

April 1983

Antitrust: Standing, Boycotts, Vertical Arrangements, Buyer's Rights, Tying, and Mergers

William M. Hannay

Follow this and additional works at: <https://scholarship.kentlaw.iit.edu/cklawreview>



Part of the [Law Commons](#)

Recommended Citation

William M. Hannay, *Antitrust: Standing, Boycotts, Vertical Arrangements, Buyer's Rights, Tying, and Mergers*, 59 Chi.-Kent L. Rev. 347 (1983).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol59/iss2/4>

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact jwenger@kentlaw.iit.edu, ebarney@kentlaw.iit.edu.

ANTITRUST: STANDING, BOYCOTTS, VERTICAL ARRANGEMENTS, BUYER'S RIGHTS, TYING, AND MERGERS

BY WILLIAM M. HANNAY*

The pendulum continued to swing back toward the center in the United States Court of Appeals for the Seventh Circuit, as the court continued its trend of putting into practice the principle that the anti-trust laws protect "competition, not competitors."¹ In a series of decisions in which defendants uniformly prevailed, the court provided new clarification of the boundaries of the antitrust laws.

STANDING: *REPP V. F.E.L. PUBLICATIONS* AND *BICHAN V. CHEMETRON*

In two decisions, the Court of Appeals fleshed out the bones of standing rules in antitrust cases, but left unclear the appropriate standing "test."

In *Repp v. F.E.L. Publications, Ltd.*,² the Seventh Circuit affirmed the dismissal of a complaint on standing grounds. Plaintiff Repp is a composer of liturgical music. In 1966 and 1967, Repp entered into several contracts with F.E.L. Publications, Ltd. (F.E.L.), a publisher and distributor of such music. Through these agreements, Repp assigned to F.E.L. all his rights, including all rights of copyright, in various of his musical compositions in return for royalties as set forth in the agreement.

In 1972, F.E.L. commenced a practice whereby it granted to individuals or organizations an unlimited license to copy any of the works assigned to F.E.L., including the works of Repp, for a blanket annual fee.³ Since the institution of this business practice, sales of Repp's musical creations in printed form and his artistic performances in the form of phonograph records, it was alleged, "steadily and drastically dimin-

* Mr. Hannay received his B.A. from Yale College in 1966 and his J.D. from Georgetown in 1973. He joined the Chicago law firm of Schiff Hardin & Waite in 1979 and is currently an adjunct instructor at IIT/Chicago Kent College of Law.

1. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977); *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962).

2. 688 F.2d 441 (7th Cir. 1982) (Grant, Senior District Judge, Northern District of Indiana, sitting by designation).

3. *Id.* at 443. For further background on F.E.L.'s licensing practices, see *F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago*, discussed *infra* at text accompanying notes 145-161.

ished."⁴ Repp alleged that demand for his works was diminished and in turn that he had been deprived of revenues, because interested parties could only obtain his works by also obtaining and paying for other, undesired musical works.⁵ Repp contended that F.E.L.'s licensing practice thus violated the Sherman and Clayton Acts.⁶

On October 8, 1980, the district court dismissed Repp's action. In addressing the federal antitrust claim, the court stated that Repp could not assert he was entitled to the remedies provided by the Acts. The court explained that recovery was limited to those injured by the defendant's restraints on competitive forces in the economy.⁷ The Court of Appeals affirmed the district court's dismissal.⁸

The Seventh Circuit began by accepting as true Repp's claim that F.E.L.'s licensing practice constituted a violation of federal antitrust laws and that he had been economically injured as a result of that practice. The court pointed out, however, that such a showing is not enough in itself for a plaintiff to succeed in a private treble damage action under Section 4 of the Clayton Act.⁹ It emphasized that "various doctrines, the most notable being standing, have been developed to limit the treble damages remedy to those truly intended by the laws to be protected from anticompetitive conduct."¹⁰ Quoting an earlier decision, the court drew attention to the requirement in all antitrust claims that the injury complained of be of a type that the antitrust laws were designed to guard against and that the antitrust violation be the direct cause of plaintiff's injury.¹¹

The court acknowledged that "[a]s a practical matter . . . the standards of 'antitrust injury' and 'direct causation' provide little meaningful assistance in determining whether a particular plaintiff has standing" and explained that courts have developed various standing

4. 688 F.2d at 443.

5. *Id.*

6. 688 F.2d at 441.

7. *Id.* at 443-4. The district court dismissed the other contract-related counts of the complaint on abstention grounds, since a parallel state court proceeding was pending in California. *Id.* at 443. Only the ruling on the antitrust count was appealed. *Id.* at 441.

8. *Id.* at 447.

9. *Id.* at 444. Section 4 of the Clayton Act provides in part:

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor 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.

Clayton Act § 4, 15 U.S.C. § 15 (1976).

10. 688 F.2d at 444.

11. *Id.* (quoting *Havoco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549, 556 (7th Cir. 1980)).

tests; in particular, the “direct injury” test and the “target area” test.¹² The court quoted with approval the definitions of these two tests set forth in a concurring opinion to the Eighth Circuit’s decision in *TV Signal Company of Aberdeen v. American Telephone & Telegraph*.¹³ The court noted that the “direct injury” test denies standing to a third party who comes between the plaintiff and the defendant. The “target area” test determines if the plaintiff is within the area of the economy which is endangered by the breakdown of competition caused by the violation.¹⁴ Stating that *no* test had yet been adopted in the Seventh Circuit, the panel declined to expressly adopt a standing test because Repp would not have had standing in either case regardless of which test was adopted.¹⁵

Under the “target area” test, the Seventh Circuit found that the key inquiry is “to identify, from the perspective of the alleged violator, the persons or entities at whom the challenged business practice was primarily directed and the purpose for which the practice was instituted.”¹⁶ Since F.E.L.’s licensing practice was directed towards users of the musical works and not suppliers,¹⁷ Repp’s alleged damage “falls outside the range of economic injuries intended to be protected by a declaration that the licensing practice is unlawful.”¹⁸ Repp’s alleged damage must therefore be characterized as “‘indirect,’ ‘secondary’ and ‘remote’ and not of the type that the antitrust laws were intended to protect.”¹⁹

With respect to the “direct injury” test, the Seventh Circuit concluded that the identical result is reached with essentially the same economic analysis.²⁰ The court held that Repp’s injuries “are not immediately related to the licensing practice but rather to the obligations and responsibilities assumed by F.E.L. by contract,” and accordingly are not direct injuries.²¹

In *Bichan v. Chemetron Corp.*,²² the Seventh Circuit again consid-

12. 688 F.2d at 444.

13. 617 F.2d 1302 (8th Cir. 1980) (Henley, J., concurring) (citations omitted).

14. *Id.* at 1311.

15. 688 F.2d 445.

16. *Id.*

17. *Id.*

18. *Id.* at 446.

19. *Id.* The court declined to follow the decision in *Mulvey v. Samuel Goldwyn Productions*, 433 F.2d 1073 (9th Cir. 1970), *cert. denied*, 402 U.S. 923 (1971), and instead found persuasive the reasoning in *Fields Productions, Inc. v. United Artists Corp.*, 318 F. Supp. 87 (S.D.N.Y. 1969), *aff’d without opinion*, 432 F.2d 1010 (2d Cir. 1970), *cert. denied*, 401 U.S. 949 (1971).

20. 688 F.2d at 447.

21. *Id.*

22. 681 F.2d 514 (7th Cir. 1982) (Bauer, J.).

ered the question of standing to bring a private treble damage action under section 4 of the Clayton Act²³ and again concluded that the plaintiff lacked standing. This time, the party seeking relief was not the supplier of a product used in an alleged tie-in further down the stream of commerce, but rather was an employee of an alleged antitrust co-conspirator who refused to participate in the conspiracy.

Plaintiff Bichan was hired as the president of Chemetron's Industrial Gas Division. Bichan alleged that a conspiracy existed among Chemetron and six other manufacturers of industrial gas to allocate customers, fix prices and to impose conditions of sales on customers.²⁴ Bichan claimed that he acted contrary to established marketing practices by competing for customers of other producers. In July of 1976, shortly after successfully obtaining an account from a customer who traditionally purchased gas from another producer, Bichan was fired and allegedly black-listed because of his refusal to continue to adhere to the industry's illegal practices.²⁵ Bichan argued that, having lost salary and bonuses as a direct result of his refusal to participate in the conspiracy, he suffered an injury within the meaning of section 4 of the Clayton Act.²⁶

Writing for the panel, Judge Bauer affirmed a district court's dismissal of the complaint, holding that resolution of the standing question is a two step process. First, the court had to determine whether Bichan's injury was an "antitrust injury" which was "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' act unlawful."²⁷ Second, it had to be determined if Bichan was the "proper party to bring this suit."²⁸ Pointing out that "the antitrust laws were not intended as a 'panacea for all wrongs,'"²⁹ the court noted that differing tests have been devised to identify which parties should be permitted to sue under section 4. The court discussed the "target area" and "direct injury" tests. The court also defined a third test, the "zone-of-interest" test, which requires the plaintiff to prove a causal relationship between his business and the antitrust violation.³⁰ Beyond these tests, the court identified an additional test which

23. See *supra* note 9 for the text of section 4 of the Clayton Act.

24. 681 F.2d at 515.

25. *Id.*

26. *Id.*

27. *Id.* (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)).

28. 681 F.2d at 515 (citing *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977)).

29. 681 F.2d at 515 (quoting *Parmelee Transportation Co. v. Keeshin*, 292 F.2d 794, 804 (7th Cir.), *cert. denied*, 368 U.S. 944 (1961)).

30. 681 F.2d at 516.

must be met; namely, that only those parties who can efficiently indicate the purposes of the antitrust laws have proper standing.³¹

Without mention of *Repp v. F.E.L. Publications, Ltd.*,³² decided barely a month before, the court began its discussion by stating that “[t]he parties agree that this circuit has adopted the target area test.”³³ The court perceived this case to be controlled by its earlier decision, *Lupia v. Stella D’Oro Biscuit Co.* case,³⁴ which the court described as the “leading case in this circuit applying the target area test.”³⁵ Under this test, for Bichan to prevail, he would have to show that he had been a target of the alleged conspiracy.³⁶

The court concluded that Bichan was not a target of the alleged anticompetitive practices because his injury did not result from a lack of competition in the labor market. Rather, the conspiracy was aimed at reducing competition in the industrial gas market. Thus, Bichan suffered no antitrust injury.³⁷ Although Bichan argued that he was actively increasing competition by wooing customers of other producers, the court held that his ability to affirmatively promote competition was “totally irrelevant.” Bichan’s injuries did not stem from a lessening of competition in the industrial gas industry while the “target area” test would require that they did.³⁸

The court declined to follow a recent Ninth Circuit case, *Ostrofe v. H.S. Crocker Co.*,³⁹ which held that a sales manager in a situation very similar to that of Bichan’s may bring a private treble damage action. The *Crocker* majority held that Congress intended that section 4 protect any injury falling “within the core of Congressional concern underlying the substantive provisions of the antitrust laws allegedly violated.”⁴⁰ The Seventh Circuit rejected the *Crocker* holding and adopted the dissent of Judge Kennedy in that case. The court explained that the United States Supreme Court case law holds that

31. *Id.*

32. See text accompanying notes 2 through 21 for discussion of *Repp v. F.E.L. Publications, Ltd.*, 688 F.2d 441 (2d Cir. 1982).

33. 681 F.2d at 517.

34. 586 F.2d 1163 (7th Cir. 1978), *cert. denied*, 440 U.S. 982 (1979).

35. 681 F.2d at 518.

36. *Id.* at 517.

37. *Id.* The court distinguished the two cases relied upon by plaintiff on the ground that the alleged conspiracies there were directed at restricting freedom of employment. See *Radovich v. National Football League*, 352 U.S. 445 (1957) (boycott to prevent football players from transferring to teams in other leagues); *Nichols v. Spencer International Press, Inc.*, 371 F.2d 332 (7th Cir. 1967) (publishers agreed not to employ each other’s former employees).

38. 681 F.2d at 518.

39. 670 F.2d 1378 (9th Cir. 1982) *Crocker* was followed in *Shaw v. Russell Trucking Line, Inc.*, 1982-83 Trade Cas. ¶ 65,044 (W.D. Pa. 1982), without reference to the *Bichan* case.

40. *Id.* at 1387.

"[Section] 4 protects only those persons injured as consumers or competitors in a defined market or in a discrete area of the economy" and that in fashioning the antitrust laws, "Congress was concerned with competition, not employee coercion or discharge."⁴¹ Accordingly, the court concluded that Bichan sustained no "antitrust injury" because he was not the target of the alleged anticompetitive practices and because his injury did not result "from the defendants' acquisition or exploitation of market power."⁴²

Furthermore, the Seventh Circuit expanded on the additional requirement for standing.⁴³ Even if it had accepted the *Crocker* holding, the court stated it still would "not believe Bichan is the proper party to bring a treble damages action because his injury is simply too remote from the alleged illegal conduct."⁴⁴ Asserting that the legislative history of section 4 indicates that the treble damages remedy was intended primarily as a "consumer welfare prescription,"⁴⁵ the court stated its belief that "the phrase 'by reason of' implies a standing requirement limiting the statute's applicability to those plaintiffs who are efficient enforcers of the antitrust laws."⁴⁶ The panel rejected plaintiff's arguments that extending protection to employees who encourage competition is consistent with the goals of the antitrust laws and that protecting those who encourage competition is the most effective method of eliminating antitrust violations. The court held that "[a]n appropriate balance is achieved by granting standing only to those who, as consumers or competitors, suffer immediate injuries with respect to their business or property."⁴⁷

The *Bichan* decision is somewhat troubling for two reasons. First, it appears to accept the "target area" test for standing as it were the established rule in the Seventh Circuit despite the contrary holding in the *Repp* case. Second, while there are good reasons for restricting the focus of antitrust relief to customers and competitors, the *Bichan* opinion devotes little attention to the policy considerations attendant upon denying standing to one who refused to cooperate in an illegal conspir-

41. 681 F.2d at 519.

42. *Id.*

43. See generally *supra* note 38.

44. 681 F.2d at 519.

45. *Id.* at 520 (quoting *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979)).

46. 681 F.2d at 520 (citing *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977); *Calderone Enterprises Corp. v. United Artists Theater Circuit, Inc.*, 454 F.2d 1292 (2d Cir. 1971), *cert. denied*, 406 U.S. 930 (1972)).

47. 681 F.2d at 520. Pursuant to Circuit Rule 16, the *Bichan* opinion was circulated among all the judges of the Seventh Circuit because it created a conflict with the Ninth Circuit. The opinion indicates that no judge voted to hear the matter *en banc*. *Id.* at 514.

acy. Assuming the existence of such a conspiracy and assuming that an employee had cooperated—rather than resisted as Bichan alleged he had—the employee himself would be criminally liable for his part in the conspiracy. Yet, by resisting the conspiracy, he opens himself up to discharge. The employee is thus placed between a rock and a hard place, thereby becoming as much a victim of an antitrust conspiracy as the customers who were its direct target. The conflict in the circuits on this issue is one that should be resolved by the Supreme Court.

BOYCOTTS: *U.S. TROTTING ASSOCIATION V. CHICAGO DOWNS* AND
TOLKAN DATSUN V. GREATER MILWAUKEE DATSUN
DEALERS

The United States Court of Appeals for the Seventh Circuit gave greater definition to the area of boycott law in two cases during the 1981-82 term. In each case, the court ruled in favor of the defendant. In *United States Trotting Association v. Chicago Downs Association*,⁴⁸ the court reversed summary judgment granted to the defendant on its antitrust counterclaim against the plaintiff, holding that the rule of reason is the appropriate standard to apply to the alleged boycott therein.

The United States Trotting Association (USTA) is a non-profit organization founded in 1939 to develop comprehensive national records and to promulgate uniform rules and standards for harness racing.⁴⁹ USTA has no interest in racing horses nor in any race tracks or race meetings. It functions solely as a sanctioning organization and information bank.⁵⁰ USTA issues registration certificates which describe in detail a horse's physical markings and pedigree and identifies its owner and breeder.⁵¹ It also issues eligibility certificates which contain performance information compiled from the horse's prior racing season. The information on the eligibility certificate is updated throughout the current season by USTA judges. Eligibility certificates are used by track officials to select competitive horses for balanced race fields; registration certificates are chiefly important in ensuring accurate identification and honest transfers of harness horses.⁵²

In Illinois, the legislature has relied on USTA as an integral part of its regulatory scheme. Illinois law requires that all horses entering

48. 665 F.2d 781 (7th Cir. 1981) (en banc) (Cummings, C.J.).

49. *Id.* at 783.

50. *Id.*

51. *Id.* at 784.

52. *Id.*

harness races be registered with and meet the requirements of USTA.⁵³ Furthermore, the Illinois Racing Board Rules provide that any harness horse entered at a parimutuel track have a current USTA eligibility certificate, that all matters relating to registration of harness horses be governed by USTA rules, and that persons suspended by USTA be barred from participating in harness race meetings.⁵⁴ There are thirteen other states which allow parimutuel harness racing that have also incorporated USTA standards in their regulatory schemes.⁵⁵

During the 1975, 1977, and subsequent racing seasons, neither Chicago Downs (an Illinois management corporation that sponsors race meetings at Sportman's Park in Cicero, Illinois) nor Fox Valley (another Illinois management corporation sponsoring harness horse-racing meetings at Sportman's Park) joined USTA as a regular member or contracted to purchase USTA's services. Nevertheless, both Chicago Downs and Fox Valley continue to hold races with USTA-registered horses and to use the information contained on USTA registration and eligibility certificates. The Court of Appeals characterized Chicago Downs and Fox Valley as "enjoy[ing] a paradigmatic 'free ride,' receiving all the benefits of USTA affiliation with none of the attendant costs."⁵⁶ In an effort to put an end to this "free riding," USTA announced to its members its intention to invoke certain sanctions: providing no services to either, entering no information in its records about racing performances at their meets, and prohibiting its members from racing horses at meets sponsored by the two organizations.⁵⁷

In addition to taking these actions, USTA filed suit against Fox Valley and Chicago Downs alleging that these defendants had misappropriated USTA's records and services, particularly its registration and eligibility certificates. Fox Valley filed a counterclaim alleging that USTA's threatened enforcement of its rules prohibiting members from racing horses at meets sponsored by non-member organizations constituted a group boycott which was *per se* violative of section 1 of the Sherman Act. The district court granted summary judgment for Fox

53. *Id.* See ILL. REV. STAT. ch. 8, § 37-3.06(c) (1979).

54. 665 F.2d at 784.

55. *Id.*

56. *Id.*

57. USTA directed its members' attention to Rules 5 and 17 in its by-laws: Rule 5 provides that members who race horses at meets sponsored by organizations that are not USTA members or contract tracks are subject to revocation of their eligibility certificates and may be precluded from obtaining certificates for future racing seasons. Rule 17 provides that USTA member drivers who drive horses at unaffiliated tracks can be fined up to one hundred dollars for each infraction. 665 F.2d at 785.

Valley and permanently enjoined USTA from "preventing its members from racing at tracks which are not USTA members. . . ."58 The Court of Appeals reversed and remanded for consideration under the rule of reason.⁵⁹

The court recognized that the Supreme Court has found certain group boycotts *per se* illegal but quoted with approval the language of the District of Columbia Circuit in *Smith v. Pro Football, Inc.*⁶⁰ The court then pointed out that a *per se* rule has never been applied by the Supreme Court to concerted refusals that are not designed to drive out competitors but to achieve some other goal.⁶¹

Applying these teachings to the instant case, the court found that there was concerted activity only in the sense that USTA is a membership organization enforcing its by-law rules and that there was no showing of a purpose to exclude competitors since Fox Valley and USTA were not competitors. The court also pointed out the absence of any subtler scheme, such as certain tracks combining behind the facade of USTA to drive Fox Valley out of business. Rather, the court pointed to a strong showing that USTA "was organized to ensure honest harness racing. . . ."62 Thus USTA was entitled to have the effects of application of its by-law rules evaluated under the rule of reason.⁶³

The court further pointed out that federal courts have not had the kind of experience with organizations like USTA that would warrant extending the *per se* rule to this case, pointing to the "inconsistency between the state of our knowledge and the certitude of the *per se* rule"⁶⁴ as indicated by the extent to which the USTA's rules minimize its "free rider" problems.⁶⁵ The result of the *per se* approach would be to foreclose all justifications USTA might make, "perhaps without

58. 487 F. Supp. 1008, 1017 (N.D. Ill. 1980).

59. 665 F.2d 781 (7th Cir. 1981) (en banc).

60. 593 F.2d 1178 (D.C. Cir. 1978). The District of Columbia Circuit stated:

[T]he common attribute of *per se* illegal boycotts is a concerted attempt by a group of competitors at one level to protect itself from competition from non-group members who seek to compete at that level.

Id. at 1173.

61. 665 F.2d at 788. The Seventh Circuit noted:

The danger of rote application of the *per se* rule to all conduct that can be called a group boycott is that the sound teachings of experience will be extended into new and unfamiliar areas where they have no proper application.

Id.

62. *Id.* at 788-89.

63. *Id.* at 789, citing, *Gunter Harz Sports, Inc. v. U.S. Tennis Ass'n*, 511 F. Supp. 1103, 1115 (D. Neb. 1981). Subsequent to the announcement of the decision in the instant case, *Gunter Harz Sports* was affirmed *per curiam* by the Eighth Circuit. 665 F.2d 222 (8th Cir. 1981).

64. 665 F.2d at 789.

65. *Id.* The court noted that the Supreme Court gave free-riding serious attention in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54-57 (1977).

achieving any procompetitive result."⁶⁶

The court identified a second, independent basis for its holding that USTA's conduct should have been evaluated under the rule of reason. Disagreeing with the district court, the Court of Appeals held that *Silver v. New York Stock Exchange*⁶⁷ controlled the instant case. The *Silver* case and cases following it stated that a *per se* rule is not always proper. The court believed that these cases mandate that courts be hesitant in using the terms "group boycott" and "*per se*" in businesses involving organized sports.⁶⁸ Thus, because a sporting activity was involved, as well as because the conduct at issue was not within the "undeniably anticompetitive *per se* boycott paradigm," the alleged boycott by USTA should be tested under the rule of reason.⁶⁹

Judge Bauer dissented from the five-judge majority on the boycott issue. Arguing that the majority misapprehended the nature of its inquiry, Judge Bauer urged that courts do have the requisite experience with group boycotts to hold that they are *per se* unlawful even though they may lack experience with sporting associations.⁷⁰ Further, the dissent argued that the Supreme Court has defined "group boycott" to include a boycott of noncompetitors, citing *St. Paul Fire & Marine Insurance Co. v. Barry*.⁷¹ Finally, the dissent disagreed that *Silver* was controlling, urging that the Supreme Court had not recognized there "a justification derived from a need for industry self-regulation."⁷²

In its opinion, the majority responded to the dissent, noting that *St. Paul Fire & Marine* was unhelpful because the Court there made clear that it was not addressing the question of what constituted a *per se*

66. *Id.*

67. 373 U.S. 341 (1963).

68. 665 F.2d at 789-90 (citations omitted).

There is now a considerable body of law, derived more or less proximately from *Silver*, recognizing that in certain self-regulatory contexts binding rules must be developed to safeguard the enterprise's viability, and that application of a *per se* standard of illegality to such endeavors is improper. Post-*Silver* court of appeals decisions have frequently acknowledged that in organized sports "interdependence," "cooperation," and at least "a few rules are essential to survival," and have often eschewed *per se* analysis in passing upon antitrust challenges to such rules. These cases provide support for the proposition that, in the context of organized sports and sanctioning organizations, courts should be hesitant to fasten upon tags such as "group boycott" and "*per se*" in order to preclude inquiry into the business necessity for or precise harm occasioned by particular rules or practices.

Id.

69. *Id.* at 790.

70. 665 F.2d at 793-94 (Bauer, J., dissenting).

71. 438 U.S. 531, 541 (1978), cited at 665 F.2d 794.

72. 665 F.2d at 794, citing *National Society of Professional Engineers v. United States*, 435 U.S. 679, 689-90 (1978).

unreasonable boycott.⁷³ The majority also rejected the dissent's apparent notion that a "boycott is a boycott is a boycott," pointing out that those cases which have found an antitrust violation from a boycott were ones in which the conduct was unequivocally anticompetitive.⁷⁴ Finally, the majority rejected the dissent's attack upon its interpretation of *Silver*, explaining that, rather than being based upon "the assumption that competition itself is unreasonable"⁷⁵ as the dissent maintained, the majority "merely require[s] that the trial court must find rather than presume harm to competition."⁷⁶ Citing its other 1981 decisions in *Lektro-Vend Corp. v. Vendo Co.*⁷⁷ and in *Quality Auto Body, Inc. v. Allstate Insurance Co.*⁷⁸ the court emphasized that "a plaintiff or counterclaimant must prove adverse impact in the relevant market to establish a section 1 rule of reason violation."⁷⁹

The court's approach seems correct. Rather than mechanically applying the term "group boycott", as the dissent would have done, the majority properly recognized the ancient concept of ancillary restraints by which a party may have "a right to restrain in order to protect its legitimate interests."⁸⁰

In *Phil Tolkan Datsun, Inc. v. The Greater Milwaukee Datsun Dealers' Advertising Association, Inc.*,⁸¹ the court again reviewed a summary judgment in the context of an alleged group boycott and this time affirmed summary judgment for defendant. Defendant Nissan Motor Corporation distributes Japanese-made automobiles and trucks in the United States under the name "Datsun". Beginning in 1976, Nissan encouraged Datsun dealers to form local advertising associations and offered to add forty dollars to the invoice of each car or truck sold to each dealer in an area and to distribute this money to the local association for joint advertising purposes. In addition, association members were to be allowed extra allotments of cars for special Datsun promotions. In August of 1978, defendant The Greater Milwaukee Datsun Dealers' Association, Inc. ("Association") was formed.

73. 665 F.2d at 788 n.11, citing *St. Paul Fire & Marine*, 438 U.S. at 542.

74. 665 F.2d at 789 n.12.

75. 435 U.S. 679, 696 (1978).

76. 665 F.2d at 790.

77. 660 F.2d 255 (7th Cir. 1981).

78. 660 F.2d 1203 (7th Cir. 1981).

79. 665 F.2d at 790 citing *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 268 (7th Cir. 1981) *cert. denied* 102 S. Ct. 1277 (1982); *Quality Auto Body, Inc. v. Allstate Insurance Company*, 660 F.2d 1195, 1203 (7th Cir. 1981), both of which are discussed in this article *infra*.

80. 665 F.2d at 790, quoting *Lektro-Vend*, 660 F.2d at 269; *Smith v. Pro Football, Inc.*, 593 F.2d at 1183.

81. 672 F.2d 1280 (7th Cir. 1982) (Cudahy, J.).

In early 1979, Nissan solicited all car dealers in the four-county Milwaukee area seeking an additional Datsun dealership. Over the protests of several members of the defendant association, Nissan selected plaintiff Tolkan, which was also a Pontiac dealer, as a new Datsun dealer. In May of 1979, Tolkan Datsun was formally appointed a Datsun dealer.

During this time, the Association had been planning a special Datsun promotion, involving Datsun 210s, the lowest-priced Nissan car. In that regard, the Association sought an additional allotment of 210 models for the promotion. In June of 1979, the Association's first advertising for the promotion appeared in local newspapers, but Tolkan Datsun's name was not among the dealers listed. Tolkan complained and was informed that it was not a member of the Association. Shortly thereafter, Tolkan applied for membership in the Association, and in July of 1979, its application was considered by the Association. The members decided that Tolkan's admission would not be considered until the end of the 210 model promotion and Tolkan was so informed. In September of 1979, the Association again met to consider Tolkan's admission and decided to deactivate the Association because no agreement could be reached. In September of 1979, Tolkan filed suit against the Association, claiming *inter alia* that the Association's refusal to admit it as a member constituted a group boycott and was thus *per se* illegal under section 1 of the Sherman Act.⁸² Cross motions for summary judgment were filed, and the district court granted the Association's motion, dismissing the complaint. The district court held that the Association's conduct was neither *per se* illegal nor illegal under the rule of reason. The Court of Appeals affirmed the judgment.⁸³

Here again the court recognized that certain types of group boycotts are *per se* antitrust violations, but again quoted with approval the language in *Smith v. Pro Football, Inc.*⁸⁴ to the effect that the "hallmark" of a *per se* illegal group boycott is "the effort of competitors to 'barricade themselves from competition at their own level'."⁸⁵ Emphasizing that recent Supreme Court decisions have cautioned against "over zealous application" of the *per se* doctrine, the court noted that several appellate cases, the *USTA* case among them, "point[ed] out the pitfalls of sweeping too broadly with the characterizations, 'group boy-

82. 15 U.S.C. § 1 (1976).

83. 672 F.2d 1280 (7th Cir. 1982).

84. *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (1978).

85. *Id.* at 1284, quoting *Smith*, 593 F.2d at 1178.

cott'.⁸⁶ The court then pointed out that membership arrangements in trade organizations are exceptions to the rule that group boycotts are *per se* violations of the antitrust laws.⁸⁷

Plaintiff Tolkan conceded the existence of such an exception but argued that *per se* treatment was appropriate since both the purpose and effect of the challenged membership restriction was to exclude competitors or coerce conduct. In support of this argument, Tolkan relied heavily on *Associated Press v. United States*⁸⁸ and *Silver v. New York Stock Exchange*.⁸⁹ The court interpreted these two cases to mean that *per se* treatment is not appropriate if the alleged group boycott does not involve a direct effort to influence the supply or demand of a competitor's product.⁹⁰ The court pointed out that, in the instant case, plaintiff Tolkan had made no showing that membership in the Association was necessary or even desirable to compete effectively as a Datsun dealer. The plaintiff conceded that it had received twenty additional 210 model cars from Nissan in lieu of participation in the ongoing Association promotion.⁹¹ The court pointed out that the only concrete injury alleged by plaintiff Tolkan was its inability to share in the profits of the previously planned Datsun 210 special promotion and concluded that this alleged injury reflected "an absence of anticompetitive effect," which was not surprising given the Association's "lack of market power and its relative inability to influence either the supply of, or the demand for, Datsun automobiles."⁹² The court declined to accept the contention "that any denial of membership by an ongoing trade association constitutes a *per se* violation of section 1 of the Sherman Act⁹³ regardless of its lack of anticompetitive effect" and held that "membership restrictions by trade organizations not possessed of significant economic or operational leverage are more appropriately evaluated according to the standards of the rule of reason."⁹⁴

The court then proceeded to evaluate defendants' conduct in light of the rule of reason. Quoting its recent decision in *Lektro-Vend Corp.*

86. 672 F.2d at 1285.

87. *Id.* citing *Florists' Nationwide Telephone Delivery Network v. Florists' Telegraph Delivery Ass'n*, 371 F.2d 263, 268-69 (7th Cir. 1967), *cert. denied*, 387 U.S. 909 (1973); *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (1978).

88. 326 U.S. 1 (1945).

89. 373 U.S. 341 (1963). See *supra* notes 67-68 and accompanying text.

90. 672 F.2d at 1286.

91. *Id.* at 1286, n.6.

92. *Id.* at 1286. The court also cited *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1372 n.40 (5th Cir. 1980) (*per se* treatment of a real estate association's membership requirements inappropriate where an association lacks market power).

93. 15 U.S.C. § 1 (1976).

94. 672 F.2d at 1287.

v. Vendo Co., the court emphasized that "any Rule of Reason analysis requires a showing of anticompetitive market effect."⁹⁵ The court could find none in *Tolkan*. The plaintiff had relied primarily on its loss of profits from the special Datsun 210 promotion as evidence of such an anticompetitive effect; however, as a factual matter (and as the district court found), Tolkan Datsun had no clear right to participate in this promotion.⁹⁶ Indeed, the Court of Appeals appeared offended by plaintiff's effort to jump on the bandwagon of the Association's previous work⁹⁷ and analogized it to the "free rider" problem in other areas of antitrust law.⁹⁸

The court went on to hold that even if plaintiff Tolkan had been entitled to participate in the 210 model promotion, "we are dubious that its exclusion from such a limited one-shot transaction would be sufficient to establish antitrust liability under the Rule of Reason."⁹⁹ The court pointed out that defendants' failure to reallocate promotional vehicles to Tolkan after it became a licensed Datsun dealer did not derogate from its ability to sell cars nor was Tolkan's continued economic viability threatened by its exclusion from membership in the Association.¹⁰⁰ Thus, plaintiff's allegations did not establish the sort of anticompetitive injury that the antitrust laws were designed to remedy.¹⁰¹

Both *USTA* and *Tolkan Datsun* stand as a warning against a mechanical and dangerous application of the "group boycott" label.

VERTICAL ARRANGEMENTS: *CRUM & FORSTER* AND *VALLEY LIQUORS*

This Term saw the arrival of yet another academician-turned-ju-

95. *Id.*, quoting *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 268 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 1277 (1982).

96. 672 F.2d at 1287.

97. The court stated that:

[T]o require defendants to share the profits of what turned out to be a shrewd investment with a competitor who had risked no capital and who had entered the market after the cars in question were selling like 'hot cakes', would violate the principle of rewarding entrepreneurial risk-taking, a capitalist commonplace presumably endorsed by the Sherman Act.

Id. at 1288.

98. *Id.* at 1288 n.10, citing the Gospel of Matthew 20:1-20:16 *inter alia* (parable of the laborers in the vineyard).

99. *Id.* at 1288.

100. *Id.*

101. *Id.*, citing *Havoco of America, Ltd. v. Shell Oil Co.*, 626 F.2d 549, 558 (7th Cir. 1980). Moreover, the court pointed out that at oral argument it was established that Tolkan is now a fully functioning member of the defendant association and has participated in all promotions undertaken since the filing of the lawsuit. 672 F.2d at 1288-89.

rist, as Professor Richard Posner of the University of Chicago took the bench. Both of his maiden antitrust opinions related to vertical arrangements.

In *Products Liability Insurance Agency, Inc. v. Crum & Forster Insurance Companies*,¹⁰² the Court of Appeals again considered an allegedly illegal refusal to deal and again affirmed a summary judgment for defendants dismissing the complaint. The plaintiff is a corporation owned and operated by an Illinois attorney named Byron Getzoff and, since it had no existence apart from Getzoff, the court treated him as the plaintiff. Of numerous defendants, only two were significant: Crum & Forster and Paris, O'Day & Reed, Inc., an insurance agency.

Getzoff was a trial lawyer who specialized in defending ladder manufacturers against product liability claims. In addition he acted as an insurance broker who, working through Paris, procured product liability insurance for the ladder manufacturers from Crum & Forster. Paris split its commissions on this insurance with Getzoff who was at the same time the leading attorney handling product liability claims for Crum & Forster.

Crum & Forster was unaware of Getzoff's activities as an insurance broker until Getzoff, who had had a falling out with Paris, described his role to the company in a letter and stated that he had requested each of the manufacturers to designate him as its exclusive broker for product liability insurance, thus cutting out Paris. In the weeks that followed, brokerage designations flowed into Getzoff from the ladder manufacturers, but Crum & Forster informed Getzoff that it would not appoint him an agent of the company. Most of the manufacturers then revoked their designations of Getzoff and subsequently Crum & Forster terminated Getzoff's legal services. Thereafter, Getzoff filed suit against Crum & Forster, Paris, and others.

The complaint did not question the lawfulness of Getzoff's termination; rather, it alleged a conspiracy between Crum & Forster and Paris to exclude Getzoff from the business of product liability insurance for ladder manufacturers. The district court granted summary judgment to defendants after pretrial discovery had been completed. The Court of Appeals affirmed.¹⁰³

The Court of Appeals first considered the district court's conclusion that Getzoff had not presented enough evidence of conspiracy to resist the defendants' motion for summary judgment. Writing for the

102. 682 F.2d 660 (7th Cir. 1982) (Posner, J.).

103. *Id.*

panel, Judge Posner remarked that the district court gave more weight than the Court of Appeals would be inclined to give to denials contained in affidavits of Crum & Forster.¹⁰⁴ This, however, did not mean that Getzoff was entitled to a trial; as the court pointed out, pretrial discovery yielded no evidence of any agreement between Paris and Crum & Forster to deny a role to Getzoff in the ladder manufacturer's insurance program. While there was evidence from which it might be concluded that Crum & Forster refused to appoint him as an insurance agent because of his long standing conflict of interest, it was plain that because the ladder program was nationwide and Getzoff a licensed insurance broker only in Illinois, he was ineligible to be an insurance agent for Crum & Forster.¹⁰⁵ The court remarked that, under the circumstances, "we cannot understand how Crum & Forster could have been expected to appoint him an agent to compete with or replace Paris at that time."¹⁰⁶ The court then held that this evidentiary record raised no questions of material fact.¹⁰⁷

The court went on to hold that, even if it were wrong and a conspiracy "could somehow be teased out of the depositions and affidavits," summary judgment was nevertheless proper because the alleged conspiracy was not in restraint of trade.¹⁰⁸ Stating that "[a]greements that are illegal *per se* are for the most part horizontal," the court pointed out that Crum & Forster and Paris are not competing sellers, but are rather in a vertical relationship.¹⁰⁹ The court explained that vertical agreements are illegal *per se* "only if their purpose is price fixing" and stated that the mere refusal of a supplier to deal with a competitor of one of his distributors is not illegal *per se*.¹¹⁰

The court pointed out that "there is a sense in which eliminating even a single competitor reduces competition" but that this "sense" is not relevant in determining whether the antitrust laws had been vio-

104. *Id.* at 662. The Court noted that "Conclusional denials of conspiracy in affidavits obviously drafted by lawyers are entitled to little weight in deciding whether to grant an antitrust defendant's motion for summary judgment." *Id.*

105. *Id.* at 662-63.

106. *Id.*

107. *Id.* at 663.

108. *Id.*

109. *Id.*

110. *Id.* See *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126, 133-34 (2d Cir. 1978) (en banc). The Seventh Circuit stated in *Crum & Forster*:

[I]n the absence of any evidence of intent to raise prices—and there is no such evidence in this case—an agreement whereby a supplier of some good or service refuses, at the behest of one of his distributors, to deal with a competitor of that distributor is not illegal *per se*. To prevail in such a case the plaintiff must show that the refusal to deal is likely to reduce competition.

682 F.2d at 663.

lated, for “[t]hose laws . . . are designed to protect the consumer interest in competition.”¹¹¹ Plaintiff’s obligation was not to show that Crum & Forster excluded Getzoff because Paris wanted it to, but rather to show that there was a deleterious effect on competition.

The court identified two possible theories of anti-competitive effect that Getzoff might have tried to establish but held that pretrial discovery produced no evidence to support either theory. The first theory would have focused on Paris as the culprit, trying either to obtain or to hold on to a dominant position in the market for insurance agents services, by getting Crum & Forster to terminate Paris’s potential competitor Getzoff. Since such a theory “pre-supposes that Paris had a big enough position in the market for insurance agency services to have a realistic hope of obtaining at least some degree of monopoly power,” the threshold issue related to relevant market and market shares, but no evidence on these questions was in the record.¹¹²

An alternative theory of liability focuses on Getzoff as a potential competitor of Crum & Forster rather than Paris. Getzoff apparently emphasized this theory, arguing that Crum & Forster was afraid that if he established himself as an insurance agent he would switch the ladder manufacturers—his “captive market,” as he called them—to another insurance company and Crum & Forster would lose that business. The court characterized Getzoff’s reference to his “captive market” as an indication that he would cause the ladder manufacturers to switch to another insurer “not with the purpose or likely effect of giving them the benefits of competition but only to extract higher commissions for himself” which would not constitute “a competitive benefit.” Since no evidence was presented concerning the structure of insurance underwriting market, any such theory “fails at the threshold.”¹¹³

As support for its allegation of an illegal boycott, Getzoff relied upon *Kor’s, Inc. v. Broadway-Hale Stores, Inc.*¹¹⁴ Judge Posner distinguished *Klor’s* from the instant case on its facts but went on to deny its continuing vitality, noting that the *Klor’s* decision came from an era where there was more focus on the individual competitor.¹¹⁵ Asserting

111. *Id.*, citing *Reiter v. Sonotone*, 442 U.S. at 343. “The consumer does not care how many sellers of a particular good or service there are; he cares only that there be enough to assure him a competitive price and quality.” *Id.* at 664.

112. *Id.* *Cf.* *Northwest Power Products, Inc. v. Omark Industries, Inc.*, 576 F.2d 83, 90-91 (5th Cir. 1978) (defendant with only 25% share of market and eight other competitors lack sufficient market power to control market).

113. 682 F.2d at 664.

114. 359 U.S. 207 (1959).

115. 682 F.2d at 665. The Court asserted, “*Klor’s* in any event belonged to an area in the Supreme Court’s antitrust jurisprudence when the Court was concerned with the welfare of indi-

that the Supreme Court's ultimate concerns in *Klor's* was with the impact on consumers of a possible monopoly arising from the elimination of small businessmen one at a time, Judge Posner concluded that "[t]his private squabble does not threaten consumers' welfare even remotely" and that Getzoff's exclusion "will [not] turn out to have been the first step in a march toward a monopoly in the insurance business."¹¹⁶

In *Valley Liquors, Inc. v. Renfield Importers, Ltd.*,¹¹⁷ the Court of Appeals per Judge Posner affirmed a denial of a preliminary injunction in a restricted distribution case. Plaintiff Valley Liquors, Inc. is a wholesale wine and liquor distributor in Northern Illinois; defendant Renfield Importers, Ltd. is one of its suppliers. In 1981, Renfield terminated Valley as a distributor of Renfield's products (which included such popular brands as Gordon's and Martini & Rossi) with respect to certain Illinois counties. Valley sued, charging Renfield with a violation of section 1 of the Sherman Act¹¹⁸ and sought a preliminary injunction under Section 16 of the Clayton Act.¹¹⁹ The district court (Grady, J.) denied the motion for preliminary injunction on the ground that Valley had not demonstrated that it was likely to win the case if tried in full.

From the evidence in the record, it appears that, until late 1981, Renfield generally sold its products to several wholesalers in the same county. Its sales had not been growing as rapidly in Illinois as in the rest of the country. However, Renfield had decided to adopt a system of restricted distribution whereby it would sell to one or at most two wholesalers in each county. Although Valley was Renfield's largest wholesaler in McHenry and DuPage Counties, accounting for some 50% of Renfield's total sales, the new plan terminated Valley and all other Renfield distributors in the two counties except two companies called Continental and Romano. The latter two companies, however, were themselves terminated in certain other areas. In addition to this evidence, there was un rebutted evidence that Valley had been selling

vidual competitors as well as with the health of the competitive process viewed as a means of protecting consumers." *Id.*

116. 682 F.2d at 665.

117. 678 F.2d 742 (7th Cir. 1982) (Posner, J.).

118. 15 U.S.C. § 1 (1976).

119. Section 16 of the Clayton Act (15 U.S.C. § 26) provides in pertinent part:

Any person . . . shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws . . . when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity . . . and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue

Renfield products at prices 5% below those charged by Renfield's other distributors in McHenry and DuPage counties, and that Valley's termination followed discussion between Renfield, Continental, and Romano in which the latter expressed unhappiness at Renfield's terminating them in other areas. There was virtually no evidence concerning Renfield's motivation for the adoption of a more restricted distribution system except that it was a reaction to Renfield's disappointing sales in Illinois.

Valley contended that two separate restraints of trade could be inferred from these facts: first, a horizontal conspiracy among Renfield, Continental and Romano to increase the wholesale prices of Renfield products in McHenry and DuPage counties; and, second, a vertical restriction unreasonably restraining trade by excluding Valley from McHenry and DuPage Counties.¹²⁰

With respect to the "horizontal" price fixing theory of Valley, Judge Posner recognized that the Third Circuit had held it unlawful *per se* for a manufacturer to terminate a distributor at the behest of a competing distributor who wants to reduce price competition in *Cernuto, Inc. v. United Cabinet Corp.*¹²¹ Judge Posner added a significant gloss to *Cernuto*, however, holding that the distributor and supplier must have the same desire. Should Renfield attempt to be more competitive by restricting its products' distribution, the antitrust laws would not be violated just because the distributors followed so they would have less price competition.¹²² The court pointed out that there was no direct evidence that Renfield was acceding to the desire of its other distributors in terminating Valley and that, since Renfield may have had reasons for terminating Valley that were independent of the desire of Continental and Romano, such a possibility is enough to rebut an in-

120. 678 F.2d at 743.

121. 595 F.2d 164 (3rd Cir. 1979).

122. 678 F.2d at 744, citing Alloy International Co. v. Hoover-NSK Bearing Co., 635 F.2d 1222, 1226 n.6 (7th Cir. 1980); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 111 (3d Cir. 1980). Judge Posner went on to muse about his holding as follows:

There is, we admit, a certain unreality in the careful parsing of motives that *Cernuto* seems to require. If a supplier wants his distributors to emphasize nonprice rather than price competition, . . . he will be hostile to price cutters because they will make it harder for his other distributors to recoupe the expenditures that he wants them to make on presale services to consumers and on other forms of nonprice competition, and of course the undersold distributors will be equally or more hostile. The motive of supplier and distributors alike could thus be described as wanting to eliminate price cutters yet there would be no *per se* illegality so long as the supplier was not just knuckling under to the distributors' desire for less competition. It is difficult to see how a court could distinguish empirically between such a case and the pure antipathy to price competition envisaged by *Cernuto*. But the unraveling of this skein can be left for another occasion.

678 F.2d at 745.

ference of collusion with those distributors.¹²³

Turning to the vertical aspects of the case, the court considered the implication of the fact that Valley sold at lower prices than the other distributors in McHenry and DuPage Counties. Because the territorial restrictions had the effect of reducing price competition among wholesalers, Valley contended that this reduction established a *prima facie* case of unreasonable restraint of trade, shifting to Renfield the burden of showing an offsetting increase in competition between brands supplied by Renfield on one hand and brands supplied by other importers or national distributors on the other, *i.e.*, an increase in inter-brand competition. Judge Posner attacked this contention frontally, asserting that “[w]e reject the casual equation of intrabrand price competition with intrabrand competition.”¹²⁴ The judge explained that the plaintiff in a restricted distribution case must show that the restriction is unreasonable, because weighing the effects on both interbrand and intrabrand competition only hurts consumers more.¹²⁵

The court considered how such a weighing of effects was to be conducted and concluded that the approach of the Fifth and Ninth Circuits was the correct one: “the balance tips in the defendant’s favor if the plaintiff fails to show that the defendant has significant market power (that is, power to raise prices significantly above the competitive level without losing all of one’s business).”¹²⁶ The court explained that a firm lacking any market power cannot afford to adopt policies that disserve consumers because of market reaction. Consumer welfare, which should be the interpretative guide to the Sherman Act, is not seriously threatened by such action.¹²⁷ Since no evidence of Renfield’s market power had been introduced by Valley, its vertical claim also had to fail.¹²⁸

123. *Id.*

124. *Id.* at 745.

125. Judge Posner elaborated:

The elimination of a price cutter who was taking a free ride on the promotional efforts of competing distributors will tend to stimulate nonprice competition among the distributors at the same time that it dampens price competition among them, so that the net effect on intrabrand competition need not be negative. In any event, the suggestion that proof of a reduction in intrabrand competition creates a presumption of illegality is inconsistent with the test that the courts apply in restricted distribution cases. The plaintiff in a restricted distribution case must show that the restriction he is complaining of was unreasonable because, weighing effects on both intrabrand and interbrand competition, it made consumers worse off.

Id.

126. *Id.*, citing *Muenster Butane, Inc. v. Stewart Co.*, 651 F.2d 292, 298 (5th Cir. 1981); *Cowley v. Braden Industries, Inc.*, 613 F.2d 751, 755 (9th Cir. 1980).

127. 678 F.2d at 745, citing *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979).

128. 678 F.2d at 745. With respect to market power, the court stated, “Since market power

Judge Posner's opinions in *Crum & Forster* and *Valley Liquors* are written in a style more reminiscent of a university lecture than a carefully-phrased judicial opinion, and they are decidedly an effort on his part to put his academic theories into practice.¹²⁹ Yet this is not to say that the opinions are inconsistent with Seventh Circuit precedent. Rather, they represent an extension of the court's concern for economic and business reality.

THE BUYER'S RIGHT TO CHOOSE HIS SELLER:
QUALITY AUTO BODY V. ALLSTATE

In *Quality Auto Body, Inc. v. Allstate Insurance Company*,¹³⁰ the Seventh Circuit affirmed a summary judgment for the defendants under section 1 of the Sherman Act¹³¹ in a case involving automobile insurance claims procedures. The district court had dismissed the case, concluding that the challenged conduct constituted neither horizontal nor vertical price-fixing, nor a group boycott.¹³²

Defendant Allstate Insurance Company ("Allstate") and defend-

can rarely be measured directly by the methods of litigation, it is normally inferred from possession of a substantial percentage of the sales in a market carefully defined in terms of both product and geography. See, e.g., *Red Diamond Supply, Inc. v. Liquid Carbonic Corp.*, 637 F.2d 1001, 1005 (5th Cir. 1981)." *Id.* The court pointed out that no market was defined and no evidence of market share was presented. The court also pointed out that Valley made no effort to establish Renfield's market power by "some alternative route, not involving proof of relevant market and market share," but the court did not elaborate on what alternative if any it had in mind. *Id.*

129. In his 1976 book *Antitrust Law: An Economic Perspective* Judge Posner described his thoughts on "restricted distribution" arrangements, as follows:

I believe that the law should treat price and nonprice restrictions the same. . . . The difficult question is whether the law should permit or prohibit price and nonprice restrictions in distribution, however imposed. The answer is not an easy one to give However, economic theory suggests that it will more commonly be manufacturer imposed and efficiency enhancing than dealer imposed and monopolizing. The number of firms in and the ease of entry into most branches of distribution militate strongly against effective caretalization of distribution. Effective dealer cartels are probably rare and this ought to rule out a per se rule against restricted distribution.

But we don't yet know enough about restricted distribution to adopt a rule of per se legality either, and consequently I believe that the Justice Department (and other anti-trust plaintiffs) should be permitted to continue to bring cases challenging restrictions in distribution. But they should be required to *prove* that the challenged restriction is, in fact, a dealer cartel. * * * Therefore, distribution cases cannot be decided simply by identifying the *source* of the restriction (i.e., whether the manufacturer or the dealer)—even if that were an easy thing to do. It is necessary in every case to determine whether the objective of the challenged restriction is to increase the provision of presale services or to generate monopoly profits. * * * [T]his suggests a possible rule for deciding some restricted-distribution cases: the lawfulness of the restriction should be conclusively presumed if the aggregate share of the relevant market possessed by the firms whose competition is restricted is not of monopoly proportions.

R. POSNER, *ANTITRUST LAW: AN ECONOMIC PERSPECTIVE*, 165-66 (1976).

130. 660 F.2d 1195 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 1717 (1982).

131. 15 U.S.C. § 1 (1976).

132. 1980-2 Trade Cas. ¶ 63,507 (N.D. Ill. 1980) (Decker, J.).

ant State Farm Mutual Automobile Insurance Company ("State Farm") had developed certain policies and practices in processing automobile damage claims of their policyholders. Most of Allstate's claims are processed under the company's "shop of the customer's choice" policy which permits the insured to choose the shop that will repair the damaged vehicle. Before the repair work is done, however, an Allstate adjuster will examine the loss and attempt to reach an agreed price with the representative of the repair shop selected by the customer so that the insurance settlement will cover the entire cost of repairs (less any deductible). If the Allstate adjuster is unable to reach an agreed price with the shop, Allstate will pay the insured an amount that represents, in the company's opinion, the competitive cost of repair. If the insured so desires, Allstate will provide the name of a shop or shops which will in all likelihood be willing to repair the vehicle for the price estimated by Allstate's adjuster. In addition, Allstate permits certain shops to begin repairing damaged vehicles insured by Allstate without waiting for a company adjuster to inspect the loss. This so-called "direct repair program" involves selection of shops which, based upon past experience, prepare competent estimates and perform quality repairs at competitive prices in the judgment of Allstate. This program is used only in cases where the customer expresses no shop preference.

State Farm's procedures for handling damaged claims are very similar to those used by Allstate. State Farm agents estimate the cost of repairs based upon the prevailing competitive price for the required parts and labor in the particular geographic area. This price is determined through periodic surveys of local garages conducted by State Farm personnel. Like Allstate, State Farm permits the insured to select a garage of his choice, but the company will pay the competitive price for the estimated repairs if an insured has no shop preference and requests a recommendation. Upon such request, State Farm will provide the insured with a list of conveniently located shops likely to perform the required repairs at a competitive price.

Plaintiff Quality Auto Body, Inc. ("Quality"), an automobile repair shop located in Westmont, Illinois, claimed that defendants' repair estimates illegally fixed the price which Quality could charge for labor and parts at the lowest prevailing competitive rate. Further, Quality contended that the defendants' lists of recommended shops effectively withheld business from shops that did not participate in defendants' pricing programs, thereby amounting to a boycott in violation of section 1 of the Sherman Act. The Court of Appeals was not deeply trou-

bled by either issue and indeed took the opportunity to remind readers that the antitrust laws are not protectionist.

Turning first to the price-fixing claim, the court assumed *arguendo*—as did the district court—that agreements between the defendants and some body shops to perform the work for a set price could be inferred.¹³³ Quality urged that the alleged agreements between the defendants and these “preferred” shops should be deemed *per se* illegal because they were “blatantly anti-competitive,” relying on the Supreme Court’s decision in *Group Life & Health Insurance Co. v. Royal Drug Co.*¹³⁴ The Court of Appeals held that *Royal Drug* did not support such a theory, pointing out that the Supreme Court specifically declined to express any opinion on the merits of a somewhat similar arrangement involving health insurance companies and pharmacies.¹³⁵ Pointing first to “the Supreme Court’s reluctance to recognize *per se* violations of the antitrust laws without considerable knowledge of the business practice in question and the impact of those practices on competition” and further pointing out that no court which has examined the antitrust implications of insurance provider agreements has used a *per se* approach, the Seventh Circuit held that the rule of reason analysis was appropriate.¹³⁶ Using this analysis, the court characterized the alleged agreements as ones by which a shop which performs repair work at the insurance company’s prevailing competitive rate can expect to be placed on a “preferred” list and receive a steady stream of referrals from claims adjusters. The court found that such an agreement did not restrain trade or violate the antitrust laws.¹³⁷ Far from establishing

133. The court gave short shrift to plaintiff’s horizontal price-fixing theory involving a conspiracy between Allstate and State Farm. Plaintiff had conceded the absence of any evidence of horizontal agreement but urged that a conspiracy could be inferred from defendants’ alleged adherence to a “common formula” for calculating damage estimates. The court rejected this inference out of hand, pointing to the undisputed fact that the rates used by the defendants frequently differed and holding that the “existence of these variances in the rates used by the two defendants minimizes the possibility of any concerted action to fix the price of auto repair.” 660 F.2d at 1200. Alternatively, the court held that even if a horizontal agreement existed, it would be immuned from antitrust scrutiny under the McCarran-Ferguson Act, 15 U.S.C. § 10 *et seq.*, which exempt the “business of insurance” from the antitrust laws.” *Id.* at 1201. With respect to the alleged vertical price-fixing, however, the court held that no antitrust exemption existed and proceeded to consider the issue on the merits. *Id.* at 1201-02.

134. 440 U.S. 205 (1979).

135. 440 U.S. at 210.

136. 660 F.2d at 1203.

137. The court stated:

A contract of this nature between a buyer (the insurance company) and a seller (the body shop) generally does not, without more, appear to violate the antitrust laws at all. Only if such an agreement contains restrictions on one party’s activities *other than those involved in the immediate purchase and sale* does the possibility of a Sherman Act violation arise. In refusing to pay a price higher than what they regard as the competitive rate, defendants have not imposed any restriction on the repair shops beyond the immediate

a Sherman Act violation, the existence of the alleged agreements "seems merely to show aggressive and competitive dealing by the insurance companies."¹³⁸

The court conceded that State Farm and Allstate were the first and second largest automobile insurers in the United States respectively, and that they have "an undeniable impact on the price structure of the auto repair market." Nevertheless, the court drew attention to the limited function of the antitrust laws, holding that "the Sherman Act provides no remedy for imbalance of market power as such."¹³⁹ Thus, plaintiff's being "at a huge disadvantage" as a trader did not constitute, without more, an antitrust violation, a conclusion that the court found to be supported by other recent decisions analyzing the antitrust implications of similar damage claim procedures.¹⁴⁰

Central to the resolution of the case was the Court of Appeal's recognition that the provider agreements were "nothing more than contracts between a buyer and a seller determining the price of services that the seller will perform."¹⁴¹ Having properly characterized the true nature of the challenged conduct, the court relied upon an obvious, but seldom-expressed tenet of antitrust law: that a buyer is not required to purchase from every seller.¹⁴²

Having disposed of the most serious of plaintiff's claims, the court turned to Quality's allegation of a "group boycott." Unlike the usual boycott claim, it was uncontroverted that neither Allstate nor State Farm had ever refused to deal with Quality. Rather Quality complained of defendants' refusal to pay the price it charged. Pouring

sales transaction. 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).

Id. (emphasis in original).

138. *Id.* at 1204.

139. *Id.*

140. *Id.*, citing *Proctor v. State Farm Mutual Automobile Insurance Co.*, 1980-2 Trade Cas. ¶ 63,591 (D.D.C. 1980); *Chick's Auto Body v. State Farm Mutual Automobile Insurance Co.*, 168 N.J. Super. 68, 401 A.2d 722 (1979), *aff'd per curiam*, 176 N.J. Super. 320, 423 A.2d 311 (1981); *DeBonaventura v. Nationwide Mutual Insurance Co.*, 419 A.2d 942 (Del. Ch. 1980), *aff'd* 428 A.2d 1151 (Del. 1981). Subsequent to the handing down of the opinion in *Quality Auto Body*, the District of Columbia Circuit affirmed *Proctor*. 675 F.2d 308 (D.C. Cir. 1982).

141. 660 F.2d at 1205, quoting from the district court's opinion, 1980-2 Trade Cas. at ¶ 76,696.

142. The court emphasized that section 1 of the Sherman Act:

[D]oes not preclude a party from unilaterally determining the parties with whom it will deal and the terms in which it will transact business. *United States v. Colgate & Co.*, 250 U.S. 300 (1919). This is true even where, as here, the buyers are big and the sellers are comparatively small.

660 F.2d at 1205.

Curiously, while *Colgate* has regularly been cited for the proposition that a seller may choose those to whom he will sell, the converse proposition has seldom if ever been stated, perhaps because it is so self evident.

some much-needed cold water on this claim, the court reminded plaintiff of the “Darwinian workings of competition (which the antitrust laws are presumably designed to foster)” and that it was “in the consumer’s best interest” that high-costs, high-price shops lose business and even go out of business if they cannot meet competition.¹⁴³ Summing up, the court asserted, “Whatever sympathy one may feel for the body shops in these circumstances, the antitrust laws were not intended to provide redress for losses resulting from non-competitive prices.”¹⁴⁴ Such common sense is refreshing in antitrust cases.

TYING: *F.E.L. PUBLICATIONS V. CATHOLIC BISHOP*

In *F.E.L. Publications, Ltd. v. Catholic Bishop of Chicago*¹⁴⁵—the second of two opinions involving the blanket licensing system of a religious music publisher—the Court of Appeals held that the plaintiff’s system did not constitute a tying arrangement that was illegal under either the *per se* or the rule of reason approach. In so holding, the Court reversed the district court’s granting of summary judgment in favor of the defendant.

As explained earlier in this article, F.E.L. is a music publisher that specializes in publishing and marketing liturgical sheet music and hymnals. The copyrights to the hymns supplied by F.E.L. are purchased from individual composers who assign the copyrights in their compositions in exchange for royalties based on sales.

In 1965, F.E.L. began supplying music to Chicago’s Catholic parishes through an agreement with the Catholic Bishop of Chicago (“Bishop”), an Illinois corporation that owns all Catholic parish property within the Archdiocese of Chicago. Because the Roman Catholic Church had never developed a national hymnal, most individual parishes in Chicago generally created their own, custom-made hymnals. Prior to 1972, F.E.L. licensed to parishes the right to copy its songs on a two cents per-song/per-copy basis for use in these hymnals. Copyright infringement, however, became a widespread and serious problem for F.E.L. in the parishes, prompting F.E.L. to institute its Annual Copying License in 1972. This license permitted parishes to copy one or more of F.E.L.’s songs, numbering approximately 1,400, in unlimited quantities for a period of one year for a fee of \$100 per year. In addition to that license, F.E.L. offered a one time usage license which per-

143. 660 F.2d at 1206.

144. *Id.*, citing *Proctor and Chick’s Auto Body*.

145. 1982-1 Trade Cas. ¶ 64, 632 (7th Cir. 1982) (Swygert, Sr. J.). The other case, *Repp v. F.E.L. Publications, Ltd.*, is discussed *supra* at notes 2-21 and accompanying text.

mitted a licensee to copy F.E.L. songs for use at a single occasion at two cents per copy per song, as well as printed hymnals and songbooks and sheet music.

When F.E.L. became convinced that the Annual Copying License had failed to discourage illegal copying, it filed suit against Bishop in September of 1976, alleging copyright infringement under the 1909 Copyright Act,¹⁴⁶ unfair competition under the Lanham Act,¹⁴⁷ and unfair competition under Illinois state law. As a result of an agreement between the parties following initiation of litigation, some 1.5 million unauthorized copies of F.E.L. songs were collected from the parishes and impounded by the district court. After conclusion of discovery, F.E.L. and Bishop filed counter-motions for summary judgment, and the district court ruled in Bishop's favor. In particular, the district court held that F.E.L.'s copyright claim was barred because the Annual Copying License was a "tying contract" and a *per se* violation of the Sherman Act. The Court of Appeals concluded that the granting of summary judgment for the Bishop was error.¹⁴⁸

In deciding that the annual copying license was a *per se* violation of the Sherman Act, the district court branded the license as a tying contract, since in order to obtain F.E.L.'s most popular songs, a church must also buy less popular songs as well. It analogized facts to those in *United States v. Paramount Pictures, Inc.*¹⁴⁹ In *Paramount*, theatre owners were required to accept inferior-quality films (the tied product) in order to obtain the right to show more popular films (the tying product). The Supreme Court held this form of marketing to be *per se* illegal under section 1 of the Sherman Act.¹⁵⁰

The Court of Appeals disagreed with this characterization of the license arrangement, stating that the annual copying licenses were more appropriately analyzed as a blanket license under the precedent established in *Broadcast Music, Inc. v. Columbia Broadcast System, Inc.*¹⁵¹ As the Supreme Court did in *Broadcast Music*, the court concluded that

146. 17 U.S.C. § 1 *et. seq.* This has since been replaced by the 1976 Copyright Act, 17 U.S.C. §§ 101 *et. seq.*

147. 15 U.S.C. § 1125(a).

148. In addition to reversing on the Sherman Act ground, the Court of Appeals held that the district court erred in its conclusions that F.E.L.'s copyright claim was barred because the annual copying license was used to illegally extend F.E.L.'s copyright over exempt performances, that the Lanham Act claim must be dismissed because it failed to satisfy the jurisdictional element of entry into commerce, and that the State claims must be dismissed because the district court declined to exercise pendent jurisdiction. 1982-1 Trade Cas. at pp. 73,462-64; 73,467-68.

149. 334 U.S. 131 (1948).

150. 15 U.S.C. § 1 (1976).

151. 441 U.S. 1 (1979).

the blanket license “has many pro-competitive, redeeming features which prevent us from presuming it illegal without further inquiry.”¹⁵² Describing the license as “a reasonable and flexible tool for dealing with the unique problems associated with the Roman Catholic liturgical music market,” the court found that it gave copyright holders protection and also allowed individual parishes to produce custom-made hymnals at a reasonable cost.¹⁵³ Thus, like the Court in *Broadcast Music*, the Seventh Circuit held that such a combination of protection and efficiencies takes the arrangement out of the *per se* rule.¹⁵⁴

The Court of Appeals also followed *Broadcast Music* in concluding that the annual copying license was not a tying arrangement, but was a separate and unique product composed of the individual compositions plus the aggregating service in which “the whole is truly greater than the sum of its parts.”¹⁵⁵ The court pointed out that the district court never identified the tying and tied products. The court stated that “[e]stablishing the existence of a tying contract requires more than a bold assertion that some songs are more popular than others.”¹⁵⁶ Given the substantial similarity between the instant case and *Broadcast Music*, the court concluded that there was little doubt that the annual copying license was not a *per se* violation.

The court went on to evaluate the license under the rule of reason. Although the posture of the case was one of summary judgment, the parties urged that it could be decided without further evidentiary proceedings, and the court agreed. The court began its discussion by stating that, under the rule of reason, an agreement whose anti-competitive effects outweigh its pro-competitive effects is an unreasonable restraint of trade.¹⁵⁷

Citing the Second Circuit’s decision in *Broadcast Music* on remand,¹⁵⁸ the Court of Appeals also held that a blanket license “does

152. 1982-1 Trade Cas. at p. 73,465.

153. *Id.*

154. *Id.*, citing *Broadcast Music*, 441 U.S. at 19, 21.

155. *Id.*, quoting *Broadcast Music*, 441 U.S. at 21-22.

156. 1982-1 Trade Cas. at p. 73,465.

157. *Id.* at p. 73,466, citing *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978). The *Bishop* court added, “In our case, the balancing of pro- and anti-competitive effects need not be undertaken because we find that the [Annual Copying Licenses] has no anti-competitive effect.” *Id.* This statement provides a much needed gloss on Justice Stevens’ enunciation of the rule of reason in *National Society*. The *National Society* formulation appears to dichotomize business conduct into either anti-competitive or pro-competitive modes. This, of course, cannot have been what Justice Stevens meant, for much business conduct is neither; it is simply competition. As the Court of Appeals recognized in *F.E.L. Publications*, the first question is whether the challenged business conduct constitutes a restraint of trade at all. Only after that inquiry does the balancing test come into play.

158. 620 F.2d 930 (2d Cir. 1980), *cert. denied*, 450 U.S. 970 (1981).

not restrain trade or have anti-competitive effects if an alternative opportunity to acquire rights to the individual songs is fully available."¹⁵⁹ Pointing to the availability of either the one-time use license or the purchase of songbooks, songcards, or sheet music from F.E.L., the court concluded that realistically available marketing alternatives did exist which remove "the potential for coercion (in the form of price fixing)" from the annual copying license.¹⁶⁰ Recognizing that the annual copying license was the only license offered by F.E.L. which allowed parishes to include F.E.L. songs and custom-made hymn notes, the court noted that a copyright owner is not required to market its copyrights in a form most convenient to its customers.¹⁶¹ Thus, the court once again made clear that the antitrust laws have decidedly limited purposes and do not give courts free rein to review the business judgments of those engaged in Commerce.

MERGERS: *KAISER ALUMINUM & CHEMICAL V. FTC*

In *Kaiser Aluminum & Chemical Corp. v. Federal Trade Commission*,¹⁶² the Court of Appeals set aside a cease and desist order issued in 1979 by the commission directing Kaiser to divest itself of all the assets which it obtained from a 1974 acquisition. In so doing, the court reemphasized certain principles of relevant product market analysis that contrast with those in other circuits and cut back substantially on the so-called "weak company" defense of *United States v. International Harvester*.¹⁶³

In 1974, Kaiser acquired the Lavino division ("Lavino") of International Minerals & Chemicals Corporation ("IMC"). Prior to that acquisition, Kaiser and Levino separately produced "refractories", i.e., heat-resistant materials that are used in the linings of industrial furnaces in kilns. The primary consumer of refractories in the United States is the steel industry; although the copper, glass, and cement industries also use refractories.¹⁶⁴

159. 1982-1 Trade Cas. at p. 73,466, citing *Broadcast Music* on remand, 620 F.2d at 936.

160. *Id.* at p. 73,466-67.

161. *Id.* at p. 73,466. The court continued:

Neither the copyright laws nor the antitrust laws guarantee churches the right to produce custom-made hymnals; a copyright owner can sell sheet music only if he so desires. We cannot overlook F.E.L.'s alternative marketing practices simply because they do not allow custom-made hymnals, and neither the expense nor the inconvenience of these alternatives makes them unreasonable.

Id.

162. 652 F.2d 1324 (7th Cir. 1981) (Baker, D.J.). The Commission's decision is reported at 93 F.T.C. 764 (1979).

163. 564 F.2d 769 (7th Cir. 1977).

164. 652 F.2d at 1327-29.

The court first considered the FTC's definition of relevant markets. The parties had agreed that the relevant geographic market was the United States in its entirety; however, there was substantial disagreement about the product market. The Commission defined an overall product market consisting of "basic" refractories (which the steel industry used almost exclusively) and subdivided it into markets for basic bricks and basic specialties. (The latter are used to repair and protect basic bricks and as mortar when a furnace lining is first constructed). The Commission went on to divide the market for basic bricks into a submarket for "BOF bricks" which are used in BOF (basic oxygen furnace) steel making and into a submarket for conventional basic bricks which are used in open-hearth furnaces and in other industrial processes. The Commission reached its product market definitions by concluding that there was substantial interchangeability of use in basic refractories and that, where interchangeability of use was not indicated, there was sufficient cross-elasticity of supply to support the markets defined.¹⁶⁵

Turning to the proper criteria for market definition, the court stated that the concept of economic substitution is the primary means by which to define a product market and that "the clearest indication that products should be included in the same market is if they are actually used by consumers in a readily interchangeable manner."¹⁶⁶ The court recognized that cross-elasticity of supply, or production flexibility among sellers, is "another relevant factor" to be considered in defining a product market for anti-trust purposes; however, the court reaffirmed its previous refusal to accept the possibility that a market could be defined solely on the basis of cross-elasticity of supply.¹⁶⁷ The court also reaffirmed the usefulness of the concept of "submarkets" established by *Brown Shoe Co. v. United States*.¹⁶⁸

165. *Id.* at 1329.

166. 652 F.2d at 1330, quoting *United States v. E.I. Du Pont de Nemours & Co.*, 351 U.S. 377, 399-400 (1956).

167. *Id.* at 1330. The court acknowledged that "economic theory" would envisage defining a market only on the basis of cross-elasticity of supply, citing *Spectrofuge Corp. v. Beckman Instruments, Inc.*, 575 F.2d 256, 280 n.79 (5th Cir. 1978). The court contrasted its previous decisions such as *Beatrice Foods Co. v. Federal Trade Commission*, 540 F.2d 303, 307 (7th Cir. 1976); *Sargent-Welch Scientific Co. v. Ventron Corp.*, 567 F.2d 701, 710 (7th Cir. 1977) with decisions in two other circuits, *Twin City Sportservice, Inc. v. Charles O. Finley & Co.*, 512 F.2d 1264, 1271-74 (9th Cir. 1975); *Telex Corp. v. International Business Machines Corp.*, 510 F.2d 894, 914-19 (10th Cir. 1975).

168. 370 U.S. 294, 325 (1962). In *Brown Shoe*, the Court held that "well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes" and set forth the following standard for defining such submarkets in a Clayton Act section 7 case:

The boundaries of such a submarket may be determined by examining such practical indicia as industry or public recognition of the submarket as a separate economic entity,

Applying these legal principles to the conclusion reached by the FTC, the court "rejected out of hand" Kaiser's contention that the proper product market is *all* refractories since there is virtually no interchangeability of use of basic and non-basic refractories.¹⁶⁹ Similarly, the court rejected the Commission's conclusion that an overall basic refractories market existed. Pointing to the Commission's finding that there was no interchangeability of use between BOF bricks and conventional bricks the court held that they could not be included in the same market, for even though they do have cross-elasticity of supply, that factor alone is insufficient under Seventh Circuit precedent.¹⁷⁰ The Commission's decision to include basic specialties in the overall market with bricks, according to the court, "only compounds the error" since specialties and bricks are not reasonably interchangeable and, even if they were, conventional bricks appear to demand specialties that are different from the specialties demanded by BOF bricks.¹⁷¹ For the latter reason, the court held that the FTC's definition of a submarket composed all basic specialties was not supported by substantial evidence. However, the court did uphold the Commission's definition of separate submarkets for conventional bricks and for BOF bricks.¹⁷²

The Court of Appeals then turned to the broader question of whether the Commission applied correct legal standards in determining that the acquisition might substantially lessen competition in the relevant market or submarket. This required the court to resolve conflicting interpretations of the Supreme Court's decision in *United States v. General Dynamics Corp.*¹⁷³ On the one hand, the Commission "applie[d] a narrow and restrictive reading to that case, confining it almost to its facts," while, on the other, Kaiser broadly interpreted *General Dynamics*, arguing for the recognition of a "weak company"

the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes and specialized vendors.

370 U.S. at 325.

169. 652 F.2d at 1331.

170. *Id.* at 1332.

171. *Id.*

172. *Id.* It should be noted that the court's treatment of relevant market definition left unclear the appropriate standard of review on appeal. The court stated early in its discussion, "The definition of relevant markets within which to measure the effects on competition of the proposed acquisition is a question of fact. As such, the Commission's findings as to relevant markets are to be accorded great deference and are to be upheld if supported by substantial evidence." 652 F.2d at 1329. In holding that the Commission was "in error when it formed [its] definition," the court applied the test of *Brown Shoe* for market definition to the Commission's "findings". *Id.* at 1332. This approach is in line with the court's earlier holding that market definition is a "mixed question of law and fact". See *United States v. Household Finance Corp.*, 602 F.2d 1255, 1260 n.7 (7th Cir. 1979), cert. denied, 444 U.S. 1044 (1981).

173. *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974).

defense.¹⁷⁴

The court began its analysis with a history of Supreme Court merger decisions after the 1950 amendment to Clayton Act Section 7 and appeared to agree with Justice Stewart's famed dissent, which protested that "[t]he sole consistency that I can find is that in litigation under Section 7, the Government always wins."¹⁷⁵ The court also appeared to agree with "judges, lawyers, and commentators [who] widely regard [*General Dynamics*] as ushering in a new era of Clayton Act Section 7 merger analysis."¹⁷⁶

In *General Dynamics*, the Supreme Court affirmed the dismissal of the Government's Section 7 claim on the ground that its statistics on concentration resulting from the merger did not accurately forecast competitive conditions in the relevant market.¹⁷⁷ Recognizing that the Supreme Court has not explained or amplified *General Dynamics* to any significant degree, and that lower courts have read *General Dynamics* in a variety of ways,¹⁷⁸ the Court of Appeals attempted to clarify *General Dynamics* and its own earlier decision in *United States v. International Harvester*.¹⁷⁹

Conceding that its opinion in *International Harvester* had given birth to a much-criticized "weak company" defense,¹⁸⁰ the court declared that such a theory represented a "mischaracterization" of the opinion and that *International Harvester* did not rely solely on the acquired firm's weak financial condition as a defense to section 7.¹⁸¹ Rather, the court explained, it had affirmed the district court's dismissal of a section 7 action for five separate reasons: (1) the acquired com-

174. 652 F.2d at 1332-33.

175. *Id.* at 1334-1335, quoting *United States v. Von's Grocery Co.*, 384 U.S. 270, 301 (1966) (Stewart, J., dissenting).

176. *Id.* at 1335.

177. 415 U.S. at 501. The Court of Appeals explained that, under *General Dynamics*, the weakness of the government's statistics lay in the fact that they measured *past* production which does not necessarily give a proper picture of a company's future ability to compete. Because electric utilities purchased most of the nation's coal pursuant to long-term requirements contracts, the absence of its acquiree's uncommitted proven coal reserves substantiate a General Dynamic's defense that, even if its acquiree remained in the market, it did not have sufficient reserves to compete effectively for long-term contracts. 652 F.2d at 1335-36.

178. 652 F.2d at 1337.

179. 564 F.2d 769 (7th Cir. 1977).

180. The Court of Appeals had there permitted a merger, stating that the acquired company's "weak financial reserves (like United Electric's weak coal reserve in *General Dynamics*) would not allow it to be as strong a competition as the bald statistical projections indicate." 564 F.2d at 773. For a critique, see, P. AREEDA & D. TURNER, *ANTITRUST LAW* (1980) at ¶ 935, which would disregard financial difficulties unless (1) "they would cause the firm's market share to decline to a level that would make the merger permissible, and (2) there is no competitively preferable alternative for resolving them."

181. 652 F.2d at 1339.

pany's financial weakness belied its apparent market strength; (2) the acquirer lacked *de facto* control over the acquiree; (3) the acquiree's competitive strength improved after the acquisition; (4) intense competition continued between acquirer and acquiree; and (5) competition improved and had become less concentrated in the relevant market.¹⁸² The Court of Appeals pointed out that "[s]ound economic theory supports any of the [latter] four grounds as reasons to avoid § 7 liability" and that financial weakness is "probably the weakest ground of all."¹⁸³ Accordingly, the court rejected Kaiser's broad reading of *General Dynamics*.

At the same time, the court rejected the FTC's interpretation of *General Dynamics* as "erroneous."¹⁸⁴ The court identified four separate errors of the Commission. First, the *General Dynamics* defense is not an "affirmative defense" in the sense that defendant bears the burden of proof. Rather, while the defendant must come forward with evidence to rebut the government's prima facie case by showing an increase in market share in a concentrated market, the government "continues to bear the burden of persuasion."¹⁸⁵ In addition, the court held that, in focusing on whether one firm's market share could be "imparted" to the other, the Commission missed the point of *General Dynamics*, since, when the "true measure of competition" was examined, the acquiree's market share became converted into a negligible one.¹⁸⁶ Third, the court held that lack of control over the circumstances that weakened the acquiree need not be shown, for "it is the Company's future prospects at the time of the acquisition that count, not the circumstances that led to its then present state."¹⁸⁷ Finally, the court rejected the Commission's requirement that Kaiser show that neither

182. 652 F.2d at 1338.

183. *Id.* at 1339. The court emphasized that, while financial weakness may be relevant "in some cases," it "certainly cannot be the primary justification of a merger in resistance to a § 7 proceeding." *Id.* at 1341. This does not mean that the court has read "financial weakness" out of section 7 analysis, however. Shortly after the *Kaiser Aluminum* decision, another panel of the Court drew attention to the "steadily deteriorating" market position of the acquired company—as well as the "dramatic" decline in the post-acquisition market shares of the acquiring company—in upholding a merger. *Lektro-Vend Corp. v. Vendo Co.*, 660 F.2d 255, 276-77 n.22 (7th Cir. 1981), *cert. denied*, 102 S. Ct. 1277 (1982).

184. 652 F.2d at 1339. The court noted that the Commission had "on numerous occasions" misinterpreted *General Dynamics* as "a case of statistical measurement of the wrong economic factors." *Id.* at 1339-40 n.11, citing *Pillsbury Co.*, 93 F.T.C. 966, 1033-36 (1979); *In the Matter of Reichhold Chemicals, Inc.*, 91 F.T.C. 246, 289-90 (1978); *In the Matter of Jim Walter Corp.*, 90 F.T.C. 671, 720, 753-55 (1977); *In the Matter of American General Insurance Co.*, 89 F.T.C. 557, 603-04, 621 (1977); and *In the Matter of Liggett & Myers, Inc.*, 87 F.T.C. 1074, 1165, 1171-72 (1976).

185. 652 F.2d at 1340.

186. *Id.*

187. *Id.*

remedy the weakened firm's position pointing out that, if an acquirer could not remedy the weakness, it would never be interested in the acquisition.¹⁸⁸

In remanding the case to the FTC, the court summarized the proper principles to be applied. It stated that market concentration statistics are the primary index for measuring market power, but that non-statistical information can be used as rebuttable evidence.¹⁸⁹ While the Court of Appeals' view of "production flexibility" as a tool in market definition remains unique, the Court's reinterpretation of *International Harvester* brings it into line with the approach to *General Dynamics* followed by other circuits.

CONCLUSION

The Court of Appeals' 1981-82 antitrust decisions reflect an increasingly sophisticated analysis that demands proof of real economic harm before conduct is declared unlawful under the Sherman or Clayton Acts.

188. *Id.*

189. *Id.* at 1341. The Court asserted:

[U]nder *General Dynamics* market concentration statistics continue to be the primary index for measuring market power, and, if they are un rebutted, those statistics standing alone can support a finding of a § 7 violation. The market concentration statistics, however, must be relevant to the focus of competition. The statistics must be an accurate measure of future ability to compete in a relevant market. Nonstatistical evidence which casts doubt on the persuasive quality of the statistics to predict future anticompetitive consequences may be offered to rebut the prima facie case made out by the statistics. The nonstatistical evidence of relevant economic factors must be weighed by the trier of fact in arriving at a conclusion as to whether the effect of an acquisition may be substantially to lessen competition. Among the factors to be considered might be ease of entry into the market, the trend of the market either toward or away from concentration, and the continuation of active price competition. In some cases unique economic circumstances might make other factors significant, e.g., the genuine independence of the acquired company as in *United States v. International Harvester Co.*, 564 F.2d 769 (7th Cir. 1977) or the merger of two small firms to survive competitively in a market, or the demand of a market for large producers.

Id.

