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## ANTITRUST ENFORCEMENT IN THE SEVENTIES

*W. Wallace Kirkpatrick\**

During the decade of the 1970s, the Antitrust Division of the United States Department of Justice filed 650 cases. What kinds of cases were they? What happened to them? What antitrust enforcement policies did these cases reflect? This article will review the 650 cases filed during that ten-year period, discuss the more interesting ones, and note changes in enforcement patterns and techniques reflected by the kinds of cases filed and their disposition.

The 650 cases produced very little new case law because few of these cases reached appellate courts. Fewer still led to significant decisions on antitrust law. Only a handful of Supreme Court opinions were handed down in these cases, and none of these opinions is of earth-shaking importance to antitrust law.

Antitrust, of course, deals with the undue concentration of economic power. In this regard it is interesting to note that approximately 190 of the 650 cases included as defendants corporations named in the current *Fortune* lists of the first and second largest 500 industrial corporations.<sup>1</sup> Almost thirty percent of the cases filed named as a defendant at least one of the major industrial corporations of the country. In light of the frequent criticism that antitrust enforcement ignores big companies and spends its

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1. The number of cases which named at least one defendant from the *Fortune* lists is inexact, and undoubtedly should be appreciably larger. The defendants named in the cases filed in the 1970s were checked against the list of the 500 largest industrial corporations published in *Fortune* magazine of May 5, 1980, and against the list of the second 500 largest industrial corporations, published in *Fortune's* issue of June 16, 1980. No doubt some defendants named in the cases were among the largest corporations when the case was filed. Some companies on the lists were without doubt smaller when they were named as defendants. The lists of major financial, transportation, and public utility concerns were not checked. Although admittedly inexact, the number of 190 cases does show that a very substantial proportion of the cases filed named major industrial concerns as defendants.

resources on matters of small economic significance, this high percentage is worth emphasizing.

Over the ten-year period, almost two-thirds of the cases filed were civil proceedings. Criminal prosecutions accounted for slightly over one-third of the cases. Table I<sup>2</sup> shows a breakdown by year of the total number of cases filed, and the number and percentage of both civil and criminal cases. Table I also shows the number and percentage of both civil and criminal cases that were easily disposed of. For the criminal cases, the easy dispositions were accomplished by the acceptance of pleas rather than

TABLE I

Calendar Year	Total # of Cases Filed	Civil Cases	% of Total Cases	Settled by Agreement	% of Civil Cases Settled	Criminal Cases	% of Total Cases	Pleas	% of Criminal Cases Settled by Pleas
			%		%		%		%
1970	67	57	85	45	79	10	15	9	90
1971	56	45	80	33	73	11	20	8	73
1972	96	73	76	67	92	23	24	21	91
1973	60	38	63	27	71	22	37	17	77
1974	71	38	54	30	79	33	46	24	73
1975	63	35	56	26	74	28	44	24	86
1976	65	39	60	29	72	26	40	18	69
1977	59	29	49	21	66	30	51	24	80
1978	62	27	44	18	67	35	56	30	86
1979	51	29	57	9		22	43	17	77
	650	410	63	305	74	240	37	192	80

holding trials or hearings. Eighty percent of the criminal cases were disposed of by pleas of *nolo contendere* or guilty. The great majority of the

2. This and the other tables in this article were compiled by the author from an examination of the cases filed and their disposition. For the year 1979, of the 29 civil cases filed, some 20 had not been finally disposed of by October 1, 1980. In view of this, no percentage of civil cases settled by agreement for that year seems meaningful.

civil cases were disposed of by the entry of a consent judgment or by the dismissal of the case by the government when the challenged merger was abandoned or the relief sought was obtained in other ways.

It is interesting to compare the figures in Table I with similar figures for prior years. The total number of cases filed each year in the seventies varied from ninety-six to fifty-one, and averaged sixty-five. In the preceding quarter century, the total number of cases filed annually ran from ninety-four to twenty-five, averaging fifty. The percentage of civil cases averaged sixty-three percent for the seventies; for the previous years it averaged sixty-two percent.<sup>3</sup>

3. Kirkpatrick, *Antitrust to the Supreme Court: The Expediting Act*, 37 GEO. WASH. L. REV. 746 (1969), contained the following table at 752, showing a breakdown of antitrust cases filed for the years 1944 through 1968.

Year	Total cases filed	Civil cases filed	% of total cases	Disposed of by agreement	% of civil cases filed	Criminal cases filed	% of total cases	Disposed of by nolo contendere pleas	% of criminal cases filed
1944	25	12	48	4	33	13	52	10	77
1945	25	21	84	13	62	4	16	4	100
1946	43	33	77	24	73	10	25	7	70
1947	33	20	61	11	55	13	39	8	61
1948	56	29	52	19	65	27	48	16	59
1949	35	19	54	14	74	16	46	10	62
1950	60	30	50	18	60	30	50	22	73
1951	49	37	75	27	73	12	25	8	67
1952	36	24	67	11	46	12	33	10	83
1953	29	10	34	6	60	19	66	9	47
1954	34	22	65	16	73	12	35	6	50
1955	54	33	61	28	85	21	39	9	43
1956	46	29	63	22	76	17	37	3	18
1957	56	30	54	21	70	26	46	19	73
1958	59	33	56	27	82	26	44	14	59
1959	63	29	46	18	62	34	54	27	80
1960	89	57	64	50	87	32	36	21	65
1961	60	40	67	22	55	20	33	12	60
1962	94	55	58	36	65	39	42	19	49
1963	40	23	58	19	83	17	42	13	77
1964	70	49	70	37	75	21	30	15	71
1965	40	31	78	21	68	9	22	4	44
1966	45	26	58	12	46	19	42	15	79
1967	54	41	76	30	73	13	24	7	54
1968	55	37	67	9	24	18	33	4	22
Totals	1250	770	62	515	66	480	38	292	60

It is obvious from Table I that few criminal cases were brought in the years 1970 and 1971. This is a reflection of the then-current enforcement policy deemphasizing criminal antitrust prosecutions. Thereafter, an appreciably larger percentage of the total cases filed were on the criminal side. In some years more than half of all cases were criminal. This temporary downplaying of the criminal enforcement tool was even more dramatically reflected in 1969, when only one criminal case was filed out of a total of forty-five cases.<sup>4</sup>

Antitrust enforcement policy is, of course, determined primarily by the Attorney General and the Assistant Attorney General in charge of the Antitrust Division, both of whom are presidential appointees subject to Senate confirmation. However, policy control by these officials cannot be exercised immediately because of the extended period of time necessary to prepare an antitrust case before it can be filed. A preliminary investigation, a full field investigation, discovery through civil investigative demands, perhaps even a grand jury investigation, can consume many months and even years before the government is ready to file a case. When a newly appointed head of the Antitrust Division takes office, the cases filed the next week, or the next month, are not necessarily a reflection of his ideas. The length of the pipeline for preparation of antitrust cases distorts the picture of a particular official's enforcement policies.

With this in mind, it is interesting to note the officials responsible for antitrust policy in the seventies. At the beginning of the decade, John Mitchell was the Attorney General and Richard W. McLaren was Assistant Attorney General heading the Antitrust Division. In 1972, Richard J. Kleindienst became Attorney General, followed by Elliot L. Richardson in

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4. In 1969, 44 civil cases were filed, of which 21 were settled by the entry of a consent decree. The one criminal case was *United States v. Dunham Concrete Prod., Inc.*, 475 F.2d 1241 (5th Cir. 1973), *cert. denied*, 414 U.S. 832 (1973); 501 F.2d 80 (5th Cir. 1974) (order for new trial of individual defendant reversed), *cert. denied*, 421 U.S. 930 (1975), involving extortion as well as an alleged Sherman Act offense.

the middle of 1973 and William B. Saxbe at the beginning of 1974. Edward H. Levi became Attorney General in the beginning of 1975 and was succeeded by Griffin B. Bell when the administration changed in early 1977. Benjamin R. Civiletti replaced Bell in the middle of 1979.

McLaren was named to the federal bench in 1972. Thomas E. Kauper succeeded him as head of the Antitrust Division. In the middle of 1976 Donald I. Baker became Assistant Attorney General. After the administration changed in 1977, John H. Shenefield became the Assistant Attorney General and remained in that post through the end of the decade.

### I. SHERMAN ACT CIVIL CASES

Civil cases comprised 410 of the 650 cases filed in the seventies. Of these civil cases, 279 were alleged violations of the Sherman Act, almost exclusively of section 1 of the Sherman Act.<sup>5</sup> Table II<sup>6</sup> shows the breakdown by year of the civil Sherman Act cases filed by the Antitrust Division. The Sherman Act cases usually represented more than half of the total civil cases filed, and in some years accounted for the great bulk of the civil filings.

For many years, the Department of Justice has had a policy of filing, in appropriate circumstances, a "companion" civil case to a criminal proceeding, filed at the same time and alleging the same offense, usually in identical phraseology. In most instances the defendants in both the criminal and the civil proceedings are the same, although at times individuals indicted in the criminal case are not named as defendants in the civil case. Since the purpose of the criminal case is to punish for past offenses, while the civil case is designed to prevent violations in the future, it is often ap-

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5. 15 U.S.C. §§ 1-7 (1976). Section 1 provides in part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

6. See note 2 *supra*.

propriate to file both types of cases in a given factual context. Table II shows the number of civil filings which were "companion" cases to criminal prosecutions.

TABLE II

Calendar Year	# of Civil Cases	Sherman Act Cases	Companion Cases	Reciprocal Dealing	Consent Judgments	Simultaneously Filed	Trials		Appeals	No Reported Action
							Gov. Prevailed	Def. Prevailed		
1970	57	38	7	6	37	19	-	1	-	-
1971	45	20	7	4	20	6	-	-	-	-
1972	73	55	17	10	45	21	1	8	2	1
1973	38	25	9	1	18	4	-	7	2	-
1974	38	31	15	2	27	5	1	1	-	2
1975	35	28	16	-	23	4	-	3	-	2
1976	39	28	13	-	20	-	2	3	1	3
1977	29	24	8	-	15	-	-	4	-	5
1978	27	17	8	-	14	-	-	-	-	3
1979	29	13	7	-	3	-	-	1	-	9
	410	279								

In 1965, Mr. Justice Douglas writing for the Supreme Court in *Federal Trade Commission v. Consolidated Foods Corp.*<sup>7</sup> said that "reciprocity . . . is one of the congeries of anticompetitive practices at which the anti-trust laws are aimed."<sup>8</sup> Subsequently the Antitrust Division filed civil complaints attacking reciprocal dealings by various large companies. Table II shows the number of such cases filed in the seventies.

7. 380 U.S. 592 (1965).

8. *Id.* at 594.

As was noted above in Table I, the great majority of civil cases filed, almost three-fourths, were disposed of by consent decree. The figure for Sherman Act civil cases settled by consent judgments is slightly higher, seventy-eight percent. But what is much more interesting about the consent judgment figures is the disappearance of the practice of filing such judgments at the same time as the complaint is filed. About twenty years ago, the Antitrust Division initiated the practice, in appropriate cases, of negotiating a consent decree with the companies under investigation prior to filing a formal complaint. The complaint would then be filed and the decree submitted to the court at the same time and announced in one press release. This practice of negotiating settlements in advance was used in numerous cases in the past, but was totally abandoned during the last four years of the decade.

Only thirty-two cases are listed under "Trials" in Table II, almost all of which were losses for the government.<sup>9</sup> This category of cases includes various proceedings or hearings, as well as regular trials, but excludes negotiated dispositions. Only five of these civil Sherman Act cases found their way to appellate courts.<sup>10</sup>

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9. The only one of the 38 Sherman Act cases filed in 1970 to actually come to trial was dismissed after the presentation of the government's case in chief. *United States v. Westinghouse Elec. Corp.*, 471 F. Supp. 532 (N.D. Cal. 1978). Included in the eight 1972 cases where the defendant prevailed at trial are three cases filed against each of the major television networks for monopolizing prime time television programming. A consent order settling the suit as it related to one of the codefendants (Viacom International, Inc., a former CBS subsidiary) was entered on Jan. 17, 1973. *United States v. CBS*, 1973-1 Trade Cas. (CCH) ¶ 74,269 (C.D. Cal. Jan. 17, 1973). The suits against the three networks, however, were dismissed without prejudice for the government's failure to comply with discovery orders to produce presidential documents which defendants asserted would show that the cases were filed because of President Nixon's desire for revenge. *United States v. NBC*, 65 F.R.D. 415 (C.D. Cal. 1975), *appeal dismissed for want of jurisdiction*, 421 U.S. 940 (1975). New complaints were filed less than a month later. Final consent decrees have been entered in the refiled cases for all three of the networks. *United States v. NBC, Inc.*, 1978-1 Trade Cas. (CCH) ¶ 61,855 (C.D. Cal. Nov. 28, 1977); *United States v. CBS*, [1980] 5 TRADE REG. REP. (CCH) ¶ 63,594 (C.D. Cal. July 3, 1980); *United States v. ABC*, [1980] 5 TRADE REG. REP. (CCH) ¶ 50,766 (C.D. Cal. Aug. 22, 1980). One of the three cases which defendants won in 1975 was dismissed at the request of the government after a verdict of acquittal had been directed at the close of the government's evidence in the companion criminal case: *United States v. ITT Continental Baking Co.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,075 (Case No. 2466) (S.D. Cal. July 19, 1976).

10. *National Broiler Marketing Ass'n v. United States*, 436 U.S. 816 (1978) (association not immune from antitrust attack under Capper-Volstead Act); *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978) (association's code of ethics violated § 1 of the Sherman Act); *United States v. National Ass'n of Security Dealers, Inc.*, 422 U.S. 694 (1975) (association rules immune from antitrust attack under § 22 of the Investment Act of 1940); *United States v. Texas State Bd. of Pub. Accountancy*, 464 F. Supp. 400 (W.D. Tex. 1978), *modified, aff'd per curiam*, 592 F.2d 919 (5th Cir. 1979), *cert. denied*, 444 U.S. 925



Perhaps the most interesting of the five was *National Society of Professional Engineers v. United States*.<sup>11</sup> The defendant Society had a membership of 69,000 graduate engineers, representing about seventeen percent of the nation's engineers registered or licensed to practice by the various states. The Society's code of ethics prohibited members from submitting competitive bids for their engineering services, and the United States charged that this violated section 1 of the Sherman Act since it eliminated price competition. The trial judge agreed,<sup>12</sup> holding that engineering, a learned profession, was not exempt from the Sherman Act, and that there was no "state action" here to protect the defendant. The trial judge had no trouble in finding that the challenged part of the code of ethics amounted to a *per se* violation of section 1:

The Court is convinced that the ethical prohibition against competitive bidding is on its face a tampering with the price structure of engineering fees in violation of § 1 of the Sherman Act. . . . The agreement among defendant's members to refrain from competitive bidding is an agreement to restrict the free play of market forces from determining price.<sup>13</sup>

The district court held that the code provision acted to fix prices and accordingly was *per se* an unreasonable restraint of trade; there was no need to consider whether the activity served an honorable or worthy end; and there was no occasion to test the code under the rule of reason.

Under the Expediting Act then in force<sup>14</sup> the defendant appealed directly to the Supreme Court. While the appeal was pending, the Court decided *Goldfarb v. Virginia State Bar*,<sup>15</sup> which held a fee schedule adopted by a bar association violated section 1 of the Sherman Act. Therefore, the Court vacated the lower court's ruling in *National Society of Professional Engineers* and remanded the case for reconsideration in light of the *Goldfarb* opinion.<sup>16</sup>

On remand, the district court adhered to its previous decision, holding

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(1979) (ban on competitive bidding illegal); *United States v. Empire Gas Corp.*, 393 F. Supp. 903 (W.D. Mo. 1975), *aff'd*, 537 F.2d 296 (8th Cir. 1976), *cert. denied*, 429 U.S. 1122 (1977) (trial court decision for defendant affirmed).

11. 435 U.S. 679 (1978).

12. *United States v. National Soc'y of Professional Eng'rs*, 389 F. Supp. 1193 (D.D.C. 1974), *vacated and remanded*, 422 U.S. 1031 (1975), *decision on remand*, 404 F. Supp. 457 (D.D.C. 1975), *aff'd in part, remanded for modification in decree*, 555 F.2d 978 (D.C. Cir. 1977), *aff'd*, 435 U.S. 679 (1978).

13. 389 F. Supp. at 1200.

14. Expediting Act, ch. 544, § 2, 32 Stat. 823 (1903) (current version at 15 U.S.C. § 29 (1974)).

15. 421 U.S. 773 (1975).

16. 422 U.S. 1031 (1975).

the code of ethics to be a *per se* violation of section 1 of the Sherman Act.<sup>17</sup> The main question on remand was the meaning of the Supreme Court's footnote 17 in the *Goldfarb* opinion, suggesting some distinction between a profession and a business.<sup>18</sup> The district court found, however, that the code provision was a *per se* violation since it dealt with the profession's business aspects rather than membership requirements or standards of conduct.<sup>19</sup>

Under a new appellate procedure<sup>20</sup> the case was appealed to the Court of Appeals for the District of Columbia Circuit. That court affirmed, agreeing with the district court that the ethics code provision was a *per se* violation and that there was no occasion to consider the price-fixing arrangement under a rule of reason approach.<sup>21</sup>

The Supreme Court, in its review of the decision, took the opportunity to provide considerable clarification in the previously confused area of the *per se* and rule of reason approaches to Sherman Act violations. The Society argued that the ban on competitive bidding in its code of ethics was not a Sherman Act violation because it was necessary to prevent defective engineering work which would result from attempts to submit the lowest possible bid. This would, the Society contended, endanger the public safety. Accordingly, the ethical ban should have been weighed under the rule of reason, and the district court's failure to do so precluded affirmance of its judgment.<sup>22</sup>

The Supreme Court held that this argument rested on a "fundamental misunderstanding of the Rule of Reason."<sup>23</sup> The rule of reason "does not

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17. 404 F. Supp. 457 (D.D.C. 1975).

18. Footnote 17 states:

The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today.

421 U.S. at 788-89, n.17.

19. 404 F. Supp. at 461.

20. The Expediting Act of 1903 was amended by the Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, § 5, 88 Stat. 1709 (1974) (currently codified at 15 U.S.C. § 29 (1976)), to provide for an initial review in the courts of appeals in most antitrust cases.

21. *National Soc'y of Professional Eng'rs v. United States*, 555 F.2d 978, 980-84 (D.C. Cir. 1977).

22. 435 U.S. 679, 687, 693-94 (1978).

23. *Id.* at 681.

open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions."<sup>24</sup> The Court pointed out that "unreasonableness" could be based either on the nature or character of the contract or act, or any surrounding circumstances giving rise to the inference or presumption that the contract or act was intended to restrain trade and enhance prices.<sup>25</sup> The Court concluded:

There are, thus, two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are "illegal *per se*." In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress.<sup>26</sup>

The Court found that the code of ethics' ban on competitive bidding amounted to a *per se* violation:

In this case we are presented with an agreement among competitors to refuse to discuss prices with potential customers until after negotiations have resulted in the initial selection of an engineer. While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement. . . . On its face, this agreement restrains trade within the meaning of § 1 of the Sherman Act.<sup>27</sup>

The Court pointed out that there was no broad exemption under the rule of reason for licensed professions. Ethical norms may serve to regulate and promote competition in the furnishing of professional services, but the rule of reason "does not support a defense based on the assumption that competition itself is unreasonable."<sup>28</sup>

Two other Supreme Court decisions resulted from civil Sherman Act

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24. *Id.* at 688.

25. *Id.* at 690.

26. *Id.* at 692 (footnote omitted).

27. *Id.* at 692-93.

28. *Id.* at 696. Justices Blackmun and Rehnquist did not join in the entire majority opinion written by Justice Stevens, although they concurred in the judgment. *Id.* at 699. Chief Justice Burger concurred and dissented in part. *Id.* at 701.

cases filed in the seventies, but these opinions are much less interesting. In February 1973, the government charged the National Association of Security Dealers, six large mutual funds, and nine major brokerage firms with violating section 1 of the Sherman Act by conspiring to prevent the development of a secondary market for mutual fund shares. The complaint, in eight counts, was dismissed by the trial court on the ground that the practices attacked were "immune from ordinary antitrust strictures" because of the provisions of the Investment Company Act of 1940 and the Securities Exchange Act of 1934.<sup>29</sup>

The Supreme Court affirmed in a five to four opinion.<sup>30</sup> Mr. Justice Powell, writing for the majority, found that the provisions of the Investment Company Act and the Securities Exchange Act either immunized the challenged practices from the Sherman Act or provided a sufficiently pervasive regulatory authority for the Securities and Exchange Commission that there was an implied immunity from antitrust liability. Justice White, writing for himself and Justices Douglas, Brennan, and Marshall, dissented, arguing that no implied antitrust immunity arose from the statutes involved in this case.<sup>31</sup>

In *National Broiler Marketing Association v. United States*<sup>32</sup> the defendant had been charged with violating section 1 of the Sherman Act by fixing prices for chickens. The district court dismissed the complaint<sup>33</sup> on the ground that the defendant was given immunity from the Sherman Act by the Capper-Volstead Act<sup>34</sup> dealing with agricultural cooperatives. The sole issue was whether the defendant qualified for Capper-Volstead immunity, since the members of the Association used contract growers in raising the chickens to marketable age. The government argued that the members were not "producers." The trial court ruled against the government, but the Fifth Circuit reversed on the ground that Capper-Volstead gave antitrust protection only to farmers and producers of agricultural products and not to all businesses in the industry.<sup>35</sup>

The Supreme Court affirmed on the grounds that the Capper-Volstead protection from the Sherman Act did not extend to an association whose

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29. *United States v. National Ass'n of Sec. Dealers, Inc.*, 374 F. Supp. 95 (D.D.C. 1973), *aff'd*, 422 U.S. 694 (1975). See Investment Company Act of 1940, 15 U.S.C. §§ 80a-1, 80a-22, 80a-22(d) (1976); Securities Exchange Act of 1934, 15 U.S.C. §§ 78a, 78j(b), 78o-3 (1976).

30. 422 U.S. 694 (1975).

31. *Id.* at 735 (White, J., dissenting).

32. 436 U.S. 816 (1978).

33. *United States v. National Broiler Marketing Ass'n*, 1975-2 Trade Cas. (CCH) ¶ 60,509 (N.D. Ga. Aug. 26, 1975).

34. 7 U.S.C. § 291 (1976).

35. 550 F.2d 1380 (5th Cir. 1977), *aff'd*, 436 U.S. 816 (1978).

members were essentially processors or packers and not farmers.<sup>36</sup> Justice White, joined by Justice Stewart, dissented on the ground that the statutory immunity should benefit all producers who partake in the risks of bringing an agricultural product to market.<sup>37</sup> On remand, the suit was dismissed by agreement between the parties, since the defendant association had abandoned the challenged practices and was in the process of dissolving.

A number of other cases filed in the seventies must be mentioned. The most interesting was *United States v. General Motors Corp.*,<sup>38</sup> in which the government tested unsuccessfully an approach to the "conspiracy" element of section 1 of the Sherman Act that had long been talked about but never put to the test. The government charged, in a two count indictment and in a companion civil complaint, that both General Motors and Ford had violated both sections 1 and 2 of the Sherman Act.<sup>39</sup> The section 1 charge, identically worded in both the indictment and the complaint, was that the defendants had engaged in a combination and conspiracy to unreasonably restrain the manufacture, sale and distribution of automobiles for the fleet market. The combination and conspiracy consisted of an agreement to eliminate price concessions in the sale or lease of automobiles to the fleet market.<sup>40</sup> Nine acts of the defendants in furtherance of the combination were specified. These included making individual public statements about their desire to eliminate price concessions and the difficulty of doing so unilaterally. It was also alleged that "certain officers and employees" of the two defendants individually made statements to industry groups about their willingness to discontinue price concessions, expecting the statements would be transmitted to the competition.<sup>41</sup> There was no suggestion that the defendants ever got together or communicated directly with each other concerning price concessions for fleet market sales, and the pleadings implicitly repudiated any such direct entry into a "combination or conspiracy."

The trial judge took the unusual step of ordering simultaneous civil and criminal trials:

In view of the similarity of the factual and legal issues

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36. 436 U.S. 816 (1978). The issue was of sufficient importance in the broiler industry that 19 states filed *amicus curiae* briefs before the Supreme Court.

37. *Id.* at 840 (White, J., dissenting).

38. 369 F. Supp. 1306 (E.D. Mich. 1974). *See also* 1974-2 Trade Cas. (CCH) ¶ 75,253 (E.D. Mich. Sept. 26, 1974); [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,072 (Case No. 2238) (E.D. Mich. Sept. 26, 1974).

39. 369 F. Supp. at 1306.

40. 1974-2 Trade Cas., ¶ 75,253 at 97,657.

41. *Id.* at 97,664.

presented by the government's prosecution of both criminal and civil proceedings, the court decided that the civil and criminal cases should be tried together with a jury impanelled to decide issues of fact in the criminal case and with the court sitting as the trier of fact in the civil case. Simultaneous trials in the civil and criminal proceedings began on September 4, 1973, and continued for some 15 weeks. After all sides had rested in the criminal case, the court granted defendants' motion for judgment of acquittal on the alleged violation of Section 2 of the Sherman Act. The case was submitted to the jury for determination on the Government's allegations relating to the claimed violation of Section 1 of that act. On December 19, 1973, the jury returned a verdict of not guilty as to both defendants.<sup>42</sup>

After making elaborate findings, the court dismissed the civil case, concluding that no agreement or conspiracy had been established. The court pointed out that basic to the government's case was the issue of whether the defendants had agreed with each other, directly or indirectly, to eliminate fleet discounts. The court reviewed the cases explaining an "agreement" and concluded that the defendants never agreed with anyone to eliminate fleet discounts:

Finally, the government's theory in this case comes dangerously close to precluding lawful pricing activity as part of vigorous price competition. Neither a pricing move by a competitor, nor a requested pricing change by a customer, can be regarded as an invitation to conspire which precludes a business from acting in its best economic interest by changing its prices when desirable. . . . The public announcement of a pricing decision cannot be twisted into an invitation or signal to conspire; it is instead an economic reality to which all other competitors must react. The government has not shown that either defendant intended its pricing moves to be a signal of its willingness to take specific additional pricing actions.<sup>43</sup>

Perhaps the most significant case filed in the last decade was the section 2 complaint against AT&T, Western Electric and Bell Labs.<sup>44</sup> American Telephone and Telegraph Co., reputedly the largest privately owned corporation in the world, and its two subsidiaries are alleged to have monopolized telecommunications services and equipment. The complaint prays for the divestiture of Western Electric, the Bell system manufacturer of

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42. *Id.* at 97,656-57.

43. *Id.* at 97,671.

44. *United States v. American Tel. & Tel. Co.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,074 (Case No. 2416) (D.D.C. Nov. 20, 1974).

equipment, from AT&T, and the separation of some or all of the Long Lines Department of AT&T from some or all of the Bell operating companies.<sup>45</sup>

Efforts by the defendants to assert that prior litigation precluded the suit or that they were immune from antitrust sanctions failed. The trial court has held that it has jurisdiction, and attempts to get higher courts to review this decision have failed. The court has also issued various orders dealing with discovery and stipulations.<sup>46</sup> The future course of this litigation will certainly be interesting, but its final outcome may not be known for years to come.

Another significant and still unresolved case is *United States v. Bechtel Corp.*<sup>47</sup> Bechtel, one of the world's largest prime contractors for major construction projects for government and large business, was charged with violating section 1 of the Sherman Act by refusing to deal with subcontractors in Arab League countries who were blacklisted by Arab organizations seeking an effective boycott of Israel.

A year after the suit was filed a consent judgment was filed, generally enjoining Bechtel from adhering to any blacklist put out by Arab countries or boycotting any subcontractor for such reasons. Thereafter both parties filed competitive impact statements and comments were received from numerous sources. Meanwhile the Export Administration Amendments of 1977<sup>48</sup> became law, providing a set of rules governing business practices of United States concerns in relation to international political boycotts. However, when the government moved, in 1978, for entry of the judgment, Bechtel claimed to have withdrawn its consent to the judgment, on the grounds of asserted conflicts with the intervening legislation, and interpretations given the judgment by the government with which Bechtel strongly disagreed. Despite the absence of the defendant's consent, the court—two years after the consent decree had been filed—ordered the judgment to be entered.<sup>49</sup>

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45. *Id.*

46. For the various reported preliminary decisions in this on-going case, see *United States v. American Tel. & Tel. Co.*, 461 F. Supp. 1314 (D.D.C. 1978); *United States v. American Tel. & Tel. Co.*, 427 F. Supp. 57 (D.D.C. 1976), *cert. before judgment denied*, 429 U.S. 1071 (1977), *cert. denied*, 434 U.S. 966 (1977); *United States v. American Tel. & Tel. Co.*, 86 F.R.D. 603 (D.D.C. 1980); *United States v. American Tel. & Tel. Co.*, 84 F.R.D. 350 (D.D.C. 1979); *United States v. American Tel. & Tel. Co.*, 83 F.R.D. 323 (D.D.C. 1979).

47. [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,076 (Case No. 2497) (N.D. Cal. Jan. 16, 1976). In addition to Bechtel Corp., four affiliates were named defendants.

48. Pub. L. No. 95-52, 91 Stat. 235 (1977) (current version at 50 U.S.C. app. § 2401 *et seq.* (Supp. III 1979)).

49. *See United States v. Bechtel Corp.*, 1979-1 Trade Cas. (CCH) ¶ 62,429 (N.D. Cal.

Aside from the fascinating question of a "consent" decree being entered over the vigorous objections of the "consenting" defendant, the case raises a very serious and perplexing question of the applicability of the antitrust laws outside the commercial arena. Does a boycott violate the Sherman Act when its sole motive is political or religious? Should the antitrust laws be applied to noncommercial conduct? The Supreme Court years ago in *Apex Hosiery v. Leader*<sup>50</sup> held a violent sit-in strike used in labor warfare was not a Sherman Act problem. In *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, the Supreme Court specifically refused to impute to the Sherman Act a purpose to regulate political activity.<sup>51</sup> Other recent cases have refused to apply the Sherman Act in situations where the questioned conduct was political or religious rather than commercial.<sup>52</sup> This seems much the better view, and *Bechtel* represents a very unfortunate prosecutorial decision to file such a complaint.

Several cases in the seventies involved allegations of patent misuse. In *United States v. Bristol Myers Co.*,<sup>53</sup> two drug manufacturing companies were charged with fraudently procuring and enforcing a patent on ampicillin, a semisynthetic penicillin. One of the defendants agreed to the entry of a consent judgment, but there is no reported action terminating the case with respect to the American defendant, Bristol Myers Co. In another case, Westinghouse Electric Co. and some Japanese manufacturers of electrical products were charged with exchanging patent and technology licenses, paying royalties regardless of any patent use, and misusing patents. The trial court dismissed the case, holding that the government had failed to show any misuse or abuse of patents.<sup>54</sup> Another case charged that a patent covering a process for making aluminum trialkyls (used as chemical intermediates) was being extended improperly by the defendants to cover unpatented products. A consent judgment was entered as to the three American companies that were defendants, and the district court found the arrangements illegal as to the German patentee.<sup>55</sup>

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Jan. 5, 1979); *United States v. Bechtel Corp.*, 1979-1 Trade Cas. (CCH) ¶ 62,430 (N.D. Cal. Jan. 5, 1979).

50. 310 U.S. 469 (1940).

51. 365 U.S. 127, 137 (1961).

52. *Missouri v. National Org. for Women, Inc.*, 620 F.2d 1301 (8th Cir. 1980); *Council for Employment & Economic Energy Use v. WHDH Corp.*, 580 F.2d 9 (1st Cir. 1978), cert. denied, 440 U.S. 945 (1979); *Allied Int'l, Inc. v. International Longshoremen's Ass'n*, 492 F. Supp. 334 (D. Mass. 1980); *Costello Publishing Co. v. Rotelle*, 1980-2 Trade Cas. (CCH) ¶ 63,499 (D.D.C. Aug. 22, 1980).

53. 1979-2 Trade Cas. ¶ 62,738 (D.D.C. May 21, 1979).

54. *United States v. Westinghouse Elec. Corp.*, 471 F. Supp. 532 (N.D. Cal. 1978).

55. *United States v. Studiengesellschaft Kohle*, 1978-2 Trade Cas. (CCH) ¶ 62,291 (D.D.C. Oct. 3, 1978).



Monopolization of rear projection read-outs, achieved in part by defendant's acquisition of patents and filing of infringement suits in order to harm competitors, was alleged in *United States v. Industrial Electronic Engineers, Inc.* A consent decree provided, among other things, for royalty-free non-exclusive licensing of certain patents.<sup>56</sup> Two other cases involved research and development. One was brought against United Aircraft charging it with violating section 2 of the Sherman Act by attempting to monopolize research and development in fuel cells by various agreements with TRW, blocking the latter's research in this area. A consent judgment prohibited such restrictive agreements.<sup>57</sup> In another case, the government charged Manufacturers Aircraft Association and twenty of its corporate members, including all the major manufacturers of airplanes, with violating section 1 by eliminating competition in research and development in patents and patentable inventions. The case was terminated by a consent judgment providing for the dissolution of the defendant association and appropriate injunctive relief.<sup>58</sup>

A series of three cases charged distributors of nickel with violating both section 1 of the Sherman Act and section 3 of the Clayton Act prohibiting tie-in sales, by selling nickel, then in short supply, to customers who required it for electroplating only on the condition the customer also buy electroplating materials such as acids, salts, chemicals, and equipment from the defendant. Two of these cases were settled by a consent judgment, and the third dismissed when relief was obtained in another proceeding.<sup>59</sup>

Professional associations were named as defendants in five other cases. Three of these involved codes or standards of ethics that contained provisions prohibiting competitive bidding or limiting conditions under which price proposals could be submitted. The separate cases involved the American Society of Civil Engineers,<sup>60</sup> the American Institute of Architects,<sup>61</sup> and American Institute of Certified Public Accountants, Inc.<sup>62</sup>

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56. 1977-2 Trade Cas. (CCH) ¶ 61,734 (C.D. Cal. Oct. 3, 1977).

57. *United States v. United Aircraft Corp.*, 1973-1 Trade Cas. (CCH) ¶ 74,467 (D. Conn. June 11, 1973).

58. *United States v. Manufacturers Aircraft Ass'n, Inc.* 1976-1 Trade Cas. (CCH) ¶ 60,810 (S.D.N.Y. Nov. 12, 1975).

59. *United States v. M & T Chemicals, Inc.*, 1975-2 Trade Cas. (CCH) ¶ 60,536 (S.D.N.Y. Sept. 23, 1975); *United States v. Kewanee Oil Co.*, 1975-2 Trade Cas. (CCH) ¶ 60,537 (S.D.N.Y. Sept. 23, 1975); *United States v. Udylyte Corp.*, 1979-1 Trade Cas. (CCH) ¶ 62,468 (S.D.N.Y. May 16, 1975). See *Occidental Petroleum Corp.*, 77 F.T.C. 710 (1970).

60. *United States v. American Soc'y of Civil Eng'rs*, 1972 Trade Cas. (CCH) ¶ 73,950 (S.D.N.Y. June 1, 1972).

61. *United States v. American Inst. of Architects*, 1972 Trade Cas. (CCH) ¶ 73,981 (D.D.C. June 19, 1972), *modified*, 1972 Trade Cas. (CCH) ¶ 74,074 (D.D.C. June 19, 1972).

Each case was terminated by the entry of a consent judgment at the same time the complaint was filed. In 1976, a civil contempt action was filed against the American Society of Civil Engineers for violating this decree, and the Society was found to be in contempt.<sup>63</sup>

The other two professional association cases involved bar associations. A suit was filed against the Oregon State Bar charging that it violated section 1 by issuing a uniform fee schedule. The complaint was dismissed eighteen months after it was filed when the court granted the defendant's motion to dismiss on grounds of mootness, the association having withdrawn its fee schedule.<sup>64</sup> The other case named the American Bar Association and charged a violation of section 1 because of the Association's prohibition of advertising by lawyers. The court dismissed the case in August, 1978.<sup>65</sup>

A few more cases merit brief comment. In 1972, each of the three major television networks was charged, in separate suits, with violating sections 1 and 2 of the Sherman Act by restricting competition for and monopolizing prime-time entertainment programs. Each case alleged that the defendant used its control over access to prime-time television to block programs of independents or programs in which the defendant had no ownership interest.<sup>66</sup> The National Association of Broadcasters was accused of violating section 1 by the "overcommercialization" rules in its Code which unduly restrict the quantity and format of advertising.<sup>67</sup>

Two cases involved major exchanges. The Chicago Board of Trade agreed to the entry of a consent judgment terminating a case which had alleged fixing of rates and fees for trading in commodity futures contracts.<sup>68</sup> A suit against the Chicago Board Options Exchange alleging the fixing of fees and commissions for trading in securities options was dismissed by the court after the Supreme Court rendered its decision in a suit

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62. *United States v. American Inst. of Certified Pub. Accountants, Inc.*, 1972 Trade Cas. (CCH) ¶ 74,007 (D.D.C. July 6, 1972).

63. The court found the defendant had violated the earlier judgment, and ordered that certain disciplinary action taken against some members be rescinded. *United States v. American Soc'y of Civil Engineers*, 446 F. Supp. 803 (S.D.N.Y. 1977).

64. *United States v. Oregon State Bar*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,074 (Case No. 2383) (D. Or. May 9, 1974). See *United States v. Oregon State Bar*, 385 F. Supp. 507 (D. Or. 1974).

65. *United States v. American Bar Ass'n*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,076 (Case No. 2524) (D.D.C. Aug. 30, 1976).

66. See note 9 *supra*.

67. *United States v. National Ass'n of Broadcasters*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,079 (Case No. 2708) (D.D.C. June 14, 1979).

68. *United States v. Board of Trade, Inc.*, 1974-1 Trade Cas. (CCH) ¶ 75,071 (N.D. Ill. June 28, 1974).

involving another exchange.<sup>69</sup>

A few other cases alleged interesting trade restraining practices. Pittsburgh Area Pontiac Dealers were charged with price fixing because the dealers agreed to advertise as a group and list prices for particular models; a consent judgment ended the suit.<sup>70</sup> A case filed in Massachusetts alleged that a bank which leased space for a branch in New England's largest shopping center violated section 1 by a clause in the lease forbidding the lessor to rent space to any other financial institution.<sup>71</sup> Two Atlanta ready-mix concrete companies were charged with coercing their suppliers to use the services of a particular bank, a codefendant: a consent judgment was filed at the same time as the complaint.<sup>72</sup>

A roofers association was sued because its members agreed that guarantees on replacement roofs would only apply for two years' time:<sup>73</sup> a consent judgment was entered. Three firms were accused of violating both sections 1 and 2 in connection with trade in chrysanthemum cuttings: the defendants agreed to a judgment.<sup>74</sup>

## II. CLAYTON ACT CASES

In the decade of the seventies, the Antitrust Division filed 124 cases charging violations of the Clayton Act.<sup>75</sup> The great majority of these, 111 cases, were brought under section 7.<sup>76</sup> Nine cases were filed under section

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69. *United States v. Chicago Board Options Exchange, Inc.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,073 (Case No. 2319) (Aug. 25, 1975). *See Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975) (finding fixed commission rates, since actively supervised by the SEC, to be outside the reach of the Sherman Act).

70. *United States v. Pittsburgh Area Pontiac Dealers, Inc.*, 1978-2 Trade Cas. (CCH) ¶ 62,233 (W.D. Pa. July 24, 1978).

71. *United States v. Warren Five Cents Savings Bank*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,079 (Case No. 2710) (June 29, 1979).

72. *United States v. Jackson's Atlanta Ready Mix Concrete Co.*, 1972 Trade Cas. (CCH) ¶ 73,827 (N.D. Ga. Mar. 1, 1972).

73. *United States v. Roofing, Metal & Heating Assocs., Inc.*, 1973-2 Trade Cas. (CCH) ¶ 74,736 (E.D. Pa. Nov. 13, 1973).

74. *United States v. Yoder Bros., Inc.*, 1972 Trade Cas. (CCH) ¶ 73,820 (N.D. Ohio Mar. 15, 1972).

75. Clayton Act, ch. 323, 38 Stat. 730 (1914).

76. Clayton Act, ch. 323, § 7, 38 Stat. 731 (1914) (codified at 15 U.S.C. § 18 (1976)). The first paragraph of § 7 reads:

No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition or to tend to create a monopoly.

4A<sup>77</sup> and four under section 8.<sup>78</sup> In addition, seven civil contempt cases were initiated.

Table III shows details of the section 7 Clayton Act cases by each year. Because bank mergers comprised a major share of the merger cases, and because the Bank Merger Act of 1966<sup>79</sup> singled out this kind of merger for

TABLE III

Calendar Year	Total Civil Cases	§ 7 Cases	Settled by Agreement	Trial		Appeals	§ 4A Cases	§ 8 Cases	Civil Contempt	No Reported Action
				Gov. Won	Def. Won					
1970	57	18(5)	9(1)	2(1)	7(3)	3	1			
1971	45	21(9)	14(5)		7(4)	3	1		3	
1972	73	18(6)	13(4)		5(2)	1	-			
1973	38	13(5)	9(3)	1	3(2)	1	-			
1974	38	7(2)	5(2)	1	1		-			
1975	35	3	1	1	1	2	-	3	1	
1976	39	8(1)	4	1	3(1)	1	1	1	1	
1977	29	5(1)	3(1)		2		-			
1978	27	8	2		1		2			5
1979	29	10(2)	6(1)		2	2	4		2	2(1)
	410	111(31)	66(17)				9	4	7	

special treatment, the statistics for bank mergers are indicated in the table in parentheses. Far fewer section 4a and section 8 cases were filed, and

77. Clayton Act, ch. 323, § 4a, *as amended*, ch. 283, § 1, 69 Stat. 282 (1955) (codified at 15 U.S.C. § 15a (1976)). This section permits the United States to recover actual damages sustained by it in its business or property by reason of anything forbidden in the antitrust laws.

78. Clayton Act, ch. 323, § 8, 38 Stat. 732 (1914), *as amended*, (codified at 15 U.S.C. § 19 (1976)). This section forbids interlocking directors serving competing corporations.

79. 12 U.S.C. § 1828(c) (1976). The genesis and nature of this statute are dealt with in Kirkpatrick, *Antitrust to the Supreme Court: The Expediting Act*, 37 GEO. WASH. L. REV. 746, 777-80 (1969).

only total numbers are shown. Few civil contempt cases were brought, and they are included in this table to complete the total number of civil cases filed in each year of the decade.

The decline in the number of section 7 merger cases filed in the later years of the decade is pronounced, and the decline in the number of bank mergers challenged is even more pronounced. More than half of all merger cases filed were disposed of by the entry of a consent judgment, which almost invariably required the divestiture of certain property by the defendant, or by the government's dismissal of the case following the abandonment of the merger plans by the parties. The most interesting figure in Table III is the number of merger cases which went to trial and resulted in a victory for the defendants. Of all the cases that were not settled by agreement, the government prevailed in only sixteen percent.

Three of the merger cases filed in the seventies, each of which involved banks, led to major Supreme Court decisions. Two of these Supreme Court opinions dealt with the "potential competition" doctrine and did very little to clarify the law in that area. The potential competition doctrine has had something of a checkered career, and there is some question whether it is still alive. Apparently the term was first used by the Supreme Court in *United States v. El Paso Natural Gas Co.*,<sup>80</sup> but that case was really one of actual rather than potential competition, and the doctrine was defined more clearly in *United States v. Falstaff Brewing Corp.*<sup>81</sup> The latter case was filed by the government in 1965, and charged that Falstaff, a national brewer which did not sell in the northeast, violated section 7 by acquiring the largest New England brewery. The trial court found that Falstaff would not have entered the New England market by any route other than acquisition of the largest local brewery, and dismissed the complaint.<sup>82</sup>

On appeal, Justice White wrote the opinion for the Supreme Court. After pointing out the types of mergers condemned by section 7, White continued:

Suspect also is the acquisition by a company not competing in the market but so situated as to be a potential competitor and likely to exercise substantial influence on market behavior. Entry through merger by such a company, although its competitive conduct in the market may be the mirror image of that of the acquired company, may nevertheless violate § 7 because the en-

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80. 376 U.S. 651, 659 (1964).

81. 410 U.S. 526 (1973).

82. *United States v. Falstaff Brewing Corp.*, 332 F. Supp. 970 (D.R.I. 1971), *rev'd and remanded*, 410 U.S. 526 (1973), *decision on remand*, 383 F. Supp. 1020 (D.R.I. 1974).

try eliminates a potential competitor exercising present influence on the market. As the Court stated in *United States v. Penn-Olin Chemical Co.*, . . . "The existence of an aggressive, well equipped and well financed corporation engaged in the same or related lines of commerce waiting anxiously to enter an oligopolistic market would be a substantial incentive to competition which cannot be underestimated."<sup>83</sup>

The Court said that the key question was whether it would be reasonable to consider Falstaff as a potential entrant into the New England market given the conditions of that market and Falstaff's capabilities. The internal company decision not to enter the market except by acquisition was relatively less important. On remand, the trial court was to consider this question.<sup>84</sup>

In *United States v. First National Bankcorporation*,<sup>85</sup> which was argued with *Falstaff*, the government challenged the acquisition by the largest banking organization in Colorado, headquartered in Denver, of a bank in Greely, 50 miles north of Denver, which was the third largest independent bank outside Denver. The government relied on the theory of potential competition, since no direct competition was involved, but the trial court dismissed the complaint because there was no evidence that the defendant would enter the Greely market except by acquisition, and no evidence showing the defendant had any present influence on the competitive market in *Greely*.<sup>86</sup>

In the Supreme Court, Mr. Justice Powell took no part in the case, and the dismissal below was affirmed by an equally divided Court. Presumably, Justices Stewart and Rehnquist, dissenters in *Falstaff*,<sup>87</sup> were for affirmance, and were joined by Chief Justice Burger and Justice Blackmun (who along with Powell made the majority in the next potential competition case);<sup>88</sup> Justices White, Douglas, Brennan, and Marshall presumably were for reversing.

*United States v. Marine Bancorporation*<sup>89</sup> involved a challenge under section 7 by the government to the acquisition by Washington's second

83. 410 U.S. at 531-32 (citations omitted).

84. *Id.* at 537. On remand, the district court dismissed the complaint, finding Falstaff was not a potential competitor. 383 F. Supp. 1020 (D.R.I. 1974).

85. 329 F. Supp. 1003 (D. Colo. 1971), *aff'd by an equally divided court*, 410 U.S. 577 (1973).

86. 329 F. Supp. at 1015.

87. 410 U.S. 526, 572 (Rehnquist, J., dissenting).

88. See notes 90-94 and accompanying text *infra*.

89. 1973-1 Trade Cas. (CCH) ¶ 74,496 (W.D. Wash. Jan. 31, 1973), *aff'd*, 418 U.S. 602 (1974).

largest banking organization, headquartered in Seattle, of the second largest bank in Spokane. Washington law prohibited branching into any town, other than a bank's headquarters, where another bank had an office. The only route for expansion into a town where there was a preexisting bank was by acquisition. The trial court dismissed the case, holding that the government had failed to prove any anticompetitive effects.<sup>90</sup>

The Supreme Court affirmed, with the "new antitrust majority," (in the words of Justice White in dissent),<sup>91</sup> refusing to apply the traditional potential competition doctrine to the facts of this case.<sup>92</sup> The majority held that the relevant market was commercial banking in the Spokane area and not statewide, and that the proper geographic market was the area in which the acquired firm was an actual, direct competitor. The Court held that the potential competition doctrine is applicable to commercial banking, but that the unique federal and state regulatory restraints on entry into the commercial banking market must be considered. The government's failure to recognize these restraints on entry into this market and its attempt to treat banking like beer amounted to a misconception of the potential competition doctrine, according to the Court.<sup>93</sup> The dissenters, Justices White, Brennan, and Marshall, accused the "new antitrust majority" of chipping away at the policies of section 7 and redefining the elements of potential competition, greatly increasing the burden of establishing a section 7 violation.<sup>94</sup>

*United States v. Connecticut National Bank*<sup>95</sup> was decided the same day as the previous case, by essentially the same alignment of Justices. In that case, the government challenged the acquisition by the fourth largest bank in Connecticut, headquartered in Bridgeport, of the eighth largest bank, headquartered in New Haven. Under Connecticut law, one bank may not branch into any town containing the main office of another bank. Since there was no direct competition, the government relied on the potential competition theory and claimed the entire state was an appropriate market in which to review this merger. The district court dismissed the case.<sup>96</sup> The Supreme Court reversed, holding that commercial banking was the product market, but the relevant geographic market was the localized area

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90. 1973-1 Trade Cas. ¶ 74,496, *supra* note 89, at 94,251.

91. 418 U.S. at 643 (White, J., dissenting).

92. *See id.* at 625-41. While the majority did apply the potential competition doctrine to the case, it nonetheless found that the doctrine had little effect in the commercial banking setting where state regulations impose stringent barriers to entries into new markets. *Id.*

93. *Id.* at 627-29.

94. *Id.* at 642 (White, J., dissenting).

95. 362 F. Supp. 240 (D. Conn. 1973), *vacated and remanded*, 418 U.S. 656 (1974).

96. 362 F. Supp. 240.

in which the acquired bank is in significant, direct competition with other banks, albeit not with the acquiring bank. Accordingly, there was no appropriate statewide market, and the trial court would have to determine the competitive effect of this merger in localized areas where each bank had its offices.<sup>97</sup>

Where does this leave the potential competition doctrine? Justice White, who wrote the *Falstaff* opinion defining much of that doctrine, thinks the "new antitrust majority" of the Court has limited that doctrine and made it much more difficult to establish a section 7 violation, absent direct competition between the parties.<sup>98</sup> Certainly the doctrine seems to be very restricted in its application to bank mergers. True, state regulations in the area vary wildly and have some bearing on how realistically a concern is viewed as a potential entrant into a market and, as such, exercises a competitive effect on that market. But this series of opinions seems to have removed from practical consideration statewide geographic markets.

The only other Supreme Court opinion in a section 7 case filed in the last decade came in *United States v. Citizens & Southern National Bank*.<sup>99</sup> The government challenged the acquisition by Citizens & Southern, Georgia's largest bank organization, of five suburban Atlanta banks. These had been established as *de facto* branches, Citizens & Southern owning five percent of the stock and the balance held in friendly hands. The purpose of the holding arrangement was to circumvent Georgia law restricting city banks' attempts to open suburban branches. In 1970, Georgia changed this law, and Citizens & Southern then sought to absorb the suburban banks and make them true branches. The trial court dismissed the case on the ground that the suburban banks had always been *de facto* branches, and the stock acquisition by Citizens & Southern that was now permissible under state law had no anticompetitive effect.<sup>100</sup> The Supreme Court affirmed, since the acquisition extinguished no present competition (there never had been any) and there was no realistic prospect of any future competition developing.<sup>101</sup>

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97. 418 U.S. at 667, 671. Justice Powell wrote the majority opinion, joined by Chief Justice Burger and Justices Stewart, Blackmun, and Rehnquist. 418 U.S. 656. The dissent was by Justice White, joined by Douglas, Brennan, and Marshall. *Id.* at 673 (White, J., concurring in part, dissenting in part). On remand, the banks abandoned the merger and the case was dismissed.

98. See *United States v. Marine Bancorporation*, 418 U.S. at 654 (White, J., dissenting).

99. 372 F. Supp. 616 (N.D. Ga. 1974), *aff'd*, 422 U.S. 86 (1975).

100. See 372 F. Supp. at 642-43.

101. 422 U.S. at 121. The government had also contended that the arrangement between Citizens & Southern and the suburban banks violated § 1 of the Sherman Act, but the Court ruled to the contrary. 422 U.S. at 119-20.



A somewhat similar factual situation had been presented several years earlier in *United States v. Trans Texas Bancorporation, Inc.*<sup>102</sup> A group of individuals owned controlling stock in a large downtown El Paso bank and they set up three suburban banks, holding stock control of each. At that time Texas law did not permit branching at all. The trial court held that there was no competition between these banks, and accordingly their acquisition by a bank holding company did not eliminate competition and so did not violate section 7.<sup>103</sup> The Supreme Court summarily affirmed.<sup>104</sup>

On November 14, 1973, three bank merger cases were filed in Detroit challenging acquisitions of banks in East Lansing, Saginaw, and Grand Rapids by Michigan's largest bank outside Detroit.<sup>105</sup> Because of the mechanics by which these acquisitions were planned, they required the approval of both the Federal Reserve Board and the Comptroller of the Currency. The former gave approval but before the latter acted, the United States filed the three cases. The trial court dismissed each as premature, since the mergers could not occur absent the Comptroller's approval. The United States appealed to the Supreme Court, which reversed *per curiam*. Some two years later all three cases were terminated by dismissal of the Saginaw and Grand Rapids cases and in the East Lansing case by the entry of a consent judgment requiring the divestiture of the bank in that city and enjoining future acquisitions in the Saginaw and Grand Rapids areas.<sup>106</sup>

Little needs to be said about the remaining bank merger cases filed in the last decade. The Bennington, Vermont, "area" was held not to be too insignificant for section 7 purposes.<sup>107</sup> Another Colorado bank merger case was dismissed following the Supreme Court's action in *Greely* discussed above.<sup>108</sup> In most of the other cases, the suits were dismissed after

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102. 1972 Trade Cas. (CCH) ¶ 74,257 (W.D. Tex. Nov. 13, 1972), *aff'd mem.*, 412 U.S. 946 (1973).

103. *Id.*

104. 412 U.S. 946 (1973). Justices Brennan, White and Marshall would have noted probable jurisdiction.

105. *United States v. Michigan Nat'l Corp.*, 1974-1 Trade Cas. (CCH) ¶ 74,928 (E.D. Mich. Feb. 19, 1974), *vacated and remanded per curiam*, 419 U.S. 1 (1974); 1976-2 Trade Cas. (CCH) ¶ 61,101 (E.D. Mich. Sept. 22, 1976) (consent decree).

106. *See* §§ IV & VI of the consent decree, 1976-2 Trade Cas. (CCH) ¶ 61,101, at 69,982-83.

107. *United States v. County Nat'l Bank of Bennington*, 339 F. Supp. 85, 91 (D. Vt. 1972).

108. *United States v. First Nat'l Bancorporation, Inc.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,070 (Case No. 2141) (D. Colo. June 1, 1973). *See* notes 85-88 and accompanying text *supra*.

the merger was abandoned; occasionally the merger was allowed to stand but injunctive provisions prohibited other acquisitions.

Two cases, *United States v. County National Bancorporation*<sup>109</sup> and *United States v. United Virginia Bancshares, Inc.*,<sup>110</sup> went against the government on the issue of geographic market. In both, the courts held the government was seeking to define too narrow a market. In a field related to banking, two cases challenged acquisitions by Beneficial Corporation of substantial finance companies. The actions were terminated by consent judgments requiring the divestiture of various local offices in cities where concentration in this business was most pronounced.<sup>111</sup> In a similar case, challenging the acquisition by Household Finance Co. of an independent consumer finance company, the trial court held that personal loans by finance companies did not constitute a separate line of commerce. The appellate court reversed.<sup>112</sup>

The nonbank merger cases filed in the seventies produced no interesting law, but some of the complaints deserve brief mention. Two suits were filed against United Technologies Corp., alleging that its tender offers for Babcock & Wilcox and for Carrier Corporation violated section 7. *United States v. United Technologies Corp. (Babcock & Wilcox)*<sup>113</sup> involved equipment for the generation of power by utilities. United Technologies produced gas turbines and Babcock & Wilcox produced fossil fuel and nuclear systems. The complaint was dismissed on the ground that the two types of equipment were not in the same product market. In *United States v. United Technologies Corp. (Carrier)*,<sup>114</sup> the Carrier acquisition involved competition in heating and air conditioning equipment and in magnet wire. This case was settled by a consent judgment requiring United Technologies to make certain trade secrets and patents available to competitors.

Acquisitions by conglomerates, of course, raise many complex problems under section 7, such as market definition as in the *United Technologies (Babcock & Wilcox)* case above, or partial overlap of various subordinate

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109. 355 F. Supp. 538 (E.D. Mo. 1973).

110. 347 F. Supp. 891 (E.D. Va. 1972).

111. *United States v. Beneficial Corp.*, 1980-1 Trade Cas. (CCH) ¶ 63,137 (N.D. Ill. Dec. 17, 1979); *United States v. Beneficial Corp.*, 1980-1 Trade Cas. (CCH) ¶ 63,136 (N.D. Ill. Dec. 17, 1979).

112. *United States v. Household Fin. Corp.*, 602 F.2d 1255 (7th Cir. 1979), *cert. denied*, 444 U.S. 1044 (1980).

113. 1977-2 Trade Cas. (CCH) ¶ 61,647 (N.D. Ohio Sept. 9, 1977).

114. 5 TRADE REG. REP. (CCH) ¶ 50,767 (N.D.N.Y. Sept. 11, 1980) (proposed consent decree).

fields. *United States v. Occidental Petroleum Corp.*,<sup>115</sup> a suit based on a tender offer by Occidental for Mead Corporation, illustrates this problem. Occidental, then the twenty-seventh largest industrial corporation in the country, was in a wide variety of business activities here and abroad. It was this country's twelfth largest oil company, the tenth largest chemical producer, and the fourth largest coal company. Mead was the 138th largest company, with primary emphasis on forest products. It was the fifth largest pulp and paper company; a major producer of chemicals, coal, iron castings, and molded rubber products; a distributor of numerous supplies for the oil and gas industries; and the largest supplier of computerized legal research systems. The complaint charged, in three counts, the lessening of competition in sodium chlorate, in carbonless copy paper, and in prime coking coal. On March 29, 1979, the Court dismissed the complaint after Occidental abandoned the acquisition.

An interesting new pleading format is illustrated in *Occidental Petroleum* where the government's complaint is divided into separate counts alleging section 7 violations in separate markets. Earlier section 7 pleadings were not divided in this way and tended to delineate the affected markets only in describing the effects of the challenged merger. While the practice of alleging various counts in the complaint does, in fact, separate the markets in which the effects of the merger are to be evaluated, such a procedure tends to under-emphasize the anticompetitive impact of the merger of two giant corporations, even though direct competition in any field may be minimal. It is instructive to compare the allegations of the three counts in *Occidental Petroleum*, which each involve substantial but hardly fundamental and basic economic markets, with the allegations contained in the complaint filed in *United States v. Ling-Temco-Vought, Inc.*<sup>116</sup> which challenged LTV's acquisition of Jones & Laughlin Steel:

The effect of the acquisition . . . may be to substantially lessen competition . . . in the following ways:

Potential independent competition by LTV and J & L Steel may be diminished in the steel industry, in other markets in which only one of them presently competes, and in certain other markets in which neither of them presently competes;

. . . .

Concentration of control of manufacturing assets will be sub-

115. [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,078 (Case No. 2668) (W.D. Ohio Oct. 11, 1978).

116. [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,070 (Case No. 2045) (W.D. Pa. May 27, 1971).

stantially increased.<sup>117</sup>

Pleading the section 7 violation in various counts each limited to a relatively narrow market might pose a serious question if one of the parties abandoned each of the specified markets: whether the merger would still violate section 7 by combining two giant concerns, increasing sheer size, and certainly increasing the "concentration of control of manufacturing assets."

The Mead Corporation was a defendant in *United States v. British Columbia Forest Products, Ltd.*,<sup>118</sup> filed on August 17, 1978. The complaint alleged a violation of section 7 in the market for coated groundwood papers which resulted from an acquisition of a Minnesota paper company by a company jointly controlled by Mead and a Canadian corporation.

Emerson Electric's acquisition of fifty percent of the stock of Skil Corporation was challenged as violating section 7. In *United States v. Emerson Electric Co.*,<sup>119</sup> a five count complaint was settled by a consent judgment providing for certain divestiture and other relief. Acquisitions by International Nickel Co., by Merck & Co., by Martin-Marietta, by White Consolidated Industries, and by Combustion Engineering also were challenged, decrees in the first three of these cases providing for certain divestiture or other injunctive relief.<sup>120</sup>

One interesting variant occurred in *United States v. Hercules, Inc.*<sup>121</sup> where the government charged that Hercules and a Japanese partner violated section 7 by the formation of a partnership through which each of the

117. See ¶ 33 of the complaint in Case No. 2045, filed April 14, 1969 in the Western District of Pennsylvania.

118. [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,078 (Case No. 2650) (D. Minn. Aug. 17, 1978).

119. *United States v. Emerson Elec. Co.*, 1980-2 Trade Cas. (CCH) ¶ 63,336 (N.D. Ill. 1980). Involved were the markets in portable electric tools, gasoline chain saws, and various other sub-markets.

120. *United States v. Merck & Co.*, 5 TRADE REG. REP. (CCH) ¶ 63,682 (S.D. Cal. Dec. 1, 1980); *United States v. Martin-Marietta Corp.*, 1980-1 Trade Cas. (CCH) ¶ 63,109 (N.D. Ill. Dec. 14, 1979); *United States v. Inco Ltd.*, 1978-1 Trade Cas. (CCH) ¶ 61,869 (E.D. Pa. Jan. 27, 1978); *United States v. White Consol. Indus.*, 323 F. Supp. 1397 (N.D. Ohio 1971) (preliminary injunction restraining merger); *United States v. Combustion Eng'r, Inc.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,078 (Case No. 2641) (D. Conn. May 10, 1978). In addition, Combustion Engineering was the defendant in two earlier cases challenging acquisitions in the fields of industrial boilers and pulp and paper machinery. A consent decree requiring divestiture was entered in the boiler case, *United States v. Combustion Eng'r, Inc.*, 1971 Trade Cas. (CCH) ¶ 73,648 (D. Conn. Sept. 8, 1971), *motion for further relief denied*, 364 F. Supp. 181 (D. Conn. 1972). The pulp and paper case was dismissed without prejudice, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,070 (Case No. 2129) (D. Conn. Jan. 1, 1974).

121. 1973-1 Trade Cas. (CCH) ¶ 74,530 (D. Del. Jul. 3, 1973).

partners acquired from the other patents relating to polypropylene. A consent judgment dissolved the partnership and restricted the exchange of technology.

Not all the section 7 cases filed in the seventies involved major companies or basic economic markets. Cases challenged mergers in the fields of artificial Christmas trees, all-beef casing frankfurters, and frozen dessert pies.<sup>122</sup> The other cases filed in this period involved a great variety of companies, markets and products. Most of these cases were terminated either by consent judgments requiring some divestiture together with other appropriate injunctive relief, or by dismissal when the merger was abandoned.

The cases lost by the government turned on a variety of issues. In several, the court disagreed with the government on its definition of relevant product market, and found the two concerns to be in separate markets. On occasion, the court accepted a failing company defense,<sup>123</sup> or found that a regulatory agency had primary jurisdiction over the acquisition. In some, the trial court held the government had failed to prove any anticompetitive effects of the merger.

During the decade of the seventies, four cases were filed charging an interlock of a director in violation of section 8, and one other case primarily under section 7 also alleged a section 8 violation. Two of the section 8 cases involved an individual acting as a director of two companies in the oil and gas industry. Foster Bam was a director of both Cities Service, a major oil company, and of American Natural Gas, a major pipeline company. The two companies were alleged to compete in seeking oil and gas producing properties. A consent decree required Mr. Bam to resign from American Natural Gas.<sup>124</sup> Marsh Cooper was a director of both Superior Oil and Texas Eastern Transmission, which allegedly competed in obtaining oil and gas properties. A consent judgment terminated the interlock.<sup>125</sup>

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122. *See* *United States v. Mrs. Smith's Pie Co.*, 1977-2 Trade Cas. (CCH) ¶ 61,606 (E.D. Pa. Apr. 28, 1977); *United States v. American Technical Indus., Inc.*, 1974-2 Trade Cas. (CCH) ¶ 75,376 (M.D. Pa. Dec. 3, 1974); *United States v. Marathon Enterprises, Inc.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,072 (Case No. 2296) (D.N.J. Dec. 14, 1972).

123. This is a doctrine developed by the courts to the effect that if the acquired company is very likely to fail and if there is no other realistic purchaser, then the acquisition does not lessen competition and so is not a § 7 violation. *See* *Citizen Publishing Co. v. United States*, 394 U.S. 131, 136-39 (1969).

124. *United States v. Bam*, 1976-1 Trade Cas. (CCH) ¶ 60,734 (D. Conn. Feb. 5, 1976).

125. *United States v. Cooper*, 1976-1 Trade Cas. (CCH) ¶ 60,952 (S.D. Tex. June 24, 1976).

More interesting are two cases filed in San Francisco alleging that a person serving as a director both of a bank and of an insurance company violated section 8. The government charged that banks and insurance companies competed in offering certain forms of credit, but the court granted the defendants' motion for summary judgment on the ground that this type of interlock is not covered by section 8.<sup>126</sup>

The *United States v. Cleveland Trust Co.*<sup>127</sup> case is perhaps the most interesting of all. The case alleged a section 7 violation because the defendant owned substantial stock in four major machine tool manufacturers. The court granted summary judgment for the defendant on this part of the case on the ground of mootness since some of the overlapping businesses had been sold. A consent judgment was entered, however, which dealt with the section 8 allegations and forbade any employees of the defendant bank from serving as directors of competing firms, even though it was not the same individual who was on the two boards.<sup>128</sup> These provisions appear to bear out the theory that the defendant bank, acting through its agents, is the director, and that the individual serving as a director is really only an agent of the bank and acts for the bank.

This theory should be compared with the Supreme Court's opinion in *Blau v. Lehman*.<sup>129</sup> In that case, suit was brought to recover short-swing profits under section 16(b) of the Securities Exchange Act of 1934,<sup>130</sup> which permits recovery by a company of profits made by one of its directors from the purchase and sale within six months of the company's securities. The director involved was a partner of Lehman Brothers, a major Wall Street securities firm. The majority of the Court declined to hold that the individual partner had been deputized by Lehman to "perform a director's duties not for himself but for Lehman,"<sup>131</sup> basing its decision on the factual context of the particular case and the legislative history of section

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126. *United States v. Crocker Nat'l Corp.*, 422 F. Supp. 686 (N.D. Cal. 1976). The first case alleged three separate interlocks with Crocker Nat'l Bank and Metropolitan Life, with Crocker Bank and Equitable Life and with Crocker Bank and Mutual Life. The second case alleged interlocks between Prudential Insurance Co. and Bank of America, and between Prudential and Banker's Trust. Even though the court granted summary judgment, several of the individuals involved already had entered consent decree arrangements. *United States v. Crocker Nat'l Corp.*, 1976-1 Trade Cas. (CCH) ¶ 60,857 (N.D. Cal. Apr. 20, 1976); *United States v. BankAmerica Corp.*, 1976-2 Trade Cas. (CCH) ¶ 61,095 (N.D. Cal. Sept. 9, 1976). They were not involved in the summary judgment motion.

127. 392 F. Supp. 699 (N.D. Ohio 1974), *aff'd*, 513 F.2d 633 (6th Cir. 1975).

128. *United States v. Cleveland Trust Co.*, 1975-2 Trade Cas. (CCH) ¶ 60,611 (N.D. Ohio Nov. 14, 1975).

129. 368 U.S. 403 (1962).

130. Securities Exchange Act of 1934, § 16(b), 15 U.S.C. § 78p(b) (1976).

131. 368 U.S. at 410.

16(b). The consent judgment in *Cleveland Trust*<sup>132</sup> certainly follows the theory of Justice Douglas' dissent,<sup>133</sup> and regards the bank itself as the director acting as it must through agents.

Nine of the cases filed in the seventies were brought primarily under section 4A of the Clayton Act, permitting the government to recover actual damages to its business or property suffered because of a violation of the antitrust laws. The government almost invariably seeks to recover as well under the False Claims Act<sup>134</sup> which allows for recovery of double damages.<sup>135</sup> None of these cases led to any opinion at the trial or appellate level on any issues relating to section 4A. Substantial damages were agreed to in the settlement of some of these cases, and others are still pending.

Two related cases deserve special mention.<sup>136</sup> Both cases charged the defendants with allocating contracts and rigging bids to the United States Department of Agriculture for corn, soybeans, milk products, and fortified sorghum grits, purchased for the Food for Peace Program, in violation of section 1 of the Sherman Act, leading to claims for damages under section 4A and the False Claims Act.<sup>137</sup> Final consent decrees in the civil cases have been entered, and one company, a defendant in both cases, agreed to pay \$2,750,000 as damages.<sup>138</sup>

During the seventies, seven civil contempt actions were initiated. One case is still unresolved, one case was settled, and in two others the government was unsuccessful.<sup>139</sup> Of the remaining three actions, one grew out of

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132. See note 127 *supra*.

133. 368 U.S. at 414 (Douglas, J., dissenting).

134. 31 U.S.C. §§ 231-233, 235 (1976).

135. One of the nine cases was brought solely under the False Claims Act. *United States v. Arcole Midwest Corp.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,079 (Case No. 2709) (N.D. Ill. June 18, 1978).

136. *United States v. Lauhoff Grain Co.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,078 (Case Nos. 2627-2628) (D. Kan. Mar. 27, 1978); *United States v. Krause Milling Co.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,078 (Case Nos. 2629-30) (D. Kan. Mar. 27, 1978).

137. *Id.*

138. *United States v. Lauhoff Grain Co.*, 5 TRADE REG. REP. (CCH) ¶ 63,643 (D. Kan. Nov. 3, 1980); *United States v. Krause Milling Co.*, 1979-2 Trade Cas. (CCH) ¶ 62,991 (D. Kan. Sept. 20, 1979).

139. Still unresolved is *United States v. Mid-America Dairymen, Inc.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,079 (Case No. 2726) (W.D. Mo. Oct. 1, 1979). The contempt action against Associated Milk Producers, Inc., was dismissed as moot after the co-op agreed to end the practices which led the government to seek the contempt order. *United States v. Associated Milk Producers, Inc.*, 477 F. Supp. 671 (W.D. Mo. 1979). In *United States v. Associated Credit Bureaus, Inc.*, 345 F. Supp. 940 (E.D. Mo. 1972), the court held there was no violation of the prior decree. In *United States v. Martin Linea Supply, Co.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,071 (Case No.

a civil case filed against Work Wear Corporation under section 7 of the Clayton Act which was terminated by a consent judgment requiring certain divestiture.<sup>140</sup> On July 1, 1975, the government filed a civil contempt petition to compel the divestiture. After an extension of time was granted,<sup>141</sup> the court finally imposed a fine of \$5,000 per day starting January 1, 1977, until the defendant divested the property. By the middle of 1979, divestiture had still not occurred, and the fine had mounted to more than \$1 million. The Court of Appeals held that this was not an abuse of discretion.<sup>142</sup> In two other cases the court found the defendant in civil contempt and entered appropriate orders.<sup>143</sup>

This review of the Clayton Act cases of the last decade suggests that the Act is becoming less important in the enforcement of antitrust, since the number of cases is diminishing, and only occasionally does a case involve a merger of the kind that contributes to the undue concentration of economic power. Bank merger cases have lost almost all of their former significance, and, of course, sections 8 and 4A are of relatively little importance.

### III. CRIMINAL CASES

During the decade of the 1970s, the government filed 240 criminal cases, or thirty-seven percent of the total number of cases filed in that period. About eighty percent<sup>144</sup> of the criminal cases were terminated by the entry of pleas of *nolo contendere* or guilty, with a relatively small number of cases going to trial. Many of the trials resulted in acquittals for some defendants, however it is clear that the number of criminal defendants acquitted was very small in relation to the total number of defendants named in all the 240 cases.

The Sherman Act has always contained criminal sanctions for its violation, but from its enactment in 1890 to 1955, the violation was a misde-

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2201) (W.D. Tex. Dec. 9, 1971), the civil contempt petition was dismissed after a related criminal case had resulted in an acquittal.

140. *United States v. Work Wear Corp.*, 1971 Trade Cas. (CCH) ¶ 73-681 (N.D. Ohio Sept. 27, 1971).

141. *United States v. Work Wear Corp.*, 1975-2 Trade Cas. (CCH) ¶ 60,431 (N.D. Ohio Aug. 15, 1975).

142. *United States v. Work Wear Corp.*, 1977-1 Trade Cas. (CCH) ¶ 61,437 (N.D. Ohio Jan. 19, 1977), *aff'd*, 602 F.2d 110 (6th Cir. 1979).

143. *United States v. American Soc'y of Civil Eng'rs*, 446 F. Supp. 803 (S.D.N.Y. 1977); *United States v. Greyhound Corp.*, 363 F. Supp. 525 (N.D. Ill. 1973), *aff'd*, 508 F.2d 529 (7th Cir. 1974). See note 63 *supra*.

144. It is not feasible to calculate a precise figure since most cases named multiple defendants, some of whom would plead, while others would stand trial.



meanor subject to a \$5,000 fine and one year in jail. In 1955, the fine was increased to \$50,000.<sup>145</sup> A dramatic change in the penalties was made in 1974 when violations were made felonies, the jail term was increased to three years, and the fines increased to \$1 million for a corporate defendant and \$100,000 for an individual.<sup>146</sup> This legislative change was undoubtedly responsible for a different approach by both prosecutors and courts to the Sherman Act as a criminal statute.

Table IV shows details by years of the criminal cases filed.<sup>147</sup>

Little antitrust law was made by these criminal cases, and there was only one Supreme Court opinion of any significance. In *United States v. United States Gypsum Co.*,<sup>148</sup> six major manufacturers of gypsum wall board were indicted for allegedly fixing prices. Four went to trial and after nineteen weeks of testimony, the jury found them guilty. The Third Circuit reversed on the ground that the trial judge's instructions regarding intent were erroneous. Other issues raised by the defendants concerning a meeting between the trial judge and the jury foreman and concerning instruc-

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145. Act of July 7, 1955, ch. 281, 69 Stat. 282 (amended 1974).

146. Antitrust Procedures and Penalties Act, 15 U.S.C. § 2 (1976).

147. The non-Sherman Act criminal cases covered a wide range of criminal charges, often filed in conjunction with Sherman Act charges. *See, e.g.*, *United States v. VSL Corp.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,079 (Case No. 2727) (E.D. Pa. Nov. 8, 1979) (mail fraud); *United States v. Watson*, and *United States v. Reeves*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,079 (Case Nos. 2703, 2702) (E.D. Mo. May 18, 1979) (making false statements to a grand jury); *United States v. Smejkal*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,079 (Case No. 2689) (D. Or. Jan. 25, 1979) (mail fraud); *United States v. Scrimgeor*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,079 (Case No. 2685) (S.D. Fla. Jan. 11, 1979) (false statements to a grand jury); *United States v. Twentieth Century-Fox*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,078 (Case No. 2653) (S.D.N.Y. Sept. 12, 1978) (criminal contempt); *United States v. Tobey*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,078 (Case No. 2648) (C.D. Ill. Aug. 4, 1978) (false statements to a grand jury); *United States v. Treadway*, 1978-1 Trade Cas. (CCH) ¶ 61,937 (N.D. Tex. Feb. 21, 1978) (obstruction of justice); *United States v. Rastelli*, 551 F.2d 902 (2d Cir. 1977), *cert. denied*, 434 U.S. 831 (1977) (racketeering); *United States v. Empire Gas Corp.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,072 (Case Nos. 2271-2272) (W.D. Mo. Aug. 14, 1972) (violation of federal firearms law).

148. 550 F.2d 115 (3d Cir. 1977) (convictions reversed and cases remanded for new trials), *aff'd*, 438 U.S. 422 (1978), *denial of motion for acquittal aff'd*, 600 F.2d 414 (3d Cir. 1979), *cert. denied*, 444 U.S. 884 (1979). Six major manufacturers of gypsum board, and 10 individuals connected with the companies were named as defendants. In January 1975, two corporations and seven individuals pleaded *nolo contendere*, 550 F.2d at 118, n.4. Maximum fines of \$50,000 each were imposed on the corporations, and the individuals were fined from \$20,000 to \$40,000 and received suspended sentences of one to six months. The remaining four corporate and three individual defendants went to trial.

TABLE IV

Calendar Year	Criminal Cases	Nolo Pleas	Guilty Pleas	Trials	Guilty	Acquittal	Appeals	Non-Sherman Act Cases	No Reported Action
1970	10	9		3	2	2	2	-	
1971	11	8		1		1	1	1	
1972	23	21		3		3		-	
1973	22	17		6	2	4	1	3	
1974	33	19	5	9	5	4	4	6	
1975	28	23	1	5	1	4		3	
1976	26	18	-	13	6	11	6	-	
1977	30	22	2	6	5	4	4	3	
1978	35	28	2	4	3	4	1	3	3
1979	22	15	2	7	4	3	-	3	3
	240	180	12	57	28	40	19	22	6

tions about withdrawal from the conspiracy were found to be grounds for reversal by only one member of the three-judge panel.<sup>149</sup> The Supreme Court affirmed.

The main and most interesting part of Chief Justice Burger's opinion dealt with the question of intent in Sherman Act cases, and seems to have contributed substantial confusion to an area of law already unclear. The gypsum board industry was oligopolistic, fifteen producers turning out a fungible product and eight of them accounting for ninety-four percent of the business. The price-fixing charge of the indictment was based on inter-seller price verification, the practice allegedly followed by the manufacturers of phoning a competitor to determine the price currently being offered to a specific customer. The government argued these price exchanges had the effect of stabilizing prices and policing agreed upon price increases.

149. 550 F.2d 115, 130-34 (Adams, J., concurring).

The defendants claimed any price exchanges were for the purpose of complying with the Robinson-Patman Act's prohibition of price discrimination and establishing a defense of good-faith meeting of competition sanctioned under section 2(b) of the Clayton Act.<sup>150</sup>

The trial judge instructed the jury that if it found the interseller price verification program had been undertaken "in a good faith effort to comply with the Robinson-Patman Act," then such verification alone would be insufficient to establish a price-fixing agreement. The judge continued that the law presumes that a person intends the necessary and natural consequences of his acts, and therefore if the effect of the exchange of pricing information was to fix and stabilize prices, the defendants "are presumed, as a matter of law, to have intended that result."<sup>151</sup> The Court of Appeals held this charge to be reversible error, believing that the price verification program, if adopted to establish a defense to price discrimination charges, would be excused from a Sherman Act attack as occurring under a "controlling circumstance" under the rationale of *United States v. Container Corporation of America*.<sup>152</sup>

The Supreme Court decision ignored much of the circuit court's approach, but agreed that this part of the charge was error:

We agree with the Court of Appeals that an effect on prices, without more, will not support a criminal conviction under the Sherman Act, but we do not base that conclusion on the existence of any conflict between the requirements of the Robinson-Patman and the Sherman Acts. Rather, we hold that a defendant's state of mind or intent is an element of a criminal antitrust offense which must be established by evidence and inferences drawn therefrom and cannot be taken from the trier of fact through reliance on a legal presumption of wrongful intent from proof of an effect on prices. Since the challenged instruction, as we read it, had this prohibited effect, it is disapproved. We are unwilling to construe the Sherman Act as mandating a regime of strict-liability criminal offenses.<sup>153</sup>

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150. Robinson-Patman Price Discrimination Act, 15 U.S.C. § 13(b) (1976).

151. 438 U.S. at 429-30.

152. 393 U.S. 333 (1969). In *Gypsum* the Third Circuit stated that the Supreme Court "has drawn a narrow line" in deciding data dissemination cases, because in competitive markets information exchanges promote competition, while in oligopolistic markets such exchanges depress competition. 550 F.2d at 122. "Where the information exchange occurs under a 'controlling circumstance,' such as the purpose of preventing fraud in *Cement Manufacturers* [Cement Mfrs. Ass'n v. United States, 268 U.S. 588 (1925)], the exchange can be upheld under the Sherman Act, despite a proven or presumed effect on price." 550 F.2d at 123 (footnote omitted).

153. 438 U.S. at 435-36 (citations omitted).

The Court went on to review the common law concept of intent being an essential element of a crime, and said that since the Sherman Act is not a strict liability statute punishment would not be fitting absent an appropriate state of mind. The Court apparently sought to draw a distinction between the civil and criminal sanctions provided in the Sherman Act, and said that since the Sherman Act is vague and imprecise, criminal enforcement requires an intent:

With certain exceptions for conduct regarded as *per se* illegal because of its unquestionably anticompetitive effects, the behavior proscribed by the Act is often difficult to distinguish from the gray zone of socially acceptable and economically justifiable business conduct. Indeed, the type of conduct charged in the indictment in this case—the exchange of price information among competitors—is illustrative in this regard. The imposition of criminal liability on a corporate official, or for that matter on a corporation directly, for engaging in such conduct which only after the fact is determined to violate the statute because of anticompetitive effects, without inquiring into the intent with which it was undertaken, holds out the distinct possibility of overdeterrence. . . . Further, the use of criminal sanctions in such circumstances would be difficult to square with the generally accepted functions of the criminal law. . . . The criminal sanctions would be used, not to punish conscious and calculated wrongdoing at odds with statutory proscriptions, but instead simply to *regulate* business practices regardless of the intent with which they were undertaken.<sup>154</sup>

The Court then reviewed the generally accepted standards or levels of intent, found that the concepts of recklessness or negligence have no place in antitrust decisions, and concluded:

Our question instead is whether a criminal violation of the antitrust laws requires, in addition to proof of anticompetitive effects, a demonstration that the disputed conduct was undertaken with the “conscious object” of producing such effects, or whether it is sufficient that the conduct is shown to have been undertaken with knowledge that the proscribed effects would most likely follow. While the difference between these formulations is a narrow one, we conclude that action undertaken with knowledge of its probable consequences and having the requisite anticompetitive effects can be a sufficient predicate for a finding of criminal liability under the antitrust laws.<sup>155</sup>

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154. *Id.* at 440-42 (citations and footnotes omitted) (emphasis in the original).

155. *Id.* at 444 (citations omitted).

The Court considered in some detail whether verification of price concessions for the sole purpose of taking advantage of the meeting competition defense of the Robinson-Patman Act should be treated as a "controlling circumstance" precluding liability under the Sherman Act, and concluded that the circuit court's analysis of this point was "unacceptable."<sup>156</sup> Of course, this had been the main thrust of the Circuit Court's decision. The Supreme Court ruled out a "controlling circumstance" exception to the ban on price-fixing for interseller price verification as a means of facilitating compliance with the Robinson-Patman Act.<sup>157</sup>

At the conclusion of the trial in this case, and after the jury had been sequestered for six days deliberating, the foreman had a meeting with the judge alone to discuss the state of the jury. Apparently, counsel consented to this meeting with some reluctance. The Supreme Court held this could constitute reversible error, since despite perfect good faith the other jurors hear only from their foreman, and the chances for misunderstanding are very substantial. It appeared in this case that the foreman may have misunderstood some words of the judge as insisting on a verdict one way or the other, since the jury returned its verdict the next morning.<sup>158</sup> The Court also found too narrow the trial judge's charge on withdrawal from the conspiracy.<sup>159</sup>

Apparently, the Supreme Court has taken the position that a Sherman Act conviction requires some element of intent. Proof of intent, however, does not require proof of a conscious desire to achieve the objective but can be satisfied if the trier of fact infers from the evidence that the defendants knew that their actions would, in the normal and natural course of events, result in the objective being realized. Yet the Court held that the trial judge committed reversible error in charging the jury that as a matter of law the defendants are presumed to have intended the natural results of their actions, and so to have intended to fix prices, if they knew their price information exchanges would lead to fixing and stabilizing prices. The trial lasted about five months; the judge's charge covered forty pages of the record; the jury deliberated six days.<sup>160</sup> One wonders what human juror, under such circumstances, could appreciate the distinctions the various members of the court find so significant.<sup>161</sup>

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156. *Id.* at 447-53.

157. *Id.* at 458-59.

158. *Id.* at 459-62.

159. The trial judge charged that withdrawal could be demonstrated only by notice to all other conspirators or disclosure to law enforcement officials. The Supreme Court said conduct inconsistent with the object of the conspiracy could be considered. *Id.* at 463-65.

160. *See id.* at 428-33, 471 (Rehnquist, J., concurring in part and dissenting in part).

161. Chief Justice Burger wrote the opinion, joined entirely by Justices Brennan, Mar-

The Third Circuit has had two occasions to consider *Gypsum* in subsequent antitrust litigation. In *United States v. Gillen*<sup>162</sup> the defendant, president of a major coal company, was convicted of price fixing by the trial court sitting without a jury. Representatives of various coal companies had regularly met and set prices for coal and the timing of price changes and Gillen regularly received reports from his company's representative at the price-fixing meetings. Because the trial judge had made no specific findings as to intent, the guilty verdict was attacked on appeal. The appellate court affirmed, holding that *Gypsum* did not basically alter the law for price-fixing cases. The appellate court pointed out that *Gypsum* was not a direct price-fix, where the parties specifically set prices, but was an exchange of price information the result of which was to stabilize prices. The *Gillen* conduct was in no sense ambiguous or approaching any "gray zone." According to the Third Circuit, the Supreme Court did not change the law or impose any new burden of proof in *per se* cases, and no inquiry need be made on the issue of intent, beyond proof that a defendant joined the conspiracy; "the mere existence of a price-fixing agreement establishes a defendant's illegal purpose."<sup>163</sup>

One member of the court, while concurring in the judgment, disagreed with the majority's interpretation of *Gypsum*, believing that even in *per se* cases the government must prove intent, at least in the sense that defendant had knowledge of the probable consequences of his acts, and this knowledge must be established by evidence or inferences therefrom and not by presumptions of law.<sup>164</sup>

A few months later, another three-judge panel of the same court considered a similar issue and reached the same result.<sup>165</sup> The majority affirmed a conviction by a jury in a straight price-fixing case under instructions that to convict the government must prove the defendants had knowingly joined a conspiracy to fix prices. The majority followed *Gillen*, saying that

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shall and White. Justice Blackmun did not participate in the case. Justices Rehnquist and Stevens concurred in part and dissented in part. Justices Stewart and Powell separately joined in various parts of the Burger opinion. 438 U.S. 422 (1978).

162. 458 F. Supp. 887 (M.D. Pa. 1978), *aff'd*, 599 F.2d 541 (3d Cir. 1979), *cert. denied*, 444 U.S. 866 (1979).

163. 599 F.2d at 545.

164. *Id.* at 548-49 (Adams, J., concurring).

165. *United States v. Continental Group, Inc.*, 456 F. Supp. 704 (E.D. Pa. 1978), *aff'd*, 603 F.2d 444 (3d Cir. 1979), *cert. denied*, 444 U.S. 1032 (1980). Five corporate manufacturers of consumer bags and seven individuals were named as defendants; some entered *nolo* pleas, others were acquitted, and two corporations and two individuals were found guilty. They appealed and the Third Circuit affirmed. The trial court had levied fines of \$750,000 and \$600,000 on the two corporations, and jail terms of four months with fines of \$40,000 and \$30,000 on the two individuals. 603 F.2d at 447.

the crucial distinction between *Gypsum* and *Gillen* was that “[a]n agreement to exchange prices, by itself, is not illegal; an agreement to fix prices is.”<sup>166</sup> One member of the panel, while concurring, argued that *Gypsum* required for conviction proof that a defendant specifically intended to produce anticompetitive effects, or proof that he knew anticompetitive effects would probably result from his conduct and evidence that such effects took place.<sup>167</sup>

A Seventh Circuit opinion is very similar. In *United States v. Brighton Building & Maintenance Co.*,<sup>168</sup> that court affirmed a jury conviction of numerous defendants accused of rigging bids to the state of Illinois. The trial judge had charged that to convict, the jury must find defendants were “knowingly and intentionally” members of the conspiracy and that it was not necessary to find a specific intent to violate the law, for the defendants “are deemed to have intended the necessary and direct consequences of their acts.”<sup>169</sup> The appellate court believed these instructions required the jury to find the defendants intentionally agreed to form a combination for the purpose of rigging bids and allocating contracts, and that this satisfied the test laid down by *Gypsum*, since bid-rigging is a *per se* offense. The court said that the jury need not be instructed that it must find an intent to restrain trade in order to convict; it is sufficient if the defendants knowingly formed the combination to rig bids and intentionally assisted in carrying out the agreement.<sup>170</sup>

Another case in which the defendants sought to rely on *Gypsum* was the Maryland private brand gasoline case, *United States v. Society of Independent Gasoline Marketers of America (SIGMA)*.<sup>171</sup> The indictment alleged that seven oil companies, their association and four individuals conspired to fix prices for private brand gasoline and in carrying out the conspiracy used *SIGMA* as a clearinghouse for gasoline pricing information in order to coordinate price increases and to eliminate discounting and settle pricing disputes. After they were convicted by the jury the association and five of the oil companies relied on *Gypsum* in their appeal, claiming they were convicted for exchanging information on prices. The Fourth Circuit, how-

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166. 603 F.2d at 462 (footnote omitted).

167. *Id.* at 468 (Hunter, J., concurring).

168. 598 F.2d 1101 (7th Cir. 1979), *cert. denied*, 444 U.S. 840 (1979), affirming convictions of nine contracting firms and two individuals charged with one count of violating the Sherman Act, 37 counts of mail fraud and two counts of racketeering. One corporate defendant pleaded guilty; at trial one other corporate defendant was acquitted; and all other defendants were found guilty on all counts. 598 F.2d at 1103.

169. 598 F.2d at 1104.

170. *Id.* at 1106.

171. 624 F.2d 461 (4th Cir. 1979).

ever, found this case unlike *Gypsum*, since here the defendants were charged with a conspiracy to fix prices and the exchange of information was merely one way in which the price fixing was effectuated. The court said that since price fixing is illegal *per se*, no inquiry as to intent or effect is necessary since "the mere existence of a price-fixing agreement establishes the defendants' illegal purpose."<sup>172</sup>

The Supreme Court handed down only one other opinion in any of the criminal cases initiated in the seventies, and that opinion had nothing to do with antitrust law. A consent judgment entered in a prior case enjoined certain Texas linen supply firms from threatening other suppliers to induce them not to serve defendants' customers. In 1971, the government filed a criminal contempt petition, alleging that the defendants were violating that provision; the trial judge dismissed the case but was reversed by the court of appeals. The government filed a new petition and eventually the trial court entered a judgment of acquittal after a jury was unable to reach a verdict. Under such circumstances, does the government have a right to appeal? The Fifth Circuit said no and the Supreme Court agreed, holding that the constitutional prohibition against double jeopardy prevented any appeal by the government.<sup>173</sup>

Of the criminal proceedings filed in the seventies, twelve other cases reached appellate courts. The Ninth Circuit had no trouble in finding a boycott to be a *per se* violation of section 1 of the Sherman Act in *United States v. Hilton Hotels Corp.*<sup>174</sup> In that case, four Portland, Oregon hotels, an association, and some individuals were charged with forcing suppliers

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172. *Id.* at 465. The jury acquitted two corporate and three individual defendants and convicted all others. *Id.* at 463. The Fourth Circuit affirmed the conviction of two of the companies, reversed the conviction of one corporation because it had been denied access to hospital records needed to cross examine a witness, and reversed the conviction of an individual on the ground that he had been granted immunity. *Id.* at 469.

173. *United States v. Martin Linen Supply Co.*, 485 F.2d 1143 (5th Cir. 1973), *cert. denied*, 415 U.S. 915 (1974), *decision after remand*, 534 F.2d 585 (5th Cir. 1976), *aff'd*, 430 U.S. 564 (1977). A companion civil contempt petition was also filed. The trial judge dismissed the criminal petition, on the ground that the conduct alleged in the petition did not violate the earlier judgment. The Fifth Circuit reversed and remanded. 485 F.2d at 1144. On retrial, the jury acquitted the individual defendant and was unable to agree as to the two corporate defendants. The trial judge, characterizing this as the weakest contempt case he had ever seen, entered judgment of acquittal. 534 F.2d at 587. The circuit court dismissed the government's appeal on the ground it had no jurisdiction. *Id.* The Supreme Court affirmed on the ground that the Constitution prevented the government from appealing from an acquittal in such circumstances. 430 U.S. at 575-76.

174. *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). Most of the defendants pleaded *nolo contendere*, but Western International Hotels and two individuals went to trial; a jury acquitted the individuals but found the corporation guilty, and the circuit court affirmed.



to the hotels, by threats of withholding purchases, to contribute one percent of their hotel sales to the association in an effort to attract conventions to the city. The appeals court held this conduct was clearly a *per se* violation, even though price, service, and quality were not affected and the ultimate objective was to bring conventions to Portland.<sup>175</sup> Since the primary purpose and direct effect of the defendants' agreement was to bring the combined economic power of the hotels to bear on the suppliers who failed to pay, the court thought this was a very clear *per se* violation.<sup>176</sup> The same court, in *United States v. Manufacturers' Association of the Relocatable Building Industry*,<sup>177</sup> gave short shrift to a contention that the *per se* rule created a conclusive presumption thereby denying defendants due process. A jury convicted the defendants of agreeing not to reduce bids nor to rebid for sixty days. The defendants argued the *per se* rule was an impermissible conclusive presumption denying them their right to a jury determination of each element of the offense. The court said the *per se* rule merely defines certain classes of pernicious conduct as unreasonable and does not establish any presumption, and so "[w]hile the appellants deserve credit for their ingenious and novel attempt to trap the Court in its own rhetoric, their contention that the *per se* rule should be set aside must be, and is rejected."<sup>178</sup>

The Fifth Circuit, in *United States v. Cadillac Overall Supply Co.*,<sup>179</sup> held the allocation of customers to be a *per se* violation. Renters of industrial garments agreed not to solicit each other's customers and to discourage customers from changing suppliers. The court found this to be a purely horizontal market division and rejected defendant's contention that the plan was merely to prevent one competitor from tortiously interfering with another's contractual rights with his customers. There was no need to apply a rule of reason analysis to this agreement, as the defendant had urged.<sup>180</sup>

In *United States v. Foley*,<sup>181</sup> convicted defendants on appeal to the

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175. 467 F.2d at 1003.

176. *Id.* at 1003-04.

177. 462 F.2d 49 (9th Cir. 1972).

178. *Id.* at 52.

179. 568 F.2d 1078, 1090 (5th Cir.), *cert. denied*, 437 U.S. 903 (1978). This appeal arose from a case filed in the Southern District of Florida naming five concerns and four individuals as defendants in an indictment charging allocation of customers in the uniform rental business. All defendants except Cadillac pleaded *nolo contendere*, and Cadillac was found guilty and appealed.

180. 568 F.2d 1087-90.

181. 598 F.2d 1323 (4th Cir. 1979), *cert. denied*, 444 U.S. 1043 (1980). Six corporate realtors and three individuals were charged with fixing real estate commissions. A jury found all defendants guilty.

Fourth Circuit argued that when Congress made violation of the Sherman Act a felony rather than a misdemeanor, a specific intent to accomplish a restraint of trade became an element of the offense. The court disagreed and held that Congress had not changed the elements of the offense when the penalty was increased.<sup>182</sup>

Eight other cases reached courts of appeals, but none of those decisions concerned antitrust law.<sup>183</sup>

Reference has already been made<sup>184</sup> to the prosecution of General Motors and Ford for allegedly restricting competition in sales to the fleet market. Since the defendants were acquitted in the criminal case, which was tried simultaneously with the companion civil case, no court opinion offers any guidance as to what the law might be concerning a conspiracy formed and carried out solely by communications through public statements. The procedure of simultaneous trials, with afternoons reserved for evidence ap-

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182. 598 F.2d at 1335.

183. In *United States v. Azzarelli Constr. Co.*, 612 F.2d 292 (7th Cir. 1979), *cert. denied*, 447 U.S. 920 (1980), the appeals court decision dealt only with questions of interstate commerce, evidence, and mail fraud. *United States v. Wells Fargo Armored Service Corp.*, 587 F.2d 782 (5th Cir. 1979) (*per curiam*), was an appeal based on defendant's contention that the change in Sherman Act penalties from a misdemeanor to a felony was an *ex post facto* law as applied in this case. The circuit court found the contention "without merit." In *United States v. Carlson & Sons, Inc.*, 1978-2 Trade Cas. (CCH) ¶ 62,310 (2d Cir. Sept. 28, 1978), the court affirmed a jury conviction which defendants had questioned on grounds they were not involved in interstate commerce. In *United States v. American Service Corp.*, 1978-2 Trade Cases (CCH) ¶ 62,238 (5th Cir. Sept. 22, 1978) (*per curiam*), the court affirmed the sufficiency of allegations that defendants were engaged in interstate commerce. *United States v. Michigan Carton Co.*, 552 F.2d 198 (7th Cir. 1977), arose out of a case charging 25 corporations and 50 individuals with price fixing of folding cardboard cartons. See *United States v. Alton Box Board Co.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,076 (Case No. 2505) (N.D. Ill. Feb. 18, 1976). One of the many corporate defendants pleading *nolo contendere* had been acquired by another company which appealed from a denial of its motion to dismiss the acquired company as a defendant. The appeal was dismissed on the ground that any objections to the form of the indictment was waived by the *nolo* plea. 552 F.2d at 202. In the same case, one corporate and two individual defendants went to trial. The individuals were acquitted by a jury which found the corporation guilty. The circuit court affirmed the conviction, resolving questions of the sufficiency of the evidence to link the company to the conspiracy and of the conduct of the trial and leave to withdraw *nolo* pleas entered after a jury in the original trial was unable to reach a decision on the grounds that the trial court had not abused its discretion. *United States v. Climatrol Corp.*, 1976-2 Trade Cases (CCH) ¶ 61,038 (5th Cir. June 9, 1976). In *United States v. Flom*, 558 F.2d 1179 (5th Cir. 1977), an individual defendant's conviction was reversed on the basis of erroneous jury instructions and improper evidence introduced at trial by the government. The defendants pleaded *nolo contendere* rather than face a retrial. See *United States v. Bethlehem Steel Corp.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,074 (Case No. 2400) (M.D. Fla. Aug. 5, 1974). In *United States v. Buzzard*, 540 F.2d 1383 (10th Cir. 1976), *cert. denied*, 429 U.S. 1072 (1977), the court affirmed an individual's conviction despite arguments involving admissibility of evidence and trial conduct.

184. See note 38 and accompanying text *supra*.

plicable only to the civil case, presents fascinating possibilities for expediting trials of both civil and criminal cases.

Five cases filed in 1973 and 1974 accused major steel companies of fixing prices and allocating contracts for reinforcing steel bars.<sup>185</sup> U.S. Steel, Bethlehem, and Armco were among the defendants. Pleas of *nolo contendere* terminated the cases.

Price fixing and collusive bidding in the cardboard and corrugated container industries led to massive criminal prosecutions. *United States v. Alton Box Board Co.*,<sup>186</sup> filed in Chicago, charged twenty-five corporate and fifty individual defendants with fixing prices for folding cartons, by agreeing not to underbid a competitor's price, and agreeing on price increases and on list prices. The indictment alleged the defendants' sales of folding cartons amounted to about \$1 billion, making this case one of the largest in terms of annual sales and also in number of defendants. *Nolo contendere* pleas were entered by all defendants except one corporation, later convicted by a jury, and two individuals, subsequently acquitted. Substantial fines and jail sentences were imposed.<sup>187</sup>

Two years later in Houston, fourteen corporations and twenty-six individuals were charged with fixing prices for corrugated containers by exchanging price information and bids and submitting noncompetitive bids. One indictment charged a felony against nine of the corporations and nine individuals.<sup>188</sup> The second indictment charged the others with a misdemeanor.<sup>189</sup> The volume of business involved in the two cases was about \$2.2 billion. All defendants in the misdemeanor indictment, and seven of the nine corporations and three of the nine individuals named in the felony indictment pleaded *nolo contendere* and very substantial fines were imposed.

It is interesting to note that six corporate defendants in the felony indict-

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185. See *United States v. Armco Steel Corp.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,073 (Case Nos. 2337-39) (N.D. & S.D. Tex. Aug. 30, 1973). Armco Steel, Bethlehem Steel and U.S. Steel were among the corporate defendants. These three cases involved the sale of reinforcing steel bars, as did *United States v. Armco Steel Corp.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,074 (Case No. 2381) (E.D. La. Apr. 23, 1974). *United States v. Bethlehem Steel Corp.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,074 (Case No. 2400) (M.D. Fla. Aug. 5, 1974), alleged conspiracy to rig bids for reinforced steel bars.

186. [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,076 (Case No. 2505) (N.D. Ill. Feb. 28, 1976). See note 183 *supra*.

187. *Id.*

188. *United States v. International Paper Co.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,078 (Case No. 2621) (S.D. Tex. Jan. 25, 1978).

189. *United States v. Boise Cascade Corp.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,078 (Case No. 2622) (S.D. Tex. Jan. 25, 1978).

ment and one in the misdemeanor indictment had been defendants in the earlier Chicago case involving folding cartons.<sup>190</sup> Two corporate defendants in the felony indictment, the Continental Group, Inc. and the Mead Corporation were acquitted in April 1979. Subsequently, a large group of commercial and industrial users of corrugated cardboard boxes brought a class action against defendants named in the two indictments. All defendants settled the action out of court except Mead. In September 1980, a jury in Houston returned a damage verdict of \$350 million against Mead in the private suit, which when trebled to over \$1 billion, would be one of the largest antitrust awards in history.<sup>191</sup>

Two other cases are sufficiently peculiar to justify brief mention. An indictment charging Braniff Airways and Texas International Airlines with excluding Southwest Airlines from intra-Texas air carriage was dismissed by the court because of the "totality of the circumstances surrounding this prosecution." These circumstances included the presence of an "unauthorized person" in the grand jury room and the presentation to the grand jury of evidence selected by the prosecutor from that given before an earlier jury.<sup>192</sup>

*United States v. Fidelity Equipment Leasing Corp.*<sup>193</sup> was an indictment alleging the defendants fixed prices on "sexually explicit adult motion pictures." Aside from the nature of the commerce involved, the pleading is noteworthy in that it bears the signature of no official from the Antitrust Division, and carries the names of only the United States Attorney and two of his assistants. The case was dismissed the following year.

Certainly the most significant development resulting from the criminal cases of the seventies has been the drastic increase in sanctions for violations of the Sherman Act. The maximum penalty for corporate defendants was set at \$5,000 when the Act was passed in 1890, and it remained at that figure for sixty-five years. Five thousand dollars was really nothing more than a relatively inexpensive license fee to violate the antitrust laws, and it was so regarded by some companies. In 1955 the maximum fine was raised

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190. See notes 183, 186 *supra*.

191. See Washington Post, Sept. 15, 1980, § A, at 12.

192. *United States v. Braniff Airways, Inc.*, 428 F. Supp. 579 (W.D. Tex. 1977). The "unauthorized person" was a former CAB employee who had joined the legal staff of the Antitrust Division and was in the grand jury room as an "observer." A prior grand jury had heard much evidence but had not returned any indictment. The prosecutor selected parts of that evidence for presentation to the second jury. The two airlines were later reindicted and pleaded *nolo contendere*. See *United States v. Braniff Airways, Inc.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,077 (Case No. 2607) (W.D. Tex. Aug. 16, 1977).

193. [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,078 (Case No. 2645) (N.D. Ga. Jun. 10, 1978).

to \$50,000.<sup>194</sup> Thereafter the courts showed a growing willingness to regard an antitrust criminal conviction as a reasonably serious offense, and in a number of cases a maximum sentence was imposed. This was true even when the conviction was entered on a plea of *nolo contendere*, and a \$50,000 fine was not unusual, especially for a large company.

Effective in December of 1974, violation of the Sherman Act was redefined as a felony, and the maximum corporate fine raised to \$1 million. The trial judges appreciated the increased concern about antitrust offenses reflected in this congressional action, and the sentences imposed for Sherman violations went up accordingly. Fines of several hundred thousand dollars became almost commonplace, especially for substantial concerns, and a *nolo* plea was treated as a plea of guilty for sentencing purposes.

A number of fines of more than a half million dollars have been imposed in recent years. In at least three cases, the court imposed the maximum fine. Cleveland Builders Supply Co. was fined \$1 million after pleading *nolo contendere* to a price-fixing agreement on ready-mix concrete in the Cleveland area.<sup>195</sup> In a case charging seven shipping companies with setting rates on ocean freight between Europe and the United States, the court sentenced Atlantic Container Line, Sea Land Service, Hapag-Lloyd and United States Lines to pay \$1 million each after acceptance of their *nolo* pleas.<sup>196</sup> After pleas of *nolo* in a case alleging allocation of projects and submission of collusive bids in marine construction, J. Ray McDermott & Co. and Brown & Root Inc. were each fined \$1 million.<sup>197</sup>

The fines imposed on individual defendants have for various reasons been much less, the court appropriately considering the individuals' financial circumstances. Misdemeanor cases usually result in fairly small fines for convicted individuals. After the offense was raised to a felony, the maximum fine for noncorporate defendants was set at \$100,000. Fines on individuals for felony convictions have in some cases been substantial, but usually have not approached the maximum.

Million dollar fines and billion dollar treble damage verdicts are certainly deterrents to people contemplating Sherman Act violations, but the average businessman is perhaps even more impressed by the chances of

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194. See notes 145-46 and accompanying text *supra*.

195. *United States v. Cleveland Builders Supply Co.*, [1970 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,079 (Case No. 2681) (W.D. Ohio Jan. 3, 1979).

196. *United States v. Atlantic Container Line, Ltd.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,079 (Case No. 2705) (D.D.C. Jun. 1, 1979).

197. *United States v. J. Ray McDermott, Inc.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,078 (Case No. 2678) (E.D. La. Dec. 14, 1978). In addition to the two companies, six individuals were named as defendants.

actually spending time in jail. Years ago, the idea that an individual anti-trust defendant would ever see the inside of a prison was regarded as preposterous; only racketeers, who incidentally got involved with antitrust, were ever sentenced to jail. "Respectable" businessmen who were "pillars of the community" received occasional fines. In a few rare instances, after jury convictions or guilty pleas, a short term of imprisonment was imposed, but these were the exceptional situations.

This approach seems to have changed drastically. In some nineteen misdemeanor cases filed in the last decade, the trial judge ordered individuals imprisoned after they had entered pleas of *nolo contendere*. The usual sentence was for thirty days but some terms were longer. In one case, sentences of six months were imposed,<sup>198</sup> and in another case a defendant who had previously received probation in an income tax violation case was required to serve nine months.<sup>199</sup> In the last case, the court explained the sentencing:

The Court has chosen to write this memorandum dealing with the imposition of sentences of imprisonment on each of the individuals because of the apparent curiosity that has been aroused in antitrust circles as a result of the imposition of prison sentences. This curiosity seems to be aroused because, in only 3 antitrust cases out of 61 arising since 1965, have the district courts seen fit to impose prison sentences. . . . The sentences of imprisonment were ordered because this Court felt and still feels that prison sentences in antitrust cases are warranted on the grounds that they act as a deterrent to others who might be tempted to commit the same criminal acts.<sup>200</sup>

The judge pointed out that businessmen who indulge in price rigging and artificial bidding are cheating the public, and he likened these illegal practices to income tax violations. The judge concluded that to impose only a sentence of probation in this case would "unduly depreciate" the seriousness of the offense.<sup>201</sup>

The *Alton Box Board Co.* case has been mentioned above, and reference

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198. In *United States v. Clovis Retail Liquor Dealers Ass'n*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,074 (Case No. 2409) (D.N.M. July 18, 1975), the court required three individual defendants to serve six months of their sentences.

199. *United States v. Clark Mechanical Contractors*, 1973-1 Trade Cas. (CCH) ¶ 74,482 (W.D. Ky. Apr. 30, 1973). Eight mechanical contracting firms and six individuals pleaded *nolo contendere* to an indictment charging the rigging of bids and the allocation of customers in the Louisville area. The court overruled a motion by one defendant to suspend a 30-day jail sentence. *United States v. Clark Mechanical Contractors*, 1972 Trade Cas. (CCH) ¶ 74,194 (W.D. Ky. Sept. 15, 1972).

200. 1973-1 Trade Cas. (CCH) ¶ 74,482 at 94,140-41.

201. *Id.* at 94,141.

made to the number of defendants indicted and the amount of commerce affected by the collusive bidding alleged.<sup>202</sup> After the *nolo contendere* pleas were accepted in that case from practically all of the defendants, the government made a major effort to persuade the trial judge to impose some period of actual confinement on many of the individual defendants, emphasizing the real need for deterrence. The government's sentencing memorandum in that case argued that the price-fixing conspiracy was "as egregious as any in the history of the Sherman Act" and that the defendants' conduct was "immoral, antisocial and calculated." After considering seven factors: level of responsibility, size of the corporation, length of participation in the conspiracy, remorse and rehabilitation, mitigating factors, salary, and net worth, the government offered the court recommendations for sentencing.<sup>203</sup>

The trial judge gave careful and thoughtful consideration to the sentencing problem before him, reviewed the various philosophies behind criminal sanctions and various guidelines for sentencing judges, decided that confinement was the exception that must be justified, agreed that the crime charged was serious, *malum in se*, and offended morality, and concluded that confinement was appropriate in the cases of some of the individuals before him.<sup>204</sup> Fourteen of the forty-eight defendants who pleaded *nolo contendere* were sentenced to jail terms ranging from twenty-four hours to ten days.<sup>205</sup>

After the violations became felonies, the sentences imposed generally increased, probably averaging three months. In about ten cases filed after 1975, the judge imposed one to three months imprisonment on some defendants after *nolo contendere* pleas had been entered. In almost all cases, the court has imposed terms of probation, often accompanied by a substantial term of imprisonment suspended in whole or at least in major part.

Charles Krause was named as a defendant in two separate indictments alleging that he, his company, and another grain company, rigged bids and

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202. See text at note 186 *supra*.

203. Government's Sentencing Memorandum, printed as Appendix I to the trial court's Memorandum Opinion on Sentencing. *United States v. Alton Box Board Co.*, 1977-1 Trade Cas. (CCH) ¶ 61,336 (N.D. Ill. Mar. 4, 1977).

204. *Id.*

205. See Appendix III to Court's Sentencing Memorandum Opinion. *Id.* The government's memorandum stated that "During the past 5 years, over 30 individuals have been sentenced to jail upon conviction in at least a dozen separate cases" and added that before 1970 individual defendants in the Electrical Equipment and Plumbing Fixtures cases were sentenced to imprisonment. The defendants' "Response" included a table covering the period July 1955 through 1975 showing 19 cases in which a jail sentence had been imposed on 49 individuals.

allocated contracts for sales of blended fortified foods to the United States Department of Agriculture for the Food for Peace Program. On pleas of *nolo contendere*, Mr. Krause was sentenced to six months in jail in each case, the sentences to run concurrently.<sup>206</sup> In *United States v. Arcole Midwest Corp.*,<sup>207</sup> each of the two individual defendants was sentenced to one year imprisonment, and fined \$50,000. In *United States v. Bertucci Construction Co.*,<sup>208</sup> one individual was sentenced to three years in jail. Neither the pleadings nor any reported memorandum on sentencing by the judge explains the reason for this sentence.

In a limited number of cases the trial judge has sought "to make the punishment fit the crime" by requiring some sort of civic, community, or charitable activity as a condition of the probation or as a prerequisite to suspension of the sentence. Sometimes the nature of the required "community service" was not specified, or was left subject to the approval of the probation officer. One judge required 200 hours of "public service work" and ten Sundays to be spent in jail.<sup>209</sup> Another specified fifty-one weeks of "public service" at fifteen hours a week.<sup>210</sup> In another case, the convicted defendant was ordered confined for sixty days to a community treatment center where he was to render community services.<sup>211</sup>

In *United States v. H.S. Crocker Co.*,<sup>212</sup> some of the individual defendants pleading *nolo contendere* were required, as a condition of their probation, to make oral presentations before twelve business or civic groups about the circumstances of the case and their participation in it. In addi-

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206. *United States v. Lauhoff Grain Co.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,078 (Case No. 2627, 2628) (D. Kan. Mar. 27, 1978); *United States v. Krause Milling Co.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,078 (Case Nos. 2629, 2630) (D. Kan. Mar. 27, 1978).

207. [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,077 (Case No. 2568) (N.D. Ill. Feb. 28, 1977), *sentence vacated sub. nom.*, *United States v. Bowler*, 585 F.2d 851 (7th Cir. 1978). The indictment also contained 12 counts of mail fraud.

208. [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,078 (Case No. 2659) (E.D. La. Sept. 27, 1978). A federal grand jury returned a felony indictment charging 16 contracting firms and 10 individuals with allocating jobs and submitting collusive bids on river bank stabilization jobs. In addition to the count charging a violation of § 1 of the Sherman Act, the indictment also contained 53 counts of mail fraud or submitting false statements.

209. *United States v. Armored Transport, Inc.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,078 (Case No. 2694) (C.D. Cal. June 4, 1979).

210. *United States v. Ward*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,078 (Case No. 2679) (E.D. La. Feb. 16, 1979).

211. *See United States v. Champion Int'l Corp.*, 557 F.2d 1270 (9th Cir.), *cert. denied*, 434 U.S. 938 (1977).

212. *United States v. H.S. Crocker Co.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,074 (Case No. 2372) (N.D. Cal. Oct. 27, 1974). The indictment named nine label manufacturers and eight individuals as defendants.



tion, they were required to submit a written report to the court giving the details and import of the presentation, and the response thereto.

Three relatively novel and somewhat interrelated techniques for criminal antitrust enforcement were illustrated by cases filed in the seventies, especially in the later years of the decade. One is the filing of a cluster of cases growing out of the same or similar type of conduct in related industries in one general area. Eight criminal cases were filed from 1972 to 1978 charging price fixing, bid rigging, and allocation of jobs in the Louisville, Kentucky area in plumbing, heating, and air conditioning, in electrical contracting, in general contracting, in paving, in ready-mix concrete, and in pipeline contracting. There was a companion civil complaint filed for each of the eight indictments.<sup>213</sup> Another illustration is the filing in Chicago of six cases from 1977 to 1979, three involving bid rigging on highway and airport runway construction, and the other three involving bid rigging for sheet metal and piping construction.<sup>214</sup> On January 17, 1974, seven criminal cases were filed in Springfield, Illinois charging bid rigging in connection with highway construction projects.<sup>215</sup>

The second relatively novel technique is to allege a violation of section 1 of the Sherman Act solely with relation to a single job contract. The usual pattern of both indictments and complaints is to allege a continuing conspiracy over a period of time to allocate contracts and submit collusive bids. Many of the recent pleadings, however, have confined allegations to one specific project and charged that the defendants agreed that one business would submit the "lowest" bid for that contract and the others would submit collusive bids. Such a limited pleading technique has undoubted

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213. See *United States v. Clark Mechanical Contractors, Inc.*, [1973-1] TRADE REG. REP. (CCH) ¶ 74,482 (W.D. Ky. Apr. 30, 1973); *United States v. Ready Elec. Co.*, *United States v. Stewart Mechanical Enterprises, Inc.*, and *United States v. Whittenberg Eng'r & Const. Co.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,075 (Case Nos. 2467, 2488, 2490) (E.D. Ky. filed June 27, Nov. 18, 20, 1975); *United States v. Medusa Aggregates Co.*, and *United States v. Owensboro River Sand & Gravel Co.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,077 (Case Nos. 2602, 2604) (E.D. Ky. July 22, 1977); *United States v. Hall Contracting Corp.*, and *United States v. United Pipeline Constr. Co.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,078 (Case Nos. 2623, 2625) (E.D. Ky. Mar. 3, 1978).

214. See *United States v. Brighton Bldg. & Maintenance Co.*, 598 F.2d 1101 (7th Cir.), *cert. denied*, 444 U.S. 840 (1979); *United States v. Bowler*, 585 F.2d 851 (7th Cir. 1978); *United States v. Allied Asphalt Paving Co.*, 451 F. Supp. 804 (N.D. Ill. 1978); *United States v. Climatemp, Inc.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,078 (Case No. 2646) (N.D. Ill. June 12, 1978); *United States v. S.J. Reynolds Co.*, and *United States v. Borg, Inc.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,079 (Case Nos. 2690, 2691).

215. *United States v. Huckaba & Sons Constr. Co.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,074 (Case Nos. 2361-2367) (C.D. Ill. Jan. 17, 1974).

trial advantages but would seem to raise problems if the government wished to seek the imposition of severe sentences by the court.<sup>216</sup>

The third novel technique is the use of the felony information. When Sherman Act violations were misdemeanors, informations instead of indictments could be utilized whenever the government thought it appropriate, but usually were filed only to supersede a technically defective indictment. After the offense became a felony, constitutional provisions prohibited the use of an information unless the defendant consented to waive indictment by a grand jury. In a number of cases in the last several years informations have been filed, suggesting that the government had reached an understanding with the defendant before the pleading was filed that no objection would be made to the absence of an indictment and also that a plea to the charge of the information would be entered. In five cases, felony informations were filed; three were settled by pleas of *nolo contendere* and two by pleas of guilty.<sup>217</sup>

#### IV. NON-SHERMAN ACT CRIMINAL CASES

Twenty-two criminal cases filed by the Antitrust Division during the decade of the seventies were not Sherman Act cases. Seven of these were petitions for criminal contempt. In three cases<sup>218</sup> fines were imposed after a plea of *nolo contendere* or a finding that the defendant was in contempt, and in the other cases<sup>219</sup> the petition was dismissed.

Fifteen cases involved making false statements or obstructing justice. Eleven of these cases charged the defendant with making false statements

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216. See, e.g., *Alton Box Board*, *supra* note 199, where the government's argument relied on the scope of the conspiracy and the commerce involved.

217. *United States v. Enderle Metal Prod. Co.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,077 (Case No. 2597) (N.D. Cal. July 7, 1977) (*nolo* plea); *United States v. Purolator Security, Inc.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,078 (Case No. 2639) (E.D. Mich. May 4, 1978) (*nolo* plea); *United States v. Saxon Paper Corp.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,078 (Case No. 2657) (S.D. Fla. Sept. 21, 1978) (*nolo* plea); *United States v. Alderson Reporting Co.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,079 (Case No. 2711) (D.D.C. July 2, 1979) (guilty plea); *United States v. Ferrell*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,079 (Case No. 2730) (W.D. Tenn. Dec. 14, 1979) (guilty plea).

218. *United States v. Greyhound Corp.*, 370 F. Supp. 881 (N.D. Ill. 1974); *United States v. Crocker Co., Inc.*, [1970-79 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,074 (Case No. 2374) (S.D. Cal. Mar. 12, 1974); *United States v. Twentieth Century Fox*, [1970-79 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,078 (Case No. 2653) (S.D.N.Y. Sept. 12, 1978).

219. *United States v. Martin Linen Supply Co.*, 430 U.S. 564 (1977); *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978); *United States v. American Cyanamid Co.*, 1978-1 Trade Cas. (CCH) ¶ 61,843 (Case No. 2375) (S.D.N.Y. June 24, 1977); *United States v. American Can Co.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,077 (Case No. 2594) (N.D. Cal. June 27, 1977). See note 173 *supra*.

to an antitrust grand jury, and in six cases the defendant pleaded *nolo contendere*, guilty, or was convicted.<sup>220</sup> Three cases involved obstruction of justice<sup>221</sup> and one charged the making of false statements to the Patent Office.<sup>222</sup>

In at least ten cases the government included, in addition to a count charging a violation of section 1 of the Sherman Act, counts charging violations of other criminal statutes. This practice was particularly prevalent in the cases charging bid rigging and collusive bidding on construction projects. Most frequently the additional counts charged violation of the mail fraud statute, although some counts alleged conspiracy to defraud the United States, racketeering, or extortion. One case included fifty-three additional counts alleging mail fraud or submitting false statements,<sup>223</sup> while others included ten to thirty-five additional counts.<sup>224</sup>

## V. CONCLUSION

The antitrust enforcement record for the seventies, judged by the cases initiated during that decade by the Antitrust Division of the Department of Justice, is impressive. The average number of cases filed each year during that period was thirty percent more than the average annual number of cases filed in the preceding quarter century. The percentage of both civil and criminal cases settled by agreement was appreciably higher in the seventies than in the earlier period. This was particularly true on the criminal side, where one-third more cases were settled by agreement than in the period from 1944 to 1968. The mix between civil and criminal cases filed in

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220. *United States v. American Bldg. Maintenance Corp.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,074 (Case No. 2386) (D.N.J. July 27, 1975) (guilty plea); *United States v. Swartz*, and *United States v. Ferranti*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,075 (Case Nos. 2460A, 2461A) (M.D. Pa. Feb. 10, 1976) (*nolo* pleas); *United States v. Hughes*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,077 (Case No. 2618) (S.D. Fla. Dec. 14, 1977); *United States v. Reeves*, and *United States v. Watson*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,079 (Case Nos. 2702, 2703) (E.D. Mo. July 18, Sept. 5, 1979) (jury verdicts of guilty).

221. *United States v. Turen*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,074 (Case No. 2387) (D.N.J. June 17, 1974) (guilty plea); *United States v. Treadway*, 1978-1 Trade Cas. (CCH) ¶ 61,937 (N.D. Tex. 1978) (charges dismissed by court); *United States v. White*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,078 (Case No. 2643) (D.D. C. June 16, 1978) (guilty plea).

222. *United States v. Markham*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,074 (Case No. 2420A) (N.D. Tex. Sept. 10, 1975) (jury conviction).

223. *See United States v. Bertucci Constr. Co.*, *supra* note 208.

224. *See, e.g.*, *United States v. Brighton Bldg. & Maintenance Co.*, *supra* note 215, included 37 mail fraud and two racketeering counts; *United States v. VSL Corp.*, [1970-1979 Transfer Binder] TRADE REG. REP. (CCH) ¶ 45,079 (Case No. 2727) (C.D. Cal. Nov. 8, 1979), included 35 mail fraud counts. Several other cases included 10 or 12 such counts.

the seventies was almost identical with the earlier years, despite the unusually small number of criminal prosecutions initiated in the first two years of the decade.

The cases of the seventies show a reassuring balance between local and national cases. Some massive proceedings were initiated, and some of very limited impact. Many major corporations, the giants of the country's economy, were named as defendants in some of the cases. Proceedings such as the *AT&T* case are of great interest as they may establish new interpretations of the antitrust laws. The cases filed also illustrate a willingness to try new approaches. The *General Motors* case was one. Unfortunately no appellate court opinion resulted to give any guidance as to whether an anti-trust conspiracy can be formed and carried out through public statements alone. The new approaches to the use of the criminal sanctions, especially in light of the increased severity of the possible penalties, again reveal an openness to new ways to secure better antitrust enforcement.

The drastic decline in importance of section 7 of the Clayton Act as an enforcement weapon gives some pause. In the bank merger field section 7 seems to have disappeared. In nonbank mergers section 7 appears blunted, and significant mergers, even though challenged, appear to go through, perhaps with limited injunctive wrappings. The field of conglomerate mergers seems relatively wide open, of course, due in part to Supreme Court opinions which are not very hospitable to extending section 7 to reach the merger of two large corporations absent clear horizontal or vertical aspects to the merger.

The most worrisome problem seems to be the almost total absence of Supreme Court opinions clarifying antitrust law. This of course is the other side of the coin to the large number of both civil and criminal cases settled by agreement. It seems in some ways that the Antitrust Division is turning itself into an administrative or regulatory agency, filing cases which it terminates by negotiation rather than litigation. The introduction of the felony information is an example of this trend. Guidance for the antitrust bar will then come not so much from Court opinions as from antitrust officials' speeches and actions. Certainly this could radically change the approach to antitrust law.

