance with this understanding the members have been so advised.

Conclusions of Law.

In this suit plaintiff is seeking injunctive relief from loss resulting from violation of the anti-trust laws (38 Stat. 730) and, pending final disposition of the matter, it asks that a preliminary injunction may issue.

By the express terms of the statute (*15 U.S.C.A. § 26*), such an injunction may not issue except upon the execution of a proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate. The plaintiff, neither in its pleadings or its argument, has offered to comply with the provisions of the statute respecting a bond; and I entertain serious doubts whether whatever loss, or damage, **[**15]** may result from the acts of the defendants, is so irreparable and immediate as to justify a preliminary injunction.

However that may be, it seems to me that the controlling issue presented on the facts established is whether there has been a violation of *sections 1* and *2* of the Act of July 2, 1890, known as the Sherman Anti-Trust Act (*15 U.S.C.A. §§ 1* and *2*). If there is no violation, the plaintiff is not entitled to relief and it necessarily follows that, in these circumstances, its prayer for preliminary injunction must fail. I have, therefore, deemed it advisable to set out the facts disclosed in the affidavits with extraordinary particularity in the belief that, if the plaintiff seeks a review by the Circuit Court of Appeals, that court, upon the record, will be able to adjudicate upon the legality of the measures adopted by the Guild to stamp out what it deems to be a pernicious practice in the ladies' garment industry.

The contention of the plaintiff is that the provisions of the by-laws and rules and regulations of the Guild, relative to the issuing of red cards to its members, and the duty of the members to refrain from dealing with the plaintiff except upon condition **[**16]** that it will subscribe to the declaration of co-operation, constitute an illegal restraint of trade in interstate commerce and, therefore, falls within the condemnation of the Sherman Act. It objects to that requirement of the declaration which provides that the co-operating retailer will accept as final the decisions of the impartial piracy committees as to whether or not garments are copies.

Certain propositions of law must, I think, be conceded at the outset. A manufacturer who puts upon the market for sale an original design of a ladies' garment cannot maintain any exclusive property rights in the design. *Cheney Bros. v. Doris Silk Corporation (C.C.A.) 35 F.(2d) 279*; *Keystone Type Foundry v. Portland Pub. Co. (C.C.A.) 186 F. 690*; *Flagg Mfg. Co. v. Holway, 178 Mass. 83, 59 N.E. 667*.

If, however, the copies are obtained by questionable methods, so that the act of the copyist would be deemed to be unfair competition, the courts will intervene to protect the originator against such unwarranted invasion of his rights of proprietorship in what he has produced. *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502*; *Board of Trade of Chicago* ***[**17]*** *v. Christie Grain & Stock Co., 198 U.S. 236, 25 S.Ct. 637, 49 L.Ed. 1031*; *International News Service v. Associated Press, 248 U.S. 215,* ***[*358]*** *39 S.Ct. 68, 63 L.Ed. 211, 2 A.L.R. 293*; *A.L.A. Schechter Poultry Corporation v. United States, 295 U.S. 495, 55 S.Ct. 837, 79 L.Ed. 1570, 97 A.L.R. 947*.

It is equally true that the decision in the case at bar cannot turn upon motives or purposes however commendable may be the motives, or however desirable the purposes. If the acts and measures adopted to accomplish these purposes come within the purview of the anti-trust laws, they must be declared to be illegal. *Thomsen v. Cayser, 243 U.S. 66, 37 S.Ct. 353, 61 L.Ed. 597*, Ann.Cas.1917D, 322; *Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 34 S.Ct. 951, 58 L.Ed. 1490*, L.R.A.1915A, 788; *Paramount Famous Lasky Corporation v. United States, 282 U.S. 30, 51 S.Ct. 42, 75 L.Ed. 145*.

On the other hand, not every combination or contract which operates to restrain trade in interstate commerce is to be condemned.

In *Board of Trade of City of Chicago v. United States, 246 U.S. 231, at page 238, 38 S.Ct. 242, 244, 62 L.Ed. 683*, Ann.Cas. 1918D, 1207, Mr. Justice Brandeis **[**18]** said:

"Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

That knowledge of actual intent will aid in the interpretation of facts and prediction of consequences was recognized in the more recent case of *Appalachian Coals, Inc., v. United States, 288 U.S. 344, 372, 53 S.Ct. 471, 479, 77 L.Ed. 825*. **[**19]**

It was not until the views of the minority in earlier cases had become the views of the majority, in *Standard Oil Co. v. United States, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619, 34 L.R.A. (N.S.) 834*, Ann.Cas. 1912D, 734, that the so-called "rule of reason" was applied to the interpretation of this statute.

It was developed in the opinion of Chief Justice White in the Standard Oil Company Case that the Sherman Anti-Trust Act was directed at evils which, both in England and in the United States, had come to be regarded as inevitable consequences of monopoly. Respecting these evils, he said (*221 U.S. 1, at page 52, 31 S.Ct. 502, 512, 55 L.Ed. 619, 34 L.R.A. (N.S.) 834*, Ann. Cas.1912D, 734):

"The evils which led to the public outcry against monopolies and to the final denial of the power to make them may be thus summarily stated: (1) The power which the monopoly gave to the one who enjoyed it, to fix the price and thereby injure the public; (2) The power which it engendered of enabling a limitation on production; and (3) The danger of deterioration in quality of the monopolized article which it was deemed was the inevitable resultant of the monopolistic control over its production **[**20]** and sale."

He also said (*221 U.S. 1, at page 56, 31 S.Ct. 502, 514, 55 L.Ed. 619, 34 L.R.A. (N.S.) 834*, Ann.Cas.1912D, 734) that the freedom to contract and to abstain from contracting and to exercise every reasonable right incident thereto became the rule in the English law except that no right existed to restrain the free course of trade by contracts or acts which implied a wrongful purpose.

In the cases where the court has struck down combinations as violative of the Sherman Act, such as *American Column & Lumber Co. v. United States, 257 U.S. 377, 42 S.Ct. 114, 66 L.Ed. 284, 21 A.L.R. 1093*; *United States v. American Linseed Oil Co., 262 U.S. 371, 43 S.Ct. 607, 67 L.Ed. 1035*; *Eastern States Retail Lumber Dealers' Ass'n v. United States, supra*, there were involved combinations which not only tended toward, but actually achieved, the accomplishment of one or more of the resultant consequences of monopoly.

It is therefore established, as stated in *Nash v. United States, 229 U.S. 373, 376, 33 S.Ct. 780, 781, 57 L.Ed. 1232*, that "only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests **[**21]** by unduly **[*359]** restricting competition or unduly obstructing the course of trade."

Applying this test, it would seem to be material to inquire whether the objects and purposes of the Guild are prejudicial to the public interest, and whether in the pursuit of those objects it had resorted to measures which unduly restrained interstate commerce.

That the aims of the Guild were calculated to benefit rather than prejudice public interest, I think is not open to debate.

It is equally apparent that the means adopted to effectuate this purpose do not involve any attempt to enhance prices or to curtail or cheapen production. Neither the purposes or measures, therefore, lead to any of the recognized evils of monopoly. The question is whether the coercive influences exerted upon the members directly, and indirectly upon conforming retailers, unduly restrain the free flow of trade to the extent that it can be said that the interests of the public are prejudiced in any way.

Undoubtedly manufacturers, so long as they are members of the Guild, voluntarily submit to restrictions upon their right to sell to nonconforming retailers. Subject to this limitation, they are entirely free **[**22]** to compete among themselves, and I am unable to discern any unlawful suppression of competition in interstate commerce intended, or effectuated, by the plan adopted for their protection against piracy. If any manufacturer is unwilling to have his freedom thus abridged, he is at liberty to resign from the Guild upon reasonable notice.

Approaching the question from the viewpoint of the plaintiff, it has not been denied the opportunity to co-operate with the Guild and secure the benefits accruing from such co-operation. If it is not willing to conform to the standards of commercial ethics prescribed by the rules of the Guild, of course it follows that certain avenues of trade are closed to it, but we have seen that, in New York alone, only 40 per cent. of manufacturers of ladies' dresses are members of the Guild, and of the better quality dresses Guild members manufactured only 55 per cent. in 1934. It is apparent, therefore, that there are open to plaintiff many other avenues. This involves no denial or abridgement of the right of fair competition. The right to compete by unfair means I assume is not a right which the anti-trust laws were designed to protect. No public interest **[**23]** can be served by such protection. The activities of the Guild present to the retailer a choice. He may choose to retain his full freedom to sell pirated articles, or he may take the other course and consent to rules adopted by the trade for the purpose of abating the evil of piracy.

It may be necessary, in order to purify the flow of trade, to impose some restraints upon those who enter it, but when such restrictions are not arbitrary or unreasonable they cannot be regarded as the undue restraint of interstate commerce contemplated by the act.

The activities of the Guild were before the New York Supreme Court, Appellate Division, in *Wolfenstein v. Fashion Originators Guild of America, Inc., 244 App. Div. 656, 280 N.Y.S. 361*. There it was held that the operations of the Guild did not constitute a violation of the state ***antitrust law***, known as the Donnelly Act (section 340 of General Business Law). The court observed that the members of the association had the right to co-operate for the purpose of correcting abuses or to stabilize the industry, provided their endeavors did not amount to an unlawful boycott or constitute an unreasonable restraint of trade; that there was nothing **[**24]** arbitrary, unreasonable, or unduly in restraint of trade in the arrangement which prohibited sales by members of the Guild to dealers who engaged in practices which were inimical to the trade.

I find nothing inconsistent between the conclusions reached by the learned court in New York and decisions of the United States Supreme Court, dealing with combinations in restraint of trade.

Anderson v. United States, 171 U.S. 604, 19 S.Ct. 50, 55, 43 L.Ed. 300, was a case where a trade association was formed among the traders in livestock in the Kansas City yards. There was no attempt to control prices or methods of sale. There were drastic regulations as to the methods and manner of conducting business, and one was that no member of the association could do business with any trader who was not a member; and in order to make effective that regulation the association sent to its members a list, similar to the red card of the Guild, designating those who were not members, and prohibiting trading with them. The court found nothing unlawful **[*360]** in the design of the trade association to bring all the yard traders into the association as members, in order that they might be compelled **[**25]** by its rules and regulations to transact business in an honest and straightforward manner.

In the course of its opinion in that case, the court made the following observations:

"If while enforcing the rules those members who use improper methods or who fail to conduct their business transactions fairly and honestly are disciplined and expelled, and thereby the number of members is reduced, and to that extent the number of competitors limited, yet all this is done, not with the intent or purpose of affecting in the slightest degree interstate trade or commerce, and such trade or commerce can be affected thereby only most remotely and indirectly; and if, for the purpose of compelling this membership, the association refuse business relations with those commission merchants who insist upon buying from or selling to yard traders who are not members of the association, we see nothing that can be said to affect the trade or commerce in question other than in the most roundabout and indirect manner."

In *Board of Trade of City of Chicago v. United States, supra*, proceedings were brought against the board on the ground that its activities ran counter to the Sherman Act because it imposed **[**26]** upon its members certain rules regarding sales which could be said to interfere to some extent with the freedom of contract of its members. The court nevertheless held that since the adoption of the rules tended to improve market conditions, the restraint imposed thereby was not an unlawful one.

The latest case where a combination, entered into the purpose of improving trade conditions, has been upheld, is *Appalachian Coals, Inc., v. United States, supra.* In that case the defendant producers created an exclusive selling agency, the Appalachian Coals, Inc., all the stock of which they held. This selling agency was to establish standard classification and to sell all the coal of its members at the best price obtainable, and if all could not be sold, the orders were apportioned among members. The officers of the agency fixed prices with certain exceptions. While the decision apparently rested upon the peculiar facts of the case relative to the economic condition of the coal industry, it nevertheless may be accepted as persuasive authority for the proposition that a combination which had for its purpose the improvement of trade conditions will not be held within the anti-trust statute **[**27]** merely because it possesses inherent power to affect competition among its members.

To quote from the opinion in that case;

"A co-operative enterprise, otherwise free from objection, which carries with it no monopolistic menace, is not to be condemned as an undue restraint merely because it may effect a change in market conditions, where the change would be in mitigation of recognized evils and would not impair, but rather foster, fair competitive opportunities. Voluntary action to rescue and preserve these opportunities, and thus to aid in relieving a depressed industry and in reviving commerce by placing competition upon a sounder basis, may be more efficacious than an attempt to provide remedies through legal processes.The fact that the correction of abuses may tend to stabilize a business, or to produce fairer price levels, does not mean that the abuses should go uncorrected or that co-operative endeavor to correct them necessarily constitutes an unreasonable restraint of trade."

To substantially the same effect may be cited: *Maple Flooring Mfrs.' Ass'n v. United States, 268 U.S. 563, 45 S.Ct. 578, 69 L.Ed. 1093*; *Cement Manufacturers' Protective Ass'n v. United States, 268* ***[**28]*** *U.S. 588, 45 S.Ct. 586, 69 L.Ed. 1104*; *National Ass'n of Window Glass Mfrs. v. United States, 263 U.S. 403, 44 S.Ct. 148, 68 L.Ed. 358*.

Plaintiff has cited, in support of its contention that the purposes and methods of the Guild come within the condemnation of the Sherman Anti-Trust Act (*15 U.S.C.A. §§ 1-7*, *15* note), the cases of *Eastern States Retail Lumber Dealers' Ass'n v. United States, supra*; *Duplex Printing Press Co. v. Deering, 254 U.S. 443, 41 S.Ct. 172, 65 L.Ed. 349, 16 A.L.R. 196*; *Federal Trade Commission v. Raymond Bros.-Clark Co., 263 U.S. 565, 44 S.Ct. 162, 68 L.Ed. 448, 30 A.L.R. 1114*; and *Paramount Famous Lasky Corporation v. United States, 282 U.S. 30, 51 S.Ct. 42, 75 L.Ed. 145*.

In some of these cases it is possible to find certain language which, taken out of its setting, might be thought to be in conflict with the conclusions which I have reached. Careful examination of these cases, however, shows that the aims and purposes of the combination were far from **[*361]** altruistic, and in the Paramount Famous Lasky Corporation Case the conditions imposed by the association upon exhibitors could very readily be found to be arbitrary and unfair and altogether destructive **[**29]** of competition.

I have reached the conclusion, therefore, that upon the facts stated the plaintiff has not shown any threatened loss or damage resulting from the violation of the anti-trust laws, and for that reason is not entitled to injunctive relief.Plaintiff's prayer for a preliminary injunction is denied.

Plaintiff's requests for findings and rulings, so far as consistent with the foregoing, are allowed; otherwise they are denied.

End of Document

United States v. Lake Asphalt & Petroleum Co.

United States District Court for the District of Massachusetts.

October 17, 1960.

Civil Action No. 59-786-W.

Reporter

1960 U.S. Dist. LEXIS 4801 *; 1960 Trade Cas. (CCH) P69,835

United States v. The Lake Asphalt and Petroleum Co., of Massachusetts; H. H. McGuire & Co., Inc.; Trimount Bituminous Products Co.; Rock-Asphalt Corp.; Mystic Bituminous Products Co., Inc.; Wachusett Bituminous Products Co.; American Oil Products Co.; and D. J. Cronin Asphalt, Inc.

Core Terms

asphalt, bid, signatory, prices, vendors, government body

Opinion by: **[*1]** WYZANSKI

Opinion

Final Judgment

WYZANSKI, District Judge: The plaintiff, United States of America, having filed its complaint herein on October 13, 1959, and defendants signatory hereto having admitted the allegations contained in the Government's complaint herein solely for the purpose and to the extent necessary to give to the following adjudication the prima facie effect stated in Section I below in the suits specified below, and for no other purpose,

Now, therefore, before any testimony has been taken herein without trial and upon the consent of all the parties hereto, it is hereby

Ordered, adjudged and decreed as follows:

I

That on the basis of said limited admission the defendants signatory hereto have engaged in an unlawful combination and conspiracy in violation of Section 1 of the Sherman Act as charged in the said complaint, this adjudication being for the sole purpose of establishing the prima facie effect of this Final Judgment, in the suits specified below, and for no other purpose;

Each defendant is enjoined and restrained from denying that this Final Judgment has such prima facie effect in any such suit; provided, however, that this section shall not be deemed **[*2]** to prohibit any such defendant from rebutting such prima facie evidence or from asserting any defense with respect to damages or other defenses available to it. The specified suits referred to above are the suits instituted in this Court by the Commonwealth of Massachusetts wherein the defendants signatory hereto are named as defendants and numbered 60-229-S on the docket of this Court and any other suit instituted by any Massachusetts city or town against any of the defendants signatory hereto prior to the date of entry of this Final Judgment, and which alleges violation of the Federal ***antitrust law*** and claims damages growing out of the purchases of Asphalt from any such defendant.

II

The Court has jurisdiction of the subject matter herein and all parties hereto. The complaint states a claim upon which relief may be granted against the defendants signatory hereto, and each of them, under Section 1 of the Act of Congress of July 2, 1890, entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

III

As used in this Final Judgment:

(A) "Person" means any individual, partnership, firm, corporation, **[*3]** association or other business or legal entity;

(B) "Asphalt" means a paving material derived from crude petroleum and sold in the form of asphalt cutbacks and asphalt emulsions;

(C) "Governmental body" means the United States, any State, County or Municipality and any Agency thereof.

IV

The provisions of this Final Judgment applicable to any defendant signatory hereto shall apply to such defendant and to its officers, agents, servants, employees, subsidiaries, successors and assigns, and to all persons in active concert or participation with any such defendant who shall have received actual notice of this Final Judgment by personal service or otherwise.

V

The defendants signatory hereto are jointly and severally enjoined and restrained from directly or indirectly:

(A) Urging, influencing or suggesting to, or attempting to urge, influence or suggest to, any other person to quote or charge non-competitive or specified prices or terms or conditions of sale for asphalt to any third person;

(B) Entering into, adhering to, maintaining or claiming any right under any contract, combination, agreement, understanding, plan or program among themselves or with any other vendor **[*4]** of asphalt or any association or central agency of or for such vendors, to:

(1) fix, determine, establish, or maintain prices, pricing methods, discounts, or other terms of sale of asphalt to any third person;

(2) allocate territories or customers for the sale of asphalt;

(3) refrain from submitting bids for the supply of asphalt to any governmental body or to any other person;

(4) submit a bid for the supply of asphalt to any governmental body or other person which bid is not intended to attract the award of a contract;

(5) refrain from competing in the sale of asphalt.

(C) Communicating, circulating, exchanging, among themselves or with other vendors of asphalt, in any manner, any price information, price list or purported price list containing or purporting to contain any prices or terms or conditions for the sale of asphalt; provided that nothing in this subparagraph (C) shall be deemed to invalidate, prohibit or restrain bona fide negotiations between vendors of asphalt.

(D) Being a member of, contributing anything of value to, or participating in any of the activities of any trade association or central agency for asphalt vendors with knowledge that the activities **[*5]** thereof are in violation of any of the provisions of this Final Judgment;

(E) Disclosing to or exchanging with any other vendor of asphalt:

(1) the intention to submit or not to submit a bid to a governmental body;

(2) the fact that a bid has or has not been submitted, or

(3) the content of any bid.

VI

Each of the defendants signatory hereto is ordered and directed, not later than sixty (60) days following the date of the entry of this Final Judgment, individually and independently (1) to review its then prevailing prices for asphalt, (2) to determine prices of asphalt based on its own manufacturing and overhead costs, the margin of profit individually desired and other lawful considerations, and (3) to establish the prices determined under (2) above, which prices shall become effective not later than ninety (90) days following the date of the entry of this Final Judgment.

VII

Each of the defendants signatory hereto is ordered and directed for a period of five years after the date of entry of this Final Judgment to submit a sworn statement in the form set forth in the Appendix A hereto, with each bid for asphalt submitted to any governmental body. Such sworn statement **[*6]** shall be signed by the principal officer of said defendant, by the person actually responsible for the preparation of said bid, and by the person who signed said bid; and a duplicate of each such sworn statement and of such bid, together with the workpapers used in the preparation of such bid shall be kept in the files of the defendant for a period of six years from the date of execution of such bids.

VIII

For the purpose of securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice, shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant signatory hereto made to its principal office, be permitted, subject to any legally recognized privilege:

(a) reasonable access during the office hours of such defendants, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any of the matter contained in this Final Judgment; and

(b) subject to the reasonable convenience of such defendant, and without restraint or interference, to **[*7]** interview officers and employees of such defendant, who may have counsel present, regarding such matters.

Upon such written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, the defendant shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be necessary for the purpose of enforcement of this Final Judgment. No information obtained by the means permitted in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings for the purpose of securing compliance with this Final Judgment in which the United States is a party or as otherwise required by law.

IX

Jurisdiction of this Court is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any of the provisions thereof, **[*8]** for the enforcement of compliance therewith, and punishment of violations thereof.

End of Document

United States v. Allied Chem. Corp.

United States District Court for the District of Massachusetts.

November 28, 1960.

Civil Action No. 59-784-S.

Reporter

1960 U.S. Dist. LEXIS 4741 *; 1961 Trade Cas. (CCH) P69,923

United States v. Allied Chemical Corp., Koppers Co., Inc., Trimount Bituminous Products Co., James Huggins & Son, Inc., H. H. McGuire & Co., Inc., and Independent Coal Tar Co.

Core Terms

road tar, bid, signatory, prices, vendors, government body

Opinion by: [*1] SWEENEY

Opinion

Final Judgment

SWEENEY, Chief Judge: The plaintiff, United States of America, having filed its complaint herein on October 13, 1959, and defendants signatory hereto having admitted the allegations contained in the Government's complaint herein solely for the purpose and to the extent necessary to give to the following adjudication the prima facie effect stated in Section I below in the suits specified below, and for no other purpose,

Now, therefore, before any testimony has been taken herein without trial and upon the consent of all the parties hereto, it is hereby

Ordered, adjudged and decreed as follows:

I

That on the basis of said limited admission the defendants signatory hereto have engaged in an unlawful combination and conspiracy in violation of Section 1 of the Sherman Act as charged in the said complaint, this adjudication being for the sole purpose of establishing the Prima facie effect of this Final Judgment, in the suits specified below, and for no other purpose;

Each defendant is enjoined and restrained from denying that this Final Judgment has such Prima facie effect in any such suit; provided, however, that this section shall not be deemed **[*2]** to prohibit any such defendant from rebutting such prima facie evidence or from asserting any defense with respect to damages or other defenses available to it. The specified suits referred to above are any suits instituted in this or any other court by the Commonwealth of Massachusetts, the States of Maine, New Hampshire, or Vermont, or any city or town within these states or the Commonwealth of Massachusetts against any of the defendants signatory hereto prior to September 14, 1960, and which allege violation of the Federal ***antitrust law*** and claim damages growing out of the purchases of road tar from any such defendant.

II

The Court has jurisdiction of the subject matter herein and all parties hereto. The complaint states a claim upon which relief may be granted against the defendants signatory hereto, and each of them, under Section 1 of the Act of Congress of July 2, 1890, entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

III

As used in this Final Judgment:

(A) "Person" means any individual, partnership, firm, corporation, association, or other business or legal entity;

(B) **[*3]** "Road tar" means a road paving material consisting of "heavy tar" and "light fluxing tar".

(C) "Governmental body" means the United States, any State, County or Municipality and any Agency thereof.

IV

The provisions of this Final Judgment applicable to any defendant signatory hereto shall apply to such defendant and to its officers, agents, servants, employees, subsidiaries, successors and assigns, and to all persons in active concert or participation with any such defendant who shall have received actual notice of this Final Judgment by personal service or otherwise.

V

The defendants signatory hereto are jointly and severally enjoined and restrained from directly or indirectly:

(A) Urging, influencing or suggesting to, or attempting to urge, influence or suggest to, any other person to quote or charge noncompetitive or specified prices or terms or conditions of sale for road tar to any third person;

(B) Entering into, adhering to, maintaining or claiming any right under any contract, combination, agreement, understanding, plan or program among themselves or with any other vendor of road tar or any association or central agency of or for such vendors, to:

(1) fix, **[*4]** determine, establish, or maintain prices, pricing methods, discounts, or other terms of sale of road tar to any third person;

(2) allocate territories or customers for the sale of road tar;

(3) refrain from submitting bids for the supply of road tar to any governmental body or to any other person;

(4) submit a bid for the supply of road tar to any governmental body or other person which bid is not intended to attract the award of a contract;

(5) refrain from competing in the sale of road tar.

(C) Communicating, circulating, exchanging, among themselves or with other vendors of road tar, in any manner, any price information, price list or purported price list containing or purporting to contain any prices or terms or conditions for the sale of road tar; provided that nothing in this subparagraph (C) shall be deemed to invalidate, prohibit or restrain bona fide negotiations between vendors of road tar. (D) Being a member of, contributing anything of value to, or participating in any of the activities of any trade association or central agency for road tar vendors with knowledge that the activities thereof are in violation of any of the provisions of this Final Judgment;

[*5] (E) Disclosing to or exchanging with any other vendor of road tar:

(1) The intention to submit or not to submit a bid to a governmental body;

(2) the fact that a bid has or has not been submitted, or

(3) the content of any bid.

VI

Each of the defendants signatory hereto is ordered and directed, not later than sixty (60) days following the date of the entry of this Final Judgment, individually and independently (1) to review its then prevailing prices for road tar, (2) to determine prices of road tar based on its own manufacturing and overhead costs, the margin of profit individually desired and other lawful considerations, and (3) to establish the prices determined under (2) above, which prices shall become effective not later than ninety (90) days following the date of the entry of this Final Judgment.

VII

Each of the defendants signatory hereto is ordered and directed for a period of five years after the date of entry of this Final Judgment to submit a sworn statement in the form set forth in the Appendix A hereto, with each bid for road tar submitted to any governmental body. Such sworn statement shall be signed by the principal officer of said defendant, by the **[*6]** person actually responsible for the preparation of said bid, and by the person who signed said bid; and a duplicate of each such sworn statement and of such bid, together with the workpapers used in the preparation of such bid shall be kept in the files of the defendant for a period of six years from the date of execution of such bids.

VIII

For the purpose of securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice, shall, on written request of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant signatory hereto made to its principal office, be permitted, subject to any legally recognized privilege:

(a) reasonable access during the office hours of such defendants, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this Final Judgment; and

(b) subject to the reasonable convenience of such defendant, and without restraint or interference, to interview officers and employees of such defendant, who may have **[*7]** counsel present, regarding such matters.

Upon such written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, the defendant shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be necessary for the purpose of enforcement of this Final Judgment. No information obtained by the means permitted in this Section shall be divulged by any representative of the Department of Justice to any person other than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings for the purpose of securing compliance with this Final Judgment in which the United States is a party or as otherwise required by law.

IX

Jurisdiction of this Court is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and punishment **[*8]** of violations thereof.

[United States v. Bituminous Concrete Assn., Inc.](#)

United States District Court for the District of Massachusetts.

December 7, 1960.

Civil Action No. 59-785-M.

Reporter

1960 U.S. Dist. LEXIS 4812 *; 1960 Trade Cas. (CCH) P69,878; 1960 WL 66003

United States v. Bituminous Concrete Assn., Inc.; Allied Chemical Corp.; Warren Brothers Roads Co.; Trimount Bituminous Products Co.; Essex Bituminous Concrete Corp.; H. H. McGuire & Co., Inc.; Rock-Asphalt Corp.; Merrimack Paving Corp.; Vulcan Construction Co. and Massachusetts Broken Stone Co.

Core Terms

bituminous, concrete, bid, prices, signatory, vendor, government body

Opinion by: [*1] SWEENEY

Opinion

Final Judgment

SWEENEY, District Judge: The plaintiff, United States of America, having filed its complaint herein on October 13, 1959, and defendants signatory hereto having admitted the allegations contained in the Government's complaint herein solely for the purpose and to the extent necessary to give to the following adjudication the prima facie effect stated in Section I below in the suits specified below, and for no other purpose,

Now, therefore, before any testimony has been taken herein without trial and upon the consent of all the parties hereto, it is hereby

Ordered, adjudged and decreed as follows:

I

That on the basis of said limited admission the defendants signatory hereto have engaged in an unlawful combination and conspiracy in violation of Section 1 of the Sherman Act as charged in the said complaint, this adjudication being for the sole purpose of establishing the prima facie effect of this Final Judgment, in the suits specified below, and for no other purpose;

Each defendant is enjoined and restrained from denying that this Final Judgment has such prima facie effect in any such suit; provided, however, that this section shall not be deemed **[*2]** to prohibit any such defendant from rebutting such prima facie evidence or from asserting any defense with respect to damages or other defenses available to it. The specified suits referred to above are any suits instituted in this or any other court by the Commonwealth of Massachusetts, or any city or town within the Commonwealth of Massachusetts or the State of New Hampshire against any of the defendants signatory hereto prior to September 14, 1960, and which allege violation of the Federal ***antitrust law*** and claim damages growing out of the purchases of bituminous concrete from any such defendant. II

The Court has jurisdiction of the subject matter herein and all parties hereto. The complaint states a claim upon which relief may be granted against the defendants signatory hereto, and each of them, under Section 1 of the Act of Congress of July 2, 1890, entitled, "An Act to protect trade and commerce against unlawful restraints and monopolies," commonly known as the Sherman Act, as amended.

III

As used in this Final Judgment:

(A) "Person" means any individual, partnership, firm, corporation, association or other business or legal entity;

(B) "Bituminous concrete" means **[*3]** a paving

(B) "Bituminous concrete" means a paving graded mineral aggregate and mixing it in controlled proportions with hot asphalt cement;

(C) "Governmental body" means the United States, any State, County or Municipality and any Agency thereof.

IV

The provisions of this Final Judgment applicable to any defendant signatory hereto shall apply to such defendant and to its officers, agents, servants, employees, subsidiaries, successors and assigns, and to all persons in active concert or participation with any such defendant who shall have received actual notice of this Final Judgment by personal service or otherwise.

V

The defendant Association signatory hereto is enjoined and restrained from collecting from or circulating, reporting, or recommending to any vendor of bituminous concrete any costs or average costs of manufacture or sale or any prices, pricing methods, discounts or other terms of sale of bituminous concrete or any formulae for computing such costs or prices.

VI

The defendants signatory hereto are jointly and severally enjoined and restrained from, directly or indirectly:

(A) Urging, influencing or suggesting to, or attempting to urge, influence or **[*4]** suggest to any other person to quote or charge non-competitive or specified prices or terms or conditions of sale for bituminous concrete to any third person;

(B) Entering into, adhering to, maintaining or claiming any right under any contract, combination, agreement, understanding, plan or program among themselves or with any other vendor of bituminous concrete or any association or central agency of or for such vendors, to:

(1) fix, determine, establish or maintain prices, pricing methods, discounts, or other terms of sale of bituminous concrete to any third person;

(2) allocate territories or customers for the sale of bituminous concrete;

(3) refrain from submitting bids for the supply bituminous concrete to any governmental body or to any other person;

(4) submit a bid for the supply of bituminous concrete to any governmental body or other person which bid is not intended to attract the award of a contract;

(5) refrain from competing in the sale of bituminous concrete.

(C) Communicating, circulating, exchanging, among themselves or with other vendors of bituminous concrete, in any manner, any price information, price list or purported price list containing or purporting **[*5]** to contain any prices or terms or conditions for the sale of bituminous concrete; provided that nothing in this subparagraph (C) shall be deemed to invalidate, prohibit or restrain bona fide negotiations between vendors of bituminous concrete.

(D) Being a member of, contributing anything of value to, or participating in any of the activities of any trade association or central agency for bituminous concrete vendors with knowledge that the activities thereof are in vioaltion of any of the provisions of this Final Judgment;

(E) Disclosing to or exchanging with any other vendor of bituminous concrete:

(1) The intention to submit or not to submit a bid to a governmental body;

(2) the fact that a bid has or has not been submitted, or

(3) the content of any bid.

VII

Each of the defendants signatory hereto, other than the defendant Association, is ordered and directed, not later than sixty (60) days following the date of the entry of this Final Judgment, individually and independently (1) to review its then prevailing prices for bituminous concrete in New England, (2) to determine prices of bituminous concrete in New England based on its own manufacturing and overhead costs, **[*6]** the margin of profit individually desired and other lawful considerations, and (3) to establish in New England and prices determined under (2) above, which prices shall become effective not later than ninety (90) days following the date of the entry of this Final Judgment.

VIII

Each of the defendants signatory hereto, other than the defendant Association, is ordered and directed for a period of five years after the date of entry of this Final Judgment to submit a sworn statement in the form set forth in the Appendix A hereto, with each bid for bituminous concrete submitted to any governmental body in New England. Such sworn statement shall be signed by a principal officer of said defendant, by the person actually responsible for the preparation of said bid, and by the person who signed said bid; and a duplicate of each sworn statement and of such bid, together with the workpapers used in the preparation of such bid, shall be kept in the files of the defendant for a period of six years from the date of execution of such bids.

IX

For the purpose of securing compliance with this Final Judgment, duly authorized representatives of the Department of Justice shall, on written request **[*7]** of the Attorney General or the Assistant Attorney General in charge of the Antitrust Division, and on reasonable notice to any defendant made to its principal office, be permitted, subject to any legally recognized privilege, (a) reasonable access during the office hours of such defendants, to all books, ledgers, accounts, correspondence, memoranda and other records and documents in the possession or under the control of such defendant, relating to any of the matters contained in this Final Judgment, and (b) subject to the reasonable convenience of such defendant, and without restraint or interference, to interview officers and employees of such defendant who may have counsel present, regarding such matters. Upon such written request of the Attorney General, or the Assistant Attorney General in charge of the Antitrust Division, the defendant shall submit such written reports with respect to any of the matters contained in this Final Judgment as from time to time may be necessary for the purpose of enforcement of this Final Judgment. No information obtained by the means permitted in this Section shall be divulged by any representative of the Department of Justice to any person other **[*8]** than a duly authorized representative of the Executive Branch of the plaintiff except in the course of legal proceedings for the purpose of securing compliance with this Final Judgment in which the United States is a party or as otherwise required by law.

X

Jurisdiction of this Court is retained for the purpose of enabling any of the parties to this Final Judgment to apply to this Court at any time for such further orders and directions as may be necessary or appropriate for the construction or carrying out of this Final Judgment, for the modification or termination of any of the provisions thereof, for the enforcement of compliance therewith, and punishment of violation thereof.

APPENDIX A

Affidavit

The undersigned hereby certify that:

1. The attached bid to (name of recipient of bid) dated has been arrived at by (name of defendant) unilaterally and without collusion with any other vendor of bituminous concrete.

2. The intention to submit the attached bid, the fact of its submission, and the contents thereof, have not been communicated by the undersigned nor, to their best knowledge and belief, by any employee or agent of (name of defendant), to any person not an **[*9]** employee or agent of (name of defendant), and will not be communicated to any such person prior to the official opening of the attached bid.

Date

Notarization

Signature of principal officer.

Signature of person who prepared bid.

Signature of person who signed bid.

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

United States District Court for the District of Massachusetts

June 10, 1963

Civ. A. No. 59-23

Reporter
218 F. Supp. 490 *; 1963 U.S. Dist. LEXIS 10508 **

UNION LEADER CORPORATION v. NEWSPAPERS OF NEW ENGLAND, INC., et al.

Core Terms

damages, losses, reasonable attorney's fees, attorney's fees, anti trust law, spent, antitrust, recovered, disbursements, prepare, cases

Counsel: **[**1]** Malloy, Myerson & Sullivan, Boston, Mass., for plaintiff. Frank Goldman, Robert H. Goldman, Lowell, Mass., for defendant.

Opinion by: WYZANSKI

Opinion

[*491] The Master having reported, and this Court having approved his report, that The Haverhill Gazette Company sustained single damage of $ 29,441.99 caused by Union Leader's violation of the antitrust laws, The Gazette now seeks an assessment of a reasonable attorney's fee, pursuant to *15 U.S.C. § 15*.

This case began with a complaint by Union Leader that, by their alleged violation of the antitrust laws, various parties, including The Haverhill Gazette Company, caused Union Leader injury. The successful efforts of The Gazette's counsel in defeating that claim do not give rise to any claim for attorney's fees cognizable under *15 U.S.C. § 15*.

But The Gazette, going beyond defending itself against Union Leader's complaint, asserted a counterclaim seeking equitable relief and substantial damages because of Union Leader's violation of the antitrust laws. This Court issued, and the Court of Appeals affirmed, a decree awarding equitable relief; and this Court is today entering judgment for three times the single damages of $ 29,441.99, **[**2]** which the Master found The Gazette suffered.

In preparing and proving their client's claim for damages, The Gazette had counsel who demonstrated the highest professional ability. They showed a mastery of subtle issues of law. They discovered, appraised, marshalled, and presented complicated facts. They resolutely met skillful, resourceful, and determined opposition.

If The Gazette had secured only equitable relief under *15 U.S.C. § 26* it would not be entitled to an attorney's fee under *15 U.S.C. § 15* or any other provisions of the antitrust laws. *Decorative Stone, Co. v. Building Trades Council, 2nd Cir., 23 F.2d 426, 428*; *Ring v. Spina, S.D.N.Y., 84 F.Supp. 403, 408*. But The Gazette is entitled to a reasonable attorney's fee for services rendered in connection with the damages recovered by it. To estimate those services, it is proper to take into account the professional work done by The Gazette's counsel not merely in the proceedings specifically directed to the assessment of those recoverable damages, but also in the earlier proceedings in this Court and in the Court of Appeals insofar as they were directed to the establishment of Union Leader's liability for those recoverable **[**3]** damages.

There could be a reasonable difference of opinion as to how much of the time The Gazette's counsel spent in preparing for and presenting the case in the original trial in this Court and on the first appeal to the Court of Appeals ultimately bore upon the issue of damages payable by Union Leader. But there can be no doubt that all the time which The Gazette's counsel spent on this case after the first mandate from the Court of Appeals to this Court was devoted exclusively to issues directly or indirectly concerned with damages.

Yet all the time spent on seeking to recover damages is not relevant. The Gazette claimed damages of staggering size, but it proved damages of only **[*492]** $ 29,441.99. Time and effort spent in presenting claims of damage which were not proved must be entirely disregarded. There is nothing contrary to that conclusion in what this Court said in *Cape Cod Food Products, Inc. v. National Cranberry As'n et al., D.Mass., 119 F.Supp. 242, 244*. When this Court there indicated that 'a losing defendant must pay what it would be reasonable for counsel to charge a victorious plaintiff', it is obvious that this Court had in mind a plaintiff who was completely, **[**4]** or substantially completely, victorious. Where in an antitrust suit a plaintiff claims a vast sum and recovers a small sum, he may owe his own counsel on account of legal services not only for items for which recovery was allowed but also for items for which recovery was denied. Yet such a partially successful antitrust plaintiff can recover from the antitrust defendant only on account of such portion of the attorney's effort as produced a recovery.

Inquiry should focus on what is the reasonable amount that a person injured by an antitrust violation would have had to pay to recover the precise losses which a court, jury, or master has held that he sustained. The inquiry resembles the familiar question, raised again and again in accident cases, as to what is a reasonable doctor's fee for attending a plaintiff injured by defendant's negligence. An answer to the inquiry in an antitrust case requires the Court to consider questions such as whether the case demanded exceptional professional ability and how much time it should have taken to prepare and present those aspects of the claim for losses which were allowed. Reference may appropriately be made to the type of factors listed **[**5]** in Canon 12 of the Canons of Professional Ethics of the American Bar Association which reads as follows:

'In determining the amount of the fee, it is proper to consider: (1) the time and labor required, the novelty and difficulty of the questions involved and the skill requisite properly to conduct the cause; (2) whether the acceptance of employment in the particular case will preclude the lawyer's appearance for others in cases likely to arise out of the transaction, and in which there is a reasonable expectation that otherwise he would be employed, or will involve the loss of other employment while employed in the particular case or antagonisms with other clients; (3) the customary charges of the Bar for similar services; (4) the amount involved in the controversy and the benefits resulting to the client from the services; (5) the contingency or the certainty of the compensation; and (6) the character of the employment, whether casual or for an established and constant client. No one of these considerations in itself is controlling.'

Yet some of those factors are obviously more suited to determining a reasonable attorney's fee in a case sounding in contract than in a case sounding **[**6]** in tort.

In a rare case a successful antitrust plaintiff may recover a reasonable attorney's fee in excess of the losses he sustained. In *Darden et al. v. Besser, 6th Cir., 257 F.2d 285, 286* where the single damages were $ 15,000, and counsel had devoted a total of 2126 hours exclusively to this litigation, the trial judge's award of a $ 10,000 fee was reversed with directions to enter judgment of $ 30,000 as an attorney's fee. In *Osborn v. Sinclair Refining Company, D.Md., 207 F.Supp. 856, 864* the single damages were only $ 12,325, but Chief Judge Thomsen, after referring to the 800 hours which counsel had spent on the case and to the legal principle established therein, allowed $ 14,000 as a reasonable attorney's fee. Allowing a reasonable attorney's fee in excess of the losses sustained by the plaintiff is proper whenever those losses could not otherwise have been recovered. However, it is doubtful whether the allowance of an attorney's fee in excess of the losses sustained can be justified solely on the basis that 'one of the purposes of private **[*493]** treble damage suits is to prevent the necessity of government civil suits or prosecutions to establish and correct violations **[**7]** of the antitrust laws.' See *Osborn v. Sinclair Refining Co., supra.* Such a principle would be understandable in connection with the statutory allowance of an attorney's fees in connection with private litigation under many regulatory statutes. But the principle is a doubtful application under the ***antitrust law*** inasmuch as the statute does not allow an attorney's fee for procuring an injunction, but allows it only as an item of damage when losses have been proved to have been sustained by the plaintiff.

Some of the cases under the antitrust laws appear to take as the reasonable basis of the attorney's fee a percentage of the damages recovered. See the cases referred to in *Cape Cod Food Products, Inc. v. National Cranberry Ass'n et al., D.Mass., 119 F.Supp. 242, 243*, where it is noted that 'the fees have often run substantially over one-third of the single damages recovered.' However in the Cape Code case the Court allowed a fee which, although it happened to be 20% Of the recovery, was not calculated on a percentage basis.

In *Webster Motor Car Co. et al. v. Packard Motor Car Co., Dist. of Col., 166 F.Supp. 865*, the Court at p. 866 stated it would 'award a counsel fee of $ 45,000, **[**8]** which would be about 23 or 24 per cent of the single damages. That is within the framework of the cases relied upon by counsel.' Thirty four per cent of the single damages was allowed in *Bal Theatre Corp. v. Paramount Film Distributing Corp., N.D.Cal., 206 F.Supp. 708*,

The percentage test is relevant in many situations. Yet considerations respecting the type of professional skill required and the extent of work necessary are more important than percentage considerations where, as in matters arising under *15 U.S.C. § 15*, the claim for an attorney's fee sounds in tort and is an additional element of damages allowable to a person who has sustained provable losses. The quality of counsel required and especially the necessary time expended on the case were the governing considerations in *Cape Cod Food Products, Inc. v. National Cranberry Ass'n, supra.*

In the instant case, it is clear that the highest professional skill was required successfully to prepare, present, and otherwise prosecute The Gazette's claim for damages totaling $ 29,441.99. To recover that sum, and without regard to any time spent in procuring injunctive relief, or to any time vainly spent in seeking to establish **[**9]** other losses not proven to the satisfaction of the Master or this Court, required lengthy investigation, preparation, and presentation. Bearing in mind all the proceedings in this Court, in the Court of Appeals on two occasions, on petitions for certiorari before the Supreme Court of the United States, I have tried to estimate what would have been the number of hours reasonably required to handle skillfully and economically a claim for losses proved to amount to $ 29,441.99. Certainly it would have been far less than the total time which the affidavits before me indicate counsel spent on both damages proven and damages unproven. Certainly to prove losses of $ 29,441.99 did not require the services of all the counsel who have filed affidavits seeking to have their services and disbursements taken into account.

My best judgment is that skillfully and effectively to prove a claim of losses of $ 29,441.99 would have required the services of two senior counsel for between 500 and 1000 hours each and of a junior counsel for between 750 and 1500 hours, and would have required disbursements (including disbursements for accountants) of about $ 8,000. Having in mind those estimates as a **[**10]** relevant but not exclusive guide, and considering that the single damages recovered were only $ 29,441.99, I allow The Haverhill Gazette Company $ 68,000 as a reasonable attorney's fee (including disbursements, but not taxable costs).

The sum of $ 68,000 is added to The Haverhill Gazette Company's recovery. **[*494]** No part of that sum is a direct award to any attorney or accountant. The statute, *15 U.S.C. § 15*, provides not for the recovery by counsel of their fees and disbursements, but for recovery of 'a reasonable attorney's fee' by 'any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws.'

United States v. Grinnell Corp.

United States District Court for the District of Rhode Island

November 27, 1964

Civ. A. No. 2785

Reporter

236 F. Supp. 244 *; 1964 U.S. Dist. LEXIS 9777 **

UNITED STATES of America v. GRINNELL CORPORATION, American District Telegraph Company, Holmes ElectricProtective Company, and Automatic Fire Alarm Company of Delaware

Core Terms

alarm, monopolize, central station, accredited, alarm company, Sherman Act, subscribers, monopolistic, prices, antitrust, markets, enterprises, acquisitions, automatic, customers, protective services, restraint of trade, installation, relevant market, burglar alarm, defendants', affiliated, charges, manufactured, competitors, interstate, effective, station, courts, attempt to monopolize

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Monopolies & Monopolization > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Regulated Practices, Monopolies & Monopolization**

The law does not require even proof of intent, much less proof of a motive, where the wrong charged is monopolization, as distinguished from an attempt to monopolize. Moreover, such intent as must be proved to sustain the charge of an attempt to monopolize, or a conspiracy to monopolize, relates to the purpose to monopolize, not to the purpose of the monopolization.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

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

Injunction against continued adherence to the patterns formed in violation of law is not merely appropriate but necessary to accomplish the declared objects of the antitrust laws.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

To succeed in an action under *15 U.S.C.S. § 2* a plaintiff must prove that the putative monopolist or monopolists sought to achieve or achieved the economic power, even though unexercised, to control prices or production in a relevant market, or to exclude competition therefrom. Proof may be direct or indirect.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] **Monopolies & Monopolization, Actual Monopolization**

One indirect method to prove the requisite power is to show defendants' occupancy of an overwhelming but not mathematically definable percentage of the market, unless that position, or, as it is called, share of the market, is shown by the supposed monopolist to be attributable exclusively to his skill, efficiency, foresight, or like affirmatively laudable business conduct. Unless he maintains the burden of proving himself within the exception, the occupant in the dominant position stands condemned.

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

HN5[] **Monopolies & Monopolization, Actual Monopolization**

What degree of occupancy, what share of the market, are indicative of monopolistic control depends on a judgment based upon all aspects of the particular market under review.

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

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

Antitrust & Trade Law > Sherman Act > Scope > Monopolization Offenses

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

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Laches

HN6[] **Sherman Act, Remedies**

In most, though not, all situations relief against the monopolization forbidden by *15 U.S.C.S. § 2* could be achieved through a proceeding under *15 U.S.C.S. § 1* couched in the form of an attack on restraints of trade. But this is not always true. Proceedings under *Section 1* may come too late: for example, the formal restraints may have been withdrawn, or laches may have intervened, or hoary precedents sustaining as valid what the current law now regards as undoubted restraints of trade may preclude the Government from securing an injunction against the restraints as such. Yet though the Government may be barred from getting under *Section 1* relief directly against the restraints, it may, nonetheless, under *Section 2* get relief against the consequences of the restraints if, but, of course, only if, they have gone so far as to involve a continuing monopolization.

Counsel: [1]** Noel E. Story and Hugh P. Morrison, Jr., Dept. of Justice, for plaintiff.

Frank A. Fritz, Robert L. Conkling, Frank A. Fritz, Jr., Averill M. Williams, Robert O. Donnelly of Bleakley, Platt, Schmidt, Hart & Fritz, New York City, and Matthew W. Goring of Hinckley, Allen, Salisbury & Parsons, Providence, R.I., for defendants American District Telegraph Co., Holmes Electric Protective Co., and Automatic Fire Alarm Co. of Delaware.

Denis G. McInerney of Cahill, Gordon, Reindell & Ohl, New York City, and Roger T. Clapp, Providence, R.I., for defendant Grinnell Corp.

Opinion by: WYZANSKI

Opinion

[*246] There follow in order an introduction, findings of fact, conclusions of law, opinion on liability, and opinion on remedy.

A. INTRODUCTION

This is a civil suit wherein the Government complains that *Sections 1* and *2* of the Sherman Act (Act of July 2, 1890, c. 647, 26 Stat. 209, 50 Stat. 693, *15 U.S.C. §§ 1*, *2*) have been violated by Grinnell Corporation, a Delaware corporation with its principal place of business in Providence, Rhode Island, (hereinafter called 'Grinnell'), and three corporations, a majority of the capital stock of each of which is owned by Grinnell, to wit, American **[**2]** District Telegraph (Company, a New Jersey corporation, (hereafter called 'ADT'), of whose capital stock Grinnell owns 76%, Holmes Electric Protective Company, a New York corporation, (hereafter called 'Holmes'), of whose capital stock Grinnell owns 100%, and Automatic Fire Alarm Company of Delaware, a Delaware corporation, (hereafter called 'AFA'), of whose capital stock Grinnell owns 89%. All these 3 corporations have their principal place of business in New York. Collectively, the 3 corporations are referred to sometimes as the 'affiliates', and sometimes as the 'alarm companies.'

Complaint, seeking relief under *§ 4* of the Sherman Act (26 Stat. 209, *15 U.S.C. § 4*), was filed April 13, 1961. Extensive pre-trial discovery and frequent pre-trial conferences with the Court, and, above all, the co-operation of informed, industrious, **[*247]** and experienced lawyers, who jointly took 128 depositions (totalling over 8,000 pages), to a large extent disclosed to each other proposed exhibits, entered into 5 stipulations (totalling 58 pages), and exchanged careful, thorough, pre-trial briefs (in excess of 400 pages), enabled the parties at the outset of the trial to lay before the Court **[**3]** 1181 exhibits comprising approximately 15,000 pages. The preliminary procedural and substantive steps reduced the taking of testimony in open Court to six days, from June 15, 1964 to June 24, 1964. The Court, at the conclusion of the testimony, required each party to use the summer recess to limit to 40 pages the principal portion of its brief, with a right to annex appendices of unlimited length. Oral arguments upon those briefs and replies thereto took place on October 9, 1964.

Before findings, conclusions, and opinions are set forth, this Court takes this opportunity to make explicit certain aspects of its approach to this controversy.

This Court is mindful that in recent years antitrust litigation, particularly Government civil actions alleging violations of *§ 2* of the Sherman Act, have involved an enormous, nearly cancerous, growth of exhibits, depositions, and ore tenus testimony. Few judges who have sat in such cases have attempted to digest the plethora of evidence, or indeed could do so and at the same time to justice to other litigation in their courts. Nor is there any sound reason to believe that such extensive presentation accomplishes any important legal or other **[**4]** social end.

Historically, the major explanation of prodigious records probably is the lack of certainty both at the bar and on the bench as to what was the scope of *§ 2*, and, even to some degree, of *§ 1* of the Act. Fluctuations in Supreme Court interpretation of the statute prevented lawyers no less than laymen from having confidence as to how an antitrust controversy would be viewed in the Supreme Court, and those who were in authority were unwilling prematurely to draw sharp boundaries of relevance and materiality.

Time, however, has hardened the lines of interpretation of the Act. No doubt, courts have been aware that the text of the Sherman Act, simpliciter, though it withstood early attacks grounded on the charge that it was so vague as not to meet the due process standard of the *Fifth Amendment to the United States Constitution*, *Nash v. United States, 229 U.S. 373, 33 S.Ct. 780, 57 L.Ed. 1232 (1913)*, would, if enacted in the same words today, without explicit legislative guidance from the debates, the committee reports, the exordium of the statute, and other ancillary sources, not easily hurdle the barrier of the *Fifth Amendment*, and comply with recent precedents requiring **[**5]** definiteness as a sine qua non of valid criminal legislation.

To satisfy both modern judicial susceptibilities, and increased awareness of the right of prospective defendants to clear warning of what constitutes criminal conduct, courts, while not abandoning the possible in futuro widening or deepening of the Sherman Act with the growth of experience, and while not sacrificing the possible stretch of the statute in the future to keep pace with any scheme hereafter developed to evade its deliberately prospective broad reach, have tended to lay down, especially in connection with *§ 1* of the Sherman Act, so-called per se rules, (as, for example, the rule invalidating price-fixing agreements made to cover a substantial market), which are relatively precise and which form the basis of virtually irrebuttable charges of violation of the *Sherman Act. United States v. Paramount Pictures, 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260*; *Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035*; *United States v. New Wrinkle, Inc., 342 U.S. 371, 72 S.Ct. 350, 96 L.Ed. 417*. Such per se rules go beyond presumptions, burdens of proof, or like procedural measures. They **[**6]** are substantive glosses constituting clear corollaries.

With regard to *§ 2* of the Sherman Act, the trend has been less clear, and has reflected a greater degree of wariness or **[*248]** timidity on the part of judges. Yet in the two decades since the opinion of Judge Learned Hand in *United States v. Aluminum Co. of America, 2nd Cir., 148 F.2d 416 (1945)*, most of the cognoscenti have expected that a day would come when the Supreme Court would announce that where one or more persons acting jointly had acquired so clear a dominance in a market as to have the power to exclude competition therefrom, there was a rebuttable presumption that such power had been criminally acquired and was a monopolizing punishable under *§ 2*. To be sure, the putative offender would be allowed to avoid or defeat this presumption if he bore the burden of proving that this share of the market was the result of superior skill, superior products, natural advantages, technological or economic efficiency, scientific research, low margins of profits maintained permanently and without discrimination, legal licenses, or the like. Cf. *United States v. United Shoe Machinery Corp., D.Mass., 110 F.Supp. 295*, aff'd **[**7]** *347 U.S. 521, 74 S.Ct. 699, 98 L.Ed. 910*. Such a shifting of the burden not merely of going forward, but of proof, such a rebuttable presumption rest on the by-now dozens of court records which make it quite clear that it is the highly exceptional case, a rara avis more often found in academic groves than in the thickets of business, where monopoly power was thrust upon an enterprise by the economic character of the industry and by what Judge L. Hand in Aluminum called 'superior skill, foresight and industry.' More than 7 decades of Sherman Act enforcement leave the informed observer with the abiding conviction that durable non-statutory monopolies (ones created without patents or licenses or lasting beyond their term) are, to a moral certainty, due to acquisitions of competitors or restraints of trade prohibited by *§ 1*. They are the achievement of the quiet life after the enemy's capitulation or his defeat in inglorious battle.

To this Court it appears that the day has come for it, and more important for counsel, to proceed on the acknowledged principle that once the Government has borne the burden of proving what is the relevant market and how predominant a share of that market **[**8]** defendant has, it follows that there are rebuttable presumptions that defendant has monopoly power and has monopolized in violation of *§ 2*. The Government need not prove, and in a well-conducted trial ought not to be allowed to consume time in needlessly proving, defendant's predatory tactics, if any, or defendant's pricing, or production, or selling, or leasing, or marketing, or financial policies while in this predominant role. If defendant does wish to go forward, it is free to do so and to maintain the burden of showing that its eminence is traceable to such highly respectable causes as superiority in means and methods which are 'honestly industrial', as Judge Hand characterized the supposititious socially desirable monopolizer.

One other preliminary point does deserve note -- and that is the relevance, if such there be, of defendant's intent. The issue is whether when the Government or other plaintiff charges a defendant with violation of the Sherman Act the complainant is under a duty to prove that his adversary had either mens rea or, more than that, the specific intent to violate the antitrust Acts. So far as concerns a charge of 'monopolizing', unlike the lesser offense **[**9]** of 'attempting to monopolize', it is not necessary, as both Aluminum and United Shoe declare, for the complainant to prove more than that defendant intended to engage in the practices which maintained its market power. A defendant who monopolizes has 'first of all * * * the intent to do the act, and secondly * * * a knowledge of the circumstances that make that act a criminal offense.' Patrick (Lord) Devlin, lecture on 'Statutory Offenses', republished in Samples of Lawmaking (London, 1962,) pp. 67-82, at p. 78.

B. FINDINGS OF FACT

1. The gist of the Government's complaint is that defendants and co-conspirators (1) have been engaged in an unlawful combination and conspiracy to **[*249]** restrain, and (2) an unlawful combination and conspiracy to monopolize, and (3) have attempted to monopolize, and (4) have monopolized, interstate trade and commerce in what the Government denominates 'the accredited central protective service business.'

2. The central station protective service (hereafter called 'CSPS') business consists of maintenance of a central station, installation and maintenance of hazard detecting devices on the subscribers' premises, connection of these devices to **[**10]** the central station by wires leased from the local telephone company, and receipt and handling of alarms transmitted to the central station from the subscribers' premises.

3. CSPS, at present, involves customer concentration within specific areas. The chief reason is that alerted CSPS employees must promptly reach the scene of the alarm, and the present system does not have scattered task forces. Another reason is that high leased-line costs make it expensive to transmit signals for a great distance. Twenty-five miles from the CSPS central station has become the common radius. But this Court is not persuaded that, with the advance in technology, there are any physical obstacles, such as electrical resistance, which now stand athwart the geographical expansion of central station coverage whenever business advantage, competitive conditions, and prospect of favorable profits make the course expedient.

4. A central service station, in its normal daily service operations, is physically independent of any other central service station. As already noted, its service is summoned, responds, and is consummated usually within a twenty-five mile radius. This is not to imply that the **[**11]** ultimate supervision is not nationally directed; nor that the system of operations, nor that the equipment used, nor the checking of equipment, nor the reports about the system have a purely local, individualized character, origin, or destination. On the contrary, the enterprise in appearance and reality, in financing, selling, advertising, purchasing of equipment, processes of management, and over-all planning is national; though, of course, the impact, as is true of every enterprise, is upon local specific points.

5. By settled practice, universal in the insurance business, underwriters of fire and burglary insurance (hereinafter called 'underwriters') allow a reduction of premiums to customers having approved protective signalling systems. To that end, underwriters have established testing laboratories, have adopted standards, have organized periodical inspections, and have offered premium discounts, of almost standard nature, based thereon. Discounts accorded to accredited central station service subscribers tend to be noticeably larger than for users of other systems.

6. When a prospective subscriber requests CSPS service, the service company surveys the subscriber's premises, **[**12]** determines the number and type of required protective devices, and estimates the cost of needed equipment and labor plus overhead expenses and often expected profit, all of which are usually used in computing an 'installation charge.' This charge is normally payable upon completion of the installation. Additional 'annual service charges', usually payable periodically in advance, and calculated with reference to the equipment in service, telephone line rental costs, expected service including maintenance costs, and often expected profit, are also charged to the subscriber. Annual service charges are covered by contracts for periods of up to five years. Such a contract normally provides that at its termination the service company has a right to remove the equipment without refunding money or making any other payment to the subscriber.

7. In 1961 ADT provided CSPS to 121 units, located, respectively, in 115 cities, which, in turn, were located, respectively, in 35 states and the District of Columbia. In 92 of those 115 cities ADT has no CSPS competition.

8. Holmes provided CSPS to 14 units, each located in one of 3 cities, -- 11 in New York City, 2 in Philadelphia, and 1 **[*250]** **[**13]** in Pittsburgh, in all of which it has CSPS competition.

9. AFA provided CSPS to 3 units, each located in one 3 cities, -- 1 each in Boston, New York City, and Philadelphia, in all of which it has CSPS competition.

10. As of December 31, 1961 in the United States there were, in addition to the alarm company defendants, 33 CSPS companies approved by one or more underwriters. Of those, each of 5 provided CSPS from 2 locations; each of the remaining 28 provided CSPS from only 1 location.

11. Of those 33 CSPS competing companies, each of 7 operated in one of 7 cities without CSPS competition; each of 23 operated in one of 23 cities where it had CSPS competition from one or more of the alarm company defendants; 3 operated in cities where they had CSPS competition from others.

12. Business or other enterprises located in cities where there is CSPS have the option, of course, of using watchmen, watchdogs, automatic proprietary systems confined to one site, (often, but not always,) alarm system connected with some local police or fire station, often unaccredited CSPS, and often accredited CSPS. There are business or other enterprises which in the same city exercise their options **[**14]** differently for different sites in that city. Thus, the Government itself in Washington uses at some public buildings a proprietary system; at others, accredited CSPS.

13. Examples of a particular enterprise changing from one alarm method to another are recited in the record; but, significantly, the preponderant shift is from the less integrated, advanced, expensive, and safe method of proprietary systems to accredited CSPS, thus indicating a customer recognition of a difference in market. This difference, to use a popular analogy, could be compared to moving into the class of the rich by changing from a compact six-cylinder car to a chauffeur-driven sedan. That is, there is a major product difference far transcending the obvious possible minimal cross-elasticity of demand.

14. It is also true that many central station companies, including defendants, furnish other forms of protection as well as accredited central station protective service. But this entry by one company into two or more adjacent markets has no substantial significance in defining either of these markets. Here a comparison may be drawn, by analogy, with the practice of General Motors Corporation in offering **[**15]** customers a choice of a chauffeur-driven Cadillac or a Chevrolet Corvair. General Motors caters both to 'the Privileged and the People' who, in Disraeli's phrase, form 'Two Nations.'

15. In 1960 the alarm company defendants together with all other CSPS companies obtained from United States manufacturers in various states over $ 12,000,000 worth of protection equipment for installation. According to page 6 of the Reply Brief for defendants, ADT, Holmes, and AFA, all this equipment was 'manufactured * * * by the defendant', (presumably overwhelmingly by Grinnell.)

16. In 1961 the alarm company defendants provided CSPS service to thousands of subscribers of whom more than 900 were each located in a state other than the one wherein the servicing station was located. For this type of service the charges in the previous year, 1960, had included $ 677,598.15 for interstate transmission of signals over wires.

17. Up to this point, most of what has been stated relates primarily to the 3 alarm company defendants which are themselves in the accredited CSPS business. Grinnell, which is not in that business, nonetheless manufactures the alarms, sprinklers, and other equipment which may **[**16]** be denominated the machinery of the business. It is the principal supplier of the dominant companies in the market. And its economic interest as a supplier stretches beyond the immediate purchasers, that is, beyond the alarm companies, to the subscribers for CSPS because, as will be recited in later findings, some of Grinnell's compensation **[*251]** for its equipment takes the form of a share in the revenues received by the alarm companies from the fees paid to them by their subscribers.

18. Were it necessary to make such a finding, this Court would find that a primary motive of Grinnell when it acquired 89% Of the capital stock of AFA, and 79% Of the stock of ADT was to secure an assured outlet for part of Grinnell's manufactured products. Investment purposes were also a motive.

19. However, in courts, unlike on the stage, the drama need not concentrate upon the parties' motives. As explained in the Introduction to these Findings of Fact, ***HN1***[] the law does not require even proof of intent, much less proof of a motive, where the wrong charged is monopolization, as distinguished from an attempt to monopolize. Moreover, such intent as must be proved to sustain the charge of an attempt **[**17]** to monopolize, or a conspiracy to monopolize, relates to the purpose to monopolize, not to the purpose of the monopolization.

20. Hence, it is quite adequate to demonstrate that Grinnell by its mere acquisition of control of companies which in combination have 87% Of the accredited CSPS market has shown by its actions that it is possessed by what the mediaevalists called 'the lust for power.' No doubt, that lust is often in modern times characterized by materialism, that is, by the search for economic advantage, including financial rewards and outlets for manufactured products. Here it is indeed probable that Grinnell's and its president's acquisition of leverage over the market for accredited CSPS was in part motivated by a desire to increase Grinnell's manufacturing business and to assure a quiet market as an outlet for the sale of Grinnell's alarms, sprinklers, and other equipment. Yet, just as the Government has no obligation to prove defendant's motives, so the Court is under no duty to make findings with respect to those springs of action. Speculation as to motives may be favored by playwrights, prosecutors, and jurors, but judges do well to take in a Pickwickian sense Pascal's **[**18]** dictum that 'the heart has reasons of which the reason knows not.'

21. Grinnell's relations to ADT, AFA, and Holmes are in a formal sense so structured that each of the affiliates of Grinnell had separate officers, and separate boards of directors which have independent identity. But the form is not a true mirror of the substance of the interrelation of the 4 companies.

21a. Since 1919 the balance sheets of Grinnell, submitted as part of Grinnell's reports to its stockholders, have shown, though in unconsolidated form, the results of the operations of all 4 defendants.

22. Since 1948 the president of Grinnell has been James Douglas Fleming, a man who joined Grinnell in 1919, and whose competence, character, and force of leadership stand revealed throughout the whole record, and most particularly in the testimony he candidly gave in open court. Until 1964, he stood in lonely eminence; there were no vice-presidents of Grinnell; nor others who had more than a closely delegated authority. A purely nominal charge has been made in the current year. Four men who had been with Grinnell for 30 years but who had no other independent distinction were named vice-presidents.

23. Mr. **[**19]** Fleming, in addition to being president of Grinnell, sits upon the board of directors of each of the 4 defendants; and is chairman of the board of ADT. There is only one fellow director of ADT who is not an officer of Grinnell or of ADT. The situation is not noticeably different in any of the affiliated companies. In only one instance that Mr. Fleming could recall, has a board of directors of one of the affiliated defendants ever vetoed, or rescinded, or overridden any of his Or Grinnell's management proposals or plans. In all major operations of all 4 defendants Mr. Fleming has illustrated the Emersonian proverb that 'where MacDonald (or, as misquoted in the record (Tr. 732) MacGregor) sits, is the head of the table.'

24. The personnel unity achieved through the dominant character of Mr. **[*252]** Fleming is buttressed in many ways. Under allocation agreements, executed in 1907, Grinnell as late as 1960 received over $ 1,200,000 from revenue produced by contracts made by its affiliates with one or more of the subscribers located in one or more of the 35 states and the District of Columbia. This sum was related to the same type of revenue which in the next year, 1961, produced **[**20]** for ADT, AFA, and Holmes more than $ 57,000,000 on account of CSPS charges those companies rendered to 93,272 subscribers located in 35 states and the District of Columbia.

25. Moreover, there is a generic similarity, though not an identity, in the contract forms, price lists, and instruction forms used by the 3 alarm company defendants. Many examples of each of these documents are sent regularly from the principal or home offices of the 3 alarm company defendants across state lines.

26. Furthermore, across state lines move to the principal or home offices of the alarm defendants reports, proposed contracts, payments, and other communications. Travel from one state to another on company business takes a substantial part of the working time of the principal officers of each of the defendants. This travel as well as the written communications produce a high degree of integration of the major policies of the 3 alarm company defendants, and result in effective control by Grinnell and by Mr. Fleming of all 4 defendants, their company subdivisions, their district sales offices, and their personnel.

27. In considering what is the relevant market, or what are the relevant markets, **[**21]** or interstate commerce, many of the factors heretofore detailed require consideration.

28. From the viewpoint of the type of service or product, the relevant market is not, as defendants contend, all protective systems, ranging from individual watchmen on the premises to the elaborate accredited central station alarm systems typified by the alarm company defendants' activities.

29. Quite plainly, non-automatic systems differ not merely in technology but in utility, efficiency, reliability, responsiveness, and continuity from all automatic arrangements. The difference between watchmen and watchdogs, at one end of the spectrum, and electrical systems at the other lies at the very heart of what is meant by such phrases as 'the industrial revolution', 'the machine age', 'technological advance', and the 'era of automation.' Antitrust judges in their employment, no less than unskilled workers in their unemployment, recognize that markets for services rendered without tools and without education in the handling of them differ toto mundo from markets for services related to machines.

30. Nor, from the viewpoint of the type of service or product, can it be validly maintained that the **[**22]** relevant market embraces all automatic systems, including not merely accredited CSPS, but also local, auxiliary, and proprietary alarms and alarm systems unconnected with accredited central stations.

31. The accredited central station business is marked out by the very patterns of the alarm company defendants, who are the dominant factors in the protective industry, as being an identifiably separate market. Illustrative are the subscriber contracts with their installation and annual charges.

32. Many (though by no means all) of those who are engaged in the alarm company business, speaking in their capacity as experts (not necessarily with the special added status of authorized spokesmen making vicarious admissions binding defendants) have in correspondence and orally shown that that portion of informed opinion which this Court regards as the more credible recognizes the accredited central station business as a separate type of business.

33. Insurance companies allow their insured a far larger reduction of premium for accredited central station service than for other types of protective service. The annual charge paid by customers is several times as much for accredited central **[**23]** station service as for **[*253]** proprietary systems, and more than for any other types of protection service.

34. There are trade associations uniting under one roof accredited central station protective service companies, and not including the generality of all types of automatic alarm systems.

35. As already noted, customers regard a change from proprietary alarms to CSPS as an entry into what is qualitatively and monetarily a new class, as when one changes from a Volkswagen to a chauffeur-driven Rolls Royce, or from a boarding house to a hotel named in a hotel association listing.

36. Hence, for purposes of the antitrust laws there exists a specific, separate, identifiable, recognized market limited to accredited central service protective systems operated by largely automatic devices.

37. If the market, product-wise, be plainly defined as limited to accredited central station protective service connected with automatic devices, it is hardly less clear that, geographically, because of the very nature of those automatic devices and the services related thereto, and the patterns in which that industry has developed, and market has a national interstate-commerce character.

[24]** 38. It is not merely a congeries of segregated local or city markets. Of course, in addition to the principal national market, there may well be local markets of limited territorial area, or city markets, which in other litigation might be found in themselves to constitute, for purposes of the antitrust laws, definable, separate markets, wherein prohibited monopolies, or prohibited monopolization, or prohibited restraints, or prohibited attempts to achieve those forbidden ends might be enjoined or punished. But regardless of such local or city markets, there exists a national interstate commerce market in accredited Central Station Protective Services.

39. The existence of a national market is underlined by defendants' own national pattern of business, with its close articulation of control from the pinnacle of Mr. Fleming down the whole range of subordinate officers, and with its constant use of interstate commerce involving equipment, officers, salesmen, correspondence, even to an appreciable extent electric current carrying alarm signals from one state to another.

40. A fire or burglary may be local. Alarms may be sent to a point only a few blocks away. Relief may be dispatched **[**25]** from a local fire or police station. But the system of accredited CSPS rests upon the far-flung structure (a) of national planning, (b) of lapsed agreements covering activities in many states, (c) of inspection, certification, and reduction of rates by national insurers, (d) of defendants' national schedules of prices, rates and terms, and (e) even, on occasion of national special discount prices to a particular customer who operates multi-state enterprises.

41. Grinnell and the affiliated companies included in its balance sheet do not pretend to have a purely local status when they solicit customers, or report to stockholders, or raise funds for their business purposes, or advertise their merits, or preen themselves on their conspicuous success.

42. When all the rest can see a typical American national business enterprise flourishing in an interstate market, federal courts too get the signal and can hear the alarm sounded when such a market is subject to restraint of trade or monopolization.

43. From the foregoing detailed facts there emerge as ultimate facts, found by this Court, first, that as the complaint alleges, 'the business of supplying and installing protection devices **[**26]** on the premises of subscribes, maintaining such devices and furnishing to subscribers protection from fire, burglary, or other hazards, through central stations accredited for such service by insurance inspecting and rating organizations' is a trade or industry which constitutes part of the commerce among the several states subject to regulation by Congress under *Article, I, Sec. 8, cl. 3 of the United States Constitution*, and indeed regulated by **[*254]** Congress by virtue of the Sherman Act, and second, that the accredited CSPS business which is performed by each of the 3 alarm defendants and is controlled by defendant Grinnell is, likewise, part of interstate commerce subject to Congressional regulation and indeed regulated by the Sherman Act.

44. During the period 1957-61 defendant alarm companies' share of the total national accredited CSPS market ranged from 87% To 91%; and ADT and Holmes had 87% To 90% Of so much of the central station burglar alarm business as was 'certificated' by all underwriters' laboratories.

45. However, it is only fair to add that from 1957 to 1961, defendant alarm companies' shares of central station subscribers and of revenue therefrom showed **[**27]** a slightly declining trend. Moreover, there is no persuasive evidence that any particular prospective entrant has been unable to begin operations, or that any specific CSPS firm has failed or been driven out of business. The most that can be said is that some competitors complain of what they regard as unsatisfactory profits.

46. Defendant alarm companies do not have unfettered power to control the price of their services. Even where they have no competition from other CSPS companies, they have not always been able to receive the standard they have set for themselves, the so-called 'Minimum Basic Rates', (hereafter called 'MRB') or annual service charges. This is due to the fringe competition of other alarm or watchmen services.

47. Yet this ceiling imposed by fringe competition and this implied cross-elasticity of demand lose almost all their significance when set against the fact that, because of their national operations, one or more of defendant alarm companies choose in some areas to operate at a loss. ADT's own counsel, in both brief and oral argument

stressed, paradoxically, that it operated 20 'deficit' offices in cities with no other central station. Counsel seem **[**28]** not to appreciate that this fact is a strong point against defendants. It conclusively proves that defendants enjoy national monopolistic power which permits one of the conspirators to occupy local markets where no independent CSPS station would long function and to extend to each of them the combination's national monopolistic control. Hardly any indicium of monopoly power is more persuasive than the continued capacity of the asserted monopolistic combination to sustain offerings at a loss either in particular areas or in particular services or products.

48. Defendants faced with proof of the overwhelming share of the accredited CSPS business in the hands of the alarm company defendants have offered no evidence to rebut the presumption that this share was the result of an attempt to monopolize and have not sought to maintain their burden of proving that their share is attributable primarily to their skill, efficiency, and foresight, or to like factors of obvious social utility. On the contrary, the evidence rather plainly indicates that acquisitions, both within and outside the relevant market, were important sources of the market power achieved by the alarm company defendants.

[29]** 49. ADT purchased in 1946 for $ 282,395.02 Reliance Alarm Co., a Detroit company. In 1955 ADT acquired for $ 300,000 General Alarm Corp. of Boston. It is true that before making the latter purchase ADT informed the Department of Justice; but it is incontrovertible that whatever else the Department's silence indicates, no inference can be drawn that the Department had, or attempted to exercise, authority to treat that disclosure as proof that ADT was growing larger by virtue solely of its skill, efficiency, foresight, or like factors of obvious public benefits. Nor did the Department of Justice suggest that when after acquiring General Alarm Co. of Boston, ADT dismantled it, ADT failed to reveal in the most flagrant way its intent to attempt to monopolize.

50. The Detroit and Boston concerns just mentioned operated approved central **[*255]** station protective systems when they were acquired. Other companies which did not operate such systems and hence admittedly were not in the market directly at issue in this case were also acquired by ADT. In its answer ADT admitted that it acquired 22 protection companies. Going further, ADT's counsel at p. 9 of their Reply Brief admit **[**30]** that ADT purchased and dismantled in 1913 the Still Alarm Co., Cleveland, and in 1959 Federal Automatic Alarms, Albuquerque; and that ADT in 1954 purchased the subscriber equipment of Globe Electric Protection Company, Atlantic City. What is significant is not that those 3 concerns fall within or without the relevant market here is issue, for plainly they fell outside that market, but that the acquisitions indicate that ADT's growth, far from being attributable solely to superior techniques and methods of administration and like so-called honestly industrial means, owes more than a little to the special kind of appetite which has characteristically revealed a monopolistic temper and explained a monopolistic growth.

51. It is unnecessary to pause for elaborate description of the other acquisitions of ADT or Holmes or AFA, if any, or of the occasional accompanying covenants by sellers not to compete with the alarm company defendants. Enough has been noted to see why it is that defendants have not borne, and cannot bear, their burden of showing that their proportion of the market is a mere tribute to their perfect performance.

51a. Another significant factor in defendants' growth **[**31]** in the share of the national market were the, by-now lapsed agreements during the period 1904-1954 between the alarm company defendants before they were affiliated, or between alarm company defendants and actual or potential competitors. Those agreements provided for the orderly allocation of geographic areas and classes of CSPS. Though the agreements are no longer legally effective, their influence in forming business patterns remains to a discernible extent.

52. One of those agreements was the Burglar Alarm Agreement of September 28, 1906 between ADT and Holmes, then unaffiliated. ADT conveyed to Holmes all burglar alarm business, including subscriber contracts and installed devices, in New Jersey, Maryland, Delaware, the District of Columbia, 8 counties of New York (New York, Richmond, Kings, Queens, Nassau, Suffolk, Westchester, and Rockland), 6 counties in Pennsylvania (Philadelphia, Delaware, Chester, Montgomery, Bucks, and Allegheny), and so much of Connecticut as lies within 33 miles of New York City. In those areas ADT agreed forever to refrain from engaging in central station burglar alarm service. Holmes agreed forever to refrain from engaging in any type of protection **[**32]** service outside of those areas; and within those areas to limit itself to burglar alarm service, and, in the case of financial institutions, to nightwatch

service. Most of the pattern thus established continued, without legal buttress, at least until this suit was brought, -- for, as of December 31, 1961, Holmes did not render service outside of the defined area; nor within the area did it serve a single central station fire alarm subscriber.

53. Another series of agreements were the Fire Alarm Agreements of April 29, 1907 among Grinnell, ADA, AFA, and the non-defendant Automatic Fire Protection Company (hereafter called 'AFP'), all then unaffiliated. (a) AFA received an exclusive right to contract with subscribes for central station sprinkler supervisory and waterflow alarm service (hereafter called 'SSWF') for Greater New York, Philadelphia, and Boston and Charlestown, Massachusetts. AFA agreed to refrain from engaging in nightwatch and burglar alarm service in those four cities, and to refrain from all others types of CSPS elsewhere in the United States. (b) AFP received an exclusive right to contractor for SSWF service elsewhere than in the 4 named cities. (c) ADT received **[**33]** the exclusive right to render nightwatch and burglar service through the United States, and agreed to permit AFA and **[*256]** AFP in their respective territories to connect SSWF alarm service to ADT's central stations. (d) Grinnell agreed to furnish all SSWF alarms for contracts obtained by AFA and AFP, and itself to refrain from invading the assigned territories. (2) Among the 4 named companies provisions were made for AFA to receive 25% Of the SSWF alarm revenue from its territory; ADT to receive 50% Of the SSWF alarm revenue from both AFA and AFP territories; and Grinnell to receive 25% Of the SSWF alarm revenue from both AFA and AFP territories. January 1, 1949 ADT purchased all AFP's rights under the agreements. Much of the pattern established under the 1907 agreements continued, without legal buttress, at least until this suit was brought, -- for, as among defendants, ADT continues as the exclusive source of central station nightwatch and burglar alarm service, AFA as the exclusive source of central station nightwatch and burglar alarm service, AFA as the exclusive source of central station fire alarm service in New York, Philadelphia, and Boston; and Grinnell does not **[**34]** furnish the types of service originally precluded by the 1907 agreements.

54. Grinnell and ADT and the Rhode Island Electric Protective Company (hereafter called 'RIEP') have agreed that RIEP shall have the exclusive right to render CSPS within Rhode Island, at prices not less than those established by ADT for like service, and with certain devices sustained by Grinnell. RIEP shares its revenue with ADT and Grinnell. This agreement is presently effective. Admittedly this relationship is a mere makeweight in indicating Grinnell's and ADT's role in controlling the approved CSPS maket, its monopolistic power therein, and its intent to monopolize.

55. Although defendants have a 'Schedule of Minimum Basic Service Charges' and 'ceiling prices' which constituted their standards rates, they depart therefrom when they encounter actual or threatened effective competition. Departures have included (a) frequent quotation of prices with an annual service charge less than 100% But not less than 80% Of the minimum basic rate, and with an advance service charge less than 100% But not less than 60% Of the minimum basic charge, (b) occasional installation of CSPS without charge, (c) rarely, successive **[**35]** bids each, progressively, lower than the so-called standard minimum basic rates, (d) at least once, the reduction of rates at all locations of a chainbusiness account to preclude a competitor of defendants from securing in one city an account of that chain, and (e) infrequently, frequently, the deferment of prompt payment of installation charges. Sometimes these departures have merely met the prices of competitors; but, on other occasions, rare though they were, the departures undercut or beat competitors' prices.

C. CONCLUSIONS OF LAW

1. From the foregoing findings of fact it is transparent that during their growing period the alarm company defendants in several respects violated the restraint of trade provisions of *Section 1* of the Sherman Act.

2. The alarm company defendants engaged in per se violations of *Section 1* when they, being the most substantial and the recognized dominant enterprises in the CSPS industry, entered into written agreements, now admittedly several decades old and formally no longer effective, which allocated geographic markets and classes of customers and fixed minimum prices for types of service. Grinnell formally took a share directly or indirectly **[**36]** in the revenues from these agreements. When the agreements expired, defendants, including Grinnell, continued most of the arrangements once founded on those unlawful legal instruments.

3. Because of the formal expiration of the agreements, it, conceivably, might be too late for the Government now to seek against defendants relief from the legal instruments as such. But the folds in the industrial scene have remained even though the technical pressure **[*257]** of the legal instruments has been withdrawn. Channels of activity begun, under legal formalities became habitual, and, even after the formalities had expired, in most cities have continued to carry the same menace to free trade. ***HN2***[] Injunction against continued adherence to the patterns formed in violation of law is not merely appropriate but necessary to accomplish the declared objects of the antitrust laws.

4. Furthermore, the alarm company defendants resorted to restraints of trade prohibited by *Section 1* of the Sherman Act when, faced with competition, they, being in a dominant position, manipulated their own prices to forestall competition. Injunction against pricing discriminatorily utilized by a monopolistic combination **[**37]** to forestall competition is appropriate and necessary.

5. The restraints of trade just mentioned were a chief avenue by which the alarm company defendants previously attempted to monopolize, and de monopolize and now do conspire to monopolize, the national market in the accredited CSPS industry, all in violation of *Section 2* of the Sherman Act.

6. Perhaps even more effective as a means used to attempt to monopolize, and eventually to monopolize, the industry, in violation of *Section 2* of the Sherman Act, were the alarm company defendants' acquisitions of competing companies, more particularly in the light of the dismantling of some of the acquired service stations.

7. Grinnell's acquisition of so high a percentage of stock of the companies engaged in the monopolization, and Grinnell's direction of the policies of the 4 companies as a whole toward the maintenance of the monopolization constituted a violation of *Section 2*.

D. OPINION ON LIABILITY

1. At this late date it is hardly necessary to do more than briefly recapitulate what is meant in Sherman Act parlance by the concepts 'to attempt to monopolize', or a 'conspiracy to monopolize', or 'to monopolize.'

2. ***HN3***[] To succeed **[**38]** in a *Section 2* case plaintiff must prove that the putative monopolist or monopolists sought to achieve or achieved the economic power, even though unexercised, to control prices or production in a relevant market, or to exclude competition therefrom. Proof may be direct or indirect.

3. ***HN4***[] One indirect method to prove the requisite power is to show defendants' occupancy of an overwhelming (but not mathematically definable) percentage of the market, unless that position, -- or, as it is called, 'share of the market', -- is shown by the supposed monopolist to be attributable exclusively to his skill, efficiency, foresight, or like affirmatively laudable business conduct. Unless he maintains the burden of proving himself within the exception, the occupant in the dominant position stands condemned.

4. ***HN5***[] What degree of occupancy, what share of the market, are indicative of monopolistic control depends on a judgment based upon all aspects of the particular market under review. But while close cases can be supposed, no informed student of prior decisions involving *Section 2* of the Sherman Act could doubt that on this record defendants occupy a share of the CSPS market for beyond the **[**39]** line justifying a presumption of monopolistic power. The percentage is so high here as to need no explication. And, as the conclusions of law already set forth state, this share of the market rests not on the skill, efficiency, and foresight of defendants, not even on their neutrally normal business methods, but on violations of per se rules governing restraints of trade and on acquisitions indicating that that growth was a response to external grasp, not to internal grip.

5. Nor in this case need we consider whether there are present all the various policy considerations advanced from time to time by legislators, judges, and academicians to justify or interpret the antitrust prohibition of monopoly.

6. Of course, in the relatively small accredited CSPS industry it would be nearly ridiculous to rest the present application **[*258]** of the Sherman Act upon a literal interpretation of the economic and philosophical postulates offered in great antitrust cases in celebrated opinions by Mr. Justice Brandeis, Mr. Justice Black, Mr. Justice

Douglas, Mr. Justice Brennan, or Judge Learned Hand. Here we are dealing with an industry which as a whole involves fewer individuals and less **[**40]** capital than, let us, say, any one of the three leading manufacturers of automobiles, of steel, or of electronics, or any one of the three largest chain retail store systems, insurance companies, or banks. The activities of Grinnell and its affiliates, no matter what their intent or their achievement, could hardly be said to have a significant potential effect comparable to those giants' maneuvers in, at least by possibility, dwarfing men, or interfering with their creative, political, or spiritual possibilities, or determining their economic fate, or depriving them of the illusion or reality of free choice in an open society.

7. What justifies this application of Section 2 of the Sherman Act to these defendants is no avoidance of 'the curse of bigness', or the fear that men will be converted into robots, or the dread that society will be stratified into trusts more burdensome than feudalism, or colonialism, or socialism, or communism, or some other despised polity, or a concern lest giants larger than the state itself shall lead us into tyranny or into the need of a socialistic regimen as an antidote to private despotism.

8. It is even doubtful whether we can say that here we **[**41]** have the danger of a business becoming slothful, routinized, sleepy, or wanting in alertness, initiative, and progressiveness, as a result of the quiet life sought and usually achieved by a monopolist.

9. Nor can it be truly asserted that here we are faced in microcosm with Action's fancied or real disease, -- the corruption of power. Mr. Fleming and his associates are not likely to be on anyone's list of Napoleons. Nor is Grinnell's corporate power 'corrupt' or 'imperial.'

10. In cases like this where the Sherman Act ban against monopolizing is invoked against defendants who have secured dominance of a small industry by imposing unlawful restraints of trade and by a steady stream of acquisitions of competitive enterprises, the usual rhetoric is quite out of place. All that is at stake here is the rooting out of a plant of minor importance in the rich forest of the American economy, not because it overshadows all of us, or even many of us, but because it represents an ultimate growth from seeds which have been declared unlawful. Congress in Section 1 of the Sherman Act outlawed the means and in Section 2 outlawed the end achieved by those means.

11. ***HN6***[] In most, though not, **[**42]** all situations relief against the monopolization forbidden by Section 2 could be achieved through a proceeding under Section 1 couched in the form of an attack on restraints of trade. But this is not always true. Proceedings under Section 1 may come too late: for example, the formal restraints may have been withdrawn, or laches may have intervened, or, as in United States v. United Shoe Mach. Corp., D.Mass., 110 F.Supp. 295, hoary precedents sustaining as valid what the current law now regards as undoubted restraints of trade may preclude the Government from securing an injunction against the restraints as such. Yet though the Government may be barred from getting under Section 1 relief directly against the restraints, it may, nonetheless, under Section 2 get relief against the consequences of the restraints if, but, of course, only if, they have gone so far as to involve a continuing monopolization. Having failed to nip the bud, the Government may still pluck the flower of evil.

E. OPINION ON REMEDY

1. Even if this is not a 'big case' in any sense (except in the Government's unnecessary volume of exhibits disclosing chiefly the Department of Justice's unwillingness to accept **[**43]** the notion that in the second half of this Century, lower Courts, educated by the Supreme Court, **[*259]** can get the point that an antitrust case really turns on a relatively manageable set of facts, on a few by-now clear legal issues, and on a presentation worthy of Mr. Justice Holmes' advice to 'Strike for the jugular'), nonetheless, the findings of fact and the conclusions of law demand a decree of scope and strength.

2. This is no border-line case. A man of the capacity, sophistication, and, possibly, risk-taking temperament of Mr. Fleming cannot have been ignorant that the companies he controlled had in the most flagrant way violated the clearest aspects, the so-called per se rules, of the Sherman Act and were continuing to follow patterns conceived in crime. Maybe he shrewdly weighed business advantage against business disadvantage, and with keen appraising

eye estimated the law's delays, the fluctuating policies of the Department of Justice, the improbability of private suitors with adequate funds and resolution, the reluctance of courts to apply surgical measures to cut deep into already established industrial patterns, and, in any event, the plausibility of the oft-cited, **[**44]** if strangely inapt, metaphor that one cannot unscramble eggs.

3. Whatever may have been the calculation of defendants or their officers, this Court has determined that this case requires a three-pronged judgment adequate to uproot the evil of a long-effective monopolization.

4. First, defendants, including the controlling Grinnell Corporation, shall be specifically directed to cease and desist from restraints of trade in which the record shows that the alarm companies have engaged directly or indirectly. This decretal provision rests expressly on the ground that the restraints were from their first imposition a violation of *Section 1*, and, alternatively as well as cumulatively, on the ground that they are a continuing cause of the monopolizing prohibited by *§ 2* of the Sherman Act. To make effective this cease and desist order which, inter alia, precludes the alarm company defendants from manipulating prices and terms of sale or servicing so as to bring against competitors defendants monopolistic power, the alarm company defendants shall be required, until further order of the Court, to file with the Antitrust Division of the Department of Justice such standard lists of prices **[**45]** and terms of sale or servicing as, at their uncontrolled pleasure, they from time to time adopt, and also to file a record of every quotation, written or oral, departing from those standard lists, such filing to reach the Division within two weeks of the quotation. It is not the purpose of this direction to give the Government the right to fix or even to object to any alarm company's standard price list. It may select any figures it likes. And at any time it may change the standard schedule, if this is done for all customers of like kind. But if an alarm company defendant seeks to depart in individual instances from its standard schedule, then it must report the departure and run the risk of being charged with invidious, illegal discrimination. The cease and desist order shall prohibit each defendant from acquiring the stock, assets, or business of enterprises in the accredited CSPS industry. External growth is the badge of the monopolist, as internal growth is the mark of the free life.

5. Second, no later than April 1, 1966 Grinnell shall file with this Court a plan of divestiture under which it shall dispose of all of its stock in each of the other defendant companies. Such **[**46]** plan may, at the election of Grinnell, provide for the stock to be sold, or for the stock to be distributed to shareholders of Grinnell, or for some combination or reasonable variation of those two methods. The date is purposely set far ahead to permit an appeal to the Supreme Court, and to let defendants consider all tax and corporate problems.

6. Third, to insure that the reforms imposed by this decree are not thwarted by a leader of great capacity but of less than an admirable record of compliance with well-known prescriptions of ***antitrust law***, and to guarantee that there is an entirely effective breaking-up of the channels of restraint and monopolization **[*260]** which the present management of Grinnell has dug so deep into the pattern of the accredited CSPS industry, and to make certain that the general public is not further prejudiced by the continued management of defendants by one who has demonstrated defiance of legal prohibitions, no defendant, after April 1, 1966, shall continue in employment as officer, director, employee, consultant, agent, or otherwise James Douglas Fleming; but nothing herein shall preclude any defendant from fulfilling any pension or like purely **[**47]** financial agreement it now has with Mr. Fleming. Full notice that this Court contemplated this decretal provision was given to defendants by this Court during the trial and on the very day when Mr. Fleming gave his extensive, uninterrupted account of his role in the conspiratorial combination. This provision shall not be construed as in any respect retroactive or punitive; its interpretation shall be strictly prospective and prophylactic; nor shall it be regarded as directed against Mr. Fleming, but against defendants' use of Mr. Fleming, the leader who brought them to this end and cannot be expected to regard a reversal of his policies as suitable marching orders. While this Court does not feel that it can leave Mr. Fleming in the saddle, there is intended in this decretal provision, or in any other part of this opinion and judgment any suggestion that Mr. Fleming lacks financial integrity or honesty of the usual type. He is an 'honest man' after the manner of Theodore Roosevelt or Norman Hapgood. See Learned Hand, on Robert P. Patterson, in THE SPIRIT OF LIBERTY ed. by Irving Dilliard, (Vintage Books, N.Y. 1959 ed.), pp. 200-208, at page 205. He is undoubtedly a man whose virtue **[**48]** the Scotch would appreciate, and of a VIRTU the Italians would applaud. But he appears on this record to have been for well over a decade and a half the vigorous captain of the defendants' conspiracy to monopolize.

Judgment in accordance with findings of fact, conclusions of law, and opinions on liability and remedy.

[Stanton v. Texaco, Inc.]

United States District Court for the District of Rhode Island

September 18, 1968

Civil Action No. 3300

Reporter

289 F. Supp. 884 *; 1968 U.S. Dist. LEXIS 12563 **; 1968 Trade Cas. (CCH) P72,595

Daniel B. Stanton v. Texaco, Inc.

Core Terms

consignment, gasoline, retail, conspiracy, purchaser, dealers, prices, Robinson-Patman Act, Sherman Act, antitrust, petroleum product, treble damages, decisions, cases, restraint of trade, summary judgment, instant case, consignee, vertical, genuine, station, lease, recent decision, resale price, retroactively, purposes, asserts

LexisNexis® Headnotes

Antitrust & Trade Law > Clayton Act > General Overview

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

See *15 U.S.C.S. § 15*.

Antitrust & Trade Law > Regulated Practices > Price Fixing & Restraints of Trade > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Regulated Practices, Price Fixing & Restraints of Trade**

See *15 U.S.C.S. § 1*.

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

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

HN3[] **Antitrust & Trade Law, Robinson-Patman Act**

See *15 U.S.C.S. § 13(a)*.

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Constitutional Law > The Judiciary > Jurisdiction > General Overview

HN4[] Subject Matter Jurisdiction, Jurisdiction Over Actions

See *28 U.S.C.S. § 1337*.

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

Civil Procedure > Judgments > Summary Judgment > Partial Summary Judgment

HN5[] Summary Judgment, Supporting Materials

Fed. R. Civ. P. 56(b) states in pertinent part: a party against whom a claim is asserted may at any time move with or without supporting affidavits for a summary judgment in the party's favor as to all or any part thereof.

Governments > Legislation > Effect & Operation > Prospective Operation

HN6[] Effect & Operation, Prospective Operation

Where the retrospective application of a newly declared doctrine would upset a party's justifiable reliance to the party's substantial injury, considerations of justice and fairness require that the new rule apply prospectively only. There is no reason why the considerations which favor only prospective application should not be applied as well in the civil area, especially in a treble damage action.

Governments > Legislation > Effect & Operation > Prospective Operation

Patent Law > Remedies > Damages > Increased Damages

Torts > Business Torts > General Overview

HN7[] Effect & Operation, Prospective Operation

Because of the important social purposes sought to be effectuated by the antitrust laws, decisions upholding business practices which are arguably violative of the antitrust laws should be read narrowly, while decisions condemning business practices should be read broadly. The rule of non-retroactivity is dissatisfactory. Plaintiff, who takes the risk and cost of the litigation derives no benefit, even though there is a judicially recognized wrong, while all subsequent persons similarly situated take, parasite-like, the full benefit of the plaintiff's path breaking. Moreover, a rule of non-retroactivity totally ignores the compensatory aspect of a treble damages award. The purpose of a treble damages award is not solely to deter the violator, but also to compensate the injured party.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

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

Resale price maintenance is per se illegal under the Sherman Act, *15 U.S.C.S. § 1*, because it constitutes an unjustifiable restraint on trader discretion in pricing practices, and because it tends to lessen horizontal competition at the retail level.

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

HN9[] **Price Fixing & Restraints of Trade, Vertical Restraints**

A supplier may not use coercion on its retail outlets to achieve resale price maintenance.

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

Contracts Law > Types of Contracts > Lease Agreements > General Overview

International Trade Law > General Overview

HN10[] **Price Fixing & Restraints of Trade, Vertical Restraints**

If a consignment agreement achieves resale price maintenance in violation of the Sherman Act, *15 U.S.C.S. § 1*, it and the lease are being used to injure interstate commerce by depriving independent dealers of the exercise of free judgment whether to become consignees at all, or remain consignees, and, in any event, to sell at competitive prices. The fact that a retailer can refuse to deal does not give the supplier immunity if the arrangement is one of the schemes condemned by the antitrust laws.

Judges: [1]** Pettine, District Judge.

Opinion by: PETTINE

Opinion

[*886] PETTINE, District Judge.

This is a private action seeking treble damages under *15 U.S.C. Sec. 15* [1] **[**2]** for alleged violation of the restraint of trade section of the Sherman Act, *15 U.S.C. Sec. 1* [2] and of the price discrimination section of the Robinson-

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[1] **HN1[]** *15 U.S.C. Sec. 15* states:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

The plaintiff also seeks injunctive relief under *15 U.S.C. Sec. 26*. The relationship between the plaintiff and defendant has long since ceased, and injunctive relief is not appropriate here. The cases cited by plaintiff in his pretrial memorandum are inapposite.

[2] **HN2[]** *15 U.S.C. Sec. 1* states in pertinent part:

Patman Act, *15 U.S.C. Sec. 13*. [3] **[**3]** This court has jurisdiction under *15 U.S.C. Sec. 15* and *28 U.S.C. Sec. 1337*. [4]

The plaintiff, who did business as the Hoxie Four Corners Texaco Station, was a gasoline service station lessee and operator between August, 1961 and late June or early July, 1964. The plaintiff was located in an area of Warwick, R.I. densely populated with retail gasoline service stations. It is understatement to say that the competition is active among service station operators within this geographical **[*887]** zone for the gasoline business of the motoring public. The defendant is a major national oil corporation which leased the plaintiff his gasoline station properties, supplied him petroleum products, and consigned him gasoline, all in accordance with detailed and specific written agreements.

The plaintiff claims that the defendant distributed gasoline to him and, under the terms of the consignment agreement, fixed the minimum resale **[**4]** price of that gasoline in violation of *Sec. 1* of the Sherman Act; that his attempts to lower prices in order to remain competitive were thwarted by the termination of the consignment agreement and the cancellation of his lease, and that as a result of these practices by the defendant, he was injured in his business in the amount of $10,000. The plaintiff also claims that the defendant distributed gasoline to him at a price higher than that charged three other retail Texaco service stations in the same geographic area in violation of Sec. 2(a) of the Robinson-Patman Act.

The defendant has moved for summary judgment [5] pursuant to *Fed. R. Civ. P. 56(b)*, [6] stating that there is no genuine issue of material fact, and that under the law as applied to the allegedly non-disputed facts, it is entitled to judgment. [7] More specifically, the defendant states (1) that the *Sec. 1* Sherman Act case law upon which plaintiff

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> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states . . . is declared to be illegal . . . .

The plaintiff's complaint also alleges a violation of Sec. 2 of the Sherman Act. Yet, there are no facts stated by plaintiff in any of the documents before this court which even hint at the existence of a monopoly or the assertion of monopolistic power. The court therefore strikes the plaintiff's allegation of a Sec. 2 violation.

[3] ***HN3***[] *15 U.S.C. Sec. 13(a)* states in pertinent part:

> It shall be unlawful for any person engaged in commerce . . . either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . where the effect of such discrimination may be substantially to lessen competition or to tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them . . . .

The plaintiff's pre-trial memorandum, filed some three-and-a-half years after his complaint, alleges violations of *15 U.S.C. Secs. 13(c)(d)* & *(e)*. Again, there is nothing in the record to buttress such tardy and conclusory allegations. The court therefore strikes the plaintiff's allegations of Secs. 2(c)(d) & (e) violations.

[4] ***HN4***[] *28 U.S.C. Sec. 1337* states:

> The district courts shall have original jurisdiction of any civil action or proceeding arising under any Act of Congress regulating commerce or protecting trade and commerce against restraints and monopolies.

[5] This is actually a renewed motion for summary judgment. Judge Day originally denied the defendant's motion. This court then decided it had the power to reconsider the denial and entertain a renewed motion, especially in the light of the decision of the district court on remand in *Simpson v. Union Oil Co., 270 F. Supp. 754 (N.D. Calif. 1967)*.

[6] ***HN5***[] *Fed. R. Civ. P. 56(b)* states in pertinent part:

> A party against whom a claim . . . is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof.

relies, *Simpson v. Union Oil Co., 377 U.S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051 (1964)*, must not be applied retroactively, and, under prior established law construing *Sec. 1*, *U.S. v. General Electric Co., 272 U.S. 476, 71 L. Ed. 362, 47 S. Ct. 192 (1926)*, defendant's motion **[**5]** must be granted, (2) that even if *Simpson* is the applicable law, defendant's motion must be granted because either (a) there is no restraint of trade because neither the vast distributional system nor the coercive element present in *Simpson* is present in the instant case, or (b) there is no combination or conspiracy in restraint of trade to which defendant is a party, or (c) there is no damage to the plaintiff proximately resulting from the restraint of trade, because the plaintiff was at all times free to shift to a purchase and sale arrangement and hence his own voluntary adherence to the consignment arrangement was the cause of this inquiry, or (d) the plaintiff is *in pari delicto* with the defendant. With respect to Sec. 2(a) of the Robinson-Patman Act, defendant states that (1) the plaintiff is not a purchaser, because gasoline is distributed to him only on a consignment basis; (2) that even if plaintiff is a purchaser, those Texaco dealers with whom plaintiff competes are not purchasers from Texaco but rather from Pennsylvania Petroleum Products Co., an independent wholesaler-jobber; and (3) that plaintiff is not in competition with Pennsylvania Petroleum Products **[**6]** Co. because plaintiff operates exclusively on the retail level selling to gasoline consumers, while Pennsylvania **[*888]** Petroleum Products Co. operates exclusively on the wholesale distributional level selling to gasoline retailers.

[7]** Although the motion for summary judgment serves a useful purpose in expediting judicial administration and foreclosing cases of no merit from the time-consuming and costly process of litigation, its effect, if granted, is so potent that it should be used with great caution. This is especially so with respect to antitrust suits, where appellate decisions treating important questions of public policy are dependent upon well-developed factual records. See *Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962)*; *White Motor Co. v. U.S., 372 U.S. 253, 9 L. Ed. 2d 738, 83 S. Ct. 696 (1963)* (see especially concurring opinion of Mr. Justice Brennan); *Simpson v. Union Oil Co., 377 U.S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051 (1964)* (dissenting opinion of Mr. Justice Stewart and memorandum of Mr. Justice Brennan and Mr. Justice Goldberg). The recent decision of the Supreme Court in *First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968)* is not a blanket endorsement of the summary judgment procedure in antitrust cases. In fact, that summary judgment in the defendant's favor was granted only because **[**8]** of the plaintiff's failure to establish an inference of conspiracy on any reasonable, common sense theory not wholly contradicted by the undisputed facts. There, the plaintiff sought to support an inference of conspiracy between parties whose interests were discordant. Here, however, the plaintiff asserts a plausible theory of vertical combination in restraint of trade. [8]

Against a background of caution, then, this court approaches, first, a statement of the applicable law, and second, an inquiry into the issuability of the factual material before it.

The Law - The Sherman Act Claim

Retroactivity of Simpson v. Union Oil Co.

The defendant asserts that the decision of the Supreme Court in *Simpson v. Union Oil Co., 377 U.S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051 (1964)* should be given prospective effect only. The defendant states that the law prior to *Simpson* clearly permitted price fixing by way **[**9]** of the agency-consignment distribution mechanism. *U.S. v. General Electric Co., 272 U.S. 476, 71 L. Ed. 362, 47 S. Ct. 192 (1926)*. The defendant then seeks to establish its

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[7] The record before this court for purposes of the summary judgment includes (1) the complaint, (2) the answer, (3) the original motion for summary judgment, (4) the original affidavit of P. R. Whitcomb, a Texaco employee, (5) the Texaco sale agreement - Exhibit A, (6) the Texaco consignment agreement - Exhibit B, (7) the defendant's original brief in support of its original motion, (8) the plaintiff's original brief in opposition to the defendant's original motion, (9) Judge Day's decision denying summary judgment, (10) the defendant's motion and memorandum concerning this court's power to reconsider, (11) the decision of this court to reconsider, (12) the defendant's renewed motion for summary judgment and supporting brief, (13) the deposition of the plaintiff, Stanton, and (14) the pre-trial memoranda of the two parties.

[8] See infra, this opinion, Sherman Act, *Sec. 1* Restraint of Trade and Combination or Conspiracy.

reliance upon General Electric by a comparison of the consignment arrangement there with the consignment agreement in the present case. The defendant finally asserts that its reliance was reasonable. In support of its position the defendant cites principally the decision of the District Court upon remand in *Simpson, 270 F. Supp. 754 (N.D. Calif. 1967)*, and another decision, *Lyons v. Westinghouse Elec. Corp., 235 F. Supp. 526 (S.D.N.Y. 1964)*. Both of those cases, however, reveal that the courts' decisions as to the retroactivity of *Simpson* were made only *after* trial, when the courts had received evidence concerning the actuality of reliance and its reasonability. Neither of those cases, moreover, could have been decided in the light of the very recent decision of the Supreme Court in *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231 (1968)*. In that case, the Supreme Court stated:

> The theory of the Court of Appeals seems to have been that when a **[**10]** party has significantly relied upon a clear and established doctrine, and ***HN6***[] the retrospective application of a newly declared doctrine would upset that justifiable reliance to his substantial injury, considerations of justice and fairness require that the new rule apply prospectively only. Pointing to recent decisions of this Court in the area of **[*889]** the criminal law, the Court of Appeals could see no reason why the considerations which had favored only prospective application in those cases should not be applied as well in the civil area, especially in a treble damage action. There is, of course, no reason to confront this theory unless we have before us a situation in which there was a clearly declared judicial doctrine upon which United relied and under which its conduct was lawful, a doctrine which was overruled in favor of a new rule according to which conduct performed in reliance upon the old rule would have been unlawful.

The Court then went on to develop the lack of a clearly established older doctrine changed abruptly by innovative principles. By the same reasoning, this court suggests that *Simpson v. Union Oil Co., 377 U.S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051* ***[**11]*** *(1964)*, was not nearly the radical departure from established ***antitrust law*** which defendant claims it to be. In fact, in *Simpson* itself the Supreme Court states that *General Electric* should have been read as limited exclusively to situations involving patents. Indeed, it might be argued as a general principle that stability is not the most important characteristic of decisions regulating business conduct with respect to the antitrust laws, and that ***HN7***[] because of the important social purposes sought to be effectuated by the antitrust laws, decisions upholding business practices which were arguably violative of those laws should be read narrowly, while decisions condemning business practices should be read broadly. There are still further reasons why a rule of non-retroactivity is dissatisfactory. Perhaps the most basic is that the plaintiff, who takes the risk and cost of the litigation derives no benefit, even though there is a judicially recognized wrong, while all subsequent persons similarly situated take, parasite-like, the full benefit of the plaintiff's pathbreaking. Moreover, a rule of non-retroactivity totally ignores the compensatory aspect of a treble damages award. **[**12]** It must be remembered that the purpose of a treble damages award is not solely to deter the violator, but also to compensate the injured party. At the very minimum, one-third of every treble damages award is devoted solely to the restoration of the plaintiff's competitive status. Perhaps the underlying reason for the various courts' decisions not to apply the *Simpson* case retroactively is the genuine fear that persons who relied upon what they deemed to be the law, and who are, hence, non-culpable persons, are burdened with punitive damages, at least with regard to approximately two-thirds of the judgment. One solution to this problem may be to allow the defendant to mitigate damages. While it is possible that the imperative mode of the treble damages statute precludes such a solution, the equities are strong enough to suggest an innovative case-law gloss. See Comment: Retroactive Application of Overruling Decisions in Antitrust Treble Damages Suits. 1967 U. Ill. L. Forum 837. For purposes of this motion for summary judgment, then, this court holds that *Simpson v. Union Oil Co., 377 U.S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051 (1964)* is applicable. The court, however, suggests **[**13]** that evidence be presented at trial as to the actuality and reasonability of the defendant's reliance on *General Electric*. The court further suggests that all counsel give consideration to the previously mentioned mitigation of damages theory. Finally, the court invites reconsideration of this question of law after trial.

Sec. 1 Restraint of Trade

HN8[] Resale price maintenance is *per se* illegal under Sec. 1 of the Sherman Act because it constitutes an unjustifiable restraint on trader discretion in pricing practices, Albrecht v. Herald Co., 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968), and because it tends to lessen horizontal competition at the retail level. U.S. v. Trenton Potteries Co., 273 U.S. 392, 71 L. Ed. 700, 47 S. Ct. 377 (1927); U.S. v. Socony-Vacuum Oil Co., 310 U.S. 150, 84 L. Ed. 1129, 60 S. Ct. 811 (1940).

Whether what is *per se* impermissible if done by way of sale - price fixing, in **[*890]** this case - becomes permissible when carried out by way of consignment or agency is a much mooted question. Defendant states that it does and seeks to avoid the impact of Simpson v. Union Oil Co., 377 U.S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051 (1964) **[**14]** by distinguishing it on two grounds: (1) the coercive element of consignment selling brought about in *Simpson* by forcing the retailer to either sell on consignment or not sell at all is absent from this case where the consignee is free to change to a number of different possible programs, including a purchase and sale program; and (2) the large-scale use of consignment price-fixing present in *Simpson* is not present in the instant case. Defendant reads *Simpson* too narrowly. In that case, in response to the defendant's argument that dealers were free to refuse to deal with the defendant if they objected to its price-rigging, the Court stated:

> If that were a defense, a supplier could regiment thousands of otherwise competitive dealers in resale price maintenance programs, merely by fear of nonrenewal of short-term leases.
>
> We made clear in United States v. Parke, Davis & Co., 362 U.S. 29, 80 S. Ct. 503, 4 L. Ed. 2d 505, that HN9[] a supplier may not use coercion on its retail outlets to achieve resale price maintenance. We reiterate that view, adding that *it matters not what the coercive device is*.

In the instant case, the defendant has simply added other supposed **[**15]** options to the dealer's right to refuse to sell. But if those are not realistic competitive options - and the plaintiff has claimed they are not - then the dealer is put to the same futile choice here as he was in *Simpson:* follow the prices or get out. Nor is the vastness of the defendant's system a *sine qua non* for a Sec. 1 violation. Admittedly, the defendant in *Simpson* maintained prices on a broad scale. But *Simpson* was a Sec. 2 monopoly as well as a Sec. 1 restraint case. Moreover, in the light of Albrecht v. Herald Co., 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968), a vertically imposed price restraint operating upon only a single dealer could be a violation of Sec. 1. To say the least, when a major national oil company uses a consignment agreement, policed by a lease, to maintain the gasoline prices of its dealer-lessee, there is sufficient restraint on alienation and possible threat to dealer competition to mandate a trial on the matter. Albrecht v. Herald Co., 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968); Simpson v. Union Oil Co., 377 U.S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051 (1964).

Contrary to the theory of at least one person, see Hitchcock, **[**16]** Schwinn: Coaster Brake for Simpson?, 54 A.B.A.J. 574 (June, 1968), the recent decision of the Supreme Court in U.S. v. Arnold Schwinn & Co., 388 U.S. 365, 18 L. Ed. 2d 1249, 87 S. Ct. 1856 (1967) does not condone vertical price-fixing by way of consignment. That case only subjects to the scrutiny of the rule of reason less competitively dangerous means of vertical restraint, namely consignment arrangements involving exclusive territorial and customer restrictions.

The decision of the First Circuit in Quinn v. Mobil Oil Co., 375 F.2d 273 (1967) does not dictate a contrary result. In that case, Judge McEntee limited himself to the absence of a combination or conspiracy. Judge Coffin's opinion with respect to vertical setting of maximum prices is distinguishable because the instant case involves fixing minimum prices, and at any rate, Judge Coffin's rationale has been overruled by Albrecht v. Herald Co., 390 U.S. 145, 19 L. Ed. 2d 998, 88 S. Ct. 869 (1968). Judge Aldrich's opinion does not conflict with the decision of this court.

Combination or Conspiracy

The complaint in the instant case, much like that in *Albrecht*, alleges the formation of a combination or conspiracy **[**17]** without specifying its makeup. The defendant suggests that there is no combination or conspiracy. Detailed consideration need not here be given to the developing definitional content of the statutory term "combination." See Turner, The Definition of Agreement Under the Sherman Act: Conscious **[*891]** Parallelism and Refusals to Deal, 75 Harv.L.Rev. 655 (1962); Note "Combinations" in Restraint of Trade: A New Approach to Sec. 1 of the Sherman Act, 1966 Utah L. Rev. 75. Suffice it to say that the facts alleged in the instant case make out one or more of the following combinations: (1) a combination between the defendant and its dealers to fix prices on the retail level, *Albrecht v. Herald Co., at p. 150* & n. 6, *U.S. v. Arnold Schwinn & Co., 388 U.S. 365, 372, 18 L. Ed. 2d 1249, 87 S. Ct. 1856 (1967)*; (2) a combination between the defendant and the plaintiff, *Albrecht v. Herald Co., 390 U.S. at p. 150* & n. 6, *U.S. v. Parke, Davis & Co., 362 U.S. 29, 4 L. Ed. 2d 505, 80 S. Ct. 503 (1960)*; *Simpson v. Union Oil Co., 377 U.S. 13, 12 L. Ed. 2d 98, 84 S. Ct. 1051 (1964)*; *First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 280 n. 16, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968)*; **[**18]** *Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 141-42, 20 L. Ed. 2d 982, 88 S. Ct. 1981 (1968)*; (Judge McEntee's opinion in *Quinn v. Mobil Oil Co., 375 F.2d 273 (1st Cir. 1967)* is distinguishable because there is here both a consignment agreement and prior acquiescence to the defendant's price dictates.) (3) a combination between the defendant and the plaintiff's customers, *Albrecht v. Herald Co., 390 U.S. at p. 150* & n. 6. This court is, therefore, prepared to go to trial on the question of combination or conspiracy. It is the suggestion of the court, however, that counsel for the plaintiff be prepared at the beginning of trial to specify which of the above or any other theories of combination or conspiracy he will present. *Fed. R. Civ. P. 8(e)(f)*. See *Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 142, 20 L. Ed. 2d 982, 88 S. Ct. 1981 (1968)*.

Proximate Cause

The defendant argues that "since plaintiff had the absolute freedom to terminate the consignment arrangement at any time, any injury that he might have sustained by failing to do so was his own doing." Defendant's Brief In Support of Motion for Summary Judgment at p. **[**19]** 16. The statement of Mr. Justice Douglas in *Simpson* supplies the short answer to that contention:

> ***HN10***[] If the "consignment" agreement achieves resale price maintenance in violation of the Sherman Act, it and the lease are being used to injure interstate commerce by depriving independent dealers of the exercise of free judgment whether to become consignees at all, or remain consignee, and, in any event, to sell at competitive prices. The fact that a retailer can refuse to deal does not give the supplier immunity if the arrangement is one of those schemes condemned by the antitrust laws.

Cf. *Perma Life Mufflers v. International Parts Corp., 392 U.S. 134, 20 L. Ed. 2d 982, 88 S. Ct. 1981 (1968)*.

In Pari Delicto

The defendant also contends that "(Plaintiff) is also precluded from seeking to recover for injuries from the consignment agreement because, even if the agreement were unlawful, his continued voluntary adherence to it places him squarely within the *pari delicto* doctrine." Defendant's Brief In Support of Motion for Summary Judgment at p. 17. The recent decision of the Supreme Court in *Perma Life Mufflers v. International Parts Corp., 392 U.S. 134,* ***[**20]*** *20 L. Ed. 2d 982, 88 S. Ct. 1981 (1968)* completely disposes of this defense.

The Law - The Robinson-Patman Act Claim [9]

Sec. 2(a) - Consignment

The defendant asserts that the plaintiff's Robinson-Patman Act theory is faulty because the plaintiff was not a "purchaser" of Texaco gasoline but was only a consignee. [10] A close reading of the several cases cited by the

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[9] See, supra, note 3.

[10] For a statement of the statutory language here pertinent, see supra, note 3. The Robinson-Patman Act

defendant **[*892]** fails to reveal any specific holding that a consignee retailer cannot be a "purchaser" for purposes of Sec. 2(a) of the Robinson-Patman Act. In fact, the case which most nearly reaches such a holding, *Students Book Co. v. Washington Law Book Co., 98 U.S. App. D.C. 49, 232 F.2d 49 (D.C. Cir. 1955)*, cert. denied, *350 U.S. 988, 100 L. Ed. 854, 76 S. Ct. 474 (1956)*, does so only after a full trial going directly to the reality of the consignment device and to a comparison and contrast of the consignment and purchase-sale distribution mechanisms. This court is likewise inclined to reach the legal **[**21]** question concerning the alleged distinction between purchase and consignment only after a full trial. While the court, therefore, declines to pass on that question at this time, it does suggest that counsel be prepared to argue the question subsequent to the presentation of evidence. The court further expects counsel at such argument to discuss two important issues with respect to this matter: (1) whether the purposes of Sec. 2(a) of the Robinson-Patman Act would be effectuated by an elaboration of the statutory term "purchaser" such that a consignee is not within the section; (2) whether Sec. 2(a) of the Robinson-Patman Act should be construed *in pari materia* with *Sec. 1* of the Sherman Act and the cases thereunder.

Competitors as Purchasers

The defendant contends that even if the plaintiff is a purchaser within the meaning of the Act his alleged competitors were not, because they purchased **[**22]** not from Texaco but from Pennsylvania Petroleum Products Co., an independent wholesaler. Defendant's statement of the law appears to be correct. However, as will appear below, [11] the status of the Pennsylvania Products Co. presents a genuine issue of material fact.

Middleman as Competitor

Defendant finally asserts that even if it sold to Pennsylvania Petroleum Products Co. at a price lower than its price to plaintiff there can be no competitive injury, because the plaintiff discriminatee operates on a different horizontal level than the favored purchaser. Here again, the defendant's legal theory appears sound. However, as will appear below, [12] the plaintiff differs with the defendant as to the defendant's alleged exclusive wholesaler status.

[23]** The Facts - The Sherman Act Claim [13]

Several genuine issues of material fact are revealed by this record. (1) Did the defendant rely upon *General Electric* and was its reliance reasonable? (2) What is the shape of the geographic zone for purposes of competition? (3) Was the plaintiff genuinely free to shift to some other competitively realistic program? (4) What was the reason for the cancellation of the plaintiff's lease and the temporary nondelivery of gasoline to the plaintiff? (5) How much is the consignment device used by Texaco in the Rhode Island market? (6) What other distribution methods are used and how do they differ from the consignment method? (7) Was there any combination or conspiracy? (8) If so, what is its makeup? (9) Was the defendant's conduct **[**24]** the cause-in-fact of the plaintiff's harm or was stiff competition the cause? (10) What specific damages did the plaintiff suffer?

The Facts - The Robinson-Patman Act Claim

There are several genuine issues of material fact with respect to the plaintiff's Robinson-Patman Act claim. (1) What is the nature of the vertical relationship between the plaintiff and **[*893]** the defendant? (2) What is the nature of the relationship between Texaco and Pennsylvania Petroleum Products Co., with particular respect to the alleged retail competitors of plaintiff? (3) What is the status of Pennsylvania on the distributional chain - is it exclusively a wholesaler or does it also operate at the retail level?

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[11] See, infra, this opinion, The Facts - The Robinson-Patman Act Claim.

[12] Ibid.

[13] At this juncture, there is no need for this court to meticulously document the basis for every factual dispute arising out of the numerous documents before it. A general enumeration of the areas of relevant dispute will suffice.

Conclusion and Caveat

For the above stated reasons, this court has determined that a trial is appropriate in this case. Counsel need not be reminded that the administration of an antitrust case is a difficult and time-consuming matter. Preparation and precision on the part of counsel are most helpful to the court. To date, the court's burden has been considerably increased by the absence of these elements. It is the expectation of this court that the trial of this case will **[**25]** be approached with a more narrow compass than has heretofore guided the proceedings.

For the reasons recited herein, the motion is hereby denied.

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Liquilux Gas Services, Inc. v. Tropical Gas Co.

United States District Court for the District of Puerto Rico

November 13, 1969

Civil Action No. 32-61

Reporter

48 F.R.D. 330 *; 1969 U.S. Dist. LEXIS 10579 **; 13 Fed. R. Serv. 2d (Callaghan) 1167

LIQUILUX GAS SERVICES OF PONCE, INC., Liquilux Distributing Corp., Liquilux Bottled Gas Corp., Liquilux Transport Corp., and Gas Ideal, Inc. v. TROPICAL GAS CO., Inc., New England Petroleum Corp., and Commonwealth Oil Refining Co., Inc.

Core Terms

Counts, propane, plaintiffs', antitrust, discretionary power, trial judge, Sherman Act, conspiracy, infrequent, discovery, piecemeal, terminate, weighing, appeals, delayed, parties, harsh

Judges: [1]** Cancio, District Judge.

Opinion by: CANCIO

Opinion

[*331] Memorandum Opinion

CANCIO, D.J.:

On September 10, 1969 the Court entered an order in this case dismissing Counts I and II of the Amended and Supplemental Complaint and striking from Count III thereof paragraphs 26(J) and 26(K), *303 F. Supp. 414*.. The balance of Count III remains for trial. Plaintiffs now seek to appeal from the Court's order of September 10, 1969, and have moved pursuant to *Rule 54(b) of the Federal Rules of Civil Procedure* for an express determination that there is no just reason for delay and for an express direction for the entry of final judgment with respect to the matters covered by the Court's order of September 10, 1969.

For the reasons set forth below, plaintiffs' motion is denied.

This is an antitrust action for damages and injunction filed by Liquilux Gas Services of Ponce, Inc., and certain other companies which plaintiffs allege to be either subsidiaries or affiliates constituting a single operating entity for the purpose of selling and distributing propane gas. The defendants are Tropical Gas Company, Inc., New England Petroleum Corporation, and Commonwealth Oil Refining Company, Inc. The **[**2]** Amended and Supplemental Complaint contained three counts. The first two counts alleged discriminatory pricing and the furnishing of preferential services in the sale of propane gas in violation of Sections 2(a) and 2(e) of the Robinson-Patman Act. The third count alleges a combination and conspiracy in restraint of trade in propane gas in violation of the Sherman Act. Tropical Gas Company, Inc., was named as a defendant in all the counts and the remaining defendants were named only in Count III.

Plaintiffs have characterized Count III as the gravamen of the offense charged, namely, conduct among all of the defendants which results in the plaintiffs being required to purchase all their propane requirements at an excessively high price from their principal competitor. The acts charged in Counts I and II were also pleaded in paragraphs 26(J) and 26(K) of Count III as part of the alleged overall conspiracy. Though somewhat different facts may be relevant to each count of the complaint, its overall thrust is directed to sale and distribution of one product, propane, in one area, and involves a limited number of parties. In plaintiffs' view, the conduct complained of constituted a **[**3]** violation of three provisions of the ***antitrust law***. The effect of this Court's order of September 10, 1969, dismissing Counts I and II, was to leave the Sherman Act count for further proceedings. The order did not terminate the proceeding as to any party.

There is a substantial issue as to whether the complaint presents multiple claims or simply a single claim with recovery being sought on three legal theories. If the latter view is taken, the Court's order of September 10, 1969, did not constitute a final order as to any claim and could not be made appealable **[*332]** by a determination under *Rule 54(b)*. [1] *Cott Beverage Corporation v. Canada Dry Ginger Ale, Incorporated et al., 243 F.2d 795 (2nd Cir. 1957)*; *Seaboard Machinery Corp. of Delaware v. Seaboard Machinery Corp., 267 F.2d 178 (2nd Cir. 1959)*; *Gold Seal Co. v. Weeks, 93 U.S. App. D.C. 249, 209 F.2d 802, 810 (1954)*; *Edney v. Fidelity and Guaranty Life Insurance Co., 348 F.2d 136 (8th Cir. 1956)*. However, because of the basis on which the Court has decided the instant motion, it is not necessary to reach this concededly difficult issue.

[4]** The Court views plaintiffs' motion as invoking its discretion. *Sears, Roebuck & Co. v. Mackey, 351 U.S. 427, 437, 100 L. Ed. 1297, 76 S. Ct. 895 (1956)*. Thus, the issue is whether under the facts of this case the Court should permit an appeal of an order which rejects certain theories of recovery but does not terminate a complicated antitrust case as to any party.

The applicable considerations are succinctly stated by Judge Hastie in *Panichella v. Pennsylvania Railroad Company, 252 F.2d 452, 454-55 (3rd Cir. 1958)*, cert. denied, *361 U.S. 932, 4 L. Ed. 2d 353, 80 S. Ct. 370 (1960)*, wherein it was stated:

> *"But otherwise and ordinarily an application for a 54(b) order requires the trial judge to exercise considered discretion, weighing the overall policy against piecemeal appeals against whatever exigencies the case at hand may present. Indeed, the draftsmen of this Rule have made explicit their thought that it would serve only to authorize 'the exercise of a discretionary power to afford a remedy in the infrequent harsh case * * *.'* 28 U.S.C.A., Federal Rules of Civil Procedure, 118-119 note.*It follows that 54(b) orders should not be entered routinely or as a courtesy or* **[**5]** *accommodation to counsel.* The power which this Rule confers upon the trial judge should be used only 'in the infrequent harsh case' as an instrument for the improved administration of justice and the more satisfactory disposition of litigation in the light of the public policy indicated by statute and rule. See 6 Moore, Federal Practice, 1953, 264-65." (*252 F.2d at 455*.)

See also: *Columbia Broadcasting System, Inc. v. Amana Refrigeration, Inc., 271 F.2d 257 (7th Cir. 1959)*, cert. denied, *362 U.S. 928, 4 L. Ed. 2d 747, 80 S. Ct. 756 (1960)*; *Gass v. National Container Corporation, 271 F.2d 231 (7th Cir. 1959)*; *Schwartz v. Compagnie General Transatlantique, 405 F.2d 270 (2d Cir. 1968)*; *Campbell v. Westmoreland Farm, Inc., 403 F.2d 939 (2nd Cir. 1968)*.

It can be said with some justification, as plaintiffs have urged, that should they eventually prevail on the appeal of the dismissal of Counts I and II, a trial of those counts would inevitably be delayed until a time subsequent to a disposition of Count III. However, permitting them to take an appeal at this time would have the effect of delaying the trial on Count III. Nor would it be proper for pretrial discovery to proceed **[**6]** while the appeal was being decided, since this could result in duplicative discovery and additional expense to the parties. In weighing the competing considerations, the Court is compelled to conclude that this is a case in which the policy against

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[1] Irrespective of which view is taken, that portion of the Court's order striking paragraphs 26(J) and 26(K) from Count III most assuredly did not dispose of any separate claim. Thus, under no circumstances could that part of the order be appealed at this time.

piecemeal appeals must govern and that plaintiffs have not made a sufficiently strong showing to require the exercise of the discretionary power **[*333]** to enter an order under *Rule 54(b)*. Accordingly, plaintiffs' motion is denied.

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Truxes v. Rolan Electric Corp.

United States District Court for the District of Puerto Rico

July 16, 1970

Civ. No. 663-67

Reporter

314 F. Supp. 752 *; 1970 U.S. Dist. LEXIS 10906 **; 1971 Trade Cas. (CCH) P73,401

Lee Sayles TRUXES and Sayles Electric Corporation, Plaintiffs, v. ROLAN ELECTRIC CORPORATION, Gordon S. Ensign, Donald G. Ensign, Holyoke Wire and Cable Corporation and Excel Electric Corporation, Defendants

Core Terms

Wire, Anti-Trust, deposition, interstate commerce, Sherman Act, motion to dismiss, venue, federal statute, raw material, applicability, plaintiffs', pleadings, cases, continuance, restraint of trade, co-defendant, documents, commerce, balum

LexisNexis® Headnotes

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

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Monopolies & Monopolization, Attempts to Monopolize**

The object of the Sherman Act, *15 U.S.C.S. § 1 et seq.*, is the prohibition of all contracts or acts which it was considered had a monopolistic tendency; especially those which were brought to unduly diminish competition, and all acts producing or tending to produce consequences of monopoly. The Sherman Act, in accordance with the "Rule of Reason" should be interpreted in the light of a broad public policy favoring competition and condemning monopoly.

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

HN2[] **Monopolies & Monopolization, Attempts to Monopolize**

The doctrine of "Incipient Restraints" as interpreted by the United States Supreme Court means to proscribe agreements or conduct which has a reasonable probability of substantial lessening of competition or a tendency to create a monopoly which affect relevant line of commerce. Even when the illegal acts are of a local nature but affect the stream of interstate commerce there might be found a violation of the antitrust laws

Antitrust & Trade Law > Public Enforcement > State Civil Actions

Constitutional Law > Supremacy Clause > General Overview

HN3[] Public Enforcement, State Civil Actions

This court consistent with the rule of applicability of federal statutes not locally inapplicable has ruled that anti-trust laws have the same force and effect in Puerto Rico as in any state of the Union.

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

HN4[] Defenses, Demurrers & Objections, Motions to Dismiss

The pleadings of a complaint are taken as true when dealing with a motion to dismiss. Courts are compelled to entertain the issues not only for the protection of the plaintiff but for the protection of the public.

Governments > Legislation > Interpretation

HN5[] Legislation, Interpretation

Whatever the equality or inequality of the Commonwealth of Puerto Rico to a state, the Federal Relations Act, 64 Stat. 319 § 4, specifies that, in considering a statute such as the federal anti-trust statute, it, shall have the same force and effect in Puerto Rico as in the United States.

Civil Procedure > Preliminary Considerations > Venue > Corporations

Civil Procedure > Preliminary Considerations > Venue > General Overview

HN6[] Venue, Corporations

Under *15 U.S.C.S. § 22*, any suit, action or proceeding under the antitrust laws against corporation may be brought not only in the judicial district where it is an inhabitant but also in any district wherein it may be found or transacts business, and all process in such cases may be served in the district of which it is an inhabitant or wherever it may be found. This section is remedial and must be liberally construed.

Civil Procedure > Preliminary Considerations > Venue > Corporations

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > ... > Venue > Federal Venue Transfers > General Overview

HN7[] Venue, Corporations

Any ruling of this court in relation to change of venue must be based on the fairness and convenience of the parties and the witnesses, and the evidence to be introduced at the trial. It is a well known principle that venue is a doctrine of convenience and not jurisdictional.

Civil Procedure > ... > Discovery > Methods of Discovery > Inspection & Production Requests

Civil Procedure > ... > Methods of Discovery > Depositions > Oral Depositions

HN8[] **Methods of Discovery, Inspection & Production Requests**

Fed. R. Civ. P. 30(b) makes it a duty of the party opposing the taking of his deposition to file a timely motion and show good cause for his non appearance. A party, desiring to take the deposition of another party, may designate in the notice of deposition the papers, documents, and the like to be produced at the examination of the party. This, however, is essentially only an invitation so far as the production of the papers, documents and the like are concerned. And if the party from whom the papers, documents, and the like are sought refuses to comply with the notice to produce, his adversary can compel production only by complying with *Fed. R. Civ. P. 34*.

Judges: [1]** Fernandez-Badillo, District Judge.

Opinion by: FERNANDEZ-BADILLO

Opinion

[*753] ORDER

FERNANDEZ-BADILLO, District Judge.

The plaintiffs brought an action against the defendants for alleged combination in restraint of trade and have invoked the jurisdiction of this court and sought for a remedy pursuant to *Sections 1*, *2* and *15 of Title 15 U.S.C.A.* The jurisdiction of the Court has also been invoked and reference has been made to *Section 1337 of Title 28 of U.S.C.A.*

Defendant Holyoke Wire and Cable Corporation on June 21, 1968 filed a motion to quash service of summons on the grounds that Holyoke is not subject to service of process in Puerto Rico; and, on June 28, 1968 co-defendant Excel Electric Corporation filed a motion for dismissal on the grounds of lack of subject matter jurisdiction and lack of substantial federal question.

On September 16, 1968 Rolan Electric Corporation and Gordon S. Ensign also filed a motion to dismiss on the grounds **[*754]** of lack of subject matter jurisdiction; and, alternatively dismissal of the action because of improper venue or that the action be transferred to the Northern District of Illinois.

Plaintiffs filed a motion in opposition to the **[**2]** request of defendants to quash service, to dismissal of the action, and the transfer of the case to other jurisdiction.

On August 30, 1968 the plaintiffs filed a motion requesting from this court an order to compel Gordon S. Ensign to appear for the continuance of his deposition. An opposition to such petition was filed on September 27, 1968.

After hearings and filing of memoranda by the parties in support of their respective positions, the Court, having given due consideration to the points in controversy, is of the opinion that the motions to dismiss filed by the defendants should be denied for the argument hereinafter expressed.

It is alleged in the complaint that the defendants conspired and combined themselves to deprive the plaintiffs of the necessary raw material to pursue its business in violation of the Anti-Trust Laws of the United States. It is inferred from the pleadings that Rolan Electric and Holyoke Wire and Cable Corporation are foreign corporations with principal offices and domicile outside of the Commonwealth of Puerto Rico. It is also inferred from the said pleadings that Gordon S. Ensign, President of Rolan Electric Corporation and Donald G. Ensign, President **[**3]** of Excel Electric Corporation, are domiciled and residents outside of the Commonwealth of Puerto Rico.

The illegal acts alleged to be committed by the defendants occurred outside and within the Commonwealth of Puerto Rico. It is also inferred from the pleadings that plaintiffs impute to the defendants to have entered into a contract, conspiracy or combination to discriminate against plaintiffs and in favor of competitor Excel Electric Corporation, in the supply of necessary raw material for the plaintiff to continue their manufacturing operation in the Commonwealth of Puerto Rico. The answers of Holyoke to interrogatories submitted by plaintiffs clearly show that Holyoke was a corporation engaged in Interstate Commerce as "in commerce" has been defined by the Antitrust Laws and as interpreted by the cases. In the same manner, Rolan Electric Corporation as an intermediate agent of plaintiffs and Holyoke Wire and Cable Corporation entered into agreement with the latter for the supply of raw material to plaintiffs and to Excel Electric Corporation. The documents on file have established that the product supplied by Holyoke Wire and Cable Corporation was at the time charged in the **[**4]** complaint very scarce and that the supply of the said product, balum wire, was not easily available to the plaintiff from other sources. The plaintiffs complain that the said balum wire at times was diverted from plaintiffs to its competitor Excel Electric Corporation.

It is a well known legal principle that the pleadings in a motion to dismiss have to be taken as true; but, the defendants' motion to dismiss involves matters relative to the applicability of federal statutes in Puerto Rico after the establishment of the Commonwealth in 1952, and that is what really is of serious concern to this court at this moment.

The applicability of *Section 1* and *2* of the Sherman Act, *15 U.S.C.A. §§ 1*, *2* has been the subject of controversy in this Court at different times, prior to Commonwealth status, Peck Steamship Line v. N.Y. and P.R.R.S.S. Co., 2 P.R.Fed.Rep. 109 (1906), Pastor v. N.Y. and P.R. Steamship Co. et als., 3 P.R.Fed.Rep. 95 (1907); and, after the Commonwealth Status, in many other cases, but particularly *David Cabrera, Inc. v. Union de Choferes y Duenos, 256 F. Supp. 839* (D.C.P.R., 1966); *Cooperativa de Seguros Multiples de Puerto Rico v. San Juan, 289 F. Supp. 983* (D.C.P.R., **[**5]** 1968). The defendants Rolan Electric Corporation, Gordan S. Ensign, Donald G. Ensign and Excel Electric Corporation **[*755]** argue that *sections 1* and *2* of the Sherman Act, *15 U.S.C.A. §§ 1* and *2*, are not applicable to Puerto Rico after Commonwealth Status. These defendants claim that since Puerto Rico is neither a state, a territory or possession of the United States such sections of the law are not any longer enforceable in Puerto Rico. This court in the case of *Liquilux Gas Services of Ponce, Inc. v. Tropical Gas Company, Inc. et al., 303 F. Supp. 414 (1969)* discussed at length the applicability of a federal statute in the commonwealth of Puerto Rico and at p. 420 of the opinion it is stated:

> "It is most significant to note that in 25 cases (the cases are cited at the bottom of page 420 Note 3) decided in a variety of forums since 1952 involving the applicability of pre-Commonwealth federal statutes to events in or citizens of Puerto Rico, pre-Commonwealth laws have been applied in precisely the same manner as they would have applied if the events had occurred in a state or the individuals had been citizens of a state. In those decisions in which Puerto Rico is still **[**6]** being referred to as a 'territory', the result of that conclusion has been that the federal statute involved was given the same effect with respect to Puerto Rico as in a state. Indeed, in every such case the result of a contrary conclusion would have been that Puerto Rican citizens would have received less protection under the federal law than citizens of a state."

It may be argued that there is no showing in the pleadings that plaintiffs were engaged in interstate commerce or that the case did not affect interstate commerce. Such interpretations of the averments would be frivolous and intended only to defeat the "Rule of Reason" which should be applied to this type of cases. *Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 59, 31 S. Ct. 502, 55 L. Ed. 619 (1911)*. The evidence before the court is enough to convince the Judge that the activities of plaintiff were as "in commerce" as defined by the Anti-Trust Laws. There is no question in the mind of this court that the case involves a substantial federal question which deserves the entertainment by this court. Prima facie there is a showing that a group of businessmen may have acted in concert to deprive plaintiffs **[**7]** of the necessary raw materials to manufacture and compete effectively. Such a combination is precisely what *Section 1* of the Sherman Act forbids. Rolan Electric Corporation and Holyoke Wire and Cable Corporation entered into a contract for the shipping of balum wire to the plaintiffs. Thereafter, Holyoke Wire and Cable Corporation refused to ship wire to the plaintiffs upon request of Rolan Electric Corporation and on the alleged subterfuge of not being able to accept orders from new clients. Moreover, by

Holyoke's own admission shipments of balum wire were made to plaintiffs' competitor, Excel Electric Corporation, during the year 1966, and said shipments, in one way or another, were guaranteed by co-defendant Rolan Electric Corporation. In the case of Peck Steamship Line v. N.Y. and P.R.S.S. Co., *supra*, this Court said:

> "The contract is only part of the conspiracy. The monopoly is only the result of it. The conspiracy is the basis of the action, and the injuries and violations of law the gist of the plaintiffs' rights."

HN1[] The object of the Sherman Act is the prohibition of all contracts or acts which it was considered had a monopolistic tendency; especially those **[**8]** which were brought to unduly diminish competition, and all acts producing or tending to produce consequences of monopoly. The Sherman Act, in accordance with the "Rule of Reason" should be interpreted in the light of a broad public policy favoring competition and condemning monopoly. *Standard Oil Co. of New Jersey v. United States, supra, pp. 59-62, 31 S. Ct. 502*.

HN2[] The doctrine of "Incipient Restraints" as interpreted by the United States Supreme Court means to proscribe agreements or conduct which has **[*756]** a reasonable probability of substantial lessening of competition or a tendency to create a monopoly which affect relevant line of commerce. *Mandeville Island Farms Inc. v. American Crystal Sugar Co., 334 U.S. 219, 68 S. Ct. 996, 92 L. Ed. 1328 (1948)*. Even when the illegal acts are of a local nature but affect the stream of interstate commerce there might be found a violation of the antitrust laws. *United States v. Yellow Cab Co., 332 U.S. 218, 67 S. Ct. 1560, 91 L. Ed. 2010 (1947)*; *United States v. Womens' Sports Wear Ass'n, 336 U.S. 460, 69 S. Ct. 714, 93 L. Ed. 805 (1949)*.

> "The source of restraint may be intrastate, as the making of a contract or combination **[**9]** usually is; the application of the restraint may be intrastate, as it often is; but neither matters if the necessary effect is to stifle or restrain commerce among the states. If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States v. Women's Sports Wear Ass'n, supra.*

In *Klor's Inc. v. Broadway-Hale Stores Inc., 359 U.S. 207, 211, 79 S. Ct. 705, 708, 3 L. Ed. 2d 741 (1959)* the Supreme Court of the United States expressed the following:

> "In the landmark case of *Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 31 S. Ct. 502, 55 L. Ed. 619*, this Court read *§ 1* to prohibit those classes of contracts or acts which the common law had deemed to be undue restraints of trade and those which new times and economic conditions would make unreasonable. * * * The Court construed *§ 2* as making 'the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the first section, that is, restraints of trade, by any attempt to monopolize, or monopolization thereof * * *.' * * * The effect of both sections, the Court said, was to adopt the **[**10]** common-law proscription of all 'contracts or acts which it was considered had a monopolistic tendency * * *' and which interfered with the 'natural flow' of an appreciable amount of interstate commerce."

Group boycotts or concerted refusals by traders to deal with other traders are forbidden under the Sherman Act and they cannot be saved by allegations that they are reasonable in the specific conditions. *Klor's Inc. v. Broadway-Hale Stores, Inc., supra.*

It is the Court's view, taking as true the well pleaded facts, that the issue is whether or not the defendants engaged in practices contrary to the Anti-Trust Laws, and, particularly, *Section 1* and *2* of the Sherman Act, *15 U.S.C.A. §§ 1* and *2*. The fact that plaintiffs' business was so small that its destruction made little difference to the economy has no bearing to sustain that a substantial federal question has been brought before this Court. *Klor's Inc. v. Broadway-Hale Stores, supra.* If plaintiffs' pleadings prima facie show that injury has been inflicted by alleged illegal acts forbidden by Anti-Trust Laws and plaintiffs' business flows in the interstate commerce then plaintiffs are entitled to have their day in **[**11]** Court, independently, whether or not the complaint discloses a public wrong:

> "Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the anti-trust laws by an aggrieved party. *These laws protect the victims of the forbidden practices as well as the public.* *Simpson v. Union Oil Company of*

> California, 377 U.S. 13, 16, 84 S. Ct. 1051, 12 L. Ed. 2d 98 (1964), citing Radovich v. National Football League, 352 U.S. 445, 453-454, 77 S. Ct. 390, 1 L. Ed. 2d 456.
>
> "Therefore, to state a claim upon which relief can be granted under that section, (Section 1 of the Sherman Act) allegations adequate to show a violation and, in a private treble damage action, that plaintiff was damaged thereby are all the law requires." Radiant **[*757]** Burners Inc. v. Peoples Co., 364 U.S. 656, 660, 81 S. Ct. 365, 367, 5 L. Ed. 2d 358 (1961).

The Court disagrees with the statements of defendants Rolan Electric Corporation, Gordon S. Ensign, Excel Electric and Donald J. Ensign, "that any alleged restraint of trade between any state or states of the union and Puerto Rico is not actionable **[**12]** under Section 1 and 2 of the Sherman Act." The history of the relations between Puerto Rico and the United States clearly has made extensive to Puerto Rico those laws not locally inapplicable. Section 14 of the Foraker Act, of 1900, 31 Stat. 80. * * * The same disposition was inserted in Section 9 of the Jones Act of 1917, 39 Stat. 954; and, in Section 9 of the Federal Relations Act, 64 Stat. 319. ***HN3***[] This Court consistent with the rule of applicability of Federal Statutes not locally inapplicable has ruled that Anti-Trust Laws have the same force and effect in Puerto Rico as in any state of the Union. *David Cabrera v. Union de Choferes y Duenos, supra*; *Cooperativa de Seguros Multiples v. San Juan, supra.*

Defendant Holyoke implies that no participation or combination with the other co-defendants was intended to deprive plaintiffs of the necessary raw materials to compete in the interstate commerce. Nevertheless, by its own admission in the sworn statement of its president it admitted that the product which plaintiff was deprived of was in scarcity at the time of the alleged illegal acts complained of. It might be that Holyoke Wire and Cable Corporation's actions were not **[**13]** directly intended to interfere with plaintiffs' business but it let itself to be induced and agreed to cut-off supply to plaintiff of balum wire with full knowledge that such a restriction in the shipment of raw material to the plaintiff would result in restraint of trade and therefore affect in one way or another interstate commerce.

Without passing judgment on the merits of plaintiffs' claims, since ***HN4***[] the pleadings of a complaint are taken as true when dealing with a motion to dismiss, this Court is compelled to entertain the issues not only for the protection of plaintiff but for the protection of the public. *United States v. General Motors, 384 U.S. 127, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966)*.

As previously stated, the applicability of a federal statute in the Commonwealth of Puerto Rico after the establishment of the Commonwealth has been subject to consideration by this court. In the case of *Mora v. Mejias, 115 F. Supp. 610 (D.C. 1953)* it was held that the Commonwealth of Puerto Rico is a "State" within a statute requiring proceedings for injunction against enforcement of a state statute or order made by an administrative board acting on ground of unconstitutionality of the **[**14]** statute; and, thereafter a whole series of cases have considered Puerto Rico as a "State" for the applicability of federal statutes. For that reason Judge Snyder in *Cosentino v. International Longshoremen's Ass'n, 126 F. Supp. 420, 422 (D.C. 1954)*, stated:

> "* * * I am satisfied that the whole body of Federal laws that apply in the same constitutional way as they do to a State, continue to apply to Puerto Rico wherever they have been previously applicable. Congress could not have meant any other conclusion, nor could Puerto Rico have consented to any other arrangement. Chaos would have immediately resulted if the contrary conclusion were reached."

It is not necessary in this case "to delve into the question of the political status of Puerto Rico as a Commonwealth" *David Cabrera Inc. v. Union de Choferes y Duenos, supra.* All that is called for here is the application of Section 9 of the Puerto Rican Federal Relations Act. ***HN5***[] "Whatever the equality or inequality of the Commonwealth to a State, the Federal Relations Act, 64 Stat. 319, at Sec. 4, specifies that, in considering a statute such as the one here interposed, it, shall have the same force and effect in Puerto Rico **[**15]** as in the United States." *David Cabrera Inc. v. Union de Choferes y Duenos, 256 F. Supp. p. 842*, **[*758]** *supra*. The argument of defendants Rolan Electric Corp., Excel Electric Corporation, Gordon S. Ensign and Donald G. Ensign to the effect that after Commonwealth Sections 1 and 2 of the Sherman Act are not applicable to Puerto Rico has no legal support in any case.

Therefore, it is the opinion of the Court that the defendants' motions to dismiss should be denied and the same are hereby denied.

CHANGE OF VENUE

Defendants Rolan Electric Corporation and Gordon S. Ensign have suggested that the action be dismissed because of improper venue or that the action be transferred to the Northern District of Illinois.

Title ***HN6***[] *15 U.S.C.A. § 22 states as follows:*

> "*District in which to sue corporation:*
> Any suit, action or proceeding under the antitrust laws against corporation may be brought not only in the judicial district where it is an inhabitant but also in any district wherein it may be found or transacts business, and all process in such cases may be served in the district of which it is an inhabitant or wherever it may be found."

It has been held that **[**16]** *Section 22 of Title 15 U.S.C.A.* is remedial and must be liberally construed. *Bruner v. Republic Acceptance Corporation, 191 F. Supp. 200* (E.D.Ark., 1961). The purpose of this section was to establish venue under antitrust laws not only where a corporation resides or is found but also where it "transacts business." *Donlan v. Carvel, 193 F. Supp. 246* (D.Md., 1961). The purpose of expansion of venue in antitrust actions, to include district in which a defendant corporation transacts business, was to give plaintiff the right to bring suit and have it tried in the district where defendants have committed violations of the Act and inflicted the forbidden injuries. *Goldlawr, Incorporated v. Shubert, 169 F. Supp. 677* (E.D.Pa., 1958); *Banana Distributors, Inc. v. United Fruit Company, 158 F. Supp. 153* (S.D.N.Y., 1957).

The plaintiffs in this action claim that both Gordon S. Ensign and Rolan Electric Corporation transacted business in the Commonwealth of Puerto Rico. Both defendants are linked by an alleged oral agreement between Lee Sayles Truxes and/or Sayles Electric Corporation, Gordon S. Ensign, Donald G. Ensign and Rolan Electric Corporation by virtue of which plaintiffs allegedly **[**17]** bought machinery belonging to Port Electric Corporation with the condition of receiving some kind of assistance and help in the supply of raw material by the aforementioned defendants. ***HN7***[] Any ruling of this Court in relation to change of venue must be based on the fairness and convenience of the parties and the witnesses, and the evidence to be introduced at the trial. It is a well known principle that venue is a doctrine of convenience and not jurisdictional. *Vance Trucking Co., Inc. v. Canal Ins. Co., 338 F.2d 943* (4 Cir. 1964); *Rutland Ry. Corp. v. Brotherhood of Locomotive Engineers et al., 307 F.2d 21* (2 Cir. 1962), certiorari denied, *372 U.S. 954, 83 S. Ct. 949, 9 L. Ed. 2d 978 (1963)*. Plaintiffs have asserted that the proper forum to litigate this action has to be Puerto Rico taking into consideration that the plaintiffs, co-defendant Excel Electric Corporation, and most of the witnesses are all residents of Puerto Rico. It has been held that "since the difficulties, including both inconvenience and expenses appear relatively equal," the Court would deny the motion of foreign corporation defendants to transfer an anti-trust action to the district in which their principal places **[**18]** of business were located and leave the plaintiff's choice of forum undisturbed. *Crawford Transport Co. v. Chrysler Corp., 191 F. Supp. 223*, p. 228 (E.D. Ky., 1961). It seems to the Court that upon the doctrine of fairness and convenience transferring the case to another jurisdiction may result in economic hardship to the **[*759]** plaintiffs in view of plaintiff's allegations that all witnesses it intends to use at the trial are residents and domiciled in the Commonwealth of Puerto Rico. The defendants have failed to show to this court an appraisable hardship. The burden is on the moving party and the statute requires a showing of "more than a limited degree of added convenience for trying the case in a different jurisdiction." *Crawford Transport Co. v. Chrysler Corp., supra.*

Therefore, the petition of defendant Gordon S. Ensign and Rolan Electric Corporation to dismiss because of improper venue and the petition to transfer the case to the Northern District of Illinois is hereby denied.

Continuance of Deposition of Gordon S. Ensign

Gordon S. Ensign appeared at the offices of plaintiff's attorneys on July 23, 1968 at 10:00 a.m. for the taking of his deposition as an individual **[**19]** and officer of co-defendant Rolan Electric Corporation. About lunch time and by agreement of the parties the said deposition was tentatively continued for August 22 or 26, the day more favorable to Mr. Ensign's attorney. On August 20, 1968 the legal representation of Mr. Ensign informed plaintiff's attorneys that Mr. Gordon S. Ensign refused to appear for the continuance of his deposition. Plaintiff filed a motion on August 29, 1968 asking the Court for an order to compel Gordon S. Ensign to appear for the continuance of his deposition; and, on September 20, 1968 Mr. Ensign's attorney filed a motion in opposition.

HN8[] *Rule 30(b) of the Federal Rules of Civil Procedure* makes it a duty of the party opposing the taking of his deposition to file a timely motion and show good cause for his non appearance. Gordon S. Ensign's motion was made after his deposition had already been commenced. No good cause has been shown by defendant Gordon S. Ensign to obtain the protection of this Court. The fact that the deponent has no access to the books of Rolan Electric Corporation is no good cause for objecting the continuance of his deposition. Moore's Fed. Prac. Vol. IV, Sec. 26.10 p. 1133 exposes **[**20]** the rule in relation to request for protection of a party under *Rule 30(b)* on the ground that the deponent has no access to the documents requested to bring with him:

> "In summary: a party, desiring to take the deposition of another party, may designate in the notice of deposition the papers, documents, and the like to be produced at the examination of the party. This, however, is essentially only an invitation so far as the production of the papers, documents and the like are concerned. And if the party from whom the papers, documents, and the like are sought refuses to comply with the notice to produce, his adversary can compel production only by complying with *Rule 34*."

The Court Orders that Gordon S. Ensign appear for the continuance of his deposition upon notice to be served by the plaintiff. The Motion to Compel defendant Gordon S. Ensign to Appear for the Taking of His Deposition filed by plaintiffs on August 30, 1968 is hereby granted.

With reference to the Second Cause of Action of the complaint the Court grants plaintiff twenty (20) days to amend and thereby make the proper allegation relative to interstate commerce activities of plaintiffs pursuant to the anti-trust **[**21]** statutes allegedly violated.

The Court also rules that service of process to Holyoke Wire and Cable Corp. pursuant to Rule 4.7 of the Rules of Civil Procedure for Puerto Rico (1958) was proper upon showing that Holyoke Wire and Cable Corporation has had the minimum contacts with the Commonwealth of Puerto Rico.

It is further ordered that once plaintiffs have made the proper allegation relative to commerce between plaintiffs and defendants, the latter shall proceed to **[*760]** file their answers to the complaint within thirty (30) days from the date of such filing by the plaintiff.

Accordingly, it is now ordered that the Motions to Dismiss filed separately by defendants Holyoke Wire and Cable Corporation on January 21, 1968, by Excel Electric Corporation on June 28, 1968, by Rolan Electric Corporation and Gordon S. Ensign on September 16, 1968 must be and are hereby denied.

It is so ordered.

End of Document

Boston Professional Hockey Asso. v. Cheevers

United States District Court for the District of Massachusetts

September 28, 1972,

Nos. 72-2484-C, 72-2490-C

Reporter

348 F. Supp. 261 *; 1972 U.S. Dist. LEXIS 11807 **; 1972 Trade Cas. (CCH) P74,227

Boston Professional Hockey Assn., Inc. v. Gerry Cheevers Boston Professional Hockey Assn., Inc. v. Derek Sanderson

Core Terms

Hockey, players, League, contracts, teams, injunctive relief, playing, season, anti trust law, probability, games, injunction, By-Laws, league team, hardship, appears, Cooper, salary, irreparable harm, provisions, ending, sport, two year, negotiations, restraining, television, amateur, terms

LexisNexis® Headnotes

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

HN1[] **Injunctions, Grounds for Injunctions**

The test to be applied by the court in deciding whether or not the plaintiffs have shown themselves entitled to injunctive relief on the basis of the oral and documentary testimony adduced at a hearing consists in the court's making a determination whether the plaintiffs have shown: (1) that immediate and irreparable harm will result to them if the court declines to issue an injunction; and (2) that there is a probability that they will ultimately prevail after a full trial on the merits.

Antitrust & Trade Law > Regulated Industries > Sports > Baseball

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

HN2[] **Sports, Baseball**

The only major league professional sport whose player contracts and reserve clause system have been ruled exempt from coverage by the federal antitrust laws is the sport of professional baseball.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > General Overview

HN3[] **Injunctions, Grounds for Injunctions**

Where the balance of hardships tips decidedly toward the party requesting the temporary relief, the burden of showing probable success lessens to a requirement that he raise questions going to the merits so serious, substantial, and difficult as to make them a fair ground for litigation and thus for more deliberate investigation.

Judges: [1]** Caffrey, Chief Judge

Opinion by: CAFFREY

Opinion

[*262] MEMORANDUM AND ORDER

CAFFREY, Chief Judge:

Two separate civil actions for breach of contract were filed in the Superior Court of Massachusetts in and for the County of Suffolk in August 1972 by the Boston Professional Hockey Association, Inc. (hereinafter the "Bruins"). Gerry Cheevers is named as defendant in the first case (Civil No. 72-2484-C), and Derek Sanderson is named as defendant in the second case (Civil No. 72-2490-C). Thereafter, both cases were removed to this court on the basis of diversity of citizenship, both defendants being citizens of Canada and the plaintiff being a corporation organized under the laws of Massachusetts with a principal place of business in the City of Boston. The complaint in each action alleges that the amount in controversy exceeds the sum of $10,000. The two cases were consolidated for hearing on plaintiff's application for a preliminary injunction and a hearing was held on September 8, 1972, at which testimonial and documentary evidence was adduced.

In Civil Action No. 72-2490, in which Sanderson is the defendant, a motion to intervene filed by the Philadelphia World Hockey Club, Inc. **[**2]** (hereinafter the "Blazers"), a corporation organized under the laws of the State of New Jersey, was allowed pursuant to *Rule 24, Federal Rules of Civil Procedure*. Sanderson has recently signed a contract to play hockey for the Blazers in the upcoming hockey season scheduled to begin in October, 1972, which will be the first season for the Blazers and for the World Hockey Association.

Prior to the hearing on September 8, the Honorable Levin H. Campbell of this court held a hearing on August 14 on motions for temporary restraining orders in both cases, and on August 17 **[*263]** Judge Campbell entered an order denying a temporary restraining order as against Cheevers and directing counsel to confer with reference to entering into a stipulation regulating activities by Sanderson between that date and the date of the hearing held on September 8. On August 30, a stipulation was filed in court, in effect restraining Sanderson from making any appearances, promotional or otherwise, on behalf of the World Hockey Association between August 30 and September 7, 1972. At the conclusion of the hearing held on September 8, an order was entered pending the filing of this Memorandum and Order **[**3]** which directed that neither player would make any appearances or perform any actions on behalf of hockey teams in the World Hockey Association prior to October 1, 1972.

The Bruins seek at this stage of the case a preliminary injunction enjoining both defendants from (a) playing hockey for any professional hockey club other than the Boston Professional Hockey Association, Inc., and (b) aiding, promoting, sponsoring, coaching, managing, or otherwise assisting any other professional hockey club in derogation of their duties of loyalty and promotional assistance to the Bruins. The narrow question presently before the court is whether or not the Bruins have made a showing that, at this stage of the case, they are entitled to the injunctive relief set out above.

HN1[] The test to be applied by this court in deciding whether or not the Bruins have shown themselves entitled to injunctive relief on the basis of the oral and documentary testimony adduced at the September 8 hearing consists in the court's making a determination whether the Bruins have shown (1) that immediate and irreparable harm will result to them if the court declines to issue an injunction, and (2) that there is a probability **[**4]** that they will ultimately prevail after a full trial on the merits. *Automatic Radio Mfg. Co. v. Ford Motor Co., 390 F.2d 113, 115* (1

Cir. 1968), cert. denied *391 U.S. 914, 20 L. Ed. 2d 653, 88 S. Ct. 1807 (1968)*; *Cuneo Press of New England, Inc. v. Watson, 293 F. Supp. 112, 115 (D. Mass. 1968)*; *Ohio Oil Company v. Conway, 279 U.S. 813, 815, 73 L. Ed. 972, 49 S. Ct. 256*; *Celebrity, Inc. v. Trina, Inc., 264 F.2d 956, 958* (1 Cir. 1959); *Flood v. Kuhn, 309 F. Supp. 793, 801 (S.D.N.Y. 1970)*.

These issues must be resolved upon the basis of the following facts. The Bruins are a professional ice hockey team which has represented Boston in the National Hockey League, an unincorporated association of ice hockey clubs, for a period of years extending well back beyond World War II. The World Hockey Association is an association of ice hockey clubs which was formed in 1971.

Defendant Sanderson is a member of the National Hockey League Players Association. He has been a standout center for the Bruins for the last several years. His abilities are rated as outstanding by Coach Tom Johnson of the Bruins and by any qualified observer of professional hockey players. Defendant Cheevers has tended **[**5]** goal for the Bruins for the last several seasons and is also a member of the National Hockey League Players Association. His abilities are best described in testimony of Coach Johnson, who observed that there is no better goalie presently active on any professional hockey team. The fact that he played 32 consecutive games during the most recent hockey season without a loss is known not only to Francis Dahl's "Bostonian who never followed baseball," but also to those very few Bostonians who never followed hockey. For purposes of this ruling I accept Coach Johnson's testimony that both Cheevers and Sanderson are hockey players in the super-star category, and by so doing the Court agrees with practically every hockey "buff" in Boston, Massachusetts and New England.

Both Cheevers and Sanderson signed National Hockey League Standard Player's Contracts in September of 1971. The standard form contract provided that the Bruins would employ each of **[*264]** them "as a skilled hockey player for the term of one year commencing October 1, 1971." Both contracts expire by their own terms on September 30, 1972. However, both contracts contain the so-called reserve clause which appears as **[**6]** Clause 17 in both players' *contracts. Clause* 17 provides as follows:

> "17. The Club agrees that it will on or before September 1st next following the season covered by this contract tender to the Player personally or by mail directed to the Player at his address set out below his signature hereto a contract upon the same terms as this contract save as to salary.
>
> "The Player hereby undertakes that he will at the request of the Club enter into a contract for the following playing season upon the same terms and conditions as this contract save as to salary which shall be determined by mutual agreement."

The standard form contract also contains the following language in Clause 6 thereof:

> "6. The Player represents and agrees that he has exceptional and unique knowledge, skill and ability as a hockey player, the loss of which cannot be estimated with certainty and cannot be fairly or adequately compensated by damages. The Player therefore agrees that the Club shall have the right, in addition to any other rights which the Club may possess, to enjoin him by appropriate injunction proceedings from playing hockey for any other team and/or for any breach of any of the other **[**7]** provisions of this contract."

At the hearing, evidence was offered and I find that the Bruins tendered new Standard Form Contracts to both Sanderson and Cheevers. The contract tendered to Sanderson offered him a salary for the year beginning October 1, 1972 in the amount of $80,000, plus certain additional payments in the nature of bonuses contingent on his achieving a certain performance by way of goals scored or points scored, shorthanded goals scored, etc. The contract tendered to Cheevers called for a salary of $70,000 for one year, plus certain bonuses contingent on his goals-against average, the number of shutout games that he plays in, etc. Both players declined to sign the Bruins' contracts. Instead, Cheevers signed a seven-year contract with the Cleveland Crusaders, calling for a payment to him of $200,000 a year for seven consecutive years ($1,400,000), plus a variety of bonuses contingent on the place in the league standing in which the team finishes and on his performance as goalie each season, and Sanderson signed a ten-year contract with the Philadelphia Blazers, calling for a payment to him of $2,325,000 over the ten-year period, payable in annual salaries of **[**8]** $300,000 for the first two years, $200,000 for the next five years, $225,000 for the eighth year and $250,000 for the last two years.

Sanderson's contract with the Blazers also obligates the Blazers to pay all legal costs and expenses of any litigation brought by either the National Hockey League or the Bruins, and his contract, in paragraph VI. 2, requires the Blazers to pay him his full salary for the first two years even if he is enjoined by court decree from playing with the Blazers. The contract reserves to the Blazers the right to terminate the contract with Sanderson after two years if he has been enjoined permanently from playing with the Blazers. The contract further provides that if Sanderson is required by a court decree to play for the Bruins or other National League team, the obligation of the Blazers to Sanderson is to be diminished in proportion to the amount of salary paid to him by the National League team for which he plays during the two years of his contract with the Blazers. A similar provision covering only the 1972-73 season appears in Cheevers' contract with the Cleveland Crusaders.

[*265] Turning to the first of the two requirements which a movant **[**9]** for injunctive relief must establish, i.e., probability of ultimate success on the merits, the first question to be determined is whether or not the contracts presently in existence between the Bruins and both defendants are valid and legally enforceable contracts. The determination of the legal validity of the standard form National Hockey League Players contract must be evaluated in the light of the contention raised by both defendants that the contract is illegal and unenforceable because Clause 17 thereof, on which plaintiff relies in its claim that there is still a contractual relationship between the parties, violates the federal antitrust laws -- specifically, *Sections 1* and *2* of the Sherman Antitrust Act, *15 U.S.C. §§ 1*, *2*, in that to the extent the reserve clause binds a player to the one National Hockey League team for so much of his entire hockey-playing life as that team elects to keep him in its service, that clause operates as a restraint on trade.

The Bruins contend, in effect, that hockey players' contracts are not subject to the federal antitrust laws, and that the enforceability and validity of the contracts are not to be measured in terms of the Sherman Act. The **[**10]** Bruins argue that the existence of a valid collective bargaining relationship immunizes certain practices common to professional sports from the scope of the antitrust laws.

A reading of the four opinions filed by Justices of the Supreme Court in *Flood v. Kuhn, 407 U.S. 258, 92 S. Ct. 2099, 32 L. Ed. 2d 728 (1972)* makes it abundantly clear that ***HN2***[] the only major league professional sport whose player contracts and reserve clause system have been ruled exempt from coverage by the federal antitrust laws is the sport of professional baseball. The opinions of the Court make it more than abundantly clear that the granting of immunity under the antitrust laws to the sport of baseball is a historical accident and an anomaly based on historical rather than legal or even rational grounds. It is equally clear from the opinions in *United States v. International Boxing Club, 348 U.S. 236, 99 L. Ed. 290, 75 S. Ct. 259 (1955)*, and in *Radovich v. National Football League, 352 U.S. 445, 1 L. Ed. 2d 456, 77 S. Ct. 390 (1957)*, that professional boxing and professional football have been held subject to the provisions of the federal antitrust laws, and it is significant to observe that in the majority **[**11]** opinion in *Flood v. Kuhn, supra, 407 U.S. at 282*, the court states:

> "In view of all of this, it seems appropriate now to say that . . . (4) other professional sports operating interstate -- football, boxing, baseball, presumably, hockey and golf -- are not so exempt."

The foregoing, while not conclusive, appears to this court to make it highly probable and well-nigh a certainty, that all professional sports operating interstate eventually will be ruled by the Supreme Court to be subject to the federal antitrust statutes. Indeed, because of its peculiarly international character, involving several teams in Canada as well as teams in the United States, professional hockey would seem to be the leading candidate for a ruling that it is subject to federal antitrust laws. Thus, although a final decision is not necessary on the point at this stage of the case, it would appear likely that the validity of the contracts between the Bruins and the defendants must be determined on the assumption that the contracts are subject to the provisions of the federal antitrust laws.

The next matter to be considered is whether the Bruins have shown that there is a probability that the National **[**12]** Hockey League Standard Player's Contract will ultimately be ruled to be valid and enforceable under the provisions of federal ***antitrust law***. This, in turn, requires that a ruling be made that the Bruins have shown that there is a probability that these contracts do not operate **[*266]** to restrain trade in violation of *Sections 1* and *2* of the Sherman Act.

The validity of the Standard Player's Contract under the antitrust laws is to be determined not merely by reading the contract itself, but the Standard Player's Contract must be considered as a portion of a substantial group of integrated documents all of which cooperate to govern the relationship between amateur and professional hockey players and the member clubs of the National Hockey League.

Clause 18 of the Standard Player's Contract contains the provision:

> "The club and the player severally and mutually promise and agree to be legally bound by the Constitution and By-Laws of the league and by all the terms and provisions thereof, a copy of which shall be open and available for inspection by club . . . and the player at the main office of the league and at the main office of the club."

In addition, and in fact, **[**13]** the relationship between the member teams of the National Hockey League inter se and the relationship between the member teams and players who have signed Standard Player's Contracts are materially affected by a number of other voluminous documents and agreements.

For example, on June 7, 1967, a "Recognition Agreement" was signed between the owners of the National Hockey League teams and a then newly-formed National Hockey League Players Association. Under the terms of this agreement the owners of the clubs agreed to recognize the Players Association as representatives of the players, authorized to represent the players concerning the players' relationships with the individual clubs. Since that date there have been a number of meetings between representatives of the owners and representatives of the Players Association. These meetings have produced a number of changes in the relationship between individual players and their clubs.

In addition, on May 1, 1968, the National Hockey League entered into a Memorandum of Agreement, some 28 pages in length, with the American Hockey League, the Western Hockey League and the Central Professional Hockey League. (Exhibit 31A in Defendant's **[**14]** Exhibit O) This Memorandum of Agreement *inter alia* provided (in paragraph 29, Internal Regulations of Leagues):

> "a. Each league party to this agreement is free to adopt such constitution and by-laws and league rules or regulations as it may see fit provided always that *nothing in such constitution, by-laws*, regulations or rules *shall conflict with this agreement* while it is in force."

A reading of this paragraph establishes that the force and effect thereof is to make both the Constitution and By-Laws of the National League subject to this paragraph, and to, in effect, make unenforceable any provision of the National League Constitution or By-Laws which is in conflict with this paragraph. The net effect of all this is to make the Standard Player's Contract also subject to this Memorandum of Agreement because the said contract (in paragraph 18) incorporates by reference as part thereof the Constitution and By-Laws of the National Hockey League, which, of course, has been rendered subservient to this Memorandum of Agreement by the above-quoted paragraph 29(a) of the May 1, 1968 Memorandum of Agreement.

The significance of this Memorandum of Agreement on **[**15]** the contract of the players appears in part in paragraph 31 thereof dealing with "Territorial Rights" which gives to signatories exclusive control of the playing of hockey games in its city of operation and within fifty miles of the corporate limits **[*267]** thereof. Clause 26 of this Memorandum of Agreement provides:

> "No member club of any league . . . shall employ . . . any player who, for any cause, is ineligible or who has been expelled by any league or its member clubs."

Clause 28 provides:

> "The AHL, WHL and CPHL agree to 'associate' themselves with the National Hockey League in the performance and fulfillment of the terms of the agreement dated May 15, 1967 (and any amendment thereto which has the concurrence of the AHL, WHL and CPHL), made between the NHL of the one part and the Canadian Amateur Hockey Association and the Amateur Hockey Association of the United States of the other part . . . ."

Other documents in evidence establish that elaborate rules are in existence relative to the establishment and maintenance of so-called Reserve List of players, Voluntarily Retired List of players, Training Camp List of players and Negotiation List of players. **[**16]** Section 15 of the By-Laws of the National Hockey League prohibits a member club or any official, player, partner, employee, agent or representative thereof from directly or indirectly tampering, negotiating with, making an offer to, or discussing employment with any employee connected with another member club or any player with respect to whom another member club had either the professional rights or the right to negotiate for said professional rights without the prior written consent of that member club. Section 15.2(a) provides for fines up to $10,000, of which 50% goes to the club interfered with; 15.2(b) prohibits the employment of the person who is the subject of tampering; and 15.2(c) provides for the deferment of the offending club's choice in the draft proceedings (either professional or amateur) next following the offense. The League President has it within his discretion to determine the classification of draft selection and the round of the selection forfeited.

While this opinion could be appreciably proliferated by setting out at length many other paragraphs from the various documents referred to in the preceding pages, it is adequate for present purposes to find, and **[**17]** I do find, that the record establishes that this integrated group of contracts, constitutions, by-laws, and agreements, all of which are in evidence, and which in their totality run to hundreds of pages of legal verbiage, effectively and totally control the career of any hockey player in the United States or Canada from the time he first joins any organized team which plays in a league on up through amateur leagues, semi-pro leagues, and minor professional leagues, to the major professional hockey league. In light of the fact that this complex system dominates and controls a hockey player's career all of his hockey-playing life as a practical matter, it would be unrealistic to rule that the Bruins have sustained their burden of showing that there is a probability that this tangled web of legal instruments will not be found to restrain trade in professional hockey.

In so deciding I am aware of the Bruins' argument that the Standard Player's Contract is a collective bargaining agreement exempt from the operation of the antitrust laws. I find and rule that this contention has no support in the evidence. There is no document contained in the thousands of pages of this record which **[**18]** establishes that the portion of Clause 17 of the Standard Player's Contract which is commonly known as the reserve clause ever was the subject matter of collective bargaining negotiations between National Hockey League team owners and representatives of the players. The fact that the presence of the reserve clause in the Standard Player's Contract antedates 1967, the year in which the Players Association was founded, appears from the deposition testimony of Charles W. Mulcahey, Jr. (p. 4-90), Vice-president and **[*268]** General Counsel of the Bruins. Mr. Mulcahey admitted that there was a reserve clause in Cheevers' contract for the 1965-66 hockey season. This evidence puts to rest any contention that the reserve clause is likely to be found to be the product of collective bargaining negotiations. Thus, I find and rule that the Bruins have not shown a probability that these Standard Player's Contracts will be found to be legally valid and enforceable in the face of the serious threat to their legality posed by the provisions of the Sherman Act.

A second portion of the twin burden to be sustained by a movant for injunctive relief is a showing by that party that he will suffer **[**19]** irreparable harm if the injunctive relief is not granted. An exhibit introduced into evidence at the hearing indicates that the Bruins had a "net profit before federal income taxes" for the year ending April 30, 1964, in the amount of $73,781.63, and for the year ending June 30, 1971, an entry reported their "net earnings before federal income taxes" as being in the amount of $1,324,890.89. The balance sheet for the Bruins as of June 30, 1971 showed a surplus in the amount of $2,758,096.85.

During this period there have been two expansions of the number of teams in the National Hockey League, but there has been only a minimal change in the seating capacity of the dilapidated Boston Garden at which the Bruins home games are played. During this same period there has been a fairly substantial increase in the price of tickets for attendance at the Bruins games, and it would appear to be a subject for judicial notice that the television coverage of Bruins games on Channel 38, and occasionally on network television through the CBS network, has increased substantially. This court can judicially notice that all of these television presentations of hockey are commercially sponsored, and **[**20]** Exhibit D introduced at the hearing shows that the net income to the Bruins from television for the year ending June 30, 1971 was in excess of one-half million dollars, specifically, $539,707.91. Other exhibits show that gate receipts for the sale of tickets for the regular season amounted to $1,097,651 in the year ending April 30, 1965, that they amounted to $1,340,002 in the year ending April 30, 1967, that they amounted to $1,968,796 in the year ending June 30, 1969, and that they amounted to $3,144,921 in the most recent season which concluded June 30, 1971.

From the foregoing statistics it would seem a permissible inference that the Bruins are a solidly established commercial operation with an operating income curve which has been moving in an upward direction steadily since at least 1965. The financial situation of the World Hockey Association, a novice league, newly come into existence, is not as yet established. The teams which comprise the World Hockey Association have published a schedule of games to begin in October 1972. None of the games has as yet taken place, and at the hearing Mr. James L. Cooper, President and one of the two principals of the Philadelphia Blazers, **[**21]** testified that the World Hockey Association will not be able to survive financially if it is not able to obtain the services of established hockey stars such as Sanderson, Cheevers, Hull, and other hockey players who have gained reputations as outstanding performers on various teams in the National Hockey League.

Mr. Cooper testified that the World Hockey Association was formed in the latter part of 1971 and that he acquired one of its twelve franchises in 1972 for the City of Philadelphia. The other eleven franchises are located in Edmonton, Winnipeg, Ottawa and Quebec, Canada, and in Boston, New York, Cleveland, Chicago, Minneapolis-St. Paul, Houston, and Los Angeles. An exhibit (Defendants' N) establishes that each of these franchises has leased ice hockey facilities for its home games during the forthcoming hockey season. The first game for this new Association is scheduled for October 10, 1972.

[*269] Cooper further testified that he and his partner have invested and personally guaranteed in excess of $5,000,000 because of some, but not all, of the financial obligations of the Blazers. He testified that on the basis of his knowledge as a trustee of the World Hockey **[**22]** Association he would estimate that between $25,000,000 and $30,000,000 has been invested in the twelve franchises. Cooper made the representation that no national league hockey player affiliated under a multi-year contract with any National Hockey League team, or with any minor professional league team, has been approached by or on behalf of the World Hockey Association, and that all former National League hockey players approached or signed by the World Hockey Association have been players whose contracts will expire October 1, 1972, unless the so-called reserve clause (Clause 17) is valid and enforceable for another year.

Finally, Mr. Cooper testified that he was of the opinion that the granting of injunctive relief prohibiting Sanderson and other established hockey stars from playing outside the National Hockey League "would signal the death of the World Hockey Association."

The financial statements in evidence make it manifest that at the present time, and for a number of years past, the Bruins are and have been in a strong, healthy, and steadily improving financial condition. In considering whether or not the Bruins have sustained their burden of showing irreparable harm unless **[**23]** they are granted the desired injunctive relief, it is well to keep in mind that although the plaintiff is popularly called and practically beloved as and under the name of "Bruins," actually the plaintiff is a business corporation formed for profit which is earning a substantial return on its capital. The irreparable harm, the probability of which must be shown by the corporate plaintiff, is harm to its financial and business health. The court is not concerned at this stage of the case with the effect of the injunction on the Bruins' standing in the National Hockey League or with the chances of the Bruins' successfully repeating their most recent performance in the Stanley Cup Playoffs. Thus, the issue, simply stated, is whether or not irreparable financial harm to the Boston Professional Hockey Association, Inc. has been shown on the record developed thus far.

I find and rule that there has been no showing that the loss of the services of Cheevers and Sanderson will cause irreparable harm to the financial affairs and fortunes of plaintiff. In fact, a finding is appropriate, in light of the financial records in evidence, that the effect to be assigned to the departure of these **[**24]** two super-stars is unknown, and on the present record it cannot be proven that the Bruins will suffer any financial loss whatsoever in their operating revenues, ticket sales, television income, etc., due to the absence of these two players from their team. Furthermore, if the threatened loss of these two defendants from the roster of the Bruins is eventually determined to constitute the breach of a valid employment contract, I rule that there is available to the Bruins a complete and adequate remedy at law, consisting of a suit for money damages for breach of contract against

Cheevers and Sanderson, as well as a suit against the third parties, the World Hockey Association, the Philadelphia Blazers and the Cleveland Crusaders, in the nature of an action in tort for interference with advantageous contractual relations.

It is usual practice for a court of equity, called upon to pass on a claim for injunctive relief, to weigh the consequences that the granting of the injunctive relief sought would have on all parties to the litigation. Courts of equity frequently, in resolving a question concerning injunctive relief, try to evaluate the balance of hardships on both parties that would **[**25]** result from the granting or the withholding of the injunction requested.

In the course of the balancing process, this court has weighed the financial effect **[*270]** that the loss of the services of these two super-stars would have on the Bruins on the one hand, and the effect it would have on the two individual players and the intervening defendant, the Blazers, on the other hand. I find that the balance of hardship favors the defendants, who would suffer a much more serious hardship if the injunction was granted than the Bruins would suffer by the denial of the injunctive relief.

This court is not unaware that it has been held, primarily by the Court of Appeals for the Second Circuit, that

> ". . . ***HN3***[] where the 'balance of hardships tips decidedly toward the party requesting the temporary relief,' the burden of showing probable success lessens to a requirement that he raise 'questions going to the merits so serious, substantial, and difficult as to make them a fair ground for litigation and thus for more deliberate investigation.'" *Flood v. Kuhn, 309 F. Supp. 793, 798 (S.D.N.Y. 1970)* aff'd, *407 U.S. 258, 32 L. Ed. 2d 728, 92 S. Ct. 2099 (1972)*; *Checker Motors v. Chrysler **[**26]** Corporation, 405 F.2d 319* (2 Cir., 1969).

There is no occasion on the facts of the instant case to apply this less stringent test which has been adopted by the Second Circuit because I find that the instant case is not one in which the balance of hardships can be found to tip decidedly toward the party requesting the temporary relief. On the contrary, it would appear that the balance of hardship from injunctive relief herein would clearly run in favor of the defendant hockey players, who have a limited number of high-earning years before them, having in mind their respective ages and the rigors of playing professional hockey with the always-present possibility of career curtailment caused by physical injury.

The testimony of Mr. Cooper also establishes that the balance of hardship tips toward the Blazers because of the "tremendously adverse effect" on their ticket sales from the existing litigation.

In summary, I find and rule that plaintiff has failed to sustain either their burden of showing probability of success on the merits or a probability of irreparable harm if the injunctive relief is denied.

Accordingly, it is Ordered:

The motion for a preliminary injunction against **[**27]** Cheevers and Sanderson is denied in their respective cases.

Lang's Bowlarama, Inc. v. AMF, Inc.

United States District Court for the District of Rhode Island

January 29, 1974

Civil Action No. 4382

Reporter

377 F. Supp. 405 *; 1974 U.S. Dist. LEXIS 12534 **; 1974-2 Trade Cas. (CCH) P75,331

Lang's Bowlarama, Inc. v. AMF Inc. and League Bowling Corp.

Core Terms

bowling, League, Robinson-Patman Act, tournament, summary judgment, discriminatory, terms, defendants', retirement, antitrust, parties, plaintiff's claim, customers, differing, reveals, balls, price discrimination, establishment, commodities, facilities, provisions, undisputed, discount, retail

LexisNexis® Headnotes

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

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

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Promotional Allowances & Services

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

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

HN1[] **Price Discrimination, Competitive Injuries**

Section 2 of the Robinson-Patman Price Discrimination Act, *15 U.S.C.S. § 13*, establishes a comprehensive prohibition of a seller's discrimination between different purchasers of commodities of like grade and quality, where the effect of such discrimination is to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination. This prohibition extends to discrimination as to price (*15 U.S.C.S. § 13a*), commissions, allowances, discounts (*15 U.S.C.S. § 13c*), payments for services or facilities (15 U.S.C.S. § 13d), and the furnishing of such services or facilities in connection with the processing, handling, sale or offering for sale of commodities (15 U.S.C.S. § 13e).

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Promotional Allowances & Services

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

HN2[] Robinson-Patman Act, Claims

Section 3 of the Robinson-Patman Price Discrimination Act proscribes discrimination in discounts, rebates, allowances, advertising service charges, or underselling for the purpose of destroying competition or eliminating a competitor. *15 U.S.C.S. § 13a*.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

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

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

HN3[] Clayton Act, Claims

Section 4 of the Clayton Act, *15 U.S.C.S. § 15*, expressly creates a private cause of action for persons who are injured in their business or property by reason of anything proscribed in the antitrust laws. The damages recoverable in such actions are statutorily established as three times the damages actually sustained. *15 U.S.C.S. § 15*.

Antitrust & Trade Law > ... > Private Actions > Standing > Clayton Act

Antitrust & Trade Law > Clayton Act > General Overview

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

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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

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

Antitrust & Trade Law > ... > Private Actions > Standing > Robinson-Patman Act

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

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

Antitrust & Trade Law > Robinson-Patman Act > Remedies > Damages

HN4[] Standing, Clayton Act

A private action for treble damages under § 4 of the Clayton Act, *15 U.S.C.S. § 15*, does not lie as to alleged violations of § 3 of the Robinson-Patman Price Discrimination Act, *15 U.S.C.S. § 13a*, since Congress did not make § 3 a provision of the ***antitrust law*** for the purposes of the Clayton Act treble damages provisions.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

HN5[] **Robinson-Patman Act, Claims**

The extension of differing credit terms to competing customers does not violate § 2 of the Robinson-Patman Price Discrimination Act, *15 U.S.C.S. § 13*.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Promotional Allowances & Services

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

HN6[] **Robinson-Patman Act, Claims**

Credit terms are not "services" and "facilities" within the meaning of §§ 2(d) and 2(e) of the Robinson-Patman Price Discrimination Act, *15 U.S.C.S. § 13(d)*, *(e)*.

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

HN7[] **Antitrust & Trade Law, Robinson-Patman Act**

See *15 U.S.C.S. § 13(a)*.

Judges: [1]** Day, District Judge.

Opinion by: DAY

Opinion

[*406] Decision Re Defendants' Motion For Summary Judgment

THE COURT. (Delivered orally from the bench).

This is a private antitrust action for treble damages arising under §§ 2 and 3 of the Robinson-Patman Price Discrimination Act, June 19, 1936, 49 Stat. 1526, 1528, *15 U.S.C., §§ 13* and *13a*; and § 4 of the Clayton Act, October 15, 1914, 38 Stat. 731, *15 U.S.C., § 15*.

In its complaint the plaintiff charges the defendants with discriminatory credit, sales and promotion arrangements in the bowling business. The plaintiff, a Rhode Island corporation, operated Lang's Bowlarama, a 40-lane bowling center in Cranston, Rhode Island. The defendant, League Bowling Corporation, a Rhode Island corporation, was the former owner of the Cranston Bowl, a 64-lane bowling center, also located in Cranston, Rhode Island, and was engaged in competition with the plaintiff's place of business. Both of these parties purchased and leased equipment from the defendant, AMF Incorporated, a New Jersey corporation, and a national manufacturer of bowling equipment and supplies.

In its complaint the plaintiff alleges that the defendant AMF discriminated **[**2]** in its credit policies and practices, its sale of goods and services and its promotional arrangements between the plaintiff and defendant League Bowling; that this discrimination operated in favor of defendant League Bowling and against the interest of and to the detriment of the plaintiff; and that as a result of this discrimination and the effects thereof, plaintiff has suffered damage to its property and business.

The defendants deny all charges of discrimination.

HN1[] Section 2 of the Robinson-Patman Act, *15 U.S.C., § 13*, establishes a comprehensive prohibition of a seller's discrimination between different purchasers of commodities of like grade and quality, where the effect of such discrimination is to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination. This prohibition extends to discrimination as to price (subsection a), commissions, allowances, discounts (subsection c), payments for services or facilities (subsection d), and the furnishing of such services or facilities in connection with the processing, handling, sale or offering for sale of commodities (subsection e).

HN2[] Section 3 of the Act further **[**3]** proscribes such discrimination in discounts, rebates, allowances, advertising service charges or underselling for the purpose of destroying competition or eliminating a competitor. *15 U.S.C., § 13a*.

HN3[] Section 4 of the Clayton Act, *15 U.S.C., § 15*, expressly creates a private cause of action for persons who are injured in their business or property by reason of anything proscribed in the antitrust laws. The damages recoverable in such actions are statutorily established as three times the damages actually sustained. *15 U.S.C., § 15*.

This matter is now before the Court on the defendants' motion for summary judgment.

The defendants assert that there is no genuine issue as to any material fact and that they are entitled to judgment in their favor, pursuant to *Rule 56 of the Federal Rules of Civil Procedure*, as a matter of law. The defendants allege that there is no evidence to substantiate the charges of the plaintiff; that the undisputed facts clearly demonstrate that the plaintiff's action fails to satisfy several essential prerequisites of the **[*407]** Robinson-Patman Act; and that there is no triable issue of material fact as to any of the claims asserted in this action.

[4]** Oral argument was heard on this motion on September 17, 1973, at which time the plaintiff submitted a memorandum in opposition to the motion, asserting that there are genuine issues of material fact and disputing the defendants' legal arguments as to whether the agreed-upon facts indicate violation of the antitrust laws cited in the complaint.

The record of this case discloses that the parties have undertaken extensive discovery since the institution of this action; and the defendants assert that the voluminous record established in this action demonstrates that the plaintiff's claims are "clearly deficient factually and legally." In oral argument defense counsel stated that the defendants admit the factual allegations of the plaintiff, but that such facts reveal no discrimination against the plaintiff in favor of defendant League Bowling, and, further, that these facts do not, as a matter of law, amount to any violation of the Robinson-Patman Act.

Initially the Court may dispose of the plaintiff's claim under § 3 of the Robinson-Patman Act, *15 U.S.C., § 13a*. The United States Supreme Court has ruled that ***HN4***[] a private action for treble damages under § 4 of the Clayton Act, *15 **[**5]** U.S.C., § 15*, does not lie as to alleged violations of § 3 of the Robinson-Patman Act, *15 U.S.C., § 13a*, since Congress did not make § 3 a provision of the ***antitrust law*** for the purposes of the Clayton Act treble damages provisions. *Nashville Milk Co. v. Carnation Co., 355 U.S. 373, 382, 2 L. Ed. 2d 340, 78 S. Ct. 352 (1958)*.

Thus, for purposes of this motion the Court considers the plaintiff's claim solely under § 2 of the Robinson-Patman Act, *15 U.S.C., § 13*.

Despite defendants' oral admission of the factual allegations of the plaintiff, the record and other written materials and oral arguments presented by the parties to the Court in connection with the instant motion do indicate certain areas of disagreement as to the events which are alleged to have occurred.

It is agreed that the plaintiff's "ten pin" bowling establishment was in direct competition with the defendant, League Bowling Corporation's "Ten Pin" bowling center in the business of selling bowling games to the general public and bowling leagues. Furthermore, the parties agree that both of these competitors were AMF "houses," so-called, in that each of them was supplied as to their bowling equipment purchases **[**6]** and leases by the defendant AMF. Additionally there is no dispute that both bowling establishments experienced general financial difficulties in the 1960s, and, specifically, each had trouble meeting its obligations to the defendant AMF.

As to the plaintiff's first claim, that of discriminatory credit arrangements, the record reveals that, contrary to the plaintiff's allegation in its complaint, the defendant AMF never actually entered into a forbearance agreement with the defendant League Bowling. Furthermore, the record also reveals that the defendant AMF's differing treatment of the plaintiff's and defendant League Bowling's debt retirement problems was founded on the disparate financial positions of the two bowling establishments, with particular regard to their relative cash flows.

The facts contained in the record before this Court do show, however, that the defendant AMF did in fact apply differing solutions to the various collection difficulties it experienced with the plaintiff and with the defendant League Bowling. Although the parties are in apparent disagreement as to certain details regarding the actual financial ramifications, the facts clearly indicate that the **[**7]** plaintiff was required to meet its obligations to AMF completely, albeit on a much revised schedule, while the defendant, League Bowling Corporation, was forgiven a substantial part of its debt owed AMF as the result of a "cash out" agreement between it and the defendant AMF.

[*408] The legal issue for this Court's determination, as indicated by these undisputed facts, is whether the actual debt retirement requirements imposed by the defendant AMF with respect to the plaintiff and the defendant League Bowling were violative of the Robinson-Patman Act.

In the reported cases involving ***HN5***[] the extension of differing credit terms to competing customers it has been universally held that such practice did not violate § 2 of the Robinson-Patman Act, *15 U.S.C., § 13*. *Skinner v. United States Steel Corp., 233 F.2d 762 (5th Cir. 1956)*; *Clausen & Sons, Inc. v. Theo. Hamm Brewing Co., 284 F. Supp. 148 (D. Minn. 1967)*, rev'd on other grounds, *395 F.2d 388 (8th Cir. 1968)*; *Secatore's, Inc. v. Esso Standard Oil Co., 171 F. Supp. 665 (D. Mass. 1959)*.

In each of these cases summary judgment for the defendant was entered on the ground that the defendants' credit policies were covered by the **[**8]** provisions of the Robinson-Patman Act, specifically § 2(d), *15 U.S.C., § 13(d)*, prohibiting discrimination in payments for services or facilities (*Clausen, supra*); and § 2(e), *15 U.S.C., § 13(e)*, prohibiting discrimination in the furnishing of services or facilities (*Clausen, Secatore's, Inc.* and *Skinner, supra.*) These cases establish uncontradicted precedent for the rule that ***HN6***[] credit terms are not "services" and "facilities" within the meaning of §§ 2(d) and 2(e) of the Robinson-Patman Act. *See* *Secatore's, Inc., supra, 171 F. Supp. at 668*; *Skinner, supra, 233 F.2d at 765-766*; and *Clausen, supra, 284 F. Supp. at 155*.

There remains the question as to whether the alleged discriminatory credit procedures violated § 2(a), *15 U.S.C., § 13(a)*, prohibition against discrimination as to price.

The court in *Skinner, supra*, indicated that the differing credit arrangements therein were not illegal price discrimination in violation of said § 2(a) of the Act, *15 U.S.C., § 13(a)*. The court stated at page 764:

> "Section 2(a) of the Act is confined to discriminations in price, and no facts are here shown that could be made the basis of invoking its provisions."

[9]** In the instant case the differing approaches to the plaintiff's and the defendant League Bowling's debt retirement problems were undertaken well after the initial sales and lease agreements were entered into, and therefore are arguably not related to the actual price charged for the commodities sold.

However, as a result of defendant AMF's debt retirement policies, defendant League Bowling was allowed to "cash out" its debt to AMF. The terms of this "cash out" agreement, which was entered into following the inability of the two parties defendant to agree on terms as to forbearance, were that defendant League Bowling paid $165,000 to completely retire its debt owed to the defendant AMF. The record reveals, however, on the other hand, that the plaintiff was required to amortize its debt completely, and a "cash out" agreement was not reached between the plaintiff and AMF. These differing arrangements arguably amount to illegal price discrimination since the effect of the "cash out" was to allow defendant League Bowling to achieve final ownership of the commodities in question at a lesser cost than that paid by the plaintiff.

However, this belated type of price adjustment **[**10]** -- that is, by differing debt retirement arrangements -- would appear to be permissible under the terms of said ***HN7***[] *15 U.S.C., § 13(a)*, which provides as follows:

> "*And provided further*, That nothing herein contained shall prevent price changes from time to time where in response to changing conditions affecting the market for or the marketability of the goods concerned, . . ."

The record reveals the significant stresses affecting the total bowling retail market during the relevant period, **[*409]** and the differential reactions of the plaintiff and defendant bowling centers to such stresses with regard to their respective amount of business revenue. The court in *Secatore's, Inc., supra*, noted the pressures on a seller which might lead to the extension of different credit terms to different purchasers. The court held *at page 668 of 171 F. Supp.* as follows:

> ". . . The extension of credit involves problems not found in the furnishing of ordinary promotional aids. It may involve difficult questions of business judgment as to the future willingness or ability of the customer to pay. It may entail a possibility of substantial financial loss to **[**11]** the creditor. It may require difficult decisions as to whether to risk financial loss by extending credit or losing a customer's business by denying it."

In the light of the judicial recognition of business stresses which may affect credit terms, which in turn might be considered part of the price of the item sold, the express allowance in *§ 13(a)*, *supra*, of price differences where market conditions dictate, and the actual conditions prevailing in the bowling market in Rhode Island during the relevant time span, the conduct of the defendant AMF with respect to debt retirement does not amount to a violation of the Robinson-Patman Act's price discrimination provision, *15 U.S.C., § 13(a)*.

The undisputed facts clearly reveal that the defendant AMF treated the credit problems of two of its competing Rhode Island customers differently, and extended to one, defendant League Bowling, a "cash out" that was not extended to the other; that is, the plaintiff. However, in the light of the accepted judicial interpretation of the provisions of the Robinson-Patman Act, such credit arrangements do not, as a matter of law, violate § 2 of the Act, *15 U.S.C., § 13*.

Therefore, **[**12]** as to the plaintiff's claim regarding alleged discriminatory credit arrangements, the defendants are entitled to the entry of summary judgment in their favor.

The second issue before the Court in considering this motion arises out of the defendant AMF's co-sponsorship, along with the defendant League Bowling, the Professional Bowlers Association, and the Narragansett Brewing Company, of a Professional-Amateur Bowling Tournament at the Cranston Bowl in August of 1969.

The plaintiff contends that this co-sponsorship itself and the sale of approximately 400 bowling balls to the defendant League Bowling, in conjunction with said tournament, were violative of the terms of the Robinson-Patman Act.

Insofar as the sale of the bowling balls is concerned, the record clearly reveals that they were sold at a price one dollar below the dealer discount price, and that they were sold in conjunction with the tournament held at the establishment of the defendant League Bowling; that is, at the Cranston Bowl. The defendants assert that this price would have been nondiscriminatorily extended to all AMF retailers, including the plaintiff, who did conduct this type of tournament. Thus, this sale **[**13]** is, as indicated by this argument of the defendants and the undisputed facts in the record, inextricably bound up with the special promotional activity -- that is, the tournament operation -- rather than being a normal sale by AMF to a retailer of its products. Thus, this Court should consider the price discount extended to the defendant League Bowling, as to this sale, as a promotional consideration to be tested under the provisions of §§ (d) and (e) of the Act, *15 U.S.C., § 13(d)* and *§ 13(e)*, rather than price distinctions governed by § 2(a), *15 U.S.C., § 13(a)*.

The defendants argue that since the plaintiff did not operate a retail bowling equipment shop at the time of the sale of said bowling balls, it was not in competition with the defendant League Bowling as to the commodity in question. However, this is irrelevant since, **[*410]** as indicated above, the Court construes the sale as part and parcel of an effort to promote the bowling sport itself, not simply as an isolated wholesale purchase by a retailer. The plaintiff and the defendant League Bowling were competitors in the sale of bowling games to the public, and any promotional considerations the defendant AMF **[**14]** extended to its customer, defendant League Bowling, inured to its benefit in this general competition.

Thus, the crucial question for this Court is whether this promotional consideration (i.e., the discount on bowling balls) was extended in a discriminatory fashion, in violation of the Robinson-Patman Act. The issue is the same with regard to the promotional consideration extended by the defendant AMF to the defendant League Bowling in connection with its co-sponsorship of said tournament at the Cranston Bowl in 1969.

The undisputed facts clearly reveal that the defendant AMF assumed part of the cost of the tournament and provided certain services which had a monetary value, as part of a promotional effort to promote the bowling sport and its products. As noted above, the Act requires that such payments and such services be available on proportionally equal terms to all customers. Sections 2(d) and 2(e), *15 U.S.C., §§ 13(d)* and *13(e)*.

The record is not entirely clear as to whether this requirement of proportionally equal treatment was adhered to in this instance. The August 1969 tournament at the Cranston Bowl was apparently the only such tournament ever co-sponsored by the **[**15]** defendant AMF; and it is, it seems to the Court, a safe assumption that League Bowling received some business benefit from the holding of this tournament in its establishment.

However, there remains unresolved an issue of fact: whether or not the plaintiff was actually afforded a practical opportunity to avail itself of this promotional consideration and to achieve the same business benefit.

Since there is an issue of material fact not resolved by the record before this Court, the defendants are not entitled to the entry of summary judgment in their favor on this issue. The defendants' motion for summary judgment on the plaintiff's claim that the defendant AMF's co-sponsorship of said 1969 tournament and the related sale of bowling balls was discriminatory should be denied.

The Court has herein considered three alleged instances of violations of the Robinson-Patman Price Discrimination Act:

(1) discriminatory debt retirement;

(2) discriminatory sales price as to 400 bowling balls sold in connection with the Pro-Am Tournament; and

(3) discriminatory promotional payments and services extended by defendant AMF in connection with said Tournament.

Counsel **[**16]** for the parties in this action have assembled a formidable record, including extensive interrogatories, depositions and other documentary evidence, to be sifted in determining this motion. The record indicates that these three instances are apparently the sole questioned areas of the defendants' conduct and activity in this case.

As to these alleged instances of violation of the Act there are in this record genuine issues of fact as to the second and third claims.

Under the circumstances the defendants are not entitled to judgment as to those issues as a matter of law.

In its decision in *First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 290, 20 L. Ed. 2d 569, 88 S. Ct. 1575 (1968)*, the Supreme Court of the United States held:

> ". . . While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of **[*411]** action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint."

In this decision **[**17]** the Supreme Court affirmed a trial court's entry of summary judgment against a plaintiff in an antitrust case.

However, in the instant case the test for dismissal is not met, and the record reveals significant probative evidence tending to support the second and third claims asserted by the plaintiff.

Having in mind the general policy of sparingly utilizing summary judgment in antitrust litigation, the defendants' motion for summary judgment in their favor as to the first claim of the plaintiff should be and is granted, and is denied as to the second and third claims asserted by the plaintiff. *See, generally*, *Poller v. Columbia Broadcasting, 368 U.S. 464, 473, 7 L. Ed. 2d 458, 82 S. Ct. 486 (1962)*.

End of Document

Anderson Foreign Motors, Inc. v. New England Toyota Distributors, Inc.

United States District Court for the District of Massachusetts

August 29, 1979

Civ. A. No. 76-417-G

Reporter

475 F. Supp. 973 *; 1979 U.S. Dist. LEXIS 10127 **; 1979-2 Trade Cas. (CCH) P62,833

ANDERSON FOREIGN MOTORS, INC., on behalf of itself and all others similarly situated, Plaintiffs, v. NEW ENGLAND TOYOTA DISTRIBUTOR, INC., ET AL., Defendants.

Core Terms

dealers, delivery, tied product, attachment, seller, transportation, tie, plaintiffs', products, tying product, antitrust, stock, tying arrangement, delivery service, common carrier, distributor, coercion, tie-in, preliminary injunction, courts, instant case, franchise, damages, Defendants', equitable, appears, buyers, merits, million dollars, manufacturers

LexisNexis® Headnotes

Civil Procedure > Remedies > Provisional Remedies > General Overview

Civil Procedure > Remedies > Damages > Monetary Damages

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN1[] **Remedies, Provisional Remedies**

Although real estate can be the subject of an ordinary motion for attachment under Massachusetts law, Mass. R. Civ. P. 4.1; *Mass. Gen. Laws ch. 223, § 42*, stock cannot be attached in an action seeking only money damages, *Mass. Gen. Laws ch. 223, § 71*.

Civil Procedure > Remedies > Provisional Remedies > General Overview

HN2[] **Remedies, Provisional Remedies**

Fed. R. Civ. P. 64 requires that a federal court look to the law of the forum state for any provisional remedies to secure a final judgment: At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought.

Civil Procedure > Remedies > Provisional Remedies > General Overview

Civil Procedure > Remedies > General Overview

Civil Procedure > Remedies > Injunctions > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

Civil Procedure > Remedies > Provisional Remedies > Attachment

Civil Procedure > Remedies > Provisional Remedies > Civil Arrests

Civil Procedure > Remedies > Provisional Remedies > Replevin

Civil Procedure > Remedies > Provisional Remedies > Sequestration

HN3[] **Remedies, Provisional Remedies**

Fed. R. Civ. P. 64 makes state law control the availability of provisional remedies to secure satisfaction of a judgment, and specifically provides that the remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies. The precise scope of *Rule 64* is somewhat unclear. According to a narrow interpretation of the Rule, the phrase "and other corresponding or equivalent remedies," was never intended to exclude temporary equitable relief otherwise proper under *Fed. R. Civ. P. 65*, even though that relief operates only to secure satisfaction of a final judgment and state law offers no equivalent remedy.

Business & Corporate Law > ... > Shareholder Actions > Actions Against Corporations > General Overview

Civil Procedure > Remedies > Provisional Remedies > General Overview

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN4[] **Shareholder Actions, Actions Against Corporations**

Mass. Gen. Laws ch. 214, § 3(7) confers jurisdiction on the supreme and superior courts in actions to reach and apply shares or interests in corporations. Massachusetts state courts rely on *§ 3(7)*, together with their power to issue injunctions pendente lite, to grant a plaintiff an equitable attachment of defendants' shares of stock by restraining their transfer prior to final adjudication of plaintiff's substantive claim.

Civil Procedure > Remedies > Provisional Remedies > Attachment

Civil Procedure > Remedies > Judgment Interest > General Overview

Civil Procedure > Remedies > Provisional Remedies > General Overview

HN5[] **Provisional Remedies, Attachment**

The conditions for issuance of a writ of attachment are set forth in Mass. R. Civ. P. 4.1(c), which requires that the plaintiff show a reasonable likelihood that he will recover judgment, including interest and costs, in an amount equal to or greater than the amount of the attachment over and above any liability insurance shown by the defendant to be available to satisfy the judgment.Massachusetts law empowers the attaching officer under certain circumstances to require security from the plaintiff before or after attachment in order to indemnify the officer from liability for an improper attachment. *Mass. Gen. Laws ch. 223, § 45A*. Otherwise, there is no requirement for an attachment bond.

Civil Procedure > ... > Injunctions > Grounds for Injunctions > Likelihood of Success

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN6[] **Grounds for Injunctions, Likelihood of Success**

The *Due Process Clause of the Fourteenth Amendment* compels the notice and hearing procedures implemented by Mass. R. Civ. P. 4.1(c). The preliminary injunction that will limit disposition of stock and assets owned or controlled by defendants amounts to a deprivation of property within the meaning of the *Fourteenth Amendment*, requiring prior notice and hearing. In particular, plaintiffs must demonstrate more than just a probability of success on the merits in order to prevail on their motion for a preliminary injunction; they must also show a reasonable likelihood that they will recover a judgment in excess of the total value of the property that is the subject of plaintiffs' motions.

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

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

HN7[] **Conspiracy to Monopolize, Sherman Act**

A tying arrangement is an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier. Not all tie-ins fall within the Sherman Act's prohibition against a contract, combination, or conspiracy in restraint of trade.

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Per Se Rule

HN8[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Courts treat tying arrangements as per se illegal. In order to establish an illegal tie, under the per se theory, the plaintiff must prove (1) that tying and tied products are separate, and (2) that the defendant has sufficient economic power with respect to the tying product appreciably to restrain free competition in the market for the tied product. It is also relevant to consider whether the seller's behavior follows the general pattern found unacceptable in earlier tying cases.

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

Civil Procedure > ... > Defenses, Demurrers & Objections > Affirmative Defenses > Burdens of Proof

HN9[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

Courts are developing two inroads on the per se doctrine in tying cases. Some courts expand the concept of two separate products by permitting business justifications for aggregation of the products to enter into the single product analysis. By holding that a challenged arrangement constitutes only a single product, courts avoid the strictures of the per se approach entirely, even though at times producing rather unusual results. A second line of attack, which is often not clearly distinguished from the first, takes the form of increasing the availability of affirmative defenses to a liability finding. Although these two approaches are often confused, there is an important difference. The plaintiff has the burden of proof on all issues implicated in the single product determination, whereas the defendant has the burden of proof with respect to each affirmative defense.

Antitrust & Trade Law > Sherman Act > Defenses

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

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

HN10[] **Sherman Act, Defenses**

In addition to the elements of the per se doctrine, the plaintiff in a private antitrust action must also show as part of his case in chief that he was injured by the challenged practice. Once the prima facie case is established the defendant may respond with several affirmative defenses based on limited business justifications. Finally, the plaintiff's failure to prove all elements of the per se theory does not foreclose his antitrust claim; the challenged practice must then be examined according to the rule of reason in order to determine if a violation of *§ 1* of the Sherman Act has nevertheless occurred.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Tying Arrangements > Sherman Act Violations

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

HN11[] **Tying Arrangements, Sherman Act Violations**

A *§ 1* of the Sherman Act violation does not require a conspiracy, to which the multitude of *§ 1* tying cases involving a single seller of tied and tying products amply attests. Tying arrangements are condemned under *§ 1* as contracts in restraint of trade.

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

HN12[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The cases support a four-pronged analysis: (1) examination of the product structure itself, (2) investigation of the defendant's product marketing practices, (3) consideration of the behavior of other industrial sellers and (4) analysis of the efficiencies gained by and the business justifications for the product combination.

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

HN13[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The single product determination frequently hinges as much on the way the two products are coupled and on the character of each product as on the fact that their sales are connected at all.

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

HN14[] **Price Fixing & Restraints of Trade, Tying Arrangements**

The franchisor is free to demonstrate that the tie constitutes a necessary device for controlling the quality of the end product sold to the consuming public. As part of this defense, however, the franchisor must establish that the tie constitutes the method of maintaining quality that imposes the least burden on commerce. If there are less burdensome alternatives, a franchisor is obligated to employ them rather than the tie.

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

HN15[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Plaintiffs in a tying case need not prove a tying product monopoly but only that defendants enjoyed sufficient economic power in the tying product market appreciably to restrain free competition in the tied product market. An appreciable restraint is shown if the seller exercises some control over some of the buyers in the market and enjoys an advantage over competing tying product suppliers.

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

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

HN16[] **Private Actions, Remedies**

In a private antitrust action, the plaintiff, in addition to proving a violation and an injury, must also show that the violation was the direct and material cause of the injury he suffered. Plaintiff's burden on the causation issue is not a heavy one; he need only establish the causal connection "with reasonable probability" and to "a fair degree of certainty."

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

HN17[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Coercion has no relevance to a determination of antitrust liability; it is relevant, if at all, only to determining whether a tie-in exists, that is, whether the seller has conditioned the sale of one product on the purchase of another. Once a tie is established, liability follows if the other two elements of the per se rule power in the tying product market and foreclosure of a not insubstantial amount of interstate commerce in the tied product are satisfied. Neither of these two elements incorporates a coercion requirement. The requisite economic power may be found on the basis of either uniqueness or consumer appeal. Such an inference does not permit an inquiry into individual coercion.

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

HN18[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Coercion may have some relevance for proving the tie in some situations, but in a case in which the tie is manifest in the express terms of a standard form contract, independent proof of individual coercion is entirely unnecessary.

Counsel: **[**1]** Donald B. Gould, Goodwin, Proctor & Hoar, Boston, Mass., for plaintiffs.

James D. St. Clair, Robert W. Mahoney, Hale & Dorr, Boston, Mass., for defendants.

James F. McHugh, John J. Curtin, Jr., Bingham, Dana & Gould, Boston, Mass., for Toyota Motor Sales, U.S.A., Inc.

Opinion by: GARRITY

Opinion

[*976] MEMORANDUM OF DECISION

The precise characterization of the motions now before the court is disputed by the parties. Anderson Foreign Motors, Inc., a Toyota automobile dealer, brought this class action against New England Toyota Distributor, Inc. (hereinafter NET) and George A. Butler, formerly President and Treasurer and now Chairman of the Board and Chief Executive Officer of NET, [1.] **[**2]** for violation of *Section 1* of the Sherman Antitrust Act, *15 U.S.C. § 1*. [2.] Plaintiffs complain of an allegedly illegal tying arrangement **[*977]** in which defendants require dealers to purchase NET's new car delivery services along with the purchase of Toyota automobiles for resale. On April 12, 1978, following a hearing, this court granted plaintiffs' motion for class certification, defining the class as all persons and entities who were Toyota dealers after January 25, 1972.

Plaintiffs now bring two motions: (1) a motion pursuant to *Fed.R.Civ.P. Rule 64* for approval of the attachment of certain real property and assets and (2) a motion pursuant to *Fed.R.Civ.P. Rule 65* for a preliminary injunction to limit the disposition of certain stock and assets of NET controlled by the defendants.

Plaintiffs seek through the pending motions to secure payment of an eventual judgment entered **[**3]** in plaintiffs' favor by restraining the disposal of certain assets in any manner injurious to plaintiffs' interests. The characterization problem stems from the nature of the property that plaintiffs wish to encumber: (1) specific parcels of real estate owned by NET and Butler and assets owned by NET and (2) the stock, rights, and assets of NET. **HN1**[] Although real estate can be the subject of an ordinary motion for attachment under Massachusetts law, [3.] Mass.R.Civ.Pro., Rule 4.1; *M.G.L. c. 223, § 42*, stock cannot be attached in an action seeking only money

[1.] The original complaint included as a defendant Toyota Motor Sales, U.S.A., the national Toyota distributing concern which imported and distributed automobiles to regional wholesale distributor-franchisees like NET. Toyota Motor Sales, however, was subsequently removed as a party-defendant on request of counsel.

[2.] Although tying arrangements can violate both *Section 1* of the Sherman Act and *Section 3* of the Clayton Act, only the former statutory provision applies to this case, since the jurisdictional prerequisites for a Clayton Act violation are not present. In particular, the tied product in this case, delivery services, is not within the Clayton Act's prohibition against ties involving "goods, wares, merchandise, machinery, supplies or other commodities." *15 U.S.C. § 14*; See, *Moore v. Jas. H. Matthews & Co., 9 Cir. 1977, 550 F.2d 1207, 1214*; *United States v. Jerrold Electronic Corporation, E.D.Pa.1960, 187 F. Supp. 545, 554*, Aff'd per curiam, 1961, *365 U.S. 567, 81 S. Ct. 755, 5 L. Ed. 2d 806*.

[3.] **HN2**[] *Fed.R.Civ.P. Rule 64* requires that a federal court look to the law of the forum state for any provisional remedies to secure a final judgment:

At the commencement of and during the course of an action, all remedies providing for seizure of person or property for the purpose of securing satisfaction of the judgment ultimately to be entered in the action are available under the circumstances and in the manner provided by the law of the state in which the district court is held, existing at the time the remedy is sought . . . .

damages, *M.G.L. c. 223, § 71*. But see, *Krohn Hite v. Berube, D.Mass.1974, 372 F. Supp. 1262, 1263* (state court appears to have effected equitable attachment by injunction). Plaintiffs, therefore, have treated what is in reality a motion for an equitable attachment of defendants' stock and assets as a motion for a preliminary injunction prohibiting NET and Butler from transferring or diminishing the value of the stock and assets other than in the ordinary course of business.

[4]** We must first decide a threshold question as to the availability of a provisional remedy in the form of the preliminary injunction that plaintiffs seek. This issue was not discussed by the parties, but since it relates to the power of this court, we must address it. ***HN3***[] *Fed.R.Civ.P. Rule 64* makes state law control the availability of provisional remedies to secure satisfaction of a judgment, and specifically provides that "(t)he remedies thus available include arrest, attachment, garnishment, replevin, sequestration, and other corresponding or equivalent remedies, . . ." The precise scope of *Rule 64* is somewhat unclear. See, 7 Moore's Federal Practice P 64.04(3). According to a narrow interpretation of the Rule, 7 Moore's, Supra, at 64-20-21, the phrase "and other corresponding or equivalent remedies, . . ." was never intended to exclude temporary equitable relief otherwise proper under *Fed.R.Civ.P. Rule 65*, even though that relief operates only to secure satisfaction of a final judgment and state law offers no equivalent remedy. Under this interpretation, we plainly have power to grant plaintiffs' motion, whether or not Massachusetts law permits equitable attachment of shares of stock.

[5]** However, the Rule is susceptible of a broader interpretation. It may make state law the Exclusive source of available remedies to secure a final judgment. Even under this broad interpretation, we still have power to grant plaintiffs' motion for a preliminary injunction. The motion in effect seeks an equitable attachment. *Daley v. Ort, D.Mass.1951, 98 F. Supp. 151, 152*. Although in Daley a motion identical to plaintiffs' motion in this case was denied because the court could find no authority for an equitable attachment prior to verdict under Massachusetts or federal law, the court appears to have overlooked ***HN4***[] *M.G.L. c. 214, § 3(7)*, (formerly *M.G.L. c. 214, § 3(8)*), **[*978]** which confers jurisdiction on the Supreme and Superior courts in "actions to reach and apply shares or interests in corporations, . . ." Massachusetts state courts rely on *§ 3(7)*, together with their power to issue injunctions Pendente lite, to grant a plaintiff an equitable attachment of defendants' shares of stock by restraining their transfer prior to final adjudication of plaintiff's substantive claim. See, *McCarthy v. Rogers, 1936, 295 Mass. 245, 3 N.E.2d 787*; Cf., *Salvucci v. Sheehan, 1965, 349 Mass.* ***[**6]*** *659, 662-63, 212 N.E.2d 243*. Hence Massachusetts law appears to provide a procedure comparable to that used by plaintiffs in this case, and we will treat plaintiffs' motion for a preliminary injunction as in the nature of an action to reach and apply coupled with a motion for temporary relief.

We now turn to the standards for exercising our power under *Rules 64* and *65*. ***HN5***[] The conditions for issuance of a writ of attachment are set forth in Mass.R.Civ.Pro., Rule 4.1(c), which requires that the plaintiff show "a reasonable likelihood that (he) will recover judgment, including interest and costs, in an amount equal to or greater than the amount of the attachment over and above any liability insurance shown by the defendant to be available to satisfy the judgment." Cf., *M.G.L. c. 223, § 42A*. Because there is no evidence of liability insurance, the central question on the motion for approval of attachment is whether plaintiffs are likely to prevail on the merits and obtain damages in the necessary amount. Massachusetts law empowers the attaching officer under certain circumstances to require security from the plaintiff before or after attachment in order to indemnify the officer from liability **[**7]** for an improper attachment. *M.G.L. c. 223, § 45A*. Otherwise, there is no requirement for an attachment bond.

The standards for granting the preliminary injunction that plaintiffs seek differ only slightly from those governing the attachment. ***HN6***[] The *due process clause of the Fourteenth Amendment* compels the notice and hearing procedures implemented by Mass. Rule 4.1(c). *Bay State Harness Horse R. & B. Ass'n v. PPG Industries, Inc., D.Mass.1973, 365 F. Supp. 1299*. The preliminary injunction that plaintiffs seek will limit disposition of stock and assets owned or controlled by defendants and thus also amounts to a deprivation of property within the meaning of the *Fourteenth Amendment*, requiring prior notice and hearing. *Fuentes v. Shevin, 1972, 407 U.S. 67, 92 S. Ct. 1983, 32 L. Ed. 2d 556*. In particular, plaintiffs must demonstrate more than just a probability of success on the merits in order to prevail on their motion for a preliminary injunction; they must also show a reasonable likelihood that they will recover a judgment in excess of the total value of the property that is the subject of plaintiffs' two motions. Cf., *Fuentes, supra, at 97*, [4] *92 S. Ct. 1983*.

[8]** Because plaintiffs' motion under *Rule 65* is in the nature of a equitable attachment, we do not require a strong showing of irreparable injury or a favorable balance of harms. Plaintiffs fear that they will not be able to obtain satisfaction for a final judgment that likely may exceed twelve million dollars, see, Part II.A Infra, without executing on the stock and assets of NET. It is our opinion that this fear is reasonably justified. Moreover, if defendants were to sell the stock and other personal property and, with the proceeds, purchase real estate, plaintiffs would be able to attach the real estate under Mass. Rule 4.1(c) without showing irreparable harm. There **[*979]** is no reason for a different result in this case just because the property happens to be in the form of stock.

After reviewing the numerous briefs and affidavits, we find that plaintiffs have demonstrated a probability of success on the merits and a reasonable likelihood of recovering a judgment in excess of seven million dollars and have otherwise satisfied the requirements of Mass.R.Civ.P. Rule 4.1(c). Therefore, we grant plaintiffs' motion for approval of attachment in the requested amount of seven million **[**9]** dollars. However, we cannot decide the motion for a preliminary injunction without some evidence of the value of the property that is the subject of that motion. Furthermore, without such evidence we are also unable to set the amount of the bond required by *Fed.R.Civ.P. Rule 65(c)*. Therefore, we are issuing a contemporaneous procedural order calling for either a stipulation of the parties or evidence of the value of the property and briefs on the issue of the amount of the security that should be required.

The parties have submitted a number of relevant affidavits in connection with both the current motion and the prior motion for class certification. Before embarking on an analysis of the issues, we will first outline generally the significant factual background. NET was the sole distributor of Toyota automobiles in the five state New England area Vermont, Maine, New Hampshire, Massachusetts and Rhode Island until March 1978 when Toyota Motor Sales, U.S.A., Inc. (hereinafter TMS), the national distributor-franchisor, assumed NET's New England distributorship. Pursuant to standard franchise agreements between NET and its dealers, NET sold automobiles to New England Toyota dealers, **[**10]** transporting the cars from the Port of Boston to the dealers' various locations in the five state area. Prior to 1972 NET had subcontracted this transportation function to independent common carriers and had required dealers to reimburse NET for its transportation costs. In that year, however, NET unilaterally changed its transportation policy, relying on the right it reserved in its dealer franchise contracts, "to deliver all Toyota products purchased by DEALER by whatever mode of transportation and from whatever point DISTRIBUTOR may from time to time establish or select." Toyota Dealer Sales and Service Agreement, Article III, PP 1, 2 (Defendants' Exhibit 1 to 5/10/76 Deposition of Ross Anderson); Accord, Toyota Dealer Sales and Service Agreement, Article VI, P B.1 (Plaintiffs' Exhibit 1 to 5/10/76 Anderson Deposition) ("most recent" agreement). NET purchased a number of tractors and trailers and in 1972 began to transport the vehicles to dealers on its own trucks, charging the dealers for the cost of carrying the cars according to Article III, P 2, of the earlier Sales and Service Agreement. The contract between TMS and NET required NET to execute this standard Agreement with each **[**11]** of its dealers. See, 11/2/70 and 3/7/73 Distributor Agreements between Toyota Motor Sales, U.S.A., Inc. and New England Toyota Distributors, Inc., Article III. Each dealer was charged the same average amount for each automobile he purchased, the total charge for all automobiles averaged over all the cars sold.

The change in delivery policy met with some opposition, mainly from the Toyota Dealer Council, an independent dealer body organized to negotiate modifications in some of NET's policies. The Dealer Council and vocal dealers objected to what they felt were excessive delivery prices charged by NET. At a later date, the dealers, dissatisfied

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[4] Of course, the seven million dollar attachment includes property that is also covered by the motion for a preliminary injunction. The overlap should not be counted twice, since attachment alone constitutes a sufficient property deprivation to trigger due process requirements. In addition, because NET no longer distributes Toyota automobiles in New England, it may be that NET's stock has no value apart from the value of the company's assets. If so, the stock would add nothing to the total value of the property plaintiffs wish to encumber. On the other hand, NET's stock may be worth more than the attachment amount of $ 5,000,000 or even more than likely damages of $ 12,000,000. At this point, we lack sufficient information to make these determinations.

with the efforts of the Council, formed the Toyota Dealers Alliance to continue negotiations with NET. Following unsuccessful attempts to change NET's transportation policy, the Dealers Alliance filed a complaint with the Federal Trade Commission in July 1976 alleging an illegal tie of the sale of automobiles to the sale of delivery services. The present action was commenced on January 30, 1976.

Defendants make two principal arguments in opposition to plaintiffs' motions. First, they contend that plaintiffs are unlikely to succeed on the merits **[**12]** for three reasons: (1) that a *Section 1* violation requires **[*980]** a conspiracy and after dismissal of TMS there is no basis for a conspiracy finding; (2) that delivery services and automobiles are a single product, a delivered car, and thus there can be no unlawful tie; and (3) that even if automobiles and delivery services are separate products, there is no proof that plaintiffs suffered any injury as a direct result of the tie since plaintiffs have not shown that defendants "coerced" them into purchasing the two in tandem. Second, defendants argue that in any event plaintiffs have failed to show that they are likely to recover damages in excess of the property they seek to attach. In the following analysis we discuss each argument separately.

I. Probability of Success on the Merits

A. Background

HN7[] A tying arrangement is "an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not purchase that product from any other supplier." *Northern Pac. R. Co. v. United States, 1958, 356 U.S. 1, 5-6, 78 S. Ct. 514, 518, 2 L. Ed. 2d 545*. Not all tie-ins fall within the Sherman Act's **[**13]** prohibition against a "contract, combination, . . . or conspiracy in restraint of trade . . . ." The theory of illegal tie-ins has evolved in response to the dual economic evils of tying: the tying arrangement harms competing sellers of the tied product by foreclosing them from access to the market for reasons having nothing to do with the merits of the tying seller's product, and harms buyers by restricting their range of choice in the tied product market. *Northern Pac. R. Co., supra, at 6, 78 S. Ct. 514*; *Times-Picayune v. United States, 1953, 345 U.S. 594, 605, 73 S. Ct. 872, 97 L. Ed. 1277*. The seller who enjoys a powerful position in the tying product market seeks to extend his economic power into the tied product market. Since demand for the tied product varies directly with demand for the tying product, the seller need only reduce the price of his tying product in order to increase sales of the tied product. In this manner he is able to reap his monopoly profit at the same time as gaining a foothold in the market for the tied product. It is this leverage made possible by the seller's strong economic position in the typing product market that offends antitrust values. *Times-Picayune, **[**14]** supra, at 614, 73 S. Ct. 872*; See, W. S. Bowman, Jr., Tying Arrangements and the Leverage Problem, 67 Yale L.J. 19 (1957).

Historically, ***HN8***[] courts have treated tying arrangements as Per se illegal. In order to establish an illegal tie, under the Per se theory, the plaintiff must prove (1) that tying and tied products are separate, *Fortner Enterprises v. U.S. Steel (Fortner I), 1969, 394 U.S. 495, 507-508, 89 S. Ct. 1252, 22 L. Ed. 2d 495*, (2) that the defendant has sufficient economic power with respect to the tying product appreciably to restrain free competition in the market for the tied product, *Fortner Enterprises (Fortner I), supra, at 499-500, 89 S. Ct. 1252*; *Northern Pacific R. Co., supra, 356 U.S. at 6, 78 S. Ct. 514*. It is also relevant to consider whether the seller's behavior follows the general pattern found unacceptable in earlier tying cases. *Kentucky Fried Chicken v. Diversified Packaging, 5 Cir. 1977, 549 F.2d 368, 375*.

HN9[] Courts have developed two inroads on the Per se doctrine in tying cases. Some courts have expanded the concept of two separate products by permitting business justifications for aggregation of the products to enter into the single product analysis. See, **[**15]** *Dehydrating Process Co. v. A. O. Smith Corp., 1 Cir. 1961, 292 F.2d 653, 655-57*, Cert. denied 1961, *368 U.S. 931, 82 S. Ct. 368, 7 L. Ed. 2d 194*; Forrest v. Capital Buildings & Loan Assn., E.D.La.1974, 385 F. Supp. 831, 838-39, Aff'd per curiam, 5 Cir. 1974, *504 F.2d 891*, Cert. denied, 1975, *421 U.S. 978, 95 S. Ct. 1980, 44 L. Ed. 2d 470*; *Automatic Radio Mfg. Co. v. Ford Motor Company, D.Mass.1965, 242 F. Supp. 852, 856-57*; *United States v. Jerrold Electronics Corporation, E.D.Pa.1960, 187 F. Supp. 545, 558-60*, Aff'd per curiam 1961, *365 U.S. 567, 81 S. Ct. 755, 5 L. Ed. 2d 806*; L. A. Sullivan, The Law of Antitrust, 443 (1977). **[*981]** By holding that a challenged arrangement constitutes only a single product, courts have avoided the strictures of the Per se approach entirely, even though at times producing rather unusual results. See, e.g., Jerrold Electronics Corporation, supra (components of antenna system are single product during start-up phase of business but separate products at a later stage). A second line of attack, which is often not clearly distinguished from the first, takes the form of increasing the availability of affirmative defenses to a liability finding. See, **[**16]** Kentucky Fried Chicken, supra, at 376-78; Northern v. McGraw-Edison Co., 8 Cir. 1976, 542 F.2d 1336, 1347, Cert. denied 1977, *429 U.S. 1097, 97 S. Ct. 1115, 51 L. Ed. 2d 544*; Baker v. Simmons Company, 1 Cir. 1962, 307 F.2d 458; Jerrold Electronics Corporation, supra, at 556-58; Annot., 14 A.L.R.Fed. 458, 492, 495 (1973). Although these two approaches are often confused, there is an important difference. The plaintiff has the burden of proof on all issues implicated in the single product determination, whereas the defendant has the burden of proof with respect to each affirmative defense. In our opinion, there is no need in the instant case to sort out who should bear the burden as to each issue in this case, See generally, M. E. Ross, The Single Product Issue in Antitrust Tying: A Functional Approach, 23 Emory L.J. 963, 989-992, 1011-14, since it appears likely that even if plaintiffs were assigned the burden of proof on all issues, they would still prevail.

HN10[] In addition to the elements of the Per se doctrine already discussed, the plaintiff in a private antitrust action must also show as part of his case in chief that he was injured by the challenged practice. See, *Ford Motor Co. **[**17]** v. Webster's Auto Sales, Inc., 1 Cir. 1966, 361 F.2d 874, 883*. Once the prima facie case is established the defendant may respond with several affirmative defenses based on limited business justifications. Finally, the plaintiff's failure to prove all elements of the Per se theory does not foreclose his antitrust claim; the challenged practice must then be examined according to the rule of reason in order to determine if a violation of Section 1 of the Sherman Act has nevertheless occurred. Fortner Enterprises (Fortner I), supra, 394 U.S. at 499-500, 89 S. Ct. 1252.

It should also be noted that ***HN11***[] a Section 1 violation does not require a conspiracy, to which the multitude of Section 1 tying cases involving a single seller of tied and tying products amply attests. See generally, Northern Pac. R. Co., supra; Times-Picayune, supra; International Salt Co. v. United States, 1962, 332 U.S. 392, 68 S. Ct. 12, 92 L. Ed. 20. "Tying arrangements are condemned under (Section 1) as "contracts in restraint of trade.' " Baker, supra, at 467. In the instant case, the required element of concerted action is supplied by the existence of the vertical tie-in contract containing the tie-in clause, Viz., **[**18]** Article III, PP 1, 2 of the Toyota Dealer Sales and Service Agreement, as interpreted and enforced by NET. Bogosian v. Gulf Oil Corporation, E.D.Pa.1975, 393 F. Supp. 1046, 1048, 1048 n. 3, Rev'd on oth. grds., 3 Cir. 1977, 561 F.2d 434, Cert. denied, 1978, *434 U.S. 1086, 98 S. Ct. 1280, 55 L. Ed. 2d 791*; See, Osborn v. Sinclair Refining Company, 4 Cir. 1963, 324 F.2d 566, 573; Cf., United States v. Parke, Davis & Co., 1959, 362 U.S. 29, 44-47, 80 S. Ct. 503, 4 L. Ed. 2d 505; United States v. Schrader's Son, Inc., 1920, 252 U.S. 85, 99-100, 40 S. Ct. 251, 64 L. Ed. 471; Ford Motor Co., supra, at 879; Sum of Squares, Inc. v. Market Research Corp. of Am., S.D.N.Y.1975, 401 F. Supp. 53, 55-56. In Solomon v. Houston Corrugated Box Co., Inc., 5 Cir. 1976, 526 F.2d 389, upon which defendants rely, the court expressly found that the contract between the two defendants was "not restrictive in any sense," Id., at 394. This answers defendants' argument that plaintiffs cannot assert a Section 1 violation following the dismissal of TMS as a party.

B. Is there a tie?

Having carefully examined the parties' arguments on this important issue, the court concludes that Toyota automobiles and delivery **[**19]** services are two separate products **[*982]** for purposes of determining a Section 1 violation. Because the parties devoted so much attention to this issue, we will present our analysis in some detail.

One initial point deserves special mention. Labeling a product aggregation does not involve a process of discovery; there are no a priori, determinate categories of single products that might serve as templates against which to measure the particular product configuration at issue. Any such judgment is basically normative, requiring an answer to an essentially prescriptive question: should the seller be forced to market the products separately?

Standards for analyzing a product aggregation have been developed by only a few courts. See, e.g., Siegel v. Chicken Delight, 2 Cir. 1971, 448 F.2d 43, 47-49; Kugler v. AAMCO Automatic Transmissions, Inc., D.Minn.1971, 337 F. Supp. 872, 874-76, Aff'd 8 Cir. 1972, 460 F.2d 1214; Jerrold Electronics Corporation, supra at 559. See generally, 2 Callman, Unfair Competition, Trademarks and Monopolies, § 38.2(b)(1)(b) (3d ed. 1969. Supp.1977). In

Siegel, the challenged arrangement involved the tying of certain supplies to the sale of franchise licenses. **[**20]** An important issue was whether a license could ever be a separate tying product. The court summarized the necessary inquiry in the following terms:

> In determining whether an aggregation of separate items should be regarded as one or more items for tie-in purposes in the normal case of sales of products, the courts must look to the function of the aggregation. Consideration is given to such questions as whether the amalgamation of products resulted in cost savings apart from those reductions in sales expenses and the like normally attendant upon any tie-in, and whether the items are normally sold or used as a unit with fixed proportions. *448 F.2d at 48*.

Jerrold Electronics Corporation sets forth more specific guidelines: (1) whether other members of the industry sell the products separately, (2) whether versions of the alleged single product differ in significant respects, (3) whether the customer is charged separately for the products, and (4) whether any components of the alleged single product are sold separately. *Id. at 559*. Kugler used two approaches to determining whether advertising, the tied product, and an AAMCO franchise license, the tying item, were one product **[**21]** for antitrust purposes. The court first applied the four Jerrold Electronics standards, and then it looked to the industry as a whole to determine if the products had been or could be sold separately. *337 F. Supp. at 875*.

HN12[] These three cases support a four-pronged analysis: (1) examination of the product structure itself, (2) investigation of the defendant's product marketing practices, (3) consideration of the behavior of other industrial sellers and (4) analysis of the efficiencies gained by and the business justifications for the product combination. We will discuss each factor in turn.

An examination of the product structure in the instant case reveals several important points. The automobile product and the delivery service do not naturally merge into a third identifiable unit. Moreover, the finished Toyota automobile delivered at the Post of Boston is able to perform all the functions for which it was designed. Delivering it to the dealer's location adds nothing to the automobile Qua automobile. In short, there is no relationship between the car and its delivery inherent in the nature of the automobile itself and thus no conceptual barrier to treating the two as separate products. **[**22]** See, *Fortner Enterprises v. U. S. Steel (Fortner I), 1969, 394 U.S. 495, 508-09, 89 S. Ct. 1252, 22 L. Ed. 2d 495*.

NET, however, sold its transportation services in a fixed one-to-one proportion to the sale of its cars. The dealer was not required to purchase carrying services from NET above and beyond those needed to move the cars that he bought. Although in many cases this factor might offer some support for a single product conclusion, See, D. Turner, The Validity of Tying Arrangements Under the ***Antitrust Law***, 72 Harv.L.Rev. 56, 68-72 (1958), the facts of this case greatly weaken its persuasive force. The **[*983]** only need dealers might have had for NET carrying services in addition to car delivery from Boston was the occasional transportation of vehicles sold or exchanged between dealers from one dealer's location to the other's premises. The initial delivery of automobiles thus represents the overwhelming segment of dealer demand for car delivery services.

NET's product marketing approach is also relevant. Although the dealer pays one price for the car, the carrying charge is an item separable from the cost of the vehicle. The dealer can quote the ultimate consumer a base **[**23]** price for the car that does not include carrying and handling charges. The fact that these costs are kept distinct suggests that both the dealer and NET treated the car and its delivery as separate items. See, *Jerrold Electronics Corporation, supra.* On the other hand, there is no evidence that NET sold its transportation services to other than its franchised dealers and for purposes other than the transportation of its automobiles.

Much of the controversy surrounding this issue focussed on the third factor, the significance of intra-industry comparisons. Defendants submitted evidence suggesting that throughout the domestic automobile industry distributors control the transportation of vehicles to their dealers. The general acceptance of this aggregated product configuration, defendants insist, is strong support for the existence of a single product. We disagree. A favorable intra-industry comparison, although relevant, is by no means conclusive on the single product issue. See, *Jerrold Electronics Corporation, supra, at 559*. All firms in an oligopolistic market, for example, might use the same economically inefficient, but financially lucrative, tie-in. If the uniformity of the practice **[**24]** were determinative, a clearly suspect tying arrangement would often be insulated from Per se scrutiny.

The comparison that defendants offer suffers from a serious weakness. Their evidence shows that although automobile manufacturers do control delivery of their vehicles, all except for Subaru employ independent common carriers to transport the cars. [5] NET uses its own trucks. This is a crucial distinction. Defendants are wrong in arguing that the only important question is who ought to have the right to control transportation services. Of equal importance is how that control is exercised. ***HN13***[] The single product determination frequently hinges as much on the way the two products are coupled and on the character of each product as on the fact that their sales are connected at all. See, e.g., *Kentucky Fried Chicken, supra* ; *Crawford Transport Company v. Chrysler Corporation, 6 Cir. 1964, 338 F.2d 934*, Cert. denied, 1965, *380 U.S. 954, 85 S. Ct. 1088, 13 L. Ed. 2d 971*; *Miller Motors, Inc. v. Ford Motor Company, 4 Cir. 1958, 252 F.2d 441, 446*; Forrest v. Capital Building & Loan Assn., E.D.La.1974, 385 F. Supp. 831, Aff'd per curiam, 5 Cir. 1974, *504 F.2d 891*, Cert. denied 1975, *421 U.S. 978,* ***[**25]*** *95 S. Ct. 1980, 44 L. Ed. 2d 470*. The ultimate concern of antitrust theory is with the anti-competitive effect generated by particular economic practices. Because different ways of tying two products can produce different market effects, they can also have different antitrust consequences.

In this case, NET's practice of using its own trucks has a potentially more serious economic impact than does an approach which employs independent common carriers and, therefore, NET gains no support from the marketing practices of other automobile distributors. First, the use of independent common carriers encourages the development of a market in the tied product. NET's practice, on the other hand, removes a substantial segment of the demand for delivery services from the competition of that market. Secondly, automobile manufacturers who use independent carriers can allow dealers to suggest potential carriers for the distributor's **[**26]** approval, perhaps according to a set of pre-established **[*984]** criteria. This kind of arrangement, although superficially similar to NET's practice, permits more dealer freedom than does NET's scheme, and dealer freedom of choice is an important value protected by tie-in law.

With respect to the fourth factor implicated in single product analysis the business justifications for one product treatment defendants suggest two reasons for distributor control over delivery. First, they insist that distributor selection of carriers is necessary to ensure timely delivery of a first class product for resale to the consumer. The reputation of Toyota and thus the livelihood of the manufacturer and distributor is made or broken at the dealer level, and therefore the distributor has a strong interest in supervising the dealer's management of his business in order to ensure product quality. Second, defendants suggest that NET's delivery system enhances efficient marketing of Toyota cars by promoting competition among dealers located at varying distances from Boston. Without a centralized delivery scheme, they argue, dealers closest to Boston would have a decided competitive advantage, since **[**27]** their transportation costs would be less than those of outlying dealers.

Business justifications for aggregated product treatment, however, have been interpreted very narrowly. Cf., *Standard Oil Co. v. United States, 1949, 337 U.S. 293, 306, 69 S. Ct. 1051, 93 L. Ed. 1371*. Consider, for example, defendants' first justification: the preservation of customer goodwill and product reputation. Although some courts use quite general terms when discussing this issue, the cases involve factual situations in which the tying arrangement at stake was the only way that the seller could ensure the maintenance of goodwill. See, e.g., *Baker, supra* (mattress company's leasing of signs to motels, advertising company's mattresses available in motel, necessitated requirement that motel stock only company's mattresses); *Dehydrating Process Co., supra, at 657* (tie of silo to sale of unloader justified by customer complaints of improperly functioning unloader when bought separately and absence of any other supplier manufacturing silos to defendant's specifications). And recently some courts have made these limitations explicit [6] *Kentucky Fried Chicken, supra, at 376*; *Northern, supra, 356 U.S. 1, 78 S.* ***[**28]*** *Ct. at 519*.

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[5] Prior to 1972, NET itself had subcontracted the delivery function to independent common carriers.

[6] This trend appears to be most marked in those opinions which analyze justifications as affirmative defenses; however, their teachings apply with equal force to the single product issue.

Kentucky Fried Chicken, a case upholding an approved source system by which the franchisor exercised some control over supply sources used by its franchisees, adopted a least restrictive alternative-type analysis to confine the goodwill defense:***HN14***[]

> (T)he franchisor is free to demonstrate that the tie constitutes a necessary device for controlling the quality of the end product sold to the consuming public. . . . As part of this defense, however, the franchisor must establish that the tie constitutes the method of maintaining quality that imposes the least burden on commerce. If there are less burdensome alternatives, a franchisor is obligated to employ them rather than the tie. *549 F.2d at 376*.

The facts of the instant case do not support such a compelling business justification. Defendants have suggested **[**29]** no reason why NET could not merely issue a list of common carrier requirements to dealers and permit dealers to select carriers that conform to those requirements. In *Northern v. McGraw-Edison Co., 8 Cir. 1976, 542 F.2d 1336*, Cert. denied 1977, *429 U.S. 1097, 97 S. Ct. 1115, 51 L. Ed. 2d 544*, the court struck down an arrangement whereby the purchase of dry cleaning equipment from the seller was tied to the sale of the dry cleaning franchise. The Northern court recognized a goodwill-product quality defense but limited it to those situations in which substitutes for the tied product had to comply with such precise and detailed specifications that other manufacturers might not be able to market a product functionally compatible with the tying product. *Id. at* ***[*985]*** *1347*. Defendants' product quality argument failed to meet this exacting standard. It is unlikely that NET will fare any better with its tying arrangement.

Even if central control over delivery proved to be necessary, there are less restrictive alternatives available to NET. Cf., *Kentucky Fried Chicken, supra at 376*. *Crawford Transport Company, supra*, illustrates one such alternative. Like Chrysler in the Crawford case, **[**30]** NET could assume control over the selection of independent common carriers according to a set of established standards. Furthermore, both dealers and independent carriers could suggest candidates, and NET might then select among them, perhaps limiting the total number. We do not suggest that such an arrangement would not violate *Section 1* under any circumstances, but it does seem likely that it would not be Per se illegal.

The second NET interest, promoting inter-dealer competition, will also not justify the restrictive tying arrangement in the instant case, even assuming substantial inter-dealer competition. All centrally controlled delivery systems further this interest to the same extent, and as discussed above, there are less burdensome alternatives to the system NET has selected.

Thus, each of the four prongs of single product analysis outlined above points in the direction of treating new cars and delivery services as two separate products. See, *BBD Transportation Co., Inc. v. U.S. Steel Corp., N.D.Calif.1976, 1976-2 Trade Cases (CCH) P 61079 at 69874*. See generally, M. E. Ross, 23 Emory L. J., Supra, at 1014; Note, Product Separability: A Workable Standard to Identify Tie-In **[**31]** Arrangements Under the Antitrust Laws, 46 S.Calif.L.Rev. 160 (1972). Cost savings seem unlikely to result from jointly selling an automobile and a service which is entirely independent of the manufacture of the car to which it is tied. See, D. Turner, 72 Harv.L.Rev., Supra, at 71-72. Indeed, dealer objections to the arrangement in the instant case suggest that it might not be an economically efficient approach.

Defendants place considerable reliance on *Crawford Transport Co. v. Chrysler Corporation, E.D.Ky.1962, 235 F. Supp. 751*, *Aff'd 6 Cir. 1964, 338 F.2d 934*, Cert. denied 1965, *380 U.S. 954, 85 S. Ct. 1088, 13 L. Ed. 2d 971*, quoting extensively from the opinion of the District Court. Holding that Chrysler's selection of independent common carriers to transport cars sold to its dealers did not offend *Section 1* of the Sherman Act, the District Court reasoned that Chrysler's strong interest in seeing to it that cars are delivered in a form attractive to consumers necessitate treating transportation as "part of the sale of an automobile", *235 F. Supp. at 753, 755*. The District Court did not devote an in-depth analysis to this issue and in particular did not consider less restrictive **[**32]** alternatives to the approach employed by Chrysler. Moreover, as the opinion of the Court of Appeals made clear, the Crawford arrangement differed significantly from the arrangement in the instant case. In Crawford, independent common carriers were used to haul the cars; Chrysler did not profit in any way from the provision of transportation services and, therefore, did not use its economic position in the automobile market as leverage to invade the car delivery market. NET, on the other hand, used its own trucks and, as plaintiffs claim, profited from providing delivery services. Although the Court of Appeals stressed the economic necessity for central control of automobile delivery, *338 F.2d at 939*, it did not draw the same conclusion from this observation as the District Court had done, Viz., that it supported a single product inference. Instead, the Court of Appeals based its conclusion on the absence of any economic gain to Chrysler. Cf., *Ohio-Sealy Mattress Mfg. Co. v. Seely, Inc., 7 Cir. 1978, 585 F.2d 821, 835*, Cert. denied, *440 U.S. 930, 99 S. Ct. 1267, 59 L. Ed. 2d 486*.

In response to our question at the hearing, both sides submitted briefs on the issue of who had title to **[**33]** the automobiles before acceptance by the dealers. Defendants argue that NET retained title, while plaintiffs contend that title passed to the dealers at some point prior to completion of delivery. We doubt whether title has any relevance **[*986]** to the existence of an illegal tie. We have been unable to locate any case which turns on this factor, and neither party offers any argument on the merits based on title. In our opinion, enforcement of the antitrust laws should not depend on the technical requirements and ambiguities of "title".

If NET were responsible for damage to the automobiles in transit (whether or not it had formal "title"), it might be reasonable to allow NET considerable latitude in arranging for safe delivery. However, in this case plaintiffs have shown to our satisfaction a reasonable likelihood that dealers were responsible for transit damage to cars during a good portion of the time period spanned by plaintiffs' claims. Defendants' argument to the contrary based on the September 8, 1978 affidavit of Mr. Benson DeWitt, in which he claims that NET reimbursed dealers $ 18,762.91 for repairs dealers made as a result of car damage at Boston or in transit during **[**34]** the period 1975 through 1977, overlooks the fact that NET was then both seller and common carrier and as common carrier, not as seller, was responsible for the loss.

Even if NET, as seller, were responsible for damage, it does not follow that NET was justified in tying delivery to cars. As we discussed Ante, there are several less restrictive alternatives that adequately protect product quality in this case.

From the foregoing analysis it appears that NET's arrangement conforms to the classic model of a tie-in. There is a tying product, Toyota automobiles, and a tied product, automobile delivery, and there are markets in both the tied product and the tying product. NET, seller of the tying product, also sold the tied product, Cf., *Kentucky Fried Chicken, supra, at 377*; *Crawford Transport Company, supra*; *Miller Motors, Inc., supra, at 446*, and dealers had to purchase the tied product from NET. Finally, NET's arrangement was authorized by neither state nor federal law. Cf., *Forrest v. Capital Buildings & Loan Assn., supra, at 837*.

This is not a case of a company unilaterally extending itself into a new market by horizontal or vertical integration, which without more does not generally **[**35]** offend *Section 1*. When a firm integrates horizontally or vertically, it enters the new market as a competitor, and the increase in competition is plainly desirable. In the instant case, however, NET did not enter the common carrier market as a competitor. To the contrary, it exploited its franchisees' dependence to secure its own economic position by creating a steady demand for its services. Although Toyota automobiles were an integral feature of the franchise arrangement, delivery services were not. Thus, NET's arrangement suffers from the evils common to all illegal ties.

C. Seller's Economic Power

After *Northern Pac. Ry. Co. v. United States, 1958, 356 U.S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545*, ***HN15***[] plaintiffs in a tying case need not prove a tying product monopoly but only that defendants enjoyed sufficient economic power in the tying product market appreciably to restrain free competition in the tied product market. *Id., at 11, 78 S. Ct. 514*; Accord, *Fortner Enterprises v. U.S. Steel (Fortner I), 1969, 394 U.S. 495, 502-03, 89 S. Ct. 1252, 22 L. Ed. 2d 495*. An appreciable restraint is shown if the seller exercises some control over some of the buyers in the market and enjoys an advantage **[**36]** over competing tying product suppliers. *U.S. Steel Corp. v. Fortner Enterprises (Fortner II), 1977, 429 U.S. 610, 621-22, 97 S. Ct. 861, 51 L. Ed. 2d 80*; *Fortner Enterprises (Fortner I), supra, 394 U.S. at 503, 89 S. Ct. 1252*.

The tying product market in this case is the market for new automobiles foreign and domestic and the relevant buyers are dealers in those automobiles. By virtue of its franchise agreements, NET controlled a group of those dealers, namely those who sold Toyota automobiles in the five state New England area. It thus appears likely that plaintiffs will be able to satisfy the Fortner Standards.

[*987] D. "Not Insubstantial" Amount of Interstate Commerce

In view of the very liberal interpretation given this element of the tying test by the Supreme Court, it is quite probable that plaintiffs will be able to demonstrate that "a total amount of business, substantial enough in terms of dollar-volume so as not to be merely De minimus is foreclosed to competitors by the tie . . . ." *Fortner Enterprises (Fortner I), supra, at 501, 89 S. Ct. at 1258*. Other common carriers engaged in the new vehicle delivery business in New England were foreclosed from access to that **[**37]** portion of the tied product market represented by the sale of Toyota vehicles to regional Toyota dealers.

E. Causation

It appears likely from the affidavit evidence submitted by both parties that plaintiffs have suffered injury in the form of overcharges for new car delivery. Since NET changed its transportation policy in 1972, the freight and handling charge has been a hotly disputed issue between the dealers, acting first through the Toyota Dealer Council and then through the Toyota Dealer Alliance, and NET. Furthermore, following the termination of NET's distributorship franchise and TMS' assumption of New England distribution, TMS, making use of independent common carriers, reduced the delivery cost from the $ 139.95 per car charged by NET to $ 77.50 per car. The marked difference between these two figures, plaintiff maintains, can only be explained as an overcharge by NET.

Defendants argue that TMS is able to charge less for delivery because, by eliminating NET's distributorship, TMS earns more profit on each automobile. Even assuming TMS now makes more from the sale of an automobile, it is not apparent to this court, and defendants have not explained, why TMS should choose **[**38]** to absorb some of its legitimate delivery costs instead of charging the entire $ 139.95 to its dealers. It seems probable both from the long history of negotiations between NET and its dealers and the unexplained reduction in delivery charges following the entry of TMS as the New England distributor that NET had overcharged dealers for its delivery services. [7.]

Defendants argue further that **[**39]** even if plaintiffs could prove their claims of injury resulting from NET's delivery overcharges, they are still unable to demonstrate that the challenged tying arrangement was a material cause of that injury, since dealers voluntarily accepted NET's exclusive control over vehicle delivery. ***HN16***[] In a private antitrust action, the plaintiff, in addition to proving a violation and an injury, must also show that the violation was the direct and material cause of the injury he suffered. See, *Ford Motor Co. v. Webster's Auto Sales, Inc., 1966, 361 F.2d 874, 883*. Plaintiff's burden on the causation issue is not a heavy one; he need only establish the causal connection "with reasonable probability" and to "a fair degree of certainty." Id.

As we understand defendants, they argue that in order to establish causation, buyers in a private antitrust action must prove that they were coerced by the seller to purchase the tied product. It is unclear at precisely which point proof of coercion is relevant. Often it has been treated as a factor in determining the existence of a tie. In other cases it has entered into the liability analysis as an element relevant to a seller's possession of market power. **[**40]** And on occasion coercion has been viewed as a requirement of plaintiff's standing under Section 4 of the Clayton Act, that is, to establish that plaintiff was harmed by the **[*988]** tie-in. Our analysis bears on the relevance of coercion to all facets of this case.

[7.] In oral argument, defendants contended that the dealers suffered no injury at all because they passed on any overcharges to consumers. In general defendants who are direct purchasers cannot make use of a pass-on theory to defend against a private antitrust damages action. *Illinois Brick v. Illinois, 1977, 431 U.S. 720, 97 S. Ct. 2061, 52 L. Ed. 2d 707*; *Hanover Shoe, Inc. v. United Shoe Machinery Corp., 1968, 392 U.S. 481, 88 S. Ct. 2224, 20 L. Ed. 2d 1231*. Nor is it likely that this case falls within any exception to the Hanover Shoe doctrine, if any exists. See, *Illinois Brick, supra, 431 U.S. at 743-45, 97 S. Ct. 2061*.

We are impressed with the array of considerations arguing against a coercion requirement in a case like the instant one involving an express tie. As the court in *Bogosian v. Gulf Oil Corp., 3 Cir. 1977, 561 F.2d 434*, Cert. denied, 1978, *434 U.S. 1086, 98 S. Ct. 1280, 55 L. Ed. 2d 791*, explained:

> It has never been an element of plaintiff's case to disprove, nor even a permitted defense, that the tied product is superior to others available on the market, or that even without the tie requirement plaintiff would have purchased the tied product. The short answer to defendants is, and always has been, that without a tie requirement, "i?f the manufacturer's brand of the tied product is in fact superior to that of competitors, the buyer will presumably choose it anyway." *Standard Oil v. United States, 337 U.S. 293, 306, 69 S. Ct. 1051, 1058, 93 L. Ed. 1371 (1949)*.

561 F.2d at 449

Distinguishing an earlier **[**41]** case, *Ungar v. Dunkin' Donuts of America, Inc., 3 Cir. 1976, 531 F.2d 1211*, Cert. denied, 1976, *429 U.S. 823, 97 S. Ct. 74, 50 L. Ed. 2d 84*, on which numerous courts have relied to support the coercion requirement in varied fact situations, the Bogosian court held, at 450, that a plaintiff need only show that the seller expressly conditioned the sale of the tying product on the purchase of the tied product. Whereas in Ungar coercion was relevant to proving the existence of the tie because the conditional nature of the sale was not apparent from the express agreement or from the operation of its terms, the challenged gas station leases in Bogosian expressly required the lessee to purchase specified amounts of defendant's gasoline. The instant case is on all fours with Bogosian : the conditioning of the sale of cars on the purchase of delivery services from NET is manifest in the provisions of the dealer franchise agreement, a standard contract that TMS required NET to sign with all its dealers.

Bogosian emphasized that ***HN17***[] coercion has no relevance to a determination of antitrust liability; it is relevant, if at all, only to determining whether a tie-in exists, that is, whether the seller **[**42]** has conditioned the sale of one product on the purchase of another. Once a tie is established, liability follows if the other two elements of the Per se rule power in the tying product market and foreclosure of a not insubstantial amount of interstate commerce in the tied product are satisfied. Neither of these two elements incorporates a coercion requirement. See, *Fortner Enterprises v. U.S. Steel (Fortner I), 1969, 394 U.S. 495, 499-500, 89 S. Ct. 1252, 22 L. Ed. 2d 495*; *United States v. Loew's Inc., 1962, 371 U.S. 38, 83 S. Ct. 97, 9 L. Ed. 2d 11*; *Northern Pac. R. Co. v. United States, 1958, 356 U.S. 1, 78 S. Ct. 514, 2 L. Ed. 2d 545*. In *United States v. Loew's, supra*, for example, the Court noted that "the requisite economic power may be found on the basis of either uniqueness or consumer appeal, . . ." *371 U.S. at 45 n. 4, 83 S. Ct. at 102*. Such an inference does not permit an inquiry into individual coercion.

The Supreme Court's Per se test is designed to eliminate detailed evidentiary inquiries of the type that would be required to prove individual buyer coercion. The advisability of this mechanical rule-oriented approach rests on the Supreme Court's judgment right or wrong **[**43]** that tying arrangements offer the consumer little benefit and much potential harm. It is the nature of the test that it focuses not on the buyer's state of mind but rather on the seller's actions; tying doctrine seeks to deter a seller's conduct in unnecessarily conditioning the sale of one product on the purchase of another. *Bogosian, supra, at 450*. See generally, A. D. Austin, The Individual Coercion Doctrine in Tie-In Analysis: Confusing and Irrelevant, 65 Calif.L.Rev. 1143 (1977).

HN18[] Coercion may have some relevance for proving the tie in some situations, but in a case like the instant one in which the tie is manifest in the express terms of a standard form contract, independent proof of individual coercion is entirely unnecessary. This appears to be the approach of a majority **[*989]** of courts. See, e.g., *Bogosian, supra*; *Moore v. Jas. H. Matthews & Co., 9 Cir. 1977, 550 F.2d 1207, 1216-17*; *Hill v. A-T-O, Inc., 2 Cir. 1976, 535 F.2d 1349, 1355*; *Schuler v. Better Equip. Launder Center, Inc., D.Mass.1977, 74 F.R.D. 85, 87*; *AAMCO Automatic Transmissions, Inc. v. Tayloe, E.D.Pa.1976, 407 F. Supp. 430, 434-35*; *Thompson v. T. F. I. Companies,* Inc., N.D.Ill.1974, 64 F.R.D. 140, 146; **[**44]** Abercrombie v. Lum's, Inc., S.D.Fla.1972, 345 F. Supp. 387, 390. But see, Hehir v. Shell Oil Co., D.Mass.1976, 72 F.R.D. 18, 21-22. [8.]

[45]** II. Additional Requirements

Plaintiffs have succeeded in demonstrating a probability of success on the merits. In order to prevail on their motions, however, plaintiffs must also show that they will probably prove damages in excess of the amount of the property they seek to encumber. Moreover, in order to obtain a preliminary injunction, plaintiffs must offer a bond in an amount sufficient to protect the defendants from their losses should this court's ruling be reversed on appeal.

A. Damages in Excess of Attachment

Plaintiffs calculate their probable damages according to a formula that converts the difference between NET's delivery charge before the TMS take-over and TMS's delivery charge after the take-over into a percentage of the NET delivery charge. This percentage, plaintiffs contend, represents the rate of NET overcharge for each automobile. They then apply the percentage to each of the NET delivery prices over various periods of NET distributorship and arrive at a grand total by multiplying the resulting figures by total cars sold during the corresponding periods and summing over time. After trebling, this total, according to plaintiffs' calculations, is more than twelve **[**46]** million dollars, an amount greatly exceeding the amount of their attachment, two million dollars of real property and five million dollars of assets. [9.]

Plaintiffs' damage formula, in our opinion at this stage of the proceedings, is a reasonable one, especially in light of the liberal standards controlling proof of damages in private antitrust actions. See, Haverhill Gazette Company v. Union Leader Corporation, 1 Cir. 1964, 333 F.2d 798, 804-807. Defendants' principal argument in opposition to the use of this method is that it fails to take into account the larger profit TMS enjoys from the sale of each car. As we noted at an earlier point in this **[**47]** opinion, we are unable to comprehend why TMS would absorb part of its delivery cost when it could charge the dealers the full amount.

We are satisfied that plaintiffs have established a reasonable likelihood that they will recover damages in excess of the amount of their attachment. We therefore **[*990]** approve the attachment in the amount of seven million dollars. However, we are unable at this time to determine the value of the property encumbered by plaintiffs' motion for a preliminary injunction. In a contemporaneous procedural order we are calling for a stipulation of the parties or affidavits bearing on this remaining question.

B. Posting of Security

Plaintiffs must post a bond sufficient to hold the defendants harmless if it turns out that the preliminary injunction was erroneously granted; setting the precise amount of the bond lies within the discretion of the issuing court.

[8.] Even if proof of individual coercion were an element of a tying violation, it appears from an examination of the affidavit evidence that there is a reasonable likelihood that plaintiffs would prevail on this issue. Only in 1972 did NET switch from hiring independent common carriers to using its own transportation facilities. Dealers who voluntarily accepted centralized delivery with the use of independent contractors could not also be deemed to have agreed to delivery by NET itself. The switch-over appears to have been a unilateral NET decision pursuant to the general terms of the standard dealer franchise agreement reserving the seller's right to control delivery. Dealers were not allowed to negotiate this new arrangement; they could either accept it or risk termination of their franchise. See, Toyota Dealer Sales and Service Agreement, Article XIII, P B(3) (most recent agreement) (Pltff's Ex. 1 to 5/10/76 Anderson Dep). Considering the large investment of each dealer in his ongoing business and the fact that no dealer could purchase Toyotas from another distributor, the latter alternative was hardly a realistic one. NET, therefore, exercised its power in the tying product market, its economically powerful position vis a vis its dealers, to coerce compliance with the new delivery system. Cf., F. T. C. v. Texaco, 1968, 393 U.S. 223, 226-29, 89 S. Ct. 429, 21 L. Ed. 2d 394.

[9.] We have considered the results of the informal survey conducted by Ronald A. Joseph, President of NET, in December 1976, just prior to commencement of this litigation. 1/6/77 Affidavit of R. A. Joseph. The survey purports to indicate that 22 of 75 dealers did not object to the NET delivery scheme. We attach little weight to this highly informal, self-serving study.

Fed.R.Civ.P., Rule 65(c); *N. E. Airlines v. Nationwide Charters & Conventions, Inc., 1 Cir. 1969, 413 F.2d 335, 338*; *Continental Oil Company v. Frontier Refining Company, 10 Cir. 1964, 338 F.2d 780, 782-83*. Unlike Continental Oil Company, on which plaintiffs rely in support of their contention that **[**48]** a bond is not required, there is no evidence in the instant case that plaintiffs have sufficient assets to respond in damages if either of the defendants is injured by reason of the wrongful issuance of this injunction.

Due to the absence of any estimates relating to the value of the stock and assets involved in this motion and damages which might result from the contemplated restraint on their alienation during the pendency of these proceedings, we are unable to determine a proper amount for the bond. Therefore, in the contemporaneous procedural order mentioned above, we are also calling, conditionally, for briefs on the issue of the amount of security which should be required and evidence of the total value of the stock and assets referred to in plaintiffs' motion under *Fed.R.Civ.P., Rule 64*.

Bass v. Boston Five Cent Sav. Bank

United States District Court for the District of Massachusetts

September 28, 1979

Civ. A. Nos. 72-2282-C through 72-2889-C

Reporter

478 F. Supp. 741 *; 1979 U.S. Dist. LEXIS 9463 **; 1980-2 Trade Cas. (CCH) P63,383

Henry J. BASS et al. v. BOSTON FIVE CENT SAVINGS BANK.; Laurence CHAIT et al. v. WATERTOWN SAVINGS BANK.; Herbert FEINSTEIN et al. v. WALTHAM FEDERAL SAVINGS AND LOAN ASSOCIATION.; Nathan LISKOV et al. v. CAMBRIDGEPORT SAVINGS BANK.; Henry PLOTNICK et al. v. SUFFOLK FRANKLIN SAVINGS BANK.; Albert ZABIN et al. v. LEXINGTON TRUST CO.; Anna PANDISCIO v. SECURITY FEDERAL SAVINGS AND LOAN ASSOCIATION OF BROCKTON.; Anna PANDISCIO v. HOME OWNERS FEDERAL SAVINGS AND LOAN ASSOCIATION.

Core Terms

mortgage agreement, mortgagee, escrow, plaintiffs', complaints, mortgagors, summary judgment, deposits, cases, motions, banks, escrow account, conspiracy, allegations, mortgage, parties, class action status, class action, reciprocal, Antitrust, funds, extend credit, defendants', limitations, monthly, trusts

LexisNexis® Headnotes

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > General Overview

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

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Numerosity

HN1[] **Responses, Defenses, Demurrers & Objections**

Fed. R. Civ. P. 23(a) lists four prerequisites to a class action: (1) the class is so numerous that joinder of all members is impracticable; (2) there are questions of law or fact common to the class; (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and (4) the representative parties will fairly and adequately protect the interests of the class.

Civil Procedure > ... > Class Actions > Prerequisites for Class Action > Predominance

Civil Procedure > Special Proceedings > Class Actions > General Overview

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

HN2[] Prerequisites for Class Action, Predominance

Fed. R. Civ. P. 23(b) provides that a class action may be maintained if the requirements of *Fed. R. Civ. P. 23(a)* are satisfied and in addition: (1) the prosecution of separate actions would create a risk of establishing incompatible standards of conduct for the party opposing the class as a result of inconsistent or varying adjudications or that adjudication as to individual members would as a practical matter dispose of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protect their interests; or (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class thereby rendering injunctive or declaratory relief as to the whole class appropriate; or (3) the court finds that the questions of law or fact common to the members of the class predominate over any questions effecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

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

HN3[] Class Actions, Prerequisites for Class Action

Because the declaration of class representation is attended by serious consequences, the plaintiff has the burden of establishing compliance with *Fed. R. Civ. P. 23*. The plaintiff's complaint must allege the existence of facts which satisfy the requirements of *Rule 23*.

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

HN4[] Class Actions, Prerequisites for Class Action

A party seeking to utilize the class action format need not establish the merits of his or her case before a preliminary determination of the class action question can be made. Before an evidentiary hearing is afforded, the plaintiff must a minimal showing that his or her class action claims have substance.

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] Antitrust & Trade Law, Sherman Act

Parallel behavior itself does not constitute a Sherman Act offense. It is merely circumstantial evidence of the existence of a conspiracy which violates the Act and the probative value of such parallel behavior varies depending on the circumstances in which it is found.

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

HN6[] Pleadings, Rule Application & Interpretation

While a plaintiff is entitled to all favorable inferences, he or she is not entitled to build a case on the gossamer threads of whimsy, speculation and conjecture.

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Regulated Industries > General Overview

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

HN7[] **Antitrust & Trade Law, Sherman Act**

The antitrust laws do not prohibit combined lobbying for the purpose of influencing legislation.

Governments > Legislation > Effect & Operation > Prospective Operation

Governments > Legislation > Effect & Operation > General Overview

Governments > Legislation > Effect & Operation > Retrospective Operation

HN8[] **Effect & Operation, Prospective Operation**

Statutes have prospective effect unless the legislature clearly manifests its intention that the statute act retrospectively.

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Legislation > Statute of Limitations > Time Limitations

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

15 U.S.C.S. § 15b provides that any action to enforce any cause of action under *15 U.S.C.S. §§ 15* or *15a* are forever barred unless commenced within four years after the cause of action accrued.

Antitrust & Trade Law > Sherman Act > General Overview

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

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

The Sherman Act forbids the extension of market dominance over one product into the market for another product by making the purchase of the first product a condition of purchasing the second. The preliminary determination to be made at the outset of every tie-in case is whether two separate products are in fact involved.

Banking Law > Consumer Protection > Truth in Lending > Disclosure

Governments > Legislation > Statute of Limitations > Time Limitations

Banking Law > Consumer Protection > Truth in Lending > General Overview

Banking Law > Consumer Protection > Truth in Lending > Liability for Violations

Governments > Legislation > Statute of Limitations > General Overview

HN11[] **Truth in Lending, Disclosure**

The Truth in Lending Act (TILA), *15 U.S.C.S. § 1601 et seq.*, specifically exempts escrows for future payment of taxes from disclosure. *15 U.S.C.S. § 1605(e)(3)*, *12 C.F.R. § 226.4(e)*. Even if such costs were not exempt from disclosure, actions brought under the TILA are subject to a one year statute of limitations. *15 U.S.C.S. § 1640(e)*.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

HN12[] **Price Fixing & Restraints of Trade, Exclusive & Reciprocal Dealing**

Reciprocity is the policy of favoring one's customers in purchasing commodities sold by them.

Banking Law > ... > Bank Accounts > Trust Accounts > General Overview

Estate, Gift & Trust Law > Trusts > General Overview

Real Property Law > Financing > Mortgages & Other Security Instruments > Definitions & Interpretation

HN13[] **Bank Accounts, Trust Accounts**

A mortgagor who claims that the bank does not have the right to treat tax escrow funds as its own must show a clear understanding of that effect.

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James J. Myers, Paul F. Hannah, Gadsby & Hannah, Boston, Mass., for Waltham Federal Sav. and Loan Ass'n.

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Thomas E. Connolly, Albert P. Zabin, Michael E. Mone, Joseph Schneider, Boston, Mass., for Henry Plotnick.

Gael Mahony, Hill & Barlow, Boston, Mass., for Suffolk Franklin Sav. Bank.

Michael E. Mone, Joseph Schneider, Boston, Mass., for Albert P. & Judith Zabin.

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George L. Wainwright, Brockton, Mass., for Security Federal Sav. & Loan of Brockton.

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Opinion by: CAFFREY

Opinion

[*743] OPINION

In 1972 eight virtually identical actions were filed in this court. Each of the eight complaints alleged that a named defendant mortgagee bank had required, as a condition on the extension of credit under a mortgage agreement, that the plaintiff mortgagor property owners make monthly deposits in a tax escrow account with the defendant bank of 1/2 of the estimated annual real estate taxes on the mortgaged property. It was further alleged that although the defendant mortgagee bank enjoyed full use of the escrow funds until such time as the taxes became due to the taxing authority, it unlawfully refused to pay interest on the money held in escrow to the plaintiff property owner.

Count I alleged that the refusal to pay interest was the result of a conspiracy in the banking community in restraint of trade in violation of the Sherman Antitrust Act *15 U.S.C.A. § 1 Et seq.*

[3]** Count II alleged that the nonpayment of interest on the required escrow deposits was an illegal tie-in arrangement in violation of *15 U.S.C.A. §§ 1* and *2* and *12 U.S.C.A. § 1972*.

[*744] Count III alleged that as to mortgagors who became mortgagors after July 1, 1969, the defendant had failed to disclose the costs incident to the defendant mortgagee's refusal to pay interest on the tax escrow deposit, in violation of the Truth in Lending Act, *15 U.S.C.A. § 1601 Et seq.* (TILA).

Four judges of this Court who are also parties to mortgage agreements have disqualified themselves from sitting on a trial or any other proceeding in these cases because plaintiffs purport to bring these actions as representatives of all other mortgagors of the defendant mortgagee banks.

Inasmuch as the same law firm represented all plaintiffs and because the factual and legal issues set forth in the eight complaints were substantially similar, the cases were determined to be "related" under local rule 8(e)(2) and all were assigned to one judge in the interest of judicial economy.

Over a period of fifteen months plaintiffs amended their complaints to add Count IV which alleged that the non-interest **[**4]** paying escrow account is the result of a reciprocal agreement which plaintiffs were forced to enter as a result of defendants' exercise of monopoly power in violation of the federal ***antitrust law*** *15 U.S.C.A. §§ 1* and *2*. Plaintiffs in seven of the eight cases were also allowed to amend their complaints to add Count V which asserted an express and implied trust theories under State law and called upon the Court to exercise pendent jurisdiction.

Five defendants have filed the following motions:

In Chait v. Watertown Savings Bank (72-2283-C) the defendant has moved for dismissal of the plaintiffs' complaint which centers around a 1968 mortgage agreement.

In Feinstein v. Waltham Federal Savings and Loan Association (72-2284-C) the escrow account in issue had been provided for in the parties' December 1965 mortgage agreement. Defendant mortgagee has filed a motion to dismiss and for summary judgment.

The complaint in Liskov v. Cambridgeport Savings Bank (72-2285-C) involves a 1970 mortgage agreement. Defendant bank has pleaded in its answer that the complaint fails to state a claim upon which relief may be granted and has also filed a motion for summary judgment or judgment on the **[**5]** pleadings.

In Plotnick v. Suffolk Franklin Savings Bank (72-2286-C) the defendant moved for dismissal or summary judgment in response to plaintiffs complaint which is based on a 1964 mortgage agreement between the parties.

In Zabin v. Lexington Trust Co. (72-2286-C) the plaintiffs' claim is based on a mortgage agreement dated June 29, 1966. Defendant has filed motions to dismiss.

The motions currently before the Court for consideration also include plaintiffs' motions for determination of class action status in all eight cases and plaintiff's motion for partial summary judgment in Liskov v. Cambridgeport Savings Bank. The plaintiffs' motion for determination of class action status will be discussed first. Having in mind that, in large part the defendants' motions encompass the same issues, they will be discussed simultaneously thereafter.

PLAINTIFFS' MOTIONS FOR DETERMINATION OF CLASS ACTION STATUS

HN1[] *Fed.R.Civ.P. 23(a)* lists four prerequisites to a class action:

(1) the class is so numerous that joinder of all members is impracticable,

(2) there are questions of law or fact common to the class,

(3) the claims or defenses of the representative parties are **[**6]** typical of the claims or defenses of the class, and

(4) the representative parties will fairly and adequately protect the interests of the class.

HN2[] *Fed.R.Civ.P. 23(b)* provides that a class action may be maintained if the requirements of 23(a) are satisfied and in addition (1) the prosecution of separate actions would create a risk of establishing incompatible standards of conduct for the party opposing the class as a result of inconsistent or varying adjudications or that adjudication as to individual members would as a **[*745]** practical matter dispose of the interests of other members not parties to the adjudication or substantially impair or impede their ability to protect their interests, or (2) the party opposing the class has acted or refused to act on grounds generally applicable to the class thereby rendering injunctive or declaratory relief as to the whole class appropriate, or (3) the Court finds that the questions of law or fact common to the members of the class predominate over any questions effecting only individual members and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy.

HN3[] Because **[**7]** the declaration of class representation is attended by serious consequences, plaintiff has the burden of establishing compliance with *Fed.R.Civ.P. 23*. *Cook County College Teachers Union, Local 1600, A.F.T. v. Byrd, 456 F.2d 882* (7th Cir.), Cert. denied, *409 U.S. 848, 93 S. Ct. 56, 34 L. Ed. 2d 90 (1972)*; *Philadelphia Electric Co. v. Anaconda American Brass Co., 43 F.R.D. 452 (E.D.Pa.1967)*. The complaint must allege the existence of facts which satisfy the requirements of that rule. *Cook County College Teachers Union, Local 1600, A.F.T. v. Byrd, supra.* *Gillibeau v. City of Richmond, 417 F.2d 426 (9th Cir. 1969)*; 7A Wright and Miller Federal Practice and Procedure: Civil § 1798 at 241-242 (1972).

Although plaintiffs in each of the eight consolidated complaints now under consideration by the Court allege that the class consists of all mortgagors of each of the eight defendant mortgagee banks who are "too numerous to permit practical joinder", beyond that numerosity they allege no facts which would render the class action procedure appropriate here.

While it is clear that ***HN4***[] a party seeking to utilize the class action format need not establish the merits of his case before a preliminary **[**8]** determination of the class action question can be made *Eisen v. Carlisle & Jacquelin, 417 U.S. 156, 94 S. Ct. 2140, 40 L. Ed. 2d 732 (1974)*; *Wilcox v. Commerce Bank of Kansas, 474 F.2d 336 (10th Cir. 1973)*; *Miller v. Mackey International, Inc., 452 F.2d 424 (5th Cir. 1971)*; *Philadelphia Electric Co. v. Anaconda American Brass Co., supra*, before an evidentiary hearing need be afforded, plaintiffs should make a minimal showing that their class action claims have substance. *Rossin v. Southern Union Gas Co., 472 F.2d 707 (10th Cir. 1973)*.

In light of the foregoing and because the tolling of the statute of limitations insures no damage will result to purported class members by denying class action status in this case despite the excessive passage of time. *American Pipe & Construction Co. v. Utah, 414 U.S. 538, 94 S. Ct. 756, 38 L. Ed. 2d 713 (1974)*, plaintiffs' motions for class action status should be denied.

Count I

In count one of their complaints, plaintiff mortgagors allege that they have been required as a condition of obtaining their mortgages, to make monthly deposits of one twelfth of their annual property taxes, with the defendant mortgagees, and that the defendants have **[**9]** declined to pay interest on the amounts so deposited. Plaintiffs further allege that defendants' failure to pay interest is the result of "agreements, combinations and conspiracies with other banks, lending institutions and organizations" in violation of *15 U.S.C.A. § 1*.

Although they make their allegations in individual complaints, all plaintiffs have used the same words to allege the existence of the same conspiracy. All five complaints were filed on the same day at a time when all plaintiffs were represented by the same counsel. Clearly, therefore, when they alleged the existence of a conspiracy in count one of their complaints, all plaintiffs had access to the same information.

It is not possible to determine from the complaints themselves exactly what that information was. Plaintiffs' allegations of conspiracy are conclusory and do not recite operative facts as required by the ruling in *Heart Disease Foundation v. General Motors Corp., 463 F.2d 98 (2d Cir. 1972)*. However, in the time period which has elapsed **[*746]** since the complaints were filed, discovery in three of the five cases [1] has revealed that plaintiffs had only two bases for their conclusory allegations **[**10]** of conspiracy:

> (1) that virtually all banks require such an interest free tax escrow arrangement as a condition of extending credit in real estate mortgage cases
> (2) that banks have joined together to lobby against bills which would reform that practice.

I rule that, even assuming that both of these basis exist in fact, defendants are entitled to summary judgment on count one.

HN5[] Parallel behavior itself does not constitute a Sherman Act offense. It is merely circumstantial evidence of the existence of a conspiracy which violates the act, *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 540-41, 74 S. Ct. 257, 98 L. Ed. 273 (1954)*, and the probative value of such parallel behavior varies depending on the circumstances in which it is found *Delaware Valley Marine Supply Co. v. American Tobacco Company, 297 F.2d 199 (3rd **[**11]** Cir. 1961)*, Cert. denied *369 U.S. 839, 82 S. Ct. 867, 7 L. Ed. 2d 843 (1962)*. Discovery has revealed that plaintiffs have no knowledge of circumstances which cast suspicion on the parallel business behavior in this case. It is just as likely therefore that the banks acted independently as it is that they acted pursuant to an agreement. Illegal conduct will not be presumed.

As stated by counsel for Cambridgeport Savings in his memorandum "the plaintiffs' contention is that, adorned with no more than the knowledge that a business policy is common to the mortgage industry, they are entitled to select some members of the industry at random and to root through their files and records in the hope of finding some hard evidence of an agreement."

> ***HN6***[] While we believe that the plaintiff is entitled to all favorable inferences, he is not entitled to build a case on the gossamer threads of whimsey, speculation and conjecture.
>
> *Hahn v. Sargent, 523 F.2d 461, 467 (1st Cir. 1975)*, Quoting, *Manganaro v. Delaval Separator Co., 309 F.2d 389, 393 (1st Cir. 1962)*.

Similarly the combined lobbying efforts of defendants and others in the banking industry lend no support to plaintiffs' allegations **[**12]** of conspiracy. It is clear that ***HN7***[] the antitrust laws do not prohibit combinations for the purpose of influencing legislation. *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961)*. Evidence of an agreement between the defendants and others to unite

[1] Feinstein v. Waltham Federal Savings and Loan Association, Liskov v. Cambridgeport Savings Bank, and Plotnick v. Suffolk Franklin Savings Bank.

their lobbying efforts would therefore not provide the basis for a claim under *15 U.S.C.A. § 1*. Additionally, the fact that the banks joined together for a lawful purpose is not evidence that they joined together for an unlawful one. Therefore no inference may be drawn from the existence of such an agreement which casts suspicion on the parallel behavior discussed above.

In light of the foregoing and without considering the other defenses raised, I rule that summary judgment should enter for the defendants on count one.

Count II

Count two alleges that requiring a mortgagor to make a monthly deposit with the mortgagee of one twelfth of the annual real estate taxes assessed against the mortgaged property as a condition of obtaining a mortgage constitutes an illegal tie-in arrangement in violation of *12 U.S.C.A. § 1972* and *15 U.S.C.A. §§ 1* and *2*. Plaintiffs' theory is **[**13]** that such a tax escrow account requires plaintiffs to provide additional property to the defendant banks as a condition to the extension of credit.

As a general rule, ***HN8***[] statutes have prospective effect unless the legislature clearly manifests its intention that the statute act retrospectively. There is no indication of any such intent in the legislative history of *§ 1972* or in the act itself. Therefore, **[*747]** since *12 U.S.C.A. § 1972* became effective on December 31, 1970 it has no applicability to the five mortgage agreements currently under the court's consideration which were all executed prior to that date.

Plaintiffs also contend in count two that the mandatory tax escrow account constitutes a tying arrangement in restraint of trade which violates *15 U.S.C.A. §§ 1* and *2*.

Defendants Waltham Federal Savings and Loan Association and Suffolk Franklin Savings Bank maintain that any claims against them under the Sherman Antitrust Act are banned by the statute of limitations. At least insofar as the allegations of count two are concerned, this court so rules.

The mortgage agreement between the Feinsteins and Waltham Federal Savings and Loan Association was executed in 1965. **[**14]** The mortgage agreement between the Plotnicks and Suffolk Franklin Savings Bank was executed in 1964. ***HN9***[] *15 U.S.C.A. § 15b* provides:

> Any action to enforce any cause of action under *sections 15* or *15a* of this title shall be forever barred unless commenced within four years after the cause of action accrued . . .

I rule that if those agreements constituted illegal tying arrangements plaintiffs had four years after the agreements were executed to bring suit in the United States District Court pursuant to *15 U.S.C.A. § 15* and that the statute of limitations had run as to both actions prior to July 24, 1972 when the complaints were filed.

Accordingly, the motions to dismiss of defendants Waltham Federal Savings and Loan Association and Suffolk Franklin Savings Bank should be allowed as to count two and the court will go on to consider the allegations of illegal tying arrangements under the Sherman Antitrust Act only against the three remaining defendants.

HN10[] The Sherman Act forbids the extension of market dominance over one product into the market for another product by making the purchase of the first product a condition of purchasing the second.

In *Fortner Enterprises, Inc.* ***[**15]*** *v. United States, 394 U.S. 495, 507, 89 S. Ct. 1252, 22 L. Ed. 2d 495 (1969)*, the Supreme Court stated that the preliminary determination to be made at the outset of every tie-in case is whether two separate products are in fact involved. Plaintiffs contend that in order to obtain credit from the defendants, the plaintiffs were also required to accept defendants' tax escrow services. The issue therefore is whether extension of credit and tax escrow services are two separate services or separate elements of the same service.

In *Stavrides v. Mellon National Bank & Trust Co., 353 F. Supp. 1072 (W.D.Pa.1973)* the court ruled that a complaint containing similar factual allegations stated a claim upon which relief could be granted. This court agrees "whether the defendants are selling one product or two, whether there is any legitimate business justification for the escrow requirement, and whether the escrow service is an ancillary part of the loan itself are clearly questions of disputed fact" *Stavrides v. Mellon National Bank & Trust Co., supra at 1077*. Therefore, the motions of the remaining three defendants for dismissal or judgment on count two should be denied.

Count III

In count **[**16]** three of their complaints, plaintiffs allege that as to plaintiffs who became mortgagors after July 1, 1969 the defendants have failed to disclose the costs incident to the defendants' refusal to pay interest on tax escrow deposits. Plaintiffs contend that such a failure to disclose violates the TILA *15 U.S.C.A. § 1601 Et seq.* and the regulations promulgated thereunder, specifically *12 C.F.R. 226.1 Et seq.*

As discussed above, the court has denied class action status to the plaintiffs in all eight of the consolidated cases now before it. As a result, the allegations of count three fail to state a claim upon which relief can be granted in Chait v. Watertown Savings Bank (72-2283-C), Feinstein v. Waltham Federal Savings and Loan Assoc. (72-2284-C), Plotnick v. Suffolk Franklin Savings **[*748]** Bank (72-2286-C) and Zabin v. Lexington Trust Co. (72-2287-C) because the mortgage agreements of the individual plaintiffs in those cases were executed prior to the effective date of the statute. Accordingly the motions to dismiss of the defendants in those cases should be allowed as to count three.

In Liskov v. Cambridgeport Savings Band (72-2285-C) the mortgage agreement at issue was **[**17]** executed in 1970, after the effective date of the disclosure provisions. Notwithstanding that fact, however, plaintiff is not entitled to recover under the TILA.

HN11[] The TILA specifically exempts escrows for future payment of taxes from disclosure *15 U.S.C.A. § 1605(e)(3)*, *12 C.F.R. 226.4(e)*. *Stavrides v. Mellon National Bank & Trust, 487 F.2d 953 (3d Cir. 1973)* and even if such costs were not exempt from disclosure, actions brought under the TILA are subject to a one year statute of limitations. *15 U.S.C.A. § 1640(e)*. Reference to the case file establishes that when plaintiffs filed their action on July 24, 1972, the statute of limitations had already run as to their mortgage agreement with the defendant.

Accordingly, defendant Cambridgeport Savings Bank's motion for summary judgment should be allowed as to count three.

Count IV

In count four, plaintiffs allege that the defendant mortgagees acting in concert with other banks have monopoly power in the real estate credit market in Massachusetts. Plaintiffs further allege in count four that the defendants have made use of that monopoly power by imposing upon plaintiffs a reciprocal agreement under the terms of which defendants **[**18]** extend credit to plaintiffs in return for which plaintiffs deposit money with the defendants in interest free accounts. Plaintiffs contend that these are reciprocal agreements which violate the Sherman Antitrust Act, *15 U.S.C.A. § 1*. I rule that such a practice, even if established at trial, would not constitute a reciprocal dealing arrangement.

HN12[] Reciprocity is basically the policy of favoring one's customers in purchasing commodities sold by them." *United States v. Penick and Ford, Ltd., 242 F. Supp. 518, 521 (D.N.J.1965)*. To hold that the plaintiffs' willingness to open interest free accounts was a "product" would stretch the concept of reciprocity too far. *Stavrides v. Mellon National Bank & Trust Co., supra at 1077*. Count four should be dismissed as to all five defendants.

Count V

In count five of their complaints the plaintiff mortgagors ask the court to exercise pendent jurisdiction over a claim which is based on state law. Plaintiffs allege that the defendant mortgagees are accountable to them for monies earned through the investment of funds which plaintiffs deposited in tax escrow accounts as required by their mortgage agreements.

Plaintiffs' theory appears to be that **[**19]** any monies earned through the investment of the tax escrow funds were held by the defendant mortgagees in trust for the benefit of the plaintiff mortgagors by reason of trusts created by the mortgage instruments. Plaintiffs further assert that even in the absence of express trusts created by the agreements, the court should impose constructive trusts because each of the defendant mortgagees has been unjustly enriched by the tax escrow arrangements.

A copy of the mortgage agreement form used by each defendant mortgagee has been filed in each of the five cases which have motions currently under consideration. Because the court will refer to the copies of those agreements in the process of ruling on the motions before it, those motions will be treated as motions for summary judgment as to count five.

I rule that the mortgage agreements filed in these cases are integrated agreements which are subject to the parol evidence rule. *Restatement (Second) of Contracts §§ 235*, *239* (Tent. Drafts Nos. 1-7, 1973) and that the court may as a matter of law interpret those agreements to determine the understanding of the parties. **[*749]** *Robert Industries Inc. v. Spence, 362 Mass. 751, 755,* ***[**20]*** *291 N.E.2d 407 (1973)*.

Four of the five agreements in question [2.] provide for the payment of monthly estimated tax payments into an escrow account and contain no provision with regard to the investment of those funds or the payment of interest of the mortgagor.

Under Massachusetts law, ***HN13***[] a mortgagor who claims that the bank does not have the right to treat tax escrow funds as its own, must show a clear understanding of that effect, *Carpenter v. Suffolk Franklin Savings Bank, 370 Mass. 314, 346 N.E.2d 892 (1976)*. I rule that due to the absence of any provision in the contract tending to show such a clear understanding between the parties, no trusts were created by those agreements as a matter of law.

In the case of Feinstein v. Waltham Federal Savings and Loan Association **[**21]** (72-2284-C) the agreement required the plaintiff to make monthly tax escrow payments to the mortgagee "in trust" but no provisions were included for the investment of those funds or the payment of interest. In addition, plaintiff Feinstein testified in deposition that he knew at the time that he entered the agreement that he would not be paid interest on the amounts deposited in the escrow account. In light of the foregoing, I rule that no trust was created by the mortgage agreement in that case.

The plaintiffs also contend that the court should impose constructive trusts because the defendant mortgagees have been unjustly enriched. I rule that even assuming all of plaintiff's allegations to be true, in the absence of an allegation of fraud under Massachusetts law no such unjust enrichment has occurred as to justify the imposition of a constructive trust in this case *Carpenter v. Suffolk Franklin Savings Bank, supra.* Accordingly, summary judgment should enter for the five defendants as to count five.

PLAINTIFFS' MOTION FOR PARTIAL SUMMARY JUDGMENT IN LISKOV V. CAMBRIDGEPORT SAVINGS BANK

Plaintiffs' motion for partial summary judgment in Liskov v. Cambridgeport Savings Bank should **[**22]** be denied.

End of Document

[2.] Those four agreements are the agreements at issue in Chait v. Watertown Savings Bank (72-2283-C), Liskov v. Cambridgeport Savings Bank (72-2285-C), Plotnick v. Suffolk Franklin Savings Bank (72-2286-C), and Zabin v. Lexington Trust Co. (72-2287-C).

Hew Corp. v. Tandy Corp.

United States District Court for the District of Massachusetts

November 21, 1979

Civ. A. No. 73-2654-F

Reporter

480 F. Supp. 758 *; 1979 U.S. Dist. LEXIS 8427 **; 1980-1 Trade Cas. (CCH) P63,065

HEW CORPORATION, ET AL Plaintiffs v. TANDY CORPORATION Defendant

Subsequent History: Related proceeding at *Stillwell v. Radioshack Corp., 2007 U.S. Dist. LEXIS 103212 (S.D. Cal., Dec. 18, 2007)*

Core Terms

lodestar, settlement, compensated, contingent, attorney's fees, franchisees, expenses, represents, franchise, compromise settlement, lower rate, petitioners', contractual, plaintiffs', changes, factors, parties

Counsel: **[**1]** Harold Brown, Brown, Prifti, Leighton & Cohen, Boston, Mass., for plaintiffs.

John J. Curtin, Jr., Bingham, Dana & Gould, Boston, Mass., for defendant.

John G. Fabiano, Hale & Dorr, Boston, Mass., for class representatives Hollis E. Whitney, Antonio Esposito, Gerald Berman, Leonard Safran.

Opinion by: FREEDMAN

Opinion

[EDITOR'S NOTE: THE ORIGINAL SOURCE CONTAINED ILLEGIBLE WORDS &/OR MISSING TEXT.]

[*759] MEMORANDUM

This case is presently before the Court on the substitute application of Harold Brown and Brown, Prifti, Leighton & Cohen for an award of attorneys' fees and expenses. Petitioners seek a total award of $ 571,098.60 [1] **[**2]** **[*760]** for services rendered and expenses incurred in connection with the litigation and the ultimate settlement of this antitrust action. After having considered the memoranda, affidavits and exhibits proffered by the parties in light of

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[1] This requested award appears to have mistakenly omitted some 126.00 hours of billable time. The sum of the categories of time spent in Appendix C-3 to the "Memorandum of Harold Brown In Support of the Petition For Fees and Costs" exceeds the sum of the hours attributed to each of the three named attorneys by that figure. Because I have determined this discrepancy to have been the result of a mathematical error and, moreover, because the position of the objectors to the application would not be materially affected or altered by an increase in the number of hours billed by petitioners, I will consider the application as correctly requesting an award which would encompass the additional 126.00 hours.

the pertinent authorities, I have decided that an award of $ 351,666.23 represents fair and just compensation for petitioners' fees and disbursements. [2]

The complaint commencing this civil action, alleging violations of section 1 of the Sherman Act, 15 U.S.C. § 1, was filed on August 9, 1973. Plaintiffs averred that defendant Tandy Corporation ("Tandy") conspired with its own subsidiaries and divisions to fix prices for Radio Shack merchandise. This activity, which plaintiffs contend had both vertical and horizontal aspects, was alleged to have occurred in contravention of a franchise agreement provision authorizing each franchisee to determine its own retail prices. The complaint charged further that Tandy conspired to illegally restrict the alienability of plaintiffs' franchises. Both injunctive relief and treble damages were requested.

In its counterclaim, Tandy asserted that plaintiffs had conspired in violation of antitrust laws. The case was certified as a class action on August 12, 1974. On January 16, 1979 this Court approved an amended stipulation of **[**3]** settlement; the matter of attorneys' fees remaining outstanding. On July 16, 1979 an evidentiary hearing, at which all interested parties were given an opportunity to be heard, was held on the application for fees. The application was taken under advisement as of July 30, 1979.

Rule 23, F.R.Civ.P. contains no provision concerning an award of attorneys' fees in class action litigation. Moreover, section 4 of the Clayton Act, *15 U.S.C. § 15*, [3] which does speak to the fees issue, is applicable where a case ends in a judgment on the merits for the plaintiff, *City of Detroit v. Grinnell Corporation, 495 F.2d 448, 468-9 (2d Cir. 1974)*, thus it is of little assistance where a compromise settlement has been struck. Any award of attorneys' fees here, therefore, must be a product of this Court's exercise of its equitable power to "make fair and just allowances for expenses and counsel fees" from a class fund [4] to those whose efforts have benefitted the fund. *Trustees v. Greenough, 105 U.S. 527, 536, 26 L. Ed. 1157 (1881)*. The purpose of such an award in this case then, would be to compensate the attorneys for the reasonable value of their services which benefitted the class by establishing, **[**4]** preserving or protecting the fund. See *Grinnell, supra at 470*, Quoting *Lindy Brothers Builders, Inc. v. American Radiator and Standard Sanitary Corporation, 487 F.2d 161, 167 (3rd Cir. 1973)* ("Lindy I").

While it is well-settled that what will constitute a reasonable attorney's fee in a particular case shall rest within the sound discretion of the Court, See *Johnson v. Georgia Highway Express, Inc., 488 F.2d 714, 717 (5th Cir. 1974)*, it is **[**5]** nevertheless true that fee awards must be "made with moderation and a jealous regard for the rights of those who are interested in the fund." *Trustees v. Greenough, supra, 105 U.S. at 536, 26 L. Ed. 1157*. In any event, this Court has a mandate to avoid awarding any amount that would constitute a "windfall fee" for the attorneys and, likewise, must avoid even the appearance of having done so. See *City of Detroit v. Grinnell, supra, 495 F.2d at 469*.

Recognizing then, that a court's role in equity is to establish a reasonable and just **[*761]** fee award so as to compensate petitioners for services and expenditures that have benefitted the class fund, this Court must determine what has been referred to as the "lodestar" figure. In order to establish this lodestar amount, the Court must initially study petitioners' time sheets in order to calculate the number of hours reasonably worked during the case. Having arrived at this figure, the Court must then seek to place a value on those hours. See *Grinnell, supra at 470-1*.

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[2] From this total award petitioners will, of course, reimburse to class members monies which had been advanced in the form of retainers ($ 58,400.00) or expenses ($ 6,778.86).

[3] *15 U.S.C. § 15* provides:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides . . . without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fees.

[4] The compromise settlement reached in this case included, in addition to contractual changes in the franchise agreements, a fund of $ 900,000.00.

This Circuit has adopted twelve factors listed in *Johnson v. Georgia Highway Express, Inc., supra*, as the criteria to be considered by a court seeking to award attorney's **[**6]** fees pursuant to the Civil Rights Attorney's Fees Award Act of 1976, *42 U.S.C. § 1988*, as amended. *King v. Greenblatt, 560 F.2d 1024, 1026 (1st Cir. 1977)*. Although the matter presently before this Court is not directly on point with King in that an award here would be pursuant to the equitable fund doctrine, the Johnson factors nevertheless facilitate the attempt to place a value on time expended by the attorneys.

1) Time Expended

Petitioners have provided time records which I find to have satisfied the strictures set forth in *King v. Greenblatt, supra.* However, this Court would be remiss in its duty if it were merely to "rubber stamp" the time charged. The hours worked must be evaluated in light of this Court's experience; time should not be valued at a uniform rate. Rather, work that is more ministerial or clerical than it is legal should be compensated at a lower rate than that which is purely legal. Furthermore, hours charged that do not benefit the fund in any way should not be compensated at all.

With regard to this petition, I have carefully studied the time charged in relation to the time and labor reasonably required for the litigation and settlement of this case. **[**7]** I have determined that Harold Brown should be compensated for 1,773.10 hours of work, [5] **[**8]** 1,493.35 hours of which should be assessed at the full value of his hourly rate. Of the remaining time, 229.05 hours should be valued at a lower rate because they represent general labor; work that was in large part ministerial or clerical. An additional 48.70 hours should be valued at a lower rate because they represent work done after the compromise settlement was approved by this Court. Mr. Brown should receive no compensation for 42.60 hours. Of this block, 38.40 hours were spent in preparation of the fee application. [6] See *Lindy Brothers Builders, Inc. v. American Radiator & Standard Sanitary Corporation, 540 F.2d 102, 111 (3rd Cir. 1976)* ("Lindy II").

In addition to Mr. Brown's time, I have decided that the firm of Brown, Prifti, Leighton & Cohen should be compensated for 63.90 hours of work performed by L. Seth Stadfeld and for 42.85 hours for P.A. Pease's services. Of Mr. Stadfeld's time, 38.55 hours should be compensated at his full hourly rate (which will be less than that of Harold Brown because Mr. Stadfeld is neither a senior partner in the firm nor as experienced in the antitrust field). The general work done **[**9]** by Attorney Stadfeld, 1.75 hours, should be valued at a lower rate as should the 23.60 hours which represent **[*762]** services done after the approval of the settlement between plaintiffs and Tandy. Similarly, all of the hours attributed to Mr. Pease should be valued at less than his billing rate because the work was done after January 16, 1979. The firm will receive no compensation for the .10 hour that Mr. Pease worked on the fee application.

2) Novelty and Difficulty of the Questions

This case involved rather novel questions with regard to the alleged horizontal and vertical aspects of the price fixing. However, the case ended in settlement, had it proceeded to a trial on the merits, plaintiffs would have encountered substantial burdens of persuasion. Counsel's ability to extract the contractual changes in the franchise

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[5] The Court notes that in many instances, Mr. Brown has attributed a great deal of hours to single dates. Specifically, on November 27, 1973 he assigned 62.00 hours; on April 12, 1974, 87.00 hours are charged; 28.00 hours are billed for May 30, 1974 and, on January 13, 1975, 30.00 hours are listed. Obviously, the times charged must represent the total number of hours put in over several days. Therefore, while this type of billing is somewhat of a hindrance to the Court, the hours will not be rejected as having insufficient documentation.

[6] The remaining 4.20 hours of non-compensated time is comprised as follows: 1) 3.00 hours of the 4.00 hours charged on November 18, 1974 for studying issues of moving for a separate trial of liability and damages. Since this case ended in settlement, the fund was not benefitted by these hours. 2) On June 24, 1974 Mr. Brown charged 2.00 hours for studying this Court's two-page order adopting the Magistrate's recommendation concerning discovery motions 1.00 is clearly sufficient. 3) Finally, the remaining .20 hour was disallowed because Mr. Brown sought to be compensated for reserving a room at a hotel on October 16, 1978.

agreements and the fund of money then, must be viewed in light of these potential difficulties as well as in light of defendant's demonstrated willingness to seek a compromise settlement almost from the inception of the action.

3) Skill Requisite to Perform the Legal Service

The qualifications of Harold Brown are beyond dispute. He is nationally known **[**10]** in the areas of ***antitrust law*** in general and franchising in particular. The Court is also mindful of the fact that prior counsel had rejected plaintiffs' case.

Nevertheless, it must be noted that very little time was actually spent in Court. The Court, therefore, has had little opportunity to observe Mr. Brown's performance on a first-hand basis.

The fact that there was no prior or pending criminal action against Tandy is also relevant. This factor is negated to some extent, however, by the fact that plaintiffs did have the benefit of similar complaints filed in other districts. The Court has also noted that no discovery was taken in this case since November 1976 and that many of the conferences that led to the settlement occurred at the instance of the parties and were conducted without the benefit of counsel.

4) Preclusion of Other Employment

There is nothing in the record to indicate that either Attorney Brown or the firm were precluded from other work by this litigation.

5) Customary Fee

Harold Brown has introduced evidence to show that the customary fee charged by attorneys with his stature and experience range from $ 100.00 to $ 200.00 an hour. Based against this background, **[**11]** the requested fee of $ 150.00 an hour seems reasonable. The hours billed for general activities and for services rendered after January 16, 1979 should be compensated at a lower rate.

The application has also requested a fee of $ 75.00 an hour for work performed by L. Seth Stadfeld. Information relative to Mr. Stadfeld's ability and experience is lacking but it is obvious to the Court that the services rendered by him were done under the direction and supervision of Harold Brown. In any event, this Court, calling on its own experience in these matters, finds that $ 75.00 an hour for work done by a partner in a firm is reasonable. However, I also find that the work done by Mr. Stadfeld of a general nature (1.75 hours) as well as that done after the compromise agreement was approved (23.60 hours) should be valued at a lesser rate.

With respect to P.A. Pease, petitioners request remuneration at a rate of $ 40.00 an hour. Again, while this is a reasonable billing rate for a law firm's associate, all of Mr. Pease's time was put in after the January 16, 1979 settlement approval. Thus, the firm should receive something less than its usual billing rate for his services.

6) Whether **[**12]** the Fee is Fixed or Contingent

It is clear that contingent fees have no place in equitable fund cases. *Lindy II, supra at 119-120*; *City of Detroit v. Grinnell Corporation, supra, 495 F.2d at 470-1*. This fee then, will be based entirely upon this Court's evaluation of the benefit to the fund of the services performed and its determination of reasonable compensation for those services.

[*763] 7) Time Limitations Imposed by Clients or Circumstances

I find that there were little or no time constraints placed upon counsel in this case. The complaint was filed in 1973 and the settlement was not finally approved until 1979 despite the fact that relatively few hours were spent in court during that time span. While there is evidence that many franchisees sold out before the settlement was reached, their actions seem to have had little effect upon the ultimate result of the action.

8) Amount Involved and Results Obtained

In addition to the fund of $ 900,000.00, there have been numerous contractual modifications made to the basic franchise agreements between Tandy and the franchisees. The plaintiffs' economic expert, William Gruber, has stated that the franchisees will realize a **[**13]** benefit of approximately 12.5 million dollars over ten years as a result of these changes. [7] Mr. Gruber admits that his evaluation is based on assumptions about the future course of conduct between Tandy and the franchisees and that, therefore, there is some degree of uncertainty involved.

One of the basic assumptions is that the franchisees adopt the new agreements. Petitioners have stipulated that the franchisees need not adopt the new contract if they feel they are better served with the old and that this election would not prejudice their right to a portion of the $ 900,000.00 fund. The Court notes in this regard that fewer than one third of the franchisees had elected to adopt the new agreement as of the time this matter was taken under advisement. A reading of the materials submitted indicates that some dispute still lingers as to whether some necessary contractual changes have been obtained. Perhaps this disagreement has effected the adoption **[**14]** of the agreements.

There is also evidence to the effect that most of the contractual changes and much of the fund was agreed upon in 1977 at a meeting held without counsel. See Affidavit of Class Representative Antonio Esposito Regarding Contractual Changes in Franchise Agreement. Viewed in this light, the result obtained in this case, at first glance very impressive, loses some of its lustre.

9) The Experience, Reputation and Ability of Attorneys

This subject was addressed in the section on customary fees, Supra. Again, there is no question as to Harold Brown's experience, reputation or ability. While information concerning both Attorney Stadfeld and Attorney Pease is lacking, the fact that they played relatively minor roles in this litigation and that their roles were to assist Mr. Brown is apparent.

10) The "Undesirability" of the Case

There is nothing before this Court to indicate anything undesirable about representing the class of plaintiffs. This is one factor of the Johnson test that lends itself more easily to civil rights litigation.

11) Nature and Length of Professional Relationship

Again, this criterion is inapplicable to the application before the Court.

12) **[**15]** Awards in Similar Cases

Petitioners point to Lindy II as justification for a double recovery of the lodestar amount. I find this analogy to be inappropriate. Lindy II was a multidistrict litigation case involving the consolidation of some 370 different actions. The settlement negotiated in that case amounted to approximately 29 million dollars. It is obvious then, that Lindy has relevance with respect to this petition only in that it serves as an illustration that a contingency factor of 2 is not called for here.

Having utilized the Johnson criteria with regard to this application for fees, this Court is now in a position to determine the lodestar figure by placing a dollar value on each of the different categories of hours worked by petitioners.

Harold Brown

The Court will award Mr. Brown $ 150.00 an hour for the 1,495.35 hours of litigational activity he performed in connection with **[*764]** this case. As for the 229.05 hours he performed general duties, I find that $ 100.00 an hour is just and reasonable. Finally, for work done after this Court approved the compromise settlement, 48.7 hours, he

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[7] See Appendix A-1 (Economic Expert's Final Report).

should be compensated at a rate of $ 75.00 as these services did not result **[**16]** in as great a benefit to the fund established.

L. Seth Stadfeld

I find that the firm of Brown, Prifti, Leighton & Cohen should be reimbursed at a rate of $ 75.00 for the 38.55 hours that Mr. Stadfeld performed purely legal work. In addition, I find that $ 65.00 an hour is just and reasonable compensation for the 1.75 hours he spent on general duties. Finally, the firm should receive $ 50.00 an hour for work performed by Mr. Stadfeld after January 16, 1979 due to its decreased beneficial value, in a relative sense, to the class fund.

P.A. Pease

Mr. Pease put in 42.85 hours [8] of work after the settlement was approved by this Court. Because these hours represent mainly procedural tasks that had little effect on the fund itself, I find that the firm should be compensated at a rate of $ 30.00 an hour for his time.

[17]** Lodestar [9]

The lodestar is determined by a multiplication of the hours the attorney reasonably worked by the value of that time. Thus, the lodestar in this case amounts to $ 256,330.50: [10]

[MISSING TEXT.]

[18]** The arrival at the lodestar does not end this Court's inquiry however. I must now determine whether or not it would be appropriate in this case to adjust the lodestar. There are two additional factors to be considered in this regard, "the contingent nature of success" and the "quality of the attorney's work." See *Lindy I, supra, 487 F.2d at 168-9*.

Contingent nature of success

The Court must look to the plaintiffs' chances for a successful resolution of this lawsuit at the time the complaint was filed in order to determine this contingent nature of success factor. Here, a prior attorney had refused to litigate plaintiffs' claims. In addition, there was no criminal action upon which to base a complaint, and no judgment **[*765]** to introduce as evidence in this case. Moreover, petitioners' theories were novel and would have been difficult to prove at a trial on the merits.

These factors are counterbalanced somewhat by the fact that petitioners did receive $ 58,400.00 in retainers from various class members at the outset of this litigation; thus, there was never a possibility that counsel would receive no compensation for their services, even had the case terminated in an adverse **[**19]** verdict. Furthermore, it was on Tandy's initiative that the settlement discussions were entered into shortly after the filing of this action.

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[8] Petitioners' figures with respect to hours worked by Stadfeld and Pease differ somewhat from the findings made by this Court. The information contained in the diary of time records (Appendix C-1) as well as the categorized graph extrapolated therefrom (Appendix C-2) were of little assistance to the Court in this regard.

[9] See Appendix to this Memorandum for computational analysis.

[10] This amount does not include compensation for 25.00 hours of "Post Settlement Activity" due to the nebulous nature of this particular category and due also to the fact that the lodestar encompasses a total of 254.00 hours for "Settlement Promotion" and "Settlement Procedures." See Appendix.

Furthermore, the 49.80 hours billed for work done in preparation of the fee application has not been factored in because that time benefitted only the petitioners and not the class fund. See *Lindy II, supra, 540 F.2d at 111*. Petitioners' contention that the fee award in *Souza v. Southworth, 564 F.2d 609 (1st Cir. 1977)* controls here is not persuasive. Souza speaks to compensation for time spent litigating the fee issue on appeal and is therefore not directly on point with the issue before this Court.

On balance, however, I find that a factor of 1.25 should be applied to that portion of the lodestar which represents the time Harold Brown worked at full compensation. I find that this factor is justified because of the contingent nature of success in this case due to the novel issues and approach presented by the complaint and due also to the difficult burden plaintiffs would have encountered at trial.

I have not applied this contingency factor to that part of the lodestar which represents time expended by Attorneys Stadfeld or Pease, or to those hours worked by Mr. Brown which I have previously determined should be valued at a rate less than full compensation. This decision was prompted both by the fairly substantial retainer involved here and by a finding that those hours did not reap as great a benefit upon the class fund.

Quality of the attorney's work

I find no reason to increase the lodestar because of this additional consideration. While there is no question but that Harold Brown ably represented plaintiffs and that he negotiated **[**20]** the best settlement possible in these circumstances, those factors were considered when I set his hourly rate at $ 150.00. Adjustments to the lodestar for unusual quality are the exception rather than the rule. See *Baughman v. Wilson Freight Forwarding Co., 583 F.2d 1208 at 1219 (3rd Cir. 1978)*. This case comes within the general rule.

Having thus adjusted a portion of the lodestar by a contingency factor of 1.25, the total amount to petitioners for attorneys' fees is $ 312,406.13.

[MISSING TEXT.]

I find that this award represents reasonable and just compensation for services rendered by Harold Brown, L. Seth Stadfeld and P.A. Pease in connection with this litigation.

Expenses

In addition to fees, counsel for plaintiff class are entitled to reimbursement for expenses reasonably incurred during this case. Petitioners have requested a total award of $ 39,260.10 for costs and expenses. After considering the documentation provided by the parties, I have concluded that this is a reasonable request and should be granted.

Summary

In summation then, this Court finds that a total award of $ 351,666.23 represents reasonable and just compensation for petitioners' fees and expenses in connection **[**21]** with this litigation. This sum is comprised in part by an award to Harold Brown of $ 306,935.63 for attorneys' fees, and awards to Brown, Prifti, Leighton & Cohen of $ 4,185.00 for services performed by L. Seth Stadfeld and $ 1,285.50 for work done by P.A. Pease. The balance of the award, $ 39,260.10, represents reimbursement for petitioners' expenditures. These amounts should be distributed to petitioners from the class fund of $ 900,000.00 which was the product of the compromise settlement entered into by the parties with this Court's approval. From this award, petitioners will reimburse those class members who advanced monies to them either in the form of retainers or expenses.

An appropriate order shall enter.

[MISSING TEXT.]

A. D. M. Corp. v. Sigma Instruments, Inc.

United States District Court for the District of Massachusetts

January 4, 1980

CA 78-288-T

Reporter

481 F. Supp. 1297 *; 1980 U.S. Dist. LEXIS 9749 **; 1980-1 Trade Cas. (CCH) P63,123

A.D.M. CORP. Plaintiff v. SIGMA INSTRUMENTS, INC., ET AL. Defendants

Core Terms

competitor, antitrust, bowling, anticompetitive, damages, manufacturer, practices, unfair, Clayton Act, acquisition, elimination, centers, effects, switch, stock

LexisNexis® Headnotes

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

Antitrust & Trade Law > Sherman Act > General Overview

HN1[] **Sherman Act, Remedies**

The Sherman Act does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce.

Antitrust & Trade Law > Clayton Act > Claims

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

Antitrust & Trade Law > Clayton Act > General Overview

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

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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

HN2[] **Clayton Act, Claims**

Plaintiffs suing for damages under § 4 of the Clayton Act must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. Thus, only those parties damaged by specific anti-competitive acts may recover under § 4 of the Clayton Act.

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > Pendent Claims

Civil Procedure > ... > Subject Matter Jurisdiction > Supplemental Jurisdiction > General Overview

HN3[] **Supplemental Jurisdiction, Pendent Claims**

If the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, state claims should be dismissed as well.

Counsel: [1]** Angelo M. Torrisi, New York City, Martin, Morse, Wylie & Kaplan, Gordon A. Martin, Boston, Mass., for plaintiff.

Goodwin Procter & Hoar, Donald B. Gould, James E. McGuire, Boston, Mass., for Sigma Intruments, Inc.

Mintz, Levin, Cohn, Glovsky & Popeo, Michael Gardener, Joseph C. Tanski, Boston, Mass., for Thomson and Frost, Inc.

Opinion by: TAURO

Opinion

[*1297] OPINION

In its substitute complaint, plaintiff (ADM) charges the defendants with a variety of misdeeds in connection with the acquisition of the plaintiff's assets by defendant Sigma Instruments, Inc. (Sigma). [1.] At issue here is defendants' motion to dismiss.

I.

ADM is a Massachusetts corporation. Prior to October 1974, it was engaged in the design, production, and sale of photo electric-motion controls and relay switching **[**2]** devices. At all relevant times, ADM was a member of the General Electronics, Inc. (General) corporate family. That family included two wholly owned subsidiaries: United Electronics Company of New Jersey (United, NJ) and United Electronics Company of Delaware (United, Del). ADM is a wholly owned subsidiary of United, Del.

In June 1973, United, NJ borrowed money from Factors and Note Buyers, Inc., **[*1298]** (Factors), a New Jersey commercial lender. As partial security for that loan, United, Del pledged its ADM stock. The loan became in default as of October 1973. Later that month, Factors took over the pledged ADM stock.

In September 1974, Sigma sought to acquire ADM's assets. Its purpose was to establish a production capability in various markets for general purpose relays. ADM alleges that defendant Arthur J. Thomson, then President of ADM, conspired with Factors and Sigma to obtain the ADM stock for Sigma. In furtherance of that scheme, ADM asserts that on October 9, 1974, Thomson formed Frost, Inc., (Frost) with himself as President and sole shareholder. On October 21, 1974, Frost paid $ 218,000 to Factors in exchange for the ADM assets. Two months later, Sigma paid **[**3]** Frost $ 290,000 for the assets plus $ 10,000 to Thomson in exchange for ADM trade

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[1.] Plaintiff's complaint alleges violations of §§ 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, and § 7 of the Clayton Act, 15 U.S.C. § 18, (Counts I-IV) and of Chapter 93A of the Massachusetts General Laws (Counts V-VII).

secrets. As a result of these transactions, Thomson and his corporate vehicle, Frost, received $ 300,000 while Sigma acquired the ADM assets and trade secrets.

The final twist in the corporate drama occurred in June 1975 when, as a result of a New Jersey Superior Court order, Factors' purchase of ADM stock was rolled back. Factors was ordered to return the ADM stock to United, Del, to pay $ 206,000 to ADM for the sale of the ADM assets, and to return other pledged assets to United, NJ. Sigma retained the ADM assets.

II.

THE FEDERAL ANTITRUST CLAIMS

Plaintiff's case rests on the alleged conspiracy entered into by Thomson, Sigma and Factors during September 1974. Plaintiff theorizes that these conspirators committed a number of business torts and unfair trade practices to effect Sigma's monopolistic aim of eliminating ADM as a competitor in various relay markets. That, says the plaintiff, is enough to establish a cause of action under § 4 of the Clayton Act, *15 U.S.C. § 15*.

It is well settled that ***HN1***[] the Sherman Act "does not purport to afford remedies for all torts committed by or against persons **[**4]** engaged in interstate commerce." *Hunt v. Crumboch, 325 U.S. 821, 826, 65 S. Ct. 1545, 1548, 89 L. Ed. 1954 (1945)*. Recently, the Supreme Court has stressed again that ***HN2***[] plaintiffs suing for damages under § 4 of the Clayton Act "must prove Antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat Inc., 429 U.S. 477, 489, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (1977)* (emphasis in original). Thus, only those parties damaged by specific anti-competitive acts may recover under § 4 of the *Clayton Act. Engine Specialties, Inc. v. Bombardier, Inc., 605 F.2d 1, 14 (1st Cir. 1979)*.

In the present case, the only anticompetitive behavior alleged by ADM is the purchase of its assets by Sigma. ADM's elimination might affect other companies active in the relay switching field in that a "deep pocket" competitor, Sigma, has emerged on the scene. But, the challenge to those companies is of no antitrust consequence to ADM which, effectively, is now out of the marketplace.

ADM's complaints are not antitrust-based. Rather, they assert damage caused by unfair **[**5]** trade practices and breaches of fiduciary duty. These torts and the damages they may have produced are unrelated to any competition between ADM and the defendants. If, for example, Thomson and Frost had conspired to effect the same transactions with a company not in the relevant markets (and without a "deep pocket"), ADM would have suffered the same injury claimed here. But there would be no antitrust claim, since no anticompetitive effects would have resulted. Here, the nature and scope of defendants' business activity is irrelevant to ADM's theory of injury. Plaintiff's claims are essentially business torts dressed up in the guise of federal antitrust.

A comparable claim was rejected by the Court in *Brunswick, supra.* There, a bowling lane manufacturer foreclosed on a number **[*1299]** of defaulting bowling centers and thereby entered the retail bowling market. Several other bowling centers sought recovery under Clayton Act § 4 charging that the manufacturer was thus monopolizing in violation of Clayton Act *§ 7*. Specifically, the rival bowling centers argued that the manufacturer's "deep pocket" would enable it to drive smaller competitors out of business. They sought **[**6]** to establish damages by calculating the profits they would have realized had the defaulting bowling centers been acquired by them rather than the foreclosing defendant. *Id. 429 U.S. at 481, 97 S. Ct. 690*.

The Court held for the defendant. It relied on the lack of connection between the allegedly anticompetitive effects of the defendant's entry into retail bowling and the plaintiffs' claimed damages. Specifically, the Court noted that had the defaulting bowling centers obtained refinancing or been purchased by a small firm (e.g., one not posing the same competitive dangers as that of the "deep pocket" defendant), plaintiffs "would have suffered the identical "loss' but no compensable injury," *Id. at 487, 97 S. Ct. at 697*. The plaintiffs had not shown that their injury reflected "the anticompetitive effect either of the violation (of the antitrust statutes) or of anticompetitive acts made possible by the violation." *Id. at 489, 97 S. Ct. at 697*.

The same issue arose in *Engine Specialties, supra.* There, ESI sued for damages under §§ 4 and 16 of the Clayton Act. Defendant Agrati-Garelli, a manufacturer of minibikes, had terminated ESI as Agrati's exclusive distributor and substituted **[**7]** defendant Bombardier. Bombardier had previously been both a manufacturer and a retailer of minibikes and had threatened Agrati with competition at both levels. To forestall that competition, Agrati and Bombardier agreed to a market division with Agrati as the manufacturer and Bombardier as the retailer and Agrati's exclusive distributor.

Bombardier claimed that ESI's injury was not related to the anticompetitive effects of the market division between Agrati and Bombardier and that ESI would have suffered the same injury had Agrati merely switched its distributorship to Sears. Such a switch, Bombardier argued, would not have involved an antitrust violation. The Court of Appeals rejected that argument and upheld the damages awarded to ESI. It found the Brunswick requirement satisfied in the connection between the market division and the specific actions taken by Bombardier and Agrati to reduce or eliminate ESI's effectiveness as a competitor. *Id. at 13-15*. The court reasoned that a simple switch to Sears would not have led to the kinds of actions taken by the defendants affecting ESI such as abrupt cancellation of the exclusive distributorship in violation of the contract terms, **[**8]** deceptive discovery of trade data, and predatory underpricing. *Id. at 14-15*. These actions could only be explained by the added factor of the agreed market division between the defendants: "(t)he ineluctable result of the allocation of markets was that Agrati could no longer provide minicycles to ESI." *Id. at 15*.

Here, the elimination of ADM as a competitor was, in a sense, the "ineluctable result" of Sigma's purchase of ADM's assets. But, ADM's injury is not the "ineluctable result" of its demise as a competitor. It is not the Fact of ADM's elimination that led to its injury. Rather, the injury resulted from the alleged conflict of interest and duplicity that permeated the transaction.

Nothing alleged here demonstrates a causal relationship between Sigma's acquisition of ADM's assets and the various instances of self-dealing and breach of fiduciary duty on which ADM rests its claim for damages. Perhaps recognizing that weakness, ADM advances another line of argument in reliance on *Albert Pick-Barth Co., Inc. v. Mitchell Woodbury Corp., 57 F.2d 96* (1st Cir.), Cert. denied, *286 U.S. 552, 52 S. Ct. 503, 76 L. Ed. 1288 (1932)*. See also *Atlantic Heel Co., Inc. v. Allied Heel Co.,* ***[**9]*** *Inc., 284 F.2d 879 (1st Cir. 1960)*. These cases stand for the proposition that certain types of unfair trade practices, accompanied by an intent to hurt a competitor, may constitute **[*1300]** per se violations of *§ 1* of the Sherman Act. In Pick-Barth and Atlantic Heel, for example, allegations that the defendants raided the plaintiffs for key employees, disturbed the plaintiffs' customer relations, and misappropriated trade secrets were held sufficient to make out a *§ 1* case.

But, ADM's reliance on the Pick-Barth line is misplaced. First, several courts have recently rejected outright the Pick-Barth per se rule. See, e.g., *Northwest Power Products, Inc. v. Omark Industries, Inc., 576 F.2d 83, 88* (5th Cir.), Cert. denied, *439 U.S. 1116, 99 S. Ct. 1021, 59 L. Ed. 2d 75 (1978)* (citing cases). Second, the First Circuit itself has reexamined Pick-Barth and concluded that "(insofar) as Pick-Barth and Atlantic Heel may be said to stand for the broad proposition that unfair competitive practices accompanied by an intent to hurt a competitor constitute per se violations of the antitrust laws, we do not now accept their teaching." *George R. Whitten, Jr., Inc. v. Paddock Pool Builders,* ***[**10]*** *Inc., 508 F.2d 547, 561 (1st Cir. 1974)*, Cert. denied, *421 U.S. 1004, 95 S. Ct. 2407, 44 L. Ed. 2d 673 (1975)*. The result is that in this Circuit the Pick-Barth allegations are to be tested by the rule of reason. *Engine Specialties, supra, at 16*.

Under such a test, ADM still faces its failure to demonstrate a causal link between the possible monopolistic effects of Sigma's acquisition and the unfair practices associated with the purchase. Moreover, Whitten stressed that the "focus" of Pick-Barth had been "on crippling the organization of a competitor." *Whitten, supra, at 562*. The essence of the employee defections and trade sabotage found in the Pick-Barth cases was the raider's attempt to reduce the effectiveness of ongoing competition. Here, ADM's effectiveness as a competitor was not crippled, but eliminated altogether. ADM, therefore, has no standing to assert the monopolizing effects of Sigma's acquisition in a market in which, as of the date of the acquisition, ADM no longer competed. Only ongoing competitors may now raise that claim.

As for the allegedly tortious conduct surrounding the asset transfer, ADM may well have a valid claim. But that type of claim is reserved **[**11]** to state unfair practices and corporate law. ADM's complaint would have this court blur the line separating federal ***antitrust law*** from those other bodies of law, largely state-created, that govern the management of corporate and commercial affairs. But, the very reason many courts have rejected the Pick-Barth line is that its rationale tended to merge these two distinct bodies of law. See, e.g., *Northwest Power, supra, at 87-90*. If Sigma has violated the antitrust laws, then it should answer to those injured thereby its ongoing competitors. If ADM has been injured by self-dealing and breach of fiduciary duty, then it should seek its remedy under those laws that address such activities. These are distinct theories whose independence must be recognized and respected.

For failure to state an Antitrust claim, plaintiff's federal claims must be dismissed.

III.

THE STATE CHAPTER 93A CLAIMS

Plaintiff's pendent claims under Chapter 93A of the Massachusetts General Laws (Counts V-VII) should be dismissed under the guidance of *United Mine Workers v. Gibbs, 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)*. There, the Supreme Court counselled that, "***HN3***[] if the federal claims are dismissed **[**12]** before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." *Id. at 726, 86 S. Ct. at 1139*. Moreover, ADM has brought similar Chapter 93A claims in another action pending in this court, hence no prejudice is likely to result from dismissal here. Counts V-VII are also dismissed, therefore.

An order will issue.

End of Document

Transitron Electronic Corp. v. Hughes Aircraft Co.

United States District Court for the District of Massachusetts

February 22, 1980

Civ. A. No. 70-484-MA

Reporter

487 F. Supp. 885 *; 1980 U.S. Dist. LEXIS 10858 **; 205 U.S.P.Q. (BNA) 799 ***; 1980-1 Trade Cas. (CCH) P63,224

TRANSITRON ELECTRONIC CORPORATION, Plaintiff v. HUGHES AIRCRAFT COMPANY, Defendant

Core Terms

patent, diode, royalties, license, invention, infringement, patent misuse, manufacturing, disclosure, sealing, glass, licensee, invalid, new matter, misrepresentations, fraudulent, license agreement, settlement, patent application, thermosetting, envelope, semi-conductor, paste, wire, subject matter, configuration, disclose, patentee, re-entrant, original application

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > Claims

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

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

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

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

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

HN1[] **Sherman Act, Claims**

To make out a Sherman Act violation by fraud on the patent office, a plaintiff must first prove fraud, and then must prove all the other elements of an antitrust offense, including an agreement under *§ 1* (conspiracy) or monopolistic intent, definition of the relevant market and exclusionary market power under *§ 2*.

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

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Recklessness

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Patent Law > ... > Inequitable Conduct > Effect, Materiality & Scienter > General Overview

HN2[] **Intellectual Property, Bad Faith, Fraud & Nonuse**

Fraud on the patent office may be "actual" with a specific intent to defraud, or "technical" where "calculated recklessness about the truth" supplies the scienter element.

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

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

HN3[] **Intellectual Property, Bad Faith, Fraud & Nonuse**

A patentee may also violate the antitrust laws by enforcing a valid patent in an unlawful manner.

Antitrust & Trade Law > Sherman Act > Defenses

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

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

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

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

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

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

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

Antitrust & Trade Law > Sherman Act > Claims

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

Patent Law > Infringement Actions > General Overview

Patent Law > Infringement Actions > Defenses > General Overview

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

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

HN4[] **Sherman Act, Defenses**

Patent misuse requires a lesser showing than a Sherman Act violation in that a licensee who asserts it need prove neither anticompetitive effects nor individual harm. Patent misuse may be shown from the totality of a licensor's conduct and business practices.

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

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

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

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

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

Patent Law > Statutory Bars > Abandonment & Forfeiture Bar > Abandonment

HN5[ ] **Misuse of Rights, Patent Misuse Defense**

Misuse of a patent merely suspends the owner's right to recover for infringement of a patent. The owner's right to recover for infringement is reinstated once the offensive practice has been abandoned and its effects have been purged.

Business & Corporate Compliance > ... > Ownership > Conveyances > Assignor & Licensee Estoppel

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

Civil Procedure > ... > Responses > Defenses, Demurrers & Objections > Waiver & Preservation of Defenses

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

Patent Law > Ownership > Conveyances > General Overview

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

HN6[ ] **Conveyances, Assignor & Licensee Estoppel**

A licensee is free at any time to refuse to make further royalty payments and successfully defend against enforcement on grounds of patent misuse. Therefore, a licensee waives a potential patent misuse defense insofar as it pays royalty fees.

Contracts Law > Remedies > Rescission & Redhibition > General Overview

Patent Law > ... > Defenses > Inequitable Conduct > Burdens of Proof

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > General Overview

Contracts Law > ... > Affirmative Defenses > Fraud & Misrepresentation > Material Misrepresentations

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

HN7[ ] **Remedies, Rescission & Redhibition**

To entitle a party to rescind a contract on the grounds of fraudulent misrepresentation in the inducement under Massachusetts law, proof of fraud must be clear and convincing. Fraud is not presumed. It must at law be clearly and fully established. Suspicion is not enough. The balance of the testimony is not to be nicely weighed.

Civil Procedure > Settlements > Releases From Liability > General Overview

Patent Law > ... > Defenses > Patent Invalidity > General Overview

Patent Law > Ownership > Conveyances > General Overview

HN8[] **Settlements, Releases From Liability**

A licensee may not avoid liability for royalties due before a declaration of invalidity when that declaration is obtained by the efforts and expenditures of another. It is only when, by judicial decree or otherwise, it is published to the world that the monopoly is destroyed, that the licensee can claim a corresponding release from his obligation to pay royalties.

Patent Law > US Patent & Trademark Office Proceedings > Continuation Applications > Copendency & Disclosure

Patent Law > Originality > Joint & Sole Inventorship

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

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

HN9[] **Continuation Applications, Copendency & Disclosure**

A Continuation in Part (CIP) is a procedure under *35 U.S.C.S. § 120* for patenting an improvement on or modification to an invention on which an application is already pending, rather than for clarifying the originally disclosed invention. The improvement or modification disclosed in a CIP must have inventorship identical to that of the parent patent.

Patent Law > Statutory Bars > On Sale Bar > General Overview

HN10[] **Statutory Bars, On Sale Bar**

According to *35 U.S.C.S. § 102(b)*, an invention may not be patented after it has been in commercial use for more than one year.

Patent Law > ... > Inequitable Conduct > Effect, Materiality & Scienter > General Overview

Patent Law > ... > Defenses > Inequitable Conduct > General Overview

HN11[] **Inequitable Conduct, Effect, Materiality & Scienter**

Fraud on the patent office must be material in order to be actionable.

Patent Law > ... > Specifications > Description Requirement > General Overview

HN12[] **Specifications, Description Requirement**

A patent attorney has a duty to provide the patent office with a full disclosure of all aspects of the invention. However, the final decision as to whether a claim falls within the initial disclosure is a function of the patent examiner, not the attorney.

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

Patent Law > Statutory Bars > Prior Patents & Publications > Foreign Patenting

HN13[] **Conveyances, Assignments**

See *35 U.S.C.S. § 185*.

Patent Law > Statutory Bars > Prior Patents & Publications > Foreign Patenting

HN14[] **Prior Patents & Publications, Foreign Patenting**

See *15 U.S.C.S. § 184*.

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

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

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

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

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

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

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

HN15[] **Bad Faith, Fraud & Nonuse, Fraud**

Mere good faith enforcement of a patent later found to be invalid does not constitute patent misuse.

Patent Law > Anticipation & Novelty > General Overview

Patent Law > ... > Inequitable Conduct > Effect, Materiality & Scienter > General Overview

HN16[] **Patent Law, Anticipation & Novelty**

Although a patent applicant need not list out the full spectrum of his knowledge to establish its bona fides, it may not deliberately fail to disclose material information such as a possible prior use.

Counsel: [1]** Louis Orenbuch, Wolf, Greenfield & Sacks, Boston, Mass., for plaintiff.

John Hally, Nutter, McClennon & Fish, Boston, Mass., for defendant.

Opinion by: MAZZONE

Opinion

[*802]** **[*888]** OPINION

Statement of the Case

The plaintiff is Transitron Electronic Corporation (Transitron), a Delaware corporation, with its principal place of business in Wakefield, Massachusetts. The defendant is Hughes Aircraft Company (Hughes), a Delaware corporation, with principal offices in California, and with a regular and established place of business in Massachusetts.

The springboard for this case is the decision in *General Instrument Corp. v. Hughes Aircraft Co., 399 F.2d 373 (1st Cir. 1968)*. That decision held that the essential claim of the subject Hughes diode patent was invalid because the claim introduced new matter not supported by the original disclosure. Following that decision Transitron demanded the return of royalties paid under the licensing agreement. Failing in that effort, Transitron commenced this suit.

Transitron charges in Count I a violation of federal antitrust laws. This count is based on allegations that Hughes fraudulently obtained a patent for a glass sealed diode from the United **[**2]** States Patent Office. Transitron claims Hughes used this patent, allegedly invalid because of the fraud, and also because of Hughes' failure to comply with the Invention Secrecy Act, *35 U.S.C. §§ 181-188*, to coerce Transitron (and other diode manufacturers) to enter a licensing agreement. It is alleged this action by Hughes was, first, an attempt to restrain trade in the diode market in violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1* and, second, an attempt to monopolize the diode market in violation of *Section 2* of the Sherman Act, *15 U.S.C. § 2*. Count II and Count III are based on the same factual **[***803]** allegations and sound in tort and contract respectively. Transitron seeks to recover treble damages for the antitrust violations and seeks return of the royalties paid under the invalid patent on either a patent misuse tort claim or breach of contract claim.

Hughes denies the allegations of any fraudulent conduct, denies violating the Invention Secrecy Act, and relies on applicable statutes of limitations. Further, Hughes counterclaims, alleging that Transitron fraudulently concealed its manufacture of diodes covered by the licensing agreement. As a result of this fraudulent **[**3]** misrepresentation, Hughes claims it is entitled to additional royalties.

[*889] Background of the Case

Most of the factual background of the case pertaining to Hughes' prosecution of the diode patent in the United States Patent Office and in Great Britain and to the communications between the parties is undisputed and is contained in the extensive documentary record. In order to understand and analyze more fully the legal theories advanced by the parties, we make our preliminary findings as to the factual background of this controversy at the outset.

The original patent application for a "Glass-Sealed Semi-Conductor Crystal Device" was filed on March 31, 1950, by Harper Q. North and Justice N. Carman, Jr. North and Carman assigned their interest in the patent application, Serial No. 153102, to Hughes Aircraft Company. The application was filed by Nicholas T. Volsk, Patent Counsel of Hughes. As filed, there were thirty-four claims. The invention related to germanium crystal conductive elements mounted in glass-sealed envelopes. It purported to disclose novel crystal device assemblies. Generally, the purpose of the invention was to produce semi-conductor crystal devices **[**4]** mounted in glass envelopes which would expand negligibly in response to temperature changes, thereby producing devices with stronger, more stable and superior electrical characteristics. The novel method of assembling such devices included the use of protective coatings to establish glass to glass seals, thus avoiding the use of high temperatures. This had not been possible under the prior art because the process for sealing the glass envelope necessarily required a high temperature which would damage the crystal.

There followed a vigorous and extended patent prosecution, in which a number of attorneys of the Hughes Patent Department took part. The personnel as well as the leadership of the Department changed during that period of time. Three additional claims were filed on September 20, 1950 making a total of thirty-seven claims. Claims 38-72 were filed on March 20, 1951; claims 73-81 were filed on May 19, 1951. Further amendments were filed periodically through July 12, 1954.

On March 10, 1952, while the application was pending, Hughes' Patent Department received a Description of Invention from Harper Q. North. This invention related to improving the diodes and the method **[**5]** for making them. Essentially, the new method involved fusing one end of the glass envelope before inserting the germanium crystal and then mounting the crystal through the use of a thermosetting compound and the application of relatively low temperatures. Inquiry was made as to the preferred composition of the thermosetting compound. Hughes contemplated the use of a gold thermosetting compound manufactured by DuPont, but investigated the possibilities of others on which it might have been able to obtain patent coverage. Hughes had put this new method into production sometime in early 1952.

On March 8, 1954, Hughes submitted claims 100-104 as an amendment to its application, purporting to recite the invention and process previously claimed in greater detail. These claims were disallowed. On July 27, 1954, Hughes submitted another proposed amendment which rewrote the previously disallowed claim 102 as claim 105 and claim 106. These last two claims were allowed on September 2, 1954 and renumbered claims 60 and 61. These claims deal explicitly with the structural and dimensional features of the diode and make no reference to the use of a thermosetting compound. On November 9, **[**6]** 1954, the patent was issued, U.S. Patent No. 2,694,168.

During the course of the patent prosecution, Hughes submitted a total of 106 claims. Those claims reflected continuing developments in the manufacture of semi-conductor diodes that occurred after the initial filing of the application. The developments related not only to the manner in which the glass enclosure was hermetically sealed, but to the structural support for elements within the enclosure. Claims 105 and 106 specifically called for the length of the seal between each of the lead wires and the respective end sections to be at least 11/2 times the maximum cross sectional dimension **[*890]** of the wire, and the outside **[***804]** dimension of each of the end sections to be at least five times the cross sectional dimension of the lead wires. This disclosure explicitly recited the measurements which the drawings submitted in connection with the original application had reflected. While the drawings are not necessarily made to scale, they are an integral part of the application and are considered by the examiner in his review of the application.

In Great Britain, a patent application for the invention was filed on March 20, **[**7]** 1951 and issued on November 24, 1954, No. 721,201. The material disclosed in claims 60 and 61 of the final United States patent was not filed in Great Britain as a claim under the parent patent, but instead was treated as a separate improvement in an application for a British Patent of Addition (the BPA) filed on November 8, 1954. Because the time for filing these claims under the parent patent had expired, it was necessary to file a patent of addition to the Patent # 721,201. The responsibility for this prosecution was assigned to Seymour Scholnick. Scholnick had not been involved with the patent prosecution in the United States. Under the guidance of British patent counsel, Carpmaels and Ransford, the claims, drawings, and prescribed preamble were filed. Carpmaels and Ransford had also filed the parent patent application.

In April, 1957, Hughes began an active industry-wide licensing program. Hughes had initially contacted Transitron about possible infringement in 1954, but Transitron refused to take a license in 1955 and Hughes did not pursue the matter. After some investigation over the next several years, Hughes determined that a number of manufacturers were infringing **[**8]** its patent. It sent notices to many of them, including Transitron charging infringement of claims 60 and 61. Hughes offered Transitron and others a non-exclusive license at a royalty rate of 1%.

On June 1, 1962, Transitron and Hughes executed a five year license agreement granting Transitron a non-exclusive right to manufacture diodes covered by claims 60 and 61 of the patent in exchange for a 1% royalty fee and for licenses under patents held by Transitron. The agreement contained a provision that a certified public accountant designated by Hughes could audit Transitron's records. Transitron manufactured under this license until October 1, 1962 when it switched to an "etched lead" diode construction and manufacturing process. Transitron notified Hughes that it was no longer manufacturing diodes within the Hughes patent and terminated royalty payments. As required by the 1962 agreement, Transitron periodically verified to Hughes between 1963 and 1966 that it was not manufacturing diodes covered by Hughes' patent.

In 1966, Hughes discovered that Transitron had abandoned its "etched lead" diode and was again manufacturing diodes covered by the license. Hughes demanded back royalties. **[**9]** After extensive negotiations, Hughes and Transitron agreed that Transitron would pay a lump sum of $ 150,000 for the infringing diodes it had manufactured between 1963 and 1966 and would renew its license agreement. Hughes did some independent investigating but did not perform an audit, although it had a right to do so under the license agreement. Transitron continued to manufacture diodes under the Hughes patent for several months until it switched to another of its own manufacturing techniques, the "mini-pack" diode.

Finally, to complete the background of this case, Hughes brought a patent infringement action against General Instrument Corporation in the District of Rhode Island. *Hughes Aircraft Co. v. General Instrument Corp., 275 F. Supp. 961 (R.I.1967)*. Hughes alleged claims 60 and 61 of the North-Carman patent had been infringed by General Instrument. Hughes was successful in the District Court. On appeal, the Court of Appeals for the First Circuit reversed, and held that claim 60 was new matter, not supported by the original disclosure in the North-Carman patent application, **[*891]** in violation of *35 U.S.C. § 132*. [1] On July 18, 1968, claim 60 of the patent was declared **[**10]** invalid. *General Instrument, 399 F.2d at 380*.

Theories of the Case

We follow the background findings with our analysis of the theories advanced by the parties.

1. The Antitrust Claim Theory

Although issuance of a patent confers a seventeen year monopoly on a patentee, it does not absolutely exempt the holder from liability under the antitrust laws, *15 U.S.C. §§ 1-15*. A patentee may violate those laws either in obtaining the patent by means of fraud on the Patent Office or in unlawfully enforcing its patent. **[***805]**

Plaintiff's allegations of antitrust violations are premised entirely upon its allegations of fraud on the Patent Office. Thus, the case falls squarely within *Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 86 S. Ct. 347, 15 L. Ed. 2d 247 (1965)*. ***HN1***[] To make out a Sherman Act violation by fraud on the Patent Office, **[**11]** a plaintiff must first prove fraud, and then must prove all the other elements of an antitrust offense, including an agreement under *Section 1* (conspiracy) or monopolistic intent, definition of the relevant market and exclusionary market power under *Section 2*. *Walker Process at 176, 86 S. Ct. at 349*.

HN2[] Fraud on the Patent Office may be "actual" with a specific intent to defraud, or "technical" where "calculated recklessness about the truth" supplies the scienter element. *W. R. Grace & Co., Inc. v. Western U.S. Industries, Inc., 608 F.2d 1214 (9th Cir. 1979)*; *Monolith Portland Midwest Co. v. Kaiser Aluminum & Chemical Corp., 407 F.2d 288 (9th Cir. 1969)*. A very high standard of proof has been established for either type of offense. Transitron must present clear and convincing evidence of (1) the falsity of Hughes' representations; (2) Hughes' fraudulent state of mind or wanton recklessness; and (3) materiality of the misrepresentations to the Patent Office's decision to issue the patent. *Johnson & Johnson v. W. L. Gore & Associates, Inc., 436 F. Supp. 704, 732*

[1] Both the District Court and the Court of Appeals directly addressed only claim 60, finding that claims 60 and 61 were nearly identical. *275 F. Supp. at 964*.

(D.Del.1977); see, *Norton Co. v. Carborundum Co., 530 F.2d 435, 444 (1st Cir. 1976)*; *United States v. American Bell Telephone **[**12]** Co., 167 U.S. 224, 251, 17 S. Ct. 809, 814, 42 L. Ed. 144 (1897)*.

The plaintiff's entire theory of this aspect of the case depends upon a finding that fraud was practiced on the Patent Office. Plaintiff alleges the following fraudulent acts and conduct of the defendant:

(1) Hughes' patent attorneys knew that claims 60 and 61 actually encompassed new matter, but intentionally withheld that information from the Patent Office.

(2) Hughes' patent attorneys intentionally misled the Patent Office by claims that the diode covered by the North-Carman patent had met with commercial success.

(3) Hughes' patent attorneys wilfully concealed from the Patent Office the fact that it was the "new" diode which met with commercial success.

(4) Hughes' patent attorneys wilfully concealed from the Patent Office that the ratios specified in claims 60 and 61 were intended to cover diode specifications adopted by the military after the initial patent application was filed.

We can find no direct evidence that Hughes knew claims 60 and 61 contained new matter and fraudulently obtained the patent, but Transitron urges us to infer such knowledge from evidence of the following **[**13]** conduct. First, the subject matter **[*892]** of claims 60 and 61 constitutes such a radical departure from the original disclosure that Hughes' patent attorneys must have recognized that the claims contained new matter. Secondly, Hughes knew of a modification by Harper Q. North that was made after the filing of the original application and Hughes may have contemplated filing a "Continuation in Part" (CIP) patent application or a wholly independent application for the modification, then without apparent reason, instead filed amendments relating to the modification under the original patent. Thirdly, Hughes claimed commercial success for the diode which was not covered by the original application. Finally, the subject matter was treated as new matter in Hughes' prosecution of the patent of addition in Great Britain.

Transitron's second theory of antitrust violation is that even if the patent was not obtained by fraud on the Patent Office, Hughes violated the Invention Secrecy Act, *35 U.S.C. § 184*, by failing to obtain a license from the United States Patent Office to file the British Patent of Addition. Transitron asserts that such a violation would invalidate the patent ab **[**14]** initio under *35 U.S.C. § 185*, that Hughes knew or should have known of the violation and resultant invalidity, and that its licensing program was, therefore, an attempt to enforce a patent known to be invalid, which may constitute an antitrust violation. *Handgards, Inc. v. Ethicon, Inc., 601 F.2d 986 (9th Cir. 1979)*, cert. denied, *444 U.S. 1025, 100 S. Ct. 688, 62 L. Ed. 2d 659 (1980)*.

HN3[] A patentee may also violate the antitrust laws by enforcing a valid patent in an unlawful manner. See, e.g., *Kobe, Inc. v. Dempsey Pump Co., 198 F.2d 416* (10th Cir.), cert. denied, *344 U.S. 837, 73 S. Ct. 46, 97 L. Ed. 651 (1952)* (patentee engaged in scheme to monopolize by acquiring all patents within industry and publicizing its very vigorous infringement litigation); *Rex Chainbelt Inc. v. Harco **[***806]** Products, Inc., 512 F.2d 993* (9th Cir.), cert. denied, *423 U.S. 831, 96 S. Ct. 52, 46 L. Ed. 2d 49 (1975)* (infringement suit "brought in furtherance and as integral part of a plan to violate the antitrust laws," *512 F.2d at 1006*); and *Otter Tail Power Co. v. United States, 410 U.S. 366, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973)*, on remand *360 F. Supp. 451 (D.Minn.1973)*, aff'd mem., *417 U.S. 901, 94 S. Ct.* ***[**15]*** *2594, 41 L. Ed. 2d 207 (1974)* ("repetitive use of litigation . . . timed and designed principally to . . . preserve defendant's monopoly," *360 F. Supp. 451*.) Although Transitron has not specifically pleaded any particular patent antitrust violation apart from fraud on the Patent Office or enforcement of a patent known to be invalid, we shall examine the evidence for proof of such a violation.

2. The Patent Misuse Claim Theory

Patent misuse is generally set up as a defense to an infringement suit. It is similar to an allegation of a patent antitrust violation in that it asserts the patentee is wrongfully attempting to enforce the patent, either because the patent was fraudulently obtained or because the enforcement methods are unlawfully anticompetitive. ***HN4***[] Patent misuse requires a lesser showing than a Sherman Act violation in that a licensee who asserts it need prove neither anticompetitive effects, *Noll v. O. M. Scott & Sons Co., 467 F.2d 295 (6th Cir. 1972)*, cert. denied, *411 U.S.*

965, 93 S. Ct. 2143, 36 L. Ed. 2d 685 (1973), nor individual harm, *Morton Salt Co. v. G. S. Suppiger Co., 314 U.S. 488, 62 S. Ct. 402, 86 L. Ed. 363 (1942)*. Patent misuse may be shown from the totality **[**16]** of a licensor's conduct and business practices. *Duplan Corp. v. Deering Milliken, Inc., 444 F. Supp. 648 (D.S.C.1977)*, rev'd in part on other grounds, *594 F.2d 979 (4th Cir. 1979)*, cert. denied, *444 U.S. 1015, 100 S. Ct. 666, 62 L. Ed. 2d 645 (1980)*. Thus, patent misuse may be seen as having a less stringent standing requirement and a lesser burden of proof than an antitrust claim. This is consistent with the general policy of the courts to erect barriers which prevent the frustration of patent law by ***antitrust law*** and its highly punitive treble damage provisions, but at the same time to relieve a licensee from paying royalties under a patent **[*893]** which is unlawfully obtained or enforced. *Handgards, 601 F.2d at 996*.

The threshold issue on plaintiff's patent misuse claim is whether patent abuse by a licensor can give rise to a tort action by the licensee. This is apparently a question of first impression. All the patent misuse cases we have been able to find involve the assertion of the doctrine by a licensee as a defense to a licensor's infringement action rather than as grounds for affirmative relief. On the basis of the history and application of the doctrine, and the **[**17]** availability of other grounds on which plaintiff licensees may seek damages in the context of patent misuse, we conclude that patent misuse of itself is not an actionable tort. [2]

Patent misuse was developed as an equitable doctrine to provide an equitable defense, analogous to the clean hands defense, against an infringement action. Chisum, Patents, p. 19-91 (1978). A patentee may commit patent misuse in improper exploitation of the patent either by violating the antitrust laws or extending the patent beyond its lawful scope. Id. That the doctrine does not create an independent cause of action for the alleged infringer is implicit in the black letter statement of the effect of finding patent misuse: ***HN5***[] "Misuse of a patent merely suspends the owner's right to recover for infringement **[**18]** of a patent." Id. at 19-156. The courts have uniformly held that the owner's right to recover for infringement is reinstated once the offensive practice has been abandoned and its effects have been purged. Id.

The doctrine was first clearly enunciated by the Supreme Court in *Morton Salt, 314 U.S. 488, 62 S. Ct. 402, 86 L. Ed. 363*, where the patentee's improper exploitation of its patent was sufficient to bar its attempt to collect royalties, regardless of whether the allegedly infringing defendant could show individual harm or whether the offensive conduct was sufficient to constitute an antitrust violation. In *Transparent-Wrap Machine Corp. v. Stokes & Swift Co., 329 U.S. 637, 67 S. Ct. 610, 91 L. Ed. 563 (1947)*, the Supreme Court held that a license provision requiring that the licensee "grant back" all its own patents to the licensor might constitute patent misuse and bar the enforcement action. In *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 133-140, 89 S. Ct. 1562, 1581-1585, 23 L. Ed. 2d 129 (1969)*, the Court found patent misuse in the terms of a license which based royalties on a percentage of gross sales without regard to the licensee's actual use of the **[**19]** patent.

The Supreme Court refined the doctrine in *United States Gypsum Co. v.* ***[***807]*** *National Gypsum Co., 352 U.S. 457, 77 S. Ct. 490, 1 L. Ed. 2d 465 (1957)*, holding that patent misuse might be "purged" so that the patentee's right to enforce its protected monopoly was reinstated. Thus, the doctrine provides only a temporary defense to a suit for royalties. This supports our conclusion that it does not create an independent right to recover the back royalties which a licensee has chosen to pay. Because the doctrine of licensee estoppel was put to rest in *Lear, Inc. v. Adkins, 395 U.S. 653, 89 S. Ct. 1902, 23 L. Ed. 2d 610 (1969)* (overruling *Automatic Radio Manufacturing Co. v. Hazeltine Research, Inc., 339 U.S. 827, 836, 70 S. Ct. 894, 899, 94 L. Ed. 1312 (1950))*, ***HN6***[] a licensee is free at any time to refuse to make further royalty payments and successfully defend against enforcement on grounds of patent misuse. Therefore, a licensee waives a potential patent misuse defense insofar as it pays royalty fees.

3. The Contract Claim Theories

Plaintiff's Count III seeks recission of the license agreements and restitution of royalties on two theories. Transitron first **[*894]** argues that **[**20]** Hughes' false and misleading representations to the Patent Office as reflected in the

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[2] E. g., actions for unfair competition, *Tubeco, Inc. v. Crippen Pipe Fabrication Corp., 402 F. Supp. 838 (E.D.N.Y.1975)*, aff'd mem., ***538 F.2d 314 (2nd Cir. 1976)***, for antitrust violations or for breach of the license agreement.

file wrapper were material misrepresentations which induced Transitron to take a license. ***HN7***[] To entitle a party to rescind a contract on the grounds of fraudulent misrepresentation in the inducement under Massachusetts law, proof of fraud must be clear and convincing. Sanborn v. Stetson, 2 Storey 481, 485 (C.C.S.D.Mass.1843); see, *Norton v. Carborundum, 530 F.2d at 444*. "Fraud is not presumed. It must at law be clearly and fully established. Suspicion is not enough. The balance of the testimony is not to be nicely weighed." Sanborn at 485. Alternatively, Transitron argues that the parties' belief that claims 60 and 61 were valid constituted a mutual mistake of fact.

Overriding patent law policies make restitution generally unavailable for royalties paid under a patent later held to be invalid. *St. Regis Paper Co. v. Royal Industries, 552 F.2d 309* (9th Cir.), cert. denied, *434 U.S. 996, 98 S. Ct. 633, 54 L. Ed. 2d 490 (1977)*. Otherwise, all licensees under a certain patent would get a "free ride" from one infringer's decision to litigate rather than pay royalties. Absent fraud or other conduct **[**21]** by the licensor justifying punitive treatment, a determination of patent invalidity does not make a license agreement void ab initio. *Troxel Manufacturing Co. v. Schwinn Bicycle Co., 465 F.2d 1253, 1260 (6th Cir. 1972)*, cert. denied *416 U.S. 939, 94 S. Ct. 1942, 40 L. Ed. 2d 290 (1974)* (Troxel I). Whenever a licensee doubts the validity of a patent, it is free to withhold royalty payments and is not estopped from raising invalidity as a defense to an infringement or breach of contract suit. *Lear, 395 U.S. 653, 89 S. Ct. 1902, 23 L. Ed. 2d 610 (1969)*. Therefore, a "mutual mistake" as to the validity of the patent does not affect the validity of the licensing agreement. We note the mutual mistake theory assumes Hughes' good faith belief in validity at the time of licensing, a premise which flies in the face of Transitron's factual allegations throughout this litigation.

The material misrepresentation theory fails because it does not appear that Transitron investigated the file wrapper before taking a license. Therefore, there was no direct reliance by Transitron on any false and misleading statements or non-disclosures contained therein. Transitron's injury resulted from its **[**22]** reliance upon the Patent Office to make a correct determination of validity. *Pepsi-Cola Metropolitan Bottling Co. v. Pleasure Island, Inc., 345 F.2d 617 622 (1st Cir. 1965)* (applying Massachusetts law).

4. Hughes' Counterclaim

On November 9, 1971, after Transitron filed this antitrust action, Hughes counterclaimed for royalties under the 1962 agreement for infringing diodes manufactured by Transitron between 1963 and 1966. Hughes argues that the $ 150,000 lump sum and renewed royalty agreement it received as payment for past infringement in the 1966 settlement does not constitute accord and satisfaction because Hughes accepted the settlement in reliance on Transitron's misrepresentations as to the quantity of patented diodes it manufactured between 1963 and 1966.

Although it is presently asserting a claim under an invalid patent, Hughes is not barred from asserting its counterclaim by the doctrine of patent misuse. It is asserting a claim for royalties due before the patent was held invalid. Thus, it is not attempting to enforce an invalid patent. In *Troxel Manufacturing Co. v. Schwinn Bicycle Co., 489 F.2d 968 (6th Cir. 1973)*, cert. denied, *416 U.S. 939, 94 S. Ct. 1942, 40* ***[**23]*** *L. Ed. 2d 290 (1974)* (Troxel II), the Sixth Circuit allowed a licensor's counterclaims, holding that ***HN8***[] a licensee may not avoid liability for royalties due before a declaration of invalidity when that declaration is obtained by the efforts and expenditures of another: **[***808]**

> It is only when, by judicial decree or otherwise, it is published to the world that the monopoly is destroyed, that the licensee can claim a corresponding release from his obligation to pay royalties.

[*895] *Troxel II, 489 F.2d at 973*, quoting *Drackett Chemical Co. v. Chamberlain Co., 63 F.2d 853, 854 (6th Cir. 1933)*.

Hughes must prove it relied on Transitron's misrepresentations in order to rescind their settlement agreement. *Pepsi-Cola Metropolitan Bottling Co., 345 F.2d at 622*. Absent such a showing, performance of the agreement whereby each party compromised its position operates as accord and satisfaction of the unliquidated claim to royalties due between 1964 and 1966. *Rust Engineering Co. v. Lawrence Pumps, Inc., 401 F. Supp. 328, 333 (D.Mass.1975)*.

The questions we decide, therefore, are whether Transitron made willful and material misrepresentations for the purpose of deceiving Hughes, whether **[**24]** Hughes reasonably relied upon them, and, if so, whether any reason exists to deny recovery of further royalties at this time.

General Findings

Plaintiff's Case

I. Hughes did not procure the North-Carman Patent through fraud on the United States Patent Office.

II. Hughes was not required to secure a license for filing the British Patent of Addition.

III. Hughes did not use its patent in an effort to eliminate competition and restrain trade, nor did Hughes use its patent in an attempt to create a monopoly.

IV. Hughes' conduct did not constitute patent misuse.

Defendant's Counterclaim

V. Transitron knowingly made misrepresentations to Hughes concerning its infringing production.

VI. Hughes did not rely on Transitron's misrepresentations.

VII. Hughes failed to fulfill its obligations to the Patent Office.

I. HUGHES DID NOT PROCURE THE NORTH-CARMAN PATENT THROUGH FRAUD ON THE UNITED STATES PATENT OFFICE.

Transitron urges us to infer Hughes' fraudulent intent from four aspects of the patent prosecution: (A) The scope of claims 60 and 61 was so different from the underlying disclosure that Hughes did realize or should have realized **[**25]** they contained new matter; (B) Hughes initially planned to file a CIP application for the patent disclosure by Harper Q. North (P.D. 437), reflecting a recognition that the subject matter was new. Its subsequent decision to file amendments was intended to hide a lack of identity of inventorship; (C) Hughes knew the commercially successful diode was not covered by the original application and had been in commercial use for more than one year; and (D) Hughes' treatment of the content of PD 437 and claims 60 and 61 as new matter in its British patent prosecution reflected a recognition of novelty. We examine each of these aspects of the prosecution individually and then in the aggregate to determine if the totality of Hughes' conduct amounted to fraud.

A. Scope of Claims 60 and 61.

The initial claims and claims 60 and 61 describe a crystal diode, with a semi-conductor element or chip mounted inside a hermetically sealed glass envelope. One wire is fixed to the chip by means of a conductive vitreous paste. A wire "whisker" serpentines down from the other lead wire inside the envelope and touches but is not attached to the chip, establishing a "point contact." One production problem **[**26]** addressed by the invention was avoiding damage to the electrical characteristics of the chip from the heat applied to seal the envelope. The invention also addressed the problem of designing the diode in such a way that the glass would not crack when heated or when the external ends of the wires were bent. Thus, the patent covered a particular configuration or package for a **[*896]** crystal diode and a method for manufacturing the package so as to make it rugged and electronically reliable.

The Court of Appeals found in General Instrument that claim 60 contained new matter in the following respects: [3]

[27]** (1) in the original drawings the chip was supported by being embedded in the bottom of the glass envelope; in claims 60 and 61 it **[***809]** is supported only by the lead wire to which it is attached.

(2) in the original claims, one of the lead wires was composed of two pieces of different diameters; claims 60 and 61 reflect a one-piece lead of constant diameter.

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[3] We need not here reiterate the Court of Appeals' comprehensive technical analysis. See *399 F.2d 373*. Of course, we do not decide here whether these changes are new or simply non-inventive changes in manufacture. We need only decide whether the changes were proposed as amendments by Hughes' patent attorneys with the knowledge that they were new and with a calculated effort and intent to deceive the Patent Office, or with reckless disregard of their novelty.

(3) the original application only illustrated by drawing certain outer dimensions of the glass package and certain ratios among its parts; those dimensions and ratios, which were critical to the commercial usefulness and ruggedness of the diode, are explicitly made normative in the later claims.

(4) the original application disclosed a manufacturing process whereby the semiconductive chip was exposed to extreme heat; although claims 60 and 61 disclose only a completed product, the process employed by Hughes and discussed at length in the BPA and internal Hughes documents for making that product is a process whereby the chip is exposed to one low temperature seal.

As additional difference not discussed in General Instrument, but argued here, was the re-entrant configuration of the glass to glass seals of the later diode. The drawings **[**28]** submitted with the original United States patent application depict an angle between the lead wire and the end of the glass envelope greater than 90o, so the package has sloping "shoulders." (Figure 1). The drawings submitted with the BPA, which reflect the substance of claims 60 and 61, depict a "re-entrant" configuration, with an angle of less than 90o between the lead and envelope. (Figure 2). The re-entrant configuration results from the new method of sealing the package described in North's invention disclosure (see Part IB, infra) and the preamble to the BPA, which was put into production in the spring of 1952.

TABLE

[*897] Transitron asserts that the re-entrant configuration was a significant departure from the original construction because with the smaller angle, much less stress was exerted on the end of the glass package when the lead wire was bent, so the glass was much less likely to crack where the wire entered and was sealed to the envelope.

We attach little significance to the re-entrant configuration for several reasons. First, there was conflicting testimony as to whether cracking around the very ends of the envelope impaired the hermetic seal. Secondly, **[**29]** there was conflicting testimony as to whether a re-entrant configuration would reduce such cracking. Finally, North discussed in detail the advantages of the manufacturing improvement he disclosed (see Part IB, infra) but he made no reference to the re-entrant configuration which happened to result from the new sealing methods. If the re-entrant configuration was a significant improvement to, and modification of the diode, we find it was wholly unintentional.

We cannot say on the basis of the four factors discussed in General Instrument plus the re-entrant configuration that Hughes knew or should have known that claims 60 and 61 contained new matter and deliberately withheld that knowledge from the Patent Office. Our review of the hundreds of exhibits, the depositions, and the testimony that comprise the record in this case leads us to conclude that Hughes' Patent Department wrote those claims in as broad a fashion as possible in order to gain the most extensive coverage for its patent. While the original application did not state the dimensions found critical in General Instrument, support for these dimensions could be found in the drawings. The ultimate decision as to novelty **[**30]** of subject matter was that of the Patent Examiner who accepted the claims. Patent coverage depends on patent claims. They define the scope of the invention. The prosecution of a patent application primarily involves working out acceptable wording of claims to be clear of prior art and to comply with statutes and rules. Initial rejection of all claims is so commonplace as to be without legal significance. There is a constant struggle that goes on between the attorney who seeks maximum protection for a client's invention and the examiner who raises all possible legal and technical objections. The result is a set of protected claims.

We also find support for our conclusion in the file wrapper. It discloses every aspect of this aggressive prosecution, including the **[***810]** resistance of the Patent Office to the number of claims, which it considered unduly great. We note that in January, 1952, early in the prosecution, the claim of radiant heat sealing was rejected and the applicants were advised to desist from presenting such a claim. Hughes felt that the prosecution **[*898]** was undergoing a haphazard examination in the Patent Office and pursued its claim. The claims eventually allowed **[**31]** as claims 60 and 61 were never rejected as unsupported. They were rejected as covered by prior patents, such as Midgley. It was not until Henry Heyman took over the prosecution that the claims were allowed.

Heyman admittedly undertook to write the claims in the broadest terms that the Patent Office would allow. In our view, this successful course of action cannot be attributed to willful concealment and deception. The Patent Office accepted the claims after much review and refinement of the application. There is no evidence that any of the Hughes patent counsel who worked on the prosecution believed the claims were novel but persisted in this effort to gain patent coverage by deliberately concealing that novelty from the examiner.

We are also aided by the testimony of Harper Q. North in finding that Hughes did not believe claims 60 and 61 were new inventions. The invention was the diode. North considered the claims to be engineering improvements, merely a way to improve the production yield by changing the manufacturing process. They did not necessarily describe a better diode, just a diode that was cheaper to make. Even the re-entrant configuration, relied upon so heavily **[**32]** by Transitron to demonstrate novel matter, was not critical as far as North was concerned. He felt the glass which encased the lead could crack off and not affect the seal in any way.

We also accept the testimony of David Doody, Director of Patents at Hughes beginning in 1957. Doody was not at Hughes during the original prosecution. We found him to be candid and helpful. Doody reviewed all of the material submitted by the manufacturers included in the proposed licensing program, particularly the comprehensive report of Raytheon patent counsel. That material focused on two reasons the claim was not valid, namely that the process was in use more than one year, and that claim 60 was not supported by the specifications. It was Doody's judgment that claims 60 and 61 were not new matter, a judgment confirmed by outside counsel as well as by a staff who were not present during the time of the prosecution. He persisted in his licensing program to gain respect for the patent. He negotiated the settlement with Transitron counsel. He consistently maintained the position that claims 60 and 61 did not involve new matter and that Hughes made a complete disclosure in the original application. **[**33]** The institution of the suit against one of the diode manufacturers who resisted the license, General Instrument Corporation, was an action which is consistent with his announced intention in pursuing the licensing program.

B. North's Invention Disclosure.

On March 7, 1952, Harper Q. North submitted to the Hughes Patent Department a "Description of Invention" # PD 437. Entitled "A Point Contact Diode of Improved Construction," PD 437 names only North as the inventor, refers to the pending United States patent application as "related," and contemplates that the invention would be for sale as of February 17, 1952. North's disclosure does not recite any of the dimensional features of claims 60 and 61, but deals with the use of thermosetting paste to mount the chip on the lead wire and with the low temperature sealing process.

On April 3, 1952, Hughes' patent attorney Rosenberg wrote to the DuPont Corporation concerning DuPont's gold thermosetting paste. He stated that "Hughes Aircraft Company has recently started production of an improved germanium diode . . . " and that he was "in the course of preparing a patent application on the improved diode . . . (.)"

On May 22, 1952 North **[**34]** conferred with attorneys Lentz and Rosenberg. PD 437 was described as "a disclosure which related to the use of a conductive thermosetting compound for mounting a semi-conductor crystal" with "rather tenuous" patentability. However, they contemplated filing some form of patent application covering use of the compound in a glass diode package as soon as possible.

[*899] On July 2, 1952, Volsk, Rosenberg, Lentz and North decided to "prosecute" PD 437. It is unclear whether they had decided how to prosecute it as a new invention, as a CIP on the original invention, or as an amendment to the original invention.

On September 11, 1952, Lentz "decided to withhold action on the application of the subject matter contained (in PD 437) for at least another week or two" and not "to proceed further with the prosecution of this disclosure" because certain details of the manufacturing process had still not been **[***811]** ironed out. Again, it is unclear what form prosecution was to take.

The Patent Office indicated on July 27, 1954, that it would allow the claims finally issued as 60 and 61. On August 17, 1954, after discussing PD 437 with Hughes' Patent Evaluation Committee of the Semi-Conductor **[**35]** Division, Lentz closed the PD 437 file without "prosecution into a patent application" because of several problems with the patenting of the gold thermosetting paste, which he viewed as the gist of PD 437. He noted that references to thermosetting compounds in the original patent application were sufficiently broad to cover that aspect of PD 437. Finally, he noted that an earlier Hughes patent application provided coverage because it disclosed a method of fusing and mounting a crystal, although it was a silicon crystal. That application, dated May 10, 1954, was entitled "Fused-Junction Silicon Diode."

Transitron argues that Hughes contemplated filing an application for a CIP on PD 437. ***HN9***[] A CIP is a procedure for patenting an improvement on or modification to an invention on which an application is already pending, rather than for clarifying the originally disclosed invention. *35 U.S.C. § 120*. The improvement or modification disclosed in a CIP must have inventorship identical to that of the parent patent. Id.; see also, *Hinde v. Hot Sulphur Springs, Colorado, 482 F.2d 829 (10th Cir.1973)*. We are asked to infer that because North appears to have been the sole inventor of the process **[**36]** in PD 437, Hughes at some time realized it could not obtain a CIP and instead contrived to protect as much as possible of PD 437's new matter in the form of amendments.

First, North's testimony that the disclosure was of an "improved construction" bears on the intent of the participants in the prosecution at this point. North submitted it as an engineering improvement and left the patent possibilities to the evaluation of the attorneys in the Patent Department. He was concerned with the improvement of the bond and the sealing process. The file wrapper contains numerous references to the use of a thermosetting paste or "slurry," indicating to us some semi-solid mixture. The file wrapper refers to a silver paste, but its function would be the same. Hughes had investigated the possibility of utilizing compositions other than the DuPont gold compound, such as rhodium, titanium and platinum.

North's diary provides further support for our conclusion that PD 437's process change, namely, the use of the thermosetting paste and sealing the envelope before inserting the crystal, need not have been viewed by Hughes as a significant departure from the original disclosure so as to warrant **[**37]** a CIP application. North's and Carman's search for a better diode never stopped. Soon after the original application was filed in March, 1950, Hughes' production department was encountering problems due to the heat seal. As early in the patent prosecution as June, 1950, the sealing difficulty led to consideration of discontinuing the use of silver paste. In July, 1950, rhodium was tested and a different DuPont composition, # 5275, was employed in the process with excellent results in one phase, but led to other problems. In August, 1950, only five months after filing, "bad diodes" were traced to instances where the crystal was supported by glass or where the paste was porous. There was not yet any large scale manufacture of the diode as originally described. A test change in the process in October, 1950, resulted in the re-entrant configuration, with which the glass ends would not crack when the leads were bent.

[*900] Throughout 1951, difficulties due to heat sealing continued. In August, 1951, Carman, the co-inventor, still employed by Hughes, was working to develop a sealing process at a low enough temperature to avoid damage to the crystal. While North was obviously **[**38]** the major figure, Carman was still involved and was consulted on occasions. In February, 1952, Carman's ideas were the subject of experiments. Compounds with rhodium, platinum and gold were tested because the thermosetting silver paste had failed. Tests using thermosetting gold paste yielded average results. And as late as June, 1952, several months after PD 437 had been submitted, suggestions to thicken the paste by using additional gold powder were being investigated.

The history of this invention, from its conception through the submission of PD 437 and beyond, is one of continuing experimentation, testing and development concerned with problems in plating the semi-conductor element and not breaking the glass envelope. The record reflects the evolution of the final device. Since heat was always a problem, a process had to be developed where there would be no bond between the crystal and the glass envelope. The vitreous bond was abandoned and the process employed a thermosetting substance to bond the crystal to its support. The original packaging process of the patent was changed by this disclosure in two respects: the **[***812]** crystal was inserted after the first seal was made and **[**39]** gold paste was used rather than some other conductive paste. The dimensions, always present in the drawings but not specified, now became important because they related to heat and strength and consequently the manufacturing process was affected. The coefficients of expansion were critical in the manufacture of the diodes but not in their use. The ratios contributed to the rugged, more reliable construction of the diode, but were not required for the electrical conducting performance of the diode. In short, these were not sudden discoveries made years after the original disclosure, but reflected the process of development throughout the life of the prosecution.

We have already noted Hughes' belief that coverage of PD 437 was adequately secured by the original application as well as the subsequent application relating to the silicon crystal diode. We further note that on October 22, 1952, North, Rosenberg and Lentz conferred regarding another patent disclosure, PD 458. This disclosure related to a hermetically sealed diode in which a crystal was mounted on a copper block to dissipate heat generated in the crystal. Since they considered the method of attaching the crystal similar **[**40]** to that described in PD 437, action was deferred until a decision was made on PD 437. These events indicate to us the interrelationship of patent applications in the Hughes Patent Department and provide support for our finding that the Hughes lawyers and scientists had a good faith belief that these developments and modifications were improvements in the existing invention and were not new matter which required disclosure as such to the Patent Office.

C. Commercial Use and Success.

The subject matter of PD 437 was in commercial use in the first half of 1952, perhaps as early as February 17 according to PD 437. Clearly, the diode was advertised in The I.R.E. Bulletin of February, 1953. ***HN10***[] An invention may not be patented after it has been in commercial use for more than one year. *35 U.S.C. § 102(b)*. Therefore, an application for a separate patent would have had to have been filed by about February, 1953. Following a line of argument similar to the CIP rationale, Transitron asserts Hughes' decision to patent the commercially successful diode as an amendment was precipitated by its failure to meet that February, 1953 deadline. It finds support for this theory in the "Remarks" submitted **[**41]** by Hughes with its first filing of claims 60 and 61 (then 102 and 103) on March 8, 1954. Hughes then stated that it had then been "active" in selling the diodes for only nine months. [4] Transitron **[*901]** argues the statement was a knowing misrepresentation designed to conceal that claims 60 and 61 would have been treated as new matter but for Hughes' failure to meet the filing deadline.

We do not equate the statement **[**42]** concerning "active" sales in light of Hughes' knowledge that diodes had been for sale for more than nine months with fraudulent intent to mislead the Patent Office. It appears to us that statements of commercial success are standard in patent prosecutions to demonstrate that an invention differs significantly from prior art. We are uninformed as to the definition of commercial success. Although Hughes may have adopted the process in its production line in 1952, the modified diode may not have been commercially successful immediately.

Transitron also argues that Hughes' assertions in the patent prosecution that the initial design had achieved great commercial success were fraudulent because only diodes within claims 60 and 61, not those disclosed by the original patent, were commercially successful. Because we find Hughes believed 60 and 61 did read on the original disclosure, we must also find Hughes made its representations of commercial success in good faith. We further find that the statement as to Hughes' commercial success was not material to the examiner's decision to allow the claims. Transitron has produced no evidence of reliance by the examiner on that statement, nor **[**43]** can we conclude that the statement would influence the examiner's decision. ***HN11***[] Fraud on the Patent Office must be material in order to be actionable. *Johnson & Johnson, 436 F. Supp. at 732*. Hughes admitted it was employing the process changes in its production lines, a fact known throughout the semi-conductor industry. [5]

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[4] We note that Rosenberg was the attorney who was prosecuting the claim at this time. A Patent Office action had been issued on March 20, 1953. Rosenberg responded by an Amendment dated September 16, 1953. Without waiting for a reply, Rosenberg filed the "Supplemental Amendment" dated March 9, 1954, which contained the "incriminating" statements. We question if he intended that the supplemental amendment relate back to the September 1953 amendment. If so, it might serve to explain the "nine months" statement since the I.R.E. Bulletin advertising the diode was issued in February, 1953.

[5] As we did earlier in advising that we were not deciding that claims 60 and 61 were non-inventive matter, we again do not decide that claims 60 and 61 would fail for late filing. That is not at issue here. The issue here is whether Hughes, with

[*813]** D. Significance of the BPA.

Hughes could not have filed the subject matter of claims 60 and 61 under the British parent patent because British patent law required that a patent application be put in order within one year of filing the complete specifications. **[**44]** Patents Act, 1949, 12, 13 & 14 Geo. 6, c. 87, § 12. Hughes could have introduced the material as an amendment after the main patent application had been accepted only for the purpose of correcting an obvious mistake. Patents Act, 1949, § 31. Because the claims described a diode so similar to that disclosed in the main patent, an application for an independent patent might well have been rejected for obviousness. A patent of addition is the appropriate way to protect an "improvement in or modification of an invention" when the applicant has filed for or obtained a patent on the main invention. Patents Act, 1949, § 26(1). Therefore, Hughes could best protect the subject matter under a patent of addition. In order to obtain a patent of addition, the claims had to disclose "novel" matter not disclosed in the specification relating to the main invention. T. Terrell, Law of Patents, § 138 (12th ed. 1971).

Transitron asks us to infer from the fact that Hughes' British patent prosecution treated the subject matter of PD 437 as new material that Hughes was aware that the subject matter was new. The language of the only two claims of the BPA, claims 1 and 2, is virtually identical **[**45]** to claims 60 and 61, but the BPA also includes a three-page **[*902]** preamble describing the problems with the original manufacturing process and the improvements on that process disclosed in PD 437, specifically use of the gold thermosetting compound and a low temperature seal.

We rely on the correspondence between British patent counsel and Hughes to form our conclusion that Hughes' British patent prosecution does not bear on the issues of this case. As we have noted earlier, the responsibility for the prosecution of the British patent of addition was assigned to Seymour Scholnick, an attorney who had no involvement with the prosecution in the United States. It is clear he relied upon claims 60 and 61 to write claims 1 and 2 because they are identical except for minor differences in describing the scope of dimensions. It is also clear that British patent counsel provided guidance for him. It was only upon the advice of British counsel that a preamble was drafted and submitted. Changes were made in the specifications after the filing. Scholnick had the benefit of all that was contained in the entire Hughes file when this application was filed in November, 1954. He continually **[**46]** referred to "improvements" in the "process" of making the diode, but did not claim an invention, in keeping with the British patent law. The final prescribed preamble was not filed until November 1, 1956, after there had been the normal exchange of correspondence between the British Patent Office and British patent counsel.

Summary: Fraud

Even when we view the above four aspects of Hughes' patent prosecution in totality, they are insufficient to convince us that Hughes knew claims 60 and 61 contained new matter when it filed them as amendments. We are mindful that the laws of agency apply, so that Hughes must be held to have known what each of its agents knew. *W. R. Grace, 608 F.2d 1214*. However, we cannot find the clear and convincing evidence that any Hughes employee knew or should have known claims 60 and 61 contained new matter that is necessary to establish fraud. We have no evidence that any member of the Hughes Patent Department ever opined that the claims contained new matter. We do not find that claims 60 and 61 are such a radical departure from previous claims that knowledge of their newness must be imputed to Hughes.

HN12[] A patent attorney does have a duty to provide the **[**47]** Patent Office with a full disclosure of all aspects of the invention. *Monolith Portland, 407 F.2d 288*. However, the final decision as to whether a claim falls within the initial disclosure is a function of the Patent Examiner, not the attorney. Hughes' decision to treat the modified construction as an amendment, rather than as a CIP or separate patent, may have been influenced by its recognition that lack of identity of inventorship precluded a CIP and that the commercial use deadline had passed

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knowledge that the time for filing had expired, conducted its patent prosecution fraudulently to conceal the new matter from the Patent Office and capture patent protection to which it was not entitled.

for an independent application, but those possible considerations do not amount to clear and **[***814]** convincing proof that Hughes knew the claims contained new matter. [6]

What constitutes new matter is a legal conclusion **[**48]** on which reasonable lawyers may differ in a close case. That this case was close is clear from the finding of validity by the District Court of Rhode Island in the first General Instrument case, *275 F. Supp. 961 (1967)*. Only after the BPA was disclosed did the Court of Appeals reverse that finding. That Court refrained from finding fraud in Hughes' prosecution of claims 60 and 61 and that Court did not have the benefit of the discovery over the ensuing years which we conclude supports Hughes' defense in this case. In the more than ten years which have elapsed since General Instrument was decided by the First Circuit, Transitron has failed to sustain its burden of showing any significant evidence of Hughes' fraudulent misconduct, **[*903]** despite exhaustive discovery and the commendable efforts of trial preparation and presentations by the attorneys for both parties.

II. HUGHES WAS NOT REQUIRED TO SECURE A LICENSE FOR FILING THE BRITISH PATENT OF ADDITION.

Transitron argues that Hughes violated the Invention Secrecy Act, *35 U.S.C. §§ 181-188*, by filing the BPA without first obtaining a license from the United States Patent Office, that the entire Hughes patent was, therefore, **[**49]** invalid ab initio under *Section 185*, [7] and that Hughes was aware of the invalidity when it demanded that Transitron take a license. *Section 184* provided in pertinent part:

§ 184. Filing of application in foreign country.

> ***HN14***[] Except when authorized by a license obtained from the Commissioner a person shall not file or cause or authorize **[**50]** to be filed in any foreign country prior to six months after filing in the United States an application for patent . . . in respect of an invention made in this country . . . .
> The term "application" when used in this chapter includes applications and any modifications, amendments, or supplements thereto, or divisions thereof.

The American parent patent was filed more than six months before the British parent patent. Claims 60 and 61 were filed as 102 and 103 on March 8, 1954, more than six months before the BPA, are virtually identical to the BPA, and clearly constitute an "application" as that term is defined in *Section 184*. Thus, Hughes was not required to obtain a license and did not violate the Act. The patent was valid for purposes of the Invention Secrecy Act, so in this respect Hughes could not have committed the antitrust offense of attempting to enforce a patent known to be invalid. We do not reach the question of whether a private right of action exists under the Act.

III. HUGHES DID NOT USE ITS PATENT IN AN EFFORT TO ELIMINATE COMPETITION AND RESTRAIN TRADE, NOR DID HUGHES USE ITS PATENT IN AN ATTEMPT TO CREATE A MONOPOLY.

Although Transitron submitted **[**51]** some evidence concerning the diode market, Hughes' and Transitron's sales, and Hughes' licensing practices, it fell short of proving any type of patent-antitrust violation.

Hughes had no overall scheme to monopolize the semiconductor or diode industry. The terms of Hughes' licenses did not "transcend what is necessary to protect the use of the patent or the patent monopoly." *Duplan, 444 F. Supp.*

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[6] While we do not attach any significance to the fact in view of our conclusion, we note that Carman witnessed the program conducted by Elmo Maiden at Hughes of the successful testing of the gold thermosetting paste from DuPont from February 15 to March 14, 1952. Carman was employed by Hughes until May, 1954.

[7] "*§ 185*. Patent barred for filing without license.

HN13[] "Notwithstanding any other provisions of law any person, and his successors, assigns, or legal representatives, shall not receive a United States patent for an invention if that person, or his successors, assigns, or legal representatives shall, without procuring a license prescribed in *section 184* of this title, have made, or consented to or assisted another's making, application in a foreign country for a patent or for the registration of a utility model, industrial design, or model in respect of the invention. A United States patent issued to such person, his successors, assigns, or legal representatives shall be invalid."

at 684, citing *Standard Sanitary Manufacturing Co. v. United States, 226 U.S. 20, 33 S. Ct. 9, 57 L. Ed. 107 (1912)*. Its royalty fee was 1% of gross sales for all licensees. That rate does not appear to have been excessive. [8] It was **[***815]** not high enough to prevent commercially successful manufacturing by many licensees. Nor does it appear that Hughes reaped unreasonable profits. Hughes did not fix its licensees' prices. It offered licenses to all comers on the same basis, and imposed no unreasonable restrictions. It did **[*904]** not demand grant back provisions or require licensees to take a license package including unpatentable information or unusable patents.

[52]** Nor were Hughes' enforcement suits and efforts to license, including threats of suit against Transitron, General Instrument, and others who manufactured under claims 60 and 61 baseless, repetitive litigation, given Hughes' belief that the claims were valid. There was no showing that Hughes had the intent or influence to force licensees into taking unwanted licenses by wearing them down with threats of costly litigation. Doody was disturbed by what he believed was infringement. His purpose in recommending and pursuing the licensing program was to gain respect for the patent as well as to gain income. He had no intent to attempt to eliminate competition or to create a monopoly. Thus, this case does not fall within *Otter Tail, 410 U.S. 366, 93 S. Ct. 1022, 35 L. Ed. 2d 359*, where intent was inferred from the nature of the defendant's enforcement litigation against its competitors.

Even if Hughes were to have the requisite anticompetitive or monopolistic intent, by fraud on the Patent Office, by an overall scheme, or by instituting vexatious litigation, Hughes' licensing program had no demonstrated anticompetitive effects on the diode market. There was no evidence concerning the **[**53]** relative earnings of the Hughes Aircraft Corporation from diode royalties, fees and sales. No evidence was presented as to what percentage of all semi-conductors or of germanium diode-type semi-conductors was manufactured under the Hughes patent. The testimony as to Hughes' share of market sales varied according to how the market was defined, and was necessarily skewed by the fact that many of Hughes' sales were internal, for use in manufacturing by other branches of the highly diversified corporation. However, between 1956 and 1961, Hughes' share of the market for all semi-conductor devices (diodes and rectifiers) dropped from 12.8% of dollar sales to 2.9%. Its share of the germanium diode and rectifier market, the specialized subgroup in which its patent was used, dropped from 34.2% to 5.7% during the same period. We find that Hughes did not exercise exclusionary power in either market at the time Transitron entered the 1962 license agreement.

IV. HUGHES' CONDUCT DID NOT CONSTITUTE PATENT MISUSE.

Even if patent misuse were an actionable tort, we find that Transitron has failed to show Hughes' conduct amounted to patent misuse. As with the antitrust allegation, Transitron's **[**54]** claim here is premised entirely on the theory that Hughes obtained its patent fraudulently. If such were the case, Hughes would have committed patent misuse. *Duplan, 444 F. Supp. at 701-702*. However, to prove patent misuse as well as a violation of the federal antitrust laws by means of fraud on the Patent Office, Transitron must provide clear and convincing evidence on the issue of fraud. *Krenzer v. Stoffel, 551 F.2d 1214, 1217* (Cust. & Pat.App.1977). If Hughes made misrepresentations to the Patent Office which were honest, albeit negligent mistakes or failures to disclose, such conduct might affect Hughes' rights to royalties, but would not support awarding damages to Transitron.

As with its antitrust claim, plaintiff has failed to plead or prove any form of patent misuse other than fraud on the Patent Office, such as coercive licensing terms and tactics or anticompetitive market control. ***HN15***[] Mere good faith enforcement of a patent later found to be invalid does not constitute patent misuse. *Troxel I, 465 F.2d at 1255*.

Cases in which patent misuse has been a bar to a licensor's suit involved much more culpable conduct by the licensor than Hughes' failure to inform the Patent Office **[**55]** of improved production methods and its failure to give timely disclosure of the British Patent of Addition in the General Instrument case. None of the classic forms of patent misuse described above overbroad grant-backs, tie-ins of unwanted or unpatentable subject matter,

[8] A royalty rate of 21/2% established by a master was found by the Sixth Circuit to be too low in a case which involved similar circumstances in that there were no available non-infringing substitutes for the patented device and in that there was great competition among sellers of infringing devices. ***Panduit Corp. v. Stahlin Bros. Fibre Works, Inc., 575 F.2d 1152 (6th Cir. 1978)***.

extending the effect of a patent beyond 17 years, price-fixing, **[*905]** or percentage royalties not based on actual use of the patent is involved here.

The Duplan case presents the factual context most similar to the present action. There, one aspect of the patentee's allegedly offensive conduct was its failure to disclose to the Patent Office previously issued French patents upon which its pending United States patent might read. There, however, the patentee's internal documents demonstrated its awareness that relevant foreign patents existed and its conscious **[***816]** decision not to disclose them. Moreover, the Court did not find patent misuse solely in that failure to disclose, but in the "totality of (the patentee's) conduct in respect of their licensing program . . .(.)" *444 F. Supp. at 695*.

V. TRANSITRON KNOWINGLY MADE MISREPRESENTATIONS TO HUGHES CONCERNING ITS INFRINGING PRODUCTION.

On July 1, 1962 Hughes **[**56]** and Transitron executed a five-year non-exclusive license agreement at a 1% royalty rate. On October 1, 1962, Transitron notified Hughes that it had changed its manufacturing process to an "etched lead" construction so that its diodes no longer fell within the patent. From January 15, 1963 until May 5, 1966, Transitron verified quarterly to Hughes that it was manufacturing no diodes under the license. However, by May 17, 1966, Hughes had determined that Transitron was manufacturing infringing diodes and demanded back royalties.

Transitron actually resumed production of the patented diode around October, 1964. Until November 25, 1964, its quarterly reports to Hughes were under the name of Transitron's comptroller. Thereafter, they were under the name of David Bakalar, Transitron's chief executive officer. Early in the 1966 settlement and license negotiations, Transitron's attorney admitted only that "a limited quantity of diodes have been made in the recent past that we believe you may conclude come within the scope of the license agreement." He later confirmed Hughes' assertion that infringing manufacture was resumed in 1964. He also represented that the decision to resume was **[**57]** made inadvertently, by a lower level Transitron employee, without Bakalar's knowledge, and that it would be extremely difficult to determine the exact amount due because of Transitron's inventory system.

Hughes now contends that, unknown to it in 1966, Transitron's infringing sales were substantial in 1964, 1965 and 1966, that Bakalar approved the decision to resume infringing production, and that he knew the exact amount of royalties due. Windsor Hunter, Transitron's chief manufacturing executive, testified that his engineering department recommended the production change, and that he discussed it orally with Bakalar, who approved it because of lower material costs and better yield rates with the Hughes construction. Bakalar testified that he had no knowledge of the change from the etched lead to the Hughes construction, and that it was worth the substantially higher cost of producing non-infringing diodes for him to avoid an audit of Transitron by Hughes under the 1962 license.

It is the function of the trial judge sitting as a trier of fact to assess the credibility of witnesses and to resolve conflicts in the evidence. The Court accepts Hunter's testimony that Bakalar approved **[**58]** the change to the Hughes diode. Bakalar's attempt to exculpate Transitron by attributing the production change to a low level employee was a fraudulent misrepresentation. I also find that Bakalar was aware that Transitron had been manufacturing substantial amounts of Hughes diodes since 1964 and was responsible, under agency principles, for his counsel's statements concerning the amount and duration of infringing production.

However, Transitron's statements concerning the difficulty of performing an inventory were not false or willfully misleading. Although Bakalar received from Hunter a tabulation of royalties due between 1964 and 1966, it is not clear that the tabulations were more accurate than his counsel represented was possible. Insufficient **[*906]** evidence concerning possible methods of determining infringing production from inventory or sales records was submitted for us to discern the truth or falsity of counsel's representations in that respect. [9] No audit was done, despite Hughes' right to one.

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[9] Even the Court's direct inquiry to the witness as to a means of ascertaining production from inventory or raw material control failed to reveal any possibility of definitive figures.

[59]** VI. HUGHES DID NOT RELY ON TRANSITRON'S MISREPRESENTATIONS.

Although Hughes may have accepted all of Transitron's representations during the 1966 negotiations, I find they were not germane to Hughes' decision to accept the settlement. Hughes was not deeply concerned with the amount of money it would receive for back royalties. The primary consideration received by Hughes in the settlement was to gain respect for the patent, to avoid litigation, to demonstrate a tough stance to other licensees, and to obtain a license under a related patent held by Transitron.

Hughes' Director of Patents, David Doody, was involved directly in the negotiations. The Court found Doody to be a credible witness. He was direct, helpful and non-evasive. Doody instituted the licensing program to gain income from all of **[***817]** Hughes' patents, although the North-Carman patent was not considered for licensing at the outset. He was disturbed when he learned of Transitron's infringement, but he did not insist on the audit to which he was entitled and which would have provided accurate figures. He could not say why he accepted the settlement of $ 150,000. Settlement discussions began immediately after Hughes **[**60]** charged Transitron with infringement and lasted almost six months. Doody knew the figures were not definite. Hughes also received a royalty free license under a Transitron (Bakalar) patent relating to a gold-bonded germanium diode. This patent had been the subject of infringement charges between the parties some years earlier, but those charges were not pursued. This settlement ended that controversy as well. We can only conclude that Doody was satisfied with the entire settlement without an accurate audit, and that Transitron's statements concerning infringing production were not material to his decision to accept the settlement.

For the foregoing reasons, we cannot conclude that Transitron made any misrepresentation which was both fraudulent and material during the settlement negotiations. Hughes has failed to prove that it reasonably relied upon these misrepresentations and therefore, none of Transitron's misrepresentations is actionable. Our conclusion is supported by the difficulty we would have in determining damages, since in accepting the settlement offer, Hughes was relieved of the costs of performing an audit, of defending Transitron's pending infringement suit against **[**61]** it or paying royalties, and of bringing a suit against Transitron where the validity of the Hughes patent might well have been put in issue.

VII. HUGHES FAILED TO FULFILL ITS OBLIGATIONS TO THE PATENT OFFICE.

While Hughes' conduct during the prosecution of claims 60 and 61 did not amount to fraud on the Patent Office or even patent misuse, it fell short of the duty a patent applicant has to the Patent Office. Hughes failed to reveal the additional refinements to the original specifications as they developed. It should have drafted its amending claims more narrowly. Specifically, it did not disclose that the one piece lead had replaced the two piece lead that was butt-welded together. It did not disclose that the lead ended inside the chamber, or that the crystal was supported by the wire. These were departures from the original invention. Hughes failed initially to specify the dimensions later found to be critical. These failures, while not willful concealment, demonstrated a lack of care, clarity, and specificity for which we cannot, in fairness, allow Hughes to recover.

[*907] ***HN16***[] Although a patent applicant need not "list out the full spectrum of his knowledge to establish **[**62]** (its) bona fides," *Eli Lilly & Company v. Generix Drug Sales, Inc., 460 F.2d 1096, 1102-3 (5th Cir. 1972)*, it may not deliberately fail to disclose material information such as a possible prior use. *Keystone Driller Co. v. General Excavator Co., 290 U.S. 240, 54 S. Ct. 146, 78 L. Ed. 293 (1933)*. A heavy burden of disclosure is imposed on an applicant in dealing with the Patent Office because a patent is a "special privilege" which "is affected with a public interest." *Precision Instrument Manufacturing Co. v. Automotive Maintenance Machinery Co., 324 U.S. 806, 816, 65 S. Ct. 993, 998, 89 L. Ed. 1381 (1945)*.

Hughes has admitted that it drafted its claims in the broadest terms that the Patent Office would allow. This tactic does not always comport with the nature of the patent system. A patent is a privilege granted by the government in order to promote inventorship and free competition:

> Letters patent are not to be regarded as monopolies, created by the executive authority at the expense and to the prejudice of all the community except the persons therein named as patentees, but as public franchises

> granted to the inventors of new and useful improvements for the purpose of securing **[**63]** to them, as such inventors, for the limited terms therein mentioned, the exclusive right and liberty to make and use and vend to others to be used their own inventions, as tending to promote the progress of science and the useful arts, and as matter of compensation to the inventors for their labor, toil, and expense in making the inventions, and reducing the same to practice for the public benefit, as contemplated by the Constitution and sanctioned by the laws of Congress.

Seymour v. Osborne, 11 Wall. 516, 78 U.S. 516, 533-34, 20 L. Ed. 33 (1870).

Hughes was granted its exclusive patent rights under an administrative process designed to further these public policies. The Patent Office was established to protect the public interest in the proper administration of the patent system. Hughes has not fulfilled its duty of care and completeness to the Patent Office. Thus, it has abused the patent process under which it claims its exclusive privilege. The Patent Office has been **[***818]** criticized for the ease with which it grants patents later found to be invalid. Duplan, 444 F. Supp. at 771. We cannot say whether such criticism is justified, but we can understand the Patent Office's difficulty **[**64]** in processing the underlying application in this case, which contained 106 colorable claims, extensive correspondence, data and personal interviews. The patent examiner must act as a judge in determining patentability, but the expert and resourceful applicant is not opposed as a party litigant in its application. The patent system is not an adversary process. Without an opposing litigant, such as a potential infringer, the Patent Office must rely on the applicant to comply with the spirit of the statute and rules governing the patent procedure. The burden is on the patent lawyer to provide care, candor, clarity and specificity in his dealings with the Patent Office. In this case, Hughes' claims were excessive, cumulative and overly broad, obfuscating the differences between claim 60 and the initial claims. Under these circumstances, we do not believe we would do substantial justice if we allowed Hughes to recover further royalties.

We also consider in this general finding that, in addition to its failure to fulfill its duty to the Patent Office, Hughes subsequently failed to make a timely disclosure of its British Patent of Addition to the courts. Its failure was attributed **[**65]** to its inability to maintain accurate records. Had Hughes paid more attention to its internal system, it would have made a timely disclosure of the BPA. It is likely that the patent would then have been challenged by infringers at a much earlier date and Hughes would have received royalties for a much shorter period of time from virtually all of the manufacturers in the large DO-7 industry. While we have concluded that its failure to disclose the BPA was not a willful concealment, we cannot condone its negligent **[*908]** conduct by allowing it to recover yet more royalties under patent claims which should never have been allowed.

Conclusions of Law

Jurisdiction

1. This Court has jurisdiction over the subject matter and parties for the antitrust claim under *15 U.S.C. §§ 1*, *2*, and *15* pursuant to *28 U.S.C. § 1337*. We exercise pendent jurisdiction over the plaintiff's tort and contract claims, and the defendant's counterclaim, which sounds in contract. *United Mine Workers v. Gibbs, 383 U.S. 715, 86 S. Ct. 1130, 16 L. Ed. 2d 218 (1966)*. Jurisdiction also exists based on diversity of citizenship. *28 U.S.C. § 1332*.

Plaintiff's Antitrust Claim

2. The plaintiff has failed to meet **[**66]** its burden of proving by clear and convincing evidence that Hughes committed fraud on the Patent Office. *Johnson & Johnson, 436 F. Supp. at 732*.

3. The plaintiff has failed to prove by a preponderance of the evidence that Hughes violated *Section 184* of the Invention Secrecy Act in failing to obtain a license for filing the British Patent of Addition. *35 U.S.C. § 184*.

4. The plaintiff has failed to prove Hughes' licenses were agreements in restraint of trade. *15 U.S.C. § 1*.

5. The plaintiff has failed to prove Hughes intended to monopolize the germanium diode, crystal diode or semi-conductor industry. *15 U.S.C. § 2*.

6. The plaintiff has failed to prove Hughes exercised exclusionary market power in the germanium diode, crystal diode or semi-conductor industry. *15 U.S.C. § 2*.

7. The plaintiff has failed to define the relevant market for purposes of the Sherman Act. *15 U.S.C. § 2*.

Plaintiff's Tort Claim

8. Patent misuse alone does not constitute an actionable tort. See text at note 2, supra.

9. The plaintiff has failed to prove by clear and convincing evidence that Hughes' conduct in the prosecution of its patent application was fraudulent. *Krenzer, 551 F.2d at 1217*. **[**67]**

10. The plaintiff has failed to prove by a preponderance of the evidence that Hughes' conduct in the enforcement of its patent constituted patent misuse.

Plaintiff's Contract Claims

11. The plaintiff has failed to prove by clear and convincing evidence that Hughes made any material false and misleading representation in inducing Transitron to enter the 1962 and 1966 license agreements. Sanborn, 2 Story at 485.

12. The plaintiff has failed to prove by a preponderance of the evidence that it relied on Hughes' representations to the Patent Office contained in the file wrapper when it entered the license agreements. *Pepsi-Cola Metropolitan Bottling, 345 F.2d at 622*.

13. A mutual mistake of fact as to the validity of a patent does not provide **[***819]** grounds for rescission of a license agreement and restitution of royalties under the patent. *St. Regis Paper, 552 F.2d 309*.

Defendant's Counterclaim

14. The defendant is not barred from asserting a claim for royalties due before its patent was found to be invalid. *Troxel II, 489 F.2d 968*.

15. The defendant has failed to make the requisite showing by a preponderance of the evidence that it relied on Transitron's misrepresentations in entering **[**68]** the 1966 settlement agreement. *Pepsi-Cola Metropolitan Bottling, 345 F.2d at 622*.

16. Transitron's performance under the 1966 settlement agreement constituted accord and satisfaction for all royalties due Hughes under the 1962 license agreement. *Rust Engineering, 401 F. Supp. at 333*.

Conclusion

The foregoing constitutes our findings of fact and conclusions of law made pursuant to *Fed.R.Civ.P. 52(a)*. In accordance therewith, judgment **[*909]** is to be entered for the defendant Hughes Aircraft Company in all counts of the plaintiff's complaint and judgment is to be entered for the plaintiff Transitron Electronic Corporation in the defendant's counterclaim.

SO ORDERED.

Allied Int'l v. International Longshoremen's Ass'n

United States District Court for the District of Massachusetts

June 17, 1980

Civ. A. No. 80-584-S

Reporter

492 F. Supp. 334 *; 1980 U.S. Dist. LEXIS 9182 **; 104 L.R.R.M. 2735; 90 Lab. Cas. (CCH) P12,475; 1980-2 Trade Cas. (CCH) P63,498

ALLIED INTERNATIONAL, INC., Plaintiff, v. INTERNATIONAL LONGSHOREMEN'S ASSOCIATION, AFL-CIO, ET AL., Defendants.

Core Terms

anti trust law, injunctions, Relations, exemption, boycott, ships, restraint of trade, combine, protest

Counsel: **[**1]** Duane R. Batista, Nutter, McClennen & Fish, Boston, Mass., for plaintiff.

Gary G. Nicolosi, Thomas W. Gleason, New York City, Joseph T. Doyle, Condon & Doyle, Boston, Mass., for defendants.

Opinion by: SKINNER

Opinion

[*335] MEMORANDUM AND ORDER

Plaintiff Allied International, Inc. ("Allied") seeks preliminary injunctive relief against the International Longshoremen's Association, AFL-CIO ("ILA"), its local unions **[*336]** and various union officials for their concerted refusal to load and unload ships engaged in trade with the U.S.S.R. Plaintiff asserts this action contravenes the National Labor Relations Act secondary boycott provisions, *29 U.S.C. §§ 158(b)(4)(i)*, *(ii)(B)*, the Sherman Antitrust Act, *15 U.S.C. § 1 et seq.*, and the common law protection against intentional interference with contractual relations. Defendants have moved to dismiss the complaint.

This action was consolidated with *Walsh v. International Longshoremen's Assoc., 488 F. Supp. 524 (D.Mass.1980)*, a case in which I denied the National Labor Relations Board's application for an injunction under § 10(l) of the National Labor Relations Act, *29 U.S.C. § 160(l)*. The facts were fully set forth in that **[**2]** opinion. It is sufficient for present purposes to recount that Allied is a Massachusetts importer of wood products from the Soviet Union and has been informed by the defendants that no ILA members would unload any cargo originating in the U.S.S.R., pursuant to a directive issued January 9, 1980 by Thomas Gleason, President of the ILA, ordering this action in response to the Soviet invasion of Afghanistan. As a result, certain wood shipments were cancelled, curtailed, or unloaded prematurely by Allied's carrier, Waterman Steamships Lines, and other cargoes are amassed on the docks of Leningrad, pending resolution of this conflict or alternative arrangements.

The National Labor Relations Board ("NLRB") sought to enjoin the ILA's refusal to work on certain ships on the ground that such refusal constituted a secondary boycott, in violation of *29 U.S.C. §§ 158(b)(4)(i)*, *(ii)(B)*. My denial of the § 10(l) petition was based on my explicit characterization of the dispute as "exercise of political protest."

> The ILA has not induced a strike against Allied, Waterman, or Clark (the stevedoring company); nor does it seek to pressure those employers not to deal with one another. No picket **[**3]** lines have been established and no other employees have been prevented from work. Union members have simply declined to accept employment on certain ships, as a form of political protest. . . . This is a primary boycott of Russian goods, with incidental effects upon those employers who deal in such goods. As such, the actions of the respondents may not be prohibited by §§ 8(b)(4)(i), (ii)(b).

Walsh v. ILA, supra at 530.

Allied has carried on the battle, by pursuing private remedies in the present case. I shall deal with defendants' motion to dismiss first, as the facts are undisputed and the questions presented are purely legal ones which have been extensively briefed by the parties.

In Count I of its complaint, Allied seeks a private damage remedy under § 303 of the National Labor Relations Act, *29 U.S.C. § 187*, alleging the same substantive violation of the secondary boycott provisions as were alleged by the NLRB in Walsh. My holding in Walsh applies as the law of the case in this consolidated action, and thus precludes Allied from asserting a claim under the National Labor Relations Act.

Allied also seeks injunctive and monetary relief under the Sherman Antitrust **[**4]** Act, *15 U.S.C. § 1*, against defendants for their concerted refusal to deal, resulting in restraint of trade. The defendants contend that their actions (or non-actions) fall within the "labor exemption" to the antitrust laws, and that their actions are not otherwise punishable by the antitrust laws for lack of any purposeful restraint of trade or conspiracy.

The history of the application of injunctions and ***antitrust law*** to labor union activity and the legislative enactments as reactions thereto have often been described. See, e.g., *Allen Bradley Co. v. Local Union No. 3, International Brotherhood of Electrical Workers, 325 U.S. 797, 65 S. Ct. 1533, 89 L. Ed. 1939 (1945)*; *United States v. Hutcheson, 312 U.S. 219, 61 S. Ct. 463, 85 L. Ed. 788 (1941)*. The Sherman Act, enacted in 1890, prohibited "every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce **[*337]** . . . " *15 U.S.C. § 1*. As a result of the primary use of this statute against labor unions rather than the business "trusts" and combinations at which it was aimed, Congress passed § 20 of the Clayton Act of 1914 which exempted from the antitrust laws specific union **[**5]** practices by prohibiting injunctions against them in cases "involving, or growing out of, a dispute concerning terms and conditions of employment." *29 U.S.C. § 52*. After the Supreme Court interpreted that statute to apply only to union activities directed against an employer by his own employees, *Duplex Co. v. Deering, 254 U.S. 443, 41 S. Ct. 172, 65 L. Ed. 349 (1921)*, Congress enacted the Norris-LaGuardia Act in 1932, further broadening labor's protection against injunctions in cases "involving or growing out of a labor dispute." *29 U.S.C. § 101*.

The first Supreme Court decision following these legislative pronouncements did not recognize any broad based exemption for labor union activity. Instead, in *Apex Hosiery Co. v. Leader, 310 U.S. 469, 60 S. Ct. 982, 84 L. Ed. 1311 (1940)*, the Court utilized traditional Sherman Act analysis to find that a violent sit-down strike did not constitute a "restraint of trade" as understood at common law. A union would be held liable only if its activities had the purpose or effect to fix the commodity price, monopolize supply, or otherwise control the market. *Id. at 512, 60 S. Ct. at 1002*. A year later, the Court decided to treat labor and **[**6]** non-labor combinations differently. In *United States v. Hutcheson, 312 U.S. 219, 61 S. Ct. 463, 85 L. Ed. 788 (1941)*, the Court read the Sherman, Clayton and Norris-LaGuardia Acts together in creating a new test for the issuance of antitrust injunctions against union activity:

> So long as a union acts in its self-interest and does not combine with non-labor groups, the licit and illicit under § 20 (of the Clayton Act, *29 U.S.C. § 52*) are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.

Id. at 232, 61 S. Ct. at 466. Unions may thus qualify for a "labor exemption" from the antitrust laws so long as they do not combine with non-labor groups and act in their "self-interest", despite an apparent common law restraint on competition.

Both prongs of this standard have been further developed by the Supreme Court. Although a union's activities fall within the protection of the Clayton Act, it may be enjoined where it acts in combination with employers to restrict competition or control the product market. *United Mine Workers* ***[**7]*** *v. Pennington, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965)*; Allen Bradley Co. v. Local Union No. 3, *International Brotherhood of Electrical Workers, supra.* On the other hand, where the union is not acting in a conspiracy with employers, the purpose behind its actions, as well as the impact of those actions upon the product market will be examined to determine liability. *American Federation of Musicians of the United States and Canada v. Carroll, 391 U.S. 99, 88 S. Ct. 1562, 20 L. Ed. 2d 460 (1968)*; *Local Union No. 189, Amalgamated Meat Cutters and Butcher Workmen of North America, AFL-CIO v. Jewel Tea Co., 381 U.S. 676, 85 S. Ct. 1596, 14 L. Ed. 2d 640 (1965)*.

In the present case, the ILA did not agree, conspire or otherwise combine with non-labor groups to institute its boycott of Soviet goods. The carrier, Waterman, made alternative arrangements upon learning of the dock workers' decision, but this acquiescence does not constitute an agreement. The ILA members simply refused to work; they did not hinder or seek to control Allied's business arrangements with anyone.

The definition of "self-interest", as used in the Hutcheson test, has not been precisely outlined. In **[**8]** Jewel Tea, the Court analyzed a marketing hours restriction to determine whether it affected the wages, hours, and other terms and conditions of employment of union members. In Carroll, the Court looked at the goals behind various union regulations imposing, inter alia, minimum prices for musicians, and found the **[*338]** restrictions exempt due to the union's legitimate interest in maintaining a basic wage structure and improving working conditions. The emerging principle is that a union's acts are in its self- interest, " . . . if they bear a reasonable relationship to a legitimate union interest." *Adams, Ray & Rosenberg v. William Morris Agency, 411 F. Supp. 403, 410 (C.D.Cal.1976)*. Accord, *H. A. Artists & Assoc., Inc. v. Actors Equity Assoc., 478 F. Supp. 496, 501-2 (S.D.N.Y.1979)*.

The ILA's actions here do not relate to a "legitimate union interest" as it has been defined in American labor history and law. This political protest falls outside of the traditional union activities concerning terms and conditions of employment. This conclusion is bolstered by the Clayton and Norris-LaGuardia Acts reference to "labor disputes" only, supporting the fair inference that federal **[**9]** courts are not prohibited from issuing injunctions in "political disputes" under these acts. I must find, therefore, that the defendants' activities do not fall within the "labor exemption" to the antitrust laws.

It does not follow, however, that the union's action here constitutes a violation of the Sherman Act. Although the framework of analysis used in Apex Hosiery has been subsequently modified, its holding that the purpose of the ***antitrust law*** was to prevent restraints in business and commerce which tended "to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services," is still viable. See *Jewel Tea, supra 381 U.S. at 690 n.5, 85 S. Ct. at 1602 n.5* ("The crucial determinant is not the form of the agreement e.g., prices or wages but its relative impact on the product market and the interests of union members.").

The Supreme Court has specifically refused to "impute to the Sherman Act a purpose to regulate, not business activity, but political activity, a purpose which would have no basis whatever in the legislative history of the Act." *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* ***[**10]*** *365 U.S. 127, 137, 81 S. Ct. 523, 529, 5 L. Ed. 2d 464 (1961)*. The First Circuit has recently reaffirmed this doctrine in a case involving access to the public media by political organizations. *Council for Employment and Economic Energy Use v. WHDH Corp., 580 F.2d 9* (1st Cir.) cert. denied, *440 U.S. 945, 99 S. Ct. 1421, 59 L. Ed. 2d 633 (1978)*. The Eighth Circuit has similarly refused to apply antitrust sanctions against a boycott related to the passage of the Equal Rights Amendment, unrelated to any economic interests, albeit with adverse economic impact upon innocent third parties. *State of Missouri v. National Organization of Women, Inc., 620 F.2d 1301* (8th Cir. No. 79-1379 March 28, 1980), aff'g *467 F. Supp. 289 (W.D.Mo.1979)*.

Admittedly, the present case does not involve the right to petition the government for specific legislative enactments, as in the Noerr and NOW decisions. Nor does this case involve purely political opponents seeking to influence political decisions of the electorate, as in the WHDH decision.

I am presented here, however, with political activity in the sense of a direct political protest against the Soviet Union's foreign policy. While commerce between **[**11]** Allied and the Soviet Union and, ultimately, the American people is being restrained by the ILA's refusal to handle certain cargo, this refusal is wholly politically oriented with no apparent economic benefit accruing to the union or its members. The ILA is not seeking to control the market in any way, as was envisioned by the Court in Apex Hosiery ; it merely wishes to register its protest. In such a situation, the Supreme Court's admonition in Noerr is particularly relevant:

> Congress has traditionally exercised extreme caution in legislating with respect to problems relating to the conduct of political activities, a caution which has been reflected in the decisions of this court interpreting such legislation. All of this caution would go for naught if we permitted an extension of the Sherman Act to regulate activities of that nature simply because those activities have a **[*339]** commercial impact and involve conduct that can be termed unethical. *Noerr, supra 365 U.S. at 141, 81 S. Ct. at 531*.

Moreover, the ILA is imposing no direct restraint on Allied, its customers or suppliers. Allied is still free to unload its ships by non-union personnel. ILA members have not **[**12]** boycotted any ships not involved in trade with the Soviet Union, including those ships owned by carriers who maintain Russian trade elsewhere. A mere refusal to work, with no economic coercion to accede to specific anticompetitive union demands, has never been held a violation of the antitrust laws. See *Hunt v. Crumboch, 325 U.S. 821, 824, 65 S. Ct. 1545, 1546, 89 L. Ed. 1954 (1945)*. Unions have been held liable only for direct affirmative restrictions upon product market competition. See, e.g., Connell Construction Co., Inc. v. Plumbers & Steamfitters *Local Union No. 100, United Association of Journeymen & Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO, 421 U.S. 616, 95 S. Ct. 1830, 44 L. Ed. 2d 418 (1975)*.

Accordingly, I find that the defendants have not engaged in a "restraint of trade" as defined by the antitrust laws, and this count must be dismissed. [1.]

[13]** Plaintiff also alleges that defendants' actions constitute the tort of interference with business relationships and is actionable under general federal admiralty law. Where an alleged tort affects the operation of ocean-going vessels and bears a relationship to maritime service, commerce, or navigation, the cause of action is cognizable in admiralty. *Carroll v. Protection Maritime Insurance Co., Ltd., 512 F.2d 4 (1st Cir. 1975)*. In such a case, it is appropriate to adopt the Restatement, Second, Torts (1977) as the substantive rule of decision. *Pino v. Protection Maritime Insurance Co., Ltd., 599 F.2d 10 (1st Cir. 1979)*.

> § 766 Intentional Interference With Performance of Contract by Third Person.
>
> One who intentionally and improperly interferes with the performance of a contract (except a contract to marry) between another and a third person by inducing or otherwise causing the third person not to perform the contract, is subject to liability to the other for the pecuniary loss resulting to the other from the failure of the third person to perform the contract.

A mere refusal to deal cannot constitute an interference as every worker may decline to offer his services **[**14]** just as every buyer may decide not to purchase. So long as no intentional and affirmative intrusion into Allied's business affairs has taken place, the defendants may not be held liable for their politically motivated refusal to handle Russian cargoes. [2.]

[1.] Given my disposition of the Sherman Act claims, I need not reach defendants' argument that no conspiracy may exist when a union acts "unilaterally" with its members and locals. I note, however, that the Supreme Court had no problem with this issue in Carroll, and all the cases cited by the defendant relate to corporations and their subdivisions or officers. In addition, counsel for the defendants repeatedly stressed at oral argument the independent nature of each local's decision, characterizing the January 9 directive as one of "policy", not "command".

[2.] The same result would have occurred under Massachusetts law, which requires a legally protected interest, intentionally invaded by conduct either per se unlawful or conducted with malice, and damages. *Old Colony Donuts, Inc. v. American Broadcasting Cos., Inc., 368 F. Supp. 785, 787 (D.Mass.1974)*; *Caverno v. Fellows, 300 Mass. 331, 333, 15 N.E.2d 483 (1938)*.

Accordingly, defendants' motion to dismiss is ALLOWED, and plaintiff's motion for a preliminary injunction is DENIED.

Anderson Foreign Motors, Inc. v. New England Toyota Distributor, Inc.

United States District Court for the District of Massachusetts

July 10, 1980

Civ. A. No. 76-417-Mc

Reporter

492 F. Supp. 1383 *; 1980 U.S. Dist. LEXIS 9300 **; 1980-2 Trade Cas. (CCH) P63,470

Anderson Foreign Motors, Inc., et al. v. New England Toyota Distributor, Inc., et al.

Core Terms

attachment, pricing, Robinson-Patman Act, preliminary injunction, defendants', seller, plaintiffs', motions, memorandum, provisional remedy, anti trust law, delivery, freight, cases, power of the court, purchasers, antitrust, remedies, approve, pricing system, Clayton Act, Sherman Act, provisional, perfected, grounds, buyers, vacate

LexisNexis® Headnotes

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

HN1[] **Price Fixing & Restraints of Trade, Tying Arrangements**

Delivered pricing, whether it takes the form of a basing point price, equalized freight, or a uniform delivered price, discriminates among purchasers of a delivered product. Buyers closest to the seller's plant pay more than the actual cost to the seller of transporting the product. Buyers furthest from the plant pay less than the actual cost the seller and nearby buyers in effect absorb the excess cost of freight.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

HN2[] **Robinson-Patman Act, Claims**

Where one competing purchaser is favored over another, directly or indirectly, in the price of a product, the seller may be in violation of section 2(a) of the Robinson-Patman Act. *15 U.S.C.S. § 13(a)*.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

HN3[] **Robinson-Patman Act, Claims**

Where a uniform delivered pricing system makes the actual or final price the same for all buyers, at all points of delivery, then competing buyers pay the same delivered price, and it is the position of the Federal Trade Commission that section 2(a) of the Robinson-Patman Act, *15 U.S.C.S. § 13(a)* is not violated.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > General Overview

Antitrust & Trade Law > Exemptions & Immunities > Robinson-Patman Act Exemptions

Antitrust & Trade Law > Sherman Act > General Overview

Antitrust & Trade Law > Sherman Act > Scope > Exemptions

HN4[] **Robinson-Patman Act, Claims**

Competing sellers who through collusion adopt delivered pricing systems in order to maintain uniform pricing in the industry violate both the Sherman Act and the Federal Trade Commission Act.

Antitrust & Trade Law > Robinson-Patman Act > Claims

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

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

HN5[] **Robinson-Patman Act, Claims**

When delivered pricing takes the form of a basing point system that includes unearned or phantom freight, the resulting price differentials violate that section 2(a) of the Robinson-Patman Act, *15 U.S.C.S. § 13(a)*.

Antitrust & Trade Law > Regulated Practices > Price Discrimination > Buyer Liability

HN6[] **Price Discrimination, Buyer Liability**

Where a seller deviates from an otherwise legal, uniform, and consistently applied delivered pricing schedule, in order to grant a favored customer a special freight allowance, that conduct is also actionable price discrimination.

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

Civil Procedure > Remedies > Judgment Liens > General Overview

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > Clayton Act > Scope

Civil Procedure > Trials > Jury Trials > Province of Court & Jury

Civil Procedure > Judgments > Relief From Judgments > General Overview

HN7[] **Clayton Act, Remedies**

The fact that Section 16 of the Clayton Act might restrict the types of final remedies available to a successful antitrust plaintiff has no bearing on the power of the courts to order provisional relief in order to preserve the value of the final remedy or to protect the court's jurisdiction.

Civil Procedure > Remedies > Provisional Remedies > General Overview

HN8[] **Remedies, Provisional Remedies**

The provisions of Mass. Civ. R. P. 4.1(a) allow for attachments subsequent to the commencement of any action.

Counsel: **[**1]** Donald B. Gould, Goodwin, Proctor & Hoar, Boston, Mass., for plaintiffs.

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James F. McHugh, John J. Curtin, Jr., Bingham, Dana & Gould, Boston, Mass., for Toyota Motor Sales, U.S.A., Inc.

Allen Kezsbom, Steven Glickstein, Kaye, Scholer, Fierman, Hays & Handler, New York City, for New England Toyota.

Opinion by: GARRITYMcNAUGHT

Opinion

[*1384] MEMORANDUM AND ORDER

After extensive briefing, affidavits and legal arguments, this court entered, on August 29, 1979, [1] a memorandum of decision on plaintiffs' motion, pursuant to *Fed.R.Civ.P. Rule 64*, for approval of the attachment of certain real property and assets, and their motion pursuant to *Fed.R.Civ.P. Rule 65*, for a preliminary injunction to limit the disposition of certain stock and assets of the defendant corporation. *Anderson Foreign Motors v. New England Toyota, D.Mass.1979, 475 F. Supp. 973*. At that time we approved the proposed attachment and conditionally granted the motion for preliminary injunction. In a procedural order entered contemporaneously with our decision we directed that no preliminary injunction would issue until evidence **[**2]** of (or a stipulation as to) the fair market value of the defendants' stock was filed with the court. Plaintiffs thereafter perfected attachments **[*1385]** of $ 1,000,000 each on real property owned by New England Toyota (NET), and on the residence of George Butler, president of NET and a defendant in this suit.

On December 7, 1979, plaintiffs moved for approval of an attachment of additional real property, and for an equitable attachment in the form of a preliminary injunction directed to additional assets held outright and in trust by George Butler. [2] The procedural order referred to had not been implemented and a preliminary injunction had not yet issued.

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[1] The case had been transferred by the Clerk in April, 1979, to Judge McNaught upon his assuming office; but as transferor judge we retained jurisdiction of all motions then under advisement.

[2] As grounds for the additional attachment, plaintiffs explained that a leasehold interest which they had sought to attach in the amount of $ 5,000,000 had been terminated while the motion for attachment was being considered by the court.

[3]** In January 1980, new lead counsel entered their appearance on behalf of the defendants. Thereafter, in response to plaintiffs' December 1979 motions for additional relief, the defendants: (1) moved that the preliminary injunction granted by the August 29, 1979 decision not be entered; (2) moved that the attachment approved by the August 29, 1979 decision be vacated; and (3) opposed plaintiffs' motions to increase the amounts subject to attachment and preliminary injunction. As grounds for the motions to vacate our prior decision, defendants stated that their motions were based on issues of law and fact not previously presented to the court. When both parties' motions came on for hearing before Judge McNaught, he entered an order dated March 21, 1980, of which a self-explanatory copy is hereto attached as Appendix A. On March 27, 1980, defendants refiled their motions in this session and they were separately briefed.

At the commencement of our hearing on the various motions, plaintiffs filed notice that they were withdrawing their two motions seeking additional security, filed on December 7, 1979, and their motion for a *Rule 65* preliminary injunction, which our August 29, 1979 **[**4]** decision had provisionally granted but which never was entered. [3] This rendered moot certain aspects of the defendants' pending motions. Still other aspects of defendants' motions raised issues that the parties had fully argued and briefed when plaintiffs first moved for preliminary relief issues specifically addressed in the court's August memorandum of decision. To the extent the defendants here renew old arguments, or raise legal theories that could fairly have been presented when the court considered these questions nearly one year ago, we will not undertake once more a full dress explanation of the court's position except with respect to the critical question of "the power of the court". We have, however, given fresh consideration to all grounds put forth by the defendants in their recent motions.

[5]** Delivered Pricing and the Robinson-Patman Act

Defendants challenge the soundness of our prior finding that plaintiffs are likely to **[*1386]** succeed on the merits of their claim that NET's practices constitute an illegal tie-in. Their main argument, based on selective citations from case law on the Robinson-Patman Act, suggests that by ruling that NET's sales and delivery practices might violate the Sherman Act, we condemn all delivered pricing systems and we force the defendants to adopt pricing practices that violate the Robinson-Patman Act. In our view, this argument misconceives the law on delivered pricing and misapprehends the proper relation of the Sherman Act to the Robinson-Patman Act.

In a theoretical sense, ***HN1***[] delivered pricing, whether it takes the form of a basing point price, equalized freight, or a uniform delivered price, discriminates among purchasers of the delivered product. Buyers closest to the seller's plant pay more than the actual cost to the seller of transporting the product. Buyers furthest from the plant pay less than the actual cost the seller and nearby buyers in effect absorb the excess cost of freight. See generally, Von Kalinowski, 9 Antitrust **[**6]** Laws and Trade Regulation, § 68.02. Generally, ***HN2***[] where one competing purchaser is favored over another, directly or indirectly, in the price of a product, the seller may be in violation of section 2(a) of the Robinson-Patman Act. *15 U.S.C. § 13(a)*. ***HN3***[] But where a uniform delivered pricing system makes the actual or final price the same for all buyers, at all points of delivery, then competing buyers pay the same "delivered" price, and it is the position of the Federal Trade Commission that the Robinson-Patman Act is

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3 Plaintiffs' decision to withdraw the motion for preliminary injunction seems to us well taken. In its August 1979 memorandum of decision, which is reported at *475 F. Supp. 973*, the court sua sponte addressed the question of its authority to order a *Rule 65* preliminary injunction as a form of equitable attachment over defendants' stock. The precise issue had not been argued or briefed by the parties. At the time, we proposed alternative bases for our power to order the requested form of preliminary injunction. Each depended on whether we took a narrow or broad view of the phrase, ". . . and other corresponding or equivalent remedies", in *Rule 64* a point apparently not settled under the present state of the law. See *475 F. Supp. at 977*. Defendants correctly point out in their recent memorandum, however, that on the question of the scope of state law remedies we incorrectly distinguished the case of *Daley v. Ort, D.Mass.1951, 98 F. Supp. 151*, which denied a motion for equitable attachment prior to verdict. Had we had the occasion to rule now directly on this point, which we would have had if plaintiffs had not withdrawn their motion for preliminary injunction, we probably would have changed that aspect of our prior decision and denied the injunction. Massachusetts law permits equitable attachment in this instance, presented in the form of a preliminary injunction only in actions founded upon a debt, which this action is not. *Mass.G.L. c. 214, § 3(7)*. See, *H. G. Kilbourne Co. v. Standard Stamp Affixer Co., 1913, 216 Mass. 118, 103 N.E. 469*; *Daley v. Ort, supra, at 152*.

not violated. Von Kalinowski, supra, § 68.02(4), n. 34; *Federal Trade Comm'n v. A. E. Staley Mfg., 1945, 324 U.S. 746, 757, 65 S. Ct. 971, 976, 89 L. Ed. 1338*.

From this proposition, that a uniform delivered pricing system does not violate section 2(a) of the Robinson-Patman Act, defendants have, in effect, derived two corollaries: (1) if delivered pricing is legal conduct for purposes of the Robinson-Patman Act, it must be legal for purposes of all other anti-trust laws; and (2) because delivered pricing (in its purest form) has been given FTC approval, sellers who deviate from a delivered pricing system do so at the peril of violating the Robinson-Patman Act.

To hold **[**7]** that certain business conduct is legal under the Robinson-Patman Act neither immunizes that conduct from Sherman Act scrutiny, nor makes such conduct, in every one of its manifestations, legal under the Robinson-Patman Act. For example, ***HN4***[] competing sellers who through collusion adopt delivered pricing systems in order to maintain uniform pricing in the industry violate both the Sherman Act and the Federal Trade Commission Act. *Federal Trade Comm'n v. Cement Institute, 1948, 333 U.S. 683, 691, 720, 68 S. Ct. 793, 798, 799, 92 L. Ed. 1010*; *Chain Institute v. Federal Trade Comm'n, 8 Cir. 1957, 246 F.2d 231, 236-38*. ***HN5***[] When delivered pricing takes the form of a basing point system that includes unearned or phantom freight, the resulting price differentials violate section 2(a) of the Robinson-Patman Act. *Corn Products Co. v. Federal Trade Comm'n, 1945, 324 U.S. 726, 734, 65 S. Ct. 961, 965, 89 L. Ed. 1320*; *Federal Trade Comm'n v. A. E. Staley Mfg., 1945, 324 U.S. 746, 758, 65 S. Ct. 971, 976, 89 L. Ed. 1338*. And ***HN6***[] where a seller deviates from an otherwise legal, uniform, and consistently applied delivered pricing schedule, in order to grant a favored customer a special freight allowance, that **[**8]** conduct is also actionable price discrimination. [4] *Guyott **[*1387]** v. Texaco Inc., D.Conn.1966, 261 F. Supp. 942, 949*; *American Can Co. v. Bruce's Juices, 5 Cir. 1951, 187 F.2d 919*, cert. den. *342 U.S. 875, 72 S. Ct. 165, 96 L. Ed. 657*; FTC Advisory Opinion No. 147, October 24, 1967, Statement of Clarification, December 26, 1973, 1973-1976 Transfer Binder, Trade Reg.Rep. (CCH) P 20,498. Thus, even though delivered pricing, when properly applied, has received the tentative approval of the FTC, the fact that certain aspects of a firm's conduct are legal under one body of ***antitrust law*** does not make the sum of a firm's conduct immune from scrutiny according to other standards of competitive conduct contained in the antitrust laws. It is noteworthy that in the cases defendants cite for a line of authority on this question, the delivered pricing practices at issue in each case were held to violate one or more provisions of the antitrust laws.

[9]** It makes even less sense to argue that because uniform delivered pricing is legal under the Robinson-Patman Act defendants are required to engage in it. It is not the position of the FTC, as defendants state in their memorandum, that a seller violates the Robinson-Patman Act when it makes allowances based on actual freight cost, or when it offers a price based on f. o. b. shipping point. Rather, it is the position of the FTC that once the choice is made to offer uniform delivered price, the seller cannot depart from the established price schedule to grant freight allowances selectively to individual, favored purchasers.

> (Although) the granting of "backhaul" allowances (based on the customer's actual freight costs) by a seller using a uniform zone delivered pricing could indeed raise Robinson-Patman questions, a non-discriminatory option offered by such a seller to all customers to purchase at a true f. o. b. shipping point price would not.

Clarification of Ruling, "Backhaul" *Allowances, 1975, 85 F.T.C. 1176*. [5]

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[4] Hence the rule regarding backhaul allowances. See *85 F.T.C. 1174 (1975)*. Since the backhaul issue was raised by defendants' counsel at the hearing on the pending motions, the rule bears restating. If a seller adopts a uniform delivered pricing system, its pricing options must be "(1) uniform, and (2) available to all customers on a non-discriminatory basis." *85 F.T.C. at 1176*. While the delivered pricing system is in operation, a backhaul allowance to one customer is illegal; a non-discriminatory option offered to all customers to purchase at an alternative f. o. b. price is not. Thus an improper backhaul allowance involves selective deviation from a delivered pricing system once it's in place. It is not the equivalent, as defendants seem to suggest, of charging a uniform mill or base price for the product and either adding a delivery charge according to the distance of the purchaser from the plant, or permitting all purchasers to contract independently for delivery.

[5] The quoted opinion clarified an earlier advisory opinion to the General Foods Corporation. In the course of the clarification the FTC noted that the legality or illegality of the delivered price system chosen by General Foods was not at issue. At issue was

[10]** NET had the choice of a number of alternative systems of delivery pricing. Its pre-1972 practice was to subcontract the transportation function and bill the dealers for the costs. NET could have selected among independent carriers chosen by the dealers themselves, or it could have selected the independent common carriers according to certain identifiable standards, thus allowing for differences in actual cost of transportation yet maintaining central control over delivery. See *Crawford Transport Co. v. Chrysler Corp., E.D.Ky.1962, 235 F. Supp. 751*, aff'd, 6 Cir. 1964, *338 F.2d 934*, cert. denied 1965, *380 U.S. 954, 85 S. Ct. 1088, 13 L. Ed. 2d 971*. Without here deciding the question, it would seem that either of these delivery alternatives would, on the one hand, offer a "non-discriminating system, giving to purchasers, who have the natural advantage of proximity to (the) plant, the price advantages which they are entitled to expect over purchasers at a distance," *A. E. Staley, supra, 324 U.S. at 757, 65 S. Ct. at 976*, and, on the other hand, reduce to a minimum NET's intrusion into the market for the sale of delivery services.

Delivered pricing is only an incidental feature in **[**11]** one of two product markets that, taken together, make up the conduct of NET that plaintiffs challenge under the Sherman Act. NET's delivered pricing system may or may not withstand the Robinson-Patman analysis applied in the above-cited cases plaintiffs make no claim of price discrimination or collusion, so a judgment on that issue is probably unnecessary in this case. Even assuming that the pricing system NET used in the tied product sales of delivery services did not discriminate among purchasers, our analysis of the anti-competitive effect of tying two product markets still stands.

[*1388] Court's Authority to Order Provisional Remedy

Since the plaintiffs have withdrawn their motion for a preliminary injunction, all that remains to be considered is the court's authority to approve attachments of defendants' realty and personal property, pursuant to *Fed.R.Civ.P. Rule 64*. Defendants have challenged the court's power to order attachment on three grounds: first, that Section 16 of the Clayton Act embodies all possible remedies, and the provisional remedy of attachment is not among them; second, that the qualifying language of *Rule 64* "any existing statute of the United States **[**12]** governs" makes the antitrust laws the exclusive source for all remedies, permanent and provisional; third, that Massachusetts law does not permit attachment in antitrust cases.

On the general subject of provisional relief, defendants argue that Section 16 of the Clayton Act enumerates specific equitable remedies for private parties in an antitrust action and that the prejudgment relief plaintiffs seek is not among them. Defendants fail, however, to distinguish provisional remedies from the relief ultimately to be granted. In each of the cases relied upon by defendants in their memorandum, the plaintiffs sought as the final order of the court equitable remedies that clearly went beyond the forms of substantive remedies contemplated by the antitrust laws. See, for example, *In re Multidistrict Vehicle Air Pollution, 9 Cir. 1976, 538 F.2d 231*, in which plaintiffs requested, inter alia, that defendants in a restraint of trade action establish a program for testing automobile emissions, and that they retrofit cars with pollution control devices. The court held that as a form of final relief, such remedies did not serve to restore competition and hence were outside the scope of Section **[**13]** 16 of the Clayton Act. See also, *Nashville Milk Co. v. Carnation Co., 1958, 355 U.S. 373, 78 S. Ct. 352, 2 L. Ed. 2d 340*. ***HN7***[] The fact that Section 16 of the Clayton Act might restrict the types of final remedies available to a successful antitrust plaintiff has no bearing on the power of the courts to order provisional relief in order to preserve the value of the final remedy or to protect the court's jurisdiction.

The ultimate issue presented, therefore, is whether this court has the power under *Fed.R.Civ.P. Rule 64* to approve the attachment of an antitrust defendant's property in order to secure satisfaction of an eventual judgment. We note at the outset that the case of *DeBeers Consolidated Mines, Ltd. v. United States, 1945, 325 U.S. 212, 65 S. Ct. 1130, 89 L. Ed. 1566*, relied on by defendants, is inapposite to this remaining question. In DeBeers the United States specifically disclaimed any benefit of *Rule 64*. *325 U.S. at 218, 65 S. Ct. at 1133*. It did so because *Rule 64* requires the district court to look to applicable state law under New York law which governed in that case, an

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only whether General Foods could follow a delivered price system with respect to one set of purchasers, while it offered freight-related allowances to private carrier customers positioned to take "dock" delivery. *85 F.T.C. at 1175*.

attachment could issue only in an action seeking a money judgment, whereas the Government's action **[**14]** sought relief solely in equity. Related cases here cited by the defendants are similarly inapposite. [6]

We therefore look to applicable federal and state law. We are not persuaded by the defendants' argument that the federal antitrust laws impliedly exclude traditional forms of provisional relief because, when Congress set out in these statutes the possible forms a final remedy could take, it did not also mention the availability of provisional remedies. [7] Moreover, it is simply too **[*1389]** superficial a reading of *Rule 64* to take the qualifying language, "subject to . . . any existing statute of the United States governs to the extent to which it is applicable," to mean, as suggested by the defendants, that the antitrust laws, as existing federal statutes, **[**15]** state not only the substantive law on competition but the relevant rules of practice, jurisdiction, and procedure as well. The above-quoted qualification to the provisions of *Rule 64* is commonly understood to refer only to federal statutes dealing specifically with the provisional remedies of attachment, garnishment or arrest. See, e.g., *12 U.S.C. § 91* (national banks immune from attachment); 40 U.S.C. § 308 (property of United States not subject to attachment); 46 U.S.C. §§ 563, 601 (Seaman's clothing and wages not subject to attachment). See generally, Moore's, Federal Practice, P 64.07(3). Accordingly, we conclude that neither Section 4 nor Section 16 of the Clayton Act works to restrict the court's power to approve an attachment in this action in accordance with *Fed.R.Civ.P. Rule 64*.

[16]** *HN8*[]

Massachusetts Rule of Civil Procedure 4.1(a) provides for attachments subsequent to the commencement "of any action." Providing other requirements of the rule have been observed, as has been done in the instant case, the rule contains no limitation, express or implied, as to the type of action in which attachment may be ordered. To the best of our knowledge, no provision in Massachusetts law proscribes prejudgment attachment in actions seeking money damages. In this respect, state law varies widely. As explained in 7 Moore's Federal Practice, P 64.04(3),

> Some states are definitely "creditor" states in which the provisional remedies are generally available for all types of legal claims and with few restrictions; others are as definitely "debtor" states in which the provisional remedies are available only for certain types of legal claims and are subject to many restrictions relative to affidavits, bonds, and related matters; and still other states are somewhere between those extremes in varying degrees. [n10]

[n10] The New England states traditionally have been in the main "creditor" states.

[17]** Many of the cases cited by the defendants are from jurisdictions whose statutes specifically limit attachment to actions in contract. See, e.g., *Crist v. United Underwriters, Ltd., 10 Cir. 1965, 343 F.2d 902*; *McCall v. Superior Court, 1934, 1 Cal.2d 527, 36 P.2d 642*. Other cited cases state in passing that the court must find explicit statutory authorization to attach but deal principally with points of law wholly apart from the attachment issue. See, e.g., *Investors Royalty v. Market Trend Survey, 10 Cir. 1953, 206 F.2d 108*; *Stowe v. Matson, 1949, 94 Cal. App. 2d 678, 211 P.2d 591*.

Our omission to require a bond from plaintiffs in connection with the attachments in the instant case was intentional. First, Rule 4.1 makes no provision for a bond. Second, a bond patterned after the conditions specified in *Rule 65(c), Fed.R.Civ.P.*, would be inappropriate here, because an order granting an attachment is not an appealable order under *28 U.S.C. § 1292*. See, *West v. Zurhorst, 2 Cir. 1970, 425 F.2d 919*. Thus there appears to be no

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[6] In *ITT Community Development Corp. v. Barton, 5 Cir. 1978, 569 F.2d 1351*, for example, nothing in the Florida law on garnishment authorized a court to order funds paid into the registry of the court to secure payment before judgment was entered.

[7] We are confused by the citation to *Bruce's Juices, Inc. v. American Can Co., 1946, 330 U.S. 743, 67 S. Ct. 1015, 91 L. Ed. 1219*, upon which defendants have in part based their statutory construction of the Clayton Act. Bruce's Juices construed only the Robinson-Patman Act. At issue in that case was whether the plaintiff-buyer should be allowed to seek as a final remedy a declaration from the court that certain notes could not be collected on by the defendant-seller who was found to have violated the Robinson-Patman Act. Such a remedy, in the Court's view, was clearly outside the intended purposes of the Robinson-Patman Act. The case does not deal either with the Sherman or Clayton Acts, or with the provisional remedy of prejudgment attachment.

mechanism for determining that the defendants' property has been wrongfully attached and awarding damages on that basis. An order approving an attachment **[**18]** does not adjudicate matters relevant to the main claim. On appeal, the plaintiffs could be reversed for any number of reasons on the merits of their claims but reversal would in no way reflect on the correctness of the decision to approve attachment. A *Rule 65(c)* bond, on the other hand, serves a specific, corrective purpose and that purpose depends on the availability of appellate review. This absence of appellate review should serve to restrain trial courts in ordering attachments; **[*1390]** and we have taken this into account in our rulings in this case.

Scope of the Attachment

Upon the filing of our memorandum and order of August 29, 1979, plaintiffs were able to perfect attachments on $ 2 million of defendants' real property. But they were unable to perfect an additional attachment of $ 5 million on a leasehold in Woburn because the leasehold interest was terminated before the attachment was approved. By denying defendants' motion to vacate we have here upheld the validity of the $ 2 million attachments already perfected. This, however, is all that remains of the orders entered August 29, 1979, by virtue of plaintiffs' withdrawal on May 19, 1980 of their applications **[**19]** for a preliminary injunction, equitable attachment, additional security and discovery of defendants' assets.

One loose end calls for a further ruling: since the court's 1979 memorandum and order approved attachments up to a value of $ 7 million and only $ 2 million worth has been perfected, has the court ordered implicitly that plaintiffs have a roving commission to attach whatever property of the defendants they may discover in order that they may make up the $ 5 million shortfall? The question has been presented in the form of a draft order attached to plaintiffs' post-hearing memorandum filed May 23, 1980 requesting a general attachment directed to all of defendant NET's assets, subject to prior notice and further applications to the court. The answer is that we do not make such a conditional order. The propriety of attachments depends on the attendant circumstances, including the apparent strength of the plaintiffs' case and the location, current use, valuation and current interests in property sought to be attached. Whether future developments in this litigation will warrant additional attachments remains to be seen. In any event, new applications and hearings will be necessary. **[**20]**

Other Related Issues

Defendants have presented numerous additional grounds in support of their motion to vacate our August 1979 order. They challenge the method of calculating potential damages, plaintiffs' proof of "antitrust injury", and defendants' economic power and market share; they propose a pass-on defense and possible business justifications for their conduct; and they argue anew the separate product analysis which we fully explored in our 1979 memorandum. Many of these issues will be further developed in the course of pretrial discovery; some may at a later date serve as grounds for motions to dismiss or for summary judgment. However, we are satisfied that the parties had ample opportunity to present these issues when we first considered plaintiffs' application for preliminary relief and that our decision to approve, once again, plaintiffs' motion for attachment is fully supported on the record and the arguments presented to date.

Conclusion

By reaffirming its order of August 1979 based upon *Rule 64, Fed.R.Civ.P.*, the court has made no final rulings on the ultimate merits of the respective positions of the parties. The question of a plaintiff's likelihood of recovering **[**21]** judgment in an amount greater than the amount of an attachment is, like findings on an application for a preliminary injunction, in essence preliminary and subject to revision in the light of changed circumstances.

Defendants' motion to vacate the $ 2 million attachment approved August 29, 1979 is accordingly denied. Plaintiffs' request for a general attachment of defendant NET's assets up to $ 7 million is also denied. **[*1391]**

The defendants in the above entitled case arguing before me that the attachment and injunction issued by Judge Garrity were "beyond the power of the court to issue".

I refuse to act in this matter. I will not review any action taken by Judge Garrity prior to reassignment of this case.

I grant leave to defendants to ask for a rehearing by Judge Garrity. Such request for rehearing addressed to Judge Garrity must be filed within 14 days from date.

Grendel's Den v. Goodwin

United States District Court for the District of Massachusetts

August 14, 1980

Civ. A. No. 77-3418-T

Reporter

495 F. Supp. 761 *; 1980 U.S. Dist. LEXIS 12787 **; 1980-81 Trade Cas. (CCH) P63,841

GRENDEL'S DEN, INC. v. Herbert N. GOODWIN et al.

Core Terms

church, license, delegation, liquor, veto, liquor license, ban, outlets, schools, religious, feet, anticompetitive, antitrust, exemption, secular, violates, parties, cases, clear statement, supervised, entities, immunity, religion

LexisNexis® Headnotes

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Establishment of Religion

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

HN1[] **Freedom of Religion, Establishment of Religion**

U.S. Const. amend. I provides: Congress shall make no law respecting an establishment of religion. The *Establishment Clause* is applicable to the states under the *Fourteenth Amendment*.

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Criminal Law & Procedure > ... > Alcohol Related Offenses > Distribution & Sale > General Overview

Constitutional Law > Prohibition

Criminal Law & Procedure > Criminal Offenses > Alcohol Related Offenses > General Overview

HN2[] **Bill of Rights, Fundamental Freedoms**

A state, acting under the powers granted by the *Twenty-first Amendment*, may constitutionally ban the sale of liquor within a specified radius of a church. On the other hand, the state's powers under the *Twenty-first Amendment* do not abrogate other constitutional guarantees. The United States Supreme Court has noted that once passing beyond consideration of the *Commerce Clause*, the relevance of the *Twenty-first Amendment* to other constitutional provisions becomes increasingly doubtful.

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Governments > State & Territorial Governments > Licenses

Constitutional Law > Prohibition

HN3[] **Bill of Rights, Fundamental Freedoms**

A state's right to regulate liquor sales is not absolute. Regulations promulgated under the umbrella of the *Twenty-first Amendment* are subject to the same standards of scrutiny developed to evaluate the constitutionality of other kinds of state action.

Governments > Legislation > Enactment

Governments > State & Territorial Governments > Licenses

HN4[] **Legislation, Enactment**

A legislature may not delegate the power to impose a restriction. The principle embodied by this rule is that legislative power may only be exercised by the legislative body, though in specific instances affected parties may be authorized to waive an otherwise applicable legislative restriction. Given this standard, therefore, the test of a statute is whether it incorporates a legislative policy subject to waiver or whether it actually licenses private persons to impose policy on the public.

Governments > State & Territorial Governments > Licenses

HN5[] **State & Territorial Governments, Licenses**

There is now no general legislative proscription on liquor licenses within 500 feet of a church or school.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Governments > State & Territorial Governments > Licenses

HN6[] **Procedural Due Process, Scope of Protection**

Due process analysis focuses on the effect of a statutory scheme. The effect of *Mass. Gen. Laws ch. 138, § 16C* is to vest authority in private persons uncontrolled by any standard or rule prescribed by legislative action. It is that lack of a legislatively enacted standard that makes *§ 16C* an example of legislative neutrality creating unwarranted delegation.

Constitutional Law > ... > Fundamental Rights > Procedural Due Process > Scope of Protection

Governments > State & Territorial Governments > Licenses

HN7[] **Procedural Due Process, Scope of Protection**

The distinction between waiving a legislative restriction and imposing a private one is not merely procedural. Rather, that distinction is one of critical substance, established by the United States Supreme Court to set an outer limit to the exercise of public power by private persons. Against this fundamental deprivation of due process, no "liberalization" or "lesser included power" argument can survive.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Establishment of Religion

HN8[] **Freedom of Religion, Establishment of Religion**

The United States Supreme Court (Supreme Court) has established a comprehensive analytic framework for testing the validity of a statute challenged under the *Establishment Clause*. To be valid under this analysis, a statute: 1) must have a secular legislative purpose, 2) must have a principal or primary effect that neither advances nor inhibits religion, and 3) must not foster an excessive entanglement with religion. The degree of entanglement between state and religion is to be measured by considering: a) the character and purpose of the benefited institution, b) the nature of the benefit, c) the resulting relationship between the state and the religious authority, and d) the potential for political divisiveness created by the challenged statute. Though the test is well-established, even the Supreme Court has recognized that its decisions have sacrificed clarity and predictability for flexibility and have erected a blurred, indistinct, and variable barrier between church and state.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Establishment of Religion

Education Law > Religion in Schools > Establishment Clause Protections

HN9[] **Freedom of Religion, Establishment of Religion**

Public money and public power may not be used if a primary effect of that use is to advance churches as religious institutions. Thus the United States Supreme Court has insisted that there be adequate controls ensuring a purely secular purpose before public programs of aid to private schools are upheld.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Establishment of Religion

Governments > Legislation > Interpretation

Governments > State & Territorial Governments > Licenses

HN10[] **Freedom of Religion, Establishment of Religion**

The "primary effect" test looks to the actual effect of a statute, not the legislative intent behind its enactment. Nor does the existence of an actual secular effect save *Mass. Gen. Laws ch. 138, § 16C*. It is true that a merely incidental benefit to a church will not void an otherwise valid statute. But, *§ 16C* clearly provides churches with more than a merely incidental benefit. The statute delegates political power that may be wielded by a church to advance it as a religious institution. It is precisely that relationship between political and religious authority that the *Establishment Clause* forbids.

Business & Corporate Compliance > ... > Real Property Law > Zoning > Ordinances

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Establishment of Religion

Governments > State & Territorial Governments > Licenses

HN11[] Zoning, Ordinances

Mass. Gen. Laws ch. 138, Section 16C does not impose a flat statutory ban. Indeed, *§ 16C*'s *Establishment Clause* defect exists because that statute does not impose a flat ban. Instead, it grants churches uncontrolled and standardless veto power to determine what licenses will be banned. The legislature may not delegate that kind of power to a church.

Constitutional Law > Prohibition

Governments > State & Territorial Governments > Licenses

HN12[] Constitutional Law, Prohibition

The breadth of a state's power to regulate economic behavior is vast. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. Moreover, where the state acts under the *Twenty-first Amendment*, the standard of review is even more forgiving. The broad sweep of the *Twenty-first Amendment* has been recognized as conferring something more than the normal state authority over public health, welfare, and morals.

Constitutional Law > Equal Protection > Nature & Scope of Protection

HN13[] Equal Protection, Nature & Scope of Protection

The mere possibility that one enjoying power under a statute might act arbitrarily is not enough to invalidate legislation on equal protection grounds.

Antitrust & Trade Law > Exemptions & Immunities > Parker State Action Doctrine > Scope

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

HN14[] Exemptions & Immunities, Parker State Action Doctrine

Anticompetitive activities properly authorized and supervised by a state are immune to challenge under federal ***antitrust law***. The United States Supreme Court stated a two-part test for the establishment of Parker immunity: First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; and second, the policy must be actively supervised by the state itself.

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

Governments > State & Territorial Governments > Licenses

HN15[] Exemptions & Immunities, Parker State Action Doctrine

Mass. Gen. Laws ch. 138, § 16C represents a clear articulation of a state policy in favor of a church or school veto over liquor license applications. The Parker test, however, requires more than a clear statement of a legislative purpose that incidentally affects competition. It requires instead a clear statement of policy in favor of the anticompetitive effects themselves.

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

Governments > State & Territorial Governments > Licenses

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

HN16[] **Parker State Action Doctrine, Local Governments & Private Parties**

Mass. Gen. Laws ch. 138, § 16C does not involve the Commonwealth in sufficiently active supervision to warrant immunity under the state exemption doctrine. The simple fact is that state authority, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity. *Section 16C* does no more than approve or ratify such conduct and hence is not the kind of direct state involvement required under Parker.

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Opinion by: TAURO

Opinion

[*762] OPINION

The plaintiff, Grendel's Den, Inc. (Grendel's), is a Harvard Square area restaurant that has, since 1977, unsuccessfully sought issuance of a liquor license by the defendant Cambridge License Commission (the CLC). The CLC denial was upheld on appeal by the Commonwealth's Alcoholic Beverages Control Commission (the ABCC). It is undisputed that both the local and state authorities have refused to grant Grendel's request solely because of the opposition filed by the Holy Cross Armenian Catholic Parish Church (the Church) under the provisions of *Mass.Gen.Laws ch. 138, § 16C*. That statute states in pertinent part:

> Premises, except those of an innholder and except such parts of buildings as are located ten or more floors above street level, located within a radius of five hundred feet of a church **[**2]** or school shall not be licensed (for sale of alcoholic beverages) if the governing body of such church or school files written objection thereto . . . .

"Church" is defined as a "building dedicated to divine worship and in regular use for that purpose." It is undisputed that the Church meets the definition.

Grendel's asserts that *§ 16C* violates the federal constitution in three ways. It first alleges a due process violation by the legislature's delegation to private persons of the power to veto issuance of a liquor license. [1] **[**3]** As a spinoff of that theory, Grendel's next argues that vesting the right of veto in the Church violates the separation of religious and political power mandated by the *Establishment **[*763]** Clause*. [2] Third, Grendel's contends that the legislative

1. U.S.Const. Amend. XIV, sec. 1.

classifications embodied in *§ 16C* are irrational and, therefore, do not afford equal protection of the law. [3.] An additional claim by Grendel's is that *§ 16C* violates federal ***antitrust law*** by creating a licensing system that permits private parties to engage in anticompetitive practices. [4.]

The parties suspended action in this case for two years pending resolution of a state court challenge to the same statute by another liquor license applicant. In *Arno v. Alcoholic Beverages Control Comm'n, 377 Mass. 83, 384 N.E.2d 1223 (1979)*, the Supreme Judicial Court upheld the validity of *§ 16C* over arguments that it violates both state and federal constitutional provisions.

With the state law issues thus settled, [5.] the parties here filed cross-motions for summary judgment with respect to these four facial attacks on the validity of *§ 16C* under federal law. [6.] The parties have asked this court, in the interest of expediting this litigation, to rule now on these federal issues, before taking evidence on Grendel's "as **[**4]** applied" arguments. They have also requested that this court certify its decision on those issues for interlocutory appeal under *28 U.S.C. § 1292(b)*.

To prepare an adequate basis for prompt decision, the parties have submitted an agreed statement of facts and an agreed statement of contested issues. There being no factual disputes material to the issues presented, and with state law decided, the cross motions for summary judgment with respect to these federal issues are ripe for decision.

I.

Grendel's is a restaurant located in the Harvard Square area of Cambridge, **[**5]** Massachusetts. The Church is situated approximately ten feet from Grendel's. There are now twenty-six liquor licenses outstanding for premises within the statutory 500 feet of the Church.

Pursuant to a purchase agreement with a license holder, Grendel's filed for a transfer of that license to itself with the CLC. After the required notice was issued, the Church filed a written objection pursuant to *§ 16C*. The CLC rejected that objection as not properly indicating due authorization from the Church's governing body. The Church then filed a second opposition on May 25, 1977. The CLC thereupon rejected Grendel's application in a letter dated May 31, 1977. The only basis for the CLC's decision cited in that letter was the filing of a proper objection by the Church.

Grendel's then appealed to the ABCC, the state agency charged with enforcing the Commonwealth's liquor regulations. After a hearing, the ABCC on September 8, 1977, upheld the CLC's denial of Grendel's application expressly on the basis of the Church's objection, which the ABCC in that decision characterized as "an absolute veto." Statement of Agreed Facts, Exhibit E.

II.

[2.] ***HN1***[] *U.S.Const. Amend. I* ("Congress shall make no law respecting an establishment of religion . . . ."). It has long been held that the *Establishment clause* is applicable to the states under the *Fourteenth Amendment*. *Cantwell v. Connecticut, 310 U.S. 296, 303, 60 S. Ct. 900, 903, 84 L. Ed. 1213 (1940)*.

[3.] U.S.Const. Amend. XIV, sec. 1.

[4.] *15 U.S.C. §§ 1*, *2*, *15*.

[5.] The Supreme Judicial Court's rulings in *Arno, supra*, and *Samel v. City of Pittsfield Licensing Board, 377 Mass. 908, 384 N.E.2d 1230 (Mass. 1979)*, have conclusively resolved issues of state law relevant to this case.

[6.] With respect to the antitrust theory, the parties have asked at this point only for a ruling as to the availability of a state exemption defense under *Parker v. Brown, 317 U.S. 341, 63 S. Ct. 307, 87 L. Ed. 315 (1942)*.

It is well established that ***HN2***[] a state, acting under **[**6]** the powers granted by the *Twenty-first Amendment*, may constitutionally ban the sale of liquor within a specified radius of a church. See, *Arno, supra, 384 N.E.2d at 1226* (citations); *California v. LaRue, 409 U.S. 109, 120, 93 S. Ct.* ***[*764]*** *390, 398, 34 L. Ed. 2d 342 (1972)* (Stewart, J., concurring) (dicta). Such a ban, properly enacted by the legislature, raises none of the issues advanced by Grendel's in its attack on the operation of *§ 16C*.

On the other hand, the state's powers under the *Twenty-first Amendment* do not abrogate other constitutional guarantees. See, *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc., 445 U.S. 97, 108, 100 S. Ct. 937, 945, 63 L. Ed. 2d 233 (1980)*; see also P. Brest, Processes of Constitutional Decisionmaking, Cases and Materials, 258 (1975), cited with approval in *Craig v. Boren, 429 U.S. 190, 206, 97 S. Ct. 451, 461, 50 L. Ed. 2d 397 (1976)*. The Supreme Court has noted that "(once) passing beyond consideration of the *Commerce Clause*, the relevance of the *Twenty-first Amendment* to other constitutional provisions becomes increasingly doubtful." *Craig, supra, at 206, 97 S. Ct. at 461*. Indeed, in Craig the Court struck down on equal **[**7]** protection grounds a state statute setting different ages at which males and females could drink beer. [7.]

It is clear, therefore, that ***HN3***[] a state's right to regulate liquor sales is not absolute. Regulations promulgated under the umbrella of the *Twenty-first Amendment* are subject to the same standards of scrutiny developed to evaluate the constitutionality of other kinds of state action. Within this framework, the court now examines plaintiff's various theories for relief.

A. Due Process.

The plaintiff's principal due process argument rests on three Supreme Court decisions defining the kind of power legislatures may delegate to private entities.

In *Eubank v. Richmond, 226 U.S. 137, 33 S. Ct. 76, 57 L. Ed. 156 (1912)*, the Court voided an ordinance which gave the power to establish building setback lines to the **[**8]** owners of two-thirds of the property abutting any street. In *Cusack Co. v. Chicago, 242 U.S. 526, 37 S. Ct. 190, 61 L. Ed. 472 (1917)*, the Court upheld a municipal restriction banning billboard construction unless the owners of a majority of the affected property waived the restriction. The triad was completed by *Washington ex rel. Seattle Title Trust Co. v. Roberge, 278 U.S. 116, 49 S. Ct. 50, 73 L. Ed. 210 (1928)*, in which the Court struck down an ordinance permitting the establishment of homes for the elderly only on the written consent of the owners of two-thirds of the property located within 400 feet of the proposed site.

As the Supreme Judicial Court observed in Arno, the teaching of these cases is that ***HN4***[] a legislature may not delegate the power to impose a restriction. *Arno, supra, 384 N.E.2d at 1227* (citing cases). The principle embodied by this rule is that legislative power may only be exercised by the legislative body, though in specific instances affected parties may be authorized to waive an otherwise applicable legislative restriction. *Cusack, supra, 242 U.S. at 531, 37 S. Ct. at 192*; *City of Eastlake v. Forest City Enterprises, Inc., 426 U.S. 668, 677-78* & n. 12, *96* ***[**9]*** *S. Ct. 2358, 2363-64* & n. 12, *49 L. Ed. 2d 132 (1976)*. Given this standard, therefore, the test of a statute is whether it incorporates a legislative policy subject to waiver or whether it actually licenses private persons to impose policy on the public.

Section 16C, as presently enacted, is the third approach adopted by the Massachusetts legislature to regulate liquor outlets located near a church or school. As originally enacted in 1954, *§ 16C* flatly forbade the licensing of liquor outlets within 500 feet of a church or school. In 1968, the legislature amended *§ 16C* to permit licenses within the 500 foot radius, provided "the governing body of such church or school assents in writing." The statute was then amended to its present form in 1970. *Arno, supra, 384 N.E.2d at 1226-27*.

[7.] See also, *Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 178-79, 92 S. Ct. 1965, 1974, 32 L. Ed. 2d 627 (1972)* (state liquor regulation cannot invidiously discriminate in violation of equal protection).

The 1954 version of *§ 16C* was a constitutional exercise of the Commonwealth's power to regulate alcohol in its promulgation of **[*765]** an absolute ban. Similarly, the 1968 version comported with the Cusack standard as the legislature there provided a clear statement of policy, but permitted individual churches and schools to exercise their discretion to waive the legislative ban on liquor outlets **[**10]** near them.

The present *§ 16C*, however, presents a quite different picture. ***HN5***[] There is now no general legislative proscription on liquor licenses within 500 feet of a church or school. The statute on its face reflects legislative neutrality concerning the proximity of liquor outlets to churches or schools. The decision as to whether a license may issue at a location within 500 feet of a church or school has been delegated to the affected institution. Legislative neutrality, therefore, has effectively delegated the policy decision of liquor licensing to private entities. An objection filed by such a private entity is unreviewable [8.] and, therefore, operates as an absolute veto over any application subject to *§ 16C*.

[11]** Even if the legislature intended to maintain a general prohibitory policy when it amended *§ 16C* in 1970, that intention could not save an otherwise invalid delegation of power. ***HN6***[] Due process analysis focuses on the effect of a statutory scheme. The effect of *§ 16C* is to vest authority in private persons "uncontrolled by any standard or rule prescribed by legislative action." *Roberge, supra, 278 U.S. at 122, 49 S. Ct. at 52*. It is that lack of a legislatively enacted standard which makes *§ 16C* an example of legislative neutrality creating unwarranted delegation. [9.]

The Commonwealth argues that the state's power to ban all liquor outlets near churches or schools implies the lesser power to conditionally approve licenses, given the consent of affected institutions. It supplements **[**12]** that argument by contending that the 1970 enactment of *§ 16C* merely shifted the burden of objection to the church or school, thereby relieving the applicant of the burden of gaining consent. See *Arno, supra, at 1227*. The Commonwealth would, therefore, characterize the 1970 amendment as a liberalization of the law with respect to license applicants such as Grendel's.

The Commonwealth's theory misconceives the due process interests at stake here. ***HN7***[] The distinction between waiving a legislative restriction and imposing a private one is not merely procedural. Rather, that distinction is one of critical substance, established by the Supreme Court to set an outer limit to the exercise of public power by private persons. To ignore that distinction would deprive Grendel's of a liquor license, without any legislative, judicial or administrative determination that its issuance would be contrary to the public interest. Instead, Grendel's would be deprived of a license solely because a private entity "uncontrolled by any standard or rule" vetoed its application. Against this fundamental deprivation of due process, no "liberalization" or "lesser included power" argument can survive.

This court **[**13]** respectfully disagrees with the Supreme Judicial Court's determination that there is "no material distinction (between the 1968 and 1970 enactments) for the purpose of analyzing the delegation issue." *Arno, supra, at 1228*. The 1970 amendment had greater substantive effect than merely shifting the burden of objection. **[*766]** Rather, the 1970 amendment actually reversed the underlying policy of the statute. Before 1970, no application was processed until the consent of *§ 16C* entities had been solicited and obtained by the applicant. The

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[8.] The Arno court noted that a hearing is available to test whether a filed objection meets the statutory criteria i. e., whether the objector is a church or school actually located within 500 feet of the applicant's premises and whether the objection was authorized by the objector's governing body. See *Arno, supra, 384 N.E.2d at 1228*. Indeed, the Church's first objection to Grendel's application was rejected by the CLC for failure to meet the statutory element of due authorization.

Arno makes clear, however, that a church or school may object without having to submit to a hearing at which its reasons or motives are examined or explained. Id. Simply put, under *§ 16C* a church or school may exercise its discretion to object for good reason, bad reason, or no reason at all.

[9.] Thus, certification of the issue of legislative intent to the Supreme Judicial Court, as suggested by the Commonwealth, would be pointless, since such a determination would have no bearing on the effect of the statute's actual operation.

policy was clear. The position of the Commonwealth was not neutral. Liquor licenses were banned, unless the affected church or school signified approval. To the contrary, the present policy under *§ 16C* is that liquor licenses are presumed to be proper for further processing, unless a church or school files an objection. Given such an objection, the issue is foreclosed without appeal or other recourse.

The substantive distinction becomes apparent when one considers the effect of a church's silence under each of the statutory schemes. Given a church's silence before 1970, the Commonwealth imposed an absolute bar to the granting of a license. Since **[**14]** 1970, the Commonwealth's policy is to permit further consideration of an application, should a church or school remain silent on the issue. That difference reflects more than a mere imposition on a church of a burden to object. It demonstrates a substantive change in legislative policy. In making that substantive change, the legislature impermissibly delegated, rather than exercised, its power. It is precisely that delegation which triggers the due process concerns delineated by *Eubank, supra*, and its progeny.

This court concludes, therefore, that the delegation of veto power to churches and schools established by *§ 16C* violates the *Due Process Clause of the Fourteenth Amendment*. [10.]

[15]** B. The *Establishment Clause*.

In recent cases, ***HN8***[] the Supreme Court has established a comprehensive analytic framework for testing the validity of a statute challenged under the *Establishment Clause*. To be valid under this analysis, a statute 1) must have a secular legislative purpose, 2) must have a principal or primary effect that neither advances nor inhibits religion, and 3) must not foster an excessive entanglement with religion. The degree of entanglement between state and religion is to be measured by considering a) the character and purpose of the benefited institution, b) the nature of the benefit, c) the resulting relationship between the state and the religious authority, and d) the potential for political divisiveness created by the challenged statute. See *Committee for Public Education v. Regan, 444 U.S. 646, 650, 100 S. Ct. 840, 845, 63 L. Ed. 2d 94 (1980)*; *Wolman v. Walter, 433 U.S. 229, 235-36, 97 S. Ct. 2593, 2598-99, 53 L. Ed. 2d 714 (1977)*; *Roemer v. Board of Public Works of Maryland, 426 U.S. 736, 748-49, 96 S. Ct. 2337, 2345-46, 49 L. Ed. 2d 179 (1976)*.

Though the test is well-established, even the Supreme Court has recognized that its decisions have "sacrificed **[**16]** clarity and predictability for flexibility," *Regan, supra, 444 U.S. at 662, 100 S. Ct. at 851*, and have erected a "blurred, indistinct, and variable barrier" between church and state, *Lemon v. Kurtzman, 403 U.S. 602, 614, 91 S. Ct. 2105, 2112, 29 L. Ed. 2d 745 (1971)*. That alone makes a detailed analysis of applicable precedent of dubious value in this case. Moreover, the Court has apparently never faced the situation presented here a legislative delegation of licensing power to a church. For both reasons, this court's application of the three-pronged test must proceed largely without the guidance of controlling precedent.

The Commonwealth first defends *§ 16C* as having the valid secular legislative purpose of protecting spiritual, cultural, and educational centers from the "hurly-burly" associated with liquor outlets. Grendel's **[*767]** concedes that such a purpose satisfies the first part of the test. As *§ 16C* includes public schools as well as private churches within its ambit, and because the legislature could reasonably believe that community activities at either type of institution might be adversely affected by proximity to liquor outlets, Grendel's concession of a legitimate **[**17]** secular purpose seems fully warranted. See *Walz v. Tax Commission, 397 U.S. 664, 672-73, 688-89, 90 S. Ct.*

[10.] Plaintiff has also assailed *§ 16C* as violative of due process because of the lack of a hearing to probe the standards and motives governing *§ 16C* entities' exercise of their veto powers. In view of this court's decision concerning plaintiff's primary due process claim, it is unnecessary to reach this issue.

To the extent that *§ 16C* is invalid because it permits private parties to use public power for invalid purposes, those aspects of *§ 16C* are better discussed in connection with particular allegations made by Grendel's, e.g., its *Establishment Clause* and antitrust claims, infra.

1409, 1413, 1421, 25 L. Ed. 2d 697 (1970) (plurality opinion of Blackmun, J., and concurring opinion of Brennan, J.); McGowan v. Maryland, 366 U.S. 420, 450, 81 S. Ct. 1101, 1117, 6 L. Ed. 2d 393 (1961).

The second element of the test requires a finding of unconstitutionality if the statute might "in part have the effect of advancing religion," Committee for Public Education v. Nyquist, 413 U.S. 756, 784 n. 39, 93 S. Ct. 2955, 2971, n. 39, 37 L. Ed. 2d 948 (1973), quoting and adding emphasis to Tilton v. Richardson, 403 U.S. 672, 683, 91 S. Ct. 2091, 2098, 29 L. Ed. 2d 790 (1971). Grendel's contends that § 16C effectively promotes religious authority by conferring on churches the unfettered opportunity to realize economic advantage and exercise political power.

The political dimension of § 16C has already been partly described in the discussion of due process, supra. What merits emphasis here is the extent to which a church under § 16C could lawfully exercise its political power to veto license applications for purely religious reasons. Thus, to take an extreme example, a **[**18]** Protestant church could exercise its veto solely to exclude non-Protestant applicants from obtaining liquor licenses within 500 feet of that church. Even such a discriminatory and ignoble motive would not be subject to review, because § 16C provides the church with unfettered discretion to file an objection that constitutes an absolute veto of the application. See note 8, supra.

Similarly, a § 16C institution could conceivably exercise its veto power solely for its economic benefit by tying that decision, directly or indirectly, to the presence or absence of a donation by the applicant. Indeed, the relevance of such potential economic benefit to the Establishment Clause issue becomes all the more striking when one considers the institutions granted veto power under § 16C. Public schools are rarely, if ever, the beneficiaries of donations. The potential economic benefit conferred by § 16C, therefore, is effectively limited to churches and private schools many of the latter, of course, being directly or indirectly controlled by churches.

It is no answer to suggest that most churches would not abuse the power granted to them under § 16C. The critical fact is that § 16C provides **[**19]** the potential for such abuse. While the Supreme Court's decisions do not, for the reasons described earlier, provide precise guidance for this court, they do underscore one basic admonition. ***HN9***[] Public money and public power may not be used if a primary effect of that use is to advance churches as religious institutions. See Walz, supra, 397 U.S. at 688-89, 90 S. Ct. at 1413 (Brennan, J., concurring). Thus the Court has insisted that there be adequate controls ensuring a purely secular purpose before public programs of aid to private schools are upheld. See, e.g., Regan, supra (concerning secular control of test grading and discussing precedents). By providing no such controls, § 16C legitimizes the potential use of delegated public power for religious purposes.

Against this effect, the Commonwealth's proffer of a predominant secular purpose is unavailing. It must be stressed that ***HN10***[] the "primary effect" test looks to the actual effect of a statute, not the legislative intent behind its enactment. Nyquist, supra, 413 U.S. at 773-74, 93 S. Ct. at 2965-66. Nor does the existence of an actual secular effect save § 16C. It is true that a merely incidental benefit to a church will not void **[**20]** an otherwise valid statute, see Reomer, supra, 426 U.S. at 748, 96 S. Ct. at 2345. But, § 16C clearly provides churches with more than a merely incidental benefit. The statute delegates political power that may be wielded by a church to advance it as a religious institution. It is precisely that **[*768]** relationship between political and religious authority that the Establishment Clause forbids.

The Commonwealth's further defense, based upon the presumed constitutionality of statutes banning liquor licenses near churches, misses the point. Such statutes are clearly distinguishable. ***HN11***[] Section 16C does not impose such a flat statutory ban. Indeed, § 16C's Establishment Clause defect exists because that statute does not impose a flat ban. Instead, it grants churches uncontrolled and standardless veto power to determine what licenses will be banned. [11] **[**21]** The legislature may not delegate that kind of power to a church. [12]

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[11] Zoning regulations also present the potential for bargaining and discretion, and churches may, of course, exercise such powers along with other property owners subject to such regulations. In zoning, however, the breadth of regulation negates any finding that the regulation has a primary effect of advancing religion. Here, because § 16C defines a narrow class of

[22]** C. Equal Protection.

Grendel's advances two arguments in support of its assertion that *§ 16C* denies equal protection of the laws. First, it claims that the exemptions included in *§ 16C* are wholly irrational. Second, it contends that the potential for arbitrary action created by *§ 16C* constitutes the kind of capricious decision making prohibited under the *Equal Protection Clause*.

It is well settled that ***HN12***[] the breadth of a state's power to regulate economic behavior is vast. See *City of New Orleans v. Dukes, 427 U.S. 297, 303-05, 96 S. Ct. 2513, 2516-17, 49 L. Ed. 2d 511 (1976)*; *Williamson v. Lee Optical Co., 348 U.S. 483, 75 S. Ct. 461, 99 L. Ed. 563 (1955)*. As the Court observed in *McGowan, supra, 366 U.S. at 426, 81 S. Ct. at 1105*, a "statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it." Moreover, where the state acts under the *Twenty-first Amendment*, the standard of review is even more forgiving. See *LaRue, supra, 409 U.S. at 114, 93 S. Ct. at 395* ("the broad sweep of the *Twenty-first Amendment* has been recognized as conferring something more than the normal state authority over public health, welfare, and morals.").

[23]** Given these principles, the legislature's decision to exempt from a *§ 16C* veto innholders and premises located ten or more floors above street level appears sufficiently rational to satisfy the dictates of equal protection analysis. With respect to innholders, the legislature could rationally conclude that most patrons of a liquor outlet located at an inn would be customers of the inn itself and hence less likely to venture outside of the inn to disturb nearby churches and schools. Likewise, the legislature could rationally believe that a distance of ten floors suffices to diminish the disturbance generated by a liquor outlet thus situated. In either case, it is not this court's duty to second-guess such determinations.

[*769] With respect to Grendel's second argument, the matter appears closer. But ***HN13***[] the mere possibility that one enjoying power under a statute might act arbitrarily is not enough to invalidate legislation on equal protection grounds. [13.] In each of the cases cited by the plaintiff, for example, it was the arbitrary action of an official that constituted the violation of equal protection. In none of those cases was the statute itself overturned because of the **[**24]** potential for such arbitrary action. See *Yick Wo v. Hopkins, 118 U.S. 356, 6 S. Ct. 1064, 30 L. Ed. 220 (1886)*; *Hornsby v. Allen, 326 F.2d 605, 609 (5th Cir. 1964)*.

In *Niemotko v. Maryland, 340 U.S. 268, 273, 71 S. Ct. 325, 328, 95 L. Ed. 267 (1951)*, also cited by the plaintiff, the Supreme Court reviewed an informal municipal licensing "practice" used to bar the use of a local park to Jehovah's

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beneficiaries and because churches and their related schools compose such a large part of the protected class, the same inference of neutrality cannot be drawn.

Likewise, a licensing structure in which the local licensing board could consider a church's objection, but would retain the right to make an independent determination, is distinguishable from this case.

[12.] The defendants have cited three lower state court opinions which they claim as precedent upholding the validity of *§ 16C*. The first, *Appeal of Rusch, 32 Pa.Cmwlth. 578, 379 A.2d 1375 (1977)*, is inapplicable because it involved the exercise of a licensing board's discretion in rejecting an application for a license near a church. Moreover, no constitutional challenge was either advanced, considered, or decided in Rusch. The second, *Horne v. Hernando County, 297 So.2d 606 (Fla.App.1974)*, is distinguishable because it upheld a county ordinance flatly banning licenses within 1500 feet of a church or school.

The third case cited, *Wiles v. Michigan Liquor Control Comm'n, 59 Mich.App. 321, 229 N.W.2d 434 (1975)*, did reject an *Establishment Clause* attack on a statute virtually identical to *§ 16C*. But it is clear from the opinion in Wiles that the court was not presented with the specific due process and *Establishment Clause* arguments advanced here. Indeed, Wiles contains only a short paragraph concluding that the licensing statute did not have the primary effect of advancing religion. Given its conclusory nature, Wiles is hardly persuasive authority on the issues before this court.

[13.] As has been noted, supra, however, that possibility does provide grounds for due process and *Establishment Clause* challenges.

Witnesses. The Court struck down the "practice" as violative of free speech and religion, but carefully limited its equal protection holding to the ruling that in the specific situation before the Court, the "practice" had been applied arbitrarily.

D. The State Exemption Defense.

Aside from its constitutional challenges, Grendel's also seeks to overturn *§ 16C* because of its alleged inconsistency with federal ***antitrust law***, which is made controlling under the *Supremacy Clause*. [14.] Grendel's **[**25]** theory, in general outline, is that *§ 16C* creates a species of economic power which churches and private schools could exercise in anticompetitive ways. [15.]

The issues before the court at this point arise from cross-motions for summary judgment aimed at the Commonwealth's assertion of a state exemption defense to Grendel's antitrust theory. Under *Parker, supra*, ***HN14***[] anticompetitive activities properly authorized and supervised by a state are immune to challenge under federal ***antitrust law***. In *Midcal, supra, 445 U.S. at 105, 100 S. Ct. at 943*, a unanimous Supreme Court stated a two-part test for the establishment of Parker immunity: "(first), the **[**26]** challenged restraint must be "one clearly articulated and affirmatively expressed as state policy'; second, the policy must be "actively supervised' by the State itself," quoting *City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410, 98 S. Ct. 1123, 1135, 55 L. Ed. 2d 364 (1978)* (opinion of Brennan, J.).

HN15[] *Section 16C*, of course, represents a clear articulation of a state policy in favor of a church or school veto over liquor license applications. The Parker test, however, requires more than a clear statement of a legislative purpose that incidentally affects competition. It requires instead a clear statement of policy in favor of the anticompetitive effects themselves. There is in this case no clear statement by the Commonwealth that the potential anticompetitive effects of *§ 16C* are legitimate, rational, or necessary in protecting centers of community activity from disturbance by liquor outlets.

Even were such a policy statement present, however, ***HN16***[] *§ 16C* does not involve the Commonwealth in sufficiently active supervision to warrant immunity under the state exemption doctrine. The simple fact is that "state (authority), approval, encouragement, or participation in restrictive **[**27]** private conduct confers no antitrust immunity." *Cantor v. Detroit Edison, 428 U.S. 579, 592-93, 96 S. Ct. 3110, 3118, 49 L. Ed. 2d 1141 (1976)*. Here, *§ 16C* does no more than approve or ratify such conduct, and hence cannot be regarded as the kind of direct state involvement required under Parker. Indeed, the Court in *Midcal, supra*, faced an **[*770]** analogous situation in which California ratified resale price maintenance schemes developed by private liquor dealers. In unanimously rejecting the proffer of a Parker immunity defense, the Midcal Court reemphasized the requirement that the state actively supervise the challenged private anticompetitive acts. *Id. 445 U.S. at 105, 100 S. Ct. at 943*.

This court determines that *§ 16C* is not immune to an antitrust challenge. Because the Commonwealth has not clearly stated a policy in favor of *§ 16C*'s potentially anticompetitive effects and because it has not actively supervised those effects, the state exemption doctrine does not apply.

III.

For the reasons described in this opinion, the court holds that *Mass.Gen.Laws ch. 138, § 16C* violates the *Due Process Clause of the Fourteenth Amendment* and the *Establishment Clause of the First* ***[**28]*** *Amendment*, but that it does not violate the *Equal Protection Clause of the Fourteenth Amendment*. The court also holds that the state exemption doctrine of *Parker v. Brown, supra*, does not preclude plaintiff from relief under federal ***antitrust law***.

[14.] U.S.Const., art. VI.

[15.] For example, church members who own liquor establishments or restaurants might exploit their churches' *§ 16C* veto power to disadvantage a competitor seeking to obtain a license. At this stage of the case, the court expresses no opinion as to the validity of such a theory and no findings as to the facts surrounding Grendel's application.

An order will issue.

Auburn News Co. v. Providence Journal Co.

United States District Court for the District of Rhode Island

November 14, 1980

Civ. A. No. 80-0446

Reporter

504 F. Supp. 292 *; 1980 U.S. Dist. LEXIS 15026 **; 1980-81 Trade Cas. (CCH) P63,640; 6 Media L. Rep. 2333

AUBURN NEWS COMPANY, INC. et al. v. PROVIDENCE JOURNAL COMPANY et al.

Core Terms

newspapers, distributors, independent distributor, monopolize, merits, papers, distributorships, circulation, distribute, vertically, anti-competitive, carriers, monopoly power, antitrust, delivery, damages, Sherman Act, advertising, elimination, reasons, preliminary injunction, customer list, combined, appears, vertical integration, secondary market, anti trust law, retail price, competitors, subscribers

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

HN1[] **Injunctions, Preliminary & Temporary Injunctions**

The decision to issue a preliminary injunction traditionally rests upon an examination of four factors: 1) the likelihood plaintiffs will suffer irreparable harm; 2) the balance of this harm with the harm defendants will suffer if they are enjoined; 3) the probability plaintiffs will succeed on the merits; and 4) the public's interest in issuing an injunction.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

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

Equity traditionally requires the moving party to demonstrate at a preliminary hearing that it will probably succeed at a trial on the merits.

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

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

If the balance of hardships tips decidedly toward the plaintiff, it is ordinarily sufficient that the plaintiff has raised questions going to the merits which are so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus, for more deliberate investigation.

Antitrust & Trade Law > Sherman Act > General Overview

HN4[] Antitrust & Trade Law, Sherman Act

Mere common ownership will not insulate entities from the reach of the Sherman Act. Further, the existence of a parent subsidiary relationship between the two entities by itself has little antitrust significance.

Antitrust & Trade Law > Sherman Act > General Overview

HN5[] Antitrust & Trade Law, Sherman Act

Antitrust law is only concerned with products reasonably interchangeable with one another, in other words, products for which there is some cross elasticity of demand.

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

HN6[] Regulated Practices, Market Definition

Traditionally, newspapers have been considered separate from other media.

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

HN7[] Regulated Practices, Market Definition

Market share should not be measured by absolute population figures, but should reflect the number of those who demonstrate an actual or potential interest in the market in which the competition is measured.

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

HN8[] Monopolies & Monopolization, Actual Monopolization

Monopolization in contravention of *§ 2*, *15 U.S.C.S. § 2*, occurs whenever one with monopoly power commits an unreasonable restraint of trade in violation of the Sherman Act *§ 1*, *15 U.S.C.S. § 1*.

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

HN9[] Monopolies & Monopolization, Actual Monopolization

Specific intent to monopolize however, can be inferred when the natural outcome of Defendants' actions is the elimination of competition.

Antitrust & Trade Law > Sherman Act > Claims

Antitrust & Trade Law > Sherman Act > General Overview

HN10[] **Sherman Act, Claims**

Rhode Island law incorporates interpretations of the federal antitrust statutes. Consequently, the potential for proof of a violation of Rhode Island law is the same as that for a violation of the Sherman Act *§§ 1* and *2*, *15 U.S.C.S. §§ 1* and *2*.

Trade Secrets Law > Protected Information > Customer Lists

Torts > Business Torts > Unfair Business Practices > General Overview

Trade Secrets Law > Trade Secret Determination Factors > Property Rights

Trade Secrets Law > Misappropriation Actions > General Overview

Trade Secrets Law > Misappropriation Actions > Elements of Misappropriation > Use

HN11[] **Protected Information, Customer Lists**

That customer lists are a property right to be protected from misappropriation is beyond dispute. The rationale behind such protection is the likelihood that absent interference, route customers will continue to patronize the same supplier. Not all customer lists, therefore, are to be protected but only those of a confidential nature, i. e., those which are comprised of customers whose trade and patronage have been secured by years of business effort and advertising, and the expenditure of time and money, constituting a part of the good-will of a business which enterprise and foresight have built up.

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Opinion by: BOYLE

Opinion

[*294] OPINION

This action concerns alleged violation of Sections One and Two of the Sherman Antitrust Act, *15 U.S.C. §§ 1*, *2 (1976)*, alleged violation of the analogous Rhode Island Antitrust statutes, *R.I. Gen. Laws § 6-36-1, et seq.* (Supp.1980), as well as an alleged breach of the common law duty not to wrongfully interfere with contractual relationships. The Plaintiffs seek a Preliminary Injunction pursuant to *Rule 65(a) of the Federal Rules of Civil Procedure*.

[*295] THE PARTIES

Plaintiffs are eighteen independent distributors who purchase at wholesale Defendants' newspapers and a much smaller number of out-of-town newspapers and distribute those newspapers by direct sale or through home delivery carriers in precisely delineated areas whose boundaries are strictly observed. Defendant, The Providence Journal Company (hereinafter, the Journal), is the publisher of The Providence Journal, **[**2]** The Evening Bulletin, The

Providence Journal-Bulletin, and The Providence Sunday Journal. These newspapers circulate throughout Rhode Island and in parts of Southeastern Massachusetts. The Providence Journal is the only morning newspaper published and sold in Rhode Island. The Providence Journal-Bulletin is the only Saturday morning newspaper published and sold in Rhode Island. The Providence Sunday Journal is the only Sunday morning newspaper published and sold in Rhode Island. Only The Evening Bulletin is subject to direct competition from other Rhode Island local newspapers.

FACTUAL BACKGROUND

For many years the Journal distributed its newspapers by selling to distributors who in turn sold to stores and home delivery carriers. Through the years the boundaries of each distribution area crystallized. In essence, the market for sale of the Journal's papers was divided into distributorships. There is testimony to indicate the territorial division was maintained not by any coercion of the Plaintiffs or Defendants, but by a mutual understanding that it was the most efficient and effective way to conduct business.

In 1973 the Journal decided to attempt to acquire some of these **[**3]** independent distributorships and distribute its newspapers itself. In furtherance of this goal Southern New England News Distributors, Inc. (hereinafter Southern New England) was formed. Southern New England was a wholly owned subsidiary of the Journal.

In March, 1973, a meeting of independent distributors was called by Mr. Koehler, the Journal's circulation director. Mr. Koehler and the independent distributors met at a country club for breakfast. The purpose of the meeting was to announce a change in the Journal's policy. From that point on, the Journal would not recognize distributorships sold to anyone other than Southern New England. The Journal would buy the distributorships at "fantastic" prices, starting at a 100% increase over the cost and going "all the way to 800-900% and/or over." In effect, the Journal would not sell its product to any new distributors. When one of the distributors asked if he would be permitted to sell his business to a son or daughter, the Journal spokesman stated that a sale to a member of a distributor's immediate family would be proper.

The apparent rigidity of the Journal's new policy was not always followed. Following the breakfast meeting, **[**4]** some distributorships were sold to persons who were not members of the immediate family of a distributor.

Sometime in late 1979 or early 1980, the Journal decided to step up its plan for in-house distribution of its newspapers. There is evidence that the Journal's decision was based on a number of business reasons including: the ability to control price; the ability to obtain detailed information on subscribers and nonsubscribers; direct access to the carrier or store owner; and the ability to improve market penetration. Further, the Journal had outside management consultants' advice.

On the other hand, there is evidence of a different scenario. Plaintiffs point to evidence which indicates the studies and reports of the Journal succeeded the decision to distribute directly, that the studies and reports were generated thereafter only to provide a basis for arguing the decision to go in-house was founded on sound business reasons and not anti-competitive intent.

In a letter dated August 11, 1980, the Journal informed all distributors that as of September 6, 1980, the Journal would no longer sell its newspapers at wholesale rates to independent distributors. The letter **[*296]** **[**5]** went on to invite the distributors to discuss a price for their distributorship with the Journal. Of the thirty-two independent distributors at the time of the August 11 letter, fourteen sold to the Journal. Plaintiffs are those distributors who did not sell. The Journal also published in its newspapers advertisements notifying home delivery carriers, including those who purchased from Plaintiffs, that they "must" contact the Journal if they wished to continue delivering the Journal's papers.

On September 5, 1980, this Court issued a Temporary Restraining Order, pursuant to *Fed.R.Civ.P. 65(b)*, in effect compelling the Journal to continue to sell to the Plaintiffs. On September 24, 1980, a hearing began on the issue of whether a preliminary injunction should issue. Seven days of testimony followed and the issues were extensively briefed.

PRELIMINARY INJUNCTION

HN1[] The decision to issue a preliminary injunction traditionally rests upon an examination of four factors: 1) the likelihood Plaintiffs will suffer irreparable harm; 2) the balance of this harm with the harm Defendants will suffer if they are enjoined; 3) the probability Plaintiffs will succeed on the merits; and 4) the public's **[**6]** interest in issuing an injunction. See Wright & Miller, Federal Practice & Procedure: Civil § 2948 (1973).

IRREPARABLE HARM

Plaintiffs claim they will suffer irreparable harm if the Journal is permitted to refuse to deal with them in that they will be forced out of business. The Journal argues that even if wrongdoing is ultimately found, money damages, easily determined, with a provision for treble damages in an antitrust action, provide an adequate remedy at law, removing the need for, and indeed requiring the denial of any interlocutory relief.

Distribution of Journal newspapers is the life blood of these Plaintiffs. [1.] The uncontradicted testimony is that the Plaintiffs' businesses will fold without the opportunity to distribute the Journal's papers. Indeed, the evidence is that the Journal required the independent distributors to devote full time to their businesses. Defendants themselves recognized the significance of the Journal's papers to Plaintiffs: distribution of the Journal's papers was a full time job.

[7]** Defendants argue, however, that there is an adequate remedy at law, namely money damages. Defendants point to the sale price of the distributorships as the easily determined measure of damages and argue that three times that amount is clearly an adequate remedy. The argument proves too much.

Theoretically, this argument has an apparent validity. Should Plaintiffs recover upon their theory for violation of the Sherman Act, they would be entitled not only to recover actual damages but three times their actual damage. *15 U.S.C. § 15 (1976)*. There are a number of real impediments to a translation of this theory into fact. Since Defendants intend to assume Plaintiffs' businesses of newspaper distribution, the real result would be that Defendants have purchased Plaintiffs' businesses, at a price determined by the Court. This result would have the effect of converting this action into a kind of private eminent domain proceeding not sanctioned by either constitutional or statutory authority.

There is also an effect upon others who are not parties to this action. At the present time Plaintiffs supply those large numbers of newspaper carriers and stores who sell Defendants' goods **[**8]** directly to the consumer. Although there are no written contracts with Plaintiffs, there is a natural reliance by those newspaper carriers and stores who distribute Defendant Journal's newspapers to the ultimate consumer upon the ability of the Plaintiffs to provide them with newspapers for sale. Plaintiffs have **[*297]** acquired or created and maintain a system of distribution involving hundreds of people, including many enterprising and hard working entrepreneurs between the ages of twelve and seventeen. Any disruption of supply would effectively terminate those businesses as effectively as it will terminate Plaintiffs' businesses. Any expectation that those relationships could be successfully resumed, after a hiatus, is not within the realm of reality. Defendants have actively solicited Plaintiffs' carriers to form a direct relationship with Defendants. An attempt to resuscitate these independent distributor-carrier business relationships while Defendant Journal is the sole source of supply would be a hope doomed to fail.

There is a further factor. Although compensation for damages to parties injured by a violation of the Sherman Act may provide a substitute for the interest **[**9]** of those parties, damages cannot restore competition, and, in a sense, damages merely serve to thwart the lofty purpose of the Sherman Act. This is not to say that every alleged violation of the Sherman Act necessarily requires equitable relief, but preserving the existence of competitive forces it is a fact which, in balance, must be given some deference.

[1.] While other papers are distributed by some of these independent distributors, it can be said their contribution to the total is de minimis.

Thus, Defendants fail to recognize the elimination of one's livelihood, the extinguishment of an entrepreneur's spirit and the disruption of existing business relationships cannot be measured by money alone. *Engine Specialties, Inc. v. Bombardier Ltd., 454 F.2d 527 (1st Cir. 1972)*; *Semmes Motors, Inc. v. Ford Motor Co., 429 F.2d 1197, 1205-06 (2d Cir. 1970)*; *Paschall v. Kansas City Star Co., 441 F. Supp. 349, 356-57 (W.D.Mo.1977)*.

COMPARATIVE HARM

The Court must balance the harm to be suffered by Defendants, should an injunction issue, and the harm to be suffered by Plaintiffs should it not issue. We begin with an observation: The Journal has operated with a system of independent distributors for a number of years. An injunction pendente lite would merely maintain the status quo until there is a full hearing on the merits. **[**10]** Thus, when balanced against the potential harm to be suffered by Plaintiffs, Defendants' argument pales. Moreover, there is evidence indicating Defendants would only gradually adopt its desired plan of distribution, that is, the change over would take a number of months to complete. The Court concludes Plaintiffs possess a greater risk of harm.

THE PUBLIC INTEREST

That the public's interest is furthered by the prevention of a violation of the antitrust statutes is beyond dispute. *Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130, 89 S. Ct. 1562, 1580, 23 L. Ed. 2d 129 (1969)*.

PLAINTIFFS' PROBABILITY OF SUCCESS

That the issuance of a prohibitory injunction is a drastic remedy is also beyond dispute. ***HN2***[] Consequently, equity has traditionally required the moving party to demonstrate at a preliminary hearing that it will probably succeed at a trial on the merits. There is astoundingly little authority which discusses precisely the implications of this standard.

The trend in more recent decisions is to adopt the alternative test articulated first in the Second Circuit. See, e.g., *United States v. Bedford Associates, 618 F.2d 904 (2d Cir. 1980)*; *Wainwright Securities,* ***[**11]*** *Inc. v. Wall Street Transcript Corp., 558 F.2d 91 (2d Cir. 1977)*, cert. denied, *434 U.S. 1014, 98 S. Ct. 730, 54 L. Ed. 2d 759 (1978)*. The standard of this line of decisions is as follows: where other factors -- such as the potential for harm to be suffered by plaintiff and the lack of a similar potential harm for defendant -- are strong, the plaintiff need not make as persuasive a showing that he is likely to succeed on the merits. *Productos Carnic, S. A. v. Central American Beefland Seafood Trading Co., 621 F.2d 683, 686 (5th Cir. 1980)*; accord, *Fox Valley Harvestore, Inc. v. A. O. Smith Harvestore Products, Inc., 545 F.2d 1096, 1098 (7th Cir.* ***[*298]*** *1976)*; *Federal Leasing, Inc. v. Underwriters at Lloyd's, 487 F. Supp. 1248, 1261 (D.Md.1980)*; *Hawaii Psychiatric Society District Branch of American Psychiatric Association v. Ariyoshi, 481 F. Supp. 1028, 1036 (D.Hawaii 1979)*.

The First Circuit has indicated approval of a balancing approach to the question of ultimate success on the merits. *National Tank Truck Carriers, Inc. v. Burke, 608 F.2d 819, 823 (1st Cir. 1979)*; *Tuxworth v. Froehlke, 449 F.2d 763, 764 (1st Cir. 1971)*. This Court has squarely addressed the issue: **[**12]**

> ***HN3***[] (if) the balance of hardships tips decidedly toward the plaintiff, it is ordinarily sufficient that the plaintiff has raised questions going to the merits which are so serious, substantial, difficult and doubtful, as to make them fair ground for litigation and thus, for more deliberate investigation.

Silva v. East Providence Housing Authority, 390 F. Supp. 691, 696 (D.R.I.1975) (quoting *Palmigiano v. Travisono, 317 F. Supp. 776, 787-88 (D.R.I.1970)* (Pettine, J.)).

This approach makes eminent good sense in view of the fact that, strictly speaking, requiring Plaintiffs to meet the "probability of success" standard virtually precludes a contrary fact finding upon hearing on the merits. The need to preserve the status quo is obvious if, absent relief, the controversy is likely to become moot pending a hearing on the merits as clearly appears to be the fact in this action. The analysis of the facts and applicable law which follows establishes that Plaintiffs are entitled to the temporary relief which they seek based upon evidence which is believable, acknowledging at the same time the existence of contrary evidence and without at the same time any prejudgment of the facts **[**13]** as they might be ultimately found at a hearing on the merits.

SECTION I CLAIMS

Plaintiffs charge Defendants with various violations of Section One of the Sherman Act which prohibits contracts, combinations and conspiracies in restraint of trade. *15 U.S.C. § 1 (1976)*. Plaintiffs allege the Journal and Southern New England combined to coerce Plaintiffs to maintain Defendant Journal's suggested retail price and that the acquisition of the fourteen independent distributors was in furtherance of this retail price maintenance scheme. Plaintiffs further allege Defendants established an illegal concerted refusal to deal when a decision was made to vertically integrate downstream, i. e., when the Journal decided to enter, develop and ultimately envelop the secondary market of newspaper distribution. If established, these claims would amount to per se violations of the *Sherman Act. United States v. Topco Associates, Inc., 405 U.S. 596, 92 S. Ct. 1126, 31 L. Ed. 2d 515 (1972)*; *Klor's v. Broadway-Hale Stores, Inc., 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959)*.

With respect to the allegation of group boycott or concerted refusal to deal, Defendants first claim the Journal and Southern **[**14]** New England are incapable of the type of concerted activity forbidden by the antitrust laws. Defendants, while acknowledging their refusal to deal with Plaintiffs, assert the decision was a unilateral one involving no combination. Finally, Defendants claim that even if some sort of concerted activity is determined to exist or to have existed, such activity concerned a vertical arrangement and not a horizontal one thereby shielding the agreement from the harshness of per se analysis.

With reference to the retail price maintenance charge, Defendants argue first that they did not attempt to maintain price, but even if there were some incidents of price maintenance in the past, they would not be grounds for enjoining or compelling divestment in an otherwise proper vertical integration.

Southern New England is the distribution arm of the Journal. Southern New England has always been a wholly owned subsidiary of the Journal. Defendants point to these facts and assert their inability to combine in violation of *§ 1*. ***HN4***[] Mere common ownership will not insulate entities from the reach of the *Sherman Act. United **[*299]** States v. Citizens Southern National Bank, 422 U.S. 86, 116, 95 S. **[**15]** Ct. 2099, 2116, 45 L. Ed. 2d 41 (1975)*; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 71 S. Ct. 259, 95 L. Ed. 219 (1951)*; *United States v. Yellow Cab Co., 332 U.S. 218, 227, 67 S. Ct. 1560, 1565, 91 L. Ed. 2010 (1947)*. Further, the existence of a parent subsidiary relationship between the two entities by itself has little antitrust significance. *Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 88 S. Ct. 1981, 20 L. Ed. 2d 982 (1968)*; *Timken Roller Bearing Co. v. United States, 341 U.S. 593, 71 S. Ct. 971, 95 L. Ed. 1199 (1951)*. While it may well be that a corporate division cannot conspire with another division as an employee may not conspire with employer, *Nelson Radio and Supply Co. v. Motorola, Inc., 200 F.2d 911 (5th Cir. 1952)*, cert. denied, *345 U.S. 925, 73 S. Ct. 783, 97 L. Ed. 1356 (1953)*; *Lamarca v. Miami Herald Publishing Co., 395 F. Supp. 324* (S.D.Fla.), aff'd, *524 F.2d 1230 (5th Cir. 1975)*, [2.] separate incorporation is another matter. The very purpose of incorporating a subsidiary is to memorialize a degree of separateness between the two entities. This is done for a number of reasons. For example, the Journal stated it was concerned **[**16]** with the threat of unionization of its distribution employees. The Journal's reasons for separately incorporating Southern New England are besides the point; the point is that at the instant Southern New England was incorporated, it had a separate legal existence. [3.] It is, therefore, quite possible to find that the Journal and Southern New England conspired or combined with one another in contravention of *§ 1*. [4.]

[2.] Defendants point to *Lamara and Millcarek v. Miami Publishing Co., 388 F. Supp. 1002 (S.D.Fla.1975)* in support of their claim that they cannot conspire among one another. Lamarca and Millcarek involved an employee-employer relationship. The case at bar concerns independent contractors. Lamarca and Millcarek, therefore, are inapposite.

[3.] Indeed, there was evidence that at certain times the Journal and Southern New England were at cross purposes.

[4.] *Knutson v. Daily Review, Inc., 383 F. Supp. 1346 (N.D.Cal.1974)*, aff'd in part rev'd in part on other grounds, *548 F.2d 795 (9th Cir. 1976)*, cert. denied, *433 U.S. 910, 97 S. Ct. 2977, 53 L. Ed. 2d 1094 (1977)*, upon which Defendants rely is not to the

[17]** Plaintiffs allege the existence of a combination the purpose of which was the maintenance of a Journal-determined maximum resale price. Plaintiffs claim the Journal combined with Southern New England as well as with the independent distributors themselves in furtherance of this price fixing scheme. For purposes of analysis, it is best to consider this allegation as it applies to separate time periods: before and after the August 11, 1980 termination letter.

DEFENDANTS' CONDUCT BEFORE THE LETTER

Relying on *Albrecht v. Herald Co., 390 U.S. 145, 88 S. Ct. 869, 19 L. Ed. 2d 998 (1968)* and applications of that opinion, Plaintiffs allege a combination between Defendants and between Defendants and the independent distributors to fix price.

Evidence was presented which, if believed by the ultimate finder of fact, would support a conclusion of price fixing. Mr. Proulx, the independent distributor in the Bristol, Rhode Island area testified that Journal's approval of him as franchisee was at least tacitly conditioned on his respect of the Journal's suggested retail price. When Mr. Proulx later raised the price of the papers to his carriers, he claims to have suffered late deliveries **[**18]** from the Journal. Plaintiff Brooks stated when she informed Mr. O'Neil of the Journal that due to increased costs of distribution she needed to raise her price for the papers, she was told she could not. Other Plaintiffs testified to similar occurrences.

The effect of such activity on the part of the Journal could only be coercive. Plaintiffs were organized and what was suffered by one distributor could be expected to be communicated to all distributors. The direct **[*300]** and natural result of such activity was communication to the independent distributors that if they did not comply with the Journal's wishes, disastrous repercussions would ensue. *Newberry v. Washington Post Co., 438 F. Supp. 470, 480-82 (D.D.C.1977)*.

With the communication of this policy, cooperation followed. With few exceptions, the price suggested by the Journal was the price charged by the independent distributors and the home delivery carriers. Consequently, under this theory a combination in violation of *§ 1* can be established: When the distributors acquiesced to the wishes of the Journal, the combination was formed. *Albrecht, 390 U.S. at 150 n.6, 88 S. Ct. at 872 n.6*. [5]

[19]** In addition to the Plaintiffs themselves, it is quite possible to find that Southern New England combined with the Journal to coerce Plaintiffs with maintaining the Journal's price schedule. In 1973 Southern New England was formed. Its avowed purpose was to acquire distributorships from those who wished to sell. Undoubtedly an effect of its formation was to place Plaintiffs on notice that the Journal was quite capable of distributing its papers should any of the Plaintiffs fall in disfavor.

DEFENDANTS' CONDUCT AFTER THE AUGUST 11, 1980, LETTER

Demonstrating a post termination price fix seems a more difficult task for Plaintiffs. For the same reasons, it appears less likely that Plaintiffs will be able to demonstrate Defendants' conduct was a per se violation of *§ 1* in the form of a concerted refusal to deal by Southern New England and the Journal.

First, the arrangement between Defendants is to be distinguished from the ordinary *§ 1* combination. Defendants represent a vertically integrated whole. As such, the decision not to sell to Plaintiffs but instead to sell only to Southern New England is best analyzed as an exclusive dealership rather than a group boycott. *Oreck **[**20]***

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contrary. There the court found two newspapers to be mere extensions of a sole owner. That court further held there had been no proof of monopoly power, nor of coercive or predatory practices.

[5] Defendants' reliance on *Naify v. McClatchy Newspapers, 599 F.2d 335 (9th Cir. 1979)* and *Newberry v. Washington Post Co., 438 F. Supp. 470 (D.D.C.1977)* is misapplied. In Naify there was no evidence of any attempt to maintain retail prices. Similarly in Newberry, with the exception of one instance, there was no evidence of coercion. Thus a combination could not be found.

Corp. v. Whirlpool Corp., 579 F.2d 126 (2d Cir.) (en banc), cert. denied, *439 U.S. 946, 99 S. Ct. 340, 58 L. Ed. 2d 338 (1978)*; See Case Note, Vertical Agreement to Terminate Competing Distributors, 92 Harv.L.Rev. 1160 (1979).

The distinction is significant for while both arrangements may be anti-competitive, group boycotts are subjected to the rigors of per se analysis while exclusive dealerships are to be reviewed according to the more forgiving standards of the *Rule of Reason. Packard Motor Car Co. v. Webster Motor Car Co., 100 U.S. App. D.C. 161, 243 F.2d 418, 420* (D.C.Cir.), cert. denied, *355 U.S. 822, 78 S. Ct. 29, 2 L. Ed. 2d 38 (1957)*.

The reasons for the distinction is clear. Group boycotts involve horizontal agreements. For the vast majority of situations they further no competitive activity while at the same time stifling competitive forces of the market place. On the other hand exclusive dealerships and vertical arrangements in general, often are competitive in effect. Further, such competitive effects often offset any anti-competitive effects. See, e.g., *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)* (exclusive **[**21]** territory arrangement whose competitive effect was the promotion of inter-brand competition and whose anti-competitive effect was the stifling of intra-brand competition was found reasonable). Thus, vertical arrangements justify the use of the Rule of Reason.

The Rule of Reason means that in determining whether there is an antitrust violation, a balancing must be performed: pro-competitive effects must be compared with anti-competitive effects. *National Society of Professional Engineers v. United States, 435 U.S. 679, 98 S. Ct. 1355, 55 L. Ed. 2d 637 (1978)*. Plaintiffs argue, and **[*301]** the evidence indicates, that vertical integration will necessarily be the undoing of their businesses. The antitrust laws, however, protect competition, not competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701 (1977)*; *Brown Shoe Co., Inc. v. United States, 370 U.S. 294, 320, 82 S. Ct. 1502, 1521, 8 L. Ed. 2d 510 (1962)*. Therefore, if the elimination of competitors from the market place is to have an anti-competitive effect their presence must be shown to have a pro-competitive effect. Plaintiffs concede they do not compete among **[**22]** themselves. Thus for the most part there is no competition in the secondary newspaper distribution market. Nonetheless, an anti-competitive effect might be caused by the elimination of Plaintiffs from this secondary market, for while out-of-state and other Rhode Island newspapers circulate throughout the State to only a minute degree, they possibly act as a competitive force since they are at least potential competitors. See *United States v. Falstaff Brewing Corp., 410 U.S. 526, 93 S. Ct. 1096, 35 L. Ed. 2d 475 (1973)*. Thus other newspapers could be said to be "waiting in the wings" thereby acting as a competitive check on the Journal. For example, if the Journal were to raise its price per copy or for advertising, these other papers might enter or expand their service of the market. The newspaper business, however, is a two-tier one: both publication and distribution of the product is required. Absent an independent distribution system, potential competitors would necessarily have to enter both markets simultaneously. Thus, an anti-competitive effect of the elimination from the market of Plaintiffs would be the entrenchment of Defendants and the raising of barriers to entry **[**23]** facing potential competitors of Defendants. See, Note, Refusals to Deal by Vertically Integrated Monopolists, 87 Harv.L.Rev. 1720, 1725-32 (1974); cf. *Hardin v. Houston Chronicle Pub. Co., 434 F. Supp. 54 (S.D.Tex.1977)*, aff'd, *572 F.2d 1106 (5th Cir. 1978)* (no showing of monopoly power, coercion or anti-competitive effect).

Defendants on the other hand assert certain sound business reasons for their decision. One of Defendants' experts testified that newspapers derive the greatest proportion of their revenue from advertising. Advertising rates in turn are determined by circulation: the paper with the greater circulation will be able to command the better price for ads run in its paper. Various Journal witnesses testified that the goal of Defendants-to maximize circulation-was often at odds with Plaintiffs' objective to maximize profit on the sale of papers. Defendants argue that there are potential subscribers in rural parts of the market whom Plaintiffs are unwilling to service because the cost of delivering to these outlanders is too dear. Plaintiffs agree. Defendants further argue it would service these potential purchasers and that the marginal cost of such service would **[**24]** be justified by an increase in ad revenues due to the increase in circulation base. Plaintiffs agree. Plaintiffs, however, do not agree with Defendants' resolution of the tension caused by the apparent cross purposes of the parties. Defendants advocate, of course, vertical integration of the distribution system. Plaintiffs on the other hand believe an increase in their delivery cost allowance would be more appropriate. [6] Defendants' proposed solution yields the elimination of the independent distributors from the market place. Plaintiffs' does not.

Defendants also point to their new customers service system. This system will allow subscribers of the Journal to call the Defendants directly with any question concerning its newspapers, while at the same time allowing the Journal to keep more accurate data on its subscribers. While centralization may have its advantages, this system would mean a subscriber would **[**25]** call not the local distributor possibly located in the same town, but rather to a centralized, perhaps distant point. Further, the evidence did not indicate that the independent distributors could not be incorporated into this new program.

[*302] In sum, it appears Plaintiff might well prove, under Rule of Reason analysis, Defendants violated *§ 1* when they decided to vertically integrate.

SECTION 2

Plaintiffs allege Defendants monopolized the newspaper business and attempted to monopolize the newspaper delivery business in Rhode Island and by doing so violated *§ 2* of the Sherman Act. Monopoly does not occur in a vacuum. The first step, therefore, is a definition of the relevant product and geographic markets.

PRODUCT MARKET

Plaintiffs assert Defendants produce a number of unique products: the only Sunday morning paper published in and distributed throughout the State, the only Rhode Island weekday and Saturday morning papers published in and distributed throughout the State, and the only Rhode Island evening weekday paper published in and distributed throughout the State. Only the evening weekday (Monday to Friday) paper is subject to direct competition from other **[**26]** locally published newspapers. In sum, Plaintiffs claim Defendants have a monopoly for the product market comprised of general circulation newspapers in the State.

Defendants view the situation from a somewhat different perspective. The thrust of their argument is that newspapers are best understood as a vehicle for advertisement rather than a commodity for sale. Defendants argue the Journal's products are by no means unique for they must compete with all other media for ad revenues. Defendants argue the other media must be considered in defining the product market.

When one gets down to brass tacks, or any other specific product, almost all products have substitutes: even buses, skywriters and road signs compete with newspapers for advertising. ***HN5***[] ***Antitrust law***, however, is only concerned with products reasonably interchangeable with one another, in other words, products for which there is some cross elasticity of demand. *Brown Shoe Co., Inc. v. United States, 370 U.S. 294, 82 S. Ct. 1502, 8 L. Ed. 2d 510 (1962)*. So while buses, skywriters, road signs and newspapers may be in the same broad product market, it may well be that ***antitrust law*** is concerned only with the more narrow **[**27]** submarket of newspapers.

> The boundaries of such submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.

Id. at 325, 82 S. Ct. at 1523.

HN6[] Traditionally, newspapers have been considered separate from other media. *Times Picayune Publishing Co. v. United States, 345 U.S. 594, 73 S. Ct. 872, 97 L. Ed. 1277 (1953)*; *Lorain Journal Co. v. United States, 342 U.S. 143, 72 S. Ct. 181, 96 L. Ed. 162 (1951)*. Plaintiffs argue the relevant product submarket may be further narrowed to include only newspapers of general circulation. This may be so. Evidence presented and testimony given indicates other Rhode Island newspapers are more parochial in nature, i. e., they are oriented more toward reporting local events.

[6] Defendants underwrite part of the cost of delivery for distributors whose area is rural.

The proper product submarket might be limited to newspapers of general circulation published in Rhode Island, i. e., the Journal's newspapers alone. As one of Plaintiffs' experts testified, the Journal's newspapers **[**28]** were "unique" in the extent of coverage of Providence news, state news and other features.

GEOGRAPHIC MARKET

The relevant geographic market is that area to which Plaintiffs can practically turn for the product. *Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 327, 81 S. Ct. 623, 627, 5 L. Ed. 2d 580 (1961)*. Plaintiffs state the relevant geographic market to be Rhode Island. Considering the necessity for prompt delivery of newspapers and the need to provide information concerning **[*303]** local events it would not seem practicable for distributors to look to Boston or New York for their product. The evidence was that the geographic market is the State of Rhode Island.

MONOPOLY POWER IN THE RELEVANT MARKETS

Evidence was presented indicating there was a relatively low level of cross elasticity between the retail price of the Journal newspapers and the demand for suburban dailies. [7.] In other words, as the price of the Journal's newspapers increased, demand for other suburban dailies did not increase but remained relatively the same.

[29]** An additional inference of monopoly power can be made from an overwhelming market share. *United States v. Grinnell Corp., 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1703-04, 16 L. Ed. 2d 778 (1966)*. The Journal's market share is remarkably impressive. If the product market is limited to newspapers of general circulation, i. e., the Journal's newspapers and out-of-town dailies, the Journal's share might be approximately ninety percent. Including all Rhode Island dailies, the percentage is not less than sixty-five percent.

Defendants data again speak from a different perspective. Its figures concern "household penetration," i. e., the percentage of Rhode Island households which receive its newspapers. The range is from a low of twenty percent for The Providence Journal to a high of sixty-two percent for The Providence Sunday Journal. While these figures are less than those usually held to establish monopoly power, *United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945)*, Plaintiffs observe that these figures measure not Defendants' share of the newspaper-buying public but include the entire public at large. ***HN7***[] Market share should not be measured by absolute population figures, **[**30]** but should reflect the number of those who demonstrate an actual or potential interest in the market in which the competition is measured.

The Court concludes Plaintiffs have shown evidence of the probable existence of monopoly power.

MONOPOLIZATION

HN8[] Monopolization in contravention of *§ 2* occurs whenever one with monopoly power commits an unreasonable restraint of trade in violation of *§ 1*. *United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 342 (D.Mass.1953)*, aff'd, *347 U.S. 521, 74 S. Ct. 699, 98 L. Ed. 910 (1954)*. As stated earlier, there is credible evidence indicating Defendants violated *§ 1* under both per se and Rule of Reason analysis.

In United Shoe Judge Wyzanski also discussed another analysis by which a *§ 2* violation could be found: monopoly power plus exclusionary practices. *Id. at 342*. Such exclusionary practices would be evidence of willful maintenance of monopoly power. Such exclusionary practices need not rise to the level of a *§ 1* violation. Therefore, even if Defendants' vertical integration were found not to be violative of *§ 1*, it might nonetheless support a *§ 2* claim inasmuch as it would raise barriers to entry to some extent in the product **[**31]** market. See discussion at 300-301, supra. *United States v. Griffith, 334 U.S. 100, 107, 68 S. Ct. 941, 945, 92 L. Ed. 1236 (1948)*; see also *FTC v. Procter & Gamble Co., 386 U.S. 568, 578, 87 S. Ct. 1224, 1230, 18 L. Ed. 2d 303 (1966)*; *Byars v. Bluff City News Co., Inc., 609 F.2d 843, 859-64 (6th Cir. 1980)*.

ATTEMPT TO MONOPOLIZE

[7.] No testimony was offered concerning the cross elasticity between the Journal's newspapers and the out-of-state dailies.

Plaintiffs further allege Defendants are attempting to monopolize the secondary distribution market. This too would be a violation of *§ 2*. The standard employed in these cases is whether there is a specific intent to monopolize as well as a dangerous probability of success. *Lorain Journal Co. v. United States, 342 U.S. 143, 154-55,* ***[*304]*** *72 S. Ct. 181, 186-87, 96 L. Ed. 162 (1951)*; *Union Leader Corp. v. Newspapers of New England, Inc., 180 F. Supp. 125, 140* (D.Mass.) aff'd in part, rev'd in part, *284 F.2d 582 (1st Cir. 1960)*, cert. denied, *365 U.S. 833, 81 S. Ct. 747, 5 L. Ed. 2d 744 (1961)*. ***HN9***[] Specific intent to monopolize however, can be inferred when the natural outcome of Defendants' actions is the elimination of competition. *Lorain Journal 342 U.S. at 154, 72 S. Ct. at 186*; *United States v. Griffith, 334 U.S. 100, 105, 68 S. Ct. 941, 944, 92* ***[**32]*** *L. Ed. 1236 (1948)*. It appears the natural result of Defendants' vertical integration would be the elimination of potential competition of distributors inter se. [8.] Further, such an integration would eliminate potential competition between Southern New England and the independents.

Without a doubt, if the integration is completed, Defendants will possess a monopoly in the field of newspaper distribution. Thus it appears Plaintiffs might well demonstrate an attempt to monopolize the secondary market. Plaintiffs allegation of attempted monopolization is further bolstered. The case at bar involves two vertically related markets: the publication and distribution of newspapers in Rhode Island. Plaintiffs allege Defendant Journal is using its position of dominance **[**33]** in the primary market to achieve dominance in the secondary market. A leading case in this area of ***antitrust law*** involving two vertically related markets is *Otter Tail Power Co. v. United States, 410 U.S. 366, 93 S. Ct. 1022, 35 L. Ed. 2d 359 (1973)*. In that case defendant was an electrical utility company and a monopolist with respect to power transmission. After a number of years of supplying power at the retail level, Otter Tail was informed by a number of municipalities that it would be needed only for wholesale purposes and that the municipalities would serve as retailers. Otter Tail refused to sell to the municipalities. [9.] The Court found Otter Tail attempted to monopolize the secondary market when it refused to deal with the municipalities. The facts of Otter Tail could be found to be similar with those of in this action. Thus it appears Plaintiffs might well demonstrate a *§ 2* violation by Defendants' attempt to monopolize.

[34]** STATE LAW CLAIMS

1. Antitrust Allegations.

HN10[] Rhode Island law incorporates interpretations of the federal antitrust statutes. *R.I.Gen.Laws § 6-36-2(c)* (Supp.1980). Consequently, the potential for proof of a violation of Rhode Island law is the same as that for a violation of *§§ 1* and *2* of the Sherman Act *15 U.S.C. §§ 1*, *2*. No further discussion is necessary.

2. Tortious Interference with Business Relations.

Plaintiffs also seek to prevent Defendants from using Plaintiffs' customer lists. ***HN11***[] That customer lists are a property right to be protected from misappropriation is beyond dispute. *Colonial Laundries, Inc. v. Henry, 48 R.I. 332, 138 A. 47 (1927)*. The rationale behind such protection is the likelihood that absent interference, "route customers will continue to patronize the same supplier ...." *Go-Van Consolidators, Inc. v. Piggy Back Shippers, 111 R.I. 697, 699, 306 A.2d 164, 165 (1973)*. Not all customer lists, therefore, are to be protected but only those of a confidential nature, i. e., those which are comprised of customers

> whose trade and patronage have been secured by years of business effort and advertising, and the expenditure of time and money, constituting a **[**35]** part of the good-will of a business which enterprise and foresight have built up ....

[8.] The testimony indicates there is practically no competition among distributors. For obvious reasons maintenance of such a condition was never an express condition of either the relationships among distributors or between distributors and the Journal.

[9.] Otter Tail also refused to "wheel" power to Plaintiffs, that is, it refused to transmit to Plaintiffs power generated by others, and engaged in harassing litigation.

Callahan v. R. I. Oil Co., 103 R.I. 656, 660, 240 A.2d 411, 413 (1968), (quoting *Town & Country House & Home Service, Inc. v.* ***[*305]*** *Newbery, 3 N.Y.2d 554, 558, 147 N.E.2d 724, 726, 170 N.Y.S.2d 328, 331 (1958))*.

The credible testimony reveals that Plaintiffs' customer lists could be found to be protected lists. Over the years distributors nurtured and cultivated their customers whose names comprised the lists. Further, when distributorships were sold, the customer lists were a significant element of the purchases. Indeed, Defendants' contract to purchase distributorships from willing parties evidence a recognition of the Seller's proprietary interest in its list.

CONCLUSION

Plaintiffs have demonstrated adequate grounds for the issuance of a Preliminary Injunction. They have established that they will suffer irreparable harm if Defendants are not enjoined, the balance of harm tips in direction of the Plaintiffs, they have established a public interest which requires preliminary relief, and they have produced credible evidence which upon hearing of the merits, if accepted, will **[**36]** result in their ultimate success. If relief were not now granted, Plaintiffs claim to remain in business would be essentially moot. These circumstances warrant a preliminary injunction. Whether or not Plaintiffs will prevail is to be determined after a full opportunity for discovery and a full exposition of the facts. Accordingly, Defendants are enjoined from refusing to deal with Plaintiffs and from using Plaintiffs' customer list pending a hearing on the merits of this action.

Plaintiffs shall prepare and present a form of Order in accord with this Opinion.

SO ORDERED.

Baldini v. New England Greyhound Asso.

United States District Court for the District of Massachusetts

December 5, 1980

CIVIL ACTION No. 77-1218-Z

Reporter

1980 U.S. Dist. LEXIS 15408 *; 91 Lab. Cas. (CCH) P12,718

DOMENIC A. BALDINI, GABRIEL J. CONTILLO and ALFRED CAIRONE, INDIVIDUALLY, AND ALSO d/b/a BAL-CON KENNELS vs. NEW ENGLAND GREYHOUND ASSOCIATION, INC. and MASSASOIT GREYHOUND ASSOCIATION, INC.

Core Terms

kennel, labor organization, dogs, independent contractor, group boycott, defendants', antitrust, employees, plaintiffs'

Counsel: **[*1]** JAMES T. GRADY, Grady & McDonald, 75 Federal St., Boston, 02110, for plaintiffs.

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Massasoit Greyhound Ass., Inc., Robert D. Kozol, Esq., FRIEDMAN & ATHERTON, 28 State Street, Boston, 02108

N.E. GREYHOUND ASSOC, Anthony J. Turco, 460 Totten Pond Rd, Waltham, Mass. 02154

George F. Gormley co-counsel, Ten Post Office Sq., Boston, Mass. 02109, for defendants.

Opinion by: ZOBEL

Opinion

MEMORANDUM OF DECISION

ZOBEL, D.J.

This is an action by three individuals, doing business under the name BAL-CON Kennels, who bred and raced greyhound dogs for profit and who are suing the New England Greyhound Association ("NEGA") and the Massasoit Greyhound Association ("Massasoit") for damages they claim to have suffered as a result of defendants' allegedly causing their dogs to be "scratched" or withdrawn from a race at Raynham Park in 1977. The action is before me on defendants' motion for summary judgment on Counts I and II of plaintiffs' complaint. Defendants have also moved for dismissal of Counts III and IV, which arise under state law, on the ground that a judgment for defendants on the two federal Counts, I and II, **[*2]** would deprive the court of pendent jurisdiction over the state claims.

I. The Duty of Fair Representation Claim

In Count I, plaintiffs allege that defendant NEGA, acting as a labor organization under Federal law, breached its duty of fair representation to the plaintiffs who were members of NEGA and who sought to obtain bookings for their greyhounds through NEGA. Defendants respond that they are not a labor organization within the meaning of *29 U.S.C. § 152* because there is no employment relationship between NEGA members and the race tracks such as Raynham with whom NEGA dealt.

The definition of a labor organization under Federal law is inclusive:

The term "labor organization" means any organization of any kind, or any agency or employee representation committee or place in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work. *29 U.S.C. § 152(5)*

While it is essentially undisputed that NEGA did negotiate on behalf of its member kennel owners with racetrack owners for agreements as to terms and conditions under **[*3]** which dogs would be raced, none of the affidavits supports a conclusion that the relationship was one of employee and employer, a necessary component of *§ 152*. The term "employee", as defined by *29 U.S.C. § 152* specifically excludes from coverage under the Act "… any individual having the status of an independent contractor." The allegations and affidavits submitted in this case, even when considered most favorably to plaintiffs, show clearly that kennel owners such as BAL-CON Kennels operated as classic independent contractors. An agreement among independent contractors to form a trade association to negotiate on their behalf does not turn such independent contractors into employees. *SIDA of Hawaii, Inc. v. N.L.R.B., 512 F.2d 354 (9th Cir. 1975)*. The courts have developed several tests to determine whether an employment relationship exists in a given situation. The most common one uses ordinary rules of agency to determine the party who has the right to control the manner and means by which the result is to be accomplished. *Local 777 Democratic V. Org. Com. v. N.L.R.B., 603 F.2d 862 (D.C.Cir. 1978)*. Other criteria include whether the alleged employee is "allowed the initiative **[*4]** and decisionmaking authority normally associated with an independent contractor", *N.L.R.B. v. United Ins. Co. of Am., 390 U.S. 254, 258, 88 S.Ct. 998, 991 (1968)*, whether putative employees make substantial personal investments in their activities, control their daily operations, are free to work when and where they wish, and have a contract which specifically provides that the relationship created is one of independent contractor, *SIDA of Hawaii, Inc. v. N.L.R.B., 512 F.2d 354, 357-58 (9th Cir. 1975)*. Courts have also emphasized that "the entrepreneurial characteristics of the owner-operators tip decidedly in favor of independent contractor status" noting that those aspects of entrepreneurial business include doing business as a corporation or partnership, hiring and firing one's own employees, working by specific jobs with no guarantee of payment and without being on the putative employer's payroll, and shouldering all of the risk of loss of the operation. *Merchants Home Delivery Serv. Inc. v. N.L.R.B., 580 F.2d 966, 974-975 (9th Cir. 1978)*.

When these criteria are applied to this case, even when all doubts are resolved in favor of the plaintiff, the conclusion that plaintiff **[*5]** kennel owners are not employees is inescapable. The kennel owners operated as a partnership, were independent entrepreneurs who bore all the risks and responsibilities of their own business, and received payment only if their dogs finished among the top four in any race. Moreover, they were wholly responsible for providing their own equipment and staffing and for overseeing the manner of daily operations of their business. Plaintiffs' reliance on the purpose and activities of NEGA is misplaced. While it is necessary that a labor organization act on behalf of its members, such activity is not sufficient to metamorphose a trade association into a labor organization without the precondition of an employment relationship between the parties. [*]

[*6] Because plaintiffs were not employees of Massasoit and NEGA was not a labor organization within the meaning of *29 U.S.C. § 152(5)*,s defendants' motion for summary judgment on Count I is allowed.

II. The Anti-Trust Claim

In Count II brought under *15 U.S.C. §§ 1*, *2*, *15*, plaintiffs allege that defendant NEGA threatened to boycott Massasoit's April 11, 1977 race at Raynham Park unless plaintiff's dogs were eliminated from the race, and that in response to these threats Massasoit demanded that plaintiffs remove their dogs from the competition, which

[*] It is true, as plaintiffs point out, that courts have found labor organizations to exist despite the inclusion of employees in categories explicitly excluded by *Section 152*, such as railway workers and supervisors, but in each of those cases the essential employment relationship between the parties was undisputed; the question instead revolved around the legislative policy excluding certain categories of employees from union membership in general. *District 2 MEBA v. Amoco Oil Co., 554 F.2d 774 (6th Cir. 1977)*; *Marriott In-Flight Services v. Transport Workers., 557 F.2d 295 (2d Cir. 1977)*.

plaintiffs did. Defendants have moved for summary judgment, claiming that plaintiffs can have suffered no "antitrust injury" because defendants' alleged actions did not affect prices, did not affect the dog-racing or sports markets in general, did not eliminate plaintiffs from competition at other racetracks, and did not represent any attempt to monopolize the dog racing business or to take concerted action to injure the plaintiffs. I find that plaintiffs have stated a claim under *15 U.S.C. §§ 1*, *2*, and *15* for antitrust injury. The arguments raised by defendants are either irrelevant to the gravamen of plaintiffs' complaint or **[*7]** raise questions which must be decided by the trier of fact.

Plaintiffs' essential charge is that a number of kennel owners, acting through NEGA, a trade association, threatened a group boycott of Massasoit if Massasoit continued to do business with plaintiffs. Group boycotts have long been held to be unduly restrictive of free trade and forbidden under *15 U.S.C. § 2*, and "they have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they 'fixed or regulated prices, parcelled out or limited production or brought about a deterioriation in quality.'" *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959)*, citing *Fashion Originators Guild of America v. FTC, 312 U.S. 457, 466 (1941)*. Such group boycotts, moreover, are among the categories of forbidden behavior which constitute per se violations of the Sherman Act so that their anticompetitive effect may be assumed. *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959)*. *George R. Whitten, Jr., Inc. v. Paddock-Pool Bldrs., Inc., 508 F.2d 547, 559 (1st Cir. 1974)*. The factual outline of cases in this category are not dissimilar to the facts as alleged **[*8]** in the complaints and affidavits here. In Fashion Originator's Guild for instance, a group of clothing and fabric designers, acting through a trade organization attempted to boycott manufacturers and retailers who continued to do business with certain other designers designated by the group as "style pirates". *332 U.S. 457, 461 (1941)*. Plaintiffs have alleged essentially similar concerted activity by NEGA.

If plaintiffs can prove that defendants' actions constituted a classic group boycott, defendants' arguments as to the actual effect on prices and on the racing industry in general are beside the point. The antitrust laws are sufficiently broad to outlaw any conspiracy among kennel owners to eliminate an unwanted competitor by directly or indirectly restricting his freedom to operate unhindered in an open competitive market. *Duplex Printing Press Co. v. Deeping, 254 U.S. 443 (1921)*. The success or failure of the attempt, and even whether or not the plan is carried out are irrelevant. *U.S. Trenton Potteries, Inc., 273 U.S. 392 (1927)*.

Defendants further contend that their actions do not constitute a group boycott, conspiracy, or concerted refusal to deal but are at most a **[*9]** type of "garden variety" business tort which should not be elevated by the court to the status of federal antitrust offense, *George R. Whitten, Jr., Inc. v. Paddock-Pool Bldrs., Inc., 508 F.2d 547, 560 (1st Cir. 1974)*, citing *Vogue Instrument Corp. v. Lem Instruments Corp., 40 F.R.D. 497, 499 (S.D.N.Y. 1966)*. In determining whether or not plaintiffs have made out a case for a per se violation, the court may eventually need to assess such considerations as the market share of defendants or the monopolizing tendency of their alleged actions, but such determinations involve questions of fact which must await trial. On the complaint and affidavits in this case so far defendants have not shown as a matter of law that no concerted group boycott of plaintiffs occurred. Summary judgment for defendants is accordingly denied on Count II. Because plaintiffs have stated a claim under Federal ***antitrust law***, and because plaintiffs' state law claims arise out of the same set of facts and occurrences, this court will retain pendent jurisdiction over the state law claims. *United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966)*.

[Barry Wright Corp. v. ITT Grinnell Corp.](#)

United States District Court for the District of Massachusetts

February 26, 1981

CIVIL ACTION No. 78-485-S

Reporter
1981 U.S. Dist. LEXIS 9432 *; 1980-81 Trade Cas. (CCH) P63,862

BARRY WRIGHT CORPORATION, Plaintiff, v. ITT GRINNELL CORPORATION and PACIFIC SCIENTIFIC CORPORATION, Defendants.

Core Terms

snubbers, mechanical, pipe, monopolize, contracts, discounts, prices, manufacturer, hanger, summary judgment motion, Clayton Act, antitrust, exhibits, summary judgment, authenticated, competitors, memorandum, selling, patent, conspiracy, terminated, customers, predatory, Robinson-Patman Act, Sherman Act, foreclose, asserts, phase, anti trust law, monopoly power

LexisNexis® Headnotes

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

Evidence > Authentication > General Overview

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

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

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

HN1[] **Summary Judgment, Opposing Materials**

Fed. R. Civ. P. 56(e) requires that a party opposing summary judgment set forth facts which would be admissible in evidence indicating that there is a genuine issue for trial. Exhibits which have not been properly authenticated cannot be used.

Evidence > Authentication > General Overview

HN2[] **Evidence, Authentication**

Fed. R. Evid. 901(b)(4) provides that appearance, contents, substance, internal patterns or other distinctive characteristics, taken in conjunction with circumstances may satisfy the requirement of authentication.

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

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

Civil Procedure > Judgments > Summary Judgment > Partial Summary Judgment

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

HN3[] **Entitlement as Matter of Law, Appropriateness**

In determining whether summary judgment is appropriate, the court must examine the record in the light most favorable to the party opposing the motion.

Antitrust & Trade Law > Clayton Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

HN4[] **Clayton Act, Claims**

Section 4 of the Clayton Act, *15 U.S.C.S. § 15*, provides that any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor. In determining whether a particular plaintiff has standing, the First Circuit has adopted the "target area" test. The target area test provides that in order to state a cause of action under the antitrust laws a plaintiff must show that he is within the area of the economy which is endangered by a breakdown of competitive conditions in a particular industry.

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

HN5[] **Private Actions, Remedies**

Antitrust injury is injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful.

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Output & Requirements Contracts

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview

HN6[] **Types of Contracts, Output & Requirements Contracts**

It is not necessary that explicit terms of a contract indicate an exclusive dealing arrangement; such an arrangement may be inferred from all the circumstances.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Exclusive & Reciprocal Dealing > Requirements Contracts

Business & Corporate Compliance > ... > Types of Commercial Transactions > Sales of Goods > Output, Exclusive & Requirements Agreements

Business & Corporate Compliance > ... > Contracts Law > Types of Contracts > Output & Requirements Contracts

HN7[] **Exclusive & Reciprocal Dealing, Requirements Contracts**

The adverse competitive effect of a requirements contract occurs only if it forecloses a substantial part of a market to competitors.

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > Clayton Act > General Overview

HN8[] **Clayton Act, Defenses**

Under *section 2(f)* of the Clayton Act, a buyer cannot be liable if a prima facie case could not be established against a seller or if the seller has an affirmative defense.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > Clayton Act > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

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

HN9[] **Robinson-Patman Act, Claims**

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

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

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

HN10[] **Robinson-Patman Act, Claims**

It is only by equating price discrimination with price differentiation that *§ 2(a)* of the Robinson-Patman act can be administered as Congress intended. The act of selling an identical product at a different price to different purchasers is discrimination within the meaning of *§ 2(a)* of the Robinson-Patman Act.

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

HN11[] Price Discrimination, Competitive Injuries

There is an obvious competitive injury where discrimination has been employed with the hope of immediate destruction of a particular competitor.

Antitrust & Trade Law > Robinson-Patman Act > Claims

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

Antitrust & Trade Law > ... > Price Discrimination > Competitive Injuries > General Overview

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

HN12[] Robinson-Patman Act, Claims

Courts, in seeking to determine whether price discriminations might injure competition, rely heavily on the existence of predatory intent. A price reduction below cost tends to establish a predatory intent.

Antitrust & Trade Law > Robinson-Patman Act > Defenses

Antitrust & Trade Law > Clayton Act > Defenses

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

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

Antitrust & Trade Law > Robinson-Patman Act > Claims

HN13[] Robinson-Patman Act, Defenses

Section 2(a) of the Robinson-Patman Act, 15 U.S.C.S. § 13(a) states that nothing herein contained shall prevent differentials which make only due allowance for differences on the cost of manufacture, sale, or delivery resulting from the differing methods or qualities in which such commodities are to such purchasers sold or delivered.

Antitrust & Trade Law > ... > Price Discrimination > Defenses > General Overview

HN14[] Price Discrimination, Defenses

The burden of proving a cost justification for discriminatory pricing is on the defendant. The cost data used to justify discriminatory pricing must be specific enough to establish that different treatment of customers was warranted.

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

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

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

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

HN15[] Conspiracy to Monopolize, Sherman Act

Section 2 of the Sherman Act provides in part that every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce shall be deemed guilty of a felony.

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

HN16[] Monopolies & Monopolization, Actual Monopolization

The offense of monopolization requires two elements: (1) the possession of monopoly power by the defendant in the relevant market, and (2) the willful acquisition or maintenance of monopoly power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

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

HN17[] Monopolies & Monopolization, Actual Monopolization

Exclusionary conduct, that is, conduct designed to foreclose competition, is a form of willful acquisition or maintenance of monopoly power.

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

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

Criminal Law & Procedure > ... > Inchoate Crimes > Attempt > General Overview

Criminal Law & Procedure > ... > Acts & Mental States > Mens Rea > Specific Intent

HN18[] Monopolies & Monopolization, Attempts to Monopolize

The elements of the offense of attempted monopolization are: (1) a specific intent to monopolize; (2) overt acts in furtherance of the attempt and (3) a dangerous probability of success in achieving monopoly power.

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

HN19[] Monopolies & Monopolization, Conspiracy to Monopolize

A conspiracy to monopolize is established by proof of a concerted action which is deliberately entered into with the specific intent to accomplish the unlawful result of achieving a monopoly.

Counsel: [*1] Donald B. Gould, Esq. (Lorraine), Goodwin, Procter & Hoar, 28 State Street, Boston, 02109, for plaintiffs.

PACIFIC SCIENTIFIC CORPORATION, John A. Nadas, Esq., Choate, Hall & Stewart, 28 State Street, Boston, 02109

PACIFIC SCIENTIFIC CORPORATION, Joseph J. O'Malley, Paul, Hastings, Janofsky & Walker, 555 S. Flower Street, 22nd Floor, Los Angeles, CA 90017

ITT GRINNELL, Bingham, Dara, & Gould, John Curtin, 100 Federal St, Boston, for defendants.

Opinion by: SKINNER

Opinion

MEMORANDUM AND ORDER

SKINNER, D.J.

This action is brought pursuant to *15 U.S.C. § 15* to recover damages for alleged violations of the antitrust laws. Plaintiff claims that defendants have violated *Sections 1* and *2* of the Sherman Act (*15 U.S.C. §§ 1* and *2*), *Sections 2(a)* and *2(f)* of the Clayton Act, as amended, by the Robinson-Patman Act (*15 U.S.C. §§ 13(a)* and *13(f)*) and Section 3 of the Clayton Act (*15 U.S.C. § 14*).

Plaintiff also alleges an action in contract against one defendant, ITT Grinnell Corp. (ITT), and in tort against both defendants. In addition, plaintiff asserts violations of *Mass. Gen. Laws c.93A §§ 2* and *11* which prohibit unfair competition. This court's jurisdiction over **[*2]** the contract, tort, and Chapter 93A claims is pendent to its jurisdiction over the antitrust claims.

Defendants, ITT and Pacific Scientific Corp. (Pacific), have filed a motion for partial summary judgment as to the antitrust claims in counts 1, 2, 3, 4, 5 and 6. In opposition to this motion, the plaintiff, Barry Wright Corp. (Barry) has submitted 251 documents. Pacific seeks to strike several of these documents.

I. MOTION TO STRIKE

HN1[] *Fed.R.Civ.P. 56(e)* requires that a party opposing summary judgment set forth facts which "would be admissible in evidence" indicating that there is a genuine issue for trial. *Hahn v. Sargent, 523 F.2d 461, 466 (1st Cir. 1975)*, cert. denied, *425 U.S. 904*. Exhibits which have not been properly authenticated cannot be used. *Hamilton v. Keystone Tankship Corp., 539 F.2d 684, 686 (9th Cir. 1976)*; 10 Wright and Miller, Federal Practice and Procedure, § 2722 at pp. 486-87 (1973).

Pacific claims that 25 of the exhibits relied upon in Barry's brief have not been properly authenticated. In particular, Pacific argues that exhibits 18, 34, 35, 44, 52, 87, 108, 118, 135, 137, 141, 187, 188 and 208 have not been identified by anyone during deposition **[*3]** testimony. Pacific also contends that exhibits 43, 63, 66, 88, 115, 116, 125, 142, 146 and 187 have been significantly impeached by various deponents. Finally, Pacific asserts that a document numbered 23301 which is referred to in Appendix B of Barry's brief in opposition to defendant's motion for summary judgment has not been filed with this court.

The impeachment of exhibits 43, 63, 66, 88, 115, 116, 125, 142, 146 and 187 by deponents does not render these documents inadmissible. The deponents' testimony would affect only the weight to be accorded these exhibits by fact-finders at a trial. Exhibits 18, 52, 87, 118, 137 and 141 have been identified by deponents and should not be stricken.

In regard to exhibit 188, a document containing nine columns of hand-written figures, a deponent has testified that the first eight columns of numbers were in his handwriting. Consequently, only the 9th column, titled "Discount %" should be stricken.

Exhibit 34 is a memorandum from Mr. Feingold, an employee of ITT, to Mr. Sherbourne, another employee of ITT. The memorandum is stamped "General Manager's Office - Feb. 10 [sic] 1975 - Pipe Hanger Division". The last page of the memorandum **[*4]** indicates that copies were to be sent to three individuals including Mr. Milman, a vice president of ITT. Mr. Milman has testified during a deposition, however, that he does not recall receiving exhibit 34. There is no other deposition testimony identifying the memorandum.

In my opinion, the lack of testimony identifying exhibit 34 does not preclude its authentication. ***HN2***[] *Rule 901(b)(4) of the Federal Rules of Evidence* provides that "appearance, contents, substance, internal patterns or other distinctive characteristics, taken in conjunction with circumstances" may satisfy the requirement of authentication. Since this memorandum is addressed by one employee of ITT to another and bears a stamp already described above, there is sufficient authentication to allow it to be considered in the motion for summary judgment.

This is also true for exhibits 35, 44, 108, 135 and 208. Exhibit 44, a memorandum between two ITT employees on stationary marked "ITT Grinnell Inter Office Correspondence" and stamped "Received - Pipe Hanger Division - Jul. 25, 1975", is sufficiently authenticated. Similarly, exhibit 108, a price quotation on Pacific's stationery which was addressed to ITT, stamped **[*5]** "Received", and produced by ITT, is properly authenticated. Moreover, exhibit 135, a snubber sales report written on Pacific stationery and stamped "received - Nov. 08 [sic] 1976 - PSCO Sales Dept." is authenticated by its contents. I also conclude that exhibits 35 and 208 fulfill the authentication requirements of *Fed.R.Evid. 901* because both of these documents were produced from ITT's files and both contain information which a firm would be likely to record in the ordinary course of business.

The final document to be considered is number 23301. This document has never been filed with this court. Accordingly, it cannot be stricken, but reference thereto will be disregarded.

Accordingly, Pacific's motion to strike is DENIED with respect to exhibits 18, 34, 35, 44, 52, 87, 108, 118, 135, 137, 141, 187, the first eight columns of 188, 208, and document 23301. The motion is ALLOWED for the ninth column of numbers in exhibit 188 listed under the heading "Discount %".

II. SUMMARY JUDGMENT

Defendants have moved for partial summary judgment with respect to counts 1, 2, 3, 4, 5 and 6. ***HN3***[] In determining whether summary judgment is appropriate, the court must examine the record **[*6]** in the light most favorable to the party opposing the motion. *Thyssen Plastik Anger KG v. Induplas, Inc., 576 F.2d 400, 401 (1st Cir. 1978)*, quoting *Hahn v. Sargent, 523 F.2d 461, 464 (1st Cir. 1975)*, cert. denied, *425 U.S. 904*. All parties have had the benefit of exhaustive discovery.

The submission of the parties, viewed in the light most favorable to Barry, warrants the following findings of facts. ITT is a pipe hanger company. A pipe hanger company designs pipe support systems used in nuclear reactors. Part of the pipe support system is a snubber. A snubber is a shock absorbing device which restrains sudden movements of a nuclear reactor's piping system in the event of earthquakes or explosions. ITT sells snubbers, either as part of its pipe hanging apparatus or separately to architectural and engineering firms (A & Es).

Until 1975, ITT supplied its own hydraulic snubbers for all nuclear power plant projects. During the period 1974-1975, however, regulatory agencies and nuclear reactor builders became concerned about leaking fluid in hydraulic snubbers. As a result, the A & Es began to purchase only mechanical snubbers which do not use hydraulic fluids.

ITT, unable **[*7]** to develop a suitable mechanical snubber, purchased snubbers from another company, Pacific. Pacific's share of the snubber market was approximately 80%. In addition to manufacturing mechanical snubbers and selling them to pipe hanger companies such as ITT, Pacific also sells snubbers directly to the A & Es.

On January 30, 1976, ITT entered into a contract with Barry for the development of a mechanical snubber. The ITT-Barry contract consisted of two phases.

The first phase was a development phase which did not bind either party to purchase or sell snubbers. During phase 1, ITT agreed to pay Barry $ 180,000 for development costs, an additional $ 54,000 for production tooling, and up to $ 60,000 for special test equipment.

On August 31, 1976, ITT and Barry agreed to enter into phase 2 of the contract. During this phase, Barry was to develop production capability for six sizes of snubbers by January 28, 1977. ITT was obliged to purchase its requirements of mechanical snubbers from Barry for the next three years, subject to an obligation to purchase at least $ 9 million but not more than $ 15 million over the three year period. ITT retained the option to purchase Barry's **[*8]** snubber production facilities at any time during phase 2. Barry agreed not to compete with ITT for five years after such purchase. In addition, while Barry was manufacturing snubbers for ITT, it could not sell mechanical snubbers to anyone else.

Meanwhile, pending the development of Barry's snubbers, ITT purchased all of its mechanical snubbers from Pacific. Pacific was also attempting to sell snubbers directly to the builders of nuclear power plants, in competition with ITT. It had not been successful in securing direct sales contracts, but in May of 1976 it arguably forced ITT to offer an additional discount to at least one customer in order to secure a contract.

In late summer, Stephen J. Toth, who had once been an employee in another division of ITT, became president of Pacific. He met with representatives of ITT and expressed a desire for a healthier relationship between the companies. For a sufficiently large order, he offered ITT discounts of 25% on the four smaller sized snubber and 30% on the larger ones. In September 1976 an agreement was negotiated for $ 5.7 million of snubbers covering ITT requirement through 1977, but this agreement was cancelled by ITT. On **[*9]** October 20, 1976, ITT gave Pacific a purchase order for its requirements for the first quarter of 1977 in the amount of $ 874,000, at standard discounts.

On January 31, ITT informed Barry by letter that it considered the cumulative delays in Barry's development program to be a breach of its contract.

On February 1, 1977, ITT gave Pacific a new blanket purchase order for mechanical snubbers for its proposed requirements through January 31, 1978 in the amount of over $ 5 million. Pacific granted discounts of 25% and 30%, as previously offered, but imposed a 100% cancellation charge, a considerably more severe cancellation provision than that which had been included in the aborted contract of September 1976.

At a meeting on February 25, 1977, representatives of ITT told an officer of Barry that May 15, 1977 was an absolute deadline for Barry to qualify the first four sizes of snubbers for production. On April 25, 1977, however, a second letter from ITT notified Barry that ITT considered its contract breached and terminated. Negotiations between ITT and Barry concerning the contract dispute continued notwithstanding. ITT proposed that Barry continue the contract, but under **[*10]** an amendment whereby its minimum purchase obligation of $ 9 million was reduced by the amount of its contracts with Pacific of over $ 5 million. The justification for this reduction was that ITT had been required to look elsewhere for snubbers because of Barry's delays and could only secure a favorable price by buying in large quantities. There is a dispute between the parties concerning the making and acceptance of this offer which cannot be resolved on this motion. In any case, negotiation ceased in early June 1977, and ITT informed Barry that the contract was terminated.

On July 5, 1977, ITT placed a blanket purchase order with Pacific for its requirements for the period February 1, 1978 through December 1, 1978. On July 14, 1977 it placed a similar purchase order for calendar year 1979. Both of these orders were subject to extraordinary discounts and severe cancellation penalties, substantially of the magnitude of those contained in the February 1 contract. There was a price escalation formula which was favorable to ITT.

Pacific did not attempt to bid separately on snubber supply contracts to ITT customers after September 1976. After it had acquired the ITT contracts, **[*11]** Pacific supplied approximately 95% of mechanical snubbers sold in the United States.

At a meeting of the Society of Security Analysts in New York in 1977, Mr. Toth, president of Pacific, made the following answer to a question concerning Pacific's competitors in the snubber business:

TOTH: Shock arrestor. Well, our major competitors are our major customers. We traditionally sell the shock arrestors to the pipe hanger people and for instance, there's a division of ITT, Grinnell up in Providence, called the Pipe Hanger Division, that probably has a major share of the market and they make hydraulic shock arrestors. So we have had to sell our product to them when at the same time they were trying to beat us out with the sale of their hydraulic units. And that's the reason for our selling directly to the utilities. We went right to the end user who just edicted [sic] to the selling engineers that they wanted a mechanical shock arrestor versus a hydraulic. So Grinnell has had to buy our unit. We really were heading on a collision course with this major customer up until last fall when we got together with them and they decided not to offer their unit nor to get into the design **[*12]** of a mechanical unit. So we now have all of their business. We have a contract with them for the next two years. That amounted to a $ 16 million order that we got this past summer and it is a major part of our backlog now and they are our friends now.

In October 1977, an ITT internal memorandum seeking approval from corporate headquarters for the cancellation of the ITT-Barry contract contained the following paragraph:

During the course of developing the product, Barry Wright Corp. (our partners in the joint venture) exercised their option to increase production costs due to escalation. At the same time our competitors, who have a similar device qualified and in production, have heard of our intent to develop our own device, offered us more favorable terms for both cost and schedules. With these new terms, the cost of developing our own product became marginal, and the project was cancelled.

Count 1

Count 1 of Barry's complaint alleges that ITT and Pacific agreed not to compete with each other in the manufacture and sale of pipe snubbers and, in furtherance of this agreement arranged that ITT's contract with Barry would be terminated. After reviewing Barry's affidavits, **[*13]** depositions and documents, I conclude that Barry has presented evidence from which a conspiracy between ITT and Pacific not to compete and concomitantly to terminate Barry can be inferred. In so concluding, I view the record in the light most favorable to Barry and indulge in all inferences favorable to Barry. *Hahn v. Sargent, 523 F.2d at 464*. An illegal conspiracy is rarely explicit. *Ferguson v. Omnimedia, Inc., 469 F.2d 194, 198 (1st Cir. 1972)*; *Zaccagnini v. Morris, 478 F.Supp. 1199, 1203 (D. Mass. 1979)*.

Pacific and ITT contend, however, that Barry does not have standing to complain of their alleged conspiracy to cease competing with each other. They argue that a lessening of competition resulting from a conspiracy would affect only snubber buyers, either pipe hanger companies or A & Es, and not Barry.

HN4[] Section 4 of the Clayton Act, *15 U.S.C.§ 15*, provides that "(a)ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor…." In determining whether a particular plaintiff has standing, the Court of Appeals for the First Circuit appears to have adopted the "target area" test. See *Engine Specialties, **[*14]** Inc. v. Bombardier Ltd., 605 F.2d 1, 17-18* (citing cases applying the "target area" test). The target area test provides that:

In order to state a cause of action under the antitrust laws a plaintiff must show… that he is within the area of the economy which is endangered by a breakdown of competitive conditions in a particular industry.

II Areeda & Truner, ***Antitrust Law*** P334d (1978), quoting *Conference of Studio Unions v. Loew's, Inc., 193 F.2d 51, 54-55 (9th Cir. 1951)*, cert. denied, *342 U.S. 919 (1952)*.

A plaintiff has standing to recover for injuries resulting from the antitrust violations of his competitor, II Areeda & Turner, ***Antitrust Law*** P340a, since the plaintiff would be within the endangered area of the economy.The facts support the inference that Barry was Pacific's competitor. Barry's contract called for it to manufacture snubbers for ITT which ITT would then sell to its customers. These customers, in a competitive market, could also be solicited by Pacific. Professors Areeda and Turner have observed that in such situations, where a defendant sells directly to consumers while the plaintiff, manufacturing the same product, sells to dealers who then sell to **[*15]** consumers, "the two manufacturers are competitors in every relevant sense." II Areeda & Truner, supra at P340b. Accordingly, Barry has standing to complain that Pacific and ITT have agreed not to compete in the mechanical snubber market.

Pacific and ITT also argue, however, that Barry has not suffered the antitrust injury required to assert an antitrust claim. ***HN5***[] Antitrust injury is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendant's acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 489 (1977)*.

In *Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 9 (1st Cir. 1979)*, cert. denied, *U.S. , 100 S.Ct. 2964 (1980)*, the Court of Appeals determined that the plaintiff had suffered antitrust injury in circumstances which resemble the facts of this case. There, Agrati, a manufacturer of minicycles conspired with a potential manufacturer, Bombardier, to divide the minicycle market in North America. Bombardier, a large firm, was considering entering the minicycle market as a manufacturer. It used its position as a strong potential competitor of Agrati to coerce Agrati into appointing Bombardier **[*16]** as Agrati's exclusive dealer in North America. As a result of granting an exclusive dealership to Bombardier, Agrati terminated its former distributor, Engine Specialties, Inc. (ESI), claiming that ESI had breached its contract with Agrati.

The Court of Appeals noted that the termination of ESI was part of a quid pro quo:

Agrati would surrender its current dealership with ESI in exchange for the promise of no competition from Bombardier and Bombardier would exchange its ability to enter the market against Agrati in exchange for the exclusive dealership as well as a promise of no competition from Agrati.

605 F.2d at 15.

The Court held that the resulting exclusion of ESI from the market for the particular brand of minicycle was antitrust injury entitling ESI to damages.

The same principles appear to apply to the facts alleged by Barry. The facts support the inference that Barry is the victim of a market allocation scheme between ITT and Pacific.Barry, a potential manufacturer, was excluded from the market as the result of an agreement between a manufacturer and a distributor not to compete.

The defendants' motion for summary judgment as to Count 1 is DENIED.

Count **[*17]** 2

In Count 2, Barry alleges that ITT has entered into a conspiracy with other suppliers of pipe hangers ("the club") to fix prices for completed pipe hanger installation, including snubbers.This is alleged to somehow relate to the ITT-Pacific requirements contracts, and the closing out of Barry, because ITT is acting as a stockpiler of snubbers for the club. It is extremely doubtful that Barry would have standing to complain of such an agreement. See *Reading Industries, Inc. v. Kinnecott Copper Corp., 1980-2 Trade Cases P63, 559* p. 79, 978 (2d Cir. 1980). No time need be spent on that inquiry, however, since the material offered by Barry in opposition to the motion for summary judgment consists of second-hand speculation, unsupported opinion and conjecture.

The defendants' motion for summary judgment is ALLOWED as to count 2.

Count 3

Count 3 of Barry's amended complaint alleges that ITT and Pacific entered into a requirements contract in violation of Section 3 of the Clayton Act and *Section 1* of the Sherman Act. Barry's allegation refers to contracts entered into by ITT and Pacific in which ITT allegedly agreed to purchase its 1977, 1978 and 1979 requirements.

In response **[*18]** to this allegation, Pacific argues that the 1977, 1978 and 1979 purchase contracts did not violate Section 3 of the Clayton Act and *Section 1* of the Sherman Act because they did not require ITT to purchase all of its snubber requirements from Pacific.

HN6[] It is not necessary that explicit terms of a contract indicate an exclusive dealing arrangement; such an arrangement may be inferred from all the circumstances. *Tampa Electric Co. v. Nashville Coal Co., 365 U.S. 320, 324-327 (1961)*; *Perington Wholesale, Inc. v. Burger King Corp., 1979-2 Trade Cases P62,986 at p. 79, 606 (10th Cir. 1979)*; *McElhenney Co. v. Western Auto Supply Co., 269 F.2d 332, 338 (4th Cir. 1959)*. The evidence would support a finding that ITT's purchase obligation was in fact in excess of its actual requirements and thus warrant a conclusion that the 1977, 1978 and 1979 contracts were requirements contracts and that they had an anti-competitive effect.

ITT and Pacific contend that Barry cannot claim to have been injured by the 1977, 1978 and 1979 contracts because it was not foreclosed by these contracts. ***HN7***[] The adverse competivie effect of a requirements contract occurs only if it forecloses a substantial part of **[*19]** a market to competitors. *Tampa Electric Co. v. Nashville Co., 365 U.S. at 329 (1960)*. The defendants argue that the 1977 ITT-Pacific contract did not foreclose Barry from the snubber market because Barry was incapable of manufacturing snubbers in 1977. There is a genuine dispute as to this material fact, however, precluding summary judgment.

The defendants also argue that the 1978 and 1979 ITT-Pacific contracts did not foreclose Barry from the snubber market because ITT, before entering into the 1978 and 1979 contracts with Pacific, had offered to purchase $ 3.6 million of snubbers from Barry, and Barry had rejected this offer. Barry has provided affidavits written by its officers, however, that state that Barry never made a "final rejection" of the offer. Since there is a dispute of fact as to whether Barry had finally rejected the ITT offer, this issue cannot be resolved by a motion for summary judgment.

Lastly, Pacific and ITT contend that after ITT contracted with Pacific, Barry made no further attempt to solicit orders from ITT. They assert that Barry's failure to sell to ITT was consequently due to Barry's own choice rather than to Barry having been foreclosed from **[*20]** the market by the ITT-Pacific contracts. Viewing the evidence in a light favorable to Barry, a trier of fact might properly conclude that Barry was acting reasonably when it did not attempt to solicit orders from ITT after ITT had terminated its contract with it.

Accordingly, the motion for summary judgment as to count 3 is DENIED.

Counts 4 and 5

Count 4 of Barry's amended complaint charges Pacific with selling mechanical snubbers to ITT at prices lower than those charged to Pacific's other customers in violation of *Section 2(a)* of the Clayton Act, as amended by the Robinson-Patman Act, *15 U.S.C. § 13(a)*. Count 5 charges ITT with knowingly inducing and utilizing the allegedly discriminatory prices in violation of *Section 2 (f)* of the Clayton Act, as amended by the Robinson-Patman Act, *15 U.S.C. § 13(f)*.

Responding to these charges, Pacific claims that Barry has failed to establish a prima facie case under *§ 2(a)* of the Clayton Act. ITT argues that because Barry's case against Pacific is fatally defective, the plaintiff has necessarily failed in its claim against ITT under *§ 2(f)* of the Clayton Act. ***HN8***[] Under *Section 2(f)*, "a buyer cannot be liable if a prima facie **[*21]** case could not be established against a seller or if the seller has an affirmative defense." *Great A & P Tea Co. v. FTC, 440 U.S. 69, 76 (1979)*.

HN9[] *Section 2(a)* of the Clayton Act, as amended by the Robinson-Patman Act, *15 U.S.C. § 13(a)*, states:

[I]t shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between purchasers of commodities of like grade and quality… where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce….

In support of their motions for summary judgment, defendants contend that price discrimination has not occurred. Pacific asserts that it has offered price discounts to one other pipe hanger firm similar to the discounts given to ITT.

The invitation to two pipe hanger companies, ITT and NPS, to participate in price discounts does not alter the fact that there was a differential between the prices paid by these two companies and the prices paid by the rest of the industry. In *FTC v. Anheuster-Busch, Inc., 363 U.S. 536, 550 (1959)*, the Court stated that *HN10*[] "it is only by equating price discrimination **[*22]** with price differentiation that *§ 2(a)* can be administered as Congress intended." The act of selling an identical product at a different price to different purchasers is discrimination within the meaning of *§ 2(a)* of the Robinson-Patman Act. [1] *Id. at 549-550*.

Defendants argue that they are nevertheless entitled to summary judgment because, assuming that price discrimination has occurred, it has not lessened competition. Pacific asserts that Barry's contract prices for snubbers were lower than Pacific's in 31 of 36 instances and, therefore, no injury to competition could have resulted. In *Utah Pie Co. v. Continental Baking Co., 386 U.S. 684, 690 (1967)*, the Court upheld a finding of a violation of the Robinson-Patman Act although the prices charged by the violators were higher than those of the plaintiff-competitor. The Court observed that there had been an injury to competition because the defendant's activities had contributed to the rapid decline of prices in the relevant market during the period covered by the suit. Id. The Supreme Court has observed **[*23]** that *HN11*[] there is an obvious competitive injury where discrimination has been employed with the hope of immediate destruction of a particular competitor. *Id. at 702*.

The defendants' second reason for asserting that there has not been an injury to competition is that Pacific's prices were not below marginal cost or average variable cost. *HN12*[] Courts, in seeking to determine whether price discriminations might injure competition, have relied heavily on the existence of predatory intent. *Utah Pie Co. v. Continental Baking Co., 386 U.S. at 702*; Kintner, A Robinson-Patman Primer at 127 (1979). A price reduction below cost tends to establish a predatory intent. *FTC v. Anheuser-Busch, Inc., 363 U.S. at 552*.

Defendants contend that the only way to prove predatory intent and the resulting possibility of harm to competition is by showing that the firm's pricing is below the marginal or average variable cost of producing the unit sold. This thesis was first advanced by Professors Areeda and Turner in Predatory Practices under *Section 2* of the Sherman Act, 88 Harv. L. Rev. 697 (1975), and has been adopted by several courts. See e.g., *Janich Brothers, Inc. v. American Distilling Co., 570 F.2d* ***[*24]*** *848, 855 (9th Cir. 1977)* cert. denied, *439 U.S. 829*; *International Air Industries, Inc. v. American Excelsior Co., 517 F.2d 714, 724 (5th Cir. 1975)*, cert. denied, *424 U.S. 943 (1976)*. This view is not universally accepted, however. See *Pacific Engineering and Production Co. of Nevada v. Kerr-McGee Corp., 551 F.2d 790, 798* (10th Cir.), cert. denied, *434 U.S. 879 (1977)*; *Chillicothe Sand & Gravel Co. v. Martin Marietta Corp., 615 F.2d 427, 432 (7th Cir. 1980)*. In both of these cases, the courts, while recognizing the usefulness of marginal or average variable cost for determining the presence of predatory conduct, stated that they would be willing to consider other factors in determining whether a defendant's conduct had been anticompetitive.

Indeed, in *Utah Pie Co. v. Continental Baking Co., supra*, the Court upheld a verdict against one defendant, Pet Milk Co., even though there had been no finding that Pet Milk's prices were below cost. [2] The Court observed that

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[1] In the absence of various economically supportable justifications such as quantity discounts, discussed infra.

[2] There was, however, evidence indicating that Pet Milk had suffered "substantial losses" during the period or price discriminating. *386 U.S. at 697*. The Court observed:

It would not have been an irrational step if the jury concluded that there was a relationship between price and the losses.

there were several facts from which the jury could have concluded that Pet Milk Co. possessed predatory intent to injure the plaintiff, Utah Pie. "As an initial matter", the Court reasoned, "the jury could have concluded **[*25]** that Pet's discriminatory pricing was aimed at Utah Pie; Pet's own management… identified Utah Pie as an 'unfavorable factor', one which 'd[u]g holes in our operation' and posed a constant 'check' on Utah's performance…." *Id. at 696-97*. Moreover, the Court noted, Pet had sent an industrial spy into Utah Pie's plant. Id.

In my opinion, Utah Pie indicates that several factors other than below-cost pricing may indicate the presence of predatory intent. The use of discriminatory pricing to induce an illegal requirements contract and to induce a contract not to compete warrants an inference of predatory intent.

Lastly, Pacific argues that it has a prima facie defense to Barry's claim that it violated the Robinson-Patman Act. ***HN13***[] *Section 2(a)* of the Act, *15 U.S.C. § 13(a)* states:

[N]othing herein contained shall prevent differentials which make only due allowance for **[*26]** differences on the cost of manufacture, sale, or delivery resulting from the differing methods or qualities in which such commodities are to such purchasers sold or delivered.

Pacific asserts that ITT's orders doubled its sales volumes. This increase, Pacific contends, made it obvious to Pacific officers that cost savings would result, allowing greater discounts to ITT.

HN14[] The burden of proving a cost justification for discriminatory pricing is on Pacific. *United States v. Borden Co., 370 U.S. 460, 467 (1961)*.The cost data used to justify discriminatory pricing must be specific enough to establish that different treatment of customers was warranted. *370 U.S. at 468-69*.

The cost data presented by Pacific with its motion for summary judgment is not so overwhelming as to preclude a genuine issue of fact, and indeed may not even meet the requirements of *United States v. Borden Co., supra.*

Accordingly, the defendants' motions for summary judgment as to Counts 4 and 5 are DENIED.

Count 6

In Count 6, Barry alleges that Pacific monopolized, attempted to monopolize and conspired to monopolize the market in violation of *Section 2* of the Sherman Act, *15 U.S.C. § 2*. Barry also **[*27]** claims that ITT conspired to monopolize in violation of the Sherman Act, *Section 2*. ***HN15***[] *Section 2* of the Sherman Act provides in part:

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce… shall be deemed guilty of a felony….

1. Monopolization

HN16[] The offense of monopolization requires two elements: (1) the possession of monopoly power by the defendant in the relevant market, and (2) the willful acquisition or maintenance of monopoly power, as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident. *United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1965)*; *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 274 (2d Cir. 1979)*, cert. denied, *444 U.S. 1093 (1980)*. For the purpose of this motion for summary judgment Pacific does not dispute that it possesses monopoly power, nor does it dispute that the market for mechanical snubbers is the relevant product market. Pacific does dispute, however, that it willfully acquired and maintained its monopoly power.

HN17[] Exclusionary conduct, i.e., conduct designed **[*28]** to foreclose competition, is a form of willful acquisition or maintenance of monopoly power. *United States v. Griffith, 334 U.S. 100, 107 (1947)*, *Berkey Photo, Inc. v. Eastman Kodak Co., supra, 273-75*; *United States v. United Shoe Manufacturing Corp., 110 F.Supp. 295, 342 (D.*

Id.

Mass. 1953), aff'd per curiam, *347 U.S. 521 (1954)*.Barry contends that there are four activities engaged in by Pacific which qualify as exclusionary conduct. These are: (1) knowing interference with Barry's contract with ITT; (2) extension of preferential discounts to ITT for the sole purpose of inducing ITT to purchase its requirements of mechanical snubbers from Pacific; (3) requiring ITT, as a condition of the granting of the discounts, to commit itself to purchase its entire requirements of mechanical snubbers from Pacific on a noncancellable basis; and (4) misuse of its patent by threatening patent litigation against any company who purchased a mechanical snubber from anyone other than Pacific.

Pacific contends that there are no facts indicating a Pacific agreement with ITT to foreclose Barry and, therefore, that it is entitled to summary judgment as to the first three activities. The existence of evidence **[*29]** relating to the first three activities -- interference with ITT-Barry contract, extension of price discounts to induce an ITT breach of that contract, and an exclusive requirements contract -- have previously been discussed in this memorandum. I have already concluded that sufficient facts exist from which it is permissible to infer the occurrence of these activities.

Pacific also argues that there are insufficient facts to indicate that it misused its patent by threatening patent litigation. Pacific contends that threats of a patent infringement suit are not an antitrust violation if the defendant believed in good faith that its patent claims were valid. See *United States v. United Shoe Machinery Corp., supra at 333*; *Transition Electronic Corp. v. Hughes Aircraft Co., 487 F.Supp. 885, 904 (D. Mass. 1980)*. There is evidence, however, which suggest that Pacific's alleged threats of patent litigation were made in bad faith. This is particularly true where these threats were coupled with other alleged exclusionary activities. See *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 424 F.2d 25, 35-36 (1st Cir. 1970)*.

Pacific's second theory is that there is no evidence **[*30]** that its alleged patent abuse has had any anticompetitive effect on Barry.Pacific refers to the testimony of a Barry official that Pacific's threats did not inhibit Barry's snubber development. There is justification for inferring from the facts and circumstances of this case, though, that Pacific's alleged threats could have encouraged ITT to terminate Barry. There is sufficient indication, therefore, that the alleged patent abuse had an anticompetitive effect.

2. Attempt to Monopolize and Conspiracy to Monopolize

HN18[] The elements of the offense of attempted monopolization are: (1) a specific intent to monopolize; (2) overt acts in furtherance of the attempt and (3) a dangerous probability of success in achieving monopoly power. *Swift & Co. v. United States, 196 U.S. 375, 396 (1905)*; See *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 626 (1953)*.

HN19[] A conspiracy to monopolize is established by proof of a concerted action which is deliberately entered into with the specific intent to accomplish the unlawful result of achieving a monopoly. *American Tobacco Co. v. United States, 328 U.S. 781, 815 (1945)*; Sullivan, Antitrust at § 49, p. 132.

In defending against **[*31]** the claim of attempted monopolization Pacific is apparently relying on its argument that it has not committed any exclusionary acts. Since there is evidence indicating that Pacific may have interfered with the ITT-Barry contract, extended discriminatory price discounts, and sought an exclusive requirements contract, this argument fails. With regard to the conspiracy allegation, ITT argues that there are no facts indicating specific intent. ITT asserts that Barry cannot provide any reason why it would have been it ITT's interest to discontinue the development of a snubber with Barry "in order to establish Pacific as a monopolist." The evidence leaves it open to a trier of fact to conclude that the combination of price, reliable delivery and product offered by Pacific convinced ITT management that it was to its advantage to further Pacific's monopolistic position by dropping Barry. The Court of Appeals has observed that "[s]tate of mind is difficult to prove and great circumspection is required where summary judgmnt is sought on an issue involving state of mind." *Hahn v. Sargent, supra at 468*.

The defendants' motions for summary judgment as to Count 6 is accordingly **[*32]** DENIED.

Bradley Auto Wash Sales, Inc. v. BP Oil, Inc.

United States District Court for the District of Massachusetts

December 29, 1981

CIVIL ACTION No. 77-3598-F

Reporter

1981 U.S. Dist. LEXIS 10018 *; 1982-1 Trade Cas. (CCH) P64,470

BRADLEY AUTO WASH SALES, INC., Plaintiff v. BP OIL, INC. and F.L. ROBERTS & COPANY, INC., Defendants

Core Terms

indemnification, antitrust, attorney's fees, violations, parties, argues, anti trust law, indemnity, cases, common law, petroleum

LexisNexis® Headnotes

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

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

HN1[] **Private Actions, Remedies**

In general, federal common law does not allow indemnification for violations of the federal antitrust laws.

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

Civil Procedure > ... > Federal & State Interrelationships > Choice of Law > General Overview

Torts > ... > Multiple Defendants > Contribution > General Overview

HN2[] **Private Actions, Remedies**

Federal law generally governs the issue of whether there is a right to indemnification or contribution in an antitrust case. When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions the answers to which are to be derived from the statute and the federal policy which it has adopted.

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

Torts > ... > Multiple Defendants > Contribution > General Overview

HN3[] **Private Actions, Remedies**

The threshold question in a claim for indemnification under a separate state law theory is whether allowing it would be inconsistent with the purpose of the antitrust laws. Under no circumstance should indemnification be allowed where such allowance would be inconsistent with the purpose of the antitrust laws. In making the decision whether indemnification is to be permitted or rejected in antitrust actions, the primary inquiry is which course best furthers the public policy in favor of competition, or least detracts from it.

Contracts Law > Contract Interpretation > General Overview

HN4[] **Contracts Law, Contract Interpretation**

The present rule of construction in Massachusetts contract cases recognizes that contract interpretation is largely an individualized process with the outcome of a particular case turning on the particular language used against the background of other indicia of the parties' intention. A contract should be construed with reference to the situation of the parties when they made it and the objects sought to be accomplished.

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview

Evidence > Types of Evidence > Documentary Evidence > Parol Evidence

Contracts Law > Contract Interpretation > Parol Evidence > General Overview

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

HN5[] **Contract Interpretation, Ambiguities & Contra Proferentem**

Extrinsic circumstances can be considered in the interpretation of ambiguous contract terms under Massachusetts law. If a contract is fairly susceptible to more than one meaning, evidence of what occurred in the course of negotiations is relevant and not excluded by the parol evidence rule.

Contracts Law > Contract Interpretation > Ambiguities & Contra Proferentem > General Overview

Contracts Law > Defenses > Ambiguities & Mistakes > General Overview

HN6[] **Contract Interpretation, Ambiguities & Contra Proferentem**

In Massachusetts, if any reasonable doubt exists concerning the parties' intention, then the contract should be construed against the authority who drafted it. If ambiguities exist and both possible interpretations could be correct, the policy in Massachusetts is to resolve the ambiguity against the drafter of the contract.

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

Civil Procedure > ... > Attorney Fees & Expenses > Basis of Recovery > American Rule

Civil Procedure > Remedies > Costs & Attorney Fees > General Overview

HN7[] **Contract Conditions & Provisions, Indemnity Clauses**

The traditional American rule requires litigants to pay their own attorney's fees.

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Opinion by: FREEDMAN

Opinion

MEMORANDUM AND ORDER

FREEDMAN, D.J.

This matter came before me on a cross-claim by defendant BP Oil, Inc. ("BP") against defendant F.L. Roberts & Company, Inc. ("Roberts") asserting the right of BP to indemnification for counsel fees which it incurred in the defense of claims made against it by the plaintiff Bradley Auto Wash Sales, Inc. ("Bradley"). [1]

[*2] BP is an Ohio corporation with its principal place of business in Wilmington, Delaware. BP is engaged in the distribution and marketing of gasoline and other petroleum products in New England, including Massachusetts. Roberts is a Massachusetts corporation with its principal place of business in Springfield, Massachusetts. Roberts is a branded distributor of BP, and is engaged in the distribution and marketing of gasoline and other petroleum products in Massachusetts and Connecticut. Bradley is a Connecticut corporation with its principal place of business in Windsor, Connecticu. Bradley was engaged in the operation of car washes and retail gasoline outlets in Connecticut and Massachusetts.

In the original action, plaintiff Bradley sued defendants BP and Roberts for various alleged violations of the antitrust laws and the Emergency Petroleum Allocation Act. The amended complaint contained five counts. On June 11, 1981 arguments by counsel for defendant BP and defendant Roberts were heard on motions for respective directed verdicts. The Court allowed defendant BP's motion for directed verdict. With respect to Roberts, the Court also allowed a directed verdict, but only **[*3]** as to counts two and three of the amended complaint (antitrust violations) and denied the motion as to counts four and five (contract violations). Count I was waived by Bradley after the amended complaint was filed. A jury trial ensued on the remaining counts as to Roberts, and the jury found for the plaintiff on June 12, 1981. The only remaining issue to be resolved is BP's cross-claim for indemnification, that is, whether Roberts must indemnify BP for the attorney's fees BP incurred in defending itself against the claims filed against it by Bradley.

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[1] BP originally filed a three-count cross-claim against Roberts: Count I asserted that BO's distributorship contracts with Roberts contained an indemnification provision applicable to this case; Count II asserted a common law right of indemnification to the extent that any liability may be imposed on it for acts of its "agent" Roberts under the doctrine of respondeat superior; and Count III asserted a right of contribution against Roberts. In a stipulation by the defendants filed on June 19, 1981, BP waived Counts II and III of its cross-claim against Roberts leaving only Count I remaining. Both parties waived their right to a jury trial on this remaining count.

BP seeks to enforce the indemnification provision contained in its January 25, 1974 agreement with Royal Petroleum Corporation, [2] and in its July 1, 1975 agreement with Roberts. The Distributor Agreements provide as follows:

"BUYER'S BUSINESS--INDEMNITY: The business conducted by Buyer in marketing BP's products is the independent business of Buyer, and this Agreement shall not be construed as reserving to or conferring upon Seller any right to direct or control any of Buyer's employees or the manner in **[*4]** which the business operations of BUYER shall be conducted. Buyer agrees to acquaint itself and strictly comply with all federal, state and local laws, ordinances, orders and regulations relating to Buyer's business and the sale, handling and distribution of petroleum products. Buyer agrees to indemnify and hold Seller, its agents and employees harmless from and against all expense, liability and claims directly or indirectly resulting from or connected with any accident or anything whatever occurring from any cause in connection with the operation or conduct of Buyer's business." (emphasis supplied).

BP argues Massachusetts substantive law should apply; and under Massachusetts law indemnity provisions in contracts are to be reasonably construed in accordance with the parties' situation when the provisions were negotiated, and in a manner which effectuates the purpose sought to be accomplished. BP argues further that the indemnity provision reasonably construed finds Roberts liable to BP for attorney's fees expended.

Defendant Roberts argues that BP's cross-claim for indemnification must fail (1) because BP must, as a matter of law, bear the expense of its own counsel fees **[*5]** in that such fees were incurred in the course of defending itself against claims that it had violated federal antitrust statutes, (2) because the indemnity clauses in the Distributor Agreements are unenforceable under Massachusetts law given the facts of the case and the particular language of the clauses and (3) because it would be contrary to general equitable considerations to allow BP to recoup its counsel fees given all the factors bearing upon BP's claim.

I. BP's Indemnification Claim in the Context of Antitrust Litigation

HN1[] In general, federal common law does not allow indemnification for violations of the federal antitrust laws. The reason for this policy is public interest, and the statutory aim of deterring antitrust violations. To allow a claim for indemnification, permits an alleged wrongdoer to escape financial consequence, militates against the deterrence objective of the antitrust statutes, and allows a common law rule to undermine the purpose of the antitrust laws. *Perma Life Mufflers, Inc. v. International Parts Corporation, 392 U.S. 134 (1968)*. Only a realistic possibility of liability for damages will encourage compliance with antitrust laws and will protect **[*6]** the public interest in preserving competition. *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1186 (8th Cir. 1979)*.

Based on the above-noted federal policy, Roberts argues that federal common law precludes indemnification becase plaintiff's allegations against BP are violations of the federal antitrust statutes. Roberts further contends that the important Congressional intent behind the antitrust statutes of deterring persons from violating such statutes will be circumvented if indemnification is permitted. BP's objection to Roberts' arguments, and one which it strenuously advances, is that in the case at hand BP was not found guilty of any illegal act but rather a directed verdict was granted in its favor, and a separate contractual agreement exists between the parties rather than a request by BP to fashion federal common law to include indemnification.

The rationale that indemnification militates against the policy of deterrence is clearly strongest in the case where a party found guilty wishes to exonerate himself from financial liability. As BP argues, in this case BP was found innocent of the allegations of antitrust violations. It is **[*7]** arguable that the indemnification bar in antitrust cases, given its purpose of deterrence, may not be applicable in cases where the party is found innocent and a separate contractual agreement of indemnity between the codefendants exists.

BP distinguishes the cases of *Texas Industries Inc. v. Radcliff Materials, Inc. 49 U.S.L.W. 4537 (1981)* (no basis in federal statutory or common law for allowing federal courts to fashion the right of contribution in an antitrust case)

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[2] Roberts is the successor corporation and transferee of all assets and liabilities of Royal Petroleum Corporation.

and *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179 (8th Cir. 1979)* [3] (federal common law does not allow indemnification for violations of the federal antitrust laws). BP argues that the holdings in the above cases are not applicable here because in neither case did the court speak to the possibility of a separate contract of indemnification or whether a bar of indemnification would similarly be found if a contract of indemnity was in existence with the party seeking indemnity being found innocent. BP argues that Massachusetts contract law should apply, and notes that indemnity contracts are enforceable under Massachusetts law.

[*8] ***HN2***[]

Federal law generally governs the issue of whether there is a right to indemnification or contribution in an antitrust case. *Sabre Shipping Corporation v. American President Lines, Ltd., 298 F.Supp. 1339 (S.D. N.Y. 1969)*. When a federal statute condemns an act as unlawful, the extent and nature of the legal consequences of the condemnation, though left by the statute to judicial determination, are nevertheless federal questions the answers to which are to be derived from the statute and the federal policy which it has adopted. *Sola Electric Company v. Jefferson Electric Company, 317 U.S. 173, 176 (1942)*.

In *Wilshire Oil Company v. Riffe, 409 F.2d 1277 (10th Cir. 1969)*, the court allowed a suit for indemnification by a corporation against its officers who had allegedly caused the firm to commit antitrust violations, but the suit was based on a separate state claim for breach of a fiduciary duty. The court in Wilshire was carefuly to point out that it was not deciding the question of whether indemnification is generally available in antitrust actions. *Id. at 1284*. The court in *Professional Beauty Supply, supra*, when commenting on the decision in Wilshire stated that "We caution, **[*9]** however, that ***HN3***[] the threshold question in a claim for indemnification under a separate state law theory is whether allowing it would be inconsistent with the purpose of the antitrust laws. Under no circumstance should indemnification be allowed where such allowance would be inconsistent with the purpose of the antitrust laws." *Id. at 1187*. In making the decision whether indemnification is to be permitted or rejected in antitrust actions, the primary inquiry is which course best furthers the public policy in favor of competition, or least detracts from it. *Perma, supra.*

II. BP's Indemnification Claims in the Context of Massachusetts Law

Both parties agree, [4] and this Court finds, that Massachusetts substantive law should govern the indemnification provision. The two contracts in question do not explicitly provide that any particular jurisdiction's law will govern them, and it is reasonable to find that Massachusetts substantive law is applicable to the cross-claim. Roberts is a Massachusetts corporation doing business in Massachusetts and is a signatory to a distributorship agreement with a national oil company where the parties presumably contemplated that a large portion of **[*10]** Roberts' business would continue to be conducted in Massachusetts, and this lawsuit principally involves acts and practices which took place in Massachusetts. See *McGinty v. Beranger Volkswagen, Inc., 633 F.2d 226, 232 (1st Cir. 1980)*. *Alyeska Pipeline Service Company v. Wilderness Society, 421 U.S. 240, 259 n. 31 (1975)*.

HN4[]

The present rule of construction in Massachusetts contract cases recognizes that contract interpretation is largely an individualized process with the outcome of a particular case turning on the particular language used against the background of other indicia of the parties' intention. A contract should be construed with reference to the situation of the parties when they made it and the objects sought to be accomplished. *Bryne v. Gloucester, 297 Mass. 156, 158 (1937)*, *Massachusetts Turnpike Anthority v. Perini Corporation, 349 Mass. 448, 452 (1968)*.

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[3] The holding in Professional Beauty Supply allowing contribution as a matter of federal common law in an antitrust case may be considered overruled in Texas Industries, Inc. which held that federal law does not allow an antitrust defendant to recover in contribution from co-conspirators. The holding in Professional Beauty Supply that indemnification is not generally allowed under federal ***antitrust law***, however, remains intact.

[4] See Roberts' Memorandum, p. 8 and BP's Memorandum, p. 2.

The background of the agreements, as known by this Court, is as follows: 1) BP was the drafter of each Agreement, with each document bearing the BP logo and containing several boilerplate clauses; 2) Steven M. Roberts stated in an affidavit that **[*11]** Roberts was not in a position to reject any clause within the Agreements but rather was required to sign the Agreements as prepared and presented by BP in order to obtain BP gasoline; 3) Steven M. Roberts also stated that at no time did BP advise Roberts that Roberts would be responsible for any of BP's attorney's fees incurred as a result of litigation against BP, and that it was not his understanding at the time that he was to be responsible for attorney's fees; 4) a hearing for parol evidence regarding the negotiation of the contract was not requested by the parties. [5]

[*12] The indemnification clause to be interpreted reads in pertinent part as follows: "Buyer agrees to indemnify and hold Seller… harmless from and against all expense, liability and claims directly or indirectly resulting from or connected with any accident or anything whatever occurring from any cause in connection with the operation or conduct of Buyer's business." To determine the intent of the parties based on the particular language used would be a difficult task. BP argues in its memorandum (p. 3) when discussing the language of the clause that "Here it would be difficult to imagine language any more broadly inclusive." This Court would be at a loss to disagree with this appraisal of maximum broadness. This extreme broadness characterized by the words "anything whatever" does, however, lead to vagueness and ambiguity. There is no mention of attorney's fees and no indication that attorney's fees should be implied.

In *Perini, supra*, the court foud that if the parties had intended to go beyond the usual forms of tort liability, they would have been unlikely to leave that extension to implication. If this concept were applied to the case at hand, it would follow that if indemnification **[*13]** for attorney's fees was intended, an appropriate clause would have been included specifically and not left to implication. This is worthy of mention as Steven Roberts stated in an affidavit that there was no discussion of the clause in question and it was not the understanding of F.L. Roberts that the clause included attorney's fees.***HN6***[]

In Massachusetts, if any reasonable doubt exists concerning the parties' intention, then the contract should be construed against the authority who drafted it. *Perini, supra.* If ambiguities exist and both possible interpretations could be correct, the policy in Massachusetts is to resolve the ambiguity against the drafter of the contract. *Bay State Smelting Company v. Ferric Industries, Inc., 292 F.2d 96 (1st Cir. 1961)*.

Neither the intention of the parties viewed in light of the background before the Court nor the language of the clause can be said to include indemnification for attorney's fees expended in defense of an antitrust action. The particular language of the provision does not imply attorney's fees, and the all-encompassing words "anything whatever" are ambiguous. Moreover, even if the interpretation suggested by BP was equally as **[*14]** likely as the interpretation suggested by Roberts, in Massachusetts the clause should be construed against the drafter BP and in light of the understanding of Roberts. Therefore, since the clause does not include a reference to attorney's fees, it was not negotiated specifically by the parties, and its language is vague, Roberts' interpretation of the clause as not including indemnification for attorney's fees is a reasonable one. Furthermore, without determining the contract clause unconscionable, it is clear that the extremely broad terms of the indemnification clause render it meaningless.

Conclusion

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[5] ***HN5***[] Extrinsic circumstances can be considered in the interpretation of ambiguous contract terms under Massachusetts law. *Golden v. Pepper Shoe Corporation, 94 F.Supp. 100 (D.C. Mass. 1950)*. *Boston and Maine Railroad v. Hall, 284 F.2d 474 (1st Cir. 1960)*. In Golden, the court held that since the contract is fairly susceptible to more than one meaning, evidence of what occurred in the course of negotiations was relevant and not excluded by the parol evidence rule.

Neither BP nor Roberts have requested a hearing to present parol evidence that might shed light on the intention of the parties when the term in question was included in the contract. The Court, therefore, finds noteworthy an affidavit by Mr. Steven Roberts stating that there was never any discussion about the indemnification clause and that it was certainly not his understanding that he agreed to pay BP's attorney's fee if BP should be sued for some conduct that relates to their business relationship.

Given the strong federal policy against indemnification in antitrust cases, and the absence of an enforceable contract clause providing for indemnification, *HN7*[] the traditional American Rule [6] requiring litigants to pay their own attorney's fees controls.

BP's demand for indemnification from Roberts for the attorney's fees expended by BP in its defense of claims made against it by Bradley, therefore, must be, and hereby is DENIED.

It is so Ordered.

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[6] See *Alyeska Pipeline Company v. Wilderness Society, 421 U.S. 240, 245 (1975)*.

Van Schaick v. Church of Scientology, Inc.

United States District Court for the District of Massachusetts

March 26, 1982

Civ. A. No. 79-2491-G

Reporter

535 F. Supp. 1125 *; 1982 U.S. Dist. LEXIS 11462 **

La Venda VAN SCHAICK, Plaintiff, v. CHURCH OF SCIENTOLOGY OF CALIFORNIA, INC., et al., Defendants

Core Terms

Church, religion, alleges, counts, religious, venue, auditing, courts, enterprise, representations, entitled to protection, motion to dismiss, conspiracy, personal jurisdiction, religious belief, treble damages, fraudulent, amend, conspiracy theory, Fair Labor Standards Act, protections, second amended complaint, fail to state a claim, racketeering activity, defense motion, scientifically, defendants', secular, intentional infliction of emotional distress, religious organization

LexisNexis® Headnotes

Civil Procedure > ... > Pleadings > Amendment of Pleadings > Leave of Court

Civil Procedure > ... > Pleadings > Amendment of Pleadings > General Overview

HN1[] **Amendment of Pleadings, Leave of Court**

Under *Fed. R. Civ. P. 15(a)* a party may amend its pleadings once as a matter of course at any time before a responsive pleading is served.

Civil Procedure > ... > In Rem & Personal Jurisdiction > In Personam Actions > General Overview

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

Torts > ... > Concerted Action > Civil Conspiracy > General Overview

Criminal Law & Procedure > ... > Inchoate Crimes > Conspiracy > General Overview

HN2[] **In Rem & Personal Jurisdiction, In Personam Actions**

While the mere presence of a conspirator within the forum state is not sufficient to permit personal jurisdiction over the non-resident co-conspirators, certain additional connections between the conspiracy and the forum state will support the exercise of jurisdiction. These additional connections exist where (1) substantial acts in furtherance of the conspiracy are performed in the forum state and (2) the co-conspirator knew or should know that the acts would be performed there.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Civil Procedure > Preliminary Considerations > Venue > Agents

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > Preliminary Considerations > Venue > Corporations

HN3[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. § 1965(a)*, provides that venue is proper for claims where a defendant resides, is found, has an agent, or transacts his affairs. For a corporate defendant in a private action under *§ 1965(a)* to be "found" in the district within the meaning of *§ 1965(a)*, it must be present in the district by its officers and agents carrying on the business of the corporation.

Civil Procedure > Preliminary Considerations > Venue > Individual Defendants

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

Civil Procedure > Preliminary Considerations > Venue > General Overview

Civil Procedure > Preliminary Considerations > Venue > Multiparty Litigation

Civil Procedure > Preliminary Considerations > Venue > Special Venue

HN4[] **Venue, Individual Defendants**

Where venue is improper under the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. § 1965(a)*, it is appropriate to inquire whether the action can be maintained under the general venue statute, *28 U.S.C.S. § 1391(b)*. *Section 1391(b)* provides that venue is proper where the cause of action arose. But where almost all of the acts upon which a plaintiff's Racketeer Influenced and Corrupt Organizations (RICO) counts are predicated occurred outside of the district, none of the RICO claims "arose" in the district.

Civil Procedure > Preliminary Considerations > Venue > Corporations

Civil Procedure > Preliminary Considerations > Venue > General Overview

HN5[] **Venue, Corporations**

Corporate residence, for venue purposes, is defined in *28 U.S.C.S. § 1391(c)* which states that a corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > General Overview

Constitutional Law > ... > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness of Legislation

HN6[] **Freedom of Religion, Free Exercise of Religion**

Thus even if the court were to find that the church is a religious institution, the *free exercise clause of the First Amendment of the United States Constitution* would not immunize it from all common law causes of action alleging tortious activity. Nor does the *First Amendment* exempt religious groups from all regulatory statutes. Whether or not such immunity exists depends, in part, on whether the adjudication of the claim would require a judicial determination of the validity of a religious belief, and, if not, on whether application of the regulation is the least restrictive means of achieving some compelling state interest.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

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

HN7[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

A "pattern of racketeering activity" is defined in the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. § 1961*, as the commission of two or more specific criminal acts, including extortion and mail fraud, within a 10-year period.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

HN8[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

18 U.S.C.S. § 1964(c) states that any person injured in his business or property by reason of a violation of *section 1962* of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

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

HN9[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The theory of plaintiff's complaint ignores the express language of *18 U.S.C.S. § 1962(c)* which provides that it shall be unlawful for any person "employed by or associated with any enterprise to conduct or participate in the conduct of such enterprise's affairs" through a practice of racketeering activity. To be sure, a person under Racketeer Influenced and Corrupt Organizations (RICO) includes a "legal entity", *18 U.S.C.S. §1961(3)*. And an "enterprise" may be either a legal entity or an informal association, *18 U.S.C.S. § 1961(4)*. But RICO quite clearly envisions a relationship between a "person" and an "enterprise" as an element of the offense which *§ 1962(c)* proscribes and for which *18 U.S.C.S. § 1964(c)* would subject the "person" to treble damages.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

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

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

HN10[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

It is only a person, or one associated with an enterprise, not the enterprise itself, who can violate the provisions of the Racketeer Influenced and Corrupt Organizations Act (RICO), *18 U.S.C.S. § 1962(c)*.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

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

Antitrust & Trade Law > Clayton Act > General Overview

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

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

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

HN11[] **Remedies, Damages**

The court believes that *18 U.S.C.S. § 1964(c)* does not extend to claims like those plaintiff asserts. That provision, which is patterned after § 4 of the Clayton Act, *15 U.S.C.S. § 15*, extends a treble damage remedy to any person injured in "business or property" by a violation of *18 U.S.C.S. § 1962*. The courts which have recently considered *§ 1964(c)* have interpreted it narrowly.

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

HN12[] **Private Actions, Racketeer Influenced & Corrupt Organizations**

The court has consistently concluded that *18 U.S.C.S. § 1964(c)* must be interpreted with careful attention to the provision's purpose and have avoided a slavish literalism that would escort into federal court through Racketeer Influenced and Corrupt Organization what traditionally have been civil actions pursued in state courts.

Antitrust & Trade Law > ... > Racketeer Influenced & Corrupt Organizations > Claims > General Overview

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

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

Antitrust & Trade Law > ... > Private Actions > Racketeer Influenced & Corrupt Organizations > General Overview

HN13[] **Racketeer Influenced & Corrupt Organizations, Claims**

The primary purpose of Racketeer Influenced and Corrupt Organization (RICO) is to cope with the infiltration of legitimate businesses, Congress designed a treble damage provision to protect those whose businesses had been infiltrated and damaged by the offenses *18 U.S.C.S. § 1962* proscribes. Although *§ 1962* reaches other types of offenses, to which RICO's other remedies were addressed, *18 U.S.C.S. § 1964(c)* confers standing to bring a civil action only on those within a smaller class.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > General Overview

HN14[] **Freedom of Religion, Free Exercise of Religion**

In order not to risk abridging rights that the *First Amendment of the United States Constitution* protects, courts generally interpret regulatory statutes narrowly to prevent their application to religious organizations. At times, the courts will require "a clear expression of Congress' intent" before subjecting religious organizations to regulatory laws pertaining to other entities Even where clear proof of such intent exists, courts have sometimes construed statutes to exclude religious groups from coverage to avoid "an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the *free exercise clause of the First Amendment*".

Torts > Intentional Torts > Intentional Infliction of Emotional Distress > Elements

Torts > Intentional Torts > Intentional Infliction of Emotional Distress > General Overview

HN15[] **Intentional Infliction of Emotional Distress, Elements**

A cause of action for intentional infliction of emotional distress consists of four elements: (1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct: (2) that the conduct was "extreme and outrageous," was beyond all possible bounds of decency and was "utterly intolerable in a civilized community"; (3) that the actions of defendant were the cause of plaintiff's distress; and (4) that the emotional distress sustained by plaintiff was "severe" and of a nature "that no reasonable man could be expected to endure it".

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

HN16[] Freedom of Religion, Free Exercise of Religion

The *First Amendment of the United States Constitution* protects utterances which relate to religion but does not confer the same license for representations based on other sources of belief or verification. Statements citing science as their source may provide the basis for a fraud action even though the same contention would not support such an action if it relied on religious belief for its authority.

Civil Procedure > ... > Relief From Judgments > Grounds for Relief from Final Judgment, Order or Proceeding > Fraud, Misconduct & Misrepresentation

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

HN17[] Grounds for Relief from Final Judgment, Order or Proceeding, Fraud, Misconduct & Misrepresentation

A claim for relief based upon fraud must include proof that defendant knowingly made a false statement. Proof of those elements-that the statement was false and that defendant knew of its falsity-becomes problematic when the statement relates to religious belief or doctrine.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

Constitutional Law > Bill of Rights > Fundamental Freedoms > General Overview

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > General Overview

HN18[] Freedom of Religion, Free Exercise of Religion

Only beliefs rooted in religion are protected by the *Free Exercise Clause of the First Amendment of the United States Constitution*, which, by its terms, gives special protection to the exercise of religion.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Establishment of Religion

HN19[] Freedom of Religion, Establishment of Religion

Any prima facie case made out for religious status is subject to contradiction by a showing that the beliefs asserted to be religious are not held in good faith by those asserting them, and that forms of religious organization were erected for the sole purpose of cloaking a secular enterprise with the legal protections of religion.

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > Free Exercise of Religion

Constitutional Law > ... > Fundamental Freedoms > Freedom of Religion > General Overview

HN20[] Freedom of Religion, Free Exercise of Religion

Although the *Free Exercise Clause of the First Amendment* protects all religions, old and new, alike once its protection attaches, in determining whether that protection applies courts may require a newer faith to demonstrate that it is, in fact, entitled to protection as a religion.

Counsel: **[**1]** Thomas Greene, Michael J. Flynn, William Sheridan, Thomas Hoffman, Philip Mulvey, Boston, Mass., for plaintiff.

Nancy Gertner, Thomas Shapiro, Silverglate, Gertner & Shapiro, Boston, Mass., for defendants.

Opinion by: GARRITY

Opinion

[*1129] MEMORANDUM OF DECISION AND ORDERS

This case raises a number of questions regarding the jurisdiction of this court, the adequacy of plaintiff's pleadings, and the reach of various federal statutes and constitutional guarantees. The decisions we state below follow a period of procedural maneuvering between the parties. We preface our discussion of the substantive issues presented for decision by reciting relevant portions of that history.

Procedural History

Seeking relief for herself and on behalf of a class she purports to represent, plaintiff La Venda Van Schaick, a resident of Massachusetts, brought this action originally against the Churches of Scientology of California, Nevada, Florida, Washington, D. C., and New York, and against numerous other corporate and individual defendants, on December 13, 1979. Service was made upon the five above-mentioned defendants by delivery of the summons to the director of legal affairs of the Church **[**2]** of Scientology of Boston. The defendant churches filed a motion to dismiss on January 16, 1980. They argued, either then or later, that the court lacked jurisdiction over the defendants, that service had been insufficient, that venue was improper, that the *First Amendment* **[*1130]** barred inquiry into the subject matter of plaintiff's complaint, that the complaint failed to state a claim upon which relief could be granted, that the plaintiff's pleadings were defective and that various parties were improperly named or joined. Plaintiff filed an amended complaint on May 22, 1980 in which she 1) dropped her claims against all defendants except the five aforementioned churches and two individuals, L. Ron Hubbard, the founder of Scientology, and Mary Sue Hubbard, the second-ranking person in the Scientology hierarchy, 2) sought to add an additional party plaintiff, Sylvana Garritano, and 3) asserted additional claims against the remaining defendants. The complaint, as first amended, asserted that defendants were liable to Van Schaick and Garritano individually for fraud (Counts IV-IX), intentional infliction of emotional distress (Counts X-XII), breach of contract (Count XIII) and violation **[**3]** of the Fair Labor Standards Act, *29 U.S.C. §§ 201*, *206* (Count XIV). In addition, the amended complaint sought to state a class action against defendants for treble damages under the civil remedy provision of the Racketeer Influenced Corrupt Organizations Act (RICO), *18 U.S.C. §§ 1961*, *1964* (Counts I-III). Defendants objected to plaintiff's attempt to add a party plaintiff. The court heard oral argument on September 8 and September 10, 1980 and received numerous briefs from the parties regarding plaintiff's motion to amend her complaint and defendants' motion to dismiss. [1.]

Plaintiff moved, on September 4, 1981, for a temporary restraining order and for other injunctive relief to prevent the destruction and dissemination of material allegedly stolen **[**4]** by defendants from the office and trash of plaintiff's attorney and in the possession of the Church of Scientology of California and of defendants' lawyers. Plaintiffs also sought the return of those documents. We heard argument on that contested motion on the same day. At the

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[1.] On August 14, 1981, before disposition of these motions, Garritano moved to substitute counsel. Her affidavit cited "irreconcilable differences" with Van Schaick's attorney, who had been acting as her counsel as well. We allowed that motion on August 21, 1981.

hearing, we ruled that this court had personal jurisdiction over the Church of Scientology of California and issued a protective order from the bench. That order, the essence of which was subsequently written and entered on September 14, 1981, directed defendants' attorneys to produce for plaintiff's attorney's inspection some 800 allegedly stolen documents and directed the Church of Scientology of California not to destroy or disseminate those documents.

On September 8, 1981, plaintiff moved to amend her complaint again and filed a proposed second amended complaint. Plaintiff stated that her previous motion to amend her complaint was withdrawn. The second amended complaint dropped plaintiff's claims against all defendants except the Churches of Scientology of California and Nevada and the two Hubbards. [2.] It also dropped Garritano's claims and changed various assertions presented in the first amended complaint. **[**5]** On September 17, 1981, we directed Garritano to file a pleading seeking either to participate or withdraw from these proceedings. Garritano subsequently advised the court that she had reached a settlement with defendants, which, after review, this court approved. Accordingly, she withdrew from the case, leaving Van Schaick the sole named plaintiff.

The Church of Scientology of California moved on December 24, 1981 that we reconsider our finding of personal jurisdiction over it and that we conduct an evidentiary hearing to resolve that question. We see no point in embellishing upon that ruling at this juncture, but may, in later ruling on the motion to reconsider, discuss further the issues regarding personal jurisdiction.

This case is within the subject matter jurisdiction of this court under *28 U.S.C. § 1332*, *29 U.S.C. § 206* and *18 U.S.C. § 1964(c)*. We decide below some of defendants' motions to dismiss for lack **[**6]** of **[*1131]** personal jurisdiction and insufficiency of service, improper venue, failure to state a claim, and on the grounds that the *First Amendment* bars this action in its entirety.

Motion to Amend Complaint

HN1[] Under *Federal Rule of Civil Procedure 15(a)* a party may amend its pleadings once as a matter of course at any time before a responsive pleading is served. Since defendants' motion to dismiss is not a "responsive pleading", *McDonald v. Hall, 1 Cir. 1978, 579 F.2d 120, 121*, plaintiff was entitled to amend her complaint without leave of court initially. Defendant objected, however, to plaintiff's attempt to add a party-plaintiff without leave of court, arguing that *F.R.C.P. 21*, which requires a court order to add a party, not *F.R.C.P. 15*, governs. And, defendants argued that the addition of Garritano as a plaintiff would fail to satisfy the tests for permissive joinder of *F.R.C.P. 20*. We need not decide that issue, however. Plaintiff Van Schaick now moves the court for leave to file a second amended complaint. She no longer seeks to add Garritano as a party-plaintiff, and Garritano, having reached a settlement with defendants, no longer seeks to intervene. Of course, a motion **[**7]** to file a second amended complaint requires permission of the court. But that permission is to be "freely given when justice so requires" under *Rule 15(a), Fed.R.Civ.P.* Accordingly, we grant plaintiff Van Schaick's motion to amend and consider the complaint filed September 8, 1981 as her current pleading.

Motion to Dismiss

For the purpose of this motion to dismiss, we assume that the following allegations, contained in Van Schaick's second amended complaint, are true.

Beginning in October, 1971, in Las Vegas, Nevada, Bob Harvey, an agent of the California and Nevada Churches represented to Van Schaick that auditing, the central practice of Scientology, [3.] was scientifically guaranteed to

[2.] Plaintiff has not served the individual defendants, L. Ron Hubbard and Mary Sue Hubbard.

[3.] Auditing is a process during which a Scientology employee or agent (Auditor) uses a set of questions and drills, in conjunction with a mechanical device similar to a lie detector (the Hubbard E-meter) to elicit personal information from the subject, for the alleged purpose of psychotherapy. In order to obtain auditing, the subject signs a contract with the Church. The auditor asks questions which locate "Buttons"-a conscious or subconscious indication or response. To help locate "buttons", the auditor uses have certain beneficial physical, mental, and social consequences for the plaintiff. Similar claims were shown to her in books and documents written by L. Ron Hubbard and disseminated to Nevada by the California Church through the mail. In March of 1972, in Nevada, Harvey also represented that auditing is confidential; that Scientology is a "law-abiding, religious, scientific organization," and that L. Ron Hubbard is a nuclear physicist with degrees from George Washington University and Princeton. **[**8]**

Based upon these representations, plaintiff paid $ 575 to the Nevada and California Churches for books and auditing courses between October 1971 and March 1972, and continued to purchase auditing services until January 1974. During this period, Van **[**9]** Schaick worked for the Nevada and California Church full time. She left Scientology in 1974.

During the summer of 1975, the plaintiff was contacted in Las Vegas, Nevada, by her auditor, Pam Bevan, who warned her that unless she returned to the Nevada Church, she would be harassed by the Church and its adherents. [4.] During the same period, she **[*1132]** was locked in a furnitureless room for a period of two weeks against her will at the offices of the Nevada Church in Las Vegas, and was audited for alleged "crimes" committed against the Church. In response she paid approximately $ 3,000 to the Church and, pursuant to an order to "disconnect" from her husband, obtained a divorce. In April of 1977, the plaintiff went to Clearwater, Florida, for additional auditing, and, in April through May of that year, paid $ 5,000 to the Florida and California Churches for new courses, books, and auditing. Returning to Nevada in April 1977, Van Schaick remained with the Church until March 1979, when she was declared a "suppressive person" and fled to Boston, in fear of harassment from the Church.

[10]** In Boston, Massachusetts, on or about September, 1979, the Nevada, California, and Boston Churches and L. Ron Hubbard, acting in concert, attempted to dissuade plaintiff from pursuing her legal remedies by relaying and eventually disclosing her confidential auditing information to her attorney in Boston, by sending Scientologists from New York and Nevada to threaten her, and by causing the Boston Church to harass her.

Jurisdiction under the Conspiracy Theory

The plaintiff here claims that this court has personal jurisdiction over the corporate defendants under the conspiracy theory of jurisdiction. The theory, which evolved in a number of cases alleging civil conspiracies, is based upon the notion that the acts of a conspirator in furtherance of a conspiracy may be attributed to the members of the conspiracy for establishing jurisdiction over the person. ***HN2***[] While the mere presence of a conspirator within the forum state is not sufficient to permit personal jurisdiction over the non-resident co-conspirators, certain additional connections between the conspiracy and the forum state will support the exercise of jurisdiction. These additional connections exist where (1) substantial acts **[**11]** in furtherance of the conspiracy are performed in the forum state and (2) the co-conspirator knew or should know that the acts would be performed there. *Leasco Data Processing Equipment Corp. v. Maxwell, S.D.N.Y., 1970, 319 F. Supp. 1256*, aff'd in part, rev'd and remanded in part, *468 F.2d 1326* (2 Cir., 1972), on remand, *68 F.R.D. 178 (1974)*; *Gemini Enterprises, Inc. v. WFMY Television Corp., M.D.N.C., 1979, 470 F. Supp. 559, 564*, and cases cited therein.

At the outset we note that not all federal courts considering the question have accepted the conspiracy theory as a basis for asserting personal jurisdiction. See *I. S. Joseph Co. v. Mannesmann Pipe and Steel Corp., D.Minn., 1976,*

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a Hubbard E-meter, a device which measures skin voltage. During auditing, the auditor pursues lines of questioning on highly personal subjects ("rundowns") to locate the subject's "buttons". The auditor then makes a written record of the disclosures made.

4. Plaintiff alleges that it is Church policy to harass ex-members, and that this policy is explicitly authorized in the "Fair Game Doctrine" which states, inter alia:

"Every S. P. (Suppressive Person) Order Fair Game. May be deprived or injured by any means by any Scientologist. May be tricked, sued, or destroyed."

For purposes of the pending motions, we ignore defense counsel's representation at oral argument that the Fair Game Doctrine had been misconstrued and was repealed in 1968.

408 F. Supp. 1023. Moreover, those federal courts which have exercised jurisdiction under the conspiracy rationale have done so on the basis of the long-arm statutes applicable in the forum states, *Mandelkorn v. Patrick et al., D.D.C., 1973, 359 F. Supp. 692*; *Ghazoul v. International Management Services, Inc., S.D.N.Y., 1975, 398 F. Supp. 307*; and no Massachusetts decision has ever adopted the theory. We note, too, that the Court of Appeals for the First Circuit has recently declined to decide whether the **[**12]** Massachusetts long-arm statute contemplates the conspiracy theory. *Glaros v. Perse, 1 Cir., 1980, 628 F.2d 679, 682 n. 4*.

As the formulation stated above makes clear, plaintiff's broad, general allegations regarding the conspiratorial nature of the Scientology movement, even if proved, would not warrant the assertion of jurisdiction under the conspiracy theory. The theory gives this court jurisdiction only over any claims which arise from acts within the commonwealth. As the Court of Appeals for the First Circuit recently observed in *Glaros v. Perse, supra*, courts which have recognized the conspiracy theory have often required the plaintiff "to pinpoint a connection between the out-of-state defendants and specific acts" in the forum state.

Although the plaintiff here does pinpoint some connection between the out-of-state defendants and occurrences in Massachusetts, she fails to submit detailed factual allegations connecting each of the nonresident **[*1133]** defendants with events occurring in this state. Although the courts are divided concerning the necessity of making such a showing, see discussion in *McLaughlin v. Copeland, D.Md., 1977, 435 F. Supp. 513, 529-33*, and the question **[**13]** has not been resolved in this circuit, *Perse, supra at 682 n.4*, we observe that the plaintiff's affidavit differs from the allegations in her complaint with respect to the nature and extent of each church's participation in the alleged conspiracy to harass her in Massachusetts, and conclude that, on the record before us, Van Schaick's reliance on the conspiracy theory is based on nothing but speculation and conjecture on the essential issue of connecting each of the corporate defendants with acts or transactions within the forum state. She simply hopes "somehow and somewhere to find enough facts to create grounds for jurisdiction." Cf. *Socialist Workers Party v. Attorney General of the United States, S.D.N.Y., 1974, 375 F. Supp. 318, 325*. We therefore conclude that there is an insufficient factual foundation for the assertion of personal jurisdiction under the conspiracy theory in this case.

Venue

The defendant churches also argue that venue is improper in this district. The controlling venue statutes are *18 U.S.C. § 1965* for the RICO claims and *28 U.S.C. § 1391(b)* and *§ 1391(c)* for the other claims plaintiff asserts. [5.]

[14]** Venue under RICO

Title ***HN3***[] *18 U.S.C. § 1965(a)* provides that venue is proper for RICO claims where a defendant "resides, is found, has an agent, or transacts his affairs." For a corporate defendant in a private action under this section to be "found" in the district within the meaning of this section, it must be present in the district by its officers and agents carrying on the business of the corporation. *King v. Vesco, N.D.Cal., 1972, 342 F. Supp. 120*. Since the California Church is carrying on the business of the corporation in this district, both directly, through its own agents, and indirectly, through the Boston Church, venue is proper in this district under *18 U.S.C. § 1965*, as to the California Church.

It is unclear whether, or in what respects, Van Schaick intends to include the Nevada church as a defendant in her RICO counts, but, in any event, we conclude that venue is improper here with respect to that defendant. Since that defendant does not meet the test for corporate residence enunciated in *King v. Vesco, supra*, venue is improper as to it in this district under *18 U.S.C. § 1965(a)*. Nor is venue proper here as to this defendant under the general

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[5.] Since the Fair Labor Standards Act does not contain a special venue provision, the general venue statute controls actions under the Act. *Goldberg v. Wharf Constructers, N.D.Ala., 1962, 209 F. Supp. 499, 501*.

venue provision, *28 [**15] U.S.C. § 1391(b)*. [6.] Therefore, the RICO claims, insofar as they pertain to the Nevada Church, must be dismissed.

Venue for Diversity and Fair Labor Standards Act Claims

Since this is a court action in which the court's subject matter jurisdiction does not rest solely on diversity of citizenship, the applicable venue provision for the remaining counts **[**16]** is *28 U.S.C. § 1391(b)*. Under these circumstances it provides that venue is proper "only in the judicial district where all defendants reside, or in which the claim arose .... ***HN5***[] Corporate residence, for venue purposes, is defined in *28 U.S.C. § 1391(c)* which states:

> **[*1134]** A corporation may be sued in any judicial district in which it is incorporated or licensed to do business or is doing business, and such judicial district shall be regarded as the residence of such corporation for venue purposes.

Since we have held that the California Church conducts business here continuously and systematically, both directly and through the Boston Church, it is "doing business" in this district within the meaning of *28 U.S.C. § 1391(c)*. Therefore, venue is proper here for the California Church, the only corporate defendant over which we have personal jurisdiction with respect to the diversity and Fair Labor Standards Act claims. [7.]

[17]** Motion to Dismiss for Failure to State a Claim

Having decided that this court has jurisdiction over the Church of California and that venue is proper in this district, we turn now to the merits of defendant's motion to dismiss each count of plaintiff's complaint. The defendant churches argued that plaintiff's first amended complaint must be dismissed because the doctrines and actions alleged as the basis for each cause of action are religious beliefs and practices. [8.] The plaintiff, on the other hand, urges that although the Church of California claims to be a religious institution, it is, in fact, part of an organized commercial and criminal undertaking engaged in fraud and that, therefore, none of the *First Amendment* protections applicable to religions should be accorded defendant.

[18]** Quite clearly, the extent to which the religious clauses of the *First Amendment* protect the Church of Scientology is a question relevant to this case. But a review of plaintiff's pleading reveals that the court need not reach the *First Amendment* issues to rule on defendant's motion to dismiss some of the counts. Some of plaintiff's counts can be, and are, dismissed on grounds other than the *First Amendment*.

[6.] The special venue provision found in *18 U.S.C. § 1965* is not intended to be exclusive, but is intended to liberalize the existing venue provisions. Therefore, ***HN4***[] where venue is improper under *§ 1965(a)*, it is appropriate to inquire whether the action can be maintained under the general venue statute, *28 U.S.C. § 1391(b)*. *Farmers Bank of State of Del. v. Bell Mortg. Corp., D.Del., 1978, 452 F. Supp. 1278, 1280-1281*. *Section 1391(b)* provides that venue is proper where the cause of action arose. But since almost all of the acts upon which plaintiff's RICO counts are predicated occurred outside of Massachusetts, none of her RICO claims "arose" in this district.

[7.] The California Church argues that even if its own business activities here are sufficiently extensive to meet the venue requirements of *28 U.S.C. § 1391(c)*, venue for the entire action is still improper in this district because the venue requirements of *28 U.S.C. § 1391(b)* have not been met with respect to the individual defendants. But the defense of improper venue is personal to the party to whom it applies, and a resident defendant may not avail himself of a dismissal or transfer due to improper venue over a nonresident, unless the latter is an indispensable party. *Camp v. Gress, 1919, 250 U.S. 308, 316, 39 S. Ct. 478, 481, 63 L. Ed. 997*; *Vance Trucking Co. v. Canal Insurance Co., 4 Cir., 1964, 338 F.2d 943, 944*; *Goldberg v. Wharf Constructers, N.D.Ala., 1962, 209 F. Supp. 499, 503-504*.

[8.] Although defendants have not addressed themselves to plaintiff's second amended complaint, we assume, based on defendants' briefs and oral argument, that they would raise the same objections to plaintiff's most recent pleading.

On the other hand, in some instances even the *First Amendment*, were it to apply, would not insulate a defendant religious organization or its members from liability. The Supreme Court has recognized that the *First Amendment's* protection "... embraces two concepts,-freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society." *Cantwell v. Connecticut, 1940, 310 U.S. 296, 303-304, 60 S. Ct. 900, 903, 84 L. Ed. 1213*. ***HN6***[] Thus even if we were to find that the California Church is a religious institution, the *free exercise clause of the First Amendment* would not immunize it from all common law causes of action alleging tortious activity. *Turner v. Unification Church,* ***[**19]*** *D.R.I., 1978, 473 F. Supp. 367, 371*, aff'd, *602 F.2d 458 (1979)*. Nor does the *First Amendment* exempt religious groups from all regulatory statutes. See, e.g., United States v. Lee, -- - U.S. -- , *455 U.S. 252, 102 S. Ct. 1051, 71 L. Ed. 2d 127, 1982*; *Heffron v. International Society for Krishna Consciousness, 1981, 452 U.S. 640, 101 S. Ct. 2559, 69 L. Ed. 2d 298*; *Prince v. Massachusetts, 1944, 321 U.S. 158, 64 S. Ct. 438, 88 L. Ed. 645*; *Reynolds v. United States, 1878, 98 U.S. 145, 25 L. Ed. 244*; *The Founding Church of Scientology of Washington v. United States, 1969, 133 U.S.App.D.C. 229, 409 F.2d 1146*; **[*1135]** *Mitchell v. Pilgrim Holiness Church Corp., 7 Cir. 1954, 210 F.2d 879*, cert. den. 1954, *347 U.S. 1013, 74 S. Ct. 867, 98 L. Ed. 1136*. Whether or not such immunity exists depends, in part, on whether the adjudication of the claim would require a judicial determination of the validity of a religious belief, *United States v. Ballard, 322 U.S. 78, 64 S. Ct. 882, 88 L. Ed. 1148* and, if not, on whether application of the regulation "is the least restrictive means of achieving some compelling state interest." *Thomas v. Review Board of the Indiana Employment Security Division,* ***[**20]*** *1981, 450 U.S. 707, 101 S. Ct. 1425, 67 L. Ed. 2d 624*. See also *Sherbert v. Verner, 1963, 374 U.S. 398, 406, 83 S. Ct. 1790, 1795, 10 L. Ed. 2d 965*; *West Virginia State Board of Education v. Barnette, 1943, 319 U.S. 624, 639, 63 S. Ct. 1178, 1186, 87 L. Ed. 1628*; *Cantwell v. Connecticut, 1940, 310 U.S. 296, 304, 60 S. Ct. 900, 903, 84 L. Ed. 1213*. Causes of action based upon some proscribed conduct may, thus, withstand a motion to dismiss even if the alleged wrongdoer acts upon a religious belief or is organized for a religious purpose.

We discuss first those counts which we dismiss on grounds independent of the *First Amendment*. We then turn to those claims against which the *First Amendment* affords no immunity.

RICO Claims

The plaintiff brings Counts I-III as class action claims for treble damages under the civil remedy provisions of RICO, 18 U.S.C. *§ 1964(c)*, [9.] on her own behalf and on behalf of all those who have paid money or property to any Church of Scientology, its employees or agents, "including defendants," as a result of violations of *§ 1962* of the RICO statute. The subsection of the Act on which plaintiff apparently [10.] relies prohibits any person (including a corporation) **[**21]** employed by or associated with any interstate enterprise, from conducting the enterprise's affairs through a pattern of racketeering activity, *18 U.S.C. § 1962(c)*. ***HN7***[] A "pattern of racketeering activity" is defined as the commission of two or more specific criminal acts, including extortion and mail fraud, within a ten-year period, *18 U.S.C. § 1961*.

We note, at the outset, the recent opinion of the Supreme Court in *United States v. Turkette, 1981, 452 U.S. 576,* ***[**22]*** *101 S. Ct. 2524, 69 L. Ed. 2d 246* which accorded RICO a more expansive reading than had some earlier lower courts. Although the Court observed "that the primary purpose of RICO is to cope with the infiltration of legitimate businesses", *Turkette, supra 101 S. Ct. at 2533*, it held that "enterprise" as defined in *§ 1961(4)* and as used in 1962(c) refers to both legitimate and illegitimate enterprises. Thus, after Turkette, it is clear that RICO applies to persons who conduct the activities of a wholly illegitimate enterprise (whose activities affect interstate

9. ***HN8***[] *18 U.S.C. § 1964(c)* states:

Any person injured in his business or property by reason of a violation of *section 1962* of this chapter may sue therefor in any appropriate United States district court and shall recover threefold the damages he sustains and the cost of the suit, including a reasonable attorney's fee.

10. Plaintiff's complaint itself fails to specify which subsection of *§ 1962* defendants are alleged to have violated; however, the memoranda of law filed subsequently have made it clear that she predicates her claim on *§ 1962(c)*.

commerce) through a pattern of racketeering activity. Although Turkette removes one potential issue from our consideration, it does not establish that RICO covers the facts and allegations of this case. Indeed, we hold that plaintiff has failed to state a claim under RICO.

HN9[] The theory of plaintiff's complaint ignores the express language of 1962(c) which provides that it shall be unlawful for any person "employed by or associated with any enterprise to conduct or participate … in the conduct of such enterprise's affairs …" through a practice of racketeering activity. To be sure, a person under RICO includes a "legal entity", **[**23]** *18 U.S.C. 1961(3)*. And an "enterprise" may be either a legal entity or an informal association, *18 U.S.C. 1961(4)*, as it was in Turkette. But RICO **[*1136]** quite clearly envisions a relationship between a "person" and an "enterprise" as an element of the offense which 1962(c) proscribes and for which 1964(c) would subject the "person" to treble damages.

Plaintiffs fail to specify this relationship. They several times refer to the Church of Scientology as an enterprise. They seem also to treat the Church of Scientology as the "person" from whom they seek treble damages. The Church of Scientology cannot, at once, be both the associated person and the enterprise. **HN10**[] It is only a person, or one associated with an enterprise, not the enterprise itself, who can violate the provisions of the section.

Moreover, **HN11**[] we believe that *§ 1964(c)* does not extend to claims like those plaintiff asserts. That provision, which is patterned after § 4 of the Clayton Act, *15 U.S.C. § 15*, extends a treble damage remedy to any person injured in "business or property" by a violation of *§ 1962*. Little legislative history exists on the clause. But courts which have recently considered *§ 1964(c)* have interpreted **[**24]** it narrowly. See *Adair v. Hunt International Resources Corp., N.D.Ill.1981, 526 F. Supp. 736, 746*; *Waterman Steamship Corp. v. Avondale Shipyards, Inc., E.D.La., 527 F. Supp. 256, 1981* (available on LEXIS, Genfed library, Dist. file); *Kleiner v. First National Bank of Atlanta, N.D.Ga., 526 F. Supp. 1019, 1981*; *Landmark Savings & Loan v. Loeb Rhoades, Hornblower & Co., E.D.Mich., 527 F. Supp. 206, 1981*, (available on LEXIS, Genfed library, Dist. file). **HN12**[] They have consistently concluded that *§ 1964(c)* must be interpreted with careful attention to the provision's purpose and have avoided a slavish literalism that would escort into federal court through RICO what traditionally have been civil actions pursued in state courts. See *Adair v. Hunt International Resources Corp., supra*; *Waterman Steamship Corp. v. Avondale Shipyards Inc., supra*; *Kleiner v. First National Bank of Atlanta, supra*; *Landmark Savings & Loan v. Loeb Rhoades, Hornblower & Co., supra*; *Salisbury v. Chapman, N.D.Ill., 527 F. Supp. 577, 1981*, (available on LEXIS, Genfed library, Dist. file). Just as in the antitrust context the Supreme Court has held that the Clayton Act's treble damage provisions are available to remedy **[**25]** only "injury of the type the antitrust laws were intended to prevent," *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 1977, 429 U.S. 477, 489, 97 S. Ct. 690, 697, 50 L. Ed. 2d 701* so, too, *§ 1964(c)* addresses only a specific sort of injury arising out of racketeering. *Landmark Savings & Loan v. Loeb Rhoades, Hornblower & Co., supra*; *North Barrington Development, Inc. v. Richard Fanslow, 547 F. Supp. 207 (1980)* (available on LEXIS, Genfed library, Dist. file). Indeed, it is telling that whereas RICO's other criminal and civil penalties apply generally to violations of *§ 1962*, the remedy which *§ 1964(c)* prescribes extends only to persons who suffer a specific injury, viz., to their business or property.

Since, as the Court observed in Turkette, "**HN13**[] the primary purpose of RICO is to cope with the infiltration of legitimate businesses, supra *101 S. Ct. at 2533*, Congress designed a treble damage provision to protect those whose businesses had been infiltrated and damaged by the offenses *§ 1962* proscribes. Although *§ 1962* reaches other types of offenses, see, e.g., *United States v. Turkette, supra*, to which RICO's other remedies were addressed, *§ 1964(c)* confers standing to bring a civil **[**26]** action only on those within a smaller class. *Salisbury v. Chapman, supra* at n. 4. The cases in which courts have held that plaintiffs have, or but for some other defect could have, stated a claim under *§ 1964(c)* have involved business persons engaged in conventional commercial activity who allegedly suffered commercial injury. For instance, in *Hellenic Lines Ltd. v. O'Hearn, S.D.N.Y.1981, 523 F. Supp. 244*, a shipping firm whose employees had paid and received bribes in connection with a scheme to bill it excessive amounts for the purchase of business related materials and services was held to state a RICO claim. Similarly, a teleprompter company that sued various defendants, including the city council and a business rival, alleging that the rival had received a cable television franchise by exercising **[*1137]** corrupt influence on the council clearly suffered the type of business injury RICO addresses. *Teleprompter of Erie, Inc. v. City of Erie, 537 F. Supp. 6 (W.D.Pa. 1981)* Erie (available on LEXIS, Genfed library, Dist. file) (RICO count dismissed on other grounds). Judge Skinner recently held that a complaint stated a civil RICO cause of action where a company alleged that **[**27]** it suffered business injury through defendants' acquisition of an interest in it through racketeering activity. Spencer Companies, Inc. v. Agency Rent-A-Car, Inc., D.Mass., November 17, 1981, Fed. Sec. L. Rep. (CCH) P98,361, Civil Action 81-2097-S. See also *Parnes v. Heinold Commodities, Inc., N.D.Ill., 1980, 487 F. Supp. 645* (RICO civil claim stated where plaintiff alleges defendant's racketeering acts caused him loss through commodities trading). We conclude that these cases reflect proper applications of *§ 1964(c)* to situations in which a defendant's racketeering caused injury to plaintiff in a business activity. [11.] The injuries plaintiff alleges here are plainly of a different nature. Count I apparently seeks damages for money the plaintiff class spent in purchasing literature and auditing. Such a claim goes beyond the theory of *§ 1964(c)*. Count II alleges no injury to business or property but rather that plaintiff had to flee about the United States and suffered emotional distress. Claims can be brought for such damages, but not under RICO. Finally, the various types of damages Count III alleges do not constitute commercial injury.

[28]** To be sure, RICO uses the disjunctive in referring to "business or property." Yet we believe that phrase must be read with the statute's primary purpose-to protect legitimate businesses from infiltration by racketeers-in mind. Thus, in construing "property" courts should be sensitive to the statute's commercial orientation and to Congress' obvious intention to restrict the plaintiff class. We do not believe Congress intended *§ 1964(c)* to afford a remedy to every consumer who could trace purchase of a product to a violation of *§ 1962*. See *Salisbury v. Chapman, supra*; *North Barrington Development, Inc. v. Fanslow, supra.* Such an interpretation would open the federal courts to frequent RICO treble damage claims by federalizing much consumer protection law and by inviting plaintiffs to append RICO claims for consumer fraud to nonfederal claims thereby achieving treble damage recovery and a federal forum. Yet the legislative history contains no hint that Congress intended RICO as a remedy for private plaintiffs alleging consumer fraud. Cf. *Adair v. Hunt International Resources Corp., supra at 747* (s 1964 not intended as remedy for private plaintiffs alleging securities fraud or misrepresentations **[**29]** in real estate transactions). Absent a clear statement that Congress intended such a result, we believe courts should confine *§ 1964(c)* to business loss from racketeering injuries. Under this analysis, the RICO claims before us here clearly cannot survive. [12.]

[30]** **[*1138]** Further, two of plaintiff's three RICO counts are deficient in additional respects. Count I, which is based on alleged violations of the mail fraud statute, *18 U.S.C. 1341*, apparently intends to claim a violation of all sections of *18 U.S.C. § 1962*. Although plaintiff's complaint is not entirely clear on this point, plaintiff predicates her class action solely on Count I, which alleges that defendants violated RICO by failing to conform to the requirements of the decree in *United States v. Article or Device, D.D.C.1971, 333 F. Supp. 357*, ("Affidavit of Michael J. Flynn in Opposition to Affidavit of Nancy Gertner and in Support of Plaintiff's Motion for Protective Order," filed December 8, 1981, p. 6). Plaintiff relies on defendants' alleged non-compliance with orders entered against the Washington, D.C. Church in the Articles or Device case to establish both the fraudulent nature of the

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[11.] Judge Duffy's opinion in *Hellenic Lines, Ltd. v. O'Hearn, supra*, is not to the contrary. He rejected as "specious" the argument that a company that had paid allegedly reasonable prices, though ones inflated by bribes and kickbacks, had not suffered an injury which *§ 1964(c)* addresses since it was "not hurt competitively by the RICO violation." Ibid. at 248. We subscribe to Judge Duffy's conclusion that a RICO violation does not depend upon the existence of a competitive injury. Although ***antitrust law*** proscribes and remedies certain injuries to competition, RICO does not so directly seek to protect competition. As Judge Churchill observed, "competitive injuries and racketeering enterprise injuries would frequently overlap, but they are not necessarily the same." *Landmark Savings v. Loeb Rhoades, Hornblower & Co., supra.* *Section 1964(c)* does not require a "competitive injury" but rather, in part, a "racketeering enterprise injury" and a plaintiff who has experienced commercial harm resulting from it.

[12.] We do not reach defendants' contention that civil liability under *§ 1962(c)* and *§ 1964(c)* must be preceded by prior criminal convictions of two criminal acts, except to note that the opposing citations relied on by plaintiff, *United States v. Malatesta, 5 Cir. 1978, 583 F.2d 748*, cert. den., 1979, *440 U.S. 962, 99 S. Ct. 1508, 59 L. Ed. 2d 777*, and *United States v. Frumento, 3 Cir. 1977, 563 F.2d 1083*, cert. den., 1978, *434 U.S. 1072, 98 S. Ct. 1256, 55 L. Ed. 2d 775*, are distinguishable in their factual situations and holdings. While it is difficult for us to conclude that Congress, in using the words "indictable" and "punishable" contemplated that civil liability could result without involvement of the criminal process, other courts have done so.

materials which were "disseminated" and to show an intent to defraud. Given the factual differences between that case and the instant suit, and considering the different legal standards applicable under the criminal mail fraud statute at issue here and the civil Food, Drug & Cosmetic **[**31]** Act, at issue there, we find Van Schaick's reliance on that litigation misplaced.

Contrary to plaintiff's assertion, the "representations made to plaintiffs in paragraphs 46 and 47" [13.] (Plaintiff's Second Amended Complaint, p. 28, P 52) were not adjudged to be fraudulent in *United States v. Article or Device, Etc., D.D.C.1971, 333 F. Supp. 357*. Judge Gesell did use the word "fraud" in the opinion, but the case held only that the representations about the E-meter there at issue violated the Food, Drug and Cosmetic Act for mislabelling, a holding that did not require a finding of "fraud" but only of "falsity."

It is unclear from the face of plaintiff's complaint what RICO violation Count III intends to allege. Plaintiff alleges that defendants have committed various criminal acts within the purview of *18 U.S.C. § 1961(1)*, the section that defines racketeering activity. Commission of these criminal acts, the complaint alleges, contradicted representations **[**32]** defendants made, and plaintiff relied upon, concerning the nature of Scientology, viz., that it was "a non-profit, educational, scientific, religious, law-abiding organization." (Plaintiff's Seconded Amended Complaint, p. 34, P 65). Although Count III alleges in conclusory language that various criminal acts were committed against opponents of Scientology, it fails to identify any specific predicate acts or to establish that they were committed within the time period set out in *18 U.S.C. § 1961(5)*. Even ignoring these deficiencies and assuming for purposes of argument only that Count III does properly allege a pattern of racketeering activity and a violation of *§ 1962*, Count III still fails to suggest any way in which plaintiff was injured in her business or property by these alleged violations of *18 U.S.C. § 1962(c)*, as *18 U.S.C. § 1964(c)* requires. Plaintiff does not claim that the alleged acts-obstruction of justice and criminal investigations, burglary, infiltration of offices, etc. caused her any harm. Rather, she, in effect, attempts to recast her fraud and contract actions, which are discussed below, as a RICO claim and thus gain the benefit of RICO's treble damage provisions. **[**33]** Yet RICO is not broad enough to embrace every fraud action, *Adair v. Hunt International Resources Corp., supra at 747*; Waterman Steamship Corp. v. Avondale Shipyards, Inc., et al., supra; Salisbury et al. v. Chapman et al., supra; *North Barrington Development, Inc. v. Fanslow, supra*, and surely this is one that is beyond its reach. [14.]

Although we dismiss plaintiff's RICO counts on the grounds stated above, we add that these counts would encounter further **[*1139]** objection if the court should find Scientology entitled to protection as a religion. ***HN14***[] In order not to risk abridging rights which the *First Amendment* protects, courts generally interpret regulatory statutes narrowly to prevent their application to religious organizations. **[**34]** At times, they will require "a clear expression of Congress' intent" before subjecting religious organizations to regulatory laws pertaining to other entities, *N.L.R.B. v. Catholic Bishop of Chicago, 1979, 440 U.S. 490, 507, 99 S. Ct. 1313, 1322, 59 L. Ed. 2d 533*. Even where clear proof of such intent exists, courts have sometimes construed statutes to exclude religious groups from coverage to avoid "an encroachment by the State into an area of religious freedom which it is forbidden to enter by the principles of the *free exercise clause of the First Amendment*." *McClure v. Salvation Army, 5 Cir. 1972, 460 F.2d 553, 560*, cert. den. 1972, *409 U.S. 896, 93 S. Ct. 132, 34 L. Ed. 2d 153*.

Intentional Infliction of Emotional Distress

(Counts X and XII)

Two of plaintiff's counts alleging intentional infliction of emotional distress fail to state a claim. Plaintiff alleges that, contrary to assurances that auditing would remain confidential, the corporate defendants systematically disclosed the auditing information obtained from subjects to control and manipulate them and that the contents of her own

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13. Plaintiff's complaint does not contain a paragraph 47.

14. For the reasons stated above, we dismiss plaintiff's three RICO counts for failure to state a claim upon which relief can be granted. Since plaintiff predicates her class action on one or more of these RICO counts, our ruling eliminates the class claims from this case.

auditing file were disclosed (Count X). She alleges further that the defendants intentionally **[**35]** subjected her to emotional distress through the policy of Disconnect (Count XII).

HN15[] A cause of action for intentional infliction of emotional distress consists of four elements: "(1) that the actor intended to inflict emotional distress or that he knew or should have known that emotional distress was the likely result of his conduct, … (2) that the conduct was "extreme and outrageous,' was "beyond all possible bounds of decency' and was "utterly intolerable in a civilized community,' … (3) that the actions of the defendant were the cause of the plaintiff's distress, … and (4) that the emotional distress sustained by the plaintiff was "severe' and of a nature "that no reasonable man could be expected to endure it.' " *Agis v. Howard Johnson Co., 1976, 371 Mass. 140, 144-145, 355 N.E.2d 315*, citing Restatement (Second of Torts) § 46, comments (d), (i), (j).

Plaintiff does not state facts sufficient to support her claim with respect to Counts X and XII of her complaint. Count X alleges that defendants have engaged in a "systematic course of conduct" to disclose information received through auditing, and that such a scheme has caused plaintiff severe emotional distress. Yet Count **[**36]** X alleges no specific disclosures, and the only one the complaint specifies is a letter to plaintiff's attorney.

With respect to Count XII, plaintiff alleges only that the Church exhorted her to sever family and marital ties and to depend solely on the Church for emotional support. Neither of these alleged courses of conduct constitutes the kind of extreme and outrageous action which will support a claim for intentional infliction of emotional distress. Cf. *Agis, supra* (irrational firing of employee with overt implication of unjustified accusation of theft); *Boyle v. Wenk, 1979, 378 Mass. 592, 392 N.E.2d 1053* (private investigator's harassing phone calls and visits to woman recently released from hospital); *George v. Jordan Marsh Co., 1971, 359 Mass. 244, 268 N.E.2d 915* (harassing debt collection practices). They are similar to the demands for single-minded loyalty and purpose that have characterized numerous religious, political, military and social movements over the ages.

Contract and Fair Labor Standards Act

(Counts XIII and XIV)

Plaintiff fails to state a claim for common law breach of contract and for violation of the Fair Labor Standards Act, *29 U.S.C. §§ 201*, *206*. Her contract **[**37]** claim essentially recasts her fraud allegations, discussed below, in contract terms. The terms of the alleged contract are entirely too **[*1140]** vague to constitute an enforceable agreement. The time of the alleged agreement is not stated, and the parties are unspecified. The only objectively determinable promise alleged is that plaintiff would receive auditing, which she did, in fact, receive. Although we would imply a common law contract if suitable allegations were before us, we will not invent one out of the imprecise and conclusory allegations in this complaint.

Similarly, the complaint fails to state a claim under the Fair Labor Standards Act (Count XIV). Count XIV is stated in words that defy deciphering. It alleges that defendants "fraudulently induced plaintiff to work for defendants through the fraudulent representations contained in preceding paragraph." Yet "preceding paragraph" contains no representations. Count XIV further rests plaintiff's claim on "said violations set forth in paragraph 121," a paragraph that merely realleges the complaint's preceding paragraphs. We conclude, from plaintiff's unclear statement of her Fair Labor Standards Act claim and from the **[**38]** other allegations in her complaint, that her services were provided primarily in exchange for auditing, rather than monetary compensation. Even considering the allegations, scattered through her pleading, that she was promised some compensation for her services, her complaint, read as a whole, fails to allege facts sufficient to show that she was a "person whose employment contemplated compensation," *Walling v. Portland Terminal Co., 1947, 330 U.S. 148, 152, 67 S. Ct. 639, 641, 91 L. Ed. 809*, that an employer-employee relationship was ever established between her and the California Church, see *Huntley v. Gunn Furniture Co., W.D.Mich., 1948, 79 F. Supp. 110, 111*, or that the labor she provided related to commerce or the production of goods for commerce.

Even if plaintiff properly stated a claim under the Fair Labor Standards Act, the bulk of it would be time-barred. A court may dismiss an action owing to the running of a statute of limitation if the defect appears on the face of the complaint. Title 29, § 255(a) prescribes a three-year limitation for willful violations of FLSA, and a two-year limitation otherwise. Under either limitation, the bulk of plaintiff's claim would be barred. **[**39]** Moreover, although plaintiff provides a summary of dates in paragraph 128, her complaint contains no allegations regarding work performed for defendant other than from March 1972 to January 1974.

Because this count of plaintiff's complaint fails to state a claim upon which relief can be granted, we need not defer decision on it until resolution of whether Scientology is entitled to protection as a religion under the *First Amendment*. [15.]

Claims Not Barred by *First **[**40]** Amendment*

Some counts of plaintiff's complaint state proper claims the adjudication of which would not be barred by the *First Amendment*.

Count VI sets forth several purely secular representations allegedly made to Van Schaick by defendant's agents. In essence, this count alleges that defendant promised that Van Schaick would receive benefits, including training, room and board, and various work and research opportunities, after undergoing a period of auditing. These representations, the complaint alleges, were fraudulent. Even if Scientology were entitled to protection as a religion, adjudicating the claims this count asserts would not force this court to consider the truth or falsity of religious doctrine, the sort of inquiry Ballard forecloses.

With respect to this claim, however, the complaint presently falls short of **[*1141]** the specificity *F.R.C.P. 9(b)* clearly requires of a claim for fraud. The time, place, manner and content of the alleged misrepresentations are not alleged with sufficient particularity to meet the requirements of the rule. Moreover, plaintiff charges a civil conspiracy to defraud, and it is necessary to plead fraudulent conspiracy with enough specificity **[**41]** to inform multiple defendants of facts forming the basis of the conspiracy charge. National Egg Co. v. Bank Leumi le- *Israel B.M., N.D. Georgia, 1980, 504 F. Supp. 305, 308*. Such allegations must "delineate among the defendants (as to) their participation or responsibilities" in making the statements which are the subject of the suit, *Lerman v. ITB Management Corp., D.Mass., 1973, 58 F.R.D. 153, 155 n.2*. Conspiracies described in sweeping and general terms cannot serve as the basis for a cause of action, and may be dismissed. *Kadar Corp. v. Milbury, 1 Cir., 1977, 549 F.2d 230, 233*. But because at least some of the misrepresentations alleged in Count VI do appear to be secular on their face, and because plaintiff's pleading burden is extraordinarily heavy due to the *First Amendment* implications of this litigation, she shall be given an opportunity to amend this count of her complaint, provided that any such amendments be filed within 15 days of the date of this Memorandum of Decision and Orders on Various Motions.

It is less clear that Count V of plaintiff's complaint can be decided independently of *First Amendment* considerations. It alleges that defendants fraudulently represented **[**42]** that auditing was scientifically guaranteed to provide an array of benefits, including a higher I.Q. for Van Schaick and her children, immunity from various illnesses, cures for various ailments and better eyesight.

Plaintiff's earlier complaint used the word "would" instead of "scientifically guaranteed." The prior wording would quite clearly have raised *First Amendment* objections if Scientology was, in fact, entitled to protection as a religion. By replacing "would" with "scientifically guaranteed" plaintiff seeks to avoid that problem. Words are not always adequate, however, to divide precisely that which relates to the sacred and that which is purely secular. As Judge Gesell wrote in *United States v. Article or Device, D.C.1971, 333 F. Supp. 357, 363*:

> What the layman reads as straight science fiction becomes to the believer a bit of early imperfect scripture. The result of all this is that what may appear to the layman as a factual scientific representation (clearly false) is not necessarily this at all when read by one who has embraced the doctrine of the Church.

[15.] The extent to which the Fair Labor Standards Act applies to religious organizations is unclear. Although the Seventh Circuit did hold that the FLSA covered employees of a church corporation who worked in a church-owned printing establishment, *Mitchell v. Pilgrim Holiness Church Corp., 7 Cir. 1954, 210 F.2d 879*, cert. den. 1954, ***347 U.S. 1013, 74 S. Ct. 867, 98 L. Ed. 1136***, the Supreme Court has not addressed this issue and the legislative history and regulations suggest that religious activities of non-profit organizations were to be exempt.

Although the distinction is not always clear, we believe that even if Scientology is entitled to protection **[**43]** as religion Count V may stand. ***HN16***[] The *First Amendment* protects utterances which relate to religion but does not confer the same license for representations based on other sources of belief or verification. Statements citing science as their source may provide the basis for a fraud action even though the same contention would not support such an action if it relied on religious belief for its authority. Although the process of sifting secular from religious claims may not be easy, *Founding Church of Scientology v. United States, 1967, 133 U.S.App.D.C. 229, 409 F.2d 1146, 1165 n. 3*, found that endeavor possible. Should this court find that Scientology is entitled to protection under the religion clauses of the *First Amendment*, plaintiff would be restricted in proving her claim for relief under Count V, to evidence which did not trench upon constitutionally protected areas.

Like Count VI, Count V presently fails to meet the specificity requirements of *F.R.C.P. 9(b)*; again, the time, place and manner of the alleged misrepresentations are not stated in the precise and particular fashion the rule requires. Moreover, the deficiencies in stating a civil conspiracy to defraud which plague Count **[**44]** VI afflict its predecessor as well. Plaintiff will be given an opportunity to amend this count within the same time limit as set with respect to Count VI.

Finally, taking plaintiff's complaint as a whole, Count XI, which alleges intentional **[*1142]** infliction of emotional distress through the Fair Game doctrine, does state a claim upon which relief can be granted. Van Schaick alleges that, pursuant to the Fair Game doctrine, agents of the Church engaged in a course of conduct, including slanderous telephone calls to her neighbors and employer, physical threats, and assault with an automobile, which was designed to dissuade her from pursuing her legal rights. The conduct alleged constitutes "an attempt to intentionally shock and harm a person's "peace of mind' by invading the person's mental or emotional tranquility," *Wenk, supra 378 Mass. at 595, 392 N.E.2d 1053*, and is therefore actionable. We have noted, however, that the Fair Game doctrine has allegedly been repealed as a matter of Scientology doctrine, and remind plaintiff that it remains her burden to show that the actions taken against her by individual Church members were taken pursuant to some Church policy, practice **[**45]** or directive. With this understanding of plaintiff's allegations, we conclude that Count XI does state a claim upon which relief can be granted.

Applicability of *First Amendment*

Our decision regarding defendant's motion to dismiss other counts of plaintiff's complaint turns on whether the Church of Scientology is entitled to *First Amendment* protections. The remaining counts of plaintiff's complaint allege assorted fraudulent conduct by the Church. ***HN17***[] A claim for relief based upon fraud must include proof that defendant knowingly made a false statement. Proof of those elements-that the statement was false and that defendant knew of its falsity-becomes problematic when the statement relates to religious belief or doctrine. In *United States v. Ballard, supra*, the Supreme Court held that the truth or falsity of religious beliefs were beyond the proper scope of judicial inquiry. Writing for the Court, Justice Douglas explained:

> Men may believe what they cannot prove. They may not be put to the proof of their religious doctrines or beliefs. Religious experiences which are as real as life to some may be incomprehensible to others. Yet the fact that they may be beyond the ken of mortals **[**46]** does not mean that they can be made suspect before the law. Many take their gospel from the New Testament. But it would hardly be supposed that they could be tried before a jury charged with the duty of determining whether those teachings contained false representations.... (*322 U.S. at pp. 86-87, 64 S. Ct. at pp. 886-87*).

Plaintiff alleges that she was fraudulently induced to become a scientologist by false representations concerning the nature of the Scientology movement (Count IV) and the content of Scientology doctrine (Counts VII-IX). If the representations involved in plaintiff's fraud counts are entitled to the protection of the *First Amendment*, Ballard would prevent us from examining their veracity. Since an essential element of a cause of action for fraud is the falsity of the representation in question, plaintiff would accordingly fail to state a claim upon which relief could be granted. [16.]

[47]** Whether the *First Amendment* immunizes those statements from judicial scrutiny depends, however, on whether the statements relate to religion or religious belief. "***HN18***[] Only beliefs rooted in religion are protected by the *Free Exercise Clause*, which, by its terms, gives special protection to the exercise of religion." *Thomas v. Review Board of the Indiana Employment Security Division, supra 450 U.S. at 713, 101 S. Ct. at 1430*. Before we can determine whether the *First Amendment* mandates dismissal of any of the fraud counts alleged in this complaint, we must first determine whether defendant is entitled to the constitutional protections reserved for religious institutions and beliefs.

[*1143] Although courts once interpreted the word "religion" as used in the *First Amendment* to require belief in a deity, see *Davis v. Beason, 1890, 133 U.S. 333, 342, 10 S. Ct. 299, 300, 33 L. Ed. 637*, they have long since abandoned so restrictive a definition. In *Torcaso v. Watkins, 1961, 367 U.S. 488, 81 S. Ct. 1680, 6 L. Ed. 2d 982*, the Court held that "religion" as used in the *First Amendment* applied to nontheistic faiths, too, and explicitly recognized as religions Buddhism, Taoism, Ethical Culture **[**48]** and Secular Humanism, 367 U.S. at 495 n. 11, 81 S. Ct. at 1684 n. 11. More recently, the Second Circuit held that Krishna Consciousness is a religion for free exercise purposes. *International Society for Krishna Consciousness, Inc. v. Barber, 2 Cir. 1981, 650 F.2d 430, 440*. [17.] Torcaso and International Society show that the concept of religion is more capacious than early cases suggested, but they do not, of course, resolve whether the representations at issue here should receive the protection the *First Amendment* confers.

[49]** In evaluating defendant's claim to *First Amendment* protection, we begin with prior litigation involving the Scientology movement. In *Founding Church of Scientology of Washington, D.C. v. United States, 1969, 133 U.S.App.D.C. 229, 409 F.2d 1146*, Judge Wright found that Scientology had established a prima facie case that it was a religion, *409 F.2d at 1160*. This finding was based upon evidence that the church maintained the formal, external appearance of a religion-it was incorporated as a religion; maintained ministers with the authority to marry and bury; and its writings were found to contain a general account of man and his nature.

Significantly, however, in the Founding Church litigation, there was no attempt to contest the bona fides of the Church's religious status. Thus, Judge Wright carefully limited his holding, stating:

> We do not hold that the Founding Church is for all purposes a religion. ***HN19***[] Any prima facie case made out for religious status is subject to contradiction by a showing that the beliefs asserted to be religious are not held in good faith by those asserting them, and that forms of religious organization were erected for the sole purpose of cloaking a secular **[**50]** enterprise with the legal protections of religion. *409 F.2d at 1162*.

[16.] We do not construe Ballard to hold that, although courts may not examine the truth or falsity of statements of a religious nature, these statements may be the bases of a fraud action if made in bad faith. The Court in Ballard never addressed that issue. Rather, it held only that the verity of religious beliefs or doctrines should not be submitted to the jury.

[17.] In International Society for Krishna Consciousness, Inc. v. Barber, the Second Circuit held that, absent a showing that no less restrictive alternative existed which would not have interfered with the Krishna ritual of "sankirtan", the practice by which those devoted to Krishna approach non-members, tell them of their religion's tenets and seek contributions, a regulation restricting solicitation at a state fair to a booth unconstitutionally interfered with free exercise rights of members of Krishna Consciousness.

In *Heffron v. International Society for Krishna Consciousness, supra*, the Supreme Court upheld a similar regulation restricting solicitation at the Minnesota State Fair as a reasonable time, place and manner restriction on *First Amendment* rights. The Court reached that decision through a different analysis than that employed by the Second Circuit and one which did not involve an inquiry regarding whether Krishna Consciousness had religious aspects entitling it to the protection of the *First Amendment*. Judge Kaufman's opinion for the Second Circuit is cited here not for its holding, which the Supreme Court rejected in Heffron, but for whatever light it sheds on the separate problem regarding the criteria a court uses to determine when the protection of the *Free Exercise clause* is properly invoked.

The determination in Founding Church that Scientology had made a prima facie case for religious status is obviously relevant to, but not conclusive for, our purposes. As Judge Wright pointed out, the government did not contest the issue. Moreover, the determination was made 12 years ago; at the least defendants would have to satisfy this court that the factors Judge Wright found persuasive still exist. Although plaintiff appeared to concede in oral argument that Scientology had made a prima facie case for *First Amendment* protection, she withdrew that concession in her post-argument brief. Scientology thus might be entitled to protection as a religion, but that entitlement is not clear.

If this case involved an established religion, the court could, of course, accord it treatment as such without further inquiry. **[*1144]** Defendants have contended, in oral argument and brief, that the court "may not favor one religion over another" by taking judicial notice of the fact that an established religion is a bona fide religion while refusing to give similar treatment to a less established religion. ***HN20***[] Although we agree **[**51]** that the *Free Exercise Clause* protects all religions, old and new, alike once its protection attaches, in determining whether that protection applies courts may require a newer faith to demonstrate that it is, in fact, entitled to protection as a religion. See, e.g., *International Society for Krishna Consciousness, Inc. v. Barber, supra at 433*; *Theriault v. Carlson, 5 Cir. 1974, 495 F.2d 390*, cert. den. 1974, *419 U.S. 1003, 95 S. Ct. 323, 42 L. Ed. 2d 279*; *United States v. Kuch, D.D.C.1968, 288 F. Supp. 439*. "Not every enterprise cloaking itself in the name of religion can claim the constitutional protection conferred by that status." *Founding Church of Scientology v. United States, 1969, 133 U.S.App.D.C. 229, 409 F.2d at 1160*. In such cases, the bare assertion of a religious nature has not been sufficient to establish *First Amendment* protection and neither is it here.

A motion to dismiss, as a vehicle for determining whether defendant's statements are entitled to the protection of the *First Amendment*, presents this court with an intractable dilemma. Scientology is not an established religion whose tenets, doctrines, and policies are generally known. The court may not, therefore, **[**52]** by judicial notice identify it as a religion. To take all of plaintiff's allegations as true could strip defendant of all *First Amendment* protection without any factual showing by plaintiff. To treat Scientology as a religion entitled to the full panoply of *First Amendment* rights would be to ignore the allegations of the complaint. Ascertaining defendant's status-whether religious or secular-requires reference to extrinsic materials. We therefore conclude that the question whether Counts IV, VII, VIII and IX state a claim upon which relief can be granted cannot be resolved on a motion to dismiss. Therefore, as to those counts we shall treat defendant's motion to dismiss as a motion for summary judgment and direct the parties to submit materials regarding whether defendant is entitled to protection as a religion under the *First Amendment*.

In making that determination, the Founding Church criteria will provide a useful starting point. See *409 F.2d at 1160*. We note, too, the similar guidelines Judge Adams enunciated in his concurring opinion in *Malnak v. Yogi, 3 Cir. 1979, 592 F.2d 197, 208-209*; whether the candidate religion addresses matters of ultimate concern, whether its doctrine **[**53]** and practices are comprehensive, and whether it includes certain formal, external characteristics of religious organizations. Most recently, Judge Kaufman, writing for the Second Circuit, has used comparable criteria. *International Society for Krishna Consciousness, Inc. v. Barber, supra at 440-41*. Presentation of proof sufficient to make a prima facie case would entitle defendant to the protections of the *First Amendment free exercise clause* unless plaintiff effectively rebuts that case. The Supreme Court's recent decision in *Thomas v. Review Board, supra*, makes clear, however, that certain types of inquiry are impermissible in determining whether the *First Amendment* protects a particular belief as religious. First, courts may not inquire into the truth or falsity of a belief in question. Whether a belief is religious "is not to turn upon a judicial perception of the particular belief or practice in question; religious beliefs need not be acceptable, logical, consistent, or comprehensible to others in order to merit *First Amendment* protection." *450 U.S. at 714, 101 S. Ct. at 1430*. Moreover, Thomas suggests the difficulty of challenging the good faith of an entire organization and **[**54]** states that courts may not ordinarily consider intrafaith differences among adherents in determining whether a religious belief is sincerely held. Although there may be ways in which a party could rebut a prima facie showing by proving that "forms of religious organizations were created for the sole purpose of cloaking a secular enterprise with the legal protection of a religion," *Founding Church of Scientology of Washington, D. C. v. United States,* ***[*1145]*** *supra at 1162*, a general inquiry into whether individual members of a religion hold in good faith the belief they assert is not one of them.

Rather, testing sincerity of religious belief involves a somewhat truncated inquiry which must focus on extrinsic evidence. See, e.g., *International Society for Krishna Consciousness, Inc. v. Barber, supra at 441-42*.

ORDERS

In accordance with this Memorandum of Decision the court orders that (1) plaintiff's motion to file a second amended complaint is granted; (2) the Church of Scientology of Nevada's motion to dismiss for lack of personal jurisdiction and venue is granted; (3) defendant's motion to dismiss Counts I, II, III, X, XII, XIII and XIV is granted; (4) defendant's motion to **[**55]** dismiss Count XI is denied, and its motion to dismiss Counts V and VI is denied on the condition that plaintiff file an amended complaint which brings those counts into compliance with *Rule 9(b), Fed.R.Civ.P.* within 15 days; and (5) defendant's motion to dismiss Counts IV, VII, VIII and IX will be treated pursuant to *Rule 12(b), Fed.R.Civ.P.*, as a motion for summary judgment.

It is further ordered that the parties submit memoranda of law, affidavits and other submissions by May 7, 1982 on said constructive motion for summary judgment; and reply memoranda by May 24, 1982.

End of Document

Barry Wright Corp. v. Pacific Scientific Corp.

United States District Court for the District of Massachusetts

January 28, 1983

Civil Action No. 78-485-S

Reporter
555 F. Supp. 1264 *; 1983 U.S. Dist. LEXIS 19678 **; 1982-83 Trade Cas. (CCH) P65,189

BARRY WRIGHT CORPORATION, Plaintiff, v. PACIFIC SCIENTIFIC CORPORATION, Defendant

Core Terms

snubbers, mechanical, discounts, sizes, contracts, hydraulic, pipe, market power, hanger, plant, cancellation, manufactured, schedules, smaller, orders, prices, negotiation, purchases, customer, phase, shock, minimum amount, purchase order, Sherman Act, patent, exclusionary, projected, delivery, obliged, costs

LexisNexis® Headnotes

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Energy & Utilities Law > Oil, Gas & Mineral Interests > Purchase Contracts > Preference & Priority Customers

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

HN1[] **Market Definition, Relevant Market**

In order to determine whether the defendant has "market power" in an antitrust case it is necessary to determine the relevant market.

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

HN2[] **Private Actions, Remedies**

Market power is defined as the power to raise the price of a product by limiting its supply.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

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

HN3[] **Actual Monopolization, Anticompetitive & Predatory Practices**

A manufacturer with market power may not indulge in exclusionary conduct, even if such conduct is not the classic monopolistic exercise of market power. Exclusionary conduct has been very broadly defined as encompassing any practices by a monopolist which are not the inevitable consequences of ability, natural forces or law. Market control is inherently evil and constitutes a violation of *§ 2* of the Sherman Act unless economically inevitable, or specifically authorized and regulated by law.

Antitrust & Trade Law > ... > Actual Monopolization > Anticompetitive & Predatory Practices > General Overview

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

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

HN4[] **Actual Monopolization, Anticompetitive & Predatory Practices**

Nonpredatory and nondiscriminatory price reductions do not violate *§ 2* of the Sherman Act. Reasonable reduction of price in response to competition is not a violation of the Sherman Act; it is in fact the result which the antitrust laws were designed to accomplish.

Counsel: [1]** Donald B. Gould, Esq., (Lorraine Goodwin, Procter & Hoar, Boston, for plaintiff.

Pacific Scientific Corporation, John A. Nadas, Esq., Choate, Hall & Stewart, Boston, Pacific Scientific Corporation, Joseph J. O'Malley, Paul, Hastings, Janofsky & Walker, Los Angeles, California, Itt Grinnell, Bingham, Dana, Gould, John Curtin, Boston, for defendant.

Judges: Skinner, D.J.

Opinion by: SKINNER

Opinion

[*1265] FINDINGS, RULINGS AND ORDER

SKINNER, D.J.

Plaintiff Barry Wright Corporation ("Barry") brought this action pursuant to *15 U.S.C. § 15* to recover damages for alleged violations of the antitrust laws. Plaintiff claims that defendant Pacific Scientific Corporation ("Pacific") has violated *Sections 1* and *2* of the Sherman Act (*15 U.S.C. §§ 1* and *2*) and *Section 3* of the Clayton Act (*15 U.S.C. § 14*). Plaintiff also alleges an action in tort, claiming that Pacific tortiously interfered with its contractual relations.

Originally ITT Grinnell Corporation ("Grinnell") was joined as a defendant. Before trial, however, the plaintiff and Grinnell effected a settlement and Grinnell is no longer in the case as a party. The case turns on the relationships between Grinnell and Barry on the one **[**2]** hand, and Grinnell and Pacific on the other. Analysis of the conduct of Grinnell and its officers is pivotal to the resolution of this case.

Findings of Fact.

Grinnell is the country's largest producer of pipe hanger systems for nuclear power plants. The selection of such systems for a proposed plant is typically done by the firm of architects and engineers ("A&E's") who have contracted to design the plant and supervise its construction. Critical components of a pipe hanger system are the shock arresters or snubbers. These must be designed to permit the normal gradual movement of the pipes as they expand and contract in response to the superheated material which passes through them. They must, however, resist sudden movement from earthquake or explosion. Snubbers are rated by the amount of force which they can resist. The sizes of snubbers involved in this case ranged from 250 lbs. (1/4 kip) to 100,000 lbs. (100 kip) sizes.

Until 1975 most snubbers were hydraulic. Grinnell made its own, which it sold at a favorable mark-up as components of its pipe hanger systems. In 1974 and 1975, hydraulic snubbers distributed by another manufacturer developed leaks. A&E's in **[**3]** the industry started to specify mechanical snubbers in response to anxiety over the potential danger of leaky hydraulic snubbers.

By 1975 Pacific had designed and produced an effective mechanical shock arrester which operated by a patented rotating inertial device. Pacific was only partially successful **[*1266]** in making independent sales to the A&E's, because the latter did not wish to carry inventories of snubbers; they wanted the pipe hanger companies to carry the inventory and release snubbers as needed during the installation of the pipe hanger system. Pacific was successful, however, in persuading the A&E's to specify mechanical snubbers to the exclusion of hydraulic snubbers. From 1975 on and during all the period material to this case, Pacific was for all practical purposes the only domestic source of mechanic snubbers. Mechanical snubbers manufactured in other countries did not meet the requirements of the Nuclear Regulatory Commission.

Pacific's share of the domestic pipe snubber market, including hydraulic snubbers, was 47% in 1976, 83% in 1977, 84% in 1978 and 94% in 1979. Pacific also makes sales of mechanical snubbers in foreign countries, but some of these **[**4]** sales were negotiated in the United States through local A&E's who were constructing nuclear plants abroad.

Grinnell continued to produce its hydraulic snubber (which had not leaked) to satisfy its backlog of orders. Most of Grinnell's new contracts, however, required mechanical snubbers. It attempted to design and manufacture its own mechanical snubber but was unsuccessful. It was therefore forced to buy from Pacific.

At the same time Pacific was trying to sell its snubbers directly to the A&E's as separate components, in competition with Grinnell. The quantity discount which Pacific allowed Grinnell permitted a small mark-up which was considerably less than the mark-up Grinnell had enjoyed on its own hydraulic snubbers. Grinnell set out to find another, more profitable source.

Barry had a division in California (not far from Pacific's plant) which was engaged in aerospace engineering, and had in fact produced mechanical shock absorbers for aerospace application. In 1973 it had produced a prototype snubber for use in nuclear power plants, but had decided not to enter the market and did not develop its product at that time.

Grinnell learned of Barry's prototype snubber and **[**5]** in late 1975 entered into negotiations with Barry to attempt to generate another source of mechanical snubbers. On January 30, 1976, Grinnell entered into a contract with Barry for the development of a mechanical snubber. The Grinnell-Barry contract consisted of two phases.

The first phase was a development phase which did not bind either party to purchase or sell snubbers. During phase one, Grinnell agreed to pay Barry $180,000 for development costs, an additional $54,000 for production tooling, and up to $60,000 for special test equipment.

On August 31, 1976, Grinnell and Barry agreed to enter into phase two of the contract. During this phase, Barry was to develop production capability for six sizes of snubbers by January 28, 1977. Grinnell was obliged to purchase its requirements of mechanical snubbers from Barry for the next three years, subject to an obligation to purchase at least $9 million but not more than $15 million over the three year period. Grinnell retained the option to purchase Barry's snubber production facilities at any time during phase two. Barry agreed not to compete with Grinnell for five years after such purchase. In addition, while Barry was manufacturing **[**6]** snubbers for Grinnell, it could not sell mechanical snubbers to anyone else.

The contract contained schedules for the completion and qualification (i.e., passing Grinnell's tests of conformity to specifications) of the various sizes of snubbers. Barry claims that these schedules merely reflected goals or expectations. Grinnell apparently claimed that the schedules were contract performance dates. In any case, over the next eighteen months Barry fell progressively further behind those schedules. As of January, 1977, it had not qualified any of its snubbers.

Meanwhile, Grinnell was buying snubbers from Pacific. Paul Milman, who was in charge of Grinnell's pipe hanger business, was stalling as much as possible on snubber delivery, and purchasing only the required **[*1267]** minimum amounts, in the hope that the Barry snubbers would soon be in production and available to Grinnell at a more favorable price. Delay became increasingly difficult, however, because of mounting pressure from Grinnell's customers for delivery of snubbers.

In the summer of 1976, Stephen Toth became president of Pacific. He observed that the number of orders that Pacific was receiving from Grinnell was **[**7]** considerably less than the number of mechanical snubbers that had been specified in outstanding pipe hanger contracts. He determined to have a meeting with Milman in order to create "a more healthy relationship" between the companies, i.e., get more orders from Grinnell for snubbers. Milman, Toth and Pope, the head of Pacific's Kintech Division, which manufactured snubbers, met at Pacific's plant on August 23, 1976. Toth asked Milman for an order. A further meeting was set up for August 31 at the Grinnell office in Providence, Rhode Island. Milman continued to stall on placing a large order, in the hope that Barry's snubber would soon be on line. Toth and Pope then agreed to increase the discount from the standard 20% to 30% on the four smaller sizes of snubber and 25% on the larger sizes.

With this incentive, Milman, on behalf of Grinnell, agreed to order $5.7 million worth of snubbers to cover Grinnell's expected needs for 1977. Pacific granted the additional discounts.

Milman informed Barry of this development. Barry requested that Grinnell hold off any long term orders to Pacific to give it a chance to qualify its snubbers, which it represented it could do by early 1977.

[8]** Milman then presented the issue to Coyle, the president of Grinnell. Coyle took the position that it was unnecessary to place such a large order. He preferred to rely on Barry to produce its snubber in time to meet customer demand and directed Milman to cancel the September order. Milman cancelled the $5.7 million order and placed an order for $1 million of Pacific snubbers on October 20, 1976. Pacific accordingly retracted the additional discounts and accepted the smaller order at the standard discount.

The schedules attached to the Grinnell-Barry contract called for Barry to develop production capacity for six sizes of snubbers by January 28, 1977. As of December, 1976, it had not even produced a prototype of any size snubber which qualified under Grinnell's specification. Barry officials notified Grinnell that they could not deliver a production project before May of 1977. On January 6, 1977, Barry postponed its projected delivery date to June, 1977.

Milman became increasingly anxious about Grinnell's ability to supply its customers. He met with Pope and Toth in California in mid-December, but without significant results, partly because Pope and Toth now distrusted Milman. **[**9]** Toth in particular thought that he could secure more favorable orders if he could go over Milman's head to Coyle. Milman arranged a meeting in Miami on January 10, 1977 at which he, Coyle, Toth and Pope were present. No business was transacted, but they agreed to continue negotiation in California on January 27.

On January 18, Barry set back its projected delivery dates an additional two months for the smaller units and until February, 1978 for the two larger units.

On January 27, Milman and Coyle met with Toth and Pope at the Pacific plant in California. Milman went to the meeting with the expectation that Pacific would not repeat its offer of extra discounts. He was so concerned about supply, however, that he was prepared to make a substantial order at the standard discount. Nevertheless, he left the negotiations to Coyle. Coyle was initially given a tour of the Pacific plant during which he observed that a substantial portion of the facility was not being fully utilized. He was thereby encouraged to strike a hard bargain. He was right. Toth was concerned that part of his plant capacity was not productive and was particularly anxious to get the Grinnell order. Toth and **[**10]** Pope were also aware of the existence, though not of the terms of, the Grinnell-Barry contract, and had been since at least **[*1268]** September, 1976. (Their testimony that they were not in the least concerned with potential competition from Barry is not credible.)

The upshot of the negotiation was that Coyle was successful in retrieving the 25% and 30% discounts which had been offered in the aborted 1976 contract on a minimum purchase of $4.3 million during the balance of 1977 and January, 1978. The minimum purchase amount was based on Grinnell's projections of its requirements for that period. It was not in form a requirement contract, however, in that Grinnell was not barred from purchasing additional snubbers from any other source. Grinnell had the option to purchase an additional 25% of the minimum order at the same price and to purchase the same quantities at the same discounts for 1978 and 1979.

Most significantly for purposes of this case, the contract provided for a 100% penalty for cancellation of any part of the minimum order. Pope testified that this clause was included because he distrusted Milman and wanted to prevent a repeat of his experience with the aborted **[**11]** agreement of the previous September. In any case, the clause was readily accepted by Milman and Coyle and was not the subject of extended negotiation.

Milman returned to Providence, and on January 31, sent Barry the following letter, which he had drafted on January 25, before the meeting with Toth and Pope:

> In response to your further slippage in schedules, we request an amendment of our agreement of January 30, 1976 to delete all minimum purchase requirements on ITT Grinnell from the agreement. As you know, we have issued two purchase orders to you for the first half of 1977. Since your estimated date for an initial shipment now is at least as late as September, 1977, it does not make sense for us to continue to issue purchase orders which we both now know you can't meet. An amendment deleting all minimum purchase requirements would, I believe, relieve some of the pressure on our relationship. In the alternative, we are not willing to extend the present agreed-to schedules which, in view of the market projection and our delivery commitments, we consider to be a material provision of the Agreement.
>
> Although it is our intention to meet and discuss with you possible revisions **[**12]** to the Agreement between our companies, our attorneys have asked me to make it clear that these efforts looking toward amendments of that Agreement cannot change the fact that the Agreement as it now stands have been breached by your company.
>
> We do not want our present pleasant relationship to be in any way jeopardized, but, on the other hand, we do not want to mislead you. Our willingness to work with you toward a formal Agreement amendment should not be interpreted as our acquiescence in Barry's failure to comply with existing agreement provisions.

At a meeting on February 25, 1977 with Barry officials, Milman stated that due to the development delays he might have to commit the next two years' purchases to Pacific. Milman proposed to reduce the minimum purchase requirement to $3.6 million. As an alternative, Barry proposed to "stretch-out" the $9 million minimum purchase requirement over a longer term. The issue was not resolved. Milman encouraged Barry to continue its development efforts and set May 15, 1977 as a deadline by which Barry had to qualify the four smaller snubbers and complete the design of the two larger sizes, if they were to get any purchases from Grinnell. **[**13]** Another meeting was held on March 14, 1977, but again no resolution was reached. I find that Milman hoped to keep Barry in the picture as an alternative source rather than become wholly dependent upon Pacific.

On April 25, 1977, David McKenny, vice-president and general counsel of Grinnell, wrote Barry a letter containing the following paragraph:

> I would like to make it clear that the May 15th date was only important in that the amendment we offered would not **[*1269]** take effect unless the qualifications we have been discussing were accomplished by that date. We would not want you to believe that, if Barry Wright accomplishes the qualifications referred to by May 15, ITT Grinnell would be obligated to continue under the original Agreement. While we are always willing to discuss with you agreements under which our two companies could proceed, our present position is that the original Agreement is breached and terminated.

By May 15, Barry had qualified the four smaller sized snubbers.

On May 16, several Grinnell representatives met with John Quinn, president of Barry, and Milt Gilbert, Barry's legal counsel. They discussed their future relationship but reached no **[**14]** agreement. They agreed to meet again on May 27.

On May 23, Milman called Quinn to postpone the scheduled meeting. Milman informed Quinn that he planned to meet with Toth and Pope in Chicago. Milman also told him that the price difference between Pacific and Barry was still over 10% but that if the differential fell below 10%, it would not be attractive to stay with Barry.

On May 31, 1977, Milman met with Pope and Toth in Chicago and agreed to purchase orders of $6.9 million for 1978 and, subject to further negotiation on escalation, the same amount for 1979. Both of these contracts provided for the extended discounts of 25% and 30% and for a 100% penalty for cancellation. In the 1979 Agreement, the cancellation penalty applied only to $5 million of the order.

On June 2, 1977, Grinnell cancelled the two purchase orders it had placed with Barry in September, 1976, upon which Barry had failed to deliver. On July 5 and July 14, 1977, Grinnell placed with Pacific the orders for 1978 and 1979, respectively, which Milman had agreed to on May 31.

I find that as of July, 1977, Barry had qualified one each of its sample snubbers in the four smaller sizes, but that their performance **[**15]** was still unreliable. The problems of putting even the four smaller sizes into production had not been solved. A critical element of the snubber was a ball screw. Ball screws which were commercially available had to be individually machined to be adapted to the Barry snubbers. No supplier of a ball screw suitable for production runs had been located. Engineering for the 35,000 lb. and 100,000 lb. snubbers, which presented different and more serious problems than the smaller sizes, had not been addressed at all. I am not persuaded by a preponderance of the evidence that Barry had the capacity to produce and deliver a full line of mechanical snubbers before the end of 1979.

The minimum amounts under the agreements for 1978 and 1979 were less than Grinnell's 1977 projections of its requirements for those years, and for 1979 substantially less. In fact, however, Grinnell's purchases were only slightly in excess of the minimum amounts.

All of Pacific's discounted prices were above both marginal and average cost, and Pacific made a substantial profit on the Grinnell sales. It enjoyed some savings in mass production and reduction of selling costs. With a few exceptions, its prices **[**16]** in all sizes of snubbers were higher than Barry's contract prices (including escalation). (It is likely, however, that if Barry had even gotten into production on the larger sizes, its increased development costs would have precluded them from selling at the contract price, and increases would have been required to make such production profitable).

At the conference on May 31, 1977, Pope and Toth agreed that 1977 prices would increase only 5% over the 1976 price list, that 1978 prices would be the same as 1977 and that 1979 prices would increase at the rate of inflation. The evidence does not support the proposition that this price structure was arrived at for the purpose of securing the contract with Grinnell; it is likely that it had been decided upon across the board, possibly as early as January, 1977.

The evidence does not support a finding that as part of the agreement, Pacific agreed not to solicit Grinnell's "backlog", i.e., existing unfilled orders for pipe hanger **[*1270]** systems with hydraulic snubbers in order to get the customer to substitute its mechanical snubbers. The evidence is rather persuasive, in fact, that Pacific actually made such solicitations.

At **[**17]** a meeting of the Society of Security Analysts in New York in the fall of 1977, Mr. Toth, president of Pacific, made the following answer to a question concerning Pacific's competitors in the snubber business:

> TOTH: Shock arrestor. Well, our major competitors are our major customers. We traditionally sell the shock arrestors to the pipe hanger people and for instance, there's a division of ITT, Grinnell up in Providence, called the Pipe Hanger Division, that probably has a major share of the market and they make hydraulic shock arrestors. So we have had to sell our product to them when at the same time they were trying to beat us out

> with the sale of their hydraulic units. And that's the reason for our selling directly to the utilities. We went right to the end user who just edicted [sic] to the selling engineers that they wanted a mechanical shock arrestor versus a hydraulic. So Grinnell has had to buy our unit. We really were heading on a collision course with this major customer up until last fall when we got together with them and they decided not to offer their unit nor to get into the design of a mechanical unit. So we now have all of their business. We have **[**18]** a contract with them for the next two years. That amounted to a $16 million order that we got this past summer and it is a major part of our backlog now and they are our friends now.

In October, 1977, a Grinnell internal memorandum seeking approval from corporate headquarters for the cancellation of the Grinnell-Barry contract contained the following paragraph:

> During the course of developing the product, Barry Wright Corp. (our partners in the joint venture) exercised their option to increase production costs due to escalation. At the same time our competitors, who have a similar device qualified and in production, have heard of our intent to develop our own device, offered us more favorable terms for both cost and schedules. With these new terms, the cost of developing our own product became marginal, and the project was cancelled.

This memo was endorsed by Milman and other Grinnell officials principally concerned with the snubber contract.

Pacific sent Barry a letter warning Barry against infringing Pacific's patent. No other action was taken. I find that this letter was sent in good faith and did not constitute an abuse of the patent.

Rulings **[**19]** *of Law*.

1. *Relevant Market*.

HN1[] In order to determine whether the defendant has "market power" it is necessary to determine the relevant market. The parties have stipulated that the relevant product market consists of both hydraulic and mechanical snubbers. This is theoretically justifiable even though customer preference was strongly in favor of mechanical snubbers on the ground that there is a point at which a price differential would negate the preference. As a practical matter, however, given the relationship of engineering performances to budgetary limits in this particular industry, it is probable that it would take a very broad price differential to achieve this theoretical result.

Defendant urges that the relevant geographic market is the entire world because Pacific makes some sales in foreign countries in competition with foreign manufacturers. The market in which Grinnell is obliged to buy and in which Barry was obliged to compete for Grinnell's business was the United States. In the United States market, Pacific was not subject to competition from foreign manufacturers. The world market is thus irrelevant to this case. The relevant market is the United States. **[**20]** *See generally*, Areeda & Turner, ***Antitrust Law***, Little, Brown and Company, 1978, §§ 522-524 and 534.

2. *Market Power*.

HN2[] Market power is defined as the power to raise the price of a product by limiting its **[*1271]** supply. There was evidence of various arcane indicia of market power which in the circumstances of this case I need not review. Pacific's dominance of the market generally and total control of mechanical snubbers in the United States clearly gave it market power. In addition, there were significant barriers to entry into the market because of the patent covering Pacific's product and the cost and difficulty of designing and producing a workable snubber which did not infringe the patent.

The possession of market power is not the equivalent of its exercise, however. It appears in this case that Pacific considered it in its best interests (i.e., presumably the maximization of profits) to reduce prices and increase production in order to utilize its total investment in its productive capacity. This is the reverse of the exercise of market power.

3. *Exclusionary Conduct*.

HN3[] A manufacturer with market power may not indulge in exclusionary conduct, even **[**21]** if such conduct is not the classic monopolistic exercise of market power. Exclusionary conduct has been very broadly defined, most notably by Judge Wyzanski in *United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 343-345 (D. Mass. 1953)*, aff'd *per curiam*, *347 U.S. 521, 74 S. Ct. 699, 98 L. Ed. 910 (1954)*, as encompassing any practices by a monopolist which were not the "inevitable consequences of ability, natural forces or law". "Market control is inherently evil and constitutes a violation of *§ 2* [of the Sherman Act] unless economically inevitable, or specifically authorized and regulated by law."

Barry has asserted that Pacific's conduct was violative of the Sherman Act in several particulars; only two of its arguments merit serious consideration.

The first argument is that the price concessions granted to Grinnell, while not predatory in the sense of violating the Robinson-Patnam Act, were nevertheless exclusionary in that they were designed to eliminate Barry as a potential competitor. They were not below any measure of cost, however, and produced a comfortable profit for Pacific. Assuming that the price concessions were in part an answer to the potential **[**22]** threat from Barry, I rule that such ***HN4***[] nonpredatory and nondiscriminatory price reductions do not violate *Section 2* of the Sherman Act. Reasonable reduction of price in response to competition is not a violation of the Sherman Act; it is in fact the result which the antitrust laws were designed to accomplish. *Cal. Computer Products v. Intern. Business Machines, 613 F.2d 727, 742 (9th Cir. 1979)*.

The second argument is that, in exchange for price cuts, Pacific imposed on Grinnell a three-year noncancellable requirements contract which was intended to foreclose Barry's entry into the market. The first answer to that argument is that it misread the facts. There was no three-year contract. Pacific offered three separate contracts at favorable discounts. The favorable discounts for 1977 were not conditioned on agreements for 1978 and 1979, nor were 1978 discounts conditioned on an agreement for 1979. Accepting all three contracts was Grinnell's choice, apparently for two reasons: relatively favorable pricing and established availability of a reliable product.

Even if the contracts were requirements contracts, separate one-year contracts in these circumstances are probably not unreasonable. **[**23]** It is not necessary to decide that issue, however, because it seems clear that the agreements were not for requirements but for specific dollar amounts. In 1978 and 1979, the minimum amounts were less than Grinnell's anticipated needs. Barry argues that in fact the minimum amounts were in excess of Grinnell's requirements and that Grinnell ended up with an excessive inventory of snubbers for which there was no economic justification. There was little if any evidence on the justification for Grinnell's inventory, and I am unable to make a finding on the point. A characteristic of a requirements contract is that the purchaser is precluded from buying any of the product from any other supplier. This **[*1272]** was not the case, and indeed Barry might have supplied the excess amount if it had taken up the $3.6 million option offered to it by Grinnell in the spring of 1977.

The aspect of the contracts which most strongly supports Barry's charges against Pacific is the 100% cancellation penalty, in effect rendering the purchase order noncancellable. It is difficult to say that this provision was "economically inevitable". It was in fact a change in practice. Pacific argues that **[**24]** it simply made specifically enforceable Grinnell's contractual obligation to purchase the minimum amount specified. This argument is a trifle disingenuous. It is clear that blanket purchase orders of the type executed by Pacific and Grinnell in January and July, 1977 were agreements governing price only. No firm obligations of the seller to deliver and the buyer to pay for the goods arose until specific purchase orders were submitted. If the agreed upon minimums were not ordered, the agreed upon discounts would be withdrawn, and the purchaser would be obliged to pay at standard rates for products actually ordered and delivered.

Strict application of the notion of "economic inevitability", however, would render a whole range of business choices illegal to the extent that a particular choice enhanced the chooser's control of the market in any respect. It seems to me to be an extraordinary extension on antitrust theory to hold a noncancellable clause in a one-year purchase contract illegal because not economically inevitable. I have found no case so holding, and I rule that the imposition of this clause, given the history of the relations between Grinnell and Pacific, and Pacific's **[**25]** legitimate desire to plan its production for at least a year, is not illegal exclusionary conduct in violation of *§ 2* of the Sherman Act.

Tortious Interference with Contractual Relations.

Barry had added a count against Pacific for tortiously interfering with its contract with Grinnell. With respect to this count, I find and rule as follows:

1. From January, 1977 onward Barry was in default on its contract with Grinnell and there was no likelihood that Barry could produce a line of snubbers within any future period reasonably within the terms of the contract.
2. Pacific did not commit any tortious act.

Conclusion.

I conclude that Pacific had achieved market power in the snubber market generally and a complete monopoly of mechanical snubbers in the United States as of January, 1977. I find that the United States is the relevant geographical market. I further find that Pacific's monopoly was achieved because of its superior skill in devising the only workable and reliable mechanical snubber on the market and because of the protection offered to it by its patent. Its monopoly was thus perfectly legal. I conclude that in 1977 it captured an even **[**26]** larger share of the market by means of three successive one-year contracts with Grinnell for substantial numbers of snubbers. I do not find that the provisions of these contracts were illegal. I further conclude that it is likely that Pacific would have captured most of this market in any event because Barry was not shown to have the ability to produce a full line of snubbers within the relevant period and no other producer was in the field.

I conclude that Barry's elimination from the market was primarily the result of its inability to furnish the product within the relevant time period, and that Pacific's domination of the market was the result of its filling the void thus created. In that sense, its eventual monopoly position was economically inevitable.

Order for Judgment.

On the basis of the foregoing, judgment shall enter for the defendant, with costs.

So ordered.

Nesglo, Inc. v. Chase Manhattan Bank, N.A.

United States District Court for the District of Puerto Rico

February 8, 1983

Civil No. 79-1674 GG

Reporter
562 F. Supp. 1029 *; 1983 U.S. Dist. LEXIS 19436 **

NESGLO, INC., et al., Plaintiffs v. THE CHASE MANHATTAN BANK, N.A. et al., Defendants

Core Terms

state court, parties, counterclaim, federal court, res judicata, proceedings, guarantors, collateral, affirmative defense, res judicata effect, litigate, mootness, courts, federal district court, reconsideration motion, state supreme court, cause of action, Tie-in, rights, motion to dismiss, preclusive effect, federal claim, intervening, purposes, court of appeals, pleadings, joined, principal debtor, anti trust law, render moot

Counsel: **[**1]** Edelmiro Salas Garcia, Esq., Hato Rey, Puerto Rico, for Plaintiffs.

Leopoldo J. Cabassa, Esq., Fiddler, Gonzalez & Rodriguez, San Juan, Puerto Rico, for Defendants.

Judges: Gierbolini

Opinion by: GIERBOLINI

Opinion

[*1030] FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM OPINION

In our Opinion and Order of December 2, 1980 we dismissed the complaint in this case, *Nesglo, Inc. v. Chase Manhattan Bank, N.A., 506 F. Supp. 254 (DCPR 1980)*; however, parallel proceedings were being carried out in the state local courts which continued their course. Our dismissal of the complaint was appealed to the United States Court of Appeals for the First Circuit and on September 14, 1981 that court entered the following order:

> "This Court, while retaining jurisdiction, remands this matter to the District Court for the purpose of receiving from the parties acceptable translations of such pleadings, docket entries, court actions, and other papers relating to litigation in the courts of the Commonwealth of Puerto Rico as may be relevant to the question whether such litigation may have rendered the instant appeal moot, and for the purpose to expeditiously deciding the issue of mootness and reporting **[**2]** its findings and conclusions to this court.
> The parties have agreed to cooperate in assembling the necessary materials without delay. They are to share equally in advancing such monies as may be necessary, the ultimate allocation of such expenses to abide final decision."

In compliance with the aforementioned order, the parties were instructed to file the necessary documents. We also ordered the parties to brief and argue the related matters of *res judicata* and collateral estoppel.

The case was scheduled for hearing but at that time the parties had not reached an agreement as to the documents to be submitted or the translations required. Disagreements between the parties continued. After substantial delays due to that fact, the parties filed legal memoranda which were examined and again we set all the pending matters for oral argument. For the second time we afforded the parties an opportunity to provide the officially certified translation of the state court documents which were finally filed after extended procrastination. Oral arguments were heard and thereafter the parties requested and were granted an additional opportunity to expand upon the arguments made. The **[**3]** additional memoranda were filed and the case was taken under advisement.

After a careful evaluation of all the documentary evidence, the oral arguments and the extensive legal memoranda filed by the parties, we enter the following basic findings **[*1031]** of fact and conclusions of law which will be supplemented in the Memorandum Opinion.

Findings of Fact

1- The parties or their privies in the state court action pending when we initially dismissed the complaint in this case, are the same as those participating in the instant proceedings.

2- The claim and/or defenses raised in the state court proceedings are substantially the same as those before this court.

3- There is a common nucleus of operative facts giving rise to both the state and federal court claims.

4- The plaintiffs in this case, defendants and counterclaimants and their privies in state court, had a full and fair opportunity to litigate their claims against the present defendants (plaintiff and its privies in state court).

5- In the exercise of its valid and proper jurisdiction, the state court dismissed plaintiffs' claims and/or defenses with prejudice for their willful and intentional failure to comply with **[**4]** a discovery order under rules of civil procedure identical to those governing civil actions for the federal district court.

6- The state court judgment became final, firm and unappealable when the state supreme court denied review.

7- No further review of the state court proceedings was sought by the present plaintiffs.

Based on the foregoing findings of fact, we reach the following:

Conclusions of Law

1- This court must accord full faith and credit to the state court judgment pursuant to *28 U.S.C. Sec. 1738*.

2- By virtue of the full faith and credit statute, this court must give preclusive effect to the state court judgment.

3- In view of the fact that the state court judgment disposes of the pending controversy between the parties, the present action has been rendered moot.

Due to the complex procedural history of the present case, a more detailed analysis of the factual framework and the underlying legal theories -- both local and federal -- upon which it rests, is required. Therefore, we issue the following:

Memorandum Opinion

On or about November 9, 1978, defendant The Chase Manhattan Bank, N.A. (Chase) initiated a collection of monies and factor's lien suit **[**5]** in the Superior Court of Puerto Rico, San Juan Part (the state court) against plaintiffs Nesglo, Inc. (Nesglo), Nestor Cruz Soto (Nestor) and Gloria D. de Cruz (Gloria).

The complaint alleged that Nesglo had defaulted on a loan and factor's lien contract and owed Chase $460,000 plus interest and $46,000 in legal fees. It requested entry of judgment against Nesglo, Nestor and Gloria in the aforementioned sums of money and, pursuant to the terms of the loan documents [1] including the factor's lien contract, that the court order the transfer to Chase of all Nesglo's inventory, account receivables, and related utilities.

Simultaneously with the filing of the complaint, Chase moved for attachment of Nesglo's inventory, account receivables, ledgers, and other assets described in its motion to that effect. Chase also requested the appointment of defendants **[**6]** Stanley Zych (Zych) and Enrique Fernandez (Fernandez) both officers of the Bank, as custodians of the property to be attached.

On November 15, 1978 the state court issued an attachment order granting Chase's motion to secure the effectiveness of judgment, and appointed Zych and Fernandez as custodians of the property to be attached. The court also issued orders attaching personal real estate and other property belonging to guarantors Nestor **[*1032]** and Gloria. Corresponding writs were also issued and Chase designated the Nesglo goods to be attached.

The attachment was executed by the state court marshals and an inventory prepared, copy of which was delivered to Fernandez.

On February 17, 1979 Chase moved for summary judgment accompanying a sworn statement by Mr. Luis Ledee, an officer of the Bank.

On February 27, 1979 Nestor and Gloria replied to Chase's motion for summary judgment denying that they or Nesglo owed any money to Chase and that, in any event, Chase collected usurious interest from Nesglo, the latter being a close corporation.

On or around March 26, 1979 defendants Nestor and Gloria filed a motion accompanying a sworn statement by Nestor dated March 19, 1979. **[**7]** Together with Nesglo, they also filed an answer to Chase's complaint raising a series of affirmative defenses very similar to the allegations found in their complaint before this court. Nestor and Gloria also filed a counterclaim, sworn to by Nestor, as president of Nesglo, and a motion to join Zych and Fernandez as defendants.

Nestor's sworn statement dated March 19, 1979 alleged that there was no credit due to Chase from Nesglo, that Chase had not credited certain amounts to Nesglo, had misappropriated certain funds, had refused to honor certain letters of credit, had not given an accounting to Nesglo, had charged Nesglo illegal interest and had imposed certain burdensome and anticompetitive conditions on Nesglo such as forbidding Nesglo to do business with other financial institutions and favoring competitors of Nesglo, also clients of the Bank.

The answer and affirmative defenses filed by Nesglo, Nestor and Gloria generally deny the allegations of Chase's complaint and raise as affirmative defenses fraud, deceit and material misrepresentations, lack of consideration, lack of compliance by Chase of its own obligations, compensation, novation, estoppel and unjust enrichment. **[**8]** They also adduce a defense that Chase violated the Commerce Code of Puerto Rico, the Tie-in Amendments to the Bank Holding Company Act of 1970, P.L. 91-607, Title I, Sec. 106(a) et seq., *12 U.S.C. 1971, et seq.* (the Tie-in Amendments), the usury statutes of Puerto Rico and those found in the national banking laws, *12 U.S.C. Secs. 85* and *86*.

Nestor's and Gloria's counterclaim incorporates the previous affirmative defenses and pleads claims for relief very similar to those pleaded by them and Nesglo before this court. They also name Zych and Fernandez as counterdefendants in the third cause of action of the counterclaim.

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[1] They consist of the Factor's Lien Contract (Exhibit A), Note (Exhibit B), Continuous and Unlimited Guaranty (Exhibit C), and Collateral Agreement (Exhibit D).

In essence, the counterclaim seeks damages arising out of the commercial contractual relationship between Nesglo and Chase because of violations of the Tie-in Amendments; usurious interest under both the federal banking and local laws; federal and local civil rights violations arising out of Chase's, Zych's and Fernandez' attachment of Nesglo's goods, account receivables, ledgers and other property; violations of the Commerce Code of Puerto Rico due to the exaction of interest over interest; general breach of contract theories under the laws of Puerto Rico as well **[**9]** as lack of an accounting by Chase; and false and material misrepresentations relating to the promissory note sought to be collected by Chase.

Simultaneously with the filing of the foregoing pleadings, Nestor and Gloria moved to have Zych and Fernandez joined as party counterdefendants to the suit. The motion asserted that these Chase officers were indispensable parties with respect to the alleged illegality of the attachment.

On April 25, 1979 Chase moved to dismiss Nestor's and Gloria's counterclaim before the state court. Nestor and Gloria opposed Chase's motion to dismiss asserting, *inter alia*, that their counterclaim arose from facts and transactions intertwined with the breach of the factor's lien agreement sought to be enforced by Chase. They also stressed their standing to sue under the federal Tie-in Amendments and the Civil **[*1033]** Code of Puerto Rico because of their status as sole stockholders and joint and several guarantors of Nesglo by virtue of which they, as guarantors, could interpose against Chase, as creditor, the same defenses and causes of action of debtor Nesglo under the theory that debtors and guarantors are in the same procedural posture *vis* **[**10]** *a vis* their common creditor.

On August 14, 1979 the state court granted "as requested" [2] Nestor's and Gloria's opposition to Chase's motion to dismiss their counterclaim. Chase then filed a petition for certiorari (interlocutory appeal) from the trial court's decision. The Supreme Court of Puerto Rico denied the petition on October 11, 1979.

Contemporaneously with their opposition to Chase's motion to dismiss their counterclaim, Nestor and Gloria also challenged the legality of the attachment sought by Chase at the commencement of the action in the state court. Chase opposed on the basis of the rights it had arising from the factor's lien contract and applicable Puerto Rican law.

On October 10, 1979 the state court granted Chase's opposition "as requested".

Chase also moved for the sale of all attached goods consisting of Nesglo's inventory, account receivables and cash, invoking the powers **[**11]** that Nesglo had granted it pursuant to the factor's lien contract. The court granted Chase's request and Gloria and Nestor moved, on behalf of Nesglo, for reconsideration of said order attacking the requested sale under federal and local due process grants. This motion for reconsideration was denied.

By this time, Nestor, Gloria and Nesglo had commenced the instant action in federal court. During April 1980 this case was temporarily assigned to the Honorable Ted Dalton, Senior District Judge of the Western District of Virginia, sitting by designation. After a series of unsuccessful settlement conferences, Judge Dalton entered an order suggesting that the parties proceed with the concurrent state action.

After Judge Dalton's suggestion, Nesglo filed in the state court a document containing an answer, affirmative defenses and counterclaim. Together with Nestor and Gloria it also requested that the state court issue summons directed to Zych and Fernandez as potential third party defendants. As part of the grounds advanced for the issuance of summons, Nesglo, Nestor and Gloria referred to this action as it stood at that time (May 6, 1980) before this court, also mentioning identity **[**12]** of parties and causes of action in both suits. As per such request, the court entered an order on May 29, 1980 directing issuance of summons against Zych and Fernandez, who were duly served with process.

Chase replied and moved to dismiss Nesglo's counterclaim and/or third party complaint. It also objected to Nesglo's amendment to plaintiff's prior answer and affirmative defenses of March 26, 1979.

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[2] "As requested" in the courts of Puerto Rico is the equivalent of "Granted and so ordered" in federal court.

On June 2, 1980 Nesglo, Nestor and Gloria opposed Chase's motion arguing, *inter alia*, that Nesglo had not answered the complaint initially. Chase replied and in due course the state court granted Chase's motion and denied Nesglo's, Nestor's and Gloria's June 2 opposing motion.

Nesglo, Nestor and Gloria then filed a motion for reconsideration of the aforementioned order and Chase opposed. On July 18, 1980 the state court entered an order denying the aforementioned motion for reconsideration. There is no evidence that this order was ever appealed to the state supreme court.

Meanwhile, Chase also moved to dismiss Nesglo's, Nestor's and Gloria's counterclaim and/or third party complaint claiming that since the counterclaim had been dismissed as to Chase, it could not be asserted **[**13]** against Zych and Fernandez. It was also claimed that as a third party complaint it was procedurally incorrect. The state court agreed.

On September 9, 1980, Nesglo, Nestor and Gloria filed a sworn informative motion before **[*1034]** the state supreme court in a pending collateral incident before said court, [3] **[**14]** wherein they represented that as of September 9, 1980 [4] Nesglo was a defendant and counterdefendant in the state court proceedings. Thereafter, on October 15, 1980, the state court granted Chase's opposition to a partial motion for summary judgment filed by Nesglo, Nestor and Gloria.

On December 2, 1980 we entered an opinion and order dismissing the instant action and Nesglo, Nestor and Gloria appealed to the United States Court of Appeals for the First Circuit. While said appeal was pending, one very important event took place in the local proceedings. The state court issued an Opinion and Judgment dated May 15, 1981, striking all of Nesglo's, Nestor's and Gloria's answers and affirmative defenses and dismissing with prejudice Nestor's and Gloria's counterclaim against Chase. The court also entered the default of defendants and rendered judgment in favor of Chase for the full amount of outstanding indebtedness plus interest, costs and attorney's fees.

In its opinion, the state court, after an extended recitation of the deplorable history of the discovery proceedings, found as a matter of fact that Nesglo, Nestor and Gloria had willfully failed to comply with its discovery orders and had, through their misconduct, abused the state adjudicatory **[**15]** process. (See Document No. 49).

Nesglo, Nestor and Gloria then filed a motion for reconsideration and simultaneously petitioned the state supreme court for a writ of certiorari to review the state court's order of October 15, 1980 denying their partial motion for summary judgment. They emphasized that concurrently with the state court proceedings, they had

> "/f/iled a Complaint in the United States District Court for the District of Puerto Rico, in which the same parties and basically the same facts are involved, and have also filed and /*sic*/ appeal before the First Circuit Court in Boston for which said court has set September 2 for oral argument as to the legal basis for said appeal. Exhibit 2".

The state court denied this motion for reconsideration on June 3, 1981.

The petition for certiorari having failed, Nesglo, Nestor and Gloria filed a petition for review again before the state supreme court. In this last petition they referred to some exhibits in their motion for reconsideration and stated that it consisted of:

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[3] The incident involved a motion to intervene filed by a creditor of Nesglo, Albert E. Rebel & Associates, Inc. ("Rebel") that claimed a preference in its credit to that of Chase. Nesglo, Nestor and Gloria intervened to correct some alleged factual misrepresentations made by Chase in its petition for certiorari. The supreme court finally issued an opinion on November 1981 clarifying the criteria to determine whether Chase's factor's lien credit was of superior rank to that of Rebel. In passing, the court considered the state court judgment against Chase to be final, firm and unappealable. The court did not take into consideration Nesglo's averments in its informative motion. See, *Nesglo, Inc. v. Chase Manhattan Bank*, 81 JTS 108 (1981).

[4] By this date, the state court had dismissed Nesglo's May 6, 1980 counterclaim and had denied reconsideration of its order.

"(b) Copy of appellants brief filed before the United States Court of Appeals for the First Circuit in Boston, *in a case* **[**16]** *between the same parties resulting from the same controversies;* . . ." (Emphasis supplied).

Meanwhile, on June 22, 1981, the state supreme court denied the petition for certiorari from the interlocutory order of October 15, 1980 denying Nesglo's, Nestor's and Gloria's motion for partial summary judgment. The court considered the petition to be frivolous and imposed sanctions on petitioners consisting of $500.00 for attorney's fees.

Two motions for reconsideration of this supreme court resolution were filed and both were denied. The petition for review was likewise denied on August 6, 1981 and a motion to reconsider said denial was also rejected on September 4, 1981.

[*1035] Mandates from all state supreme court proceedings were issued and the case returned to the state court on October 13, 1981 (Petition for Review) and on October 19, 1981 (Certiorari).

No evidence in the record exists that Nesglo, Nestor and Gloria perfected an appeal or petition for certiorari to the Supreme Court of the United States from the state supreme court decisions during the pendency of the proceedings before us, as authorized by *28 U.S.C. 1257*.

We shall now discuss the legal significance **[**17]** of the aforementioned findings of fact and their bearing on the ultimate issue of mootness.

Plaintiffs initially contend that they have not been afforded an adequate opportunity to argue the issue of mootness because defendants should have been required to state their position first. This contention is frivolous. While it is true that initial memoranda of law were filed simultaneously by both parties, we later held oral argument on all issues raised therein, and plaintiffs were afforded a reasonable opportunity to rebut defendants' assertions. Indeed, at the close of argument, we invited the parties to file additional memoranda so that each could have one last opportunity to discuss the issues raised in their respective briefs and motions.

As to the issue of mootness, we start with the often cited definition given in *Powell v. McCormack, 395 U.S. 486, 496, 23 L. Ed. 2d 491, 89 S. Ct. 1944*:

"Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."

Proper disposition of the mootness issue in this case is thus governed by those Supreme Court cases recognizing that an intervening judicial **[**18]** decision in a collateral proceeding may moot a parallel action pending in another court. *Murphy v. Hunt, 455 U.S. 478, 71 L. Ed. 2d 353, 102 S. Ct. 1181 (1982)* (civil rights suit brought in federal district court by sex offender challenging a state's constitutional provision restricting bail, on basis of Eight Amendment's prohibition of excessive bail, held to have been rendered moot by intervening state court conviction); *Patterson v. Warner, 415 U.S. 303, 39 L. Ed. 2d 343, 94 S. Ct. 1026 (1974)* reh. den. *416 U.S. 952, 94 S. Ct. 1962, 40 L. Ed. 2d 302* (upholding constitutionality of state statute vacated on direct appeal to Supreme Court and case remanded for district court's initial consideration of whether action was rendered moot by an intervening state court decision); [5] *Aikens v. California, 406 U.S. 813, 32 L. Ed. 2d 511, 92 S. Ct. 1931 (1972)* reh. den. *406 U.S. 978, 92 S. Ct. 2407, 32 L. Ed. 2d 677* (court dismisses writ of certiorari on the ground that issue on which writ was granted had been rendered moot by an intervening state court decision); *Lowe v. Duckworth, 663 F.2d 42 (7th Cir. 1981)* (federal habeas corpus petition rendered moot on appeal by intervening **[**19]** state court decision ordering a new trial. Since the court granted the relief sought, there was termination of the live controversy between the parties).

The argument of "voluntary cessation" urged by plaintiffs and expounded in *County of Los Angeles v. Davis, 440 U.S. 625, 59 L. Ed. 2d 642, 99 S. Ct. 1379 (1979)* and followed in *Free v. Landrieu, 666 F.2d 698 (1st Cir. 1981)*, is

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[5] The procedure used by the Supreme Court in this case to determine mootness -- whether a live case or controversy has ceased to exist between the parties on appeal -- closely resembles the procedure used herein by the First Circuit Court of Appeals. 415 U.S. at 306.

not applicable to the facts of this case. As previously stated, we will decide the issue on whether the intervening state judgment fully disposed of the pending controversy between the parties and if so, whether we must accord said judgment full faith and credit pursuant to 28 U.S.C. 1738.

The state court judgment of May 15, 1981 is now final, firm and unappealable. **[**20]** We will now determine whether it should be accorded full *res judicata* effects in this court by virtue of the federal full-faith-and-credit statute. As the Supreme Court recently observed:

> **[*1036]** "As one of its first acts, Congress directed that all United States Courts afford the same full-faith-and-credit to state court judgments that would apply in the State's own Courts. Act of May 26, 1790, Ch. 11, 1 Stat. 122, *28 U.S.C. Sec. 1738*." *Kremer v. Chemical Construction Corp., 456 U.S. 461, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982)* reh. den. *458 U.S. 1133, 103 S. Ct. 20, 73 L. Ed. 2d 1405 (1982)*. [6]

[21]** If in Puerto Rico a court would give preclusive effects to the state court judgment of May 15, 1981 and the other ancillary decisions made by both the state and supreme courts, then *Section 1738* commands that this court do likewise. As we have said earlier, the end effect, consistent with one of the cardinal purposes behind *res judicata*, would be to obliterate any case or controversy hitherto extant between opposing parties to the suit.

In assessing the effects of the state court proceedings we follow the rules laid down by the United States Court of Appeals for the First Circuit in *General Foods v. Mass. Dept. of Public Health, 648 F.2d 784, 785-786 (1st Cir. 1981)* for cases falling within the federal question jurisdiction of federal courts (challenge to state regulations on federal grounds in federal court by members of association previously litigating the issue in state court).

> ". . . /w/here the State Court rendering the judgment would give it preclusive effect, federal courts must give it such preclusive effect. /Citations omitted / . . . /and/ . . . /w/here the State Court rendering the judgment would not give it preclusive effect, the federal courts would **[**22]** not give it such preclusive effect."

Furthermore, it is now well settled that in Puerto Rico, "the doctrine of res judicata, *res judicata pro veritate habetur*, is . . . part of /its/ Civil Law, and except, for comparative purposes /the courts / need not resort to other sources for its analysis". *Republic Security Corporation v. The Puerto Rico Aqueduct and Sewer Authority, 674 F.2d 952, 955-956, n. 4 (1st Cir. 1982)* quoting from *Lausell Marxuach v. Diaz de Yanez, 103 D.P.R. 533, 535 (1975)*.

As recently described by this court, after a remand from the First Circuit of Appeals, [7] quoting from a leading Puerto Rico Supreme Court case: [8]

> "'In general terms, it may be affirmed that the rule of res judicata is based on considerations of public policy and necessity: on the one hand, the interest of the State in terminating litigations in order that judicial issues may not be perpetuated, . . ., and, on the other hand, the desirability of not submitting a citizen twice to the inconveniences which the litigation of the same cause entails . . . *In its origin it presupposed an adversative or litigious proceeding and an adjudication on the merits. However, the complexities* **[**23]** *of the modern proceeding and the increase in litigation have resulted in its extension -- by statutory channels -- even to*

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[6] In *Kremer* the Court held that a state court judgment upholding a state agency's rejection of an employment discrimination claim, which would have *res judicata* effects in the state's own courts, precludes a federal action under Title VII of the 1964 Civil Rights Act on the same claim of employment discrimination. In so doing, the Court considerably narrowed the scope of judicial exceptions to the preclusive command of 28 U.S.C. Se. 1738 in the context of relitigation of federal claims originally filed and disposed of in state courts.

[7] *Rodriguez v. Baldrich, 628 F.2d 691 (1st Cir. 1980)* (judgment of dismissal on *res judicata* grounds vacated and remanded to district court for clarification of Puerto Rican law on *res judicata* effect in federal court of a state court dismissal for failure to post a nonresident cost bond).

[8] *Perez v. Bauza*, 83 P.R.R. 213, 217-218 (1961).

> *decisions which have not adjudicated the controversies on its merits*. (Emphasis in original)." *Rodriguez v. Baldrich, 508 F. Supp. 614, 616 (D.P.R. 1981)*. [9]

[24]** **[*1037]** The court quoted another passage from *Perez v. Bauza, supra*, which is relevant to the issue in this case, namely: a willful failure to comply with a discovery order must be accorded full *res judicata* effect in this court. The Supreme Court of Puerto Rico fully endorses the view that an involuntary dismissal under Rule 39.2 of the Rules of Civil Procedure of Puerto Rico of 1958 [10] (equivalent to *Fed. R. Civ. Proc. 41(b)*) operates as an adjudication on the merits:

> "/T/he pertinent part of the rule reads as follows:
>
> '(b) *Involuntary Dismissal: Effect Thereof*. For failure of the plaintiff to prosecute or to comply with these rules or any order of the court, a defendant may move for dismissal of an action or of any claim against him. After the plaintiff has completed the presentation of his evidence, the defendant, without waiving his right to offer evidence, in the event the motion is not granted, may move for a dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. Unless the court in its order for dismissal otherwise specifies, a dismissal under this subdivision and any dismissal not provided for in this **[**25]** rule, other than a dismissal for lack of jurisdiction, operates as an adjudication upon the merits.
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> * * *
>
> "*Rule 41(b)* is consistent with the inherent power of courts to relieve the congestion of their calendars . . ., and likewise *it is undoubtedly consistent with the laudable purpose of discouraging delinquent litigants or those who utilize the judicial channel to cause inconveniences to the adverse party by initiating untenable proceedings*.'" (Emphasis in original quotation of *Rule 41(b)* other emphasis, ours). *Id.*

[26]** Clearly a Puerto Rican court would accord full *res judicata* effect, as a matter of statutory law, to a dismissal of claims filed by a recalcitrant party who willfully disregards discovery orders issued by the court, much the same way as a federal court would do in similar circumstances. [11] *Compare, Nasser v. Isthmian Lines, 331 F.2d 124 (2d Cir. 1964)* (involuntary dismissal of seaman's complaint for failure to answer interrogatories operates as *res judicata* in subsequent federal suit) *with Souchet v. Cossio*, 83 P.R.R. 730 (1961) (prior involuntary dismissal of action seeking declaration of nullity of a sale, replevin and other remedies for failure to prosecute, accorded full *res judicata* effect in subsequent identical action between the same parties).

[27]** The pronouncements of the Supreme Court of Puerto Rico echoed in *Baldrich*, to the effect that public policy requires that procedural or "penalty dismissals" [12] be accorded full *res judicata* effect in subsequent litigation

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[9] According to *Perez v. Bauza, supra*, as interpreted by *Baldrich, res judicata* in Puerto Rico has the same contours that it has in federal law for it "relieve/s/ parties of the cost and vexation of multiple lawsuits, conserves judicial resources, and, by preventing inconsistent decisions, encourages reliance on adjudication". *Allen v. McCurry, 449 U.S. 90, 94, 66 L. Ed. 2d 308, 101 S. Ct. 411 (1980)*.

[10] As pointed out in *Baldrich, supra, 508 F. Supp. at 615, n. 1*, the Puerto Rico Rules of Civil Procedure of 1958 were repealed in 1979 by the Rules of Civil Procedure of 1979. Rule 39.2 was reenacted as Rule 39.2(c) and its text, insofar as pertinent here, is identical to that of its predecessor. See, 32 L.P.R.A. App. 111, p. 162 (1980). This rule is virtually identical to *Fed. R. Civ. Proc. 41(b)* governing involuntary dismissals. In 1943 it was also known as *Rule 41(b)* of the Rules of Civil Procedure of Puerto Rico, 1943, and such is the reference in the *Bauza* passage reproduced above.

[11] In dismissing complaints for failure to comply with discovery orders the trial courts of the Commonwealth of Puerto Rico seem to enjoy the same discretionary latitude as federal district courts. Orderly administration of justice in this sense is identical both in the state and federal systems. See, e.g., *Corchado v. Puerto Rico Marine Management, 665 F.2d 410 (1st Cir. 1981)* (circuit court underscores that dismissals with prejudice for failure to comply with discovery orders will ordinarily be upheld as being within sound discretion of trial court).

[12] See, generally, 18 C. Wright, A. Miller & E. Cooper, *Federal Practice and Procedure*, Civil: Sec. 4440, at 362-365 (1981).

initiated by the parties affected by such dismissals, is not inconsistent with recent pronouncements on the subject by the Supreme Court of the United States.

In *Allen v. McCurry, 449 U.S. 90, 66 L. Ed. 2d 308, 101 S. Ct. 411 (1980)*, the Court accorded full *res judicata* effect to state court determinations made in the course of criminal proceedings in the context of a **[*1038]** subsequent federal civil rights action brought in federal court by the criminal defendant. The Court made it very clear that litigants have no "unencumbered opportunity to litigate a /federal/ right in federal district court, regardless of the legal posture in which the **[**28]** federal claim arises". *449 U.S. at 103*. It is only necessary that a particular litigant have a "full and fair opportunity" to present the particular claim or issue in state court. *Id. at 95*.

The Court has recently stated that the contents of "what a full and fair opportunity to litigate entails is the procedural requirements of due process", *Kremer v. Chemical Construction Corp., supra, 102 S. Ct. at 1898, n. 24*, and the fact that a particular litigant "fail/s/ to avail himself of the full procedures provided by state law does not constitute a sign of their inadequacy" /citations omitted /. *Id. at 1899*.

Considering the above, we have no doubt that the courts of the Commonwealth of Puerto Rico would give full preclusive or *res judicata* effects to a dismissal for willful failure to comply with discovery orders, such as was entered here by the state court on May 15, 1981. Notwithstanding, we must now determine whether we should give full preclusive effect to said judgment by virtue of the federal full-faith-and-credit statute, *28 U.S.C. Sec. 1738*.

Plaintiffs strenuously argue that there is no identity of parties between this suit and the prior state court proceedings. **[**29]** They contend that even though Chase sued Nesglo, Nestor and Gloria in state court, only Nestor and Gloria filed a "permissive and independent counterclaim" and "Nesglo did not file an answer and was not a counterclaimant". We disagree.

An examination of the answer and affirmative defenses filed in the state court on March 26, 1979 reveals that they were filed on behalf of "defendant" (la parte demandada). [13] Furthermore, in the portion of the counterclaim (reconvencion) the appearing defendants are singled out and identified as "defendant-counterclaimant Mr. Nestor Cruz and Mrs. Gloria D. de Cruz" (la parte demandada-reconveniente don Nestor Cruz y dona Gloria D. de Cruz). But aside from party identification in connection with the pleadings, there are other indicia that Nesglo, in fact, appeared and made allegations in the state court. In the answer, practically all of the allegations refer to the business relationship between Chase and Nesglo. The same is true as to the affirmative defenses.

[30]** With respect to the counterclaim, while it may be true that it is filed by Nestor and Gloria, it still incorporates the affirmative defenses previously set forth by Nesglo, and sets forth claims for relief properly belonging to Nesglo and not just Nestor and Gloria as joint and several guarantors of the latter. Indeed, a comparison between the counterclaim and the amended complaint filed before this court reveals a substantial similarity, if not identity of, material operative facts underlying the various claims for relief stated in both documents.

Physical identity of parties is not necessary for *res judicata* purposes under Puerto Rican substantive law. As Article 1204 of the Civil Code provides, *in fine:*

> "It is understood that there is identity of persons whenever the litigants of the second suit are legal representatives of those who litigated in the preceding suit, *or when they are jointly bound with them or by the relationships established by the indivisibility of prestations among those having a right to demand them, or the obligation to satisfy the same*." *31 L.P.R.A. Sec. 3343* (Emphasis supplied).

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[13] In Puerto Rico it is common practice to refer to all defendants or the defendants in general as "the party defendant" (literal translation). If a particular defendant or plaintiff is to be singled out then he or she or it (if a corporation) is expressly identified in the pleadings.

The state court record reveals that Nestor and Gloria **[**31]** were the joint and several [14] **[**32]** guarantors of Nesglo's contractual obligations **[*1039]** to Chase. As such, their prestations were indivisible with those of Nesglo towards Chase and hence they had "a right to demand them, or the obligation to satisfy the same". [15] Indeed, a close examination of Nestor's and Gloria's counterclaim in state court, and their opposition to Chase's motion to dismiss the same, reveals that Nestor and Gloria are the functional privies of Nesglo within the scope and intendment of the "identity" definition found in the last paragraph of Article 1204.

The contents of the aforementioned opposition to Chase's motion to dismiss establish that Nestor and Gloria asserted standing on their own behalf and that of Nesglo, to prosecute their federal and state claims against Chase, including those arising out of the Tie-in Amendments, relying on their status as joint and several guarantors of Nesglo, entitled to oppose or interpose against the creditor /*Chase*/ the same defenses and/or causes of action that Nesglo would have opposed or interposed. Nestor and Gloria are therefore bound by the Judgment of May 15, 1981 as privies of Nesglo, for purposes of the identity required under Puerto Rican *res judicata* doctrine. [16]

[33]** Moreover, Nesglo has expressly admitted on the record that it was a party to the state court answer and counterclaim of March 26, 1979.

Plaintiffs' reliance on *A & P General Contractors v. Asociacion Cana, Inc., 110 D.P.R. 753 (1981)*, is misplaced. In *A & P*, a guarantor sued to recover a pledge it had given to the creditor of the principal debtor. When such action was initiated, the principal debtor had already commenced suit against the creditor because of the latter's breach of its contractual obligations to advance money to the former for construction purposes. In the guarantor's suit, as a condition for release of the pledge -- a certificate of deposit -- the court had to determine whether the creditor had indeed breached the contractual obligations to the principal debtor for then, said breach would not only extinguish the principal debtor's obligations to the creditor, but would also terminate the accessory surety agreement binding the guarantor-pledgor. Upon extinguishment of the prime obligation, the guarantor would thus become automatically entitled to return of the certificate of deposit pledged to the creditor, and this is exactly what happened in the guarantor's **[**34]** suit.

The state supreme court reversed the lower court ruling that had allowed the principal debtor in his separate suit against the creditor, to invoke successfully the doctrine of "offensive collateral estoppel" by judgment on the issue of the creditor's liability for breach of contract. The court advanced two grounds for its decision: (1) that the principal debtor being represented by the same attorneys as the guarantor, could have intervened but had voluntarily chosen not to do so in the guarantor's suit, and (2) that there was really no identity of **[*1040]** parties between the principal debtor and guarantor since the latter was merely suing *qua* guarantor to recover the pledge. *A & P General Contractors, supra.*

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[14] As explained by this court in *Wong v. Key Finance Corporation, 266 F. Supp. 149, 153, 154 (D.P.R. 1967)*, the words "joint" or "jointly" in English are the equivalent of "solidaria" or "solidariamente" in Spanish, which in the case of multiple debtors or guarantors, means that *any* of them are liable for the entire sums owed. The Code also confers standing on solidary debtors to "utilize, against the claim of the creditor, all the exceptions arising from the nature of the obligation and those which are personal to him". Article 1101, ***31 L.P.R.A. Sec. 3112***. Sureties binding themselves jointly (solidarily) with the principal debtor are treated, according to the Code, as principal solidary debtors subject to the provisions found in Article 1090-1101, 31 L.P.R.A. Secs. 3101-3112. *Wong, supra, Id.*

[15] They also had the right to utilize against the claim of Chase, as creditor, all exceptions arising from the nature of the obligation. Article 1101.

[16] The same result would be obtained under the federal *res judicata* principle as the Supreme Court of the United States indicated in a similar context in *Montana v. United States, 440 U.S. 147, 59 L. Ed. 2d 210, 99 S. Ct. 970 (1979)*. The Court at page 154 quoting from *Souffront v. Compagnie des Sucreries, 217 U.S. 475, 486-487, 54 L. Ed. 846, 30 S. Ct. 608*, observed that "/O/ne who prosecutes or defends a suit in the name of another to establish and protect his own right or who assists in the prosecution or defense of an action in aid of some interest of his own . . . is as much bound . . . as he would be if he had been a party to the record."

As commentator Manresa points out, in discussing the requirement of "identity" of parties for the presumption of *res judicata* to be successfully invoked:

> "With reference to solidarity and indivisibility of obligations, we will note that the extension of the first judgment to all those interested therein shall have full application concerning the totality of the obligation, to its essence or validity, and to the acts wherein its origin is found; but **[**35]** not concerning the very personal circumstances of someone who may not have litigated before, except in the event that they /such circumstances / may have been utilized with respect to the *exclusive portion of said interested person by one of his co-obligees*.
>
> "It is to be noted, and it has great importance, that the requirement of identity of parties is in practice satisfied when the two suits are in all other respects *exactly* the same, and, presenting the same question, and exercising the same actions, /they are / ground/ed/ on the same cause and refer/red/ to the same objects."
>
> (Emphasis supplied) (Translation ours). Manresa, *Comentarios al Codigo Civil*, Tome 8 Vol. II, pp. 242-243 (Reus, 5th Ed. 1950).

Scaevola takes the same position on this "identity" issue and concludes that, when two or more persons bound solidarily appear as such in a first suit, their personalities merge or they establish such a procedural unity, that what is done by one or against one binds all the rest, for purposes of *res judicata*. Scaevola, *Codigo Civil*, Tome XX, p. 450 (Madrid 1904). See also, Puig Brutau, *Fundamentos de Derecho Civil*, Tome I, Vol. 2, p. 146, n. 41 (Bosch. **[**36]** 1959). The Supreme Court of Puerto Rico has adopted these doctrinal views. *Heirs of Zayas Berrios v. Berrios*, 90 P.R.R. 537, 551-552 (1964). (Control of first action by real party defendants, sufficient to bar second suit by said defendants due to their juridical solidarity with nominal party defendant appearing in first suit); Cf. *General Foods v. Mass. Dept. of Public Health, infra*, 648 F.2d at 787-789 and note 6; *Pan American Match, Inc. v. Sears Roebuck Co., 454 F.2d 871, 874 (1st Cir.)*, cert. den. *409 U.S. 892, 34 L. Ed. 2d 149, 93 S. Ct. 113 (1972)*.

Plaintiffs next contend that the state court proceedings did not involve the same claims as those pressed before this court. They collaterally attack the state court's jurisdiction over the federal Tie-in Amendment violations they voluntarily raised there as affirmative defenses and counterclaim. [17] Their argument is premised on the theory that Congress vested federal courts with exclusive jurisdiction to entertain this type of claim to the exclusion of state courts. With respect to their federal constitutional and civil rights claims, they contend that Judge Dalton, sitting by designation, somehow reserved plaintiffs' **[**37]** rights to come back to this court.

Upon examining the state court claims pressed by plaintiffs-defendants-counterclaimants therein -- and comparing them to the amended complaint filed before this court [18] in September 1979, we find that all of the causes of action pleaded in the state court have their roots in the **[**38]** same nucleus of operative facts comprising the business **[*1041]** contractual relationship between Chase and Nesglo dating back to 1972. It may be that particular theories, bolstered by statutory citations, vary somewhat, but the essential facts giving rise to the claims asserted are a constant factor in both the state and federal pleadings.

In requesting the state court to issue summons to serve Zych and Fernandez as third party defendants, plaintiffs in May 1980 made reference to the federal action and its similarities to the state court proceedings. Later, they even

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[17] Plaintiffs themselves characterize Nestor's and Gloria's state court counterclaim as permissive. Though it is not necessary for us to decide whether such counterclaim is permissive or compulsory for purposes of this opinion, certainly this characterization shows that plaintiffs were not involuntary defendants hauled into state court against their wishes. They freely chose their state forum and must abide by their conduct even if it implies waiver of a federal forum and its protections. See, *Nash County Board of Education v. Biltmore Co., 640 F.2d 484, 492 (4th Cir. 1981)*, cert. den. ***454 U.S. 878, 70 L. Ed. 2d 188, 102 S. Ct. 359***, reh. den. ***454 U.S. 1117, 102 S. Ct. 692, 70 L. Ed. 2d 654***.

[18] A complete description of the claims set forth in this amended complaint of September 1979 is set out in our original reported opinion and order dismissing this action. See, *506 F. Supp. 254 (D.P.R. 1980)*.

attached an order of this court as part of their opposition to Chase's request for dismissal of Nesglo's counterclaim filed in state court.

In their motion for reconsideration of the judgment entered by the state court on May 15, 1981, **[**39]** and apparently aware of the *res judicata* effect that said judgment would have in the federal proceedings, plaintiffs Nesglo, Nestor and Gloria advanced as a ground in support of their request, the concurrent "complaint in the United States District Court for the District of Puerto Rico, *in which the same parties and basically the same facts are involved*" (emphasis added) as well as the appeal pending before the United States Court of Appeals for the First Circuit. They attached as exhibits copies of the brief filed before the First Circuit Court of Appeals.

In Puerto Rico, strict identity between causes of action in the first and second suits is not required. The cause or grounds for the claim or request should not be confused with the remedies actually sought in one or the other action. *Mercado Riera v. Mercado Riera*, 100 P.R.R. 939, 950-51 (1972).

In *Mercado Riera, res judicata* was applied by the court to a new action for damages arising out of the dissolution of a partnership because in the previous action plaintiff had failed to claim them. The court expressly overruled two prior cases [19] which had rejected the defense of *res judicata* "because, despite **[**40]** the fact that the second action could be joined to the first, the failure to join it did not constitute a waiver of the claim for damages because the right to join several causes of action is discretionary with the plaintiff" /citations omitted /. *Id.* at 953. The trend in Puerto Rico, therefore, is to preclude in the subsequent suit whatever could have been claimed or joined with the first one but was not. This, of course, includes all grounds or defenses that could have been raised either prior to or after judgment in the first suit. And, ordinarily, failure to correct an error in the first action either by motion or on appeal will result in preclusion in the subsequent action, even if the first judgment can be branded as erroneous. Cf. *A.S.A. v. Belendez*, 98 P.R.R. 506, 510-512 (1970) (failure to appeal first ruling that plaintiff had not exhausted his administrative remedies precludes him from raising lack of jurisdiction of an administrative board in second suit even if jurisdictional theory had changed between suits).

[41]** *Lawlor v. National Screen Service Corp., 349 U.S. 322, 99 L. Ed. 1122, 75 S. Ct. 865 (1955)*, advanced by plaintiffs in support of their theory that the state and federal claims are not the same, is distinguishable from the case at bar for there a state court judgment [20] was not involved and under federal principles of *res judicata* new operative facts giving rise to new claims for relief had arisen, as well as new parties joined when the second suit was filed.

In light of the foregoing legal principles, and on the basis of the state court record, we conclude that there is "identity" of claims for *res judicata* purposes between the claims advanced by plaintiffs in this court and those previously advanced in the state court.

Interestingly, **[**42]** plaintiffs seem to attack the state court's jurisdiction over the claims **[*1042]** they voluntarily presented there and which were the subject of extensive discovery, contending that the state court lacked subject matter jurisdiction because Congress granted exclusive jurisdiction to federal courts to entertain private treble damage suits based on violations of the Tie-in Amendments prohibitions found in the federal banking laws.

As we pointed out in our original decision in this case, it was not the intention of Congress to preempt state court jurisdiction over activities otherwise covered by the federal banking tie-in amendments. If so, there would not have been any reason for Congress to have inserted the language in *12 U.S.C. Sec. 1978* [21] acknowledging the parallel

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[19] *Blanco v. The Capital*, 77 P.R.R. 607 (1954) and *Capo v. A. Hartman & Co.*, 57 P.R.R. 190 (1940).

[20] As *General Foods v. Mass. Dept. of Public Health, supra, 648 F.2d at 785-786* makes clear, in the case of a state court judgment deciding federal questions, federal courts must refer to state law on *res judicata* to comply with the command of *28 U.S.C. Sec. 1738*.

[21] *12 U.S.C. Sec. 1978* provides as follows:

power of the states to afford relief to any citizen suffering business injury as a consequence of the conduct prohibited by the preceding sections of the act. This congressional concern for preserving intact concurrent state jurisdiction over banking, is reflected in the abridgment of the original prohibition of anticompetitive practices envisioned in the original Senate Bill, so as not to interfere with traditional, **[**43]** localized banking customs and customer credit extension practices. *Nesglo, Inc. v. Chase Manhattan Bank, N.A., supra, 506 F. Supp. at 261-264*.

Indeed, the plain statutory language of *12 U.S.C. Secs. 1975* [22] and *1978*, is fully compatible with, and does not implicitly repeal or carve an exception to, the full-faith-and-credit mandate found in *28 U.S.C. Sec. 1738*. In *Kremer v. Chemical Construction Corporation, supra*, the Supreme Court of the United States refused **[**44]** to construe the statutory grant of a right to federal court access granted to victims of employment discrimination under Title VII of the Civil Rights Act of 1964, as impliedly repealing the mandate of *28 U.S.C. Sec. 1738*. Likewise, the deference to state court jurisdiction over banking affairs embodied in *12 U.S.C. Sec. 1978*, as supported by the legislative history of the bank Tie-in Amendments, should disprove such implied repeal of or exception to a time-tested federal statute of such practical significance for present-day comity and federalism.

[45]** Plaintiffs brought upon themselves the natural consequences of their own voluntary acts before the state court. So much is apparent from the state court Opinion and Judgment of May 15, 1981. In this sense, the state court judgment is, in principle, no different from the state court judgment by stipulation entered and given full *res judicata* effect by a federal court in *Nash County Board of Education v. Biltmore Co., 640 F.2d 484 (4th Cir. 1981)*, cert. den. *454 U.S. 878, 70 L. Ed. 2d 188, 102 S. Ct. 359*, reh. den. *454 U.S. 1117, 102 S. Ct. 692, 70 L. Ed. 2d 654*.

In *Nash* a state county board of education sued in federal district court various milk producers seeking treble damages for a price fixing conspiracy in violation of the federal antitrust laws. However, the State Attorney General had previously entered into a consent decree with the milk producers in a prior state action he had brought under the state antitrust laws. The federal district court gave full *res judicata* effect to the state court judgment and dismissed the action. The U.S. Court of Appeals for the Fourth Circuit affirmed, holding that *28 U.S.C. Sec. 1738* barred the second suit. The court used **[**46]** various alternative theories **[*1043]** to support its conclusion that the state court judgment was entitled to full-faith-and-credit in the federal court even though the antitrust laws had been judicially construed to confer exclusive federal jurisdiction on federal courts. [23] In comparing the state and federal claims, it focused on the operative facts giving rise to both claims rather than on the statutory source for each, and attached significant consequences to the conduct of plaintiffs' representative in prosecuting the claims in state court:

> ". . . the plaintiff, *by choosing to file the state action on the same cause of action, had voluntarily waived the benefits if any, of a federal forum and both res judicata and collateral estoppel should be available to bar a*

> "Nothing contained in this chapter shall be construed as affecting in any manner the right of the United States or any other party to bring an action under any other law of the United States or of any State, including any right which may exist in addition to specific statutory authority, challenging the legality of any act or practice which may be proscribed by this chapter. No regulation or order issued by the Board under this chapter shall in any manner constitute a defense to such action."

[22] *12 U.S.C. Sec. 1975* provides as follows:

> "Any person who is injured in his business or property by reason of anything forbidden in section 1972 of this title may sue therefor in any district court of the United States in which the defendant resides or is found or has an agent, without regard to the amount in controversy, and shall be entitled to recover three times the amount of the damages sustained by him, and the cost of suit, including a reasonable attorney's fee."

[23] In so doing, the court adopted Moore's comments on *Connelly v. Balkwill, 174 F. Supp. 49, 11 Ohio Op.2d 289, 83 Ohio L. Abs. 513 (N.D. Ohio 1959)*, aff'd. ***279 F.2d 685 (6th Cir. 1960)***. *Nash, supra, 640 F.2d at 488, n. 10*. The Supreme Court of the United States has noted the *Nash* method of ascertaining whether there is identity of claims in *Kremer v. Chemical Construction Corp., supra.*

cause of action, even though the federal action was within the exclusive jurisdiction of a federal court." (Emphasis supplied).

Nash, supra, 640 F.2d at 497.

[47]** As the Supreme Court stated in *Federated Department Stores, Inc. v. Moitie, 452 U.S. 394, 69 L. Ed. 2d 103, 101 S. Ct. 2424 (1981)*, a party who has litigated in a prior action will be held to his conduct therein, and if he fails to pursue a remedy within the prior action that could have preserved his rights, he may not thereafter seek collateral relief in the federal courts. The virtues of *res judicata* were further stressed in *Moitie* as an important tool for the even handed administration of justice within the federal system. Petitioners - retail purchasers of clothing -- Moitie and Brown -- had initially filed an antitrust suit in a California federal district court alleging a price fixing conspiracy among retail chain stores in California. The action was dismissed because, at that time, ultimate consumers or purchasers of products were considered not to have standing to sue under federal antitrust laws. They did not appeal the decision of the district court whereas other plaintiffs *did* appeal. While the latter appeal was pending, the Supreme Court issued an opinion recognizing retail purchasers standing to sue under federal ***antitrust law***, [24] and the appeals **[**48]** court reversed and remanded. Meanwhile, Moitie and Brown had refiled their antitrust claims in state court under California's antitrust laws. Defendants removed the same to the federal district court that had previously entertained the action and now had it on remand from the court of appeals, which had vacated the dismissal in light of the intervening Supreme Court decision on standing. Defendants then moved for dismissal and the court granted it considering its prior decision to be *res judicata* as to Moitie and Brown. An appeal was taken, and the court of appeals reversed because it considered the district court's initial decision to be erroneous, and hence, unjust for Moitie and Brown to suffer the consequences of a dismissal while those in their same procedural posture were allowed to prosecute identical claims. Defendants finally appealed to the Supreme Court and the latter reversed the court of appeals.

[49]** The Supreme Court underscored the conduct of Moitie and Brown in the first action and the fact that they *failed to appeal* the initial district court decision, even though the same was later reversed as being erroneous. Whether the decision was correct or not was considered by the court to be immaterial for *res judicata* purposes, [25]

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[24] *Reiter v. Sonotone Corp., 442 U.S. 330, 60 L. Ed. 2d 931, 99 S. Ct. 2326 (1979)* held that retail purchasers can suffer an "injury" to their business or property within the meaning of section 4 of the Clayton Act, which grants a private treble damage remedy to persons suffering business injury as a consequence of an antitrust violation.

[25] Defendants read the *Moitie* decision as signaling the demise of the judicially created doctrine of exclusive federal judicial jurisdiction in antitrust cases. See *Nash, supra, 640 F.2d 492, n. 13*. They argue that inasmuch as the Supreme Court acted on an action removed from state court, if the pleadings, as the court stated, merely reproduced the initial federal antitrust claims originally filed in the district court, then the state court had no subject matter jurisdiction over the action and the district court could acquire none on removal. *General Investment Co. v. Lake Shore & M.S.R. Co., 260 U.S. 261, 288, 67 L. Ed. 244, 43 S. Ct. 106 (1922)* (federal court must dismiss for want of jurisdiction federal antitrust action originally filed in state court and subsequently removed to the former court). See also, *Blumenstock Bros. Adv. Agency v. Curtis Pub. Co., 252 U.S. 436, 64 L. Ed. 649, 40 S. Ct. 385 (1920)*; *Freeman v. Machine Co., 319 U.S. 448, 451, 87 L. Ed. 1509, 63 S. Ct. 1146, n. 6 (1943)*; *but see, Testa v. Katt, 330 U.S. 386, 389-394, 91 L. Ed. 967, 67 S. Ct. 810 (1947)* (state court is obligated under *supremacy clause*, to enforce private treble damage remedy -- similar to that in antitrust laws -- found in Emergency Price Control Act of 1942, as amended, regardless whether it be considered "penal" in nature). A remand was thus in order and the *res judicata* question need not have been decided. A careful review of the *Moitie* Supreme Court decision reveals that indeed the court was aware of the removal problem, but nevertheless chose to entertain the *res judicata* arguments. *Moitie, supra, 452 U.S. at 397, n. 2*.

While defendants' arguments certainly bear weight, we find it unnecessary to reach this issue on the present record. Whether or not the state court here had subject matter jurisdiction of the federal claims before this court, is really immaterial in view of the opportunities available to the plaintiffs to redress any jurisdictional errors within the state court system.

We remain unpersuaded that Congress intended to vest federal courts with jurisdiction exclusive of that of state courts to entertain private treble damage actions under the Tie-in Amendments, especially, under the criteria set forth in ***Gulf Offshore Co. v. Mobil Oil Corp., 449 U.S. 1033, 66 L. Ed. 2d 494, 101 S. Ct. 607***, to determine whether a congressional grant of federal jurisdiction displaces state court jurisdiction over the same federal claims:

because **[*1044]** Moitie and Brown had foregone an initial appeal when their original federal action had been dismissed. They had available an appellate procedure, which they should have used regardless of the settled antitrust doctrine prevalent at that time (prior to the *Sonotone* decision).

[50]** The reasoning in *Moitie* is fully applicable here. Plaintiffs Nesglo, Nestor and Gloria had a full and fair opportunity to present their case in state court, including any objections they may have had to the subject matter jurisdiction of the state court. They voluntarily chose not to avail themselves of that opportunity and they seek further prosecution of their claims in this court under the theory, rejected in *Allen v. McCurry, supra*, [26] that "every person asserting a federal right is entitled to one unencumbered opportunity to litigate that right in a federal district court, regardless of the legal posture in which the claim arises". *449 U.S. at 103*.

Let us now examine plaintiffs' assertion that they preserved their federal rights in this **[**51]** court pursuant to Judge Dalton's Order of April 22, 1980. Plaintiffs' reliance on *England v. Louisiana State Bd. of Med. Exam., 375 U.S. 411, 84 S. Ct. 461, 11 L. Ed. 2d 440 (1964)* is again misplaced. Contrary to the *England* situation, where plaintiffs **[*1045]** first sought relief in federal court (*375 U.S. at 412*), plaintiffs herein and their privies first pressed their federal claims in state court and then refiled them in federal court. See, *Partido Nuevo Progresista v. Barreto Perez, 639 F.2d 825, 826, n. 2 (1st Cir. 1980)*, cert. den. *451 U.S. 985, 68 L. Ed. 2d 842, 101 S. Ct. 2318* and cases cited. In these circumstances, plaintiffs would seem foreclosed from invoking the doctrine of federal right preservation announced in *England*.

Moreover, while it is true that *England* reversed the lower court dismissal, it did so because it considered appellants to have relied in good faith on prior case law. Hence, it made the requirement of explicit reservation of federal rights in state court prospective in nature, explicitly warning that the mistaken view of the appellants in that case "will not avail other litigants who rely upon it after today's decision". **[**52]** (*375 U.S. at 422*) Plaintiffs here are therefore not entitled to the relief afforded the *England* plaintiffs, for they actively prosecuted their claims in state court, and voluntarily invoked, as well as used, the state court process, fully and unreservedly submitting to it. Now they are and should be bound by the judgment entered by said court. The fact that the claims pressed in state court were never actually litigated is immaterial for, by operation of law, the state court dismissal here is the equivalent of a trial on the merits, [27] **[**53]** the same way it would have been in this court under *Fed. R. Civ. Proc. 41(b)*. Consequently, all of the federal claims, [28] even those allegedly arising under the Tie-in Amendments, were

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1) an explicit statutory directive;

2) an unmistaken implication from legislative history, and

3) a clear incompatibility between state court jurisdiction and federal interests.

Aside from the fact that in the case of Tie-in Amendments, there is no explicit statutory directive or legislative history permitting an inference of exclusive jurisdiction -- the contrary is just the situation as embodied in *12 U.S.C. Sec. 1978* -- we fail to perceive a clear incompatibility between state court jurisdiction and the commercial interests sought to be protected by Congress in the amendments. The broad traditional regulatory power of banking by the states, taken into consideration by Congress in enacting the Tie-in Amendments, certainly makes entertainment of such federal claims by state courts conducive to the enforcement of federal rights. *Kremer v. Chemical Construction Corp., supra*; *Dowd Box Co. v. Courtney, 368 U.S. 502, 507-508, 7 L. Ed. 2d 483, 82 S. Ct. 519 (1962)* (concurrent jurisdiction of state courts upheld in actions under Section 301 of the Labor Management Relations Act). Certainly, the courts of the Commonwealth of Puerto Rico are not foreign to broad antitrust private treble damage remedies to redress unfair methods of competition of the type pressed by plaintiffs in this court. See, the Puerto Rico Monopoly Act, Act No. 77 of June 25, 1964, as amended, ***10 L.P.R.A. Secs. 257 et seq.***, especially Secs. 259(a) and 262) (Unfair Methods of Competition and Exclusive Dealing). The act explicitly vests on the Superior Court of Puerto Rico jurisdiction to entertain private treble damage suits in ***10 L.P.R.A. Sec. 268(a)***.

[26] The U.S. Court of Appeals for the First Circuit had already held *pro tanto* in the context of a state civil proceedings in *Lovely v. Laliberte, 498 F.2d 1261, 1263-64 (1st Cir. 1974)*, cert. den. ***419 U.S. 1038, 42 L. Ed. 2d 316, 95 S. Ct. 526 (1974)***.

[27] See *Rodriguez v. Baldrich, supra.*

properly dismissed by the state court. See, *Key v. Wise, 629 F.2d 1049 (5th Cir. 1980)*, cert. den. *454 U.S. 1103, 70 L. Ed. 2d 647, 102 S. Ct. 682* (federal claim over which federal courts had exclusive jurisdiction by explicit congressional grant held barred by state court judgment entered after federal court erroneously abstained from entertaining federal claims originally brought to its attention).

Even if the assumption of jurisdiction by the state court over these claims were erroneous, and we remain unpersuaded that this is so, [29] we are not at liberty to collaterally review such an implicit exercise of jurisdiction. *Rooker v. Fidelity Trust Co., 263 U.S. 413, 68 L. Ed. 362, 44 S. Ct. 149 (1923)* (subject matter jurisdiction underlying bill in equity to collaterally review state court judgment because of federal prohibitions, held impermissible); *Chicot County Drainage District v. Baxter State Bank, 308 U.S. 371, 84 L. Ed. 329, 60 S. Ct. 317 (1940)* (erroneous assertion of jurisdiction by first court not collaterally reviewable); *Erspan v. Badgett, 659 F.2d 26, 28-29 (5th Cir. 1981)*, cert. den. *455 U.S. 945, 102 S. Ct. 1443, 71 L. Ed. 2d 658* (no jurisdiction found, on the basis of *Moitie*, to collaterally **[**54]** review a state court judgment of doubtful binding force after a U.S. Supreme Court decision); *Key v. Wise, supra, 629 F.2d at 1055-1057, 1061-1068)* (state court assumption of jurisdiction over federal claims within exclusive jurisdiction of federal court after erroneous abstention by federal district court, held to bar collateral review of state court judgment sought by plaintiffs upon return to federal court); Cf. *Kremer v. Chemical Construction Corporation, supra, Underwriters National Assurance Company v. North Carolina Life & Accident & Health Insurance Guaranty Association, supra* (state court collateral review of sister state court judgment is very **[*1046]** narrow and otherwise subject to *res judicata* and full-faith-and-credit constraints).

[55]** In view of the above findings and conclusions, we hold that on the basis of the record before us, [30] the courts of Puerto Rico would give full preclusive effects to the state court Judgment of May 15, 1981. This being so, we find that *28 U.S.C. Sec. 1738* commands this court to do likewise.

Inasmuch as the issues pending appellate review before the U.S. Court of Appeals for the First Circuit have been fully disposed of by the courts of Puerto Rico, we further consider this case to have been rendered moot for interim events or collateral judicial proceedings have fully disposed of the live case or controversy **[**56]** that at one time may have existed between opposing parties to the litigation. Based on the foregoing, our prior opinion and order entered December 2, 1980 and accompanying judgment, should be substituted [31] by the present opinion, and a judgment of dismissal on grounds of mootness should be entered. *United States v. Munsingwear, Inc., 340 U.S. 36, 39-41, 95 L. Ed. 36, 71 S. Ct. 104 (1950)*; *Gomes v. Rhode Island Interscholastic League, 604 F.2d 733, 736 (1st Cir. 1979)*; and *Duke Power Co. v. Greenwood, 299 U.S. 259, 267, 81 L. Ed. 178, 57 S. Ct. 202 (1936)* (when controversy becomes moot on appeal it is duty of appellate court to set aside decision below and remand cause with directions to dismiss).

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[28] There is no question that state court jurisdiction over the federal constitutional and civil rights claim is concurrent with that of federal courts. See, *Diaz v. Collazo*, 82 JTS 30 (March 10, 1982) and cases cited; see, also, *Lovely v. Laliberte, supra, note 26*.

[29] Even if this were a case of exclusive federal judicial jurisdiction, the equities would tend to favor enforcement of traditional *res judicata* preclusion inasmuch as there is simply no need to assess whether uniform national policy in antitrust enforcement would be affected given the voluntary conduct of plaintiffs in state court in refusing to comply with state judicial procedure. If anything, an interest in uniform and proper administration of justice should prevail, and in this instance, the state court judgment fosters this interest the same way as any federal judgment in similar circumstances would.

[30] As mentioned previously, in arriving at our findings and conclusions, we have relied in part on our familiarity with Puerto Rican substantive and procedural law. In any event, as respects civil procedure, the Puerto Rican rules are very similar to and sometimes identical with the Federal Rules of Civil Procedure. This identity exists in the area of dismissals for failure to comply with discovery orders.

[31] Given the retention of appellate jurisdiction by the United States Court of Appeals for the First Circuit, we may not vacate our prior judgment at this stage of the proceedings. However, this should not be construed as a rejection or departure from the views expressed in our original opinion to which we still adhere.

[57]** The Clerk is ordered to remit forthwith the instant Findings of Fact, Conclusions of Law and Memorandum Opinion, as well as the supplementary record upon which they are based, to the Clerk of the United States Court of Appeals for the First Circuit.

SO ORDERED.

M & H Tire Co. v. Hoosier Racing Tire Corp.

United States District Court for the District of Massachusetts

March 29, 1983

Civil Action No. 82-0697-C

Reporter

560 F. Supp. 591 *; 1983 U.S. Dist. LEXIS 18162 **; 1983-1 Trade Cas. (CCH) P65,311

M & H TIRE COMPANY, INC., Plaintiff, v. HOOSIER RACING TIRE CORPORATION, ET AL., Defendants

Core Terms

tire, tracks, racing, season, promoters, track-tire, sports, modified, drivers, tire company, testing, rule of reason, manufacturers, regulation, Sherman Act, group boycott, sanctioning, conspiracy, designated, automobile racing, anti trust law, brand, rules committee, competitors, cases, anticompetitive, participated, single-brand, injunction, purposes

LexisNexis® Headnotes

Antitrust & Trade Law > Sherman Act > General Overview

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

See *15 U.S.C.S. § 1*.

Antitrust & Trade Law > Sherman Act > General Overview

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

The Sherman Act, *15 U.S.C.S. § 1*, requires that there be concerted action among businessmen from which the court or jury can reasonably infer that the participants had a conscious commitment to a common scheme designed to achieve an unlawful objective.

Antitrust & Trade Law > Sherman Act > General Overview

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

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

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

Proof of a combination or conspiracy under the Sherman Act, *15 U.S.C.S. § 1*, does not require the existence of an express agreement. It is enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

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

HN4[] **Per Se Rule & Rule of Reason, Sherman Act**

While the language of the Sherman Act, *15 U.S.C.S. § 1*, is broad enough to render illegal many commercial understandings, the "rule of reason" is the prevailing mode of analysis. Under this rule, the fact finder balances all the circumstances of a case in deciding whether a restrictive practice is illegal under the Act as an unreasonable restraint on competition. The analysis required by the rule of reason, however, is laborious, and as the courts gained experience with antitrust problems they identified certain types of agreements that were so consistently unreasonable that they could be deemed illegal per se, without exhaustive inquiry into their purported justifications.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

HN5[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

Among the practices that have been deemed so pernicious as to be unreasonable per se are group boycotts. The classic group boycott, deserving of per se condemnation, is an agreement designed to eliminate competition by a concerted refusal to purchase from or sell to the business rivals of one or more of the conspirators.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

HN6[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

The traditional definition of group boycott is a concerted attempt by a group of competitors at one level to protect themselves from competition from non-group members who seek to compete at that level. In other words, the agreement is between business competitors in the traditional sense.

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

Business & Corporate Law > Distributorships & Franchises > Causes of Action > Restraints of Trade

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

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

Business & Corporate Law > Distributorships & Franchises > Causes of Action > General Overview

HN7[] Price Fixing & Restraints of Trade, Vertical Restraints

A conspiracy between a store and the manufacturers and distributors of a product may constitute a per se violation of the Sherman Act, *15 U.S.C.S. § 1*, even though the conspiracy involves only a single retailer and is directed at only a single competitor.

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

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

HN8[] Price Fixing & Restraints of Trade, Vertical Restraints

Where it is shown that a vertically imposed restraint is intended to suppress horizontal competition, the agreement is the equivalent of a horizontal restraint of trade.

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

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

HN9[] Practices Governed by Per Se Rule, Boycotts

Where the evidence shows that a group of purchasers combined with promoters and a company to fix the maximum price of a product by eliminating competition from other sellers, this combination is in fact within the undeniably anti-competitive per se boycott paradigm.

Antitrust & Trade Law > Regulated Industries > Sports > Baseball

Business & Corporate Compliance > ... > Business & Corporate Law > Cooperatives > Formation

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

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

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

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Practices Governed by Per Se Rule > Boycotts

Business & Corporate Law > Cooperatives > General Overview

HN10[] Sports, Baseball

Sports other than baseball are subject to the antitrust laws, and among the antitrust restrictions that apply to sports are prohibitions against group boycotts. However, in professional sports, unlike many other forms of business competition, a few rules are essential to survival, and courts have been reluctant automatically to subject the cooperative activities of sports organizations to application of the group boycott per se rule. The legitimate goal of such sports regulation is the preservation of participant parity and competitive equivalency, and some courts have chosen a more extended analysis of the administrative regulations of sports organizations that focuses on the purpose of the regulation and the procedures followed in adopting it. Sports organizations, however, do not have unlimited discretion in adopting rules and regulations. When the purpose of a sports regulation is to eliminate business competition, the concerted action is not eligible for rule of reason analysis and must be subjected to per se treatment.

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

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

HN11[] **Regulated Industries, Sports**

Sports regulations must satisfy basic tenets of procedural fairness. According to the following three-pronged test, a sports regulation can escape per se treatment only if: (1) there is a legislative mandate for self-regulation, or otherwise, and; (2) the collective action is intended to achieve an objective consistent with the policy justifying self-regulation, is reasonably related to that objective, and is no more extensive than necessary, and; (3) the governing organization provides procedural safeguards to protect against arbitrary restraints and to provide a basis for judicial review.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

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

Antitrust & Trade Law > ... > Per Se Rule & Rule of Reason > Per Se Rule Tests > Manifestly Anticompetitive Effects

HN12[] **Regulated Industries, Higher Education & Professional Associations**

Under the rule of reason, a restraint must be evaluated to determine whether it is significantly anticompetitive in purpose or effect. In making this evaluation, the court analyzes the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. If, on analysis, the restraint is found to have legitimate business purposes whose realization serves to promote competition, the anticompetitive evils of the challenged practice must be balanced carefully against its pro-competitive virtues to ascertain whether the former outweighs the latter. A restraint is unreasonable if it has the net effect of substantially impeding competition. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.

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

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

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

Securities Law > ... > Self-Regulating Entities > National Securities Exchanges > General Overview

HN13[] **Regulated Industries, Sports**

A sports regulation that seeks an improper objective, or is overly broad, or was not adopted pursuant to fair procedures, is condemned as a per se violation of the antitrust laws without further inquiry into its ultimate economic consequences.

Antitrust & Trade Law > Sherman Act > General Overview

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

The Sherman Act, *15 U.S.C.S. § 1 et seq.*, is aimed primarily at combinations having commercial objectives and should be applied sparingly to organizations that normally have other objectives such as labor unions, political lobbying groups, or sports associations.

Antitrust & Trade Law > Regulated Industries > Higher Education & Professional Associations > General Overview

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Per Se Rule & Rule of Reason > Sherman Act

Antitrust & Trade Law > Sherman Act > General Overview

HN15[] **Regulated Industries, Higher Education & Professional Associations**

Analysis under the rule of reason starts from the premise that the Sherman Act, *15 U.S.C.S. § 1 et seq.*, reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. The purpose of a rule of reason analysis is to form a judgment about the competitive significance of the restraint. And practices which are unreasonably restrictive of competitive conditions must be condemned, even though they have beneficial effects in other areas.

Antitrust & Trade Law > Sherman Act > General Overview

HN16[] **Antitrust & Trade Law, Sherman Act**

The law protects the impersonal forces of competition, rather than consumer preference, on the basis that economic forces will ultimately enhance consumer welfare.

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

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

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

HN17[] **Price Fixing & Restraints of Trade, Per Se Rule & Rule of Reason**

A plaintiff must, as part of his prima facie case under the rule of reason, provide proof of a well-defined relevant market upon which the challenged anticompetitive actions would have had a substantial impact.

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

HN18[] **Private Actions, Remedies**

Once the fact of injury to the plaintiff has been established, the amount of damages may be fixed by the trier of fact according to a just and reasonable estimate of the damages based on relevant data, including both probable and inferential, as well as direct and positive proof.

Antitrust & Trade Law > Clayton Act > Remedies > Damages

Civil Procedure > Remedies > Injunctions > Permanent Injunctions

Antitrust & Trade Law > Clayton Act > General Overview

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

Antitrust & Trade Law > Clayton Act > Remedies > Injunctions

HN19[] **Remedies, Damages**

Under the Clayton Act, a plaintiff is entitled to an injunction to prevent threatened loss or damage by a violation of the antitrust laws. *15 U.S.C.S. § 26 (1982)*. Injunctive relief is appropriate, even though the illegal practice has been seasonally discontinued, unless it is clear that the practice will not recur.

Counsel: [1]** Gael Mahony, Hill & Barlow, Boston, Massachusetts, Thomas J. Dacey, esq., for Plaintiff.

Hoosier Racing Tire & B. Summers, John Hally, Esq. & Wm. Baker, esq., Nutter, McClennen, & Fish, Boston, Massachusetts, For All Defendants.

Judges: Caffrey, Ch. J.

Opinion by: CAFFREY

Opinion

[*594] CAFFREY, Ch. J.

Plaintiff brings this action under the antitrust laws of the United States seeking permanent injunctive relief and treble damages pursuant to Sections 4 and 16 of the Clayton Act, *15 U.S.C. §§ 15* and *26*, for defendants' alleged violation of *Section 1* of the Sherman Act, *15 U.S.C. § 1*. The Court has jurisdiction of the action and the parties under *15 U.S.C. §§ 15*, *22*, and *26*.

I. *Proceedings to Date*

Plaintiff commenced this action on March 11, 1982, alleging that the so-called "single tire rule" (described below), as adopted under the circumstances of this case, violated *Section 1* of the Sherman Act in that it constituted an illegal group boycott, a tying arrangement, and a tortious interference with plaintiff's advantageous business relations.

[*595] Plaintiff sought a preliminary injunction against the use of the tire rules at the defendant tracks for the 1982 racing season. **[**2]** After an evidentiary hearing upon the motion on March 22, 1982, this Court denied plaintiff's motion for preliminary injunction in an opinion dated March 31, 1982.

On April 15, 1982 defendant filed a counterclaim for a declaratory judgment as to the validity under the antitrust laws of the single tire rule, as adopted in this case, and if adopted in the future.

The case was tried to this Court from December 14 through 20, 1982. At the close of its case plaintiff waived Counts 3 through 7, leaving only claims that the adoption of the single tire rule was a concerted refusal to deal, and as such was unlawful under the Sherman Act, *Section 1* either *per se* (Count 1), or under the rule of reason (Count 2). Hoosier waived its counterclaim.

This opinion will constitute the Court's findings of fact and conclusions of law pursuant to *Fed.R.Civ.P. 52(a)*.

II. *Parties*

A. *Plaintiff*

M & H Tire Co., Inc. (M&H) is a Massachusetts Corporation with its principal place of business in Watertown, Massachusetts. M&H designs, produces, and sells racing tires for use in organized motorcar-racing competition. Marvin Rifchin is the President of M&H.

B. *Defendants*

1. Hoosier **[**3]** Racing Tire Corp. (Hoosier) is an Indiana Corporation with its principal place of business in Lakeville, Indiana. Hoosier also designs, produces, manufactures, and sells racing tires and does business in direct competition with M&H. Robert Newton is the President of Hoosier.

2. Bobby Summers is the New England distributor for Hoosier and resides in Connecticut.

3. New England Drivers and Owners Club (NEDOC), organized in 1970, is an unincorporated association existing under the laws of Massachusetts, with an address in Franklin, Massachusetts. NEDOC is an association many of whose members are racing-car owners or drivers who compete in organized racing events in the Northeastern United States. NEDOC is composed of many but not all, of the racing car drivers and owners who compete in the modified class at Stafford Motor Speedway, Seekonk Speedway, Thompson Speedway, and Riverside Speedway. Richard Armstrong is the President of NEDOC.

4. Stafford Springs Enterprises, Inc. is a Connecticut corporation with its principal place of business in New Britain, Connecticut. Stafford Springs Enterprises, Inc. owns and manages Stafford Motor Speedway (Stafford), in Stafford Springs, **[**4]** Connecticut, and promotes organized automobile racing events at that facility. Edwin Yerrington is the promoter of that track.

5. Bristol County Stadium, Inc. (Bristol County) is a Massachusetts corporation with its principal place of business in Seekonk, Massachusetts. Bristol County leases the Seekonk Speedway in Seekonk, Massachusetts. Bristol County is owned and managed by D. Anthony Venditti and his family, and has its principal place of business in Venditti's home. Through ARC (below) and Venditti, Bristol County is responsible for promoting auto racing and other events at the track.

Both Stafford and Seekonk Speedway (Seekonk) feature "short oval" or "circle" track automobile racing in various classes, including the modified class. The bulk of the participants in such racing are amateur drivers who race several times weekly during the season.

6. Auto Racing Club (ARC) is a non-profit Massachusetts corporation. ARC was organized by Venditti and also has its headquarters in Venditti's home. ARC promotes the automobile racing conducted at Seekonk, segregating divisions, supplying insurance, handicapping racers, conducting the races, paying referees and officials, disbursing **[**5]** prize money from funds it received from Bristol County and promulgating rules (including the subject single-tire rule).

[*596] III. *General Background*

The present controversy grew out of a decision involving Hoosier, its dealer Summers, NEDOC, and the promoters at four major automobile race tracks, to adopt a rule requiring drivers to use a Hoosier "Budget" tire during the 1982 automobile racing season. Under this commonly called "track-tire" rule, only one brand of tire can be used at a particular track during a racing season.

A. *The Racing Tire Market*

It is not disputed that the production and sale of racing tires constitutes a distinct market in interstate commerce. Racing tires are designed for use on high performance vehicles in organized competition rather than for street or highway use. They differ from street tires, in size, construction, and materials and they require specialized equipment and technical knowledge for their manufacture.

During 1982, the active manufacturers of racing tires of the sort involved in this case were M&H, McCreary Tire and Rubber Co. (McCreary), Goodyear, and Hoosier, Firestone had largely dropped out of this market by **[**6]** 1982.

Traditionally, racing tires were sold by independent dealers to racing car owners and drivers. Tires were transported by dealers to the race tracks and sold directly to drivers and owners from the dealers' trucks on the day of the race. Under the open competition system which traditionally has prevailed in the racing tire market, the sales of a particular brand of tire were directly related to the success which the tire had enjoyed at recent races. As Hoosier President Robert Newton testified, sales were based on last night's or last week's results, the reasonable inference being, that upon learning that winning cars have raced with a particular tire, drivers and owners would change brands to purchase the "winning circle" brand for their own cars. Consequently, tire companies competed vigorously throughout the racing season by making technical adjustments and introducing new tires in order to improve their sales.

B. *Racing in the Northeast*

There are numerous distinct classes of racing cars, each with its own set of rules, and its own special tire needs. The most popular and prestigious class of racing in the Northeast is the modified class, which attracts the fastest **[**7]** cars, draws the most spectators, and pays the largest purses in the region. Technical standards for modified race cars are promulgated by the National Association of Stock Car Auto Racing, Inc. (NASCAR). NASCAR, which is not a party in this lawsuit, sanctions and administers races at those tracks that adhere to its rules and conducts a "point fund" for drivers who compile the best record in NASCAR-sanctioned events. Modified racing is conducted at Stafford, Seekonk, Riverside Park Speedway (Riverside), and Thompson Speedway (Thompson). Stafford, Thompson, and Riverside are sanctioned by NASCAR. In order to allow drivers the opportunity to compete for NASCAR points, these three tracks schedule their regular events on different days of the week so that drivers can race at each track in the course of a weekend. NASCAR does not sanction races at Seekonk, but Seekonk follows the NASCAR rule book for its modified class.

NASCAR is not a recognized sanctioning organization. The NASCAR rules regulate only sanctioned events and thus do not embody a thoroughly regulatory scheme over the tracks as a whole, or even over all modified races at the tracks. The NASCAR rules leave the tracks **[**8]** free to promulgate regulations regarding the equipment used by competitors. It is to be noted that NASCAR regulations do not regulate the compounds or the brands of tires to be used at NASCAR-sanctioned events.

NEDOC, as stated above, is composed of drivers and owners who race in the modified divisions at the four above-stated tracks. As is the case with NASCAR, NEDOC is not a recognized sanctioning organization. NEDOC's principal function has been to negotiate with promoters on behalf of drivers and owners. The organization **[*597]** has also been a source of proposals for rules to be adopted by the tracks. Among the rules proposed were those regulating equipment such as gear and carburetor rules, as well as bans on the use of fuel injection and aluminum block engines. Rules such as these regulating equipment had the avowed purpose of enhancing participant equality.

C. *The Cost of Automobile Racing*

Modified racing cars originally resembled "stock cars" sold for street use and ran on tires similar to street tires. During the 1960's, however, competitors began to refurbish their cars with special racing components that increased engine horsepower and reduced car weight. **[**9]** In response, tire companies began to produce wider, softer tires capable of handling greater horsepower and speed. Since 1975, the costs of modified racing have increased substantially due to more expensive engines, chassis, frames, fuel, and tires. However, according to Arute, owner of Stafford, the prize money has remained relatively stable.

Arute also testified regarding the evolution of the so-called tire problem. Commencing at a time when M&H was the only manufacturer involved in furnishing tires specially for modified racing, and continuing through a period when the several manufacturers competed to provide even faster and softer compounds creating more demands for tires and tire changes from race to race, the sport of automobile racing had allegedly become a tire race, not a driver's race. Thus, in the early years of modified racing, a relatively small recapped tire was being used by all drivers at a more reasonable cost; but as tire technology evolved and tire sizes increased to the 15-inch tread of the 1981 modified season, tires became increasingly softer and, correspondingly, faster, less durable, and more expensive. The cost of a single 15-inch modified tire, as **[**10]** sold by Goodyear in the 1981 racing season, was $140 and the price of the comparable tire at the beginning of the 1982 season was $170.

In an effort to control costs, promoters in the Northeast advocated track-tire rules under which all competitors at a particular track are required to race with a single brand of tire for an entire season. As early as 1972, Seekonk adopted a track-tire rule for the modified class. Three years later, Arute organized a meeting in New York City among track promoters and tire company representatives to discuss tire rules. In 1978, the Northeast Promoters Association, organized by Stafford promoter Edwin Yerrington, proposed that twenty tracks in the Northeast implement a one-brand, one-tire rule. Initially and for various reasons, drivers and owners opposed track-tire rules. The track-tire rule adopted at Seekonk in 1972 led to a driver's strike allegedly due to manufacturer failure to supply enough of the designated tires. The 1978 proposal for a twenty-track tire rule was rejected by NEDOC members, in part because they believed that the single brand rule would violate federal antitrust laws.

IV. *Facts*

In 1980, Stafford's Yerrington **[**11]** renewed his proposal for a track-tire rule. At a NEDOC meeting held on August 5, 1980, Yerrington informed the members present that Stafford planned to impose its own track-tire rule for the 1981 season. The promoters at Seekonk, Thompson, and Riverside later made similar announcements. Following Yerrington's announcement, NEDOC selected a rules committee to investigate the adoption of a single-brand tire rule.

At the annual meeting of NEDOC held on January 6, 1981, Yerrington informed the membership that he had conducted some tire tests at Stafford. He further suggested that NEDOC itself adopt a single-brand rule. The members voted to study the feasibility of a tire rule and contact tire companies regarding their ability to supply the required tires. The day after NEDOC's annual meeting, Yerrington contacted Hoosier and McCreary to inform them of NEDOC's interest in a single-brand tire rule and to request those companies to submit proposals for such a rule. In response to Yerrington's inquiry and a subsequent request by NEDOC president Armstrong, **[*598]** Newton, president of Hoosier, replied that Hoosier was ready to recommend a suitable tire. McCreary also replied that **[**12]** it was willing to supply a tire for track-tire rule purposes.

At a March 3, 1981 meeting, NEDOC members voted to conduct tests to select a single-brand, low cost tire for use in modified racing. After the March 3 vote, NEDOC again contacted the tire companies, this time to request tires for testing. The date set for testing was May 1, 1981. In response, M&H questioned the legality of the rule and the fairness of the proposed test in a memorandum to NEDOC dated April 19, 1981.

M&H agreed to submit tires for testing, but otherwise refused to participate in the NEDOC program until the issues of legality and fairness were addressed. NEDOC did not attempt to answer M&H upon these issues.

The May 1, 1981 test was cancelled because only two volunteer drivers and two tire companies appeared. As a result, NEDOC did not adopt a tire rule for the 1981 season.

NEDOC again tried to implement a tire rule in the fall of 1981. On October 1, 1981, the NEDOC Rules Committee met with representatives of Hoosier, M&H, Goodyear, and McCreary to discuss a tire rule for the 1982 racing season. Armstrong informed each tire company representative that the company whose tire was chosen would be required **[**13]** to supply all the tires needed at the four tracks where NEDOC members raced at a guaranteed price for the entire 1982 season. Armstrong also told the tire company representatives that NEDOC required a tire in the $90-$100 range, about $40-$50 less than the prevailing price for modified tires during the 1981 season.

NEDOC conducted two tire tests at Stafford in the fall of 1981: the first in September or October; and the second on November 7. That organization did not adopt any written procedures for conducting the tire tests prior to the beginning of testing. According to the testimony, NEDOC gave relatively short notice of the first test, so that M&H had only a four-year old tire available and Goodyear was unable to produce a tire in the required size in time for the first test. Armstrong did, nevertheless, use the available tires from these two companies for testing purposes.

The first test was held at Stafford and took about two to two and one-half hours. Three cars participated and four tire companies: Hoosier, M&H, Goodyear, and McCreary. Notes were taken regarding the testing by Richard Armstrong's wife as well as by Robert Garbarino, Chairman of the Rules Committee.

[14]** On the basis of the first day of testing, it was Armstrong's opinion that at least two of the tires might meet NEDOC's requirements: The Hoosier Budget Tire and the M&H 91.

The second day of testing took place on November 7, 1981 and took one and one-half to two hours. Two different cars participated in the second test and were driven by two different drivers. The same four tire companies took part although not necessarily using the same tires that had been used in the first test. Both M&H and Goodyear furnished new tires for the second test. NEDOC did not inform Goodyear or M&H that the new tires had to be tested twice for "repeatability" in order to be considered for the NEDOC rule. According to Armstrong's testimony he believed the tire companies knew or should have known this fact without being told. In any event, neither the M&H 91 nor M&H's new tire were tested a second time.

After the second test, NEDOC solicited and received bids from the four tire companies. The Rules Committee then selected the Hoosier 13-inch Budget Tire for use in modified racing during the 1982 season.

On November 23, 1981, the NEDOC Rules Committee met with Stafford promoter Yerrington, the **[**15]** original proponent of the track-tire rule. Yerrington, however, was reluctant to adopt the proposed rule unless the promoters at the other area tracks also agreed to implement the rule. At Yerrington's request, the Rules Committee arranged **[*599]** a meeting at the Howard Johnson's Motor Lodge in Warwick, Rhode Island on December 17, 1981 attended by Stafford promoter Yerrington, Seekonk promoter D. Anthony Venditti, and Irving Potter, president of NEPRA, the promoter at Thompson and Riverside. At the meeting, the promoters and NEDOC officials unanimously agreed to require all cars in the modified division to use the Hoosier 13" Budget tire for the 1982 season.

In order to be assured that Hoosier had the capacity to supply the required number of tires, members of the Rules Committee, NEDOC President Armstrong, and Seekonk promoter Venditti visited the Hoosier plant in Lakeville, Indiana on January 15, 1982.

At NEDOC's 1982 Annual Meeting held on January 19, 1982, the Rules Committee reported on the selection of the Hoosier Tire and the visit to the Hoosier plant. On January 28, 1982, NEPRA President Potter withdrew from the tire rule agreement because of the advice of counsel **[**16]** to the effect that the tire rule could cause antitrust problems. On February 18, 1982, NEDOC held a Special Car Owners Meeting to discuss rule changes and immediately after that, on March 11, 1982, M&H filed the present suit. At the start of the 1982 season, both Seekonk and Stafford enforced the Hoosier tire rule. Problems with the Hoosier tire began to surface, soon after the season began. Despite attempted modifications, the problems persisted and consequently, Stafford abandoned the tire rule on August 6, 1982. Seekonk continued to enforce it through the 1982 season.

V. *Applicable Law*

The issue in this case is whether the Hoosier track-tire rule proposed by NEDOC and enforced at Stafford and Seekonk during the 1982 season constituted a group boycott of non-tire rule tires, having the express purpose as well as the effect of restraining competition in the manufacture and distribution of modified class racing tires in violation of *Section 1* of the Sherman Act. *Section 1* of the Sherman Act provides, in relevant part, that

> ***HN1***[] Every contract, combination . . . or conspiracy in restraint of trade or commerce among the several states, . . . is declared to be illegal **[**17]** . . . .

15 U.S.C. § 1.

This case requires the Court to consider: 1) whether the legality of the track-tire rule is governed by a *per se* rule or by the rule of reason, and; 2) whether the track-tire rule, if tested by the rule of reason, is a reasonable restraint. On the basis of each test considered separately, I rule the tire rule violates the Sherman Act.

A. *Per Se Illegality*

1. Conspiracy

HN2[] *Section 1* of the Sherman Act requires that there be concerted action among businessmen from which the Court or jury can reasonably infer that the participants had a conscious commitment to a common scheme designed to achieve an unlawful objective. *Sweeney & Sons, Inc. v. Texaco, 637 F.2d 105, 111 (3d Cir. 1980)*.

I find that on December 17, 1981, there was a meeting at the Howard Johnson Motor Lodge in Warwick, Rhode Island, attended by members of the NEDOC Rules Committee and by the promoters at Stafford, Seekonk, Thompson, and Riverside. At that meeting, NEDOC President Richard Armstrong proposed that the tracks adopt a Hoosier tire rule. I also find that the promoters unanimously agreed with Armstrong's recommendation and that the Hoosier tire rule was thereafter **[**18]** enforced at Stafford and Seekonk. NEPRA, the promoter at Thompson and Riverside, withdrew from the Hoosier tire rule only after its attorney advised that participation in the tire rule could cause legal problems.

Despite this uncontroverted evidence of coordinated behavior, the defendants maintain that the adoption of the Hoosier tire rule was a separate and unilateral decision on the part of each track. I find no such separate or unilateral decision. Defendants' position ignores both the law of illegal combinations and the evidence at trial.

[*600] ***HN3***[] Proof of a combination or conspiracy under *Section 1* of the Sherman Act does not require the existence of an express agreement. In the leading case of *Interstate Circuit Inc. v. United States, 306 U.S. 208, 226, 83 L. Ed. 610, 59 S. Ct. 467 (1939)* the Supreme Court ruled that it was "enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it." *United States v. Paramount Pictures, Inc., 334 U.S. 131, 142, 92 L. Ed. 1260, 68 S. Ct. 915 (1948)*; *United States v. Parke, Davis & Co., 362 U.S. 29, 4 L. Ed. 2d 505, 80 S. Ct. 503 (1960)*; **[**19]** *United States v. Container Corp. of America, 393 U.S. 333, 337, 21 L. Ed. 2d 526, 89 S. Ct. 510 (1969)*; *Sweeney & Sons, Inc. v. Texaco, supra.*

The evidence at trial proved that concerted action was contemplated, invited, and adhered to. New England promoters had been attempting to institute track-tire rules since 1972, when Venditti introduced such a rule at Seekonk. According to Joseph Jacobs, Manager of Racing for McCreary Tire and the self-proclaimed inventor of track-tire rules, track rules permit promoters to offer competitors some relief from the escalating costs of racing without increasing prize money.

However, I find that to introduce a track-tire rule successfully, the promoter must have the acquiescence of the drivers who regularly race at his track. Drivers have the power to undermine unwanted rules by staying home, as they did in 1972, when Venditti introduced a tire rule at Seekonk. Moreover, when a promoter adopts a track-tire rule at a NASCAR-sanctioned track, he risks the wrath of drivers who travel from track to track in pursuit of point money, and who resent having to purchase special equipment to race one track. Thus, the promoters have a strong incentive **[**20]** to coordinate their tire rules with each other and with car owners.

In this case, I find that the invitation to concerted activity was first extended by Yerrington on August 5, 1980, when he informed a meeting of NEDOC car owners that he planned to implement a track-tire rule at Stafford for the 1981 season. Yerrington renewed this invitation in January 1981, when he told the Annual Meeting of NEDOC that NEDOC should adopt its own tire rule. Later, the promoters at Seekonk, Thompson, and Riverside informed NEDOC that they too would adopt track-tire rules unless NEDOC acted.

I find that the NEDOC membership, concerned that the tracks would adopt inconsistent rules, formed a committee to investigate available tires. The Committee met with representatives of major tire companies, conducted two tests at Stafford, solicited bids from the tire companies, and decided to recommend that the tracks adopt the Hoosier 13-inch Budget tire for the 1982 season.

As soon as the NEDOC committee selected the Hoosier Budget tire, it met with Yerrington, the original proponent of the rule. Yerrington was reluctant, however, to commit Stafford unless promoters at the other three area tracks also **[**21]** agreed. NEDOC then summoned the promoters to the December 17 meeting at the Howard Johnson Motor Lodge, at which I find that it was unanimously agreed by the four race facilities promoters to adopt the NEDOC proposed Hoosier 13-inch Budget tire for the 1982 racing season.

I rule that from this evidence it is clear that, for purposes of the Sherman Act, NEDOC and the tracks contemplated and participated in concerted action to adopt the Hoosier tire rule.

I further find that Hoosier participated in the combination between NEDOC and the track promoters. Among the actions that I find were taken by Hoosier to insure that its Budget tire would be designated by NEDOC are the following. Hoosier offered to participate in the tire test originally scheduled for May 1, 1981. Hoosier representative Bobby Summers attended the meeting between NEDOC and the tire companies on October, 1981. Hoosier submitted tires for testing at the two tire tests held in the fall of 1981. After the tire tests, Hoosier submitted a bid. Hoosier agreed to hold the **[*601]** retail price at a specified price for the entire 1982 season and to supply all the tires needed at the four New England tracks where NEDOC **[**22]** members raced. Newton invited NEDOC and the track promoters to visit Hoosier's plant in Lakeville, Indiana. After the racing season began Hoosier, at the request of NEDOC, made technical changes in its track tire. From this evidence, the Court finds that Hoosier as well as NEDOC and the tracks participated in a combination within the meaning of *Section 1*.

Contrary to defendant's assertions, the conspiracy was not terminated as of February 18, 1982, when Seekonk and Stafford became aware of NEPRA's withdrawal from the track-tire rule agreement. The conspiracy existed as of December 17, 1981 and continued until the end of the 1982 racing season at Seekonk, the last remaining track operating, pursuant to the conspiracy. The withdrawal of various conspirators along the way did not affect the existence of the conspiracy itself which continued until its objectives were fulfilled. Accordingly, I rule that plaintiff has proved that NEDOC, the tracks and Hoosier shared a mutual commitment to an anticompetitive course when they contemplated and participated in a concerted action to adopt the Hoosier tire rule to the exclusion of all competing tires.

2. Group Boycott

HN4[] While the language **[**23]** of *Section 1* is broad enough to render illegal many commercial understandings, the Supreme Court in *Standard Oil of New Jersey v. United States, 221 U.S. 1, 55 L. Ed. 619, 31 S. Ct. 502 (1911)*, established the "rule of reason" as the prevailing mode of analysis. Under this rule, the fact finder balances all the circumstances of a case in deciding whether a restrictive practice is illegal under the Act as an unreasonable restraint on competition. The analysis required by the rule of reason, however, is laborious, and as the courts gained experience with antitrust problems they identified certain types of agreements that were so consistently unreasonable that they could be deemed illegal *per se,* without exhaustive inquiry into their purported justifications. *Northern Pacific Railway Co. v. United States, 356 U.S. 1, 5, 2 L. Ed. 2d 545, 78 S. Ct. 514 (1958)*. ***HN5***[] Among the practices that have been deemed so pernicious as to be unreasonable *per se* are group boycotts. *United States* *v. General Motors Corp., 384 U.S. 127, 145-46, 16 L. Ed. 2d 415, 86 S. Ct. 1321 (1966)*; *Radiant Burners, Inc. v. Peoples Gas Light and Coke Co., 364 U.S. 656, 5 L. Ed. 2d 358, 81 S. Ct.* ***[**24]*** *365 (1961)*; *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212-13, 3 L. Ed. 2d 741, 79 S. Ct. 705 (1959)*; *Fashion Originators' Guild v. FTC, 312 U.S. 457, 85 L. Ed. 949, 61 S. Ct. 703 (1941)*; *See* *Silver v. N.Y. Stock Exchange, 373 U.S. 341, 347, 10 L. Ed. 2d 389, 83 S. Ct. 1246 (1963)*. The classic group boycott, deserving of *per se* condemnation, is an agreement designed to eliminate competition by a concerted refusal to purchase from or sell to the business rivals of one or more of the conspirators. *United States v. General Motors Corp., supra, at 140*; *Klor's Inc. v. Broadway-Hale Stores, Inc., supra, at 213*.

The tire rule agreed upon by Hoosier, NEDOC, Stafford Springs, and Seekonk represents precisely such an agreement: a group of purchasers (the NEDOC members) combined with a group of middlemen (the track promoters) and with one supplier (Hoosier) to eliminate all competition for the sale of racing tires at the affected tracks. The adoption of the track-tire rule in effect enabled Hoosier to foreclose other racing tire manufacturers from the most popular class of racing at some of the most prestigious tracks in the Northeast.

Defendants argue **[**25]** correctly that the circumstances of this case do not fit the traditional parameters of horizontal group boycott activity. ***HN6***[] The traditional definition of group boycott is a concerted attempt by a group of competitors at one level to protect themselves from competition from non-group members who seek to compete at that level. *Klor's Inc. v. Broadway-Hale* ***[*602]*** *Stores, Inc., supra, at 212*; *Brenner v. World Boxing Council, 675 F.2d 445, 454 (2d Cir. 1982)*. In other words, the agreement is "between business competitors in the traditional sense." *Mackey v. National Football League, 543 F.2d 606, 619 (8th Cir. 1976)*. Defendants claim, in effect, that a group boycott would exist in this case only if two or more tire companies joined together to eliminate a third.

Defendants' argument overlooks however, the clear teaching of *Klor's, Inc. v. Broadway-Hale Stores, Inc., supra,* at 107. In that case, Klor's operated an appliance store next door to one of the outlets of Broadway-Hale. Klor's alleged that Broadway-Hale had conspired with major manufacturers and distributors of appliances not to sell to Klor's. The Supreme Court held that ***HN7***[] the conspiracy between Broadway-Hale **[**26]** and the manufacturers and distributors of appliances constituted a *per se* violation of *Section 1* of the Sherman Act, even though the conspiracy involved only a single retailer and was directed at only a single competitor. The case of *United States v. Ciba Geigy Corp., 508 F. Supp. 1118 (D.N.J. 1976)*, is also relevant on the issue whether to treat business arrangements as horizontal or vertical for purposes of group boycott analysis. In *Ciba Geigy* there were a series of supply agreements which limited the range of uses to which a purchaser was entitled to put sold material. Although the contracts were reached in a vertical, supplier-purchaser contract, the Court found that they in fact were designed to limit horizontal competition between Ciba and its vendees. The Court further held that ***HN8***[] where it is shown that a vertically imposed restraint is intended to suppress horizontal competition, the agreement is the equivalent of a horizontal restraint of trade. *United States v. Ciba Geigy Corp., supra, at 1146*.

Defendants claim that the arrangement among NEDOC, the track promoters and Hoosier is analogous to a vertical relationship, and that vertical agreements are illegal **[**27]** *per se* only if their purpose is price fixing. *Products Liability Insurance Agency, Inc. v. Crum & Forster Insurance Companies, 682 F.2d 660, 663 (7th Cir. 1982)*. The combination among NEDOC, the tracks, and Hoosier bears little resemblance to the vertical relationship between manufacturer and dealer dealt within the leading case of *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 52-54, 97 S. Ct. 2549, 53 L. Ed. 2d 568 (1977)*. Moreover, even if the proposed analogy to vertical relationships were apt, the combination among the defendants' would still be illegal *per se,* because the aim of the tire rule was unmistakably to fix prices.

At the meeting between NEDOC and the tire companies on October 1, 1981, NEDOC informed each of the tire companies that it expected them to guarantee a fixed price of between $90 and $100 for the upcoming season. To achieve this goal, it was necessary to adopt track rules designating a single brand of tire at a stated price. Only through single-brand rules could NEDOC and the tracks assure themselves that the price of racing tires would not rise over the course of a season through the introduction of new, more successful, and **[**28]** accordingly more expensive products.

HN9[] The evidence demonstrates, therefore, that a group of purchasers combined with two track promoters and a tire company to fix the maximum price of tires by eliminating competition from other sellers. I rule that this combination is in fact "within the undeniably anti-competitive *per se* boycott paradigm." *U.S. Trotting Assoc. v. Chicago Downs Assoc. Inc., 665 F.2d 781, 790 (7th Cir. 1981)*.

3. Sports Self-Regulation

Defendants argue that this case is a case of attempted sports self-regulation by a sports organization, and that the rule of reason, not the *per se* rule is uniformly applied to such cases of self-regulation.

The Court notes in the first instance that ***HN10***[] sports other than baseball are subject to the antitrust laws, *Flood v. Kuhn, 407 U.S. 258, 276-83, 32 L. Ed. 2d 728, 92 S. Ct. 2099 (1972)*, and among the antitrust restrictions that apply to sports are prohibitions **[*603]** against group boycotts. *Washington State Bowling Proprietors Assoc. v. Pacific Lanes Inc., 356 F.2d 371, 376 (9th Cir. 1966)*; *Blalock v. Ladies Professional Golf Assoc., 359 F. Supp. 1260, 1264-68 (N.D. Ga. 1973)*.

There has been judicial **[**29]** recognition, however, that in professional sports, unlike many other forms of business competition, "a few rules are essential to survival," *Hatley v. American Quarter Horse Assoc., 552 F.2d 646, 652 (5th Cir. 1977)*, and accordingly courts have been reluctant automatically to subject the cooperative activities of sports organizations to application of the group boycott *per se* rule. *Brenner v. World Boxing Council, 675 F.2d 445, 454 (2d Cir. 1982)*. These cases all recognize that the legitimate goal of such sports regulation is the preservation of participant parity and competitive equivalency, [1] and some courts have chosen a more extended analysis of the administrative regulations of sports organizations that focuses on the purpose of the regulation and the procedures followed in adopting it. *See, e.g., Brenner v. World Boxing Council, supra at 454-55*. The cases do not, however, give sports organizations unlimited discretion in adopting rules and regulations. First, it has been recognized generally that when the purpose of a sports regulation is to eliminate business competition, the concerted action is not eligible for rule of reason analysis and must be subjected **[**30]** to *per se* treatment. *See U.S. Trotting Assoc. v. Chicago Downs Assoc., supra at 788-89*; *Smith v. Pro Football, Inc., 193 U.S. App. D.C. 19, 593 F.2d 1173, 1177-80 (D.C. Cir. 1978)*; *Blalock v. Ladies Professional Golf Assoc., supra, at 1265-68*.

[31]** Second, recent cases have recognized that ***HN11***[] sports regulations must satisfy basic tenets of procedural fairness. According to the three-pronged test announced in *Denver Rockets v. All-Pro Management Co., Inc., 325 F. Supp. 1049, 1064-65 (C.D.Cal. 1971)*, a sports regulation can escape *per se* treatment only if: 1) there is a legislative mandate for self-regulation, or otherwise, and; 2) the collective action is intended to achieve an objective consistent with the policy justifying self-regulation, is reasonably related to that objective, and is no more extensive than necessary, and; 3) the governing organization provides procedural safeguards to protect against arbitrary restraints and to provide a basis for judicial review. *Accord, Brenner v. World Boxing Council, supra, at 454-55*; *Gunter Harz Sports, Inc. v. United States Tennis Assoc., 511 F. Supp. 1103, 1116* (D.Neb.), *aff'd, 665 F.2d 222 (8th Cir. 1981)*; *Linseman v. World Hockey Assoc., 439 F. Supp. 1315, 1321 (D.Conn. 1977)*.

The Hoosier track-tire rule does not meet these standards for several reasons. First, the objective of the rule is plainly to fix prices. NEDOC recommended the adoption of the tire **[**32]** rule in order to fix the price of modified racing tires in the range of $90-$100 for the 1982 season. Price-fixing even to achieve a legitimate goal such as competitive equivalency is not an objective of sports regulation.

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[1] *Brenner v. World Boxing Council, 675 F.2d 445 (2d Cir. 1982)*; *North American Soccer League v. National Football League, 670 F.2d 1249, 1258-59 (2d Cir. 1982)*; *U.S. Trotting Assoc. v. Chicago Downs Assoc., Inc., 665 F.2d 781, 789-90 (7th Cir. 1981)*; *Gunter Harz Sports, Inc. v. United States Tennis Assoc., 511 F. Supp. 1103, 1115-16 (8th Cir. 1981)*; *Hatley v. American Quarter Horse Assoc., 552 F.2d 646, 652 (5th Cir. 1977)*; *Neeld v. NHL, 594 F.2d 1297, 1298-1300 (9th Cir. 1979)*; *Mackey v. NFL, 543 F.2d 606, 619 (8th Cir. 1976)*, *cert. denied*, ***434 U.S. 801, 54 L. Ed. 2d 59, 98 S. Ct. 28 (1977)***; *Cooney v. American Horse Shows Assoc., 495 F. Supp. 424, 430 (S.D.N.Y. 1980)*; ***Denver Rockets v. All-Pro Management Inc., 325 F. Supp. 1049, 1064-65 (C.D. Cal. 1971)***; *STP Corp. v. U.S. Auto Club, Inc., 286 F. Supp. 146 (S.D. Ind. 1968)*.

Second, the goal of fixing the price of modified racing tires was achieved by designating one tire company as the sole supplier of tires, thereby eliminating all inter-brand competition at the affected tracks. The Court is not aware of any case that has approved the elimination of inter-brand competition as a legitimate form of sports self-regulation.

[*604] Third, the rule was not adopted by an independent sanctioning organization interested in the health of the sport as a whole. The defendants admit that neither NEDOC, NEPRA nor NASCAR (the latter two not parties to this suit) is the recognized sanctioning organization governing amateur and/or professional automobile racing in the Northeast. Defendants contend that "short oval" automobile racing lacks the formal overall regulatory scheme of such sports as football and basketball, and that the tracks themselves are the customary and primary source of the rules and regulations governing their races in **[**33]** the various divisions. Defendants would have the Court hold that each race track is itself a recognized sanctioning organization for purposes of antitrust analysis. That position is not supportable in law. If the Court were to hold that any sports organization lacking in overall regulatory scheme were exempt from *per se* application of the antitrust laws, it would in effect extend to such independent sports groups *carte blanche* permission to adopt any rules they chose regardless of the anticompetitive effect. The weight of the ***antitrust law***, on the contrary, suggests that if sports associations wish to avoid strict application of the antitrust laws, they must organize and create sanctioning bodies whose responsibility it is to insure the integrity and continuity of the sport.

Defendants claim that the existence of a formal sanctioning body is not formally required by law before defendants can claim the benefit of the rule of reason holdings in the sports cases. Defendants argue that to impose such requirement is tantamount to forcing defendants to conspire (i.e. to form a league or sanctioning body) before they could further conspire (i.e. under the aegis of such a league) **[**34]** to adopt a reasonable rule. Defendants assert that the situation of the unorganized tracks here is analogous to local golf clubs who in conjunction with their membership adopt rules respecting permitted equipment. The Court suggests that were all the major golf clubs in the Northeast to decide as a group that, to insure competitive equivalency among golfers, they would adopt a rule designating one brand of golf club to be manufactured by one company; and were the clubs further to agree that no golfer without the designated brand could play in tournaments at those clubs, there would be an antitrust problem in that situation as serious as the one in this case.

Fourth, the procedures followed by NEDOC in arriving at the Hoosier tire rule lacked procedural fairness. The notice given to the tire manufacturers of the tests held in the fall of 1981 was inadequate; the tire manufacturers were not informed of key criteria used in judging the tires; the procedures followed during the tire tests were hit or miss as well, in that they failed to account for relevant variables and were not adequately recorded. Moreover, from the scanty NEDOC records which survived, it is not possible for the **[**35]** Court to determine why NEDOC thought that the Hoosier Budget tire was superior to other tires tested, such as the Goodyear M-23 or the M&H 91 and 95. *Compare* Silver v. New York Stock Exchange, supra, 373 U.S. at 362-363 (discussing importance of procedural due process as providing a basis for judicial review).

The Court fully supports the proposition that professional sports need some rules preferably ones superior to the law of the jungle in order to survive. However, that proposition does not legalize the track-tire rule under the circumstances of this case, since it is a device designed by a group of purchasers to fix the price of tires by eliminating inter-brand competition. This Court accordingly rules that the tract-tire rule proposed by NEDOC and enforced at Stafford and Seekonk during the 1982 racing season constituted a group boycott in *per se* violation of Section 1 of the Sherman Act.

B. *Rule of Reason*

I further rule that even if judged under the rule of reason, the track-tire rule violated the antitrust laws. ***HN12***[] Under the rule of reason, a restraint must be evaluated to determine whether it is significantly anticompetitive in purpose or effect. **[*605]** **[**36]** In making this evaluation the Court will analyze "the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed." National Society of Professional Engineers v. United States, 435 U.S. 679, 692, 55 L. Ed. 2d 637, 98 S. Ct. 1355 (1978); Smith v. Pro Football, Inc., supra, at 1183. If, on analysis, the restraint is found to have legitimate business purposes whose realization serves to promote competition, the anticompetitive evils of the challenged practice must be balanced carefully against its procompetitive virtues to ascertain whether the former outweighs the latter. [2] **[**37]** A restraint is unreasonable if it has the net effect of substantially impeding competition. [3]

The Court notes that the more carefully considered sports regulation cases have applied a very restricted version of the rule of reason. Under the test announced is *Denver Rockets, supra,* ***HN13***[] a sports regulation that seeks an improper objective, or is overly broad, or was not adopted pursuant to fair procedures, is condemned as a *per se* violation of the antitrust laws without further inquiry into its ultimate economic consequences. In this respect, the *Denver Rockets* decision follows the teachings of the Supreme Court in *Silver v. New York Stock Exchange, supra, 373 U.S. at 364-65*. As analyzed by the Court above, the Hoosier tire rule fails the *Denver Rockets* test and is therefore illegal **[**38]** *per se*.

Defendants argue that the *Denver Rockets* case is not applicable in the present context. They argue that *Denver Rockets* involved a situation in which the particular restriction entirely precluded the complainant from the market in question, in that the rule was adopted by a sporting association whose determination then became binding on every competitor in the league. Defendants contend that in the instant case, the challenged rule-making activities were done on a single or two-track basis and that plaintiff was not precluded from doing business with the other two tracks who withdrew from the track-tire rule prior to the opening of the 1982 season. Defendant argues that whether or not the adoption of the rule was joint as between Seekonk and Stafford, it was certainly confined to those two tracks alone and did not have any further exclusionary effect.

The Court has found *supra* that the December 17, 1981 meeting resulted in a conspiracy among all four major Northeast automobile racing tracks to adopt the tire rule, and that the conspiracy continued until the end of the 1982 racing season. Accordingly, M&H was initially foreclosed from the tire market at **[**39]** all four tracks, and ultimately foreclosed from 50 percent of the market during most of the 1982 season. The exclusionary effect of foreclosure from even 50 percent of the market is significant and substantial for purposes of antitrust analysis.

Defendants further object to the use of the *Denver Rockets* case on the grounds that it is now a largely outmoded analytic approach to the avoidance of *per se* rule. The more modern analysis, defendants suggest, is reflected in the First Circuit's recent case, *Allied International, Inc. v. ILA, 640 F.2d 1368 (1st Cir. 1981)*. *Allied* involved a suit by a Massachusetts importer of wood products from the Soviet Union **[*606]** against the longshoremen's union for refusing to unload a Soviet ship in a United States harbor as a protest against the Soviet Union's invasion of Afghanistan.

Allied involves a politically motivated boycott. In this regard it is similar to the case of *Missouri v. National Organization of Women, Inc., 620 F.2d 1301 (8th Cir. 1980)* which involved a boycott of all convention facilities in states that had not ratified the equal rights amendment. In neither of these cases did the Court apply the **[**40]** Sherman Act. As stated by those Courts, and as stated above by this Court, ***HN14***[] the Act is aimed primarily at combinations having commercial objectives and should be applied sparingly to organizations that normally have other objectives such as labor unions, political lobbying groups, or sports associations.

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[2] *See* *Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49, 97 S. Ct. 2549, 2557, 53 L. Ed. 2d 568 (1977)*, *citing* *Chicago Bd. of Trade v. United States, 246 U.S. 231, 238, 38 S. Ct. 242, 62 L. Ed. 683 (1918)* (under the rule of reason, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition"). *Cf.* *id. at 50 n.16, 97 S. Ct. at 2558* (in determining whether a particular commercial practice should be prohibited *per se,* "the probability that anticompetitive consequences will result from [the] practice and the severity of those consequences must be balanced against its pro-competitive consequences").

[3] *See* *National Society of Professional Engineers v. United States, 435 U.S. at 691, 98 S. Ct. at 1365*, *quoting* *Chicago Bd. of Trade v. United States, 246 U.S. at 238, 38 S. Ct. at 244*, ("The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition.")

Contrary to defendants contentions, however, the case at bar is not appropriately analyzed within a political framework such as the one in *Allied* or *Missouri*. It is appropriately analyzed within the rule of reason framework as it is established in the sports regulation cases including *Denver Rockets* and its progeny.

Moreover, even under the extended rule of reason analysis advocated by the defendants, the Hoosier track-tire rule must fail. ***HN15***[] Analysis under the rule of reason starts from the premise that the Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. *National Society of Professional Engineers v. United States, supra, 435 U.S. at 695*. The purpose of a rule of reason analysis is to form a judgment about the competitive significance of the restraint. And practices which **[**41]** are unreasonably restrictive of competitive conditions must be condemned, even though they have beneficial effects in other areas.

In this case there was evidence in the form of testimony from Dr. Dalton, that multi-track tire rules have a detrimental impact on competition in the racing tire market. Although the racing tire market is relatively concentrated with only four or five active suppliers, it is nevertheless highly competitive, primarily because, according to Dr. Dalton, open competition gives tire manufacturers the opportunity and the incentive to innovate. Track-tire rules eliminate competition over the course of the season and substitute, instead, the designation of a single tire made from less-expensive material. Such rules lessen both the incentive and the opportunity to innovate. Such rules also raise barriers to entry into the market and increase opportunities for collusion, although there was no evidence of collusion in this case. Thus, in the long run, these rules are likely to lead to higher prices and lower-quality tires.

Defendants have offered the testimony of certain drivers who claim to prefer competition under track-tire rules. No doubt many drivers **[**42]** are in favor of such rules because under the Hoosier tire rule, the price of tires was approximately $50 less in 1982 than in 1981. In our economy, however, prices are set by the impersonal forces of competition, and not by consumer preference. Furthermore ***HN16***[] the law protects the impersonal forces of competition, rather than consumer preference, on the basis that economic forces will ultimately enhance consumer welfare. *See Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 486, 50 L. Ed. 2d 701, 97 S. Ct. 690 n. 10 (1977)*; *Reiter v. Sonotone Corp., 442 U.S. 330, 343, 60 L. Ed. 2d 931, 99 S. Ct. 2326 (1979)*.

The defendants also seek to justify tire rules as essential to controlling the cost crisis in racing. The evidence at trial, however, indicated that the cost crisis affects not only racing tires, but also racing engines, racing chassis, gasoline, and other components as well. The evidence further demonstrated that one of the reasons for the crisis is that purses offered by track promoters have not kept pace with the every-day cost of racing an automobile. Alternative approaches to the cost crisis could include increased purses, objective specifications restricting **[**43]** engine performance, or **[*607]** some more reasonable approach to tire specification.

In sum, the evidence at trial did not demonstrate that the Hoosier tire rule was essential to the survival of professional auto racing as a sport, or that, over time, such a tire rule would effectively cut costs at all.

Defendant argues that when a restraint is challenged under the rule of reason, the plaintiff has the burden of establishing not only that the restraint is unreasonable but also a relevant geographic and product market within which to measure the effect of the restraint. *Gough v. Rossmoor Corp., 585 F.2d 381 (9th Cir. 1978)* (the restraint, even if unreasonable, must adversely affect competition and not merely one competitor); *Dougherty v. Continental Oil Co., 579 F.2d 954 (5th Cir. 1978)* (must evaluate the operation of the restraint in the context of a defined geographic and product market).

As stipulated among the parties, the relevant product market was racing tires. Plaintiff has established that the relevant geographic market was the Northeastern United States. Plaintiff further established that there are four major New England race tracks that conduct such racing. **[**44]** Defendants contend that in addition to the four defendant tracks there were other tracks in New England that conduct modified racing. Since no sales data was furnished on tire sales at those tracks, defendant argues that plaintiff has failed to establish a defined geographic market. The Court holds, to the contrary, that ***HN17***[] plaintiff has made out a prima facie case under the rule of reason of "proof of a well-defined relevant market upon which the challenged anticompetitive actions would have had a substantial impact." *Dougherty v. Continental Oil Co., supra, at 963*. Plaintiff has presented evidence that there are four *major* tracks in the Northeast that conduct automobile racing in the modified class. Defendant has presented no convincing evidence to the contrary and therefore plaintiff adequately established the existence of a relevant market.

Accordingly, the Court rules that under a rule of reason analysis, the Hoosier track-tire rule as it existed in 1982 had severe anticompetitive effects and demonstrated insufficient procompetitive virtues, and that it therefore unreasonably restrained trade in violation of *Section 1* of the Sherman Act.

VI. *Damages*

HN18[] Once the **[**45]** fact of injury to the plaintiff has been established, the amount of damages may be fixed by the trier of fact according to a just and reasonable estimate of the damages based on relevant data, including both probable and inferential, as well as direct and positive proof. *Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264, 90 L. Ed. 652, 66 S. Ct. 574 (1946)*; *see* *Story Parchment Co. v. Paterson Parchement Paper Co., 282 U.S. 555, 75 L. Ed. 544, 51 S. Ct. 248 (1931)*.

At Thompson and Riverside in 1982 where open tire competition was permitted, M&H, according to Rifchin and Garuti, his distributor, sold approximately 40 percent of the tires sold at Riverside and approximately 60 to 65 percent of those sold at Thompson. Potter, the promoter at those two tracks, contradicted this testimony. Potter testified that in the beginning of the 1982 season M&H had a 45 to 50 percent share of sales at those two tracks but that, by the end of the season, that figure had declined to approximately 35 percent. According to Potter's testimony, Goodyear had the major portion of the tire market for the modified class in 1981 when drivers were running on a 15-inch tire. When track promoters **[**46]** revised the allowable tire size on the modified division in 1982 to 13 inches, however, Goodyear was late in producing the new-sized tire, apparently giving M&H a competitive edge in the 1982 season. By the end of the season Goodyear had come out with its 13-inch tire and, according to Potter, M&H's lead was reduced.

In 1982, Hoosier sold 1,822 13-inch Budget tires for use under track-tire rules at Seekonk for the whole season and at Stafford until August 6. Rifchin testified that M&H could have supplied all these tires without purchasing additional equipment, hiring additional personnel, leasing additional **[*608]** space, or incurring other overhead expenses. The Court finds that, based upon Goodyear and M&H tire sales at Riverside and Thompson, it is reasonable to infer that, had the track-tire rule not been in effect, M&H would have obtained approximately 45 percent of those Hoosier sales, at a gross profit of $30 per tire equalling $24,597. [4]

[47]** VII. *Injunctive Relief*

HN19[] Under Section 16 of the Clayton Act, a plaintiff is entitled to an injunction to prevent threatened loss or damage by a violation of the antitrust laws. *15 U.S.C. § 26 (1982)*. Injunctive relief is appropriate, even though the illegal practice has been seasonally discontinued, unless it is clear that the practice will not recur. *United States v. Concentrated Phosphate Export Assoc., 393 U.S. 199, 203, 21 L. Ed. 2d 344, 89 S. Ct. 361 (1968)*; *United States v. W. T. Grant, 345 U.S. 629, 632, 97 L. Ed. 1303, 73 S. Ct. 894 (1953)*; *Allee v. Medrano, 416 U.S. 802, 810-11, 40 L. Ed. 2d 566, 94 S. Ct. 2191 (1974)*. In this case it is likely that, due to driver pressure, multi-track tire rules will be proposed and may well be adopted in the future. Track promoters have advocated such rules for over a decade, and at least two tire companies, McCreary and Hoosier, advertise the availability of tires for such rules. Moreover, successful tire rules in the modified class require the cooperation of drivers and owners. Therefore I rule that M&H is entitled to injunctive relief against multi-track, single-brand tire rules that designate in the conjunctive, **[**48]** one compound, one manufacturer, and one price.

Order accordingly.

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[4] Total Hoosier sales (1,822 tires) X M&H market share (45%) X M&H gross profit per tire ($30) = $24,597.

ORDER

CAFFREY, Ch. J.

In accordance with opinion filed this date, it is ORDERED:

1. That M&H Tire Company, Inc. is awarded single damages in the amount of $24,597 which when trebled produces a judgment for $73,791 for plaintiff.

2. Defendants are permanently enjoined from promulgating or enforcing a multi-track, single-brand tire rule which designates one compound, one manufacturer, and one tire price.

March 29, 1983

Interface Group, Inc. v. Gordon Publications, Inc.

United States District Court for the District of Massachusetts

April 25, 1983

Civil Action No. 83-92-G

Reporter

562 F. Supp. 1235 *; 1983 U.S. Dist. LEXIS 17456 **; 1983-1 Trade Cas. (CCH) P65,466

THE INTERFACE GROUP, INC., Plaintiff, v. GORDON PUBLICATIONS, INC., Defendant

Core Terms

advertising, distributed, Dealer, trade show, trade publication, attend, exhibitors, space, booth, exhibition, exposition, monopoly power, antitrust, prevail, Sherman Act, injunction, products, rates, monopolize, rental, relevant market, newspapers, attendees, hotels, preliminary injunction, sufficient showing, magazines, contends, monopoly, violates

LexisNexis® Headnotes

Civil Procedure > Remedies > Injunctions > Preliminary & Temporary Injunctions

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

HN1[] **Injunctions, Preliminary & Temporary Injunctions**

In order for a party to obtain a preliminary injunction, the court must find that the party has satisfied four criteria: (1) that the party will suffer irreparable injury if the injunction is not granted; (2) that such injury outweighs any harm which granting injunctive relief would inflict on the opposing party; (3) that the party has exhibited a likelihood of success on the merits; and (4) that the public interest will not be adversely affected by the granting of the injunction.

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

Antitrust & Trade Law > Regulated Practices > Market Definition > Relevant Market

Antitrust & Trade Law > Sherman Act > General Overview

HN2[] **Monopolies & Monopolization, Actual Monopolization**

The purpose of the prohibitions of *15 U.S.C.S. § 2* of the Sherman Act is to go beyond *15 U.S.C.S. § 1*'s proscription of contracts, combinations, or conspiracies in restraint of trade, which applies to conduct by two or more actors, in order to proscribe conduct by a single economic entity which may stifle competition. The first step in a court's analysis of a claim of monopolization or an attempt to monopolize must be an examination of the relevant market to determine if the alleged monopolizer's conduct is likely to affect competition adversely.

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

Antitrust & Trade Law > Sherman Act > General Overview

HN3[ ] **Regulated Practices, Market Definition**

A relevant market is defined as the narrowest market which is wide enough so that products from adjacent areas or from other producers in the same area cannot compete on substantial parity with those included in the market.

Antitrust & Trade Law > Sherman Act > General Overview

Civil Procedure > ... > Federal & State Interrelationships > Federal Common Law > General Overview

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

Civil Procedure > Preliminary Considerations > Federal & State Interrelationships > General Overview

HN4[ ] **Antitrust & Trade Law, Sherman Act**

As a general rule, a company has the unfettered right to deal with whom it pleases and to refuse to deal with whom it pleases, so long as the determination is made unilaterally. Courts must not yield to the long resisted temptation to create a federal common law of unfair competition. The purpose of the Sherman Act is not to maintain friendly business relations among firms in the same industry nor was it designed to keep these firms happy and gleeful. In some circumstances, however, a monopolist who controls a facility, access to which is essential for a competitor to enter a market, may be under a duty to make the facility accessible. When an essential facility exists, the firm that controls the facility can block access to the market by excluding competitors.

Antitrust & Trade Law > Public Enforcement > US Federal Trade Commission Actions > General Overview

Banking Law > Federal Acts > Federal Trade Commission Act > Unfair Competition & Practices

Antitrust & Trade Law > Clayton Act > Scope

Antitrust & Trade Law > Consumer Protection > Deceptive & Unfair Trade Practices > General Overview

Antitrust & Trade Law > Federal Trade Commission Act > General Overview

Antitrust & Trade Law > Sherman Act > General Overview

Governments > Legislation > Interpretation

HN5[ ] **Public Enforcement, US Federal Trade Commission Actions**

The Massachusetts unfair competition act is to be construed consistently with the interpretations given by federal courts and the Federal Trade Commission in construing § 5(a)(1) of the Federal Trade Commission Act (Act). *Mass. Gen. Laws ch. 93A, § 2(b)*. The Act is somewhat broader than the Sherman Act and the Act prohibits incipient violations of the Sherman Act and the Clayton Act as well as some practices which violate neither the letter nor the spirit of the antitrust laws. However, to violate the Act or the Massachusetts statute, a practice must be unfair, immoral, oppressive, unethical, unscrupulous, or cause substantial injury to consumers or competitors.

Antitrust & Trade Law > ... > Price Fixing & Restraints of Trade > Horizontal Refusals to Deal > General Overview

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

HN6[] **Price Fixing & Restraints of Trade, Horizontal Refusals to Deal**

Refusals to sell, without more, do not violate the law. It is the right of one engaged in private business to refuse to deal, or discontinue dealing, with anyone, for any reason, unless the dealer combines with others in a concerted effort to hinder free trade.

Counsel: [1]** Earle C. Cooley, Esq., Hale & Dorr, Boston, Massachusetts, for Plaintiff.

R. Robert Popeo, Esq., Mintz, Levin, Cohn, Ferris, Glovsky & Popeo, Boston, Massachusetts, for Defendant.

Judges: Skinner, J.

Opinion by: SKINNER

Opinion

[*1236] MEMORANDUM AND ORDER DENYING DEFENDANT'S MOTION FOR PRELIMINARY INJUNCTION

SKINNER, J.

The plaintiff, The Interface Group, Inc. (Interface), is a Massachusetts corporation which is in the business of producing computer and communications conferences, trade shows, and expositions in the United States and abroad. Plaintiff brought this suit for preliminary injunctive relief and a declaratory judgment under *28 U.S.C. §§ 2201* and *2202*. The defendant, Gordon Publications, Inc. (Gordon), is the publisher of some 15 specialty trade magazines, three of which, *Computer Dealer, Computer Products*, and *Software Retailing*, are specifically directed to the computer trade. The plaintiff wants to keep the defendant from selling or distributing a "show daily" from the exhibition floor of any of plaintiff's shows unless the defendant and the plaintiff enter into a contract which authorizes the defendant to do so. The defendant filed an answer and a counterclaim, **[**2]** alleging that the defendant has a contract right to distribute defendant's show daily at plaintiff's exhibitions and alleging that plaintiff's efforts to exclude the defendant constitute violations of the United States antitrust laws and the Massachusetts law proscribing unfair methods of competition.

For the past few weeks, the parties have been engaged in a process of expedited discovery so this court would have the opportunity to rule on a motion for a preliminary injunction before the plaintiff's upcoming trade show, Comdex/Spring '83, which will be held at the Georgia World Congress Center in Atlanta, Georgia, April 26-29, 1983. At this point in the proceedings, the court has before it defendant's **[*1237]** motion for a preliminary injunction. Both parties have submitted extensive filings in support of their respective positions and the court heard oral argument on April 20, 1983.

The Comdex shows, or Computer Dealer Exhibition shows, are a series of computer trade shows sponsored by Interface at which most of the exhibitors are manufacturers or other suppliers of computers or computer-related products. These exhibitors will be there to sell to the show attendees. The **[**3]** attendees or buyers are not individual consumers buying personal home computers, but rather are resellers, which include independent sales organizations such as dealers, distributors, systems houses, computer retailers, turnkey vendors, value adders, mass merchandisers, and others. Interface sponsored the first Comdex show late in 1979 and now sponsors three Comdex shows each year. Two are held in the United States and one is held in Europe. The largest show is Comdex/Fall, which this year was held in Las Vegas, Nevada. The next largest show is Comdex/Spring, which is held annually in a city in the eastern United States. The first Comdex/Europe was held last year in Amsterdam, The Netherlands, and Comdex/Europe '83 is also scheduled to be held in Amsterdam.

In addition to the exhibitors who purchase booth space so they can sell computers and computer products, some of the purchasers of Comdex booths are publishers of computer trade magazines. The defendant, Gordon Publications, Inc., is in the business of publishing business and technical trade journals for several technical fields, such as biology, metallurgy, and, of course, computers. Gordon has participated as an exhibitor **[**4]** at every single one of Interface's Comdex shows since Interface started producing the Comdex series in 1979. At the shows, Gordon distributes its three computer journals: *Computer Dealer, Computer Products*, and *Software Retailing*. In addition, ever since the second Comdex show, Comdex/Spring '80, Gordon has published and distributed a "show daily" as part of its Comdex exhibit.

A "show daily" resembles a program for a trade show. It contains information about the exposition, the exhibitors, and the happenings at the show and in the industry. It is also filled with advertising. Show dailies contain advertising both from the exhibitors concerning their company and their wares and from area hotels and other merchants concerning services in the city where the exposition is held. In the computer trade show industry, show dailies, including Gordon's, are distributed free of charge to the people who attend the shows, and the advertising revenue covers the costs of writing, printing, and distributing the publication. Gordon's show dailies are tabloid newspapers which contain articles about trade developments, product announcements, and information about the show. In addition, **[**5]** Gordon's show daily is filled with advertising, mostly by exhibitors in the show. The advertisements stay the same throughout the show, but the articles are changed slightly so a different edition of the show daily is distributed each day of the show. The show dailies distributed by Gordon in Las Vegas were 168 pages in length. Almost every page contained advertising and approximately 100 pages contained only advertising. Gordon sold all of that advertising space and distributed thousands of free copies.

Gordon uses its show daily as an inducement to the industry to advertise in its principal computer trade publication, *Computer Dealer*, by offering reduced rates in the show daily to advertisers in *Computer Dealer*. Gordon sets its show daily advertising rates below the prevailing market rate for other computer trade publications, including other show dailies in the computer trade.

From Comdex/Spring '80 through and including Comdex/Spring '82, Interface allowed and even encouraged Gordon to publish and distribute its show daily. Interface, as the management of these trade shows, supplied much of the information about the show and the exhibitors which became the editorial **[**6]** and news content of Gordon's show dailies.

[*1238] Over the years, the Comdex shows grew. From 157 exhibitors and 2100 attendees at Comdex/Fall '79, the show has grown to 1106 exhibitors and 30,500 attendees at Comdex/Fall '82. Over the same period, advertising in Gordon's show dailies has grown. From Spring, 1980 through Spring, 1982 Gordon was the only firm distributing a show daily at Comdex shows and, as a result, as the show audience grew and Gordon's distribution and circulation grew with it, advertisers became more interested in advertising in Gordon's show daily, a publication that would be distributed to all who attended. For example, Gordon grossed $ 105,000 in advertising revenue for its show dailies which were distributed at Comdex/Fall '82 in Las Vegas.

During 1982 a dispute developed between the parties, resulting in this litigation. It was the view of Sheldon Adelson, President of Interface, that because Gordon was distributing its show daily on premises leased by Interface to an audience assembled through Interface's efforts, Interface was entitled to a share of the show daily revenue. Interface told Gordon that Interface would not agree to allow Gordon **[**7]** to distribute its show dailies at future Comdex shows unless Gordon agreed to pay Interface 25 to 30% of the gross show daily advertising revenue. Gordon refused.

On October 15, 1982 Interface returned Gordon's application and deposit for an exhibit booth at the Comdex/Europe '82 show in Amsterdam, which was held November 8-11, 1982. In November, 1982 Interface rejected Gordon's applications for exhibit space at the Comdex/Fall '82 and Comdex/Spring '83 expositions. The Comdex/Europe '82 and Comdex/Fall '82 shows were held and Gordon attempted, with varying degrees of success, to distribute its show daily at these shows, despite Interface's refusal to license such distribution or to sell Gordon exhibit space. There were court cases in Amsterdam and Las Vegas concerning distribution of Gordon's show dailies at these shows. Gordon alleges that in addition to seeking to keep Gordon from distributing its show dailies in the Comdex exhibition halls, Interface interfered with Gordon's distribution of show dailies from hotels in Amsterdam and Las Vegas.

Interface has refused to accept Gordon's application for an exhibit booth at Comdex/Spring '83 in Atlanta, so Gordon will not be allowed **[**8]** to distribute its show daily or its three computer magazines from the exhibition floor in Atlanta if an injunction does not issue. Whether or not Gordon is allowed to distribute show dailies from the exhibition floor, Gordon has arranged to distribute its show dailies from hotels and other areas in Atlanta where Gordon might reach those attending the exposition without entering premises leased by Interface to do so.

In addition, Interface has decided to enter the market and will be publishing and distributing its own show daily at the Comdex/Spring '83 exposition. All of the advertising for both plaintiff's and defendant's show dailies has already been solicited, and both parties are ready to go to print with their respective publications.

Gordon seeks a preliminary injunction preventing interferce from keeping Gordon's show daily off the exhibition floor. ***HN1***[] In order for Gordon to prevail, the court must find that Gordon has satisfied four criteria:

> (1) that [Gordon] will suffer irreparable injury if the injunction is not granted; (2) that such injury outweighs any harm which granting injunctive relief would inflict on [Interface]; (3) that [Gordon] has exhibited a **[**9]** likelihood of success on the merits; and (4) that the public interest will not be adversely affected by the granting of the injunction.

Auburn News Co., Inc. v. Providence Journal Co., 659 F.2d 273, 277 (1st Cir. 1981), *cert. denied*, *455 U.S. 921, 71 L. Ed. 2d 461, 102 S. Ct. 1277 (1982)* (citation omitted). *See also* Section 16 of the Clayton Act, *15 U.S.C. § 26*.

I turn first to assess the likelihood of success of Gordon's contract and antitrust claims. The evidence shows that companies wishing to participate in an Interface exposition must complete an application form for that exposition. The application form **[*1239]** states that no contract for exhibit space exists until Interface accepts the application in writing. Interface literature explains the AO Procedure, a first-come, first-served, priority system. AO stands for assignment order and the AO procedure provides that exhibit booth space at Comdex shows will be assigned on the basis of how many prior shows the exhibitor has attended.

For example, under the AO procedure, the first exhibitor at the first Comdex show would be given AO priority number 1 (one). As long as he paid his exhibit rental **[**10]** fee on time, kept his contractual commitments, and did not miss two consecutive shows, he would keep AO priority number 1 (one). Exhibitors are allowed to select which exhibit booths they want to occupy at each show on the basis of their respective AO priority numbers. The holder of AO priority number 1 (one) gets his first choice concerning which exhibit booth he wants. Gordon contends that its prior contracts, course of dealing, and the AO procedure have given Gordon an option or a contract right to participate in all future Comdex shows. Interface contends that the AO procedure simply establishes what an exhibitor's selection priority will be *if* Interface agrees to enter into a contract renting an exhibition booth to that exhibitor. In my view, Gordon is not likely to succeed on the merits of this contract claim.

Gordon further contends that by refusing to sell Gordon an exhibit booth, Interface is violating *Sections 1* and *2* of the Sherman Act, *15 U.S.C. §§ 1* and *2*.

Gordon's *Section 1* claim is that Interface contacted hotels in Las Vegas and Amsterdam to convince them to prohibit Gordon from distributing show dailies from their hotels and these communications coupled **[**11]** with concerted action establish a concerted refusal to deal. *See* *Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207,* 70 S. Ct. 705, 3 L. Ed. 2d 741 (1966); Fashion Originators' Guild of America v. FTC, 312 U.S. 457, 85 L. Ed. 949, 61 S. Ct. 703 (1941). However, Gordon has not produced any evidence that this conduct, even if it took place as alleged, is likely to continue at future Comdex expositions. Rather, all evidence is to the contrary. Interface has acknowledged that Interface has no right to interfere with Gordon's distribution of its show dailies at hotels and all other areas which have not been leased by Interface. Therefore, since Gordon will be entitled to treble damages, costs and a reasonable attorneys' fee if it proves at trial that Interface engaged in such conduct and that conduct was a violation of Sherman Act § 1 and caused Gordon damages, because there is no immediate danger of irreparable loss or damage, Gordon's Section 1 allegations do not merit preliminary injunctive relief. *See* Clayton Act §§ 4 and 16, 15 U.S.C. §§ 15, 26.

Gordon also contends that Interface's unilateral refusal to sell exhibition space to Gordon violates Section 2 of **[**12]** the Sherman Act. Gordon has outlined four separate theories under which it believes that Interface's conduct violates the Section 2 proscriptions against monopolization and attempts to monopolize. Interface's conduct is challenged as: (1) an attempt to monopolize, (2) an unlawful exclusion of Gordon from an essential facility, (3) use or leverage of monopoly power in one market to foreclose competition in another market, and (4) an effort by Interface to extend or abuse its monopoly power.

HN2[] The purpose of the prohibitions of Section 2 of the Sherman Act is to go beyond Section 1's proscription of contracts, combinations, or conspiracies in restraint of trade, which applies to conduct by two or more actors, in order to proscribe conduct by a single economic entity which may stifle competition. *See* *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 272 (2d Cir. 1979)*, *cert. denied*, *444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980)*. The first step in this court's analysis of a claim of monopolization or an attempt to monopolize must be an examination of the relevant market to determine if Interface's conduct is likely to affect competition adversely. *See, e.g.,* **[**13]** *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391-393, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*; **[*1240]** *Home Placement Service, Inc. v. Providence Journal Co., 682 F.2d 274, 278-281 (1st Cir. 1982)*.

The Court of Appeals ***HN3***[] defines a relevant market as "the narrowest market which is wide enough so that products from adjacent areas or from other producers in the same area cannot compete on substantial parity with those included in the market." *Home Placement Service, Inc. v. Providence Journal Co., 682 F.2d at 280*, *quoting* L. Sullivan, Handbook of the Law of Antitrust 41 (1977). Applying that standard and the Supreme Court's "reasonable interchangeability" formulation to this case, *see* *United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 100 L. Ed. 1264, 76 S. Ct. 994 (1956)*, it appears that the relevant product market is not show dailies at Comdex shows as Gordon suggests, but rather is advertising in computer trade publications which have a substantial circulation to independent sales organizations (ISO's), original equipment manufacturers (OEM's) and other firms which are in the market for the products hawked at Comdex shows.

It is important **[**14]** that show dailies are not sold to the people who attend trade shows. The attendees are not the buyers and the show dailies are not the product. Rather, the product in this case is advertising space in a computer publication which will be distributed to the people who attend Interface's Comdex expositions. The critical question is whether the advertisers who buy space in the show dailies believe that advertising by other means is not a reasonable substitute for advertising in a show daily. Compare the *Home Placement* case, for example, wherein the Court of Appeals explained that weekly newspapers were not an adequate substitute for daily newspapers when the product being advertised was rental property, and therefore daily newspaper rental advertising was the relevant market. Rental properties went on and off the market daily and renters needed an up-to-date listing of what properties were available in this volatile market. Therefore, firms and individuals who advertised rental property did not perceive daily and weekly newspapers as "reasonably interchangeable." *Home Placement Service v. Providence Journal Co., 682 F.2d at 280*. In this case, however, the evidence suggests **[**15]** that the relevant product market is broader.

There is significant evidence that show dailies are included in this broader computer dealer trade publication advertising market and do not constitute a relevant submarket. First, Interface's show daily editor set the advertising rates for Interface's show daily by reference to the rates charged by other computer trade publications.

This demonstrates his perception that his rates had to be competitive with the rates for advertising in other trade publications; otherwise, the advertisers would not purchase ads in his publication. Second, the same advertisers who advertised in Gordon's computer trade publications, such as *Computer Dealer*, also advertised in Gordon's show daily. Both show daily ads and ads in other computer trade publications identify the advertiser, its products, and extol its products' virtues. Advertisers often place the same ad in show dailies and other computer trade publications, such as Gordon's *Computer Dealer*. Both media also circulate to the same audience; many trade publications develop their mailing lists by referring to lists of those who exhibit at or attend trade shows. Third, while the minor **[**16]** daily updating of the "news" content of the show dailies may have been peripherally interesting to the attendees at Comdex shows, there has been insufficient evidence submitted that this daily updating affected the advertisers. There was no daily updating of advertisements. The ads ran in all three editions of the show daily. All of the ads for the upcoming Comdex/Spring '83 show have already been placed. Therefore, unlike the *Home Placement* case in which daily newspapers gave rental advertisers a chance to inform the public about rental availability on a day-to-day basis, show daily advertisements are submitted well in advance, as are ads in other computer trade publications. Fourth, Gordon's advertisements in its own **[*1241]** show dailies evidence that several of its publications are sent to the same organizations which attend Comdex shows. In addition, while the primary advertisers in show dailies are the exhibitors, only 12% of the Comdex/Fall '82 exhibitors advertised in Gordon's show daily; the other 88% evidently spent their advertising dollars elsewhere. Fifth, Gordon reports that some of the advertisers who had placed ads in Gordon's *Computer Dealer* publication **[**17]** pulled their ads when they learned Gordon might not be allowed to distribute *Computer Dealer* at Comdex/Spring '83. This is because advertisers do not just reach the people who attend trade shows through show dailies. They also reach the people who attend these shows through the other computer trade publications distributed at the shows. The evidence presented to this point indicates that *Computer Dealer* and show dailies are in the same market, the market for advertising in computer dealer trade publications. Gordon believes the computer dealer trade publication market is very competitive and its expert, Professor Cady of the Harvard Business School, agrees with that assessment. Therefore, in my view, Interface's show daily is entering a very competitive *product* market in which Interface will have a very small market share and will compete with many other computer trade publications for advertising revenue.

Similarly, since there are non-Comdex trade shows which are attended by many of the same people who attend the Comdex shows and many OEM's and ISO's which do not attend the Comdex shows, [1] I find that Gordon has not shown that show dailies distributed at these other **[**18]** competing trade shows are not in the same relevant *geographic* market as show dailies distributed at Comdex shows.

Gordon is of course correct that show dailies distributed at Comdex shows are a very valuable marketing device for those trying to reach independent computer sales organizations and other computer dealers because show dailies can be distributed at low cost to a large group of people whom the advertiser wants to reach. Similarly, a program distributed at theatres is a valuable marketing vehicle, what Gordon calls a "rifle shot," for advertisers who wish to reach patrons of the theatre. However, there are other ways to contact patrons of the theatre to inform them about products they may wish to purchase and these other advertising methods are included in the same relevant market if they are reasonably interchangeable substitutes which sufficiently limit the market power of the firm distributing the program. *See* 2 P. Areeda & D. Turner, **[**19]** ***Antitrust Law*** P 518 (1978). There are also other ways to reach computer dealers. In my view, at this stage of the proceedings, the best evidence argues for a product market which includes, at a minimum, computer dealer trade publications.

Gordon also claims that Interface is attempting to monopolize in violation of *Section 2* of the Sherman Act. To establish a likelihood of prevailing on the merits of this claim, Gordon must demonstrate that Interface acted with specific intent to achieve a monopoly position in a relevant market and that there is a dangerous probability that Interface will succeed. *See American Tobacco Co. v. United States, 328 U.S. 781, 785, 90 L. Ed. 1575, 66 S. Ct. 1125 (1946)*; *United States v. Empire Gas Corp., 537 F.2d 296, 298-299 (8th Cir. 1976)*, *cert. denied*, *429 U.S.*

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[1] *See* discussion of trade show monopoly *infra*.

1122, 51 L. Ed. 2d 572, 97 S. Ct. 1158 (1977). Gordon has not produced sufficient evidence that there is a dangerous probability that Interface will monopolize a relevant market.

Gordon argues that the fact that Interface's advertising rates for ads placed in its show daily are five times the rates charged by Gordon shows that by excluding Gordon Interface has achieved a monopoly **[**20]** position and is charging monopoly prices. However, the evidence is that Interface has set a competitive price to compete with advertising in other trade publications. Gordon's lower prices reflect Gordon's marketing strategy to use its show daily to attract advertising in its other publications, in effect, **[*1242]** using the show daily something like a "loss leader." *See, e.g., Lormar v. Kroger Co.*, 1979 Trade Cas. P 62498 (S.D. Ohio 1979). Under Gordon's analysis, before Interface entered the show daily business Gordon had a monopoly position and could have charged very high advertising rates. Yet, even at that time Gordon charged less than the prevailing market rates. Therefore, a comparison between the rates charged by Interface and Gordon for show daily advertising does not demonstrate that Interface is earning monopoly profits.

Gordon's second *Section 2* theory is based on the "essential facility doctrine" or "bottleneck analysis" outlined by the Supreme Court in *Otter Tail Power Co. v. United States, 410 U.S. 366, 35 L. Ed. 2d 359, 93 S. Ct. 1022 (1973)* and anticipated by our Court of Appeals twenty-one years earlier in *Gamco, Inc. v. Providence Fruit & Produce* ***[**21]*** *Bldg., Inc., 194 F.2d 484 (1st Cir. 1952)*. ***HN4***[] As a general rule, a company has the unfettered right to deal with whom it pleases and to refuse to deal with whom it pleases, so long as the determination is made unilaterally. *Byars v. Bluff City News Co., Inc., 609 F.2d 843, 854 (6th Cir. 1979)*; *Associated Press v. United States, 326 U.S. 1, 14-15, 89 L. Ed. 2013, 65 S. Ct. 1416 (1945)*; *United States v. Colgate & Co., 250 U.S. 300, 307, 63 L. Ed. 992, 39 S. Ct. 465 (1919)*. Courts must not yield to the "long resisted temptation to create a federal common law of unfair competition." *George R. Whitten, Jr., Inc. v. Paddock Pool Bldrs., Inc., 508 F.2d 547, 560 (1st Cir. 1974)* (citation omitted), *cert. denied*, *421 U.S. 1004, 44 L. Ed. 2d 673, 95 S. Ct. 2407 (1975)*. "The purpose of the Sherman Act . . . is not to maintain friendly business relations among firms in the same industry nor was it designed to keep these firms happy and gleeful." *Berkey Photo, Inc. v. Eastman Kodak Co., 603 F.2d 263, 291 (2d Cir. 1979)*, *cert. denied*, *444 U.S. 1093, 62 L. Ed. 2d 783, 100 S. Ct. 1061 (1980)* (citation omitted).

In some circumstances, however, under the *Otter Tail* case, **[**22]** a monopolist who controls a facility, access to which is essential for a competitor to enter a market, may be under a duty to make the facility accessible. When an essential facility exists, the firm that controls the facility can block access to the market by excluding competitors. *See generally* Note, Refusals to Deal by Vertically Integrated Monopolists, 87 Harv. L. Rev. 1720, 1740-1752 (1974).

Gordon has not demonstrated a likelihood of prevailing on this theory for two reasons. First, Gordon has not made a sufficient showing that Interface has monopoly power in the computer trade show industry. *The Sizzle Sheet*, a computer publication, identifies approximately 200 computer and computer-related trade shows scheduled for 1983 in its "1983 Information Trade Show Calendar." Gordon contends that Comdex shows are "unique" dealer-to-dealer shows, unlike all the other computer trade shows. However, examination of *The Sizzle Sheet's* calendar demonstrates that while the Comdex shows may be the largest, there are approximately one hundred other computer trade shows which are attended by ISO's, OEM's, and other dealers. There is significant evidence that the trade show industry **[**23]** in general is growing extremely quickly and computer-related shows are the fastest-growing segment. While Gordon's experts may prove to be correct that there are some economies of scale in the computer trade show market, there is also evidence that there are diseconomies of scale and if a show tries to grow too large it may lose some business. *See* P. Alker, For Convergent, Comdex is Too Big to Be Effective, in Computer System News 91 (March 14, 1983) (Exhibit E to Affidavit of Sheldon G. Adelson). A survey conducted by Gordon's own *Computer Dealer* magazine found that only 44.1% of the dealers responding attended Comdex shows, 61.2% attend the NCC show, 15.5% attend the NOMDA show, and 44.9% attend other shows (Exhibit F to Affidavit of Sheldon G. Adelson). Therefore, a sufficient showing of Interface's monopoly power has not been presented.

In addition, there has not yet been a sufficient showing that the Comdex show is an "essential facility" for a firm in the business of selling advertising space in computer **[*1243]** trade publications. In my view, this is not the same type of case as those relied upon by Gordon. In *United States v. Terminal R.R. Assoc. of St.* ***[**24]*** *Louis, 224*

U.S. 383, 393, 56 L. Ed. 810, 32 S. Ct. 507 (1912), the defendant railroads gained control of all railroad switching facilities in St. Louis "to obtain the control of every feasible means of railroad access to St. Louis." Despite Professor Cady's characterization of Comdex as a "market maker" or a computer "exchange," excluding a publisher of computer trade magazines from a Comdex show is not the same as excluding a securities broker-dealer from access to the New York Stock Exchange as in *Silver v. New York Stock Exchange, 373 U.S. 341, 10 L. Ed. 2d 389, 83 S. Ct. 1246 (1963)*. Similarly, this is not a case like *Gamco Inc. v. Providence Fruit & Produce Bldg., Inc., 194 F.2d 484 (1st Cir. 1952)*, in which the defendants excluded the plaintiff, a Providence, Rhode Island buyer and reseller of produce, from access to the Providence produce building. The produce building was adjacent to the Providence Railroad Station's main freight lines and all local produce trade was centered in the building. The Court of Appeals in that case found that to exclude Gamco from the Produce Building would effectively exclude him from the Providence produce market. In this case, given **[**25]** that there are many other shows and Interface does not control access to the market, Gordon has not made a sufficient showing that the essential facility doctrine is applicable.

Gordon's final two *Section 2* theories, that Interface leveraged monopoly power in one market to foreclose competition in another and that exclusion of Gordon was an effort by Interface to abuse or extend its monopoly power, both require a showing that Interface has monopoly power or is likely to obtain monopoly power in the computer trade show market. *See, e.g., United States v. Griffith, 334 U.S. 100, 105-108, 92 L. Ed. 1236, 68 S. Ct. 941 (1948)*; *Gamco, 194 F.2d at 486-487*; *Berkey Photo, 603 F.2d at 275*; *Home Placement, 682 F.2d at 281*. Because it is my view that Gordon is not likely to be able to establish that Interface possessed or will possess such monopoly power, I do not believe Gordon is likely to prevail on the merits under either of these theories.

With respect to Gordon's antitrust claims under state law, I reach the same result: Gordon is not likely to prevail on the merits. As Gordon points out, ***HN5***[] the Massachusetts unfair competition act is to be construed consistently with the **[**26]** interpretations given by federal courts and the Federal Trade Commission in construing § 5(a)(1) of the Federal Trade Commission Act. *See M.G.L. c. 93A, § 2(b)*. The Federal Trade Commission Act is somewhat broader than the Sherman Act and the Supreme Court has said that the Federal Trade Commission Act prohibits incipient violations of the Sherman Act and the Clayton Act as well as some practices which violate neither the letter nor the spirit of the antitrust laws. *See FTC v. Sperry & Hutchinson Co., 405 U.S. 233, 239, 31 L. Ed. 2d 170, 92 S. Ct. 898 (1972)*. However, to violate the Federal Trade Commission Act or the Massachusetts statute, a practice must be unfair, immoral, oppressive, unethical, unscrupulous, or cause substantial injury to consumers or competitors. *See PMP Associates, Inc. v. Globe Newspaper Co., 366 Mass. 593, 321 N.E.2d 915 (1975)*; *FTC v. Sperry Hutchinson Co., supra.*

Gordon has not made a sufficient showing that the state antitrust laws should be interpreted to prohibit unilateral refusals to deal by non-monopolists. The Massachusetts Supreme Judicial Court, in one of the principal cases relied upon by Gordon, stated:

> Although **[**27]** most of the "refusal to deal: cases have arisen under the anti-trust acts, the analysis therein is applicable to the instant case. . . . ***HN6***[] "Refusals to sell, without more, do not violate the law." *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 625, 97 L. Ed. 1277, 73 S. Ct. 872 (1953)*. In each of these cases, the court emphasized that more than a mere refusal to deal would be required to violate the Federal acts. . . . It is the right of one engaged in private business to refuse to deal, or **[*1244]** discontinue dealing, with anyone, for any reason, unless the dealer combines with others in a concerted effort to hinder free trade.

PMP Associates, Inc. v. Globe Newspaper Co., 366 Mass. at 597 (citations omitted). *Compare Auburn News Company, Inc. v. Providence Journal Co., 659 F.2d at 278*. Gordon has not shown that Interface's refusal to deal or its decision to replace Gordon's show daily with its own show daily as the exclusive show daily at Comdex shows will affect competition adversely. Similarly, there has been no showing that it was in any sense unfair, immoral, oppressive, unethical or unscrupulous for Interface to refuse to enter into a **[**28]** contract selling Gordon booth space at upcoming Comdex shows when Interface gave Gordon notice well in advance that its application would not be accepted. Gordon has not demonstrated that Massachusetts law prohibits such conduct. *See also* P. Areeda, Antitrust Analysis 832-834 (3d Ed. 1981).

It is therefore my view that Gordon is not likely to prevail on either its state or federal antitrust claims, so preliminary injunctive relief should not be granted. In addition, Gordon has not demonstrated that relief at law would be inadequate. Should Gordon prevail at trial, treble damages, attorneys' fees and costs would be an adequate remedy. Gordon's main argument in support of its contention that damages would be an inadequate remedy is based on Professor Cady's statement that if Gordon loses market share during the pendency of this suit Gordon will lose credibility with its advertisers and will be unable to recover that market share. However, the only reason Gordon gives for this loss of credibility is that the advertisers will see that Gordon is not distributing its show daily at Comdex shows. If this court orders Interface to sell Gordon booth space at future shows, Gordon **[**29]** will be able to use this court's orders as assurance to advertisers that Gordon will be present at future shows. Therefore, Gordon has not given this court any reason to believe that under the facts of this case it would be difficult for Gordon to regain its market share. Gordon has not shown that it will suffer irreparable injury if the injunction is not granted.

Accordingly, Gordon's motion for preliminary injunction is DENIED.

Custom Auto Body, Inc. v. Aetna Casualty & Surety Co.

United States District Court for the District of Rhode Island.

August 3, 1983

C.A. No. 78-0301.

Reporter

1983 U.S. Dist. LEXIS 14941 *; 1983-2 Trade Cas. (CCH) P65,629

Custom Auto Body, Inc. v. Aetna Casualty and Surety Co.

Core Terms

insureds, shops, provider, repair shop, insurance company, summary judgment, repair, insurance business, automobile repair, allegations, boycott, purchases, recommends, antitrust, regulated, rule of reason, Sherman Act, policyholders, estimate, automobile insurance, McCarran-Ferguson Act, concerted, output, genuine issue, price fixing, repair costs, repair work, body shop, constitutes, defamatory

Counsel: **[*1]** Robert Testa and Ralph J. Gonnella, Providence, R.I., for plaintiff

Robert W. Lovegreen and Robert C. Burns, Providence, R.I., for defendant

Opinion by: PETTINE

Opinion

Opinion

PETTINE, SR. J.: This case presents a broad antitrust challenge by an independent auto body repair shop to the practices employed by Aetna Casualty & Surety Company (Aetna) to settle claims in Rhode Island. The plaintiff's essential claim is that the defendant has combined and conspired with others to coerce and intimate independent automobile repair shops to accept insufficient remuneration for the services. The defendant is said to have carried out this conspiracy in violation of *Section 1* of the Sherman Act. [1] Plaintiff seeks treble damages and injunctive relief from this Court pursuant to *15 U.S.C. §§ 15* and *26*. The complaint also alleges a state law claim for slander the defendant has moved for summary judgment on both counts. For the reasons set forth below, the defendant's motion is granted in part and denied in part.

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[1] *Section 1* of the Sherman Act provides that:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint or with foreign nations, is hereby declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court."

15 U.S.C. § 1.

[*2] I. Facts and Allegations

The Court will consider first the antitrust claims made by plaintiff. The plaintiff makes the following four allegations:

(1) the defendant has established vertical provider agreements with certain recommended or preferred repair shops which fix the price of automobile repairs;

(2) the defendant has engaged in a horizontal price-fixing conspiracy with other insurance companies;

(3) the defendant has combined with its insureds to aggregate buying power and thereby restrain trade in the automobile repair industry; and

(4) the defendant has combined with its insureds, certain preferred shops, and certan independent damage appraisers to boycott plaintiff's shop. [2]

[*3] Before analyzing these specific claims, a general description of the claims settlement practices used by the automobile insurance industry in general and by Aetna in particular may be useful.

The focus of this case is on the market interaction of automobile insurance companies and automobile repair shops. Such interaction is inevitable given the nature of the parties' respective businesses. An automobile insurance company in the course of its business issues policies of insurance which obligate it to undertake the repair of damaged automobiles owned by its insureds. In theory the insurance company could discharge its obligations under the insurance policy after the occurrence of an insurable event by performing any necessary repair work itself. In general, however, insurance companies have not chosen to pursue this option. Instead, they allow their insureds to select an automobile repair shop at which repairs can be performed, and agree to reimburse their insureds for the cost of such repairs.

The potential problems which may be created by this system of reimbursement are obvious. If an insured is guaranteed reimbursement up to any amount spent on repairs, there will be **[*4]** little incentive to shop around to secure an advantageous price for repair work. Any money spent will ultimately be reimbursed, so an insured will be relatively indifferent in choosing between high-priced and low-priced repair shops.

Automobile insurance companies deal with this problem by specifying in the contract of insurance that they will only be responsible for the competitive cost of repair. If the insured incurs expenses in excess of the competitive cost of repair, he will have to pay the excess out of his own pocket. This arrangement gives the insured a powerful incentive to shop around until he finds a repair shop that is willing to work for the competitive price specified by the insurance company.

Problems with this approach may arise if the insurance company has set the competitive cost for repair work at a price which is so low that insureds find it difficult to locate a repair shop that is willing to perform the necessary repairs at the specified price. To ensure customer satisfaction, the insurance company may have to identify for its insureds several repair shops that are willing to perform repair work for the competitive price established by the company. **[*5]** This ability to recommend particular shops may in turn give the insurance company significant market leverage in dealing with repair shops. For example, it would be possible for an insurance company to agree to recommend a substantial volume of business to repair shops that are willing to work for a lower price than is usually charged.

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[2] Plaintiff also contends that agreements between the defendant and certain insurance adjustment firms violate the Sherman Act. Objection and Opposition at 12. But plaintiff fails to advance any theory under which the Court could find such contracts to be illegal restraints of trade. It does not suggest that the contracts with adjusters by themselves restrain trade, nor does it indicate that such agreements facilitate other types of illegal combinations. The Court therefore concludes that plaintiff's allegations as to the illegality of the defendant's agreements with insurance adjusters are without merit.

Aetna has submitted detailed affidavits which describe the specific procedures it uses in settling claims. The contents of these affidavits have not been directly controverted by the plaintiff. The defendant's submissions state that when an automobile owned by an Aetna insured is damaged, the insured is requested to have the damaged vehicle inspected before it is repaired. The insured is encouraged to use one of Aetna's drive-in claim centers, but he or she is not required to do so. After inspecting the car, an Aetna appraiser will prepare an estimate of the competitive cost of replacement parts, the amount of time required to make the necessary repairs, and the hourly rate charged for labor. Aetna frequently uses a publication known as a crash manual to determine the amount of time required for a particular job and the suggested retail prices **[*6]** for replacement parts. The third component -- the hourly labor rate -- is determined through an informal survey of rates being charged by various local shops. Aetna attempts to set the rate which it will pay at the lowest level that the insured could obtain on his own without undue inconvenience.

After receiving their estimate, Aetna's policyholders remain free to select the repair shop at which they wish to have repair work done. If the shop selected is unwilling to work for the amount of Aetna's estimate, Aetna will attempt to negotiate an acceptable price.If negotiations fail, the car owner must choose between paying any amount in excess of the estimate himself or having his car repaired elsewhere. Aetna, however, guarantees its insureds that repairs can be obtained for the amount of its estimate, and it will furnish its insureds with the names of two or three repair shops that will perform the necessary work for the estimated amount. Aetna states that it selects the shops that it recommends based on its experience with shops in the area. It denies having any agreement with the shops that it recommends whereby the insurance company agrees to recommend such shops in return **[*7]** for a commitment by the recommended or preferred shop to accept Aetna's estimate. Aetna's affidavits also state that it determines the competitive cost of repairs unilaterally and independently without consultation with other insurance companies.

II. Summary Judgment Standard

Aetna's submissions must be viewed in light of the standards which govern motions for summary judgment. Because the question of the appropriateness of summary judgment in this case is a close one, the Court deems it advisable to set forth the applicable standard at some length.

Rule 56 of the Federal Rules provides that a court may not grant summary judgment unless it is satisfied that there are no genuine issues of material facts and that the movant is entitled to judgment as a matter of law. *Fed. R. Civ. P. 56(c)*,. The party seeking summary judgment has the burden of affirmatively demonstrating that there is no genuine issue of fact on every material issue raised by the pleadings. *Adickes v. S.H. Kress & Co., 398 U.S. 144, 159-60 (1970)*; *Mack v. Cape Elizabeth School Board, 553 F. 2d 720, 722 (1st Cir. 1977)*. This is so even if the movant is the defendant, and would have no burden whatsoever if the **[*8]** case were to go to trial. *Mack v. Cape Elizabeth School Board, supra, at 722*. In determining whether genuine issues exist, the Court is required to view the record in the light most favorable to the opponent of the motion, and must indulge all reasonable inferences favorable to the opponent. *Thyssen Plastik Anger KG v. Induplas, Inc., 596 F. 2d 400, 401 (1st Cir. 1978)*; *Hahn v. Sargen 523 F. 2d 461, 464 (1st Cir. 1975)*, cert. denied, *425 U.S. 904 (1976)*.

The First Circuit requires this Court to be highly circumspect in granting summary judgment. It has held that summary judgment is not appropriate where there exists the "slightest doubt" as to any material fact. *United States v. DelMonte de Puerto Rico, Inc., 586 F. 2d 870, 872 (1st Cir. 1978)* (quoting *Peckham v. Ronrico Corp., 171 F. 2d 653, 657 (1st Cir. 1948)*. The United States Supreme Court has likewise counselled that "summary procedures should be used sparingly in complex antitrust litigation where motive and intent play leading roles, the proof is largely in the hands of the alleged conspirators, and hostile witnesses thicken the plot." *Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464, 473 (1962)* (footnote omitted). **[*9]** [3]

[3] The Court is nevertheless aware that the First Circuit has recently warned that Poller should not "become a magic wand waved indiscriminantly by those opposing summary judgment motions in antitrust actions." *White v. The Hearst Corp., 669 F. 2d 14, 17 (1st Cir. 1982)*, (quoting *Mutual Fund Investors v. Putnam Management Co., 553 F. 2d 620, 624 (9th Cir. 1977))*.

The Court recognizes, however, that summary judgment may be warranted even in the litigation of complex antitrust cases.The Supreme Court has made it clear that *Rule 56* cannot be read out of antitrust cases, and that plaintiffs should not be afforded a full-dress trial if the trial court is satisfied that there exists no significant probative evidence tending to support the complaint. *First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289-90 (1968)*; *White v. The Hearst Corp., 669 F. 2d 14, 17 (1st Cir. 1982)*.

III. Agreements Between Aetna and Preferred Automobile Repair Shops

Turning now to a consideration of plaintiff's allegations in light of the summary judgment standard, the Court will analyze first what appears to be the plaintiff's principal contention. [4] The plaintiff maintains that **[*10]** Aetna has entered into price-fixing agreements with certain preferred auto body repair shops, and that such agreements are per se illegal under the Sherman Act. The defendant makes three arguments in reposnse. First, it contends that no such agreements exist. Second, it contends that even if such agreements exist, they are immune from antitrust scrutiny by reason of the McCarran-Ferguson Act, *15 U.S.C.§§ 1011 et seq.* Finally, defendant maintains that verticle agreements between insurance companies and automobile repair shops (sometimes referred to as provider agreements) do not contravene *Section 1* of the Sherman Act. These contentions will be considered seriatim.

[*11] A. Proof of the Agreement

To prove a violation of *Section 1* of the Sherman Act, plaintiff must first show that the defendant entered into a contract, combination or conspiracy. As the First Circuit recently observed, "in the field of Sherman Act violations a conspiracy, as in other proscribed conspiracies, imports a plurality of persons acting in concert to attain a common goal or purpose." *White v. The Hearst Corp., 669 F. 2d 14, 18 (1st Cir. 1982)*. See *American Tobacco Co. v. United States, 328 U.S. 781, 810 (1946)*. In this case, the defendant contends that it did not enter into any agreement with automobile repair shops, and that the necessary concert of action is therefore lacking.

The defendant has supported this contention by submitting affidavits which flatly deny the existence of any agreement with an auto body repair shop with respect to anything other than the price to be charged for a particular job. Despite these sworn submissions, the Court believes that a triable issue of fact exists on this question. The defendant admits that it recommends particular repair shops if its policyholders request a recommendation. Aetna also admits that it determines which shops **[*12]** to recommend by considering which shops have been willing to work for the amount of Aetna's estimate. The repair shops which have been recommended are no doubt aware of this, and are likewise aware that an increase in rates which Aetna deems unacceptable will jeopardize future referrals.

While the question is a close one, the Court believes that the economic realities of this situation are such that a reasonable trier of fact could infer the existence of informal agreements between Aetna and the repair shops agree to accept Aetna's the repair shops that it recommends, whereby such shops agree to accept Aetna's estimate in return for receiving referrals from Aetna. It is true that any such agreement does not guarantee a shop that it will receive a specific amount of business. It is also true that repair shops remain free at any time to alter their prices if

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[4] A threshold objection by defendant to this Court's jurisdiction can be disposed of without extended dicussion. The defendant contends that the Court lacks subject matter jurisdiction over this case because plaintiff has failed to establish that the alleged restraint of trade affects interstate commerce. See *15 U.S.C. § 1* (prohibiting "restraint of trade among the several States, or with foreign nations . . ."). The defnednat concedes that many of the parts and supplies which plaintiff purchases in the course of its business come from outside of Rhode Island. Defendant's Memorandum of Law at 24. The defendant argues, however, that the effect of any alleged illegalities is merely to divert business from one body shop to another without affecting the total volume intrastate business or the total amount of parts and supplies purchased in interstate commerce. However, if plaintiff is successful in showing that the provider agreements between Aetna and certain body shops are used to limit the quality of repair work performed, the requisite effect on interstate commerce could be shown. This possibility that the defendant's practices as a matter of practical economics may affect interstate commerce is sufficient to satisfy the Sherman Act's jurisdictional requirement. *McLain v. Real Estate Board of New Orleans, Inc., 444 U.S. 232, 242-43 (1980)*; *Cordova Simonpetri Insurance Agency, Inc. v. Chase Manhattan Bank N.A., 649 F. 2d 36, 45 (1st Cir. 1981)*.

they are willing to risk a loss of Aetna referrals. This, however, suggests only that any agreement which exists is not very specific and can be altered at the will of the parties. It does not affirmatively demonstrate a lack of concerted action.

On similar facts, the district court in *Quality Auto Body, Inc. v. Allstate **[*13]** Insurance Co., 1980-2 TRADE CASES P63,507 (N.D. Ill. 1980)*, aff'd, *660 F. 2d 1195 (7th Cir. 1981)*, cert. denied, *102 S. Ct. 1717 (1982)*, reached the same conclusion. It noted that:

The court would be blind to economic reality, however, if it did not recognize that the policies of the defendants, well known to every body shop, create powerful incentives to adhere to the insurance companies' guidelines. Body shops know that if they follow the prevailing competitive rate, they can expect to have insurance company work referred to them. These incentives and this knowledge could be said to create informal vertical agreements between the insurance companies and certain body shops. Indeed, it appears that in some manner each insurance company communicates its guidelines to the shops with which ti deals, and that shops following these guidelines are awarded by being placed on each company's list (however informally that list is maintained) of preferred shops. From these facts, the trier of fact could draw the inference that at least some body shops have agreed to perform body work for a set price. Thus, viewing the facts in the light most favorable to the plaintiff, the court will, **[*14]** for the purposes of this motion, assume that informal vertical arrangements, between the defendants and certain "preferred" body shops, exist. Accordingly, these practices, in addition to the explicit agreements that are a part of the Allstate direct repair program must be scrutinized under the Act.

Id. at 76,694-95.

B. McCarran-Ferguson Immunity

The McCarran-Ferguson Act provides in relevant part that the Sherman Act and Clayton Act "shall be applicable to the business of insurance to the extent that such business is not regulated by State law." *15 U.S.C. § 1012(b)*. The Act further provides that, "Nothing contained in this Act shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." *15 U.S.C. § 1013(b)*. The Act thus exempts the provider agreements in question from the operation of the antitrust laws only if: (1) they constitute the "business of insurance"; (2) they are regulated by state law; and (3) they do not constitute boycotts, coercion, or intimidation. *Group Life & Health Insurance Co. v. Royal Drug Co., 440 U.S. 205, 210 n. 4 (1979)*.

The plaintiff argues that the defendant's **[*15]** provider agreements do not constitute the business of insurance, and therefore are not exempt under McCarran-Ferguson. It relies prirmarily on the Supreme Court's decision in Royal Drug. [5] That case presented an antitrust challenge to provider agreements between a health insurance company and certain pharmacies. Under the agreements, participating pharmacies agreed to accept limited reimbursement for dispensing drugs to persons covered by the insurer's health plan. [6] In return, the health insurance policy made it financially advantageous for plan members to deal with participating drug stores. [7] The Supreme Court was called upon to determine whether such agreements constituted the business of insurance for McCarran-Ferguson purposes.

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[5] The reasoning and analysis in Royal Drug were closely followed in the Supreme Court's most recent decision on McCarron-Ferguson immunity. See *Union Labor Life Insurance Co. v. Pireno, 50 U.S.L.W. 4911, 4913* (U.S. June 29, 1982).

[6] Participating pharmacies agreed to charge plan members only $2 for any prescription drug they dispensed. The health insurance company reimbursed participating pharmacies for only the actual cost of all drugs dispensed to plan members. The pharmacies in the plan thus received only a $2 markup on all drugs sold to plan members. *Royal Drug at 209*.

[7] Plan members dealing with participating pharmacies had to pay only $2 for any prescription drug. Members who dealt with nonparticipating pharmacies had to pay the full price charged by the pharmacy, and received reimbursement amounting to only 75% of the difference between the price of the drug and $2. Id.

[*16] Since the McCarran-Ferguson Act does not define "the business of insurance," the Court sought to determine whether the provider agreements fell "within the ordinary understanding of that phrase, illumined by any light to be found in the structure of the Act and its legislative history." *Royal Drug at 211*.The Court observed that the primary elements of insurance are the spreading and underwriting of a policyholder's risk.The Court added that the business of insurance is also commonly understood to relate to the contract between the insurer and insured. *Id. at 215*.

The provider agreements at issue fit neither of these descriptions of the business of insurance. The agreements did not involve any spreading or underwriting of risk, nor did they constitute a contract between insurer and insured. At most the provider agreements were a convenient method of minimizing the insurance company's costs. As such, they were legally indistinguishable from a host of other costcutting arrangements which constituted the business of insurance companies, but not the business of insurance. *Id. at 217*. The Court also canvassed the legislative history of the McCarran-Ferguson Act and found full **[*17]** support for its conclusion that the provider agreement were not the business of insurance. *Id. at 217-24*. This conclusion was further bolstered by the traditional canon of construction which requires exemptions from the antitrust laws to be narrowly construed. *Id. at 231*.

The provider agreements in this case are legally indistinguishable from those found to fall outside the McCarran-Ferguson exemption in Royal Drug. They do not spread or underwrite a policyholder's risk, nor are they contracts between the insurer and insured. At best they are a means by which the defendant seeks to minimize costs and ensure customer satisfaction. While such agreements may constitute the business of insurance companies, they are not the business of insurance as defined in Royal Drug. [8]

[*18] The Fifth, Seventh and District of Columbia Circuits have reached the same conclusion with respect to informal provider agreements between automobile insurance companies and automobile insurance companies and automobile repair shops. Proctor v. State Farm Mutual Automobile Insurance Co., 675 F. 29 308, 336-37 (D.C. Cir. 1982); *Quality Auto Body, Inc. v. Allstate Insurance Co., 660 F. 2d 1195, 1201 (7th Cir. 1981)*, cert. denied, *102 U.S. 1717 (1982)*; *Liberty Glass Co. v. Allstate Insurance Co., 607 F. 2d 135, 137-38 (5th Cir. 1979)*.

C. Legality of the Agreements

The plaintiff maintains that the provider agreements are illegal per se and should be found to violate the Sherman Act without regard to their utility. In support of this position it relies on *Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 408 (1911)*, and its progeny, which hold that vertical price fixing is illegal per se. Specifically, these cases hold that manufacturers and distributors may not place restrictions on the price which retailers may charge for resale of a product to the general public. It must be acknowledged that the provider agreements do not precisely fit this pattern. Plaintiff **[*19]** points out, however, that the relationship between Aetna and the automobile repair shops that is recommends is a vertical one, i.e. their businesses are situated at different levels of the market. It further maintains that Aetna agrees on prices with the preferred repair shops, and that this agreement constitutes vertical price fixing.

As the defendant points out, plaintiff's analysis misses the mark by a wide margin. Plaintiff acknowledges that defendant is properly characterized as a purchaser of repair services on behalf of its insureds. As a purchaser it is required to enter the marketplace, negotiate with sellers, and arrive at a mutually satisfactory price. This sort of "price-fixing" occurs whenever a purchase is made by a buyer. It certainly cannot be said to be illegal per se. *Quality Auto Body, Inc. v. Allstate Insurance Co., 660 F. 2d 1195, 1202-03 (7th Cir. 1981)*, cert. denied, *102 S. Ct.*

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[8] In D & B Auto Body, Inc. v. Firemen's Fund Insurance Co., Civ. No. 79-0550, a case involving antitrust issues identical to those in the case at bar, the Court requested the participation of the Antitrust Division of the United States Department of Justice as amicus Curiae. In response to this invitation to this invitation, the Division submitted an excellent Memorandum of Law discussing the relevant issues. D & B Auto Body subsequently was dismissed pursuant to a stipulation by the parties. The Court nevertheless found the views of the Antitrust Division quite useful, and will cite them in this Opinion where appropriate. In connection with the McCarron-Ferguson immunity issue discussed above, the Court notes that the Justice Department agrees that the vertical provider agreements at issue do not constitute "the business of insurance" within the meaning of the McCarran-Ferguson Act. Memorandum of the United States at 6-7.

1717 (1982); *Travelers Insurance Co. v. Blue Cross of Western Pennsylvania, 481 F. 2d 80, 84* (3d Cir.), cert. denied, *414 U.S. 1093 (1973)*; *Medical Arts Pharmacy of Stamford, Inc. v. Blue Cross & Blue Shield of Connecticut, Inc., 518 F. Supp. 1100, 1106-07 (D. Conn. 1981)*, aff'd, **[*20]** *675 F. 2d 502 (2d Cir. 1982)*; *Sausalito Pharmacy, Inc. v. Blue Shield of California, 1981-1 TRADE CASES P63,885 at 75,607 (N.D. Cal. 1981)*.

As noted above, the type of vertical price fixing that has been condemned as illegal per se involves restrictions on a purchaser's freedom to resell the purchasesd product to a third person. See, e.g., *Albrecht v. The Herald Co., 390 U.S. 145*; *United States v. Parke, Davis & Co., 362 U.S. 29 (1960)*. Under the provider agreements at issue here, there simply are not third persons to whom a resale is made. The agreements thus clearly do not come within the traditional classification of vertical price fixing which is condemned as illegal per se. *Medical Arts Pharmacy of Stamford, Inc. v. Blue Cross & Blue Shield of Connecticut, Inc., supra, at 1107*; Sausalito Pharmacy, Inc. v. Blue Shield of California, supra, at 75,607; *General Glass Co. v. Globe Glass and Trim Co., 1980-2 TRADE CASES P63,531 at 76,851 (N.D. Ill. 1980)*.

Despite this, the question arises whether the provider agreements should be held to constitute a new class of agreements which are illegal per se. The First Circuit has expressed some reluctance to add to "the per se pantheon **[*21]** recognized by the Supreme Court." *George R Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F. 2d 547, 560 (1st Cir. 1974)*, cert. denied, *421 U.S. 1004 (1975)*. In this case it seems clear that a per se approach is inappropriate.

The Supreme Court has indicated that per se rules should only be applied where the purpose and effect of a restraint "threaten the proper operation of our predominantly free-market economy -- that it, [where] the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output. . . ." *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19-20 (1979)*. Accord *Arizona v. Maricopa County Medical Society (1982-2 TRADE CASES P64,792, 50 U.S.L.W. 4687, 4690* (U.S. June 15, 1982). Agreements that are per se illegal are characterized by "their pernicious effect on competition and lack of any redeeming virtue." *Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958)*. Far from lacking any redeeming virtue, the provider agreements in this case have a substantial pro-competitive effect. The defendant has concluded such agreements in an attempt to satisfy the needs of its insureds **[*22]** at the lowest possible price. The agreements themselves tend to encourage repair shops to compete with each other by offering lower prices to attract greater shares of insurance company work.

As the Seventh Circuit recently observed,

Defendants are simply taking steps to insure the best terms available in the marketplace and firmly indicating their position on price to the sellers (the body shops). As the Third Circuit explained in *Travelers Insurance Co. v. Blue Cross of Western Pennsylvania, 481 F. 2d 80* (3d Cir.), cert. denied, *414 U.S. 1093 (1973)*, "this pressure encourages [suppliers] to keep their costs down; and, for its own competitive advantage, [enables the insurer to pass] . . . along the savings thus realized to consumers. To be sure, [the insurer's] initiative makes life harder for commercial competitors. . . . The antitrust laws, however, protect competition, not competitors; and staff competition, not competitors; and staff competition is encouraged, not condemned."

Id. at 84.

Quality Auto Body, Inc. v. Allstate Insurance Co., 660 F. 2d 1195, 1203 (7th Cir. 1981), cert. denied, *102 U.S. 1717 (1982)*; accord *Proctor v. State Farm Mutual Automobile Insurance **[*23]** Co., 1980-81 TRADE CASES P63,591 at 77,141 (D.D.C. 1980)*, aff'd, *675 F. 2d 308 (D.C. Cir. 1982)*. Given this substantial positive effect on competition, it is clear that the provider agreements cannot be found to be illegal per se.

Having reached this conclusion, the question arises whether the effects and purpose of the provider agreements must also be analyzed under the rule of reason. Such an inquiry would certainly be in keeping with the usual practice in antitrust cases. See, e.g., *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 24-25 (1979)* (holding that blanket licenses are not per se illegal, remanding to Court of Appeals for consideration of licenses under rule of reason). In this case, however, plaintiff has focussed almost exclusively on the legality of the agreements under the per se rule. In a similar case, one court has ruled that where "plaintiffs have placed all their eggs in the per se basket," further scrutiny of the challenged agreements under the rule of reason is inappropriate. *Medical Arts Pharmacy of Stamford, Inc. v. Blue Cross & Blue Shield of Connecticut, Inc., 518 F. Supp. 1100, 1109*, (D. Conn. 1981), aff'd, *675 F. 2d 502 (2d Cir. **[*24]** 1982)*.

The Court does not believe that a similar approach is warranted in this case. Plaintiff by its general allegations has challenged the legality of the provider agreements under *Section 1* of the Sherman Act. While relying almost exclusively on its argument that the agreements are illegal per se, a reading of plaintiff's pleadings and submissions suggests that it has also raised the question of the agreements' legality under the rule of reason. In particular, plaintiff's allegation that the defendant has used its market power as a large-scale purchaser of automobile repair work to obtain the services of preferred shops at an artificially low price [9] is sufficient to suggest that the agreements have an anticompetive effect which must be analyzed under the rule of reason. Having determined that this issue is properly raised by the pleadings, the defendant as the movant for summary judgment has the burden of showing that no genuine issue of fact exists as to the legality of the agreements under the rule of reason.

Under the rule of reason the Court must assess the anticompetitive and procompetitive effects **[*25]** of a particular agreement "by analyzing the facts perculiar to the business, the history of the restraint, and the reasons why it was imposed." *National Soc'y of Professional Engineers v. United States, 435 U.S. 679, 692 (1978)*. The Court has already noted its opinion that the agreements in question have a substantial procompetitive effect in that they foster price competition between automobile repair shops. See *Chick's Auto Body v. State Farm Mutual Automobile Insurance Co., 168 N.J. Super. 68, 401 A. 2d 722, 731-32 (1979)*, aff'd per curiam, *176 N.J. Super. 320, 423 A. 2d 311 (1980)* (agreements are "the very essence of competition"). Plaintiff alleges, however, that the agreements also have a significant anticompetitive effect. In contends that the defendant has used its position as a large-scale buyer to enter into provider agreements which depress the price of automobile repairs below competitive levels. In short, it contends that the defendant possesses monoposony [10] power, and that it has concluded provider agreements to enable it to wield this power more effectively. [11]

[*26] To show an abuse of monopsony power, however, it is not enough merely to indicate that the defendant possesses significant market power because it makes purchases of repair services on a large scale. *Quality Auto Body, Inc. v. Allstate Insurance Co., 660 F. 2d 1195, 1204 (7th Cir. 1981)*, cert. denied, *102 S. Ct. 1717 (1982)* (buyers' possession of significant market power not a violation of Sheman Act absent certain types of abuse). Plaintiff must point to some way in which the provider agreements restrict output or otherwise injure competition. See *Medical Arts Pharmacy, Inc. v. Blue Cross & Blue Shield, Inc., 675 F. 2d 502, 507 (2d Cir. 1982)* (provider agreements did not violate rule of reason where insurer had small market share and could not use monopsony power to obtain agreements with anti-competitive effect); *Sausalito Pharmacy, Inc. v. Blue Shield of California,*

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[9] See Plaintiff's Objection and Opposition at 3 and 11.

[10] Monopsony is the economic term used to describe a market involving one buyer and numerous sellers. It is the counterpart in the buyer's market of monopoly.

[11] The vertical provider agreements might also have anticompetitive effects if they facilitated the creation of horizontal cartels between insurance companies or between automobile repair shops. *Workman v. State Farm Mutual Automobile Insurance Co., 520 F. Supp. 610, 615-17 (N.D. Cal. 1981)*; Sausalito Pharmacy, Inc. v. Blue Shield of California, 1981-1 TRADE CASES at 75,609; Quality Auto Body, Inc. v. Allstate Insurance Co., 1980-2 TRADE CASES at 76,696. Likewise, the agreements might violate the rule of reason if they were used by automobile repair shops as an instrument of predatory pricing. Sausalito Pharmacy, Inc. v. Blue Shield of California, supra, at 75,609. There is no contention in this case that automobile repair shops have attempted to form a horizontal cartel or have engaged in predatory pricing. Plaintiff's contentions with respect to the existence of horizontal agreements between insurance companies are discussed in greater detail infra.

1981-1 TRADE CASES P63,885 at 75,609 (N.D. Cal. 1981) (no violation of rule of reason absent showing of intent in provider agreements to affect quantity or quality of services). [12]

[*27] To understand whether there is a significant possibility that the challenged provider agreements have the anticompetitive effect of restricting output, a more detailed understanding of the economics of monopsony may be necessary. Professors Areeda and Turner suggest that before a large-scale buyer will restrict output and thereby injure competition, three conditions must be satisfied. 4 P. Areeda & D. Turner, ***Antitrust Law*** P964 at 202 and n. 2 (1980). First, the buyer must possess significant market power in that its purchases are so numerous that they have an appreciable effect on total output. Second, the buyer must make its purchases in an industry which has a rising cost curve, i.e. one where each successive unit produced costs more to produce than the previous one. Finally, the buyer must possess the power to restrict its purchases to a particular amount. If all three conditions are present, a rational large-scale purchaser will limit its purchases to a smaller quantity of goods which are produced at a lower price than would be prevalent under conditions of free competition. Id. If the provider agreements in question were used to effectuate such a limitation, they would **[*28]** have a significant anticompetitive effect and would probably violate the rule of reason.

It is difficult to assess whether the three preconditions to abuse of monopsony power are present in this case. The parties have offered no evidence as to the market share of defendant, so it is impossible to assess whether it possesses sufficient market power to affect appreciable total output. Nor is there any evidence which indicates whether the automobile repair industry possesses a rising cost curve. At first glance, however, it might seem possible to reach a conclusion with respect to the third condition -- the ability of the defendant to restrict its purchases.

The defendant arguably does not possess this ability. Its obligation to purchase repair services is fixed by its contracts with its insureds. Upon the occurrence of an insurble event, the defendant must arrange for the repair of the damaged vehicle. There thus exists little discretion on the part of Aetna to determine the amount of repair work which it will purchase.

However, it would be open to the defendant to restrict the level of repair services purchased by arranging for its preferred shops to perform repairs of **[*29]** an inferior quality. I note that plaintiffs in other cases have alleged that insurance companies do precisely this, although their claims have not been substantiated. *Quality Auto Body, Inc. v. Allstate Insurance Co., 660 F. 2d 1195, 1204 n. 6 (7th Cir. 1981)*, cert. denied, *102 S. Ct. 1717 (1982)*; [13] *Workman v. State Farm Mutual Automobile Insurance Co., 520 F. Supp. 610, 621 (N.D. Cal. 1981)*. In any case, the Court is convinced that such a restriction of output is at least a possible result of the challenged provider

[12] The Justice Department takes the position that the vertical agreements in question do not violate the Sherman Act absent a showing that "insurance companies have the power to limit the amount of repair work performed for policyholders, that they refuse to deal with any competent repair shop in the same terms available to other repair shops, or that there are other facts that would render their actions unreasonably anticompetitive." Memorandum of the United States at 11.

[13] The Seventh Circuit in this case noted that:

"When the rate is too low, some repair shops resort to dishonest practices in order to survive. These practices include: (1) charging for new parts but using old parts; (2) estimating parts that are not damaged; (3) straightening old parts but charging for new parts; (4) inflating labor hours; (5) billing for repairs which have not been performed; and (6) offering rebates and bribes to adjusters."

Quality Auto Body, Inc. v. Allstate Insurance Co., supra, 1204 n. 6.

The court went on to observe that, "Although these deplorable practices may be prevalent in the auto repair industry, in and of themselves they are not matters the antitrust laws were intended to address." Id. (emphasis in original). This Court agrees with the Seventh Circuit that unethical business practices which do not have a significant adverse effect on competition do not violate the antitrust laws. *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F. 2d 547, 560-2 (1st Cir. 1974)*, cert. denied, ***421 U. S. 1004 (1975)***. However, if dishonest business practices are the result of a concerted effort to restrict output, a significant adverse effect on competition may result, and the Sherman Act's rule of reason may be violated.

agreements. [14] As a result, I cannot say on this record that plaintiff would be unable to show at trial that the provider agreements have the anticompetitive effect of restricting production and that such agreements therefore violate the rule of reason. For this reason the defendant's motions for summary judgment must be denied.

[*30] I wish to note, however, that the question of the appropriateness of summary judgment in this case is a very close one. This is because plaintiff has raised the question of the possible abuse of monopsony power in a very oblique fashion. As a consequence, the defendant undoubtedly lacked proper notice as to what it was required to refute in order to prevail on its motion. The Court also considers it highly unlikely that the provider agreements are in fact being used by defendant to exert monopsony power and to restrict output. There is certainly nothing in the record which would point to this. But plaintiff, as nonmovant, does not bear the burden of showing the existence of genuine issues of fact, and the silence of the record on this point, therefore, cannot be held against it. In the end, the Court is persuaded that the better course is to proceed with caution. As the First Circuit has noted: The summary judgment rule, *F.R. Civ. P. 56*, can be a valuable tool for saving judicial time. However, by use in inappropriate situations, or misues, it can also waste time. In view of the possible terminal result, it is essential that i's be dotted and t's crossed.

*Mack v. Cape **[*31]** Elizabeth School Board, 553 F. 2d 720, 722 (1st Cir. 1977)*.

This is not to say that a trial will be necessary on the question of the possible anticompetitive effect of the provider agreements. Further submissions made pursuant to a renewed motion for summary judgment by the defendant may show that no genuine issue of fact exists on the pivotal question of restriction of output. If this is the case, a grant of summary judgment in favor of defendant on this question will be warranted.

IV. Horizontal Price-Fixing Agreements Between Insurance Companies

Although plaintiff does not emphasize this aspect of its case in its Memorandum of Law in opposition to the defendant's motion for summary judgment, the complaint in this action also alleges that the defendant has combined and conspired with other insurance companies to fix the price paid to automobile repair shops for their services. Second Amended Complaint P6. Such an agreement between buyers of services, if not immune from antitrust scrutiny under the McCarran-Ferguson Act, would be illegal per se. *Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 235 (1948)*: *Williams v. St. Joseph Hospital, 629 **[*32]** F. 2d 448, 453 (7th Cir. 1980)*. The Court finds, however, that Aetna has demonstrated that it has not engaged in any conspiracy with other automobile insurance companies to fix the price of automobile repairs, and that no genuine issue of fact exists on this question.

In sworn affidavits submitted by its present and former Providence Branch Claims Managers, Aetna has categorically denied consulting with any other insurance company in determining the competitive cost of repairs. Daffron Affidavit at 3; Mistretta Affidavit at 4. Following this sworn denial, "[i]t . . . became [plaintiff's] burden to present factual materials that might have been admissible at trial as evidence to support the complaint." *White v. The Hearst Corp., 669 F. 2d 14, 18 (1st Cir. 1982)*. This plaintiff clearly has failed to do.

Indeed, in deposition testimony Richard Ruggiero, the president of Custom Auto Body, admitted that he has no direct evidence that Aetna has agreed with other insurance companies to fix prices, and that plaintiff's allegations in this regard are largely conjectural. Ruggiero Deposition at 82-84. Nor has plaintiff produced any persuasive circumstantial evidence which tends **[*33]** to show the existence of such an agreement. [15] Faced with this

[14] Aetna comes very close to demonstrating that it does not attempt to restrict output by limiting the quality of repairs performed by its preferred shops. Aetna's affidavits state that it recommends shops based on their ability to perform quality repairs at a competitive price, and that it quarantees that workmanlike repairs can be performed for the amount of its estimate. Daffron Affidavit at 5; Mistretta Affidavit at 2. This is circumstantial evidence that Aetna has not conspired with preferred repair shops to restrict output by performing inferior repairs. Absent an explicit denial that such an agreement exists, however, the Court cannot say that this is sufficient to meet Aetna's burden of showing the absence of any genuine issue of material fact.

complete absence of evidence to contradict Aetna's sworn statement that it has not engaged in horizontal price fixing, the Court is required to grant summary judgment for Aetna on this claim. [16]

[*34] V. Agreements Between Aetna and Its Policyholders

The third focus of plaintiff's antitrust challenge is the relationship of the defendant with its policyholders. Plaintiff maintains that the defendant has acted in concert with its insureds to create a horizontal combination of automobile owners which uses its combined purchasing power to restrain trade in the automobile repair industry. The court believes, however, that any such combination is clearly exempt from antitrust scrutiny under the McCarran-Ferguson Act, and that defendant is entitled to summary judgment for this reason. I thus need not reach the question of whether the defendant would be entitled to summary judgment on the alternative ground that the alleged combination is completely legal under the Sherman Act.

To decide whether plaintiffs claim is barred by the McCarran-Ferguson Act, the court must first determine whether the challenged conduct constitutes "the business of insurance". Before reaching this question, however, it is necessary to understand precisely what conduct plaintiff is challenging. Read broadly, plaintiff's allegations appear to challenge the legality of the basic concept of automobile insurance. **[*35]** As was noted earlier, automobile insurance provides for the spreading of risk by obligating the insurance company to undertake the repair of automobile damage sustained by its policyholders. In fulfilling its obligations under the insurance contract, the insurance company will always be required to perform some purchasing functions on behalf of its insureds. Some combination of buying power thus seems virtually inherent in any automobile insurance policy. It seems unlikely, however, that plaintiff intends to argue from this that automobile insurance by its very nature is violative of the antitrust laws. [17]

A more reasonable interpretation of plaintiff's contention is that it challenges the provision in the insurance policy which limits the reimbursement of the policyholder to the reasonable or competitive cost of repairs. Absent such a restriction on the policy's coverage, an insured would have less incentive to accept his insurance company's recommendation of a repair shop, and the company would find it more difficult to aggregate the buying **[*36]** power of its insureds in dealing with repair shops. Even accepting this more reasonable interpretation of plaintiff's allegations, however, it is clear that plaintiff is challenging conduct which constitutes the business of insurance.

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[15] Plaintiff appears to rely on the theory of conscious parallelism to prove the existance of a horizontal conspiracy. It claims that the defendant and other insurance companies employ similar practices in settling claims, such as the use of the same independent publication to determine repair times and new part prices. Plaintiff suggests that the existence of these similiar practices can only be explained as the result of a conspiracy between insurance companies. The Supreme Court has indicated that parallel behavior may be circumstantial evidence of the existence of an agreement or conspiracy. See *Interstate Circuit, Inc. v. United States, 306 U.S. 208, 226-27 (1939)*. But it is also clear that mere proof of parallel behavior without more does not prove the existence of a contract, combination or conspiracy. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 541 (1954)*; *Naumkeag Theatres Co. v. New England Theatres, Inc., 345 F. 2d 910, 911-12* (1st Cir., cert. denied, ***382 U.S. 906 (1965)***.

In this case, plaintiff has failed to show that the similar practices employed by automobile insurance companies are anything more than the result of the companies' independent pursuit of their economic self-interest. Absent such a showing, the doctrine of conscious parallelism in no way supports an inference of conspiracy. See *Quality Auto Body, Inc. v. Allstate Insurance Co., 660 F.2d 1195, 1200-01 (7th Cir. 1981)*, cert. denied, ***102 S. Ct. 1717 (1982)***; *Workman v. State Farm Mutual Automobile Insurance Co., 520 F. Supp. 610, 621 (N.D. Cal. 1981)*; *Sausalito Pharmacy, Inc. v. Blue Shield of California, 1981-1 TRADE CASES P63,885 at 75,612 (N.D. Cal. 1981)*; *Chick's Auto Body v. State Farm Mutual Automobile Inesurance Co., 168 N.J. Super. 68, 401 A. 2d 722, 730-31 (1979)*, aff'd per curiam, *176 N.J. Super. 320, 423 A. 2d 311 (1980)*.

[16] The Court therefore need not dedcide whether an agreement between insurance companies to fix the price of automobile repairs would be immune under the McCarran-Ferguson Act.

[17] Such a claim would clearly be a challenge to "the business of insurance" within the meaning of the McCarran-Ferguson exemption.

As the Supreme Court noted in Royal Drug:

Another commonly understood aspect of the business of insurance relates to the contract between the insurer and the insured. In enacting the McCarran-Ferguson Act Congress was concerned with: "The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement -- these were the core of the "business of insurance.""

Royal Drug at 215-16 (quoting *SEC v. National Securities, Inc., 393 U.S. 453 460 (1969)*.

The conduct challenged here, involving as it does the provisions of the insurance policy itself, falls within the core of "the business of insurance" as the Supreme Court has defined that term. [18]

[*37] The challenged conduct must also be regulated by state law before the McCarran-Ferguson exemption will apply. [19] In accordance with the intent of Congress expressed in the McCarran-Ferguson Act, Rhode Island has established a comprehensive program of regulation for the business of insurance. See R.I.G.L. § 27-29.1. Rhode Island law prohibits any person from engaging in "an unfair method of competition or an unfair deceptive act or practice in the business of insurance." *R.I.G.L. § 27-29-3*. The Insurance Commissioner is authorized to make determinations as to what constitutes unfair competition, and to seek injunctions in superior court enjoining any violation he determines is taking place. *R.I.G.L. § 27-29-8*.

In addition to this general regulation, Rhode Island law **[*38]** specifically regulates claims adjustment procedures. The Insurance Commissioner is authorized to order the discontinuance of any claims adjustment practice which he finds to be unfair, with Rhode Island statutes. *R.I.G.L. § 27-10-10*. The Commissioner's authority also extends specifically to motor vehicle damage appraisers, and he is authorized to "prescribe reasonable regulations concerning . . . the methods with which [such appraisers] conduct their business." *R.I.G.L. § 27-10.1-1* (1981 supp.).

Pursuant to his statutory authority, the Insurance Commissioner has promulgated Regulation XXVIII, Fair Insurance Claim Settlement Practices. Section 9 of this regulation establishes "Standard For Prompt, Fair and Equitable Settlements Applicable to Automobile Insurance." The regulation provides that:

A viewing of a damaged automobile for the purposes of preparing an estimate for the cost of repair shall be made within seven (7) working days of notification to the insurer of the claim. Such estimate shall be in an amount for which it may be reasonably expected the damage can be satisfactorily repaired.

Regulation XXVIII § 9(d).

It thus appears that Rhode Island has specifically **[*39]** authorized the activities challenged by the plaintiff by passing a regulation that permits an insurance company to pay only the reasonable cost of repairs. Such specific authorization more than satisfies the requirement that the business of insurance be regulated by state law before the McCarran-Ferguson exemption will be available. [20] See *Dexter v. Equitable Life Assurance Society of the*

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[18] Plaintiff appears to argue that even if the agreements between Aetna and its insureds are themselves immune under the McCarran-Ferguson Act, the anticompetitive effects of such agreements are not. Objection and Opposition at 11-12. This argument is completely without merit. As the Justice Department points out, "An antitrust exemption would be meaningless, however, if it were forfeited to the extent that the exempted conduct produced anticompetitive effects." Memorandum of the United States at 14. See *Royal Drug at 249* (Brennan, J. dissenting). If the agreements satisfy the requirements of the McCarran-Ferguson Act, they are exempt from the antitrust laws without regard to their possible anticompetitive effects.

[19] In addition, under the McCarren-Ferguson Act the antitrust laws remain applicable to acts of boycott, coercion and intimidation in the business of insurance. *15 U.S.C. § 1013(b)*. The Court concludes for the reasons set forth in a subsequent section of this opinion that the actions of defendant and its insureds cannot be said to constitute an act of boycott or coercion. See pp. 30-34 infra.

United States, 527 F. 2d 233, 236 (2d Cir. 1975); Crawford v. American Title Insurance Co., 518 F. 2d 217, 219 (5th Cir. 1975) (2-1 decision); Commander Leasing Co. v. Transamerica Title Insurance Co., 477 F. 2d 77, 83 (10th Cir. 1973); Miley v. John Hancock Mutual Life Insurance Co., 148 F. Supp. 299, 302 (D. Mass.), aff'd per curiam, 242 F. 2d 758 (1st Cir.), cert. denied, *355 U.S. 8288 (1975)*.

[*40] Accordingly, I find that the combination between Aetna and its insureds which is challenged by the plaintiff constitutes the business of insurance which is regulated by state law. As such, the combination is immune from antitrust attack under the McCarran-Ferguson Act. [21] The defendant's motion for summary judgment on this claim will therefore be granted.

VI. Agreements Between Aetna "Preferred" Repair Shops, Damage Appraisers and Policyholders **[*41]** to Boycott Plaintiff's Repair Shop

Plaintiff's final antitrust claim is that Aetna has conspired with its insureds, certain automobile repair shops, and certain automobile damage appraisers to boycott plaintiff's repair shop. Plaintiff contends that a boycott occurs when the defendant informs its policyholders that it will pay only the amount which it determines to be the reasonable cost of repair work. This amount is sometimes less than the amount that plaintiff charges for its services. Insureds who wish to deal with plaintiff's shop may thus be forced to choose between paying the additional amount charged by plaintiff out of their own pockets, or having the repair work performed at a "preferred" shop which will do the work for the amount estimated by Aetna. In many such instances, insureds choose to take their business elsewhere, and this refusal to deal constitutes the alleged boycott of which plaintiff complains.

In response the defendant has offered sworn affidavits which state that Aetna imposes no restrictions on its insureds' freedom to deal with any repair shop they choose. The only limitation imposed by Aetna is that it will pay no more than the competitive cost **[*42]** of repairs. Daffron Affidavit at 4-5; Mistretta Affidavit at 7. It is also important to note that plaintiff does not contend that it is being boycotted despite its willingness to offer price quotes and other terms that are comparable to those offered by preferred shops. Plaintiff apparently concedes that the alleged boycott has occurred only because of its refusal to offer prices and terms in line with those offered by other shops.

A group boycott has been described generally as "concerted refusal by traders to deal with other traders." *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959)*. But obviously not every refusal to deal constitutes an illegal boycott. A purchaser's refusal to deal with a seller because his price is too high, for example, is clearly not an illegal boycott under the Sherman Act. Rather, this is simply the result of the proper functioning of the marketplace wherein purchasers decide whether or not to buy based on the price and quality of goods. See *American Tel. & Tel. Co. v. Delta Communications Corp., 408 F. Supp. 1075, 1101 (S.D. Miss. 1976)*, aff'd per curiam, *579 F. 2d*

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[20] To trigger McCarran-Ferguson exemption, the system of state regulation need not completely duplicate the provisions of the federal antitrust laws. The Court agrees with the Second Circuit's observations that:

"The McCarran-Ferguson Act clearly contemplates that where a state undertakes to regulate the business of insurance, it has the power to permit practices which would otherwise violate federal antitrust laws; if the exemption is only to apply when state law squarely prohibits all acts which would, absent the exemption, violate the antitrust laws, the state regulation which the McCarran-Ferguson Act aims to foster, *15 U.S.C. §§ 1011*, *1012(a)*, would be a nullity."

Dexter v. Equitable Life Assurance Soc'y of the United States, 527 F. 2d 233, 236 (2d Cir. 1975); accord *Travelers Ins. Co. v. Blue Cross of Western Pa., 481 F. 2d 80, 83 n. 10* (3rd Cir.); cert. denied, ***414 U.S. 1093 (1973)***; *Ohio AFL-CIO v. Insurance Rating Bd., 451 F. 2d 1178, 1181 (6th Cir. 1971)*, cert. denied, *409 U. S. 917 (1972)*.

[21] The Justice Department takes the position that a combination between insurers and insureds which aggregates buying power would not violate the antitrust laws in any case, absent some showing that insureds had agreed to pool their purchasing power and restrict demand so as to lower the price of automobile repairs below the competitive level. Memorandum of the United States at 16.It seems at least unlikely that plaintiff could make such a showing at trial. Because defendant is entitled to summary judgment on McCarran-Ferguson grounds, however, the Court need not decide if defendant has met its burden of showing that no genuine issue of fact exists as to this possible anticompetitive effect of the insurer-insured combination.

972 (5th cir. 1978), modified on other grounds, 590 F. 2d 100 **[*43]** (5th cir. 1979) ("[a] refusal to buy a product for more than it is worth simply cannot be a violation of the antitrust laws.")

Purchases in the insurance context, however, are somewhat different from the typical purchase of goods and services in that both the insurer and the insured perform certain purchasing functions. The insured usually performs the task of selecting a provider of services while the insurer pays for the purchase subject to the coverage limitations of the insurance policy. Because two separate entities perform purchasing functions, plaintiff claims that there is concerted action when an insured automobile owner declines to use plaintiff's shop because the owner's insurance company will not reimburse the full cost of repairs. Plaintiff appears to conclude from this that the conduct of the defendant and its insureds involves both concerted action and a refusal to deal, and that therefore such conduct constitutes a concerted refusal to deal which by definition is an illegal boycott.

But this is a concerted refusal to deal only as a matter of semantics. Verbal formulas cannot be used to obscure the fact that the defendant and its insureds have simply acted **[*44]** as rational consumers in declining to patronize high-priced repair shops. Plaintiff at all times has been free to complete for the business of the defendant and its insureds by offering lower prices or higher quality services. From time to time plaintiff has failed in this endeavor because Aetna deemed the plaintiff's charges unreasonable and individual car owners did not believe that the quality of plaintiff's services justified paying an additional amount out of their own pockets. Far from being an illegal boycott, such activities merely constitute the normal functioning of a free-market economy. As the Seventh Circuit recently observed in a similar case: Although some repair shops which charge more than the so-called prevailing competitive rate may suffer some economic losses, these losses appear basically to be the result of the shops' inability or unwillingness to meet competition. The Darwinian working of competition (which the antitrust laws are presumably designed to foster) mean that high-cost, high-price shops tend to lose business and might even go out of business if they cannot become more competitive. Presumably, this process is in the consumer's best interest (although **[*45]** it may have social costs we think inappropriate to address here). Whatever sympathy one may feel for the body shops in these circumstances, the antiturst laws were not intended to provide redress for losses resulting from noncompetitive prices.

Quality Auto Body, Inc. v. Allstate Insurance Co., 660 F. 2d 1195, 1206 (7th Cir. 1981), cert. denied, *102 S. Ct. 1717 (1982)*.

Moreover, the harm to competition that usually results from a group boycott is conspicuously absent here. The Supreme Court has noted that the principal evil of group boycotts is their tendency to "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." *Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959)* (quoting *Kiefer-Stewart Co. v. Joseph R. Seagram & Sons 1950-1951 TRADE CASES P62,737, 340 U.S. 211, 213 (1951))*. The Court noted that a group boycott curtails the freedom of both the participants in the boycott and the boycott's target to deal with each other on the same terms that they deal with others. *Id. at 213*. Here plaintiff remains free to compete with all other body shops on the same basis in attracting the business of Aetna **[*46]** and it insureds. Individual insureds likewise remain free to deal with plaintiff's shop by personally paying the additional amount charged by plaintiff. The restrictions on freedom to trade usually associated with group boycotts are thus wholly absent in this case.

I note that courts faced with allegations of an illegal boycott based on similar facts have uniformly found such allegations to be without merit. Quality Auto body, *Inc. v. Allstate Insurance Co., 660 F. 2d 1195, 1206 (7th Cir. 1981)*, cert. denied, *102 S. Ct. 1717 (1982)*; *Bartholomew v. Virginia Chiropractors Ass'n, Inc., 612 F. 2d 812, 817-18 (4th Cir. 1979)* (2-1 decision), cert. denied, *446 U.S. 938 (1980)*; *Proctor v. State Farm Mutual Automobile Insurance Co., 561 F. 2d 262, 275 (D.C. Cir. 1977)*, vacated and remanded on other grounds, *440 U.S. 942 (1979)*; *Workman v. State Farm Mutual Automobile Insurance Co., 520 F. Supp. 610, 622-24 (N.D. Cal. 1981)*; *Nationwide Mutual Insurance Co. v. Automotive Service Councils of Delaware, Inc., 1981-1 TRADE CASES P63,958 at 75,963 (D. Del. 1981)*; *Chicks' Auto Body v. State Farm Mutual Automobile Insurance Co., 168 N.J. Super. 68, 401 A. 2d 722, 730 (1979)*, aff'd per curiam, **[*47]** *176 N.J. Super. 320, 423 A. 2d 311 (1980)*. The only case that is arguably to the contrary is *General Glass Co. v. Globe Glass & Trim Co., 1980-2 TRADE CASES P63,531 at 76,843 (N.D. Ill. 1980)*. There the court held that plaintiff's allegations that they had been boycotted by an insurance company, the company's policyholders, and certain preferred glass repair shops were sufficiently supported by the evidence so as to require a trial on the merits. Id. at 76,853-54. This case, however, is distinguishable. Evidence in General Glass Co. indicated that individual insureds were told that they had to replace their broken glass at a "preferred" repair shop, and that they could not use a non-preferred shop. Id. at 76,853. No such restriction on an insured's freedom of choice has been shown to have taken place in this case.

For the foregoing reasons the Court believes that defendant has shown that there exists no genuine issue of fact on the boycott claim, and that the conduct challenged here does not constitute an illegal boycott. The defendant is thus entitled to summary judgment on this claim.

VII. Slander Claim

The Second Amended Complaint alleges that one Walter Fortin, **[*48]** acting as the agent of the defendant, stated to one of plaintiff's customers, "What makes you think this repair work is so good; in my opinion, this work stinks." The plaintiff further alleges that Fortin made this statement with respect to work that had been performed by the plaintiff that said statement was false, and that Fortin acted maliciously in making it. Plaintiff now seeks to recover nominal actual and punitive damages on a state law claim based on slander.

The defendant has moved for summary judgment on a number of grounds. First, it argues that the Court should exercise its discretion under *United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966)*, to dismiss the pendent state claim. In the Court's opinion, Gibbs is inapplicable to the present controversy. This is because a reading of the complaint discloses an independent basis for federal jurisdiction over the state law claim. Specifically, Paragraph 2 of the Second Amended complaint alleges that plaintiff is a Rhode Island corporation with its principal place of business in Rhode Island. Paragraph 3 alleges that the defendant is a Delaware corporation with its principal place of business in Hartford, Connecticut. **[*49]** Paragraph 1 states that the amount in controversy exceeds the sum of $10,000 exclusive of interest and costs. The complaint thus alleges all the facts necessary to show the existence of diversity jurisdiction. *28 U.S.C. §§ 1332(a)* and *(c)*. The Court, therefore, has independent subject matter jurisdiction over Count II and lacks any discretion to dismiss the claim under the doctrine announced in Gibbs. It is true that the complaint does not specifically refer to *28 U.S.C. § 1332*, and that the plaintiff has unnecessarily sought to invoke the Court's pendent and ancillary jurisdiction. It is well settled, however, that a failure to cite the proper jurisdictional provision is not fatal if the complaint sets forth sufficient facts to show that the court has jurisdiction. *Continental Casualty Co. v. Canadian Universal Insurance Co., 605 F. 2d 1340, 1343 55*th Cir. 1979), cert, denied, *445 U.S. 929 (1980)*; *Lytle v. Freedom International Carriers, S.A., 519 F. 2d 129 132-33 (6th Cir. 1975)*; *Williams v. United States, 405 F. 2d 951, 954 (9th Cir. 1969)*.

The defendant's second argument is that the statement allegedly made by Fortin was a statement of opinion which is not actionable **[*50]** because it was not defamatory. The defendant relies on *§ 566 of the Restatement (Second) of Torts* which states, "A defamatory communication may consist of a statement in the form of an opinion, but a statement of this nature is actionable only if it implies the allegation of undisclosed defamatory facts as the basis for the opinion." The Court is uncertain whether Rhode Island courts would follow the rule set forth in the Restatement. Two somewhat dated cases indicate that a false statement that the goods and services supplied by a tradesman are of inferior quality is actionable regardless of whether it is a statement of opinion or an assertion of fact. *Barr v. Providence Telegram Publishing Co., 27 R.I. 101, 103, 60 A. 835 (1905)*; *Morrison-Jewell Filtration Co. v. Lingane, 19 R.I. 316, 317, 33 A. 452 (1895)*. But I need not decide this question because I am convinced that the alleged statement was defamatory even under the Restatement approach.

The Restatement provides that an opinion is defamatory if it implies the allegation of undisclosed defamatory facts. Fortin's statement of opinion may be fairly interpreted to imply either that the work performed suffered from hidden **[*51]** defects or that such work was generally inferior when compared to the work performed by other automobile repair shops with which Fortin was familiar. Either implication could well constitute the allegation of undisclosed defamatory facts, and the statement of opinion would thus be defamatory even under the Restatement approach. I conclude that the defendant's argument on this point is without merit.

The defendant's final argument is that it is entitled to summary judgment because the statement made by Fortin was privileged under Rhode Island law. The Rhode Island Supreme Court has recognized the existence of a qualified privilege for communications between parties who share a "common interest" in the subject matter of the communication. *Ventetuolo v. Burke, 470 F. Supp. 887, 897 (D.R.I. 1978)*, aff'd *596 F. 2d 476, 485 (1st Cir. 1979)*; *Powers v. Carvalho, 117 R.I. 519, 368 A. 2d 1242, 1249 (1977)*; *Ponticelli v. Mine Safety Appliance Co., 104 R.I. 549, 247 A. 2d 303, 306 (1968)*. The communication alleged in the complaint would seem to fall within the scope of this privilege, since Aetna's agent and the policyholder to whom he spoke had an important common interest in a full and **[*52]** open discussion of the quality of repairs obtained by the insured and paid for by Aetna.

This qualified privilege may be lost, however, if plaintiff can show that the defendant acted with malice in making the false statement. *Swanson v. Speidel Corp., 110 R.I. 335, 293 A. 2d 307, 310 (1972)*; *Ponticelli v. Mine Safety Appliance Co., 104 R.I. 549, 247 A. 2d 303, 308 (1968)*. Malice in this context may be present when the defendant acts with ill will, spite, or malevolence, *Swanson v. Speidel Corp., 110 R.I. 335, 293 A. 2d 307, 310 (1972)*, or when the defendant's "statement was made with the knowledge that it was false or with a reckless disregard of whether it was false or not." *Powers v. Carvalho, 117 R.I. 519, 368 A. 2d 1242, 1250 (1977)*. Plaintiff in its complaint has alleged that the defendant acted with malice and defendant has failed to show that there is no genuine issue on this question. [22] Defendant's motion for summary judgment on the basis of privilege must therefore be denied.

[*53] VIII. Conclusion

The Court finds that defendant is not entitled to summary judgment on plaintiff's claim that its provider agreements with "preferred" automobile repair shops violate the rule of reason under the Sherman Act. The defendant's motion for summary judgment on all other antitrust claims is granted. The defendant's motion for summary judgment on plaintiff's slander claim is denied.

An order will be prepared in keeping with this Opinion.

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[22] Defendant in its Memorandum of Law cites the deposition of Richard Ruggiero, the plaintiff's president, in support if its position that Fortin's statement was made without malice. The Court has read the cited portion of the deposition and finds therein no discussion whatsoever of the question of malice.

Cia. Petrolera Caribe, Inc. v. Avis Rental Car Corp.

United States District Court for the District of Puerto Rico

December 2, 1983

Civ. No. 82-0062 (JP)

Reporter

576 F. Supp. 1011 *; 1983 U.S. Dist. LEXIS 11185 **; 1984-1 Trade Cas. (CCH) P65,940

CIA. PETROLERA CARIBE, INC., Plaintiff, v. AVIS RENTAL CAR CORPORATION, et al., Defendants

Core Terms

gasoline, customers, rental, Deposition, products, rented, tying arrangement, defendants', anti trust law, summary judgment, retail, tied product, car rental, antitrust, tank, buy

Counsel: **[**1]** Celso E. Lopez, San Sebastian, Puerto Rico, and Carlos F. Lopex, Santurce, Puerto Rico, for plaintiff.

Alfredo Castro Mesa, Caparra Heights, Puerto Rico, for Prentals, Inc. d/b/a Nat. Car Rental.

Manuel A. Guzman, McConnell, Valdes, Kelley, Sifre Griggs & Ruiz-Suria, San Juan, Puerto Rico, for Avis Rental Car Corp.

Salvador Antonetti, Fiddler, Gonzalez & Rodriguez, San Juan, Puerto Rico, and Arthur H. Kahn, Schnader, Harrison, Segal & Lewis, Philadelphia, Pennsylvania, for Hertz Rental Co.

Alan S. Ward and Jeffrey S. Holik, Baker & Hostetler, Washington, District of Columbia, for Avis.

Judges: Pieras, District Judge.

Opinion by: PIERAS

Opinion

[*1012] ORDER

PIERAS, District Judge.

I. INTRODUCTION

The plaintiff in this action, Cia. Petrolera Caribe, Inc. (Caribe), seeks injunctive relief and treble damages for violation of the federal antitrust laws. The gist of Caribe's complaint is that the defendants, Avis Rent A Car de Puerto Rico, Inc. (Avis), Puerto Ricancars, Inc. (Hertz), and Prentals, Inc. (National), have engaged in practices constituting **[*1013]** an illegal "tie-in" in violation of Section 3 of the Clayton Act and *Section 1* of the Sherman Act. [1]

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[1] Section 3 of the Clayton Act, *15 U.S.C. Sec. 14 (1976)*, provides in pertinent part:

[2]** Plaintiff asserts in Count I that under the terms of contracts between the defendants and their respective car rental customers, those customers who wish to rent a car are "forced" to buy from the defendants the gasoline which the car consumes. Plaintiff avers this to be an illegal tying arrangement in restraint of trade in the sale of gasoline. Plaintiff alleges that this action curtails the available market for gasoline and forecloses sales to customers who might otherwise have bought gasoline from him.

The second count of the complaint alleges that under the terms of "illegal arrangements and contracts," the defendants have conspired to restrain free trade in gasoline in violation of *Section 1* of the Sherman Act. Although the basis of this charge is unclear from the complaint, Caribe's Vice President testified at his deposition that what Caribe alleges in Count II is

> that the consumer does not have the choice of buying from any other company, from any other retailer . . . But we are not alleging that the three of you (referring to the defendants) have gotten together and conspired against us in that -- uh -- in those terms. We are alleging that the consumers are deprived **[**3]** of having their choice.

Deposition of Felipe M. Lopez (Lopez Deposition) at 73-74. [2] Thus, Count II is duplicative of Count I and will be treated herein as raising no additional claim.

Presently before the Court is a joint motion of all defendants to dismiss the complaint or, in the alternative, for judgment on the pleadings under *Rules 12(c)* and *56 of the Federal Rules of Civil Procedure*. Because the parties have submitted motions and memoranda supported by affidavits, the Court will treat this as a motion for summary judgment.

Defendants contend, first, that this Court lacks jurisdiction to hear this case because none of the acts complained of occur in or affect interstate commerce. Defendants also challenge plaintiff's standing to sue under the antitrust laws, **[**4]** contending that a wholesaler, such as the plaintiff, may not assert an antitrust claim relating principally to retail competition. Finally, defendants argue forcefully that the plaintiff has failed to establish any conduct on defendants' part that violates the antitrust laws.

II. FINDINGS OF FACT

1. Plaintiff, Cia. Petrolera Caribe, is a Puerto Rican Corporation engaged in the business of wholesaling petroleum products, including gasoline and diesel oil. Caribe purchases these products from refiners and resells them to approximately forty retailers, *i.e.*, service stations operating in Puerto Rico under the "Caribe" name. Lopez Deposition at 15-17.

2. Caribe owns, but does not operate, a small number of these service stations; these are leased to, and operated by, independent parties. The remainder are both owned and operated by independent parties. *Id.* at 20-21.

3. Caribe conducts business solely in Puerto Rico, and has no offices, employees, installations, or equipment outside of Puerto Rico. *Id.* at 16, 21.

[*1014] 4. Caribe does not engage, and never has engaged, in the retail sale of petroleum products, including gasoline. *Id.* at 15.

> It shall be unlawful for any person engaged in commerce . . . to lease or make a sale . . . of goods, wares, merchandise, machinery, supplies, or other commodities . . . for use, consumption, or resale . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor . . . of the lessor or seller, where the effect (thereof) . . . may be to substantially lessen competition . . .

Section 1 of the Sherman Act, *15 U.S.C. Sec. 1*, prohibits contracts, combinations and conspiracies in restraint of trade.

[2] Mr. Felipe M. Lopez is a director, Vice President and Treasurer, as well as a shareholder, of Caribe. In addition, he is the officer primarily responsible for the day-to-day operations of the company. Lopez Deposition at 6, 8-9, 15.

5. Neither **[**5]** Caribe nor any of its related retail service stations engages in the business of renting cars. *Id.* at 24.

6. Caribe has never either offered to sell or actually sold any gasoline to any car rental company. *Id.* at 27-29.

7. One of the independently-owned service stations to which Caribe wholesales its products is located at the San Juan International Airport. *Id.* at 18.

8. Co-defendant Avis is a Puerto Rican corporation engaged in the car rental business. Answer of Defendant Avis, par. 3.

9. Co-defendant Hertz is a Puerto Rican corporation engaged in the car rental business. Answer of Defendant Hertz, par. 4.

10. Co-defendant National is a Puerto Rican corporation engaged in the car rental business. Answer of Defendant National, par. 2.

11. The challenged practices of the three defendants do not differ significantly from one another for purposes of this lawsuit; therefore, the three shall be dealt with collectively in this opinion.

12. On May 17, 1982, Mr. Lopez rented a car from Avis in Mayaguez and drove to San Juan. Mr. Lopez returned the car to the Avis office at the San Juan airport. Lopez Deposition at 50-54. Mr. Lopez rented the car pursuant **[**6]** to Avis' standard rental agreement. [3]

13. Paragraph 3 of Avis' standard rental agreement states:

> Renter shall pay Lessor on demand: . . .
> (b) if . . . the vehicle is returned with less gasoline than when rented, an additional charge to compensate Lessor (Avis) for such deficiency . . .

Lopez Deposition, Exhibit 1; Affidavit of John Sotolongo, ("Avis Affidavit"), paragraph 5. [4]

[7]** 14. All of defendants' cars are rented pursuant to the standard rental agreement and none of defendants' rentals include gasoline in the rental rate. Avis Affidavit, paragraphs 4, 5; Hertz Affidavit, paragraphs 3, 4; National Affidavit, paragraphs 4, 5.

15. Defendants do not require car rental customers to buy gasoline from them and defendants make no gasoline charge unless the customer returns the car to them with less gasoline than when rented. Avis Affidavit, paragraph 7; Hertz Affidavit, paragraph 7; National Affidavit, paragraph 8.

16. Defendants do not prohibit or restrict their customers' right to buy gasoline from any source. Avis Affidavit, paragraph 7; Hertz Affidavit, paragraph 7; National Affidavit, paragraph 8.

17. Customers of defendants who wish to purchase gasoline before returning the rented cars may purchase gasoline from anyone they choose. Avis Affidavit para. 7; Hertz Affidavit para. 7; National Affidavit para. 8.

18. When Mr. Lopez rented a car from Avis on May 17, 1982, he was not told he had to buy gasoline from Avis, nor was he told he could not refill the tank himself from any source. Lopez Deposition at 53-55, 80.

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[3] A copy of the standard rental agreement between Mr. Lopez and Avis was made an exhibit to the transcript of his deposition. Lopez Deposition at 5; *Id.* Exhibit 1.

[4] A customer of Hertz or National also pays for gasoline only if the car rented is returned with less gas then when picked up. Affidavit of Alberto Roque, ("Hertz Affidavit"), paragraph 4; Affidavit of Miguel A. Marrero ("National Affidavit") paragraph 5. The current provision of Avis' standard rental agreement pertaining to gasoline charges has been used by Avis since July 1977. Avis Affidavit, paragraph 4. Hertz and National have used similar provisions at all times relevant to this action. Hertz Affidavit, paragraph 3; National Affidavit, paragraph 5.

III. LEGAL ANALYSIS

A. **[**8]** *Tying Arrangements*

A "tying arrangement" or "tie-in" is the sale or lease of one item (the "tying product") only on condition that the buyer or lessee take a second product (the "tied **[*1015]** product") from the same source. III *P. Areeda & D. Turner, **Antitrust Law*** para. 733, at 257 (1978). Such arrangements can have a serious adverse impact on competition in the market for the tied product. As the Supreme Court has declared:

> By conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the "tied" product's merits and insulates it from the competitive stresses of the open market . . . . The effect on competing sellers attempting to rival the "tied" product is drastic: to the extent the enforcer of the tying arrangement enjoys market control, other existing or potential sellers are foreclosed from offering up their goods to a free competitive judgment; they are effectively excluded from the marketplace.

Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 605, 73 S. Ct. 872, 878, 97 L. Ed. 1277 (1953).

Because of their potential to thus restrain trade, tying **[**9]** arrangements with respect to commodities have historically been condemned under Section 3 of the Clayton Act when either (1) the seller has a monopolistic position in the market for the tying product or (2) a substantial volume of trade is restrained in the market for the tied product. *Id. at 608-609, 73 S. Ct. at 880*; III *P. Areeda & D. Turner, supra*, para. 733b. Moreover, when *both* of these factors are present, such a tie-in constitutes a *per se* violation of *Section 1* of the Sherman Act. *Id.* at 609, 73 S. Ct. at 880; *International Salt Co. v. United States, 332 U.S. 392, 396, 68 S. Ct. 12, 15, 92 L. Ed. 20 (1947)*.

Because this case is before us on defendants' joint motion for summary judgment, we must determine whether Caribe has made the showing required to defeat such a motion. Summary judgment on the merits is appropriately granted when the pleadings, depositions and other papers, together with the affidavits, if any, "show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Fed.R.Civ.P. 56(c)*.

Caribe argues that this case is inappropriate for summary judgment, relying on **[**10]** *Poller v. Columbia Broadcasting System, 368 U.S. 464, 82 S. Ct. 486, 7 L. Ed. 2d 458 (1962)*. Plaintiff characterizes the instant case as "complex" antitrust litigation in which summary judgment should be used sparingly. The Court disagrees with plaintiff's characterization of this case as "complex," since the pleadings disclose a straightforward and uncomplicated set of facts. This is certainly not a case where the defendants' "motive" and "intent" will play a dispositive role as in *Poller*. Caribe cannot avoid summary judgment simply by waving the "magic wand" of *Poller. White v. Hearst Corp., 669 F.2d 14, 17 (1st Cir.1982)*.

Even if plaintiff's characterization were correct, however, the Court does not believe that summary judgment is inevitably inappropriate in antitrust litigation. *See First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 289-90, 88 S. Ct. 1575, 1592-93, 20 L. Ed. 2d 569 (1968)*. On the contrary, even in an antitrust case, the party opposing the motion must come forward with "some indication that he can produce the requisite quantum of evidence to enable him to reach the jury with his claim." *White v. Hearst Corp., 669 F.2d **[**11]** 14, 17 (1st Cir.1982)* (quoting *Hahn v. Sargent, 523 F.2d 461, 468 (1st Cir.1975)*, *cert. denied, 425 U.S. 904, 96 S. Ct. 1495, 47 L. Ed. 2d 754 (1976))*.

The papers presented to this Court clearly show that plaintiff cannot meet this standard. The threshold requirement of any unlawful tying arrangement is that there are two distinct products in question that are in fact "tied" to one another. *Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 613-14, 73 S. Ct. 872, 883, 97 L. Ed. 1277 (1953)*. It is highly questionable in the instant case whether two distinct products are involved. The defendants are in the business of furnishing rental cars to customers for use in providing transportation from place to **[*1016]** place. The cars are furnished with a full tank of gasoline as a convenience to the customer. There would be very little market for that gasoline without the rental car, just as there would be very little market for the car without the gasoline. Accordingly, the Court is not convinced that there are involved here the two distinct products necessarily prerequisite to any tying arrangement. *See* *Washington Gas Light Co. v. Virginia Electric Power* **[**12]** *Co., 438 F.2d 248 (4th Cir.1971)* (holding that underground electrical wiring and the electricity delivered through it were not separate products).

Even if rental cars and the gasoline they consume are deemed separate products, however, plaintiff's claim must fail. Coercion is an essential element of any tying arrangement, *i.e.*, forcing the purchaser or lessor to take the unwanted tied product along with the tying product. "A buyer must be told he will not get the tying product unless he purchases the tied product." *Robert's Waikiki U-Drive, Inc. v. Budget Rent-A-Car Systems, Inc., 491 F. Supp. 1199, 1207 (D.Hawaii 1980)*. Plaintiff has not only failed to present facts showing that the sale of gasoline is forced upon defendants' customers along with rental of a car, but Caribe's own vice-president recognized that the practice of defendant Avis is directly contrary to such an assertion. [5]

[13]** In addition, each of the defendants has established by affidavit, supported by documentary evidence, that their customers are not required to purchase gasoline from them. As a matter of practice, each defendant rents a car with a full tank of gasoline at the time the customer picks up the car. [6] The rental rate does not, however, include any charge for gasoline. *See, e.g.*, Hertz Affidavit para. 4. A customer who returns a car with less than a full tank is charged for the gasoline necessary to make up the deficiency. Customers have the choice, however, of returning the car with a full tank, in which case the car rental company imposes no charge for gasoline. As Caribe's representative acknowledged, there are no restrictions on where customers may purchase the necessary gasoline. Lopez Deposition at 93. Clearly, no customer is "forced" to purchase gasoline from the rental company.

[14]** In contrast to the defendants' detailed factual affidavits and exhibits, Caribe has presented only conclusory affidavits that fail to meet the requirements of *Rule 56(e)*. That rule requires that affidavits "shall set forth such *facts* as would be admissible in evidence." *Fed.R.Civ.P. 56(e)* (emphasis added). With respect to the defendants' alleged "forced" sale of gasoline, the affidavit submitted by plaintiff's vice-president contains no facts, but relies solely on a conclusory assertion based on the affiant's "personal experience." [7] **[**15]** As noted above, however, during deposition testimony this same affiant expressly admitted his personal knowledge of the fact that the defendants do not force customers to purchase gasoline. Lopez Deposition at 93. Absent such a relationship between rental cars and **[*1017]** gasoline, the tie-in Caribe has alleged cannot exist. [8]

The record in this case clearly establishes that the defendants do not force the sale of any of their products on their customers. Thus, the plaintiff cannot establish an illegal tying arrangement, and the defendants are entitled to judgment as a matter of law.

B. *Standing*.

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[5] Mr. Felipe Lopez, Vice-President of Caribe, testified to his personal experience in renting a car from defendant Avis. He conceded that he was at no time told that he must buy gasoline from Avis; rather, he expressly acknowledged that the defendants permit their customers to buy gasoline from any source, and do not force them to purchase it from the car rental company. Lopez Deposition at 93.

[6] This practice is based on market research indicating that car rental customers prefer to rent cars with a full tank of gasoline. *See, e.g.*, Avis Affidavit para. 6; National Affidavit para. 6; Hertz Affidavit para. 5. There may also be other business reasons for such a practice. Uniformity in the amount of gasoline in cars available for rental prevents unnecessary administrative expense for the rental company. For practical reasons, a full tank is the easiest to administer. The Court finds these business considerations far outweigh any anti-trust concerns the plaintiff has asserted.

[7] Affidavit of Felipe M. Lopez, para. 5. The only other affidavit to address this issue simply incorporates the statements of Mr. Lopez, and is entitled to no independent evidentiary weight. *See* Affidavit of C. Lopez-Pena, para. 2.

[8] The Court has reviewed Caribe's request for additional discovery to obtain facts in support of its claim. In light of the plaintiff's concessions during deposition testimony and the facts submitted by the defendants, the Court finds that no issue of material fact concerning the alleged tie-in can be raised thereby. Plaintiff's request, accordingly, is denied. *First Nat'l Bank of Arizona v. Cities Serv. Co., 391 U.S. 253, 88 S. Ct. 1575, 20 L. Ed. 2d 569 (1968)*; *O. Hodgkins Sales Corp. v. Chrysler Corp., 327 F. Supp. 1020 (D.Mass.1971)*.

Section 4 of the Clayton Act, *15 U.S.C. § 15*, states that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . ." Despite the breadth of this language, the Supreme Court has held that **[**16]** "Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation." *Hawaii v. Standard Oil Co., 405 U.S. 251, 263 n. 14, 92 S. Ct. 885, 891 n. 14, 31 L. Ed. 2d 184 (1972)*; *see also* *Gilbuilt Homes, Inc. v. Continental Homes of New England, Inc., 667 F.2d 209 (1st Cir.1981)*. The First Circuit uses a "target area" test to determine whether a plaintiff has standing under the antitrust laws. *Engine Specialties, Inc. v. Bombardier, Ltd., 605 F.2d 1 (1st Cir.1979)*, *cert. denied*, *446 U.S. 983, 100 S. Ct. 2964, 64 L. Ed. 2d 839 (1980)*. Under that test, the plaintiff must be a "target" of the proscribed activities in order to sue; merely having a "relationship" with the target is insufficient. 454 F.2d at 18; *see generally* II *P. Areeda & D. Turner, supra*, P 334d. Where, as here, retailers of gasoline would be the target of the allegedly illegal conduct, a wholesaler such as Caribe has no standing to sue. *Billy Baxter, Inc. v. Coca Cola Co., 431 F.2d 183, 189 (2d Cir.1970)*; *Robert's Waikiki U-Drive, 491 F. Supp. at 1206 n. 1*; *see Associated General Contractors of California,* **[**17]** *Inc. v. California State Council of Carpenters, 459 U.S. 519, 103 S. Ct. 897, 74 L. Ed. 2d 723 (1983)*. In arguing to the contrary, plaintiff relies primarily on a Ninth Circuit case, *Karseal Corp. v. Richfield Oil Corp., 221 F.2d 358 (9th Cir.1955)*. The Court cannot find that the position adopted in that case is followed in this Circuit.

The Court holds that Caribe, as a wholesaler, has no standing to sue for injuries incurred by the retailers to whom it sells its products.

IV. CONCLUSIONS OF LAW

Based on the foregoing findings of fact and legal analysis, the Court hereby makes the following conclusions of law:

1. Caribe has no standing under the federal antitrust laws to bring this suit.

2. Even assuming *arguendo* that Caribe could establish standing, the record clearly and conclusively shows that the defendants do not force the sale of gasoline on automobile rental customers, and therefore, defendants' practices do not constitute an unlawful tying arrangement as a matter of law.

Accordingly, the Clerk shall enter JUDGMENT in favor of the defendants, DISMISSING the complaint as to each of them.

IT IS SO ORDERED.