San Diego Law Review

Volume 6
Issue 1 *1969*

Article 9

1-1-1969

Antitrust-Doctrine of In Pari Delicto Held Not to be Recognized as a Defense in Private Antitrust Action to Bar Recovery by a Plaintiff Who Was a Party to an Agreement Allegedly Containing Terms in Violation of Antitrust Laws. Perma Life Mufflers, Inc. v. International Parts Corp. (U.S. 1968)

Peter K. Nunez

RECENT CASES

ANTITRUST—DOCTRINE OF IN PARI DELICTO HELD NOT TO BE RECOGNIZED AS A DEFENSE IN PRIVATE ANTITRUST ACTION TO BAR RECOVERY BY A PLAINTIFF WHO WAS A PARTY TO AN AGREEMENT ALLEGEDLY CONTAINING TERMS IN VIOLATION OF ANTITRUST LAWS. *Perma Life Mufflers, Inc. v. International Parts Corp.* (U.S. 1968).

During the Spring Term of 1968, the Supreme Court of the United States decided an issue which has been plaguing the field of private antitrust litigation since 1900.[1] To what extent does the common law doctrine of *in pari delicto*[2] affect the right of a plaintiff to recover for violations of the antitrust laws? The answers to this question have been so varied and confused that, until the decision in *Perma Life Mufflers, Inc. v. International Parts Corp.*,[3] no definite solution has been possible.

This case arose from franchise agreements entered into by plaintiffs, four operators of "Midas Muffler Shops," with defendant Midas, Inc. Plaintiffs charged that Midas, its parent corporation International Parts Corp., two other subsidiaries, and several officers and agents of the corporation, all defendants here, had conspired to violate section 1 of the Sherman Act,[4] section 3 of the Clayton Act,[5] and the Robinson-Patman Act.[6] Specifically, plaintiffs charged that the terms of the franchise agreement acted to restrain and substantially lessen competition, and that price and service discriminations had been granted to certain of defendants' customers, but not to any of the plaintiffs.[7] The United States

1. Bishop v. American Preservers Co., 105 F. 845 (C.C.N.D. Ill. 1900), was the first reported case applying the doctrine in antitrust cases.

2. The term is defined as follows:

> *'In pari delicto potior est conditio possidentis,'* when each party is equally at fault, the Law favors him who is actually in possession; that is, the parties will be left where they are.

Reaves Lumber Co. v. Cain-Hurley Lumber Co., 152 Tenn. 339, 279 S.W. 257, 258 (1926).

3. 392 U.S. 134 (1968).

4. 15 U.S.C. § 1 (1964).

5. 15 U.S.C. § 14 (1964).

6. 15 U.S.C. § 13 (1964).

7. The alleged violations were contained in the following terms: Plaintiffs were obligated to 1) purchase all their mufflers from defendant; 2) honor the Midas guarantee on mufflers sold by any dealer; 3) sell the mufflers at resale prices fixed by defendants and at locations specified in the agreement; 4) purchase all other exhaust parts from defendant; 5) carry the complete line of Midas products; 6) refrain from dealing with any

District Court for the Northern District of Illinois, Eastern Division, granted the defendants' motion for summary judgment on the basis that plaintiffs were barred by the *in pari delicto* doctrine. The Court of Appeals affirmed this ruling on all of the claims except that arising out of the Robinson-Patman Act. As an alternative ground for barring the Sherman Act claim, the Court of Appeals also ruled that defendants, because of their common ownership, could cooperate without creating an illegal conspiracy.[8] The Supreme Court granted certiorari[9] for the stated reason that "[T]hese rulings by the Court of Appeals seemed to threaten the effectiveness of the private action as a vital means for enforcing the antitrust policy of the United States. . . "[10] In a decision marked by five separate opinions, the Court reversed the rulings of the Court of Appeals and declared that the doctrine of *in pari delicto* was no longer available as a defense in a private antitrust action.[11]

Prior to this decision, the applicability of the *pari delicto* doctrine, as well as other common law doctrines occasionally pleaded in antitrust cases,[12] was the object of much confusion. Conflicting decisions within the federal court system evidenced this wide-spread uncertainty.[13] At the crux of this uncertainty were two fundamental issues. The first centered on a determination of the extent to which the common law system was intended to overlap and influence the purely statutory remedies provided by the antitrust legislation enacted by Congress. The second focused on an examination of precisely what result the private action was intended to accomplish. A study of the case law reveals how difficult it has been to resolve these issues.[14] The case law, in turn, has engendered a plethora of articles and notes by various scholars which further evidence this uncertainty.[15]

---

of defendant's competitors. In return, defendants obligated themselves to 7) underwrite the cost of the guarantee system; 8) allow plaintiffs the use of registered trademarks and service marks; 9) grant to plaintiffs the exclusive right to sell "Midas" products within a defined territory. 392 U.S. at 137.

8. Perma Life Mufflers, Inc. v. International Parts Corp., 376 F.2d 692 (7th Cir. 1966). For an analysis of the 7th Circuit decision, see the case note in 5 SAN DIEGO L. REV. 171 (1968).

9. 389 U.S. 1034 (1968).

10. 392 U.S. at 136.

11. *Id.* at 140.

12. A review of the "pass-on" defense is found in Commonwealth Edison Co. v. Allis-Chalmers Mfg. Co., 335 F.2d 203, 206-07 (7th Cir. 1964). Other defenses: "Consent" and "Unclean hands."

13. Cases cited notes 25-26 *infra*, and accompanying text.

14. *Id.*

15. See, for example Bushby, *The Unknown Quantity in Private Antitrust*

In dealing with the first problem, some courts have proceeded on the assumption that, since Congress did not expressly declare otherwise, common law concepts apply to antitrust cases notwithstanding the statutory basis of the action.[16] It would appear that this has been the view adopted by those courts which have allowed the application of *in pari delicto* and other common law defenses. By refusing to apply common law doctrines, it would appear that other courts have treated the absence of any reference to common law defenses as evidence that Congress did *not* intend them to apply.[17]

Thus, we are confronted with a paradoxical situation in which the proponents of contradictory viewpoints employ in their behalf the very same fact—the absence of any language in the statutes as to the application of common law defenses. This has led some writers to suggest that Congress should resolve this ambiguity by a legislative expression concerning the applicability of common law defenses.[18] This recommendation has gone unheeded, however, and it has been left to the courts to undertake this clarification.

The second consideration contributing to the divergent views surrounding the common law defenses can be viewed as a conflict of two philosophies. On the one hand, some courts have adopted

---

Suits—The Defense of In Pari Delicto, 42 VA. L. REV. 785 (1956), showing the uncertainty in establishing the applicability of the defense; Note, *In Pari Delicto and Consent as Defenses in Private Antitrust Suits*, 78 HARV. L. REV. 1241 (1965), the inhibiting effect of the defenses on the private antitrust action; Comment, *Limiting the Unclean Hands and In Pari Delicto Defenses in Antitrust Suits: An Additional Justification*, 54 NW. U.L. REV. 456 (1959), arguing that the call of public policy must be given decisive weight; Comment, *Antitrust Enforcement By Private Parties: Analysis of Developments in the Treble Damage Suit*, 61 YALE L.J. 1010 (1952), dealing generally with antitrust enforcement through the private action, and the deterioration caused by curtailing the private action.

16. *See* United States v. Greater Kansas City Chapter Nat'l Elec. Contractors Ass'n, 82 F. Supp. 147, 149 (W.D. Mo. 1949): "[T]he Sherman Anti-Trust Law was and is but an exposition of the common law and common law doctrines in restraint of trade." *See also* Mayer Bros. Poultry Farms v. Meltzer, 80 N.Y.S.2d 874, 274 App. Div. 169 (1948).

17. *See* Radovich v. National Football League, 352 U.S. 445, 454 (1957):

> In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws.

Philco Corp. v. Radio Corp. of America, 186 F. Supp. 155, 166 (E.D. Pa. 1960):

> An antitrust action is a creation of statute, unknown at common law, and to apply common law principles indiscriminately to actions of this magnitude could conceivably lead to grotesque results.

18. 54 NW. U.L. REV. 456 (1959); 42 VA. L. REV. 785, 800 (1956).

the view that the plaintiff in a treble damages action must not be allowed to profit from his own wrongdoing.[19] Notwithstanding the public policy aspects of antitrust legislation, he must not be allowed to recoup losses incurred as the result of an illegal agreement which proved unprofitable. In short, emphasis is placed upon the moral guilt of the plaintiff to the exclusion of the broader aspects of antitrust legislation. Proponents of this view invariably seek to apply the *pari delicto* doctrine as a bar to recovery in a private action.[20]

On the other hand, some have adopted the view that overriding public policy reasons behind antitrust legislation in general and the private antitrust action in particular demand that private plaintiffs be allowed to prosecute their claims with little regard to their own individual involvement in the illegal scheme.[21] The rationale behind this philosophy is that vigilant and effective prosecution of infractions of the antitrust laws benefits society as a whole by promoting competition and open markets, and, stated conversely, by preventing restraints of trade and monopolies. This reasoning takes note of the fact that the private action "was designed to obviate the need for the vastly expanded federal agency thought necessary to supervise the regulatory scheme adequately .... [T]he private action supplements the deterrent effect of governmental power and encourages obedience to existing decrees."[22] The courts adopting this view tend to overlook the *pari delicto* defense.[23]

---

19. Perma Life Mufflers, Inc. v. International Parts Corp., 376 F.2d 692 (7th Cir. 1967); Pennsylvania Water & Power Co. v. Consolidated Gas Elec. Light & Power Co. of Baltimore, 209 F.2d 131 (4th Cir. 1953); Eastman Kodak Co. v. Blackmore, 277 F. 694 (2d Cir. 1921).

20. Perma Life Mufflers, Inc. v. International Parts Corp., 376 F.2d 692 (7th Cir. 1967); Pennsylvania Water & Power Co. v. Consolidated Gas Elec. Light & Power Co. of Baltimore, 209 F.2d 131 (4th Cir. 1953); Singer v. A. Hollander & Son, 202 F.2d 55 (3rd Cir. 1953).

21. *See* Ring v. Spina, 148 F.2d 647, 653 (2d Cir. 1945): "Considerations of public policy demand court intervention in behalf of such a person, even if technically he could be considered in pari delicto."; Johnson v. Joseph Schlitz Brewing Co., 33 F. Supp. 177, 179 (E.D. Tenn. 1940), *aff'd mem.*, 123 F.2d 1016 (6th Cir. 1941): "[T]he agreement cannot be used to defeat plaintiff's right of action based upon the overriding statutory policy of the Sherman Act, if that right of recovery is otherwise clear."

22. Note, *In Pari Delicto and Consent as Defenses in Private Antitrust Suits*, 78 HARV. L. REV. 1241 (1965) (footnotes omitted).

23. Radovich v. National Football League, 352 U.S. 445, 453-54 (1957):

> Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect

An examination of the case law clearly reveals these conflicting attitudes. Between the *Bishop* case,[24] which applied the doctrine and the Supreme Court decision in *Perma Life*, which rejected it, many diverse results have been reached by the courts.[25] But even in those decisions where a private plaintiff was allowed to recover despite his involvement in an illegal scheme, the courts have not expressly rejected the *pari delicto* defense.[26] Usually, they have found some justification for overlooking it, such as the creation of an exception to the doctrine or an expansion of a previously recognized exception, or a liberal construction of the statutes. For example, in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*,[27] the Court refused to recognize the *pari delicto* doctrine where the plaintiff-wholesaler was involved in an illegal conspiracy with other wholesalers, all of whom were dependent upon defendant as their source of supply, since the plaintiff's misconduct occurred in a transaction other than the one involved in the antitrust action.

In *Eastman Kodak Company of New York v. Southern Photo Materials Company*,[28] the Court rejected the *pari delicto* doctrine because of evidence that the plaintiff had complied with defendant's terms through business necessity. This adoption of an economic coercion theory to mitigate the effects of the *pari delicto* doctrine has subsequently been relied on by the courts to permit recovery by a plaintiff who otherwise would have been precluded from pressing

---

the victims of the forbidden practices as well as the public. (citations and footnotes omitted).

See Simpson v. Union Oil Co. of California, 377 U.S. 13 (1964); Lawlor v. National Screen Service Corp., 349 U.S. 322 (1955); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951); Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743 (1947); Waldron v. British Petroleum Co., 231 F. Supp. 72 (S.D.N.Y. 1964).

24. 105 F. 845 (C.C.N.D. Ill. 1900).

25. Cases applying the defense: Crest Auto Supplies, Inc., v. Ero Manufacturing Co., 360 F.2d 896 (7th Cir. 1966); Pennsylvania Water & Power Co. v. Consolidated Gas Elec. Light & Power Co., 209 F.2d 131 (4th Cir. 1953), *cert. denied*, 347 U.S. 960 (1954); Northwestern Oil Co. v. Socony-Vacuum Oil Co., 138 F.2d 967 (7th Cir. 1943).

The *Crest* case is of particular interest in that it was decided by the same court which heard the original *Perma Life* appeal. For an insight into its influence upon that decision, *see* Note, 5 SAN DIEGO L. REV. 171, 173 (1968).

26. For cases upholding validity of the defense in general, but failing to apply it, *see* Simpson v. Union Oil Co. of California, 377 U.S. 13 (1964); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951); Eastman Kodak Co. of New York v. Southern Photo Materials Co., 273 U.S. 359 (1927); Bales v. The Kansas City Star Co., 336 F.2d 439 (8th Cir. 1964).

27. 340 U.S. 211 (1951).

28. 273 U.S. 359 (1927).

his claim. Notable among these cases are *Bales v. The Kansas City Star Company*[29] and *Simpson v. Union Oil Co. of California*.[30]

The *Simpson* case in particular and its interpretation by other courts is of considerable importance because of the frequency with which it is cited.[31] It also provides a glimpse of how the Supreme Court Justices have reacted to this aspect of the private antitrust action. Faced with a plaintiff who had agreed to an allegedly illegal consignment arrangement, the Court sought a method to permit him to press his claim. The tenor of Justice Douglas' opinion illustrates how a majority of the Court has resolved the two fundamental issues discussed above.[32] "There is *actionable* wrong whenever the restraint of trade or monopolistic practice has an impact on the market; . . ."[33] Later:

> The interests of the government also frequently override agreements that private parties make. Here we have an antitrust policy expressed in Acts of Congress. Accordingly, a consignment, no matter how lawful it might be as a matter of private contract law, must give way before the federal antitrust policy.[34]

Although Douglas was referring specifically to consignment agreements, and not to the *pari delicto* defense or coercion, his remarks indicate that a majority of the Court is willing to give the antitrust policy a pre-eminent position over common law concepts.[35] Basing its decision on the consignment-coercion aspects,

---

29. 336 F.2d 439 (8th Cir. 1964).

> Of course, if the plaintiffs actually were in pari delicto with the defendants . . . , the law should leave them where it finds them. But if they accepted the contract restrictions only in business necessity and not in any sanction or furtherance of a trust endeavor by the Star, they would not be in pari delicto for purposes of the right to recover . . . .

Id. at 444.

30. 377 U.S. 13 (1964).

31. United States v. Arnold, Schwinn & Co., 388 U.S. 365 (1967); United States v. General Motors Corp., 384 U.S. 127 (1966); Perma Life Mufflers, Inc. v. International Parts Corp., 376 F.2d 692 (7th Cir. 1967); Quinn v. Mobil Oil Co., 375 F.2d 273 (1st Cir. 1967).

32. Joining Justice Douglas in the majority opinion were Chief Justice Warren and Justices Black, Clark, and White. Justices Stewart, Brennan, and Goldberg dissented, and Justice Harlan did not participate.

33. 377 U.S. at 16 (emphasis added).

34. *Id.* at 18.

35. For an analysis of the consignment aspect of the *Simpson* case, *see* J.A. RAHL, *Control of an Agent's Prices: The Simpson Case—A Study in Antitrust Analysis*, 61 NW. U.L. REV. 1 (1966).

the Court ruled that Simpson had suffered actionable damage. Furthermore, although the Court did not expressly state its views as to the *pari delicto* doctrine, it is implied that it was not to apply here, since the decision placed its emphasis on the "actionable" nature of plaintiff's damage.

When the *Perma Life* case was affirmed by the 7th Circuit, the majority opinion interpreted *Simpson* to be a case resting purely on the coercive nature of the consignment agreement, without need for or reference to the *in pari delicto* doctrine.[36] The lone dissenter, Judge Cummings, took exception to this interpretation. It was his opinion that the *Crest* decision, upon which the majority relied heavily, had been modified by the subsequent *Simpson* holding; further, that in the light of *Simpson,* the Supreme Court would no longer accept the doctrine in a case such as this. Judge Cummings pointed out that the *pari delicto* issue had been fully briefed before the Supreme Court, and he was therefore forced to conclude that it had been rejected.[37] In light of the Supreme Court decision in *Perma Life*, the dissenting opinion below was closer to the truth. Probably sensing the confusion engendered by the divergent views as to the meaning of *Simpson*, the Supreme Court undertook to review the 7th Circuit's decision on *Perma Life.*

It is evident from the majority opinion written by Justice Black[38] that the Court meant to clear up completely all the ambiguities, contradictions, questions, problems and vagaries that have haunted the application of the *pari delicto* doctrine in private antitrust actions. To achieve this end, the Court hit upon the simple but heretofore neglected expedient of completely eliminating the *pari delicto* doctrine.[39]

In justifying this sweeping decision, the Court relied upon two basic theories. The first related to the public policy aspects of

36. 376 F.2d at 697; *see* 5 SAN DIEGO L. REV. at 174.

37. 376 F.2d at 704-05.

38. Justice Black spoke for Chief Justice Warren and Justices Douglas and Brennan, with Justice White joining with additional observations. All five (with the exception of Justice Brennan in the *Simpson* case) have consistently been aligned on the side seeking the broadest possible application of the antitrust laws and the most restricted application of the common law defenses to defeat private actions.

39. To what extent this decision was prompted by judicial impatience with the failure of Congress to act is not clear. It should be noted, however, that some writers had previously suggested this solution. *See* note 18 *supra*, and LOEVINGER, *Private Action—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167 (1958).

antitrust legislation and the application of common law defenses in antitrust actions. In the words of the Court:

> There is nothing in the language of the antitrust acts which indicates that Congress wanted to make the common law *in pari delicto* doctrine a defense to treble damage actions, and the facts of this case suggest no basis for applying such a doctrine even if it did exist . . . . We have often indicated the inappropriateness of invoking broad common-law barriers to relief where a private suit serves important public purposes.[40]

Thus the Court enunciated its position in relation to the two fundamental issues discussed above. The majority believes that common law defenses were not intended to overlap into this statutory field so as to defeat the purposes of the antitrust legislation and, in particular, the private enforcement action. The Court describes the private action as "an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws."[41] It points out the "over-riding public policy in favor of competition."[42] To rule otherwise "would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement."[43]

The second theory followed by the Court is a coercion argument closely akin to that applied in the *Simpson* decision. Plaintiffs' involvement "was not voluntary in any meaningful sense."[44] They had to accept the illegal terms or risk losing the franchises and an attractive business opportunity. Relying on *Simpson*: "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."[45]

The Court adds, as a modification to the coercion theory, that even if plaintiffs did bargain for some of the terms in the franchise agreement, they should not be blamed for seeking to minimize the disadvantages caused by the more onerous terms demanded by the defendant as a requisite to doing business.[46] The only relevance of

40. 392 U.S. at 138.
41. *Id.* at 139.
42. *Id.*
43. *Id.*
44. *Id.*
45. *Id.* at 140, *quoting from* 377 U.S. at 16.
46. It is precisely this modification that lies at the crux of the disagreement between the members of the majority on the one hand, and the concurring opinions of Justices Fortas and Marshall and the dissenting opinion of Justices Harlan and Stewart on the other.

plaintiffs' bargaining for the inclusion of certain terms is in the assessment of damages.

At this point the Court makes a statement which at first glance raises an inference that perhaps the *pari delicto* doctrine has not been totally abandoned:

> [O]nce it is shown that the plaintiff did not aggressively support and further the monopolistic scheme as a necessary part and parcel of it, his understandable attempts to make the best of a bad situation should not be a ground for completely denying him the right to recover . . . .[47]

The question at once arises, what if plaintiff *did* aggressively support and further the monopolistic scheme? Does *in pari delicto* then apply to deny him a treble damage recovery? It would appear, however, that such would not be the result. The Court subsequently responded to this question:

> We need not decide however, whether such truly complete involvement and participation in a monopolistic scheme could ever be a basis, wholly apart from the idea of *in pari delicto*, for barring a plaintiff's cause of action . . . .[48]

Although it is not a complete answer, perhaps the Court meant to imply that a plaintiff in such a situation would indeed be barred from a recovery, but on some basis other than the *pari delicto* doctrine.

Having thus dispensed with the *pari delicto* issue, the Court moved next to a consideration of the ruling by the Court of Appeals that, because of the common ownership of the corporations, defendants did not create a conspiracy. The Court rejected this analysis on the basis of previous case law.[49] It was held that since defendants did business as separate entities, "the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities."[50] Furthermore, each plaintiff could have alleged a combination between Midas and himself or between Midas and other franchise dealers who acquiesced in the scheme.[51]

47. 392 U.S. at 140.

48. *Id.* (emphasis added).

49. Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951); Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951); United States v. Yellow Cab Co., 332 U.S. 218 (1947).

50. 392 U.S. at 141-42, and the cases cited therein.

51. *Id.* at 142.

As was pointed out in the introduction, five separate opinions were written in this case. Aside from that written by Justice Black, Justice White joined the majority with his own opinion in which he made additional comments.[52] Both Justices Fortas and Marshall wrote their own opinions in which they concurred in the result but not in the reasoning.[53] The fifth was the dissent in which Justices Harlan and Stewart joined.[54] In addition to the conflict surrounding the issues of common law encroachment and the policy behind the private action discussed above, at the root of the difference expressed by the other members of the Court is a fundamental disagreement over the literal meaning of *in pari delicto*.

It would appear that Justices Fortas and Marshall place greatest emphasis on the "equal" aspect of the definition. By this interpretation, both parties must have contributed equally to the fault so that if placed on a scale, the faults of the two parties would balance each other. If such were the case, then the parties would be *in pari delicto*. Using this as the criterion, Fortas would not discard the doctrine altogether. Nevertheless, he would allow plaintiffs here to pursue their cause of action since he did not believe their fault to "equal" that of defendants.[55] Justice Marshall seems to agree with this reasoning.[56]

To the contrary, however, are the views of Justices Harlan and Stewart. They appear to attach a more liberal meaning to the

52. Justice White's comments can best be described as a proposal to replace the *in pari delicto* doctrine with a respective fault approach somewhat akin to a comparative negligence concept. Plaintiffs would be allowed to bring the action regardless of degree of involvement. Damages would then be awarded in proportion to the respective responsibilities for the injury incurred.

53. 392 U.S. 134, 147-53 (1968).

54. Without exception, Justices Harlan and Stewart have steadfastly refused to accept the broad policy arguments used by the Court in previous decisions dealing with this subject. See the dissenting opinions in Simpson v. Union Oil Co. of Calif., 377 U.S. 13, 25; Albrecht v. The Herald Co., 390 U.S. 145 (1968); U.S. v. Parke, Davis & Company, 362 U.S. 29 (1960).

55. 392 U.S. at 148. "Clearly, petitioners here are not co-adventurers or partners in the franchise arrangement as a whole, and they are not barred by *in pari delicto*."

56. *Id.* at 149.

> Such an approach would still require reversal of the decision of the Court of Appeals in this case. As this Court's opinion makes perfectly clear, the mere fact that a party enters into an agreement containing provisions that are violative of the antitrust laws . . . is not in itself sufficient to show that he is equally responsible for the existence of the illegal provisions.

doctrine, emphasizing the "fault" rather than the "equal" aspect. Thus, they would retain the doctrine and apply it whenever both parties have contributed to the "fault," regardless of the respective weights of their contributions.[57] As applied here, they would bar plaintiffs from recovery.

Another aspect of the majority opinion which spawns disagreement is the contention that the plaintiffs' bargaining for certain terms in the franchise agreement was not fatal to the cause of action. Both Fortas and Marshall maintain that if plaintiffs are chargeable with the responsibility for the insertion of a particular clause or restrictive covenant, they have participated in the formation and implementation of the illegal scheme and should be barred by *pari delicto*.[58] The dissenters agree with this contention, since according to their view, any involvement *ipso facto* produces fault from which plaintiffs cannot escape.

Harlan also expresses his views on the policy issue espoused by the majority. He makes it quite clear that he considers the equities of the parties to be paramount to the public interest, and that the effect of the majority opinion will be to produce "well-compensated dishonor among thieves."[59] He thus voices his support for the argument that the moral guilt of the plaintiff overrides the public policy reasons upon which antitrust legislation is based. In his concurring opinion, Justice Marshall also adopted the view that the equities of the parties are the more important consideration.[60]

The decision in *Perma Life* is interesting for several reasons. Of most immediate concern, it has settled the question as to the availability of *in pari delicto* as a defense in private antitrust actions. Moreover, in doing so, it has reflected those conflicting philosophies which have been responsible for the confusion which created the problem and have kept it smoldering for over half a century. More generally, it reveals the divergent views among members of the Court as to who should bear the burden of enforcing antitrust legislation enacted by Congress. In rejecting the *pari delicto* doctrine, the Court has insured the private plaintiff an active and important place in the enforcement of those policies.

PETER K. NUNEZ

57. *Id.* at 154.
58. *Id.* at 148, 149-50.
59. *Id.* at 154.
60. *Id.* at 151.