Louisiana Law Review

Volume 41 | Number 2
Developments in the Law, 1979-1980: A Symposium
Winter 1981

Public Law: Antitrust Law

Michael R. Fontham

PUBLIC LAW

ANTITRUST LAW

*Michael R. Fontham**

A number of important antitrust cases were decided in the federal courts in the past year. Two decisions rendered by the courts of appeals have the potential of creating significant changes in the antitrust process. These cases involve major issues in the areas of the right of jury trial and the apportionment of damages among tortfeasors. In addition, the Supreme Court decided three significant antitrust cases, and other important decisions were rendered at the court of appeals level.

MAJOR DEVELOPMENTS

In the most striking and potentially important recent development in the field of antitrust, the United States Court of Appeals for the Third Circuit held that the complexity of an antitrust case is a potential ground for denying the right to a jury trial. Another major development was the split in the circuits that arose on the question of whether a right of contribution exists among antitrust tortfeasors, an issue that the Supreme Court agreed to review. Both of these matters have substantial importance for antitrust litigants.

The Right to a Jury Trial in Antitrust Treble Damage Cases

The decision of the Court of Appeals for the Third Circuit on the jury trial issue occurred in *In re Japanese Electronic Products Antitrust Litigation*.[1] In a departure from the prior holdings of the Supreme Court and the weight of authority in the lower courts,[2] a divided panel of the third circuit held that a jury trial may be denied in an antitrust case "when a jury will not be able to perform its task of rational decisionmaking with a reasonable understanding of the evidence and the relevant legal standards."[3] *Japanese Elec-*

* Adjunct Professor of Law, Louisiana State University; Member, New Orleans Bar.

1. 631 F.2d 1069 (3d Cir. 1980).

2. *See, e.g.*, Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959); Fleitmann v. Welsbach Street Lighting Co., 240 U.S. 27 (1916); *In re* United States Fin. Sec. Litigation, 609 F.2d 411 (9th Cir. 1979), *cert. denied sub nom*, Gant v. Union Bank, 100 S. Ct. 1866 (1980); Cherokee Laboratories, Inc. v. Rotary Drilling Serv., Inc., 383 F.2d 97 (5th Cir. 1967), *cert. denied*, 390 U.S. 904 (1968).

3. *In re* Japanese Elec. Prod. Antitrust Litigation, 631 F.2d 1069 (3d Cir. 1980) [hereinafter cited as Japanese Elec. Prod.].

tronic Products is the biggest victory thus far for advocates of the theory that the jury demand of a party may be stricken prior to the trial on the ground that the case is too complicated to be understood by a group of laymen.[4]

In its decision, the third circuit recognized and held that the right of jury trial is protected in antitrust cases by the seventh amendment to the United States Constitution.[5] However, the court determined that this provision must be balanced against the due process clause of the fifth amendment, which assertedly "precludes trial by jury when a jury is unable to perform [its] task with a reasonable understanding of the evidence and the legal rules."[6] The due process objections to trial by jury in complex cases were expressed as follows:

> The due process objections to jury trial of a complex case implicate values of fundamental importance. If judicial decisions are not based on factual determinations bearing some reliable degree of accuracy, legal remedies will not be applied consistently with the purposes of the laws. There is a danger that jury verdicts will be erratic, and completely unpredictable, which would be inconsistent with evenhanded justice. Finally, unless the jury can understand the evidence and the legal rules sufficiently to rest its decision on them, the objective of most rules of evidence and procedure in promoting a fair trial will be lost completely ....[7]

In light of these considerations, the court refused to "read the seventh amendment to guarantee the right to jury trial in these suits."[8]

The court also formulated standards for determining the complexity of the case and the jury's ability to understand it.[9] It found, first, that a district court should consider the "overall size" of the case, including the estimated length of the trial, the amount of evidence to be introduced, and the number of individual issues. Second, the conceptual difficulty of understanding the legal issues and the facts should be analyzed on the basis of such references as the

---

4. *Id.* at 1086. *See, e.g., In re* United States Fin. Sec. Litigation, 609 F.2d 411 (9th Cir. 1979), *cert. denied sub nom,* Gant v. Union Bank, 100 S. Ct. 1866 (1980). Schwegmann Bros. Giant Super Markets v. Almaden Vineyards, Inc., ___ F. Supp. ___ (E.D. La. 1980); Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59 (S.D.N.Y. 1978); Radial Lip Mach., Inc. v. International Carbide Corp., 76 F.R.D. 224 (N.D. Ill. 1977); *In re* Boise Cascade Sec. Litigation, 420 F. Supp. 99 (W.D. Wash. 1976).

5. 631 F.2d at 1079.

6. *Id.* at 1084.

7. *Id.* at 1084.

8. *Id.* at 1086.

9. *Id.* at 1088.

"amount of expert testimony and the probable length and detail of jury instructions." Third, the difficulty of segregating distinct aspects of the case should be considered as "indicated by the number of separately disputed issued [sic] relating to single transactions or items of proof."[10]

The decision indicated that the jury trials should be denied only in unusual cases where "due process clearly requires a nonjury trial."[11] As a protection against any unnecessary dilution of the right to a jury trial, the court noted the availability of the writ of mandamus to remedy erroneous district court decisions prior to trial, and required that a district court "make explicit findings on the dimensions of complexity when it denies a jury trial in an action at law on grounds of complexity."[12]

The district court in *Japanese Electronic Products* had made no determination as to whether the complexity of the case made it impossible for a jury to understand. Instead, the decision of the district court was based on the determination that the seventh amendment guarantee is applicable regardless of the complexity of the case.[13] Thus, the third circuit simply vacated the order of the district court and remanded for a consideration of whether the issues are sufficiently complex to require the denial of a jury trial.[14]

The Applicable Precedent

The decision of the third circuit is a dramatic departure from the state of the law in the antitrust field. On at least two occasions, the Supreme Court of the United States has ruled that the right to a jury trial is guaranteed in antitrust treble damage actions.[15] The Court has indicated that this right emanates not only from the seventh amendment,[16] but is implicitly guaranteed by the antitrust statutes.[17] Numerous other federal decisions have relied on the theory that the right to a jury trial is absolute in antitrust actions.[18]

---

10. *Id.*
11. *Id.* at 1088.
12. *Id.* at 1089.
13. *In re* Japanese Elec. Prod. Antitrust Litigation, 478 F. Supp. 889 (E.D. Pa. 1979).
14. 631 F.2d at 1091.
15. Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959); Fleitmann v. Welsbach Street Lighting Co., 240 U.S. 27 (1916).
16. Fleitmann v. Welsbach Street Lighting Co., 240 U.S. 27 (1916).
17. Beacon Theatres, Inc. v. Westover, 359 U.S. 500 (1959).
18. *See, e.g.*, Poller v. Columbia Broadcasting System, Inc., 368 U.S. 464 (1962); Cherokee Laboratories, Inc. v. Rotary Drilling Serv., Inc., 383 F.2d 97 (5th Cir. 1967), *cert. denied*, 390 U.S. 904 (1968); Davis v. Marathon Oil Co., 57 F.R.D. 23 (N.D. Ohio 1972); Lah v. Shell Oil Co., 50 F.R.D. 198 (S.D. Ohio 1970).

In addition, only months prior to the *Japanese Electronic Products* decision, the United States Court of Appeals for the Ninth Circuit reversed a ruling that struck a jury demand on the ground of complexity in a securities case, and the Supreme Court denied certiorari.[19]

The constitutional right to a jury trial in antitrust cases is established under *Fleitmann v. Welsbach Street Lighting Co.*[20] In *Fleitmann*, the Court considered whether the jury trial guarantee of the seventh amendment, which applies in all cases arising "at common law"[21] but does not apply to suits in equity, required a trial by jury in a stockholder's derivative action for damages under the Sherman Act. The combination of the "equitable" derivative action, not covered by the seventh amendment, with the "legal" antitrust suit requiring a jury trial under the seventh amendment, raised the issue of whether the seventh amendment required a jury trial of the combined action. The Court held that the seventh amendment would apply to the antitrust suit absent the derivative action. It stated: "Of course the claim set up is that of the corporation alone, and if the corporation were proceeding directly under the statute no one can doubt that its only remedy would be at law."[22] In addition to this holding that antitrust suits are "legal" in nature and thus subject to the jury trial guarantee of the seventh amendment, the Court held that the combined action could not be tried without a jury. Although no specific requirement of a jury trial is contained in the antitrust laws, the Court apparently interpreted the statute to include the right of jury trial. It said:

> [W]e agree with the courts below that when a penalty of triple damages is sought to be inflicted, the statute should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law. On the contrary, it plainly provides the latter remedy, and it provides no other.[23]

In another leading case involving the combination of an equitable claim with an antitrust action, *Beacon Theatres, Inc. v. Westover*,[24] the Court again held that a jury trial is a right in an antitrust suit. In *Beacon Theatres*, the plaintiff sued for declaratory and injunctive relief to prevent the institution against it by the

19. *In re* United States Fin. Sec. Litigation, 609 F.2d 411 (9th Cir. 1979), *cert. denied sub nom*, Gant v. Union Bank, 100 S. Ct. 1866 (1980).

20. 240 U.S. 27 (1916).

21. U.S. CONST. amend. VII.

22. 240 U.S. at 28.

23. *Id.* at 29.

24. 359 U.S. 500 (1959).

defendant of a treble damage suit under the antitrust laws. The defendant counterclaimed, seeking treble damages under the antitrust laws on the basis of the same controversy alleged in the complaint. A jury trial was demanded by the defendant on the factual issues in the case. The district court, however, held that the suit for declaratory judgment and an injunction was essentially equitable and should be tried prior to a jury trial on the counterclaims. The Court of Appeals for the Ninth Circuit denied a writ of mandamus.[25] The Supreme Court granted certiorari because " '[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care.'"[26] The Court reversed the decision of the district court, holding that Beacon Theatres "cannot be deprived of [its rights to jury trial] merely because Fox took advantage of the availability of declaratory relief to sue Beacon first."[27]

In reaching its decision, the Court specifically relied on and cited the seventh amendment.[28] It stated that "the right to a jury trial is a constitutional one . . . while no similar requirement protects trials by the court . . . ."[29] The Court also held that the right to trial by jury applies to treble damage antitrust suits and was mandated in these cases by Congress. It stated:

> Since the right by jury applies to treble damage suits under the antitrust laws, and is, in fact, an essential part of the congressional plan for making competition rather than monopoly the rule of trade . . . the Sherman and Clayton Act issues on which Fox sought a declaration were essentially jury questions.[30]

These rulings of the Supreme Court established the principle that the right of jury trial is applicable in antitrust suits for treble damages. They are supplemented by another leading decision of the Supreme Court, *Poller v. Columbia Broadcasting System, Inc.*,[31] where the Court determined that the summary judgment procedure should be "used sparingly in complex antitrust litigation . . . ."[32] The Court indicated that trial by jury is appropriate in these cases. "Trial by affidavit is no substitute for trial by jury which so long has been the hallmark of 'even handed justice.'"[33] In light of these

25. Beacon Theatres, Inc. v. Westover, 252 F.2d 864 (9th Cir. 1958).
26. 359 U.S. at 501, *quoting* Dimick v. Schiedt, 293 U.S. 474, 486 (1935).
27. 359 U.S. at 504.
28. *Id.* at 510.
29. *Id.*
30. *Id.* at 504 (citation omitted).
31. 368 U.S. 464 (1962).
32. *Id.* at 473.
33. *Id.*

decisions of the Supreme Court, and other leading cases recognizing the importance of the right of jury trial in cases arising at law,[34] the decision in *Japanese Electronic Products* is a sharp departure from precedent.

The Supreme Court's Footnote in Ross v. Bernhard

Although the decision in *Japanese Electronic Products* was based primarily on the theory that due process limits the reach of the seventh amendment in complex cases rather than on an analysis of the "legal" or "equitable" nature of a complex antitrust suit,[35] the genesis for the current debate over the applicability of the seventh amendment in complex litigation is a footnote contained in the decision of the Supreme Court in *Ross v. Bernhard*.[36] The footnote suggests that the practical abilities and limitations of juries is a factor that may be considered in determining whether a claim is legal or equitable in nature.[37] This reference has provided a foundation for claims that the complexity of a suit may justify the denial of the right to a jury trial.[38]

Ross was a stockholder's derivative action against the directors of a closed-end investment company. The suit charged that the directors had breached their fiduciary duty; it also alleged a breach of a contract. The plaintiffs demanded that the defendants "account for and pay to the Corporation for their profits and gains and its losses."[39] The district court denied a motion to strike the jury, but the Court of Appeals for the Second Circuit reversed on the ground

34. For instance, in *Cherokee Laboratories, Inc. v. Rotary Drilling Serv., Inc.*, 383 F.2d 97 (5th Cir. 1967), *cert. denied*, 390 U.S. 904 (1968), the United States Court of Appeals for the Fifth Circuit reversed a directed verdict for the defendant in an antitrust case. The court stated:

> We review the district court's direction of verdict for the defendants in the light of the Supreme Court's statement that "the right to trial by jury applies to treble damage suits under the antitrust laws, and is, in fact, an essential part of the congressional plan for making competition rather than monopoly the rule of trade . . . .

383 F.2d at 103. In addition, in *Thermo-Stitch, Inc. v. Chemi-Cord Processing Corp.*, 294 F.2d 486 (5th Cir. 1961), the court followed *Beacon Theatres* in a suit involving equitable and legal actions. Judge Wisdom, speaking for the court, stated: "While the right to trial by jury is a constitutional one, no similar importance attaches to trial by court." *Id.* at 490 *See also* Davis v. Marathon Oil Co., 57 F.R.D. 23 (N.D. Ohio 1972); Lah v. Shell Oil Co., 50 F.R.D. 198 (S.D. Ohio 1970).

35. Japanese Elec. Prod., 631 F.2d at 1083.

36. 396 U.S. 531 (1970).

37. *Id.* at 538 n.10.

38. *See, e.g., In re* United States Fin. Sec. Litigation, 609 F.2d 411, 424-26 (9th Cir. 1979).

39. 396 U.S. at 532.

that a derivative action is equitable in nature. The Supreme Court reversed, holding that "the right to jury trial attaches to those issues in derivative actions as to which the corporation, if it had been suing in its own right, would have been entitled to a jury."[40]

Although *Ross* reaffirmed the broad commitment of the Supreme Court to the right of jury trial, a footnote in the opinion has been used as authority for limiting the right of jury trial in complex cases. This footnote states:

> As our cases indicate, the "legal" nature of an issue is determined by considering, first, the pre-merger custom with reference to such question; second, the remedy sought; and, third, the practical abilities and limitations of juries. Of these factors, the first, requiring extensive and possibly abstruse historical inquiry, is obviously the most difficult to apply.[41]

On the basis of this statement, some courts have found that the right to a jury trial in any civil case is limited by the complexity of the issues.[42] However, this interpretation is inconsistent with the content and context of the *Ross* footnote.

The *Ross* footnote applies not to the determination of whether a particular case must be tried to a jury, but to the prospective decision as to whether a newly created cause of action is legal or equitable in nature. Thus, the footnote refers to determining "the 'legal' nature of an issue . . . ."[43] This reference indicates that the practical abilities of jurors would be relevant to determining whether an entire class of claims is legal or equitable in nature, but it does not suggest that the courts analyze the abilities of jurors to handle particular cases within those classes of claims that have already been ruled "legal."[44] This point was made by Judge Friendly of the second circuit in *United States v. J.B. Williams Company, Inc.*,[45] where the court upheld the right of jury trial in an FTC cease and desist case. He said:

> [T]he footnote in Ross v. Bernhard was part of an argument for applying the Seventh Amendment right to a jury trial where it

---

40. *Id.* at 532-33.

41. *Id.* at 538, n.10.

42. *See, e.g.*, ILC Peripherals Leasing Corp. v. International Business Mach. Corp., 458 F. Supp. 423 (N.D. Cal. 1978); Bernstein v. Universal Pictures, Inc., 79 F.R.D. 59 (S.D.N.Y. 1978); *In re* Boise Cascade Sec. Litigation, 420 F. Supp. 99 (W.D. Wash. 1976).

43. 396 U.S. at 538 n.10.

44. Radial Lip Mach., Inc. v. International Carbide Corp., 76 F.R.D. 224, 227-28 (N.D. Ill. 1977).

45. 498 F.2d 414 (2d Cir. 1974).

> had not been recognized before the merger of law and equity—not a suggestion that a type of statute which had uniformly been held to carry the right of jury trial should now be construed to eliminate it.[46]

The interpretation of *Ross* to require an examination of the abilities of jurors on a case by case basis is also inconsistent with the holding of the case and the legal principles cited by the Court. The decision of the Court upheld the right of jury trial. In addition, the text of the opinion annotated by the *Ross* footnote cited a "right to jury trial on the legal claims which must not be infringed either by trying the legal issues as incidental to the equitable ones or by a court trial of common issues existing between the claims."[47] Moreover, the Court relied on the *Fleitmann* holding that the antitrust statutes could not be read as permitting the courts to dispense with the right of jury trial.[48] Thus, the text of the *Ross* case is inconsistent with the interpretation of the footnote that would permit dispensing with juries in complex cases.[49]

Although the *Ross* footnote provided the impetus for the movement to limit the right of jury trial in complex cases, the third circuit did not rely fully on this passage as the basis for its decision in *Japanese Electronic Products*. The court found it "unlikely" that the Supreme Court would have "announced an important new application of the Seventh Amendment in so cursory a fashion."[50] However, the court did read the *Ross* footnote as opening the way for decisions limiting "the range of suits subject to the seventh amendment

---

46. *Id.* at 428.

47. 396 U.S. at 538.

48. *Id.* at 536.

49. In *Curtis v. Loether*, 415 U.S. 189 (1974), the Court dropped the third part of the *Ross* test in analyzing the issue of whether a jury trial was required in a fair housing case arising under the Civil Rights Act of 1968. It found that a jury trial was required and made no mention of any consideration of the practical limitations of juries. The Court said: "The Seventh Amendment does apply to actions enforcing statutory rights, and requires a jury trial upon demand, if the statute creates legal rights and remedies, enforceable in an action for damages in the ordinary courts of law." *Id.* at 194. The omission of any mention of the third part of the *Ross* test led the United States Court of Appeals for the Fourth Circuit to discount the importance of this factor in *Barber v. Kimbrell's, Inc.*, 577 F.2d 216 (4th Cir. 1978), a case upholding the right of jury trial in suits arising under the Truth in Lending Act. The fourth circuit stated: "This third test [of *Ross*], however, was not reiterated by the Court in *Curtis*, raising doubts as to its continued vitality." *Id.* at 225 n.25.

50. Japanese Elec. Prod., 631 F.2d at 1080. A similar view was expressed by the ninth circuit in *In re United States Fin. Sec. Litigation*, 609 F.2d 411, 425 (9th Cir. 1979): "After employing an historical test for almost two hundred years, it is doubtful that the Supreme Court would attempt to make such a radical departure from its prior interpretation of a constitutional provision in a footnote."

. . . ."[51] This interpretation may have been an important predicate for the court's ultimate holding that the due process clause could be used to remove certain cases from the reach of the seventh amendment.

Approach of the Majority in Japanese Electronic Products

The due process analysis of the third circuit emanates from the premise that the due process provision of the fifth amendment is designed to minimize the risk of erroneous decisions. As the possibility of error is enhanced when a jury may not fully understand the evidence and the applicable legal principles, the court determined that due process would preclude trying the case to a jury. In the opinion of the court, this decision reflects the "most reasonable accommodation between the two constitutional provisions."[52]

The decision to recognize a due process interest in minimizing the risk of erroneous decisions was assertedly buttressed by the finding that jury trials are not an essential element of due process in civil cases. According to the court, the experience of the federal courts in equitable actions proves that basic fairness can be achieved in judge trials.[53] Additionally, the court found support for its decision in the refusal of the Supreme Court to incorporate the right of jury trial in civil cases as an element of due process required to be accorded in the states under the fourteenth amendment.[54] Thus, the loss of the right to jury trial does not implicate the "fundamental concerns"[55] attendant to the increased risk of erroneous decisions.

Nor was the third circuit persuaded by other arguments favoring the absolute right of jury trial. Although the decision to strike the jury demand in advance necessarily depends on a prognostication of the difficulties that would be experienced by a jury, the court found no difficulty with the hypothetical nature of the analysis. Indeed, the court drew support from this point, holding that "the procedural requirements of due process are by their very nature prospective . . . ."[56] The court also rejected arguments based on the special abilities of the jury to apply community wisdom and values, holding that these qualities have little meaning when the jury does not understand the case.[57] Finally, the court was unim-

51. 631 F.2d at 1080.
52. *Id.* at 1084.
53. *Id.* at 1085.
54. *Id.*
55. *Id.* at 1084.
56. *Id.* at 1085.
57. *Id.*

pressed with the contention that juries are a necessity to provide a needed check on judicial power: "A jury unable to understand the evidence and legal rules is hardly a reliable and effective check on judicial power."[58] In light of its analysis, the court declined to hold that the right of jury trial under the seventh amendment is absolute. Instead, in cases of sufficient complexity, it held that "the interests protected by [the] procedural rule of due process carry greater weight than the interests served by the constitutional guarantee of jury trial."[59]

Analysis of the Decision

The decision in *Japanese Electronic Products* reflects the valid doubts that are harbored by many persons in the legal system concerning the competence of jurors to understand the especially complex case. However, the analysis of the court fails to demonstrate that the constitutional interest in preserving the right of jury trial is outweighed by the values protected in a prospective decision to strike the jury. In addition, the ruling is likely to produce results that are at odds with its intended effect. Therefore, the decision does not provide adequate justification for an abrupt departure from the line of constitutional authority guaranteeing the right of jury trial in antitrust treble damage cases.

First, although the opinion of the third circuit is presented as a constitutional due process analysis, the primary interest served by the ruling is not due process, but judicial economy. The rules of judicial procedure already provide the litigants with adequate protection against the "due process" risk identified by the court: the likelihood of erroneous decisions. The trial judge possesses the power to protect the rights of litigants through procedures providing for summary judgment, directed verdict, judgment notwithstanding the verdict, new trial, remititur and additur.[60] Moreover, through the use of special interrogatories, the court can determine the internal consistency of the decision of the jury and gauge its understanding of the issues. The only added benefit served by striking the jury demand in advance is to decrease the likelihood that judicial effort will be wasted in the trial of a complex suit because the jury fails to understand the issues. This interest is doubtlessly important, reflecting the interests of the judiciary, the litigants, and the jurors, but it is an administrative interest that should not outweigh a specific constitutional value.[61]

58. *Id.* at 1085.
59. *Id.*
60. *See* FED. R. CIV. P. 50, 56, & 59.
61. *See, e.g.*, Shapiro v. Thompson, 394 U.S. 618 (1969).

The interpretation that *Japanese Electronic Products* is a "judicial economy" ruling is buttressed by an analysis of the factors set forth by the court as the measure of complexity. Virtually all of these factors are quantitative rather than qualitative in nature. They include the length of the trial, the amount of evidence, the number of issues, the amount of expert testimony, the length and detail of jury instructions, and the number of separately disputed issues relating to single transactions or items of proof.[62] These factors are more designed to gauge the amount of judicial effort required in a particular case than the ability of a jury to grasp the issues. Indeed, given the difficulty of predicting in advance the composite intelligence of any jury, the court probably could not have articulated standards that would accurately predict the ability of a jury to understand a given case. Therefore, the decision of the court appears designed primarily to avoid the prospect of wasting judicial resources.

Second, the decision of the court strikes an unjustified balance of the competing constitutional interests. The so-called due process "right" to be free from the risk of erroneous decisions is no right at all: litigants will always face the possibility of error as long as human beings in any capacity decide cases. An unquantified and unquantifiable "minimization" of this risk may be an important interest, but its status is more a reflection of the current beliefs of some judges than of constitutional values. On the other hand, this judge-created "right" is in direct conflict with a specific, textual provision of the Constitution that appears to guarantee absolutely the right of jury trial. Whether or not this guarantee has been termed "fundamental" for the purpose of application to the states,[63] its presence in the text of the Constitution should provide it with preeminent legal status in the federal system. In the "balancing" of constitutional interests, the implications drawn by judges from a vague guarantee should not prevail over a specific textual right.

Third, the right of jury trial protects a fundamental element of due process that was not recognized by the third circuit. The court dismissed the theory that the jury is a needed check on judicial power, theorizing that a jury incapable of understanding the issues could not secure "[o]ur liberties" as well as judges proceeding rationally and according to law. However, the interest protected by the right to jury trial is more related to objectivity than liberty.

62. 631 F.2d at 1088.

63. The third circuit in *Japanese Elec. Prod.* relied on the failure of the Supreme Court to rule that the right to a civil jury trial is an "essential element of ordered liberty required of the states by the due process clause of the fourteenth amendment." *Id.* at 1085.

Most judges do proceed rationally, under the law, and in accord with the evidence, but some are known to lean substantially toward favored interests. These judges may sit on cases despite their bias, producing unfair results in decisions couched in factual determinations that protect against appeal. To a litigant faced with a biased judge, the only possibility of a fair decision is usually the avenue of a jury trial. This check against the unfair exercise of judicial power is essential in our system, where judges are appointed for life and the motion for recusal is seldom made because it is likely to be well-remembered.

Fourth, the decision is likely to produce unmanageable consequences for the judicial system. Given the current interest in the issue cited by the third circuit,[64] it is likely that a large number of litigants will accept the open invitation to attempt to strike their opponents' jury demands. This effort will entail a showing of "complexity" under the standards articulated by the court. Thus, for those parties who wish to strike the jury, an essential element of trial tactics will be to enhance the apparent complexity of the case through the protraction of discovery, the creation and complication of issues, the production of numerous experts on various matters, and the asserted reliance on volumes of evidence. A determined litigant in an antitrust, securities or other complex case, unless tightly controlled by a strong trial court, can produce quantitative complexity by a simple combination of will and effort. This conduct, however, will have the side effect of unnecessarily burdening the judicial system. The result of *Japanese Electronic Products* may be an increase, rather than a decrease, in the waste of judicial resources.

The decision in *Japanese Electronic Products* is an unjustified departure from the established law. This ruling strikes an inappropriate balance between the competing constitutional interests and may produce a drain on judicial resources. The decision should be reviewed by the Supreme Court to eliminate the conflict in the circuits and, more importantly, to re-establish the legal rule entitling a party to a jury trial in an antitrust treble damage case.

The Issue of Contribution Among Antitrust Tortfeasors

In a burst of decisions on the relatively unlitigated issue of whether antitrust defendants may force joint tort-feasors to bear a proportionate share of the damages awarded a plaintiff, a split developed among the circuits and the Supreme Court agreed to review the question. In the first decision rendered on the issue by a court

64. *Id.* at 1074.

of appeals, the eighth circuit broke from district court precedent and the "traditional federal common law rule" and held that contribution may be enforced in an antitrust action. *Professional Beauty Supply, Inc. v. National Beauty Supply, Inc.*[65] In subsequent decisions, however, both the fifth circuit, in *Wilson P. Abraham Const. Corp. v. Texas Industries, Inc.*,[66] and the tenth circuit, in *Olson Farms, Inc. v. Safeway Stores, Inc.*,[67] held that a contribution claim is not available to antitrust defendants. The Supreme Court granted certiorari to review *Wilson P. Abraham*.[68]

The Split on the Contribution Issue

Under the federal common law, a defendant traditionally has had no right to seek contribution from joint tort-feasors.[69] Although few published decisions actually confronted the issue, the federal district courts generally applied this rule in antitrust cases.[70] Thus, if an antitrust plaintiff chose to exclude some tortfeasors from a suit, the defendants had no right to bring third party actions against the excluded parties to pay their pro rata shares of any damages. Instead, those parties included as defendants were required to pay the entire award, regardless of whether other parties participated in the conduct that injured the plaintiff.

The federal common law is applicable only to the extent that Congress fails to direct a rule to be applied in a specific instance. Thus, if the antitrust laws contained an explicit or implicit resolution of the contribution issue, this rule would control over the general tort rule fashioned by the judiciary.[71] All three courts of appeals apparently agreed, however, that the Sherman and Clayton

65. 594 F.2d 1179, 1182 (8th Cir. 1979). As the court pointed out, contribution had been denied in prior federal district court decisions. *See, e.g.*, Olson Farms, Inc. v. Safeway Stores, Inc., TRADE REG. REP. (CCH) ¶ 61,698 (D. Utah 1977).

66. 604 F.2d 897 (5th Cir. 1979).

67. No. 939 ANTITRUST & TRUST REG. REP. (BNA) E-1 (10th Cir. 1979).

68. 101 S. Ct. ___ (1980), *sub nom.*, Texas Indus., Inc. v. Radcliffe Materials, Inc. The Court initially granted certiorari in *Westvaco Corp. v. Adams Extract Co.*, an unpublished decision of the fifth circuit that denied the right of an antitrust defendant to seek contribution from parties that have settled with the plaintiff. 100 S. Ct. 3008 (1980). However, the court revised its grant of certiorari and chose to hear the *Wilson P. Abraham* case. 101 S. Ct. ___ (1980).

It should be noted that the law firm in which this writer is a partner is involved in the *Wilson P. Abraham* litigation and has an interest in the Supreme Court's determination.

69. *See* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1182 (8th Cir. 1979).

70. See note 63, *supra*.

71. *See* Wilson P. Abraham Constr. Corp. v. Texas Indus. Inc., 604 F.2d 897, 900-01 (5th Cir. 1979).

Acts contain no directive on the contribution issue.[72] Thus, the issue became whether the underlying objectives of the antitrust laws justified a departure from federal common law. All three of the courts devoted extensive discussion to various policy arguments for and against a right of contribution.

The decision in *Professional Beauty Supply* was based primarily on the factor of "fairness between the parties."[73] After rejecting a number of policy arguments against a right of contribution, the eighth circuit determined that fairness required the recognition of this right. It stated: "There is an obvious lack of sense and justice in a rule which permits the entire burden of restitution of a loss for which two parties are responsible to be placed upon one alone because of the plaintiff's whim or spite, or his collusion with the other wrongdoer."[74] This consideration, combined with the court's determination that the objectives of the antitrust laws would be undermined if "a significant number of antitrust violators [escaped] liability for their wrongdoing,"[75] led to a determination that contribution generally should be permitted. However, the court left the way open for triers of fact to deny contribution in cases of exceptionally flagrant conduct by the party seeking contribution.[76]

The decisions of the fifth and tenth circuits also reviewed the policy arguments on the contribution issue, but both courts determined that the policy factors favoring contribution were insufficiently persuasive to justify a new rule of law. In the *Wilson P. Abraham* case, the decision was based in part on the fear that a rule favoring contribution would diminish the deterrent effect of the treble damage penalty and cause difficulties for plaintiffs by fostering an increase in the overall size of antitrust suits.[77] One of the factors cited in *Olson Farms* was the potential unmanageability of antitrust cases if a right of contribution were permitted.[78] The double-edged nature of the contribution dispute led both courts to decline to enter "such a complex policy thicket,"[79] instead leaving the resolution of the issue to Congress.[80]

---

72. *Id. See* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1182 (8th Cir. 1979); Olson Farms, Inc. v. Safeway Stores, Inc., no. 939 ANTITRUST & TRUST REG. REP. (BNA) E-1 (10th Cir. 1979).

73. 594 F.2d at 1185.

74. *Id.* at 1185-86.

75. *Id.* at 1185.

76. *Id.* at 1186.

77. 604 F.2d at 905.

78. No. 939 ANTITRUST & TRUST REG. REP. (BNA) E-1.

79. *Id.* at E-4.

80. *Id.*

The Competing Policy Arguments

One of the primary policy issues discussed by the courts is the question of whether a right of contribution would enhance or diminish the deterrent effect of the antitrust laws.[81] The argument in favor of increased deterrence is the contention that a rule allowing contribution tends to ensure that all tortfeasors will be required to pay their share of the treble damage penalty. Without this rule, it is argued, some tortfeasors may be more inclined to engage in antitrust activity because of the increased prospect that they may escape liability altogether.[82] On the other hand, opponents of the contribution rule argue that the possibility of sole liability for treble damages carries an enhanced deterrent effect.[83] This contention was relied on by the fifth circuit, which cited "prevailing economic theory"[84] and stated: "The chance that a participant may be faced with a full judgment is more likely to discourage anticompetitive conduct than would ensuring that each participant pays only some fair share."[85] Each of these theories is probably true for some antitrust tortfeasors, but it is difficult to quantify the merit of either. Thus, these contentions tend to cancel each other out.

The interest of fairness provides a strong argument in favor of a rule permitting contribution. The idea of some joint tort-feasors escaping liability, while others bear the entire cost of treble damages, would be inconsistent with a goal of distributing the loss on an equitable basis. In a case in which the plaintiff's choice of defendants is based on collusion with one of the conspirators or fear of retaliation from a powerful enterprise, the requirement that only the named defendants bear the loss appears particularly unfair.[86] However, this interest is not necessarily determinative of the issue, because the antitrust laws were not designed to promote fairness for the violators. The treble damage penalty in the antitrust laws establishes instead that the statute is designed to inflict losses on antitrust violators in excess of the damages they have caused. This objective of the antitrust laws significantly tempers the fairness argument.

---

81. *See, e.g.*, Wilson P. Abraham Constr. Corp. v. Texas Indus. Inc., 604 F.2d 897, 901 (5th Cir. 1979); Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1184 (8th Cir. 1979).

82. Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1185 (8th Cir. 1979).

83. Wilson P. Abraham Constr. Corp. v. Texas Indus. Inc., 604 F.2d 897, 901 (5th Cr. 1979).

84. *Id.*

85. *Id.*

86. *See* Professional Beauty Supply, Inc. v. National Beauty Supply, Inc., 594 F.2d 1179, 1185-86 (8th Cir. 1979).

The strongest argument in favor of maintaining the no-contribution rule is that it will promote the ability of plaintiffs to manage and prosecute their lawsuits. This objective is consistent with the purpose, reflected in the treble damage provisions of the antitrust laws, of promoting enforcement of the statutes by litigants acting as "private attorney generals."[87] This purpose may be undercut if plaintiffs, which are usually outmanned in antitrust cases anyway, are required to bear the costs of litigation that become larger than anticipated through the addition of third party defendants. The antitrust plaintiff may not be able to afford the added expense and burden of a suit involving all potential defendants.

More significiantly, the pro-contribution rule would eliminate a major incentive for individual defendants to settle with the plaintiff in cases involving multiple defendants. One of the overriding reasons for settlement is to avoid the enormous legal costs that are often associated with antitrust litigation. But this incentive disappears if a settling defendant can be rejoined as a third party defendant to ensure that it contributes its pro rata share of the damages. Moreover, the certainty of ultimately paying a full pro rata share of damages will leave a defendant disinclined to accept a favorable offer from the plaintiff early in the litigation. Thus, the interest of promoting early settlement—a means by which many plaintiffs are able to finance the "big" antitrust case and reduce it to manageable size—would be injured by a rule favoring contribution. This factor has substantial importance, because the difficulty of financing and effectively prosecuting antitrust claims is a major barrier to private enforcement.

In *Wilson P. Abraham Const. v. Texas Industries, Inc.*,[88] the Supreme Court will have the opportunity to resolve the issue, and its decision is likely to have a significant impact on future antitrust enforcement.

DECISIONS OF THE SUPREME COURT

Three significant antitrust decisions were rendered by the Supreme Court in the October, 1979 term. In a case arising in New Orleans, the Court continued its expansive interpretation of the jurisdictional reach of the Sherman Act by holding that real estate brokerage activities may substantially affect interstate commerce. In addition, the Court further reduced the impact of the "state action" doctrine in decreeing that price-fixing activities are subject to

87. Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 130-31 (1969); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968).

88. *Cert. granted*, ___ S. Ct. ___ (1980).

the Sherman Act even though the price fixing occurs pursuant to state policy and enforcement. Finally, the Court decreed that an agreement fixing credit terms is a per se violation of the Sherman Act.

Reach of the Commerce Clause of the Sherman Act

In *McLain v. Real Estate Board of New Orleans, Inc.*,[89] the Court clarified and expanded the reach of its jurisdictional decision in *Goldfarb v. Virginia State Bar*.[90] In the *Goldfarb* case, the Court ruled that legal services, though performed wholly intrastate, were subject to the Sherman Act where they were part of real estate transactions involving significant interstate activities. The Court relied on the "necessary connection"[91] between the allegedly illegal conduct and the interstate transactions arising because the title examinations were necessary in real estate transactions. It added: "Where, as a matter of law or practical necessity, legal services are an integral part of the interstate transaction, a restraint on the trade may substantially affect interstate commerce for Sherman Act purposes."[92]

Although the *Goldfarb* decision maintained the Court's expansive view of jurisdiction under the Sherman Act, the lower courts in *McLain* viewed the Court's language as establishing a requirement that the challenged activity be an "integral" part of the transactions having interstate aspects.[93] In *McLain*, the defendants were real estate brokers charged with conspiring to fix brokerage prices in the greater New Orleans area. The jurisdictional claim of the plaintiff was based on the contention, like the one relied on in *Goldfarb*, that the brokerage activities were part of transactions having overall interstate aspects.[94] However, both the district court and the fifth circuit found that the challenged brokerage activities were not an integral part of the interstate transactions.[95] Brokerage services were not necessary to the completion of real estate transactions and only occasionally did brokers deal directly with the interstate phases of procuring title insurance and financing for these sales.[96]

89. 100 S. Ct. 502 (1980).
90. 421 U.S. 773 (1975).
91. *Id.* at 784.
92. *Id.* at 785.
93. McLain v. Real Estate Board of New Orleans, Inc., 100 S. Ct. 502, 508 (1980).
94. 100 S. Ct. at 505-06.
95. McLain v. Real Estate Board of New Orleans, Inc., 583 F.2d 1315 (5th Cir. 1978); McLain v. Real Estate Board of New Orleans, Inc., 432 F. Supp. 982 (E.D. La. 1977).
96. 432 F. Supp. at 985.

Thus, both courts ruled that the claim should be dismissed for lack of jurisdiction.[97]

The Supreme Court reversed. It noted that two independent theories may support jurisdiction in Sherman Act cases: (1) the challenged activities may be "in" interstate commerce, or (2) these activities may have an "effect on commerce."[98] The language relied on from *Goldfarb* was not controlling of *McLain*, it said, because the "integral part" criterion was the basis on which the Court found the attorneys' title searches to be "in" interstate commerce.[99] The Court said:

> By placing the *Goldfarb* holding on the available ground that the activities of the attorneys were within the stream of interstate commerce, Sherman Act jurisdiction was established. The *Goldfarb* holding was not addressed to the "effect on commerce" test of jurisdiction and in no way restricted it to those challenged activities that have an integral relationship to an activity in interstate commerce.[100]

Instead of requiring that the challenged brokerage activities be an integral part of the interstate commerce associated with real estate transactions, it is only necessary that the "activities which allegedly have been infected by a price-fixing conspiracy be shown 'as a matter of practical economics' to have a not insubstantial effect on the interstate commerce involved."[101] The Court believed that this showing might be made at trial where, "as here, the services of respondent real estate brokers are often employed in transactions in the relevant market."[102]

McLain reaffirms the line of holdings of the Court that the Sherman Act reaches as far as the commerce clause permits to restrain anticompetitive practices.[103] Jurisdiction may be established by a showing that the challenged activities are "in" the stream of interstate commerce or, under the broad "effect on commerce" theory, that they have "an effect on some other appreciable activity demonstrably in interstate commerce."[104] This determination of effect is made under a "not insubstantial"[105] analysis, a test that is likely to encompass most of the economic activity in the United States.

---

97. 583 F.2d at 1321-23.
98. 100 S. Ct. at 509.
99. *Id.* at 510.
100. *Id.*
101. *Id.* at 511.
102. *Id.*
103. *See* Gulf Oil Corp. v. Copp Paving Co., Inc., 419 U.S. 186, 194-95 (1974).
104. 100 S. Ct. at 509.
105. *Id.* at 511.

Restriction of the State Action Doctrine

The recent disinclination of the Court to apply the doctrine that grants antitrust immunity for "state action" surfaced again in *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc.*[106] The Court refused to apply the doctrine to a California system of resale price maintenance in the marketing of wine. Although the program was mandated by state law and enforced through state action, the Court found that it violated the Sherman Act.

Under the state action doctrine established in *Parker v. Brown*,[107] actions of the state were held to be outside the scope of the antitrust laws. Thus, even if conduct would be illegal if engaged in by private parties, it was immune from antitrust enforcement if engaged in by the state. This doctrine, however, was determined to be inapplicable if the state merely attempted to sanction private illegal conduct.[108] In recent years, the Court has restricted the scope of the state action doctrine by refusing to apply it when the state "prompts" rather than compels the anticompetitive activity[109] and when the state plays a passive rather than an active role in the regulatory scheme.[110] However, the Court continued to apply the immunity when the state actively participated in the anticompetitive activity.[111]

The *Midcal Aluminum* case provided an opportunity to delineate further the dividing line between immune and non-immune activity. The California price-fixing system required all wine producers, wholesalers and rectifiers to file resale prices with the state and precluded state-licensed wine merchants from reselling to retailers at prices different from the prices on file.[112] If a licensee made sales at prices below the established prices, it faced state-imposed penalties, including fines, license suspension, or license revocation.[113] However, the state did not set the resale prices or review the reasonableness of the prices set by wine dealers.[114]

The decision of the Court turned on the failure of the state to actively participate in the price-setting activities. After reviewing its prior decisions, the Court determined that there are two prereq-

106. 100 S. Ct. 937 (1980).
107. 317 U.S. 341 (1943).
108. Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951).
109. Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975).
110. Cantor v. Detroit Edison Co., 428 U.S. 579 (1976).
111. New Motor Vehicle Board of Calif. v. Orrin W. Fox Co., 439 U.S. 96 (1978).
112. 100 S. Ct. at 940.
113. *Id.*
114. *Id.*

uisites for antitrust immunity under the state action doctrine: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself."[115] The first criterion was met by the California regulatory scheme because the policy was "forthrightly stated and clear in its purpose to permit resale price maintenance,"[116] but the second requirement was not met, despite the state enforcement activities. The Court said:

> The State simply authorizes price-setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any 'pointed reexamination' of the program. The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price fixing arrangement.[117]

The Court also held that the state program was not protected by the twenty-first amendment to the Constitution.[118]

The decision in *Midcal Aluminum* may give further impetus to the trend of restrictions on the state action doctrine. The California program was mandated and enforced by the state. The failure of California to continuously monitor market conditions or the reasonableness of prices is the type of omission that may occur in the regulatory programs of many states. If so, these state laws may be subject to attack as inconsistent with the Sherman Act.

Application of the Per Se Rule to Credit Fixing

In *Catalano, Inc. v. Target Sales, Inc.*,[119] the Court held that an agreement among competitors to deny credit terms to their customers is a per se violation of the Sherman Act. According to the complaint, the defendants, a group of beer wholesalers, agreed among themselves to make sales to retailers only if payment was made in advance or upon delivery of the beer. Credit terms allegedly had been available prior to the agreement. The district court denied a motion of the plaintiffs to declare the alleged practice a per se violation and, in an interlocutory appeal, the ninth circuit affirmed.[120]

---

115. *Id.* at 943.
116. *Id.*
117. *Id.* at 943-44.
118. *Id.* at 944-48.
119. 100 S. Ct. 1925 (1980).
120. Catalano, Inc. v. Target Sales, Inc., 605 F.2d 1097 (9th Cir. 1979).

In a per curiam opinion, the Supreme Court reversed. It held that credit terms are an "inseparable part of the price"[121] because interest-free credit is the equivalent of a price discount equal to the value of the use of the purchase price for the period credit is extended. Thus, an agreement fixing credit terms is a form of price fixing. The Court stated: "An agreement to terminate the practice of giving credit is thus tantamount to an agreement to eliminate discounts, and thus falls squarely within the traditional *per se* rule against price fixing."[122] Since the alleged credit fixing was simply another form of price fixing, the Court held it should be "conclusively presumed illegal without further examination under the rule of reason."[123]

DECISIONS OF THE COURTS OF APPEALS

In addition to the cases involving the right of jury trial and the issue of contribution among joint tort-feasors, significant decisions in at least two areas were rendered by the courts of appeals. One of these decisions affirmed a dismissal of the suit of the State of Missouri against the National Organization for Women, Inc. resulting from a convention boycott against states failing to pass the Equal Rights Amendment.[124] The ruling, which rested on the theory that the Sherman Act is not intended to cover anticompetitive activity that is politically motivated, produced a sharp division on a panel of the Court of Appeals for the Eighth Circuit. In two other important decisions, the ninth circuit[125] and seventh circuit[126] refused to apply the rule against antitrust suits by indirect purchasers established in *Illinois Brick Company v. Illinois*[127] when the plaintiffs were parties purchasing from a division or subsidiary of a co-conspirator[128] or an intermediary alleged to be a co-conspirator with the original seller.[129]

The National Organization for Women Decision

In *State of Missouri v. National Organization for Women*,[130] the court held that the Sherman Act was not intended to apply to a "politically motivated but economically tooled boycott participated

121. 100 S. Ct. at 1928.
122. *Id.*
123. *Id.* at 1929.
124. State of Missouri v. National Organization for Women Inc., 620 F.2d 1301 (8th Cir. 1980), *cert. denied*, 101 S. Ct. 122 (1980).
125. Royal Printing Co. v. Kimberly-Clark Corp., 621 F.2d 323 (9th Cir. 1980).
126. Fontana Aviation, Inc. v. Cessna Aircraft Co., 617 F.2d 478 (7th Cir. 1980).
127. 431 U.S. 720 (1977).
128. Royal Printing Co. v. Kimberly-Clark Corp., 621 F.2d 323 (9th Cir. 1980).
129. Fontana Aviation, Inc. v. Cessna Aircraft Co., 617 F.2d 478 (7th Cir. 1980).
130. 620 F.2d 1301 (8th Cir. 1980).

in and organized by noncompetitors"[131] of the victims of the boycott. The National Organization for Women, Inc. (NOW) organized a convention boycott against all states that had not ratified the Equal Rights Amendment (ERA). This boycott was undertaken to inflict economic harm on private business interests catering to the convention trade in order to achieve the political purpose of persuading legislators to vote for the ERA. Economic damage was caused to businesses in Missouri, spreading adverse effects to "'all parts of the economy of the state,'"[132] and the state filed a suit under the Clayton Act for injunctive relief to end the boycott. The district court dismissed the case and the eighth circuit affirmed, holding that "NOW's activities were political and thus not within the scope of the Sherman Act . . . ."[133]

The conclusion of the court in the *National Organization for Women* case is supported primarily by its reading of the Supreme Court decision in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*[134] In *Noerr*, the Supreme Court held that the Sherman Act was not applicable to a publicity campaign undertaken by a group of railroads for the purpose of fostering legislation harmful to the trucking industry. Although this action was concerted activity designed to achieve an anticompetitive end, the Court found that it was not actionable because "no violation of the Act can be predicated upon mere attempts to influence the passage or enforcement of laws."[135] Because the boycott sponsored by NOW was an attempt to influence the passage of legislation, just as the publicity campaign in *Noerr* was designed to accomplish this purpose, the court reasoned that the boycott was outside the scope of the Sherman Act.[136]

A sharp dissent by Senior Judge Gibson contended that the majority had made an "over-board interpretation of the *Noerr* case."[137] The dissent focused on the action of NOW, the use of an economic boycott, rather than on the ultimate purpose of fostering the passage of the ERA. It stated: "The anticompetitive economic and commercial effects of the boycott on Missouri's legitimate business interests and welfare are identical, regardless of whether the motivation for the boycott is political or economic."[138] Concluding that the

131. *Id.* at 1302.
132. *Id.* at 1303.
133. *Id.* at 1302.
134. 365 U.S. 127 (1961).
135. *Id.* at 135.
136. 620 F.2d 1309-16.
137. 620 F.2d at 1319 (Gibson, J., dissenting).
138. *Id.* at 1323.

political purpose alone is insufficient to immunize activity that is covered by the literal terms of the Sherman Act, Judge Gibson asserted that the case should be remanded for a full evaluation of the competing interests in the protection of competition and the preservation of first amendment freedoms.[139]

If the balancing proposed by Judge Gibson were conducted, the result might well be the same as that reached by the majority. Although the NOW boycott may have caused economic damage to Missouri businesses, its impact is spread sufficiently throughout the country to limit the potential damage to competition in any particular area. In addition, the overriding political purpose of the boycott could justify a decision to protect it under the first amendment. Thus, the decision of the majority, though cast as an interpretation of the scope of coverage of the antitrust laws, may have reflected a subjective balancing of the type proposed by the dissent.

Regardless of the outcome of a balancing test, however, the conclusions drawn by the majority are based on a questionable interpretation of the *Noerr* decision. The majority's analysis is almost dogged in its refusal to deal with the essential difference between the *Noerr* and *National Organization for Women* cases: in *Noerr*, private parties sought to persuade the government to take the action that would be injurious to competition, while in *National Organization for Women*, the private parties engaged in the anticompetitive activity in an effort to achieve their legislative goals. The foray of NOW into the economic world with a weapon long recognized as anathema to free competition[140] is hardly the same as the action of undertaking a publicity campaign.

In addition, the court failed to analyze the critical distinction between anticompetitive conduct undertaken by the government and the anticompetitive actions of private parties. The anticompetitive effects contemplated in *Noerr* presumably would have been legal, because anticompetitive activities engaged in by the state traditionally have been immunized from antitrust liability under the "state action" doctrine announced in *Parker v. Brown*.[141] On the other hand, the state action exception is not available to protect the economic conduct of a private organization. Thus, the concerted activity in *Noerr* was not illegal in and of itself and was designed to produce a result not barred by the antitrust laws.

The result in *National Organization for Women* is also troubling

139. *Id.* at 1323-26.

140. Klor's, Inc. v. Broadway-Hale Stores, 359 U.S. 207 (1959); Fashion Originators' Guild of America, Inc. v. Federal Trade Com'n, 312 U.S. 457 (1941).

141. 317 U.S. 341 (1943).

for its tenacious focus on "purpose" as the only determinant of the applicability of the Sherman Act. This interpretation ignores the harm that can be caused by the conduct of those who collaborate to harm competitors. The generalized boycott of NOW and groups in sympathy with it may not destroy the economy of Missouri, but a more localized victim or group of victims could be chosen whose loss could significantly injure competition.[142] In such a situation, the actions of the boycotting groups would be deeply inconsistent with the purposes of the Sherman Act, yet this conduct would relate to the political process only to the extent that the destruction of the "hostage" is assertedly designed indirectly to foster a political end. The strong interest of American society in preventing the destruction of the economic system, compared to the relatively weak interest in preserving the indirect method of injuring third parties to coerce political action, suggests that the focus on purpose alone may produce results that are harmful to the public welfare.

The decision of the eighth circuit ascribes too much weight to the precedential impact of *Noerr*. Moreover, the analysis of the court fails to balance adequately the competing interests at stake when a group threatens to destroy competition to achieve a political end. The categorical exemption from antitrust liability of the anticompetitive activity undertaken to indirectly coerce legislative action is unjustified. The ruling, if it lays the basis for future anticompetitive activity for "political" purposes, could have a significant adverse impact on the economic system.

The Exceptions to Illinois Brick Company v. Illinois

Illinois Brick v. Illinois[143] established the rule that only those firms that purchase goods directly from antitrust violators may sue for damages under the Clayton Act. The rule was adopted primarily for two reasons: (1) to avoid the possibility that violators might be held liable to multiple parties for the same overcharges,[144] and (2) to avoid the complexities of proof attendant to separating out each potential plaintiff's damages.[145] Indirect purchasers generally may not recover any damages, even if the overcharges were "passed on" to them by their suppliers. Two decisions of the courts of appeals,

142. As an example, a decision by NOW and other women's groups to boycott Chrysler Corporation automobiles could result in the failure of this company, with the result that market power would be further concentrated in the other car manufacturers.

143. 431 U.S. 720 (1977).

144. *Id.* at 730.

145. *Id.* at 730-31.

however, refused to apply this rule where special relationships existed between the original seller and the intermediary.

In *Royal Printing Company v. Kimberly-Clark Corp.*,[146] the ninth circuit held that the indirect purchaser rule should not be applied when the intermediary is a division or a subsidiary of a co-conspirator. Because a subsidiary or a division of a company probably would not be allowed to bring an antitrust suit for overcharges, the court reasoned that the creation of an additional group of potential claimants would not bring about the danger of multiple liability that led to the *Illinois Brick* ruling.[147] Moreover, the court avoided the problem of undue complexity by holding that the indirect buyer could sue for the entire amount of the overcharge.[148] Although this result might produce a windfall gain if the entire overcharge was not passed on by the intermediary, there was "nothing wrong [with this result] so long as the antitrust laws are vindicated and the defendant does not suffer multiple liability . . . ."[149]

A similar result was reached in *Fontana Aviation, Inc. v. Cessna Aircraft Company*,[150] though the court merely refused to uphold a summary judgment where it was alleged that the intermediary was a co-conspirator with the original seller. It stated: "We are not satisfied that the *Illinois Brick* rule directly applies in circumstances where the manufacturer and the intermediary are both alleged to be co-conspirators in a common illegal enterprise resulting in intended injury to the buyer."[151] The case was remanded for a trial.

CONCLUSION

The major developments in the field of antitrust may have a significant impact on the process in which antitrust issues are resolved. The circumscription of the right of jury trial is apparently aimed at promoting judicial economy, but this decision undermines a constitutional procedure that tends to ensure an objective trier of fact. In addition, the ruling could induce some litigants to conduct their cases in a manner designed to promote complexity, thereby increasing the burden on the judiciary. The split in the circuits on the contribution issue presents the important question of how to apportion damages among antitrust violators. The resolution of this issue may significantly affect the incentive for individual defendants in

146. 621 F.2d 323 (9th Cir. 1980).
147. *Id.* at 326.
148. *Id.* at 327.
149. *Id.*
150. 617 F.2d 478 (7th Cir. 1980).
151. *Id.* at 481.

conspiracy cases to settle with the plaintiff. The decisions of the Supreme Court in the 1979 term broadened the scope of Sherman Act jurisdiction, further restricted the "state action" exception to antitrust liability, and established that credit fixing is a per se violation. In other decisions of the courts of appeals, a political boycott was ruled outside the scope of the Sherman Act, and the *Illinois Brick* rule against suits by indirect purchasers was not applied to cases in which special relationships existed between the seller and the intermediary.