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ANTITRUST DECISIONS OF THE SEVENTH CIRCUIT IN THE 1984-85 TERM

WILLIAM M. HANNAY¹

While the United States Court of Appeals for the Seventh Circuit decided a number of antitrust cases during the 1984-85 term, the most important antitrust law relating to the Seventh Circuit was made in Washington, D.C.

SUPREME COURT REVIEW OF SEVENTH CIRCUIT DECISIONS

A. *Res Judicata and Pretrial Discovery*

In a 7-to-0 decision, the United States Supreme Court reversed the Seventh Circuit's decision in *Marrese v. American Academy of Orthopaedic Surgeons*.² Earlier, by a 5-to-4 *en banc* vote, the Seventh Circuit, speaking through Judge Posner, had issued the court's third opinion in the *Marrese* case, articulating an expanded version of the doctrine in *res judicata* and expressed its views on the appropriate use of pretrial discovery.³

The case involved an antitrust suit brought by two physicians—Treister and Marrese—against the American Academy of Orthopaedic Surgeons for rejecting their applications for membership. Earlier, the physicians had brought separate state court actions which were dismissed. The Illinois Appellate Court held that Treister's complaint failed to state a cause of action under state law because Academy membership was not an "economic necessity."⁴ The Illinois Supreme Court denied leave to appeal.⁵ Marrese's suit was also dismissed on the same grounds. Both doctors then brought antitrust actions in federal district court seeking damages and injunctive relief under Section 1 of the Sherman Act. The Academy moved for dismissal on the ground of *res judi-*

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2. 105 S. Ct. 1327 (1985), *rev'g*, 726 F.2d 1150 (7th Cir. 1984) (*en banc*).

3. The original panel opinion and a subsequent opinion on rehearing were reported at 706 F.2d 1488 (7th Cir. 1983) and 692 F.2d 1083 (7th Cir. 1982). The earlier Seventh Circuit opinions are discussed in Fair, *Antitrust: 1983-84 Seventh Circuit Developments*, 61 CHI.-KENT L. REV. 183, 199-201 (1985).

4. *Treister v. American Academy of Orthopaedic Surgeons*, 78 Ill. App. 3d 746, 755-56, 396 N.E.2d 1225 (1979).

5. 79 Ill. 2d 630 (1980).

cata, but the district court (Shadur, J.) twice denied that motion and denied the Academy's request to have his ruling certified for immediate appeal under 28 U.S.C. § 1292(b). Discovery was begun and plaintiffs sought the Academy's records relating to all denials of membership between 1970 and 1980. The Academy refused, even after the district court issued a protective order limiting access. The trial court held the Academy in criminal contempt and fined it \$10,000.

On appeal, from the contempt judgment, a panel of the Seventh Circuit twice reversed. In the meantime, the case had been reassigned to another district court (Plunkett, J.) who certified the district court order denying the Academy's motion to dismiss on *res judicata* grounds. The appeals were consolidated for *en banc* hearing. Judge Posner's opinion commanded a 5-vote majority for reversal of the district court's discovery order but only a plurality for his rationale which was that the action was barred because plaintiffs could have raised their antitrust claims in the state court action under the Illinois Antitrust Statute or brought a federal antitrust suit in federal court and joined their state law causes of action as pendent claims.

The Supreme Court reversed and remanded the case for further consideration of Illinois State Preclusion Law. Justice O'Connor, writing for the Court, pointed out that under the full faith and credit statute, 28 U.S.C. § 1738, a federal court "generally is required to consider first the law of the state in which the judgment was rendered to determine its preclusive effect."⁶ Since analysis of state preclusion law may make it unnecessary to determine if a federal court should refuse to give preclusive effect to a state court judgment, the Court remanded the case stating, "we are unwilling to create a special exception to Section 1738 for federal antitrust claims that would give state court judgments greater preclusive effect than would the courts of the State rendering judgment."⁷

Thus, the Supreme Court held that the Seventh Circuit erred when it determined as a matter of federal law that the antitrust action was barred by the earlier Illinois judgments based on the same facts. Chief Justice Burger concurred in the judgment, but urged the formulation of a federal rule to be applied in cases where state law is silent or indeterminate on the question of claim preclusion.

B. *Boycotts and Boating Associations*

The Supreme Court has, at least temporarily, torpedoed an antitrust

6. *Marrese*, 105 S. Ct. at 1332.

7. *Id.* at 1334.

action against a trade association by a manufacturer whose product was denied certification. In *Moore v. Boating Industry Associations*,⁸ the Seventh Circuit upheld a jury verdict finding Section 1 liability from the trade association's failure to employ "due process" in carrying out its product certification program. In a memorandum opinion issued October 15, 1985, the U.S. Supreme Court granted a petition for writ of certiorari, vacated the judgment, and remanded the case "for further consideration in light of *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.* . . ."⁹

In the *Northwest Wholesale Stationers* case, the Court had held that a member's expulsion from a joint buying cooperative is not subject to *per se* invalidation under Section 1 of the Sherman Act as a group boycott or concerted refusal to deal, absent a showing "that the cooperative possesses market power or exclusive access to an element essential to effective competition."¹⁰ The Court reversed the Ninth Circuit's finding of *per se* liability which was based on the theory that the cooperative failed to afford procedural protections, such as notice and a hearing, to permit the member to challenge the expulsion.

The Supreme Court concluded that, unlike the situation in *Silver v. New York Stock Exchange*,¹¹ there was no statutory mandate for industry self-regulation which was such an essential part of the statutory scheme that the Sherman Act could be construed as having been partially repealed. Only where such a self-regulatory scheme exists is *Silver's* concern for adequate procedural safeguards necessary to accommodate the important national policy of promoting effective and fair self-regulation. The correct analysis is one under the Rule of Reason unless the market power element referred to above is present. Because the Ninth Circuit failed to evaluate the challenged conduct under the Rule of Reason, the case was remanded for further consideration.

In *Moore v. Boating Industry Associations*, the Seventh Circuit dealt with a somewhat similar situation. Plaintiff Moore is a California-based manufacturer of boat trailer lights. In 1974, plaintiff introduced a new trailer light (Model No. 701) containing a number of desirable features, particularly water resistance. The light was certified as being "sales-worthy" by both the states of Virginia and California.¹² The California

8. 754 F.2d 698 (7th Cir. 1985).

9. 106 S. Ct. 218 (1985).

10. *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 105 S. Ct. 2613 (1985).

11. 373 U.S. 341 (1963).

12. Pursuant to statute the Federal Department of Transportation has promulgated standards regulating boat trailer lights. The DOT permits self-certification of compliance by the manufacturer.

Highway Patrol, however, subsequently raised a question about the sufficiency of the brightness of the lights.

Defendants' alleged illegal conduct commenced in 1976 at about the time of the defendant Associations' annual meeting. Just prior to the 1976 trade show, a letter alleging that plaintiff's light did not meet DOT criteria was submitted to the Boating Industry Associations and its affiliate (defendant Trailer Manufacturers Association) by the Wesbar Corporation. Wesbar was an association member which manufactured a taillight in direct competition with the Model No. 701. The Associations' administrator (defendant Reed) did not contact the plaintiff regarding this complaint, but instead, with no other information, informed the Associations' membership that the Model No. 701 was not DOT-approved. Trailer Manufacturers were told orally that if they used the Model No. 701 lights, the Associations would deny them certification. Testimony established that the Associations' certification of a boat trailer was essential to trailer marketing.

The next day after learning of the administrator's statement plaintiff advised the Associations that the administrator was wrong and supplied copies of the Model No. 701's Certification of Approval from the states of California and Virginia. No correction was made by the Associations during the meeting. A month later, the Associations sent a Model No. 701 light to a private testing laboratory, but the model appears to have been improperly assembled (and there was even evidence of possible tampering by persons unknown). The private testing lab reported that the Model No. 701 did not meet the DOT standards, and thereafter the Associations issued a "technical bulletin" stating that the Associations would not certify any trailers using the Model No. 701. Litigation followed. At the conclusion of trial, a jury found that the defendant Associations and its administrator violated Section 1 of the Sherman Act. The court of appeals affirmed, pointing to evidence showing a sharp decrease in Model No. 701's sales to members of the Associations after the technical bulletin was issued. From this evidence, the court concluded that the certification program "possessed market power" which is an essential element in such a case.¹³ The Seventh Circuit took the position that there was little or no difference between a *per se* and a Rule of Reason analysis in group boycott cases and emphasized that the "complete lack of due process afforded the plaintiffs in their product . . . in the

Two states (Virginia and California), however, require affirmative certification by state officials prior to the sale of such lights.

13. *Moore*, 754 F.2d at 710.

discriminatory manner in which the certification was denied” constituted a Section 1 violation.¹⁴ The court was particularly impressed by the undisputed evidence that the Associations had never taken action against any light manufacturer where similar questions had been raised, including Wesbar, the very company that had complained about the Model No. 701.

Putting aside the open question as to whether the challenged conduct constitutes an antitrust violation in light of *Northwest Wholesale Stationers*, the court’s analysis of the conspiracy element seems weak. Defendants’ principal defense was the lack of a conspiracy. The Seventh Circuit rejected this argument stating that “there is sufficient evidence in the record to demonstrate that the members acted in response to the threat by the defendants to revoke the members’ certificate of approval [for their trailers] if they used the Model 701. . . .”¹⁵ This part of the court’s analysis seems somewhat thin.

The jury was instructed, in connection with the conspiracy element that “[a] trade association is by its nature involved in concerted action” The Seventh Circuit stated that this instruction should be read in light of the rest of the instructions, which gave a fairly traditional statement of the conspiracy requirement. Nevertheless, the court went a long way to reading out of existence the conspiracy element in trade association by stating as follows: “Trade organizations . . . are formed to represent the interests of their members and when the members agree to establish a certification program . . . in an attempt to regulate themselves and their industry, they do engage in concerted action.”¹⁶

Here, unlike earlier cases in which conspiracy was found, there was no evidence of an agreement to do the particular acted issue. While there is no dispute that the members of the Associations agreed to set up a certification program, it appears that only one person made the decision to act in an unfair and discriminatory fashion: the Association’s administrator. From the court’s description of the evidence, it appears that a conspiracy between the Associations’ administration and the rival manufacturer (Wesbar) may have occurred, but this was not the basis of the court’s affirmance. Rather, Judge Coffey, speaking for the majority, took the position that the concerted action element was satisfied by the members’ creation of a certification program (a totally neutral act in itself) with antitrust liability triggered by the unfair or discriminatory conduct

14. *Id.* at 712.

15. *Id.* at 710

16. *Id.* at 714.

of an Association employee acting alone. This seems to take conspiracy law too far.

C. *Keogh Doctrine Immunity*

In the matter of *Wheat Rail Freight Rate Antitrust Litigation*,¹⁷ the Seventh Circuit re-examined the *Keogh* Doctrine and, over the objections of plaintiff Shippers & Amicus Department of Justice, held that the doctrine retains continuing viability. Subsequently, a petition for a writ of certiorari was filed.¹⁸ The petition is being held pending decision in a similar case that the United States Supreme Court will hear this term in *Square D Company*.¹⁹ The question to be addressed by the Supreme Court is whether the decision in the *Keogh v. Chicago & Northwestern Railway Co.*²⁰ precludes shippers from recovering damages under the antitrust laws for the conspiratorial acts of a rate bureau and member carriers who knowingly violate the Interstate Commerce Act, related ICC regulations, and their rate bureau agreement.

In *Keogh*, the Supreme Court had held that a shipper cannot recover antitrust treble damages based upon a claim that, but for an alleged conspiracy among carriers, the shipper would have been entitled to transportation rates lower than the rates which were filed with and approved by the ICC. The case involved an antitrust suit brought by a flax and excelsior shipper against railroad carriers, alleging that the carriers had conspired through their committee to fix excessive rates. Although the challenged rates had been filed, suspended, investigated, and finally approved as reasonable and non-discriminatory by the ICC, the shippers claimed that they were entitled to damages under the Sherman Act.

For a unanimous court, Justice Brandeis held that a private shipper could not maintain such a cause of action. The Court believed this conclusion necessary in order to accommodate both antitrust and regulatory goals, pointing to the alternative regulatory remedies available for the allegedly injurious conduct at issue. First, the Court reasoned that the shipper had no legal right to be charged a lesser rate because the ICC had determined the specific rate. The Court felt that Congress intended the procedures set forth in the ICC Act for challenging rates to be exclu-

17. 759 F.2d 1305 (7th Cir. 1985).

18. *Sub nom.* Little Crow Milling Co., Inc. v. Baltimore & Ohio R.R., No. 85-112 (filed July 16, 1985).

19. *See Square D Company v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347 (2d Cir. 1985), *cert. granted*, 106 S. Ct. 57 (1985).

20. 260 U.S. 156 (1922).

sive.²¹ Consequently, the imposition of the existing rates had caused the plaintiff no legally cognizable injury.

Second, the Court was concerned that maintenance of Keogh's action would give it a preference over other shippers who did not join the suit.²² Finally, the Court observed that plaintiff's damage theory rested on speculation because there was no way of determining whether the ICC would have approved the lower rate or whether it might have benefited Keogh at all.²³ The *Keogh* Doctrine was specifically affirmed by the Supreme Court in *Georgia v. Pennsylvania Railroad*.²⁴ The Court stated that:

The legal rights of a shipper against a carrier in respect to a rate are to be measured by the published tariff. That rate until suspended or set aside was for all purposes the legal rate between the shipper and carrier and may not be varied or enlarged either by contract or tort of the carrier.²⁵

In *Wheat Rail Freight Rate Antitrust Litigation*, the defendant railroads had acted pursuant to an agreement approved by the ICC. Under the Interstate Commerce Act, two or more rail carriers may enter into an agreement relating to rates and will not be subject to antitrust liability with respect to making or carrying out the agreement if it is submitted to and approved by the ICC and if it is carried out under the conditions required by the Commission.²⁶ In 1982, following several years of proceedings before the ICC with respect to the propriety of certain rates, various wheat shippers filed the present suit in federal district court alleging that the railroads had lost their immunity from antitrust laws provided by § 10706(a)(2)(A) when they failed to follow the notice and hearing requirements set forth in the original Agreement. The district court (Marshall, J.) dismissed the shippers' antitrust damage claims on the ground that the *Keogh* Doctrine impliedly immunized the railroads from antitrust liability for their conduct.²⁷ On appeal, the shippers and amicus, the U.S. Department of Justice, argued that the *Keogh* Doctrine was no longer applicable to the facts of the case. Specifically, they argued that the Railroad Revitalization Regulatory Reform Act of 1976 (the "4R Act"),²⁸ changed the regulatory environment in which the rail-

21. *Id.* at 162.

22. *Id.* at 163.

23. *Id.* at 163-65.

24. 324 U.S. 439 (1945).

25. *Id.* at 453.

26. 49 U.S.C. § 10706(a)(2)(A).

27. *In re Wheat Rail Freight Rate Antitrust Litigation*, 579 F. Supp. 517, 535-38 (N.D. Ill. 1984).

28. P.L. 94-210, 90 Stat. 31.

roads operate from that under which they operated at the time of *Keogh* thereby invalidating the doctrine's usefulness in the case. The Seventh Circuit rejected that argument.

Under the 4R Act, the ICC no longer has the authority to determine whether a rate is reasonable unless it first finds that the railroads at issue have market dominance. Congress enacted the 4R Act to "reform . . . the cartel structure of the industry resulting from the rate bureaus."²⁹ In turn, Congress mandated that the railroad industry "must be treated more like a competitive industry with respect to antitrust policy."³⁰ The shippers and amicus argued that, in the absence of authority by the ICC to declare these rates reasonable, the antitrust laws must be given greater force than they were given in *Keogh* to govern the competition within the carrier industry.

In rejecting this argument, the Seventh Circuit pointed out that, while the 4R Act introduced a measure of market competition, "it is not correct to say that ICC authority over rates is completely eliminated."³¹ While the 4R Act amended the ICC's authority to declare rates unreasonably high, the ICC's responsibility to determine whether rates unjustly discriminate against shippers, commodities, or geographic regions remains unchanged.³² The Seventh Circuit concluded that

The 4R Act . . . has not so drastically altered the regulatory environment as to invalidate the principles operating behind the *Keogh* decision. Finally, in consideration of the interplay of Congressional antitrust goals and Congressional regulatory goals leads us to conclude that the regulatory policies governing the railroads here are incompatible with antitrust enforcement.³³

Having found that the ICC still maintains extensive jurisdiction over railroad rates and that a successful antitrust suit would be "repugnant" to the operation of the regulatory scheme, the court held that the conduct was impliedly immune.

The conduct at issue in the *Square D Company* case which will be considered by the Supreme Court this term, is not markedly different than that at issue in the *Wheat Rail Freight* case. Like the plaintiffs in the Seventh Circuit case, the plaintiffs in *Square D Company* argued that *Keogh* had been overruled by subsequent developments. In addition,

29. See S. REP. NO. 499, 94th Cong., 2d Sess. 14 (1976), reprinted in 1976 U.S. CODE CONG. & AD. NEWS 28.

30. *Id.*

31. *Wheat Rail Freight*, 759 F.2d at 1311.

32. 49 U.S.C. § 10741(a), (b). See S. REP. NO. 595, 94th Cong. 2nd Sess. 148, reprinted in 1976 U.S. CONG. & AD. NEWS 163.

33. *Wheat Rail Freight*, 759 F.2d at 1312.

they argued that the facts alleged amounted to a broader conspiracy that does not fall within the purview of *Keogh*. They claim that the defendants acted outside the scope of the ICC-authorized agreement by "engaging in conduct that either was not or could not be proved by the ICC."³⁴ The Second Circuit affirmed the application of *Keogh*.³⁵ The trial court had rejected plaintiffs' argument about a "broader conspiracy" because whatever the breadth of plaintiffs' allegations, "the complaint essentially focuses on what plaintiffs claim are unjust and excessive rates."³⁶

It is likely that the Supreme Court will reaffirm the *Keogh* Doctrine in cases like *Square D Company* and *Wheat Rail Freight* where shippers seek to imply the federal antitrust laws as an alternative vehicle for evaluating the reasonableness of rates filed with a regulatory agency.

D. Municipal Services and State Action

Three years ago, the Seventh Circuit addressed the question of the immunity of a municipality for acts which might otherwise violate the antitrust laws in *Town of Hallie v. City of Eau Claire*.³⁷ The case was recently reviewed by the Supreme Court and affirmed on March 15, 1985.³⁸ In 1978, the Supreme Court held that a municipal corporation is not automatically exempt under the "state action" doctrine and that, if challenged under the antitrust laws, must demonstrate that it is engaging in the challenged activity pursuant to a "clearly articulated" state policy.³⁹ The 1978 decision gave new prominence to the decision in *Parker v. Brown*,⁴⁰ in which the state action doctrine had first been enunciated. The court's holding in *Community Communications Co. v. City of Boulder*,⁴¹ complicated matters by rejecting the argument that a state "home rule" statute satisfied the requirement of "clear articulation and affirmative expression."

In *Town of Hallie*, four townships in Wisconsin brought suit against the City of Eau Claire, the owner of the only sewage treatment facility in the area. The City refused to supply sewage treatment services to the towns and would only supply such services to individual landowners in the towns who would consent to become annexed by the City and pay for

34. See *Square D. Company v. Niagara Frontier Tariff Bureau, Inc.*, 596 F. Supp. 153, 155 (W.D.N.Y. 1984).

35. *Square D Company*, 760 F.2d at 1349.

36. *Square D Company*, 596 F. Supp. at 155.

37. 700 F.2d 376 (7th Cir. 1983).

38. 105 S. Ct. 1713 (1985).

39. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978).

40. 317 U.S. 341 (1943).

41. 455 U.S. 40 (1982).

sewage collection services from the City. While the towns could provide sewage collection services, they had no means of sewage treatment or disposal. The Seventh Circuit and later the Supreme Court held that this conduct by the City constituted "state action" under *Parker v. Brown* and was therefore exempt from the antitrust laws.

The Seventh Circuit held that it was not necessary that the state direct or compel the challenged conduct but rather:

We hold that any municipality acting pursuant to clearly articulated and affirmatively expressed state policy which evidences an intent of the legislature to displace competition with regulation—whether compelled, directed, authorized or in the form of a prohibition—is entitled to antitrust immunity because conduct pursuant to such a policy would constitute state action.⁴²

Further, since sewage treatment was a "traditional municipal function," there was no requirement for the state to actively supervise the municipality's conduct.

The Supreme Court reiterated its view that the doctrine of *Parker v. Brown* arose from principles of federalism and state sovereignty and does not necessarily require antitrust immunity from municipalities because such entities are not "sovereigns." Rather, in order for a municipality to obtain an antitrust exemption, the municipality must demonstrate that its allegedly anti-competitive activities are authorized by the state "pursuant to state policy to displace competition with regulation or monopoly public service." The Supreme Court admitted that it has never stated how clearly a state policy must be articulated for a municipality to be able to establish that its anti-competitive activity constitutes state action nor has it decided whether a municipality, like a private party, must be actively supervised by the sovereign state in order to maintain exemption.

The plaintiff towns conceded that the Wisconsin statute authorizing a municipality to provide sewage services appeared to contemplate allowing cities to refuse to provide services to those beyond its boundaries, but contended that this was not a clear articulation of an intention to replace competition. The Court concluded that competition need not be referred to specifically if the conduct authorized by the statute logically may result in an anti-competitive effect. Quoting Areeda and Turner, the Court referred to a "regulatory structure that inherently displaced unfettered business freedom."⁴³ Thus, if a statute replaces competition inherently, it cannot be construed as being merely "neutral" within the meaning of the *City of Boulder*. The state need not compel the municipi-

42. *Town of Hallie*, 700 F.2d at 381.

43. *Town of Hallie v. City of Eau Claire*, 105 S. Ct. 1713, 1718 (1985).

pality to act in any particular manner, for "we may presume, absent a showing of the contrary, that the municipality acts in the public interest."⁴⁴

Finally, with respect to active supervision the Court found no need for the municipality to be actively supervised as long as the state has articulated the policy to allow the municipality to provide for the function in question. Again, the Court would presume that the City is not acting in furtherance of a private anti-competitive scheme. In addition, as the Seventh Circuit noted, a requirement of state supervision would be unwise and wasteful because a state would then be compelled to supervise all local actions if municipalities were to avoid antitrust exposure.

E. X-Rays, Price Fixing, and the Solicitor General

In *Indiana Federation of Dentists v. Federal Trade Commission*,⁴⁵ the Seventh Circuit handed the FTC a substantial setback in the health care area, but the Supreme Court may alter that result. The Commission had issued a cease and desist order prohibiting the association and its member dentists from collectively refusing to comply with the request of group dental health care insurers to submit copies of a patient's dental x-rays along with the patient's insurance claim form. The Commission had ruled that the association had engaged in an unfair method of competition in violation of Section 5 of the FTC Act, using a Rule of Reason analysis.⁴⁶ The Seventh Court reversed.

Following the Seventh Circuit's reversal, the Commission requested the Solicitor General of the United States to file a petition for writ of certiorari on behalf of the Commission. When he declined to do so, the FTC for the first time exercised its right to file its own petition.⁴⁷ On October 14, 1985, the Supreme Court granted the petition and will consider the case this term.

In the *Indiana Federation* case, a group of Indiana dentists formed the association as a labor union in an attempt to qualify for exemption from the federal antitrust laws under Section 6 of the Clayton Act. About one year after the association was formed, it adopted a "work rule" which consisted of a campaign to refuse jointly to send to dental insurance companies any dental x-rays or radiographs for pre-treatment benefit determination. The dentists offered to allow dental representa-

44. *Id.* at 1720.

45. 745 F.2d 1124 (7th Cir. 1984).

46. *In re Indiana Fed'n of Dentists*, 101 F.T.C. 57, 179 (1983).

47. See Section 204(a) of the Magnuson-Moss Warranty—Federal Trade Commission Improvements Act—U.S.C. § 204(a) (1982).

tives from the companies to visit their offices and review records or examine patients, but they contended that the sending of x-rays to insurance companies would result in attempted diagnosis of dental disease by laymen, which was a violation of Indiana state law and a violation of the dentists' duty to render the highest possible quality treatment to their patients. An FTC administrative law judge declared this conduct to be a violation of Section 5 of the FTC Act as a *per se* form of boycott of cost containment mechanisms. While rejecting the applicability of the *per se* theory,⁴⁸ the Commission analyzed the conduct under the Rule of Reason and found that:

the practical implementation of the Work Rule was to refuse to cooperate with claims review programs which relied upon submission of x-rays. The effect of [defendants'] conduct was to reduce competition among dentists to cooperate with dental reimbursement plans and, by doing so, to swart the efforts of individual insurance companies to contain costs by offering coverage for only the least expensive adequate course of treatment.⁴⁹

This in turn resulted in "reducing or eliminating competition among dentists as to their policy of dealing with third-party payers."⁵⁰ "By colluding, competitor dentists were freed to some extent from . . . market forces because they knew other participants in the boycott would also refuse to cooperate."⁵¹

On appeal, the Seventh Circuit held that the Commission had failed to prove any impact on competition. Neither the ALJ nor the Commission found that the dentists' conduct harmed competition among insurers in their efforts to provide group dental health coverage nor among dentists in their efforts to attract and treat patients covered by such insurance. To the Seventh Circuit, the Commission's finding of a federal antitrust violation was based upon insufficient evidence and was merely "a rubber-stamp approval of the group dental health care insurers' practice to formulate a course of dental treatment based solely upon dental x-rays and an insurance claim form, in violation of established, accepted and approved standards of quality dental care."⁵² Writing for the panel, Judge Coffey stated that refusal to submit x-rays was based on "legal, moral and ethical considerations" and not on economic grounds.⁵³

The Commission petitioned the Seventh Circuit for rehearing, which

48. *Indiana Fed'n of Dentists*, 101 F.T.C. at 168.

49. *Id.* at 171-72.

50. *Id.* at 173.

51. *Id.*

52. *Indiana Fed'n of Dentists*, 745 F.2d at 1144.

53. *Id.* at 1139.

was denied. Judge Fairchild (who had concurred in the panel decision only with respect to the Commission's failure to prove the competitive significance of the arrangement) voted to grant rehearing and Judges Cudahy, Eschbach and Posner voted to grant rehearing *en banc*. In its petition for a writ of certiorari, the Commission argued that the Seventh Circuit acted contrary to *National Society of Professional Engineers v. United States*,⁵⁴ and created a safe harbor for boycotts organized by professional associations in furtherance of allegedly moral or ethical duties.

The Supreme Court's grant of the petition should give the Court an opportunity to bring some needed clarification to the area of ethical defenses to the antitrust laws. Some of this confusion was engendered by the *National Society of Professional Engineers* decision and by the Seventh Circuit's decision in *Wilk v. American Medical Association*.⁵⁵

APPLICATION OF ANTITRUST LAWS TO STANDARD-MAKING

In *ECOS Electronics Corp. v. Underwriters Laboratory*,⁵⁶ the court found no violation of Section 1 of the Sherman Act in the activities of Underwriters Laboratories, Inc. (UL) in certifying the safety of a product made by plaintiff's competitor. While the decision makes no new law, it is a useful exercise in common sense.

Plaintiff ECOS manufactures an electrical outlet testing device in competition with the Daniel Woodhead Company. Woodhead submitted its device to UL which, after various modifications were made by Woodhead, certified the device as safe. Although actions against certifying bodies such as UL are often brought by manufacturers who have been denied approval, plaintiff ECOS never sought approval but rather based its complaint on the ground that UL approved Woodhead's product.

ECOS alleged that it manufactured a device that was far superior to Woodhead's product and which was correspondingly more expensive. ECOS opposed Woodhead's application for approval, arguing that it should not be certified because of certain limitations in its performance. UL, nevertheless, granted a safety certification. ECOS then filed its action, claiming that UL's certifications of the less-expensive product denied ECOS "an unfettered opportunity" to offer [its] product in the market because ECOS testers are substantially more expensive than Woodhead's and purchasers will buy the least expensive "adequate"

54. 435 U.S. 679 (1978).

55. 719 F.2d 207 (7th Cir. 1983), *cert. denied*, 104 S. Ct. 2398 (1984). See Fair, *supra* note 3, at 187-89.

56. 743 F.2d 498 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 1178 (1985).

product. The court through Judge Pell held that "plaintiff must show either that it was barred from obtaining approval of its product on a discriminatory basis from its competitors, or that the conduct as a whole was manifestly anti-competitive and unreasonable," quoting an earlier Sixth Circuit decision.⁵⁷ Though claiming to be denied an "unfettered opportunity" to sell its product, plaintiff ECOS was clearly interested in "lessening competition" not enhancing it, the court noted.⁵⁸ "ECOS seeks to avoid the fetters of price competition by claiming that consumers are injured when they choose inferior testers because of the price."⁵⁹ ECOS may not indirectly force Woodhead to raise its prices by forcing UL to raise its standards.

The ultimate result of ECOS's logic would be to eliminate all standard-making organizations but "[t]his was not the intended effect of the antitrust laws."⁶⁰

TYING ARRANGEMENTS AND HOUSING ARRANGEMENTS

In *Carl Sandburg Village Condominium Association v. First Condominium Development Co.*,⁶¹ the Seventh Circuit recognized the *per se* legality of a tying arrangement where the alleged tying company has absolutely no economic interest in the sales of the tied seller. The court affirmed the dismissal with prejudice of a complaint by the district court (Getzendanner, J.).

The facts were relatively straight forward. In early 1979, the defendants had purchased and converted Carl Sandburg Village from rental apartments to condominium units. During the conversion process, defendants established condominium associations under their own direction. The associations entered into management agreements with Arthur Rubloff and Company which had been managing the buildings since 1965. The individual unit owners were indirectly subject to the Condominium Management Agreement with Rubloff by virtue of their status as members of the associations. The agreements appointed Rubloff as the managing agent for two years at a fee computed and payable monthly by each condominium unit.

In 1982, the condominium associations, which were by this time no longer under the direction of the developers, sued the developers and

57. *ECOS Elec.*, 743 F.2d at 501 (quoting *Eliason Corp. v. National Sanitation Found.*, 614 F.2d 126, 129 (6th Cir.), *cert. denied*, 449 U.S. 826 (1980)).

58. *ECOS Elec.*, 743 F.2d at 501.

59. *Id.* at 502.

60. *Id.* at 503.

61. 758 F.2d 203 (7th Cir. 1985).

Rubloff in a 9-count complaint alleging a Sherman Act tie-in and various state claims including breach of fiduciary duty in failing to disclose defects in the buildings, negligent misrepresentation, negligent construction, and a breach of express and implied warranties of workmanship.

The district court dismissed the tie-in claim, and the Court of Appeals affirmed, on the ground that the tying and tied products are sold by different, unaffiliated sellers and that the plaintiff failed to allege that the seller of the tying product received a commission or rebate from the seller of the tied product. The Seventh Circuit pointed out that in this circuit "an illegal tying arrangement will not be found where the alleged tying company has absolutely no economic interest in the sales of the tied seller, whose products are favored by the tie-in."⁶² The court noted that this economic interest requirement has also been imposed by courts in the Second, Third, Fourth, Fifth, Sixth, Ninth and Eleventh Circuits.⁶³ The court also clarified that this economic interest requirement was an essential element of a Rule of Reason tie-in claim as well.⁶⁴

The Seventh Circuit (per Flaum, J.) rejected plaintiffs' argument that Rubloff conferred an economic benefit upon the developers (the tying sellers) by concealing defects in the condominium structure, thereby permitting the developers to sell units at inflated prices. The court rejected plaintiffs' analogizing this concealment of defects to a kickback, rebate, or commission. In addition, the court pointed out that plaintiffs had been allowed a full year of discovery on the issue of economic interest because of the difficulty of knowing whether any "secret" rebates or discounts had been paid. The court pointed out that this discovery yielded no such evidence.⁶⁵

Because the federal cause of action was dismissed for failure to state a claim, the court affirmed the district court's dismissal without prejudice of the remaining state claims for lack of subject matter jurisdiction.⁶⁶

62. *Id.* at 207 (citing *Ohio-Sealy Mattress Mfg. Co. v. Sealy, Inc.*, 585 F.2d 821, 835 (7th Cir. 1978), *cert. denied*, 440 U.S. 930 (1979)).

63. *Carl Sandburg Village Condominium Ass'n*, 758 F.2d at 208. *See, e.g.*, *Esposito v. Mister Softee, Inc.*, 1980-1 Trade Cas. (CCH) ¶ 63,089, at 77,423-24 (E.D.N.Y. Dec. 14, 1979), *cert. denied*, 465 U.S. 1026 (1984); *Venzie Corp. v. United States Mineral Prod. Co., Inc.*, 521 F.2d 1309, 1317 (3d Cir. 1975); *Miller Motors, Inc. v. Ford Motor Co.*, 252 F.2d 441, 446-47 (4th Cir. 1958); *Kenner v. Sizzler Family Steak Houses*, 597 F.2d 453, 456 (5th Cir. 1979); *Crawford Transp. Co. v. Chrysler Corp.*, 338 F.2d 934, 939 (6th Cir. 1964); *cert. denied*, 380 U.S. 954 (1965); *Roberts v. Elaine Powers Figure Salons, Inc.*, 708 F.2d 1476, 1478-81 (9th Cir. 1983); *Midwestern Waffles, Inc. v. Waffle House, Inc.*, 734 F.2d 705, 712 (11th Cir. 1984).

64. *Carl Sandburg Village Condominium Ass'n*, 758 F.2d at 210. *See Warner Management Consultants, Inc. v. Data Gen. Corp.*, 545 F. Supp. 956, 957 (N.D. Ill. 1982).

65. *Carl Sandburg Village Condominium Ass'n*, 758 F.2d at 209.

66. *Id.* at 211.

TERMINATION OF A DEALER FOR BREACH OF AN EXCLUSIVE DEALING ARRANGEMENT

In *Roland Machinery Company v. Dresser Industries, Inc.*,⁶⁷ Judge Posner reversed a preliminary injunction enjoining the termination of an equipment dealer. While the court appeared to enunciate a new standard for reviewing preliminary injunctions, the principal interest of this case is its interpretation of exclusive dealing law.

Roland Machinery had for many years been the exclusive dealer in Central Illinois for International Harvester's line of construction equipment. In 1972, Dresser Industries purchased International Harvester's construction equipment division. About eight months later, Roland Machinery Company became a dealer for Komatsu, a Japanese manufacturer of a competing line of construction equipment. Shortly thereafter, Dresser terminated Roland's dealership pursuant to a clause in the agreement which allowed either party to terminate without cause on ninety days notice. Roland brought suit under Section 3 of the Clayton Act, and the district court (Ackerman, J.) preliminarily enjoined the termination.

In reversing the trial court's decision, Judge Posner examined the "balance of harms" and concluded that the balance was close because the district court was clearly erroneous in finding a threat to the existence of plaintiff's business and because it was unlikely that the district court could administer the injunction so as to prevent harm to defendant.⁶⁸ Under the Seventh Circuit's new standards, where the balance of harms was close, the likelihood of success had to be rather substantial.⁶⁹

The Seventh Circuit concluded that plaintiff had failed to demonstrate the necessary likelihood of success on the merits because it had failed to show either that there was an exclusive agreement or that the agreement was likely to have a substantial anti-competitive effect. First, the record did not establish that the parties had reached even an implicit agreement that Roland could not carry a competing manufacturer's line. As an aside, Judge Posner noted that even an announced policy of granting only exclusive dealerships and terminating those which violated the policy would not establish the necessary agreement.⁷⁰

In this respect to the anti-competitive effect of the agreement, Judge Posner stated that plaintiff must prove that the agreement keeps a com-

67. 749 F.2d 380 (7th Cir. 1984).

68. *Id.* at 392.

69. *Id.* at 387.

70. *Id.* at 393.

petitor out of the relevant market and that this exclusion will cause prices to rise above the competitive level or otherwise injure competition. Since Komatsu is one of the largest manufacturers of construction equipment in the world and no manufacturer of such equipment has long-term exclusive dealing agreements, the record on appeal indicated that Komatsu could not be kept out of Central Illinois. Further, he emphasized the possible competitive benefit of exclusive dealership: that exclusive dealers may promote a product more vigorously, provide more information and services to the consumer, and are less likely to take a "free ride" on the manufacturer's promotional efforts. He commented that "[e]xclusive-dealing contracts terminable in less than a year are presumptively lawful under Section 3."⁷¹

Judge Swygert dissented.⁷² First, he urged that the abuse of discretion standard should be retained for preliminary injunctions and disagreed with the majority's assessment of the balance of harms, because it depended on assumptions that lacked any basis in the record. He also disagreed with the majority's assessment of the likelihood of success, because evidence of defendant's surveillance and incentives to dealers to deal exclusively implied an exclusive dealing arrangement. He also believed that there was evidence of anti-competitive effect in the relevant market.

ETHICAL RESTRICTIONS MAY AFFECT PRICE AND STILL BE LEGAL

In *Vogel v. American Society of Appraisers*,⁷³ the Seventh Circuit upheld expulsion of a gem appraiser from a society of appraisers for "unethical" pricing practices. The district court (McMillen, J.) had denied a preliminary injunction, and on appeal the denial was affirmed.

The by-laws of the American Society of Appraisers states that "it is unprofessional and unethical for the appraiser to do work for a fixed percentage of the amount of value . . . which he determines at the conclusion of his work."⁷⁴ Plaintiff Vogel, an experienced gem appraiser, charged a flat one percentage fee, of the value ultimately determined (subject to a minimum fee of \$10.00). Vogel's expulsion, which was publicized in the Society's newsletter in March, 1983, caused Vogel to lose referrals from other Society members and from other appraisers. Vogel brought suit claiming that the by-law constituted a price-fixing agreement in violation

71. *Id.* at 395.

72. *Id.* at 396-404.

73. 744 F.2d 598 (7th Cir. 1984).

74. *Id.* at 599.

of Section 1 of the Sherman Act and that his expulsion constituted a boycott of him.

Speaking for the court, Judge Posner found that the prohibition on fixed-percentage appraisals "seems unrelated or at most very tenuously related to any purpose or probable consequence of raising the price of appraisals."⁷⁵ Rather "it merely outlaws a method of fee setting that seems to invite the appraiser to practice a fraud on his customer, by first announcing that his fee is a fixed percentage and then over-appraising the item; or, at the very least, that invites discrimination against wealthier, or less sophisticated customers."⁷⁶ Thus, the "challenged by-law is more likely a praiseworthy effort at self-regulation than a device for facilitating supracompetitive pricing."⁷⁷ Judge Posner found that while ethical concerns have often and unavailingly been offered as reasons for limiting price competition,⁷⁸ there is no suggestion that the Society's by-laws actually covers an effort to fix prices.⁷⁹ Accordingly, the court saw no likelihood of success on the merits.

For the future in the case, Judge Posner commented that, if in the trial on the merits Vogel can show that abolishing fixed-percentage fees encourages "the members of the Society to adopt a collusive fee schedule as a substitute, he will be well on his way to proving a violation of the statute."⁸⁰ Alternatively, Vogel may be able to prove a Rule of Reason violation by showing that the Society's members as a group have a substantial share of the relevant market and that the anti-competitive effects of the by-law exceed any pro-competitive effects that the Society may be able to point to.

TRUCKING ASSOCIATION FALLS AFOUL OF *TOPCO* RULE

In *General Leaseways, Inc. v. National Truck Leasing Association*,⁸¹ the court affirmed a preliminary injunction enjoining practices which constituted a horizontal market allocation.

The National Truck Leasing Association is composed of companies that lease trucks to businesses on a "full service" basis, *i.e.*, with an understanding that the lessor of the trucks is responsible for servicing the trucks either himself or by others. This service aspect is particularly crit-

75. *Id.* at 602.

76. *Id.*

77. *Id.* at 603.

78. *Id.* at 602. See also *National Soc'y of Professional Eng'r v. United States*, 435 U.S. 679, 693-96 (1978).

79. *Vogel*, 744 F.2d at 602-03.

80. *Id.* at 603.

81. 744 F.2d 588 (7th Cir. 1984).

ical for "over the road" rentals since a truck may break down hundreds of miles from the lessor's place of business and require immediate service. In order to compete with nationwide truck rental companies, Association members agree to provide reciprocal service to one another when their trucks break down out of their own service area.

The antitrust controversy arose because the Association assigns each member a location in which it may do business and forbids that member from doing business as an Association franchisee elsewhere. It also further prohibits that franchisee from affiliating with any nationwide truck leasing company such as Hertz or Avis. Thus, the members may not compete against one another as Association franchisees because reciprocal service is unavailable to one operating from an unauthorized location. Nor may an Association franchisee compete outside its assigned territory by obtaining servicing rights through the Hertz or Avis network. General Leaseways, an expansion-minded franchisee, defied the rules and sued to avoid expulsion.

For antitrust purposes, the most significant portion of the court's opinion was that of dealing with probability of success on the merits. The court (per Posner, J.) noted the similarities to *Topco* and *Sealy*, and recognized that the law may have shifted, but rejected the Association's free rider arguments as weak. The Association's basic argument was that members forego extortionate prices for service and thus that an expansion-minded franchisee rides "free" on the others by making too many service calls. Judge Posner rejected this, both because the expanded franchisee also will have to do more repairs and because there is no evidence that members do not charge fully remunerative fees for repairs.⁸²

The court further noted that the prohibition on competition here was basically horizontal and that, unlike *ASCAP/BMI*,⁸³ no unique market was being created. Moreover, unlike *NCAA*,⁸⁴ the restriction here was not merely ancillary to the proper purposes of the Association and thus subject to the Rule of Reason, rather the evidence at the injunction hearing suggested the *per se* rule was applicable.

Finally, on a Rule of Reason analysis, in light of the fact that it is difficult to enter the trucking business due both to federal regulation and the need for reciprocal service, Judge Posner would not hold that the district court (McGarr, C.J.) erred in finding that the restrictions General Leaseways defied have a substantial anti-competitive potential.

82. *Id.* at 592.

83. *Broadcast Music Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1 (1979).

84. *National Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla.*, 104 S. Ct. 2948 (1984).

Judge Posner stated that “[t]his finding is dispositive under the Rule of Reason because the Association’s attempted justification based on free-rider problems is unpersuasive.”⁸⁵

STATE ACTION AND HEALTH CARE

In *Marrese v. Interqual, Inc.*,⁸⁶ the court held that the State Action Doctrine immunized the revocation of clinical privileges at an Indiana hospital. The court affirmed dismissal by the district court (Leighton, J.) of a complaint charging a Section 1 violation and a claim of monopolization of the spinal surgery market in Evansville, Indiana. The district court, however, had not considered the State Action issue but rather had dismissed the complaint on the grounds of insufficient effect on interstate commerce.

The Seventh Circuit reversed the district court’s decision on interstate commerce. In light of the new and vastly expanded interpretation of the interstate commerce requirement under the Sherman Act generally adopted by the federal courts, the Seventh Circuit held that it was sufficient for plaintiff to allege that, in the course of his practice, he purchased supplies and services from out-of-state sources and received revenues from the federal medicare and medicaid programs as well as out-of-state insurance companies.⁸⁷ Plaintiff also alleged that the majority of his patients came from outside of Indiana. Plaintiff further alleged that twenty-five percent of the patients at the hospital at issue (Deaconess Hospital) came from outside Indiana and that the hospital purchased \$5,000,000 in supplies and equipment from out-of-state sources.⁸⁸ It should be noted that the court expressly declined to rule whether a plaintiff can rely on the interstate activities of defendant alone to meet the interstate commerce requirement.⁸⁹

The Seventh Circuit nevertheless affirmed the dismissal based on its own analysis of the State Action Exemption. The court ordered the issue of State Action to be briefed on appeal. The court noted that Indiana statutes specifically require that hospitals engage in medical staff peer review to review the quality and necessity of care for patients.⁹⁰ The court considered this a “clearly articulated and affirmatively expressed . . . state policy” and held that it was “actively supervised” by the State

85. *General Leaseways*, 744 F.2d at 597.

86. 748 F.2d 373 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 3501 (1985).

87. *Id.* at 383.

88. *Id.* at 380.

89. *Id.* at 383 n. 16.

90. *Id.* at 384.

of Indiana which had formed two regulatory agencies to promulgate and enforce standards of competent medical practice by physicians and hospitals.⁹¹ Both agencies review the records of medical peer review committees. The court also noted that Indiana statutes provide that participants in the medical peer review process shall be immune from civil liability.⁹² Finally, it was noted that under the Indiana statutory scheme, "any practitioner investigated by a medical peer review committee shall receive the due process safeguard of an evidentiary hearing before any disclosure of the committee's findings" and that physicians who lost privileges may challenge the "good faith" of the hospital staff and its applicable fair hearing procedure in Indiana courts.⁹³

In the instant case, after conducting an independent audit of plaintiff's medical practice, defendant Interqual had recommended to the Special Ad Hoc Committee at the hospital that plaintiff's clinical privileges at Deaconess be revoked. The committee forwarded Interqual's recommendation to the Medical Staff Executive Council at Deaconess which adopted the recommendation.

The court (per Coffey, J.) emphasized the need to balance federal and state interests, noting that Indiana has an important interest in the protection of its citizens through the medical peer review process. Permitting a Sherman Act attack on this process would destroy it by inducing physicians to avoid participation, the court believed.⁹⁴ The court further stated that allowing antitrust litigation would increase the cost of medical care to consumers and that the plaintiff is protected by due process safeguards of hearings and state court review.⁹⁵

The decision is an unprecedented one in its application of the State Action Doctrine to the health care field. Whether it will be applied by other courts has yet to be seen.

PROCEDURAL ISSUES RELATED TO ANTITRUST CASES

The Seventh Circuit has considered interesting procedural issues in connection with three antitrust cases recently: the *AT&T-MCI* case, the *Folding Carton* case, and the *Dunlop-Wilson* tennis ball case.⁹⁶

In January 1983, the Seventh Circuit set aside a \$1.8 billion judgment in favor of MCI Communications Corporation and remanded the

91. *Id.*

92. *Id.* at 391.

93. *Id.* at 392.

94. *Id.* at 394.

95. *Id.*

96. *See infra* notes 97, 101 and 110.

case for retrial on the amount of damages that MCI had suffered as a result of AT&T's antitrust violations.⁹⁷ On remand, MCI proposed to introduce a "lost profits" study that purported to show MCI's damages based upon lost revenue from its public long-distance services known as Execunet and Network Service. AT&T filed a motion in limine to exclude the study, contending both that MCI had represented at the first trial that public line service damages were not at issue and that the Seventh Circuit's 1983 decision precluded MCI from attempting to recover such damages.

The district court (Grady, J.) denied AT&T's motion, but permitted AT&T to seek an interlocutory appeal. The Seventh Circuit denied AT&T's petition for permission to appeal.⁹⁸ The court declined to exercise its discretion to accept the appeal for several reasons. First, the question of whether MCI's prior statements or the 1983 decision precluded MCI from raising public line service damage claims were difficult issues which could be more adequately addressed on a full record after trial. The court in its per curiam decision also pointed out that the chance of a third trial being required if it were later held error to admit the public line service evidence could be minimized by the district court's use of special verdict forms or jury interrogatories so that the amount of any damages awarded in connection with lost profits of Execunet or Network Service would be stated in the verdict. Judge Cudahy dissented in part, arguing that the court had an obligation to address the "wholly unanticipated" set of circumstances about which the 1983 mandate was silent.⁹⁹

At the time the court considered the matter, the potential significance of the admission of MCI's public line service evidence was great. Under the challenged lost profits study, MCI's damages would be approximately \$5 billion before trebling in contrast to the \$900 million claimed at the first trial. As it turned out, however, the Seventh Circuit spared itself some unnecessary legal analysis. The study was admitted at the retrial; however, the jury apparently gave it little credence and awarded MCI treble damages totalling only \$113 million on May 28, 1985. On November 18, 1985, MCI and AT&T announced a settlement of their 11-year old antitrust dispute.¹⁰⁰

The Seventh Circuit's decision in *In re Folding Carton Antitrust Liti-*

97. *MCI Communications Corp. v. American Tel. & Tel.*, 708 F.2d 1081 (7th Cir.), cert. denied, 464 U.S. 891 (1983).

98. *American Tel. & Tel. v. MCI Communications Corp.*, 748 F.2d 799 (7th Cir. 1984).

99. *Id.* at 802.

100. *New York Times*, Nov. 19, 1985, § D, Page 6, at Col. 4.

gation,¹⁰¹ brings to a close the lengthy litigation surrounding allegations of price fixing in the folding carton industry. On September 19, 1979, the district court (Robson and Will, JJ.) entered a final judgment approving a settlement agreement providing for payment by the 25 defendants of \$200 million into a fund for distribution to the plaintiff class. The settlement agreement provided for a cut-off date for claims but made no provision for disposition of any sums left in the fund. By 1982, approximately \$6 million dollars was left undistributed. The fund's Administration Committee (composed principally of plaintiffs' counsel) recommended to the court that the remaining funds be used to establish a private "anti-trust development and research foundation" to promote the study of complex litigation and various substantive and procedural aspects of antitrust law. Various class members and defendants objected, urging that the fund be distributed to the plaintiff class or otherwise pro rata to the settling defendants. The district court accepted the Administration Committee's recommendation.¹⁰² On appeal, the Seventh Circuit reversed and held that the reserve fund shall escheat to the United States subject to the conditions expressed in 28 U.S.C. §§ 2041 and 2042.¹⁰³

The Seventh Circuit first rejected the appropriateness of utilizing the "fluid recovery concept."¹⁰⁴ Because the defendants had been sufficiently deterred, have disgorged illegally obtained profits, and have satisfied the compensatory factor of the Sherman Act, fluid recovery is not needed.¹⁰⁵ The court (per Cummings, C.J.) held that establishment of the proposed Foundation would be "carrying coals to Newcastle" because of the "voluminous research with respect to multi district antitrust litigation and the substantive and procedural aspects of the antitrust laws by judges, lawyer specialists, law schools, bar associations," and governmental entities.¹⁰⁶ In the Seventh Circuit's view, establishing "an unneeded foundation for these purposes . . . would be a miscarriage of justice and an abuse of discretion."¹⁰⁷ Rather, the funds should escheat to the United States Government because the "spirit" of 28 U.S.C. §§ 2041-42 is "certainly satisfied and indeed the technical Congressional requirements present no real obstacles."¹⁰⁸

101. 744 F.2d 1252 (7th Cir. 1984), *cert. denied*, 106 S. Ct. 11 (1985).

102. *In re Folding Carton Antitrust Litigation*, 557 F. Supp. 1091 (N.D. Ill. 1983), *aff'd*, 744 F.2d 1252 (7th Cir. 1984), *cert. denied*, 106 S. Ct. 11 (1985).

103. *Folding Carton*, 744 F.2d at 1256.

104. *See Simer v. Rios*, 661 F.2d 655, 675-77 (7th Cir. 1981), *cert. denied*, 456 U.S. 917 (1982).

105. *Folding Carton*, 744 F.2d at 1254.

106. *Id.* at 1254-55.

107. *Id.* at 1255.

108. *Id.*

Judge Flaum dissented in part, contending that the fund should escheat to the state, in the same proportion as the citizenship of the plaintiff class members as the "parens patriae" representatives of non-claiming class members.¹⁰⁹

Finally, the Seventh Circuit dealt with the always embarrassing issue of judicial recusal in the *Dunlop-Wilson* tennis ball case. In *Dunlop Tire and Rubber Corp. v. Pepsico, Inc.*,¹¹⁰ Dunlop claimed that Wilson had attempted to monopolize the tennis ball industry through the use of predatory pricing. After several years of discovery, the trial was set to commence before the district court (McMillen, J.) in June, 1985. On the very eve of trial, a situation arose which appeared to call for the recusal of the judge. Judge McMillen denied the recusal motion, and an immediate petition for a writ of mandamus under 28 U.S.C. § 1651 was filed with the Seventh Circuit. The trial began before the district court, but was terminated after four days when the Seventh Circuit ordered the judge to recuse himself.¹¹¹

The district judge had reached retirement age some months prior to the events in question, and, though taking senior status, decided to explore the possibility of resigning from the bench and resuming the practice of law. To this end, he contacted a "headhunter" who agreed to contact various Chicago law firms to see whether any of them might be interested in employing him. Whether authorized to or not, the headhunter called both of the law firms involved in the litigation. The law firm representing defendant stated that it was not interested. What the other law firm representing plaintiff did is less clear. The Seventh Circuit made clear that there would be "no actual impropriety" if the district judge was allowed to continue to preside over the trial.¹¹² Nevertheless, the Seventh Circuit "reluctantly" concluded that recusal was required because of the appearance of partiality that would be created by his continuing to preside in the case.¹¹³ Section 455(a) of the Judicial Code requires a federal judge to recuse himself "in a proceeding in which his impartiality might reasonably be questioned," and the Seventh Circuit has read this to require recusal whenever there is "a reasonable basis" for a finding of an "appearance of partiality under the facts and circum-

109. *Id.* at 1256-59.

110. *Dunlop Tire and Rubber Corp. v. Pepsico, Inc.*, No. 81 C. 7079, slip op. (N.D. Ill. July 31, 1985).

111. *Pepsico, Inc. and Wilson Sporting Goods Co. v. Honorable Thomas R. McMillan*, 764 F.2d 458 (7th Cir. 1985).

112. *Id.* at 460.

113. *Id.*

stances” of the case.¹¹⁴ Judge Posner writing for the panel concluded that “an objective disinterested observer . . . would entertain a significant doubt that justice would be done in the case” because of the “asymmetrical” responses of the two firms to the headhunters inquiry.¹¹⁵ Beyond that, Judge Posner stated “[t]he appearance of equal justice requires that the judge not be exploring the prospects of employment with one lawyer or all lawyers appearing in a case before him.”¹¹⁶

CONCLUSION

Judge Posner wrote a number of the court’s antitrust decisions in the 1984-85 term, but it does not appear that his views are substantially different from his colleagues. The court is conservative in antitrust matters but not because it is located near the “Chicago School” of economics.

114. See *SCA Services, Inc. v. Morgan*, 557 F.2d 110, 116 (7th Cir. 1977).

115. *Pepsico*, 764 F.2d at 460-61.

116. *Id.* at 461.

