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ANTITRUST LAW

*Michael R. Fontham**

The developments in the field of antitrust involved a number of areas. In a major interpretation of the Robinson-Patman and Clayton Acts, the Supreme Court eliminated the automatic damages rule and held that a plaintiff must prove actual injury to be successful.¹ The Court also resolved a split among the circuits on the issue of contribution in antitrust cases, endorsing the majority rule that refused to recognize a right of contribution.² In addition, several decisions were rendered by the courts of appeals that limited the scope of the antitrust laws on various grounds. Moreover, two rulings of courts of appeals gave further definition to the applicable evidentiary standard in predatory pricing cases. In other developments, important decisions were rendered in cases involving the issues of monopolization, standing, distributor terminations, the right of jury trial, real estate multiple listing services, conspiracy, and franchise tying arrangements.

THE REQUIREMENT OF ACTUAL INJURY TO SUPPORT A ROBINSON-PATMAN CIVIL DAMAGES CLAIM

The treble damages provision of the Clayton Act provides a right of action to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . ."³ In cases brought pursuant to the Robinson-Patman Act, the question of whether the requisite injury may be inferred from proof of substantial price discrimination had split the circuit courts.⁴ In a case involving a claim of price discrimination alleged to result from a discriminatory bonus incentive program in the marketing of automobiles, the Fifth Circuit held that the failure of the plaintiff to offer any substantial evidence of injury attributable to the incentive program was fatal to the action.⁵ The Supreme Court upheld this substantive ruling, but vacated and remanded the decision of the court

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1. *J. Truett Payne Co., Inc. v. Chrysler Motors Corp.*, 101 S. Ct. 1923 (1981).

2. *Texas Indus., Inc. v. Radcliff Materials, Inc.*, 101 S. Ct. 2061 (1981).

3. 15 U.S.C. § 15 (1976).

4. *Compare Fowler Mfg. Co. v. Gorlick*, 415 F.2d 1248 (9th Cir. 1969), *cert. denied*, 396 U.S. 1012 (1970) *with Enterprise Indus., Inc. v. Texas Co.*, 240 F.2d 457 (2d Cir.), *cert denied*, 353 U.S. 965 (1957).

5. *Chrysler Credit Corp. v. J. Truett Payne, Inc.* 607 F.2d 1133 (5th Cir. 1979).

of appeals for a further analysis of the evidence on the issue of damages in *J. Truett Payne Co. v. Chrysler Motors Corp.*⁶

Section 2(a) of the Robinson-Patman Act⁷ makes it unlawful to discriminate in price between different purchasers of commodities where the effect may be to substantially lessen competition. To prove a violation of this provision, a plaintiff need not show that actual injury to competition resulted from the price discrimination.⁸ For a private plaintiff to recover treble damages pursuant to this provision, however, he must proceed under section 4 of the Clayton Act, which embodies the requirement of injury to the plaintiff's business or property.⁹ Interpreting this provision as "remedial"¹⁰ in nature, as compared to the "prophylactic"¹¹ provision of the Robinson-Patman Act allowing proof that competition "may" have been injured, the Court ruled that a treble damage plaintiff "must make some showing of actual injury attributable to something the antitrust laws were designed to prevent."¹² It rejected the argument that injury could be inferred from the proof of price discrimination alone or from proof that injury to competition might result from the discrimination.¹³

The Court indicated that any plaintiff proceeding under section 4 of the Clayton Act would have to prove actual injury to his business or property. It relied on a merger decision arising under section 7 of the Clayton Act, *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*,¹⁴ which held that the injury requirement of section 4 is not satisfied by a showing under section 7 that a merger may lessen competition. "Likewise in this case," said the Court, "proof of a violation does not mean that a disfavored purchaser has been actually 'injured' within the meaning of § 4."¹⁵ In addition, the Court interpreted the legislative history of the Robinson-Patman Act as indicating a Congressional rejection of proposals for an automatic damage rule.¹⁶

6. 101 S. Ct. 1923 (1981).

7. 15 U.S.C. § 13(a) (1976).

8. *See, e.g.,* *Corn Prods. Refining Co. v. Federal Trade Comm'n*, 324 U.S. 726, 742 (1945).

9. 15 U.S.C. § 15 (1976).

10. 101 S. Ct. at 1927.

11. *Id.*

12. *Id.*

13. *Id.*

14. 429 U.S. 477 (1977).

15. 101 S. Ct. at 1927.

16. *Id.* at 1927-28. The Court determined that the original Patman bill, H.R. 8442, § 2(d), 74th Cong., 1st Sess. (1935) and the Robinson bill, S. 3154, § 2(d), 74th Cong., 1st Sess. (1935), provided for a presumption that any plaintiff would be damaged in the

Although the claim that price discrimination, by itself, would make out a cause of action and entitle the plaintiff to damages was rejected by the Court, it did not direct the outright dismissal of the claim. Instead, the Court indicated that once the plaintiff proves a violation of section 2(a) of the Robinson-Patman Act, a lenient standard will be applied to determine whether damages can be proven.¹⁷ The Fifth Circuit had bypassed the issue whether a section 2(a) violation occurred, grounding its decision on the plaintiff's failure to "introduce substantial evidence of injury attributable to the programs"¹⁸ Thus, the Court vacated and remanded the case for a consideration of whether a section 2(a) violation had been proven. It directed the court of appeals, if it determined that a violation had occurred, to review the evidence of injury in light of the lenient damages standard mandated by previous cases.¹⁹

The doubts of the Court as to the adequacy of proof of injury arose primarily because of the plaintiff's failure to show any effect of the alleged price discrimination on retail prices.²⁰ The claim of lost sales resulting from the alleged discrimination was weak because of the absence of any proof that the alleged violation allowed the plaintiff's competitors to undersell it.²¹ The plaintiff argued, however, that its lost profits made it less able to compete effectively because it had fewer funds with which to advertise and make capital expenditures.²² The plaintiff suffered a four percent drop in its market share in one of the years of the damage period and inferred that this loss was attributable to the alleged discrimination.²³ The Court found that, "[e]ven construed most favorably to petitioner, the

amount of the price discrimination, but these provisions were removed from the legislation.

17. This determination flowed from the Court's "traditional rule excusing anti-trust plaintiffs from an unduly rigorous standard of proving antitrust injury." 101 S. Ct. at 1929. The rule rests on two theories noted by the Court in *Truett Payne*. First, the "vagaries of the marketplace usually deny us sure knowledge of what plaintiff's situation would have been in the absence of the defendant's antitrust violation." *Id.* Second, "it does not 'come with very good grace' for the wrongdoer to insist upon specific and certain proof of the injury which it has itself inflicted." *Id.*

18. *Chrysler Credit Corp. v. J. Truett Payne, Inc.*, 607 F.2d 1133, 1135 (5th Cir. 1979).

19. 101 S. Ct. at 1930.

20. *Id.* at 1928.

21. *Id.* n.4. See also, the statement of Mr. Justice Powell in his dissenting opinion, which was joined by three other members of the Court: "A plaintiff must show, to recover damages for a violation of § 2(a), that unlawful discrimination in price allowed a favored competitor to draw sales or profits from him, the unfavored competitor." *Id.* at 1931 (Powell, J., dissenting).

22. *Id.* at 1928 n.4.

23. *Id.* at 1938.

evidence of injury is weak."²⁴ However, it refused to hold that this evidence was insufficient as a matter of law.²⁵

The primary problem with the decision in *Truett Payne* is the failure adequately to distinguish injury as prerequisite to the establishment of a claim under section 4 of the Clayton Act from the damages flowing from an antitrust violation. It is one thing to apply a lenient evidentiary standard in assessing the proof of the amount of a plaintiff's damage, and another to apply this standard in determining whether one of the elements of the violation has been proven.²⁶ By engrafting the lenient damage rule onto the evaluation of whether "injury" has been proven as an element of the offense, the Court in effect compromised between the approach that presumes injury from price discrimination alone and the standard that would require the plaintiff to fully prove the injury. Under the Court's decision, a plaintiff in a section 2(a) Robinson-Patman action apparently will be required to prove: (1) a price discrimination that violates section 2(a), by a preponderance of the evidence; (2) that the price discrimination injured the plaintiff in his business or property, under a more lenient standard than previously was applied to the assessment of damages; and (3) the amount of damages, which would also be determined under the lenient standard.

The rejection of the automatic damages rule by the Supreme Court resulted in similar rulings by two courts of appeals. In *Allen Pen Co. v. Springfield Photo Mount Co.*,²⁷ the First Circuit followed *Truett Payne* and affirmed the dismissal of a price discrimination suit on the ground that the evidence could not support a finding of injury to the plaintiff resulting from the alleged violation.²⁸ The purported price discrimination in the marketing of stationary and school supplies affected less than two percent of the plaintiff's business.²⁹ The only evidence of damage to the plaintiff was an estimate by its president of a decrease in the rate of growth of total sales allegedly attributable to the discrimination.³⁰ The court determined that even under a lenient damages rule, the "showing here is clearly inadequate."³¹

24. *Id.* at 1929.

25. *Id.* at 1928, 1929 & n.4.

26. See the dissent of Mr. Justice Powell, 101 S. Ct. at 1931.

27. 653 F.2d 17 (1st Cir. 1981).

28. *Id.* at 19.

29. *Id.* at 20.

30. *Id.* at 22.

31. *Id.* at 23. The court added:

Unlike *Truett Payne*, appellant here produced no economic expert; it did not go out of business; it showed no absolute drop in sales; and the affected sales were

Similarly, the Seventh Circuit followed *Truett Payne* in overruling an automatic damage award that had been granted under the prevailing rule in that circuit in *Vanco Beverages, Inc. v. Falls City Industries, Inc.*³² The district court was directed to "assess plaintiff's damages by virtue of lost sales and profits."³³

RESOLUTION OF THE CONTRIBUTION ISSUE

Resolving another split that had developed among the circuit courts, the Supreme Court in *Texas Industries, Inc. v. Radcliff Materials, Inc.*³⁴ ruled that a defendant in an antitrust action has no right to seek contribution from joint tort-feasors. The Eighth Circuit had previously ruled that contribution may be enforced in an antitrust action,³⁵ while the Fifth and Tenth Circuits applied the traditional rule under federal common law that precluded a defendant from seeking contribution in tort cases.³⁶ The Supreme Court affirmed a ruling of the Fifth Circuit that denied a claim of contribution.³⁷

The opinion in *Texas Industries* identified conflicting policy interests for and against a rule that would allow contribution.³⁸ However, these interests were deemed less important than a "very

but a tiny fraction of its total business. While these are not indispensable prerequisites, their absence is fatal when a Robinson-Patman Act plaintiff fails, as here, to provide any coherent theory making plausible a causal connection between any violation that it was likely to show and any significant actual injury.

Id. The court also found that the requisite injury was not established for claims of violation of sections 2(e) and 2(c). *Id.* at 24-25.

32. 654 F.2d 1224 (7th Cir. 1981). This case overruled the standard set forth in *Grace v. E.J. Kozin Co.*, 538 F.2d 170, 174 (7th Cir. 1976). The *Vanco* decision is also notable for its holding that the "meeting competition" defense of section 2(b) of the Robinson-Patman Act, 15 U.S.C. § 13(b) (1976), is not established by a showing that the defendant held prices stable in one geographic area while raising prices in response to a competitor's price changes in another area. 654 F.2d at 1230.

33. 654 F.2d at 1231.

34. 101 S. Ct. 2061 (1981).

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

36. *Wilson P. Abraham Constr. Corp. v. Texas Indus., Inc.*, 604 F.2d 897 (5th Cir. 1979); *Olson Farms, Inc. v. Safeway Stores, Inc.*, No. 939 ANTITRUST & TRADE REG. REP. (BNA) E-1 (10th Cir. 1979).

37. The *Wilson P. Abraham* decision, 604 F.2d 897, was the case reviewed by the Court.

38. These arguments include the contentions in favor of a rule of contribution that "fairness and equity [require that the] often massive judgments in antitrust actions be shared by all the wrongdoers" and that, if the contribution rule were adopted, a "greater likelihood" would exist that "all wrongdoers will be held liable and thus share the consequences of the wrongdoing." 101 S. Ct. at 2064. Opponents of the proposed rule argued that the deterrent force of the antitrust laws is enhanced by the possibility "that a single participant could be held fully liable for the total amount of the judgment." *Id.* at 2065.

significant and perhaps dispositive threshold question: whether courts have the power to create such a cause of action absent legislation and, if so, whether that authority should be exercised in this context.³⁹ The Court held that the power to create an additional antitrust remedy is not vested in the courts.⁴⁰ As the antitrust laws do not explicitly or implicitly create this right of action,⁴¹ this determination precluded the recognition of the alleged claim.

The inquiry as to whether the federal courts possess the power to fashion a right of contribution involved analysis of two areas. First, the Court inquired as to whether "a federal rule of decision is 'necessary to protect uniquely federal interests.'"⁴² Although the antitrust area involves a strong federal interest, the requisite exceptional interest was not present because the contribution issue does not involve "the duties of the Federal Government, the distribution of powers in our federal system, or matters necessarily subject to federal control even in the absence of statutory authority."⁴³

Second, the Court reviewed the antitrust laws and determined that Congress has not "vested jurisdiction in the federal courts and empowered them"⁴⁴ to create new antitrust remedies. While the Court held that the judiciary possesses the right to develop a common law of antitrust under sections 1 and 2 of the Sherman Act,⁴⁵ it found that this power does not extend to the formulation of remedies. The Court distinguished the "sweeping language"⁴⁶ of the first two sections of the Sherman Act, which assertedly contemplate judicial interpretation, from the "detailed and specific"⁴⁷ remedial provisions passed by Congress. According to the Court, this detail indicates that Congress did not contemplate judicial action to create new antitrust remedies. Thus, it determined that the issue should be left for Congress to resolve.⁴⁸

RESTRICTIONS ON THE SCOPE OF THE ANTITRUST LAWS

A number of cases were decided that tend to restrict the applicability of the antitrust laws. They include a case holding that

39. *Id.* at 2065-66.

40. *Id.* at 2070.

41. *Id.* at 2066-67.

42. *Id.* at 2067.

43. *Id.* at 2068.

44. *Id.*

45. *Id.*

46. *Id.* at 2069.

47. *Id.*

48. *Id.* at 2070. For a more detailed discussion of the courts of appeals decisions on the contribution question, see Fontham, *Developments in the Law 1979-1980—Antitrust Law*, 41 LA. L. REV. 314, 428-32 (1981).

federal instrumentalities are not subject to the Sherman Act, two rulings applying the *Noerr-Pennington* doctrine to preclude liability for alleged anticompetitive conduct, a holding that the Capper-Volstead Act permits price-fixing by associations of dairy cooperatives and a holding that the scope of Sherman Act jurisdiction under the "effect on commerce" test should be construed narrowly. On the other hand, two cases rejected claims of antitrust immunity arising under laws regulating the insurance industry.

Immunity of Federal Instrumentalities

The trend of decisions in recent years had tended to limit the scope of governmental immunity from antitrust liability. These cases have increasingly reduced the reach of the "state action" doctrine announced in *Parker v. Brown*,⁴⁹ in which actions of the state were held to be outside the scope of the antitrust laws.⁵⁰ In addition, in at least one case decided by the United States Court of Appeals for the District of Columbia Circuit, an instrumentality of the District of Columbia was held to be subject to antitrust liability in *Hecht v. Pro-Football, Inc.*⁵¹ Despite the trend of decisions, and its own prior ruling in *Hecht*, the District of Columbia Circuit ruled in *Sea-Land Service, Inc. v. The Alaska Railroad*⁵² that a federal instrumentality is not subject to the antitrust laws.

The Alaska Railroad is an entity wholly owned and operated by the United States.⁵³ It was alleged to have conspired with a private corporation to eliminate competition and monopolize business in Alaska. The district court dismissed the action on the ground of sovereign immunity.⁵⁴ This rationale was overruled by the appellate court, but the ruling was nevertheless affirmed on the ground that "Congress did not place the United States or its instrumentalities under the governance of the Sherman Act."⁵⁵

The decision in the *Alaska Railroad* case rests primarily on an interpretation of the ruling of the Supreme Court in *United States v. Cooper Corp.*⁵⁶ and the legislative history of the Clayton Act. The court noted that the antitrust laws grant a right of action to "per-

49. 317 U.S. 341 (1943).

50. Decisions limiting the scope of *Parker v. Brown* include: *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978); *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

51. 444 F.2d 931 (D.C. Cir. 1971).

52. 659 F.2d 243 (D.C. Cir. 1981).

53. *Id.* at 244.

54. *Id.*

55. *Id.*

56. 312 U.S. 600 (1941).

sons" injured by antitrust violations as well as making "persons" subject to liability for violations.⁵⁷ It reviewed the holding in *Cooper* that the United States is not a "person" authorized to maintain a suit for treble damages under the antitrust laws. In addition, it relied on the Court's statement "that if the United States qualified as a 'person' entitled to maintain a treble damage action, it would also qualify as a 'person' subject to Sherman Act liability."⁵⁸ The court of appeals inferred that *Cooper* determined the United States qualified as neither type of "person." After the decision in *Cooper*, Congress amended the Clayton Act to permit the United States to sue for actual, though not treble, damages for antitrust violations.⁵⁹ It did not amend the Sherman Act to permit the United States to be held liable. As "Congress had a clear occasion to address the issue in 1955 but failed to do so,"⁶⁰ the court was unwilling "to engraft on [the] statute additions . . . the legislature might or should have made."⁶¹

The greatest impediment to the decision of the court of appeals was its own prior ruling in *Hecht*. In that case an instrumentality of the federal government, the District of Columbia Armory Board, was held to be subject to the antitrust laws.⁶² The appellants in *Alaska Railroad* relied heavily on *Hecht*, but the court distinguished the case on the ground that the Armory Board "more closely resembl[ed] a municipal agency than a United States instrumentality."⁶³ It distinguished federal from state or municipal agencies on the basis of a ruling of the Supreme Court, *Georgia v. Evans*,⁶⁴ rendered the year after *Cooper*, that the states could sue for treble damages under the antitrust laws. It concluded: "While *Hecht* stands as this court's precedent regarding District of Columbia agencies such as the Armory Board, we hold that *Hecht* does not supply analysis appropriate in a case in which the activities of a United States instrumentality are at issue."⁶⁵

While the *Alaska Railroad* case presents a straight-forward analysis of the *Cooper* holding and legislative actions occurring in 1955, its attempt to avoid the precedential impact of *Hecht* and the decisions involving state agencies is strained. The court failed to

57. 659 F.2d at 245. See 15 U.S.C. §§ 1, 2, 15 (1976).

58. *Id.* (citation omitted).

59. 15 U.S.C. § 15a (1976).

60. 659 F.2d at 246.

61. *Id.* (citing *United States v. Cooper Corp.*, 312 U.S. at 605).

62. *Hecht v. Pro-Football, Inc.*, 444 F.2d 931, 936-42 (D.C. Cir. 1971).

63. 659 F.2d at 246.

64. 316 U.S. 159 (1942).

65. 659 F.2d at 246-47.

elaborate on any differences, important to the enforcement of anti-trust policies, between the Alaska Railroad and the District of Columbia Armory Board. Indeed, both of these instrumentalities were alleged to have engaged in concerted activity with a private party to eliminate competition. Moreover, the holding of the Supreme Court in *Cooper*, a decision rendered in 1941, is not a good indication of the Court's current attitude toward the antitrust liability of governmental agencies. Shortly after the *Cooper* decision, state action was held to be outside the scope of the antitrust laws,⁶⁶ yet the scope of this ruling has been limited significantly by subsequent cases.⁶⁷ If the conclusions as to the states set forth in *Parker* are no longer completely valid, the dicta contained in *Cooper* may also be suspect. The court of appeals failed to deal adequately with the trend of decisions limiting the scope of governmental immunity.

Immunity Under the Noerr-Pennington Doctrine

Under the decisions of the Supreme Court in *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*,⁶⁸ and *United Mine Workers of America v. Pennington*,⁶⁹ private parties may not be subjected to antitrust liability for concerted attempts to influence the passage of legislation or for their use of the administrative and judicial processes, even if these activities have an anticompetitive purpose. These decisions are grounded in the concept that parties have the constitutional right to petition the government and use the governmental processes, even if the purpose of this action runs counter to the policies embodied in the antitrust laws.⁷⁰ The *Noerr-Pennington* doctrine is subject to a "sham" exception, however, in cases where baseless, repetitive claims are brought in a pattern that abuses the administrative or judicial process, which exception is discussed in *California Motor Transport v. Trucking Unlimited*.⁷¹ In two cases rendered by the courts of appeals, the *Noerr-Pennington* doctrine was applied to protect parties that allegedly used judicial and administrative processes to achieve anticompetitive goals.

In *Ad Visor, Inc. v. Pacific Telephone & Telegraph Co.*,⁷² the Ninth Circuit reviewed a holding that 63 state court collection suits

66. *Parker v. Brown*, 317 U.S. 341 (1943).

67. See note 50, *supra*.

68. 365 U.S. 127 (1961).

69. 381 U.S. 657 (1965).

70. See, e.g., *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 138 (1961).

71. 404 U.S. 508 (1972).

72. 640 F.2d 1107 (9th Cir. 1981).

brought against a party came within the "sham" exception. The district court had characterized the suits as brought "in furtherance of an anticompetitive scheme, and used as a bludgeon to retain a monopoly and to interfere with the business relationships of a competitor."⁷³ The court of appeals, however, held that the lawsuits were protected under *Noerr-Pennington*. It found that the collection suits were not baseless⁷⁴ and held that "multiplicity, by itself, does not vitiate the Noerr-Pennington protections,"⁷⁵ even if brought with the purpose of interfering with others' business relationships.⁷⁶ It concluded that the collection suits were protected by the first amendment right to petition the government for the redress of grievances.⁷⁷

In *Federal Prescription Service, Inc. v. American Pharmaceutical Association*,⁷⁸ the District of Columbia Circuit held that certain litigation activities, as well as lobbying efforts with state pharmaceutical boards, conducted by a pharmaceutical association to inhibit the sales of a mail order pharmacy were protected under the *Noerr-Pennington* doctrine. The court was unimpressed by the argument that the pharmacy boards were made up of pharmacists who competed with the plaintiff and therefore catered to the interests of the pharmaceutical association.⁷⁹ "However desirable might be the goal of ridding government of the appearance of catering to special interests," it said, "the Sherman Act was not designed to achieve it."⁸⁰ The court also refused to reduce the scope of the *Noerr-Pennington* immunity when the activities of a pharmaceutical board shifted from matters of policy to discretionary judgments responsive to commercial considerations. It held that the proper focus in applying the doctrine is on the activities of the lobbyists, not on those of the governmental agency.⁸¹

Nor would the court accept the contention that the governmental agencies conspired with the association. Although this conduct, if proven, would not be protected by the *Noerr-Pennington* doctrine, the court found the evidence insufficient to prove a conspiracy. Even though the action of board members may have been designed to further the economic good of the association rather than the

73. *Id.* at 1109.

74. *Id.* at 1110.

75. *Id.* at 1109.

76. *Id.*

77. *Id.* at 1110.

78. No. 1028 ANTITRUST & TRADE REG. REP. (BNA) A-24 (D.C. Cir. 1981).

79. *Id.* at A-25.

80. *Id.*

81. *Id.* at A-26.

public good, the court found that this approach could be explained without any necessary inference of a conspiracy.⁸² It held that an inference of conspiracy should be made only when alleged conspirators take parallel action that is contrary to their own self interests.⁸³ The court also found that the plaintiff had failed to prove any injury resulting from these and other alleged violations.⁸⁴

Capper-Volstead Act

The Capper-Volstead Act provides that persons engaged in the marketing of agricultural products may form associations to market these products and make "the necessary contracts and agreements to effect such purposes."⁸⁵ This statute has the effect of exempting farmers who comprise an association from liability for agreements that otherwise would violate section 1 of the Sherman Act, including price-fixing agreements enacted by the association.⁸⁶ However, the Act does not wholly immunize agricultural associations from conduct violative of the antitrust laws, including conduct that would violate the monopolization provision of section 2.⁸⁷

In *Fairdale Farms, Inc. v. Yankee Milk, Inc.*,⁸⁸ two claims were raised that the conduct of certain dairy cooperatives violated the antitrust laws. First, because seven cooperatives had formed an association for the purpose of setting prices, it was claimed that a section 1 price-fixing violation occurred. The plaintiff, a producer and dealer-processor in milk, conceded that a cooperative could fix the prices charged by its members, but contended that cooperatives could not further agree to form an association for the sole purpose of fixing prices.⁸⁹ Second, it contended that farm cooperatives may be held liable for illegally monopolizing a market under the same standards that would apply to a corporation.⁹⁰

The Second Circuit rejected both these claims. It indicated that a "*de minimus* organizational distinction,"⁹¹ coupled with a "hyper-technical reading of the statute"⁹² should not permit the plaintiff to

82. *Id.* at A-27.

83. *Id.*

84. *Id.*

85. 7 U.S.C. § 291 (1976).

86. *Maryland & Virginia Milk Producers Ass'n v. United States*, 362 U.S. 458, 466 (1960).

87. *Id.* at 467, 468.

88. 635 F.2d 1037 (2d Cir. 1980).

89. *Id.* at 1039.

90. *Id.* at 1040.

91. *Id.* at 1039.

92. *Id.* at 1040.

avoid the intended effect of the Capper-Volstead Act. Thus, although the statute specifically permits only the formation of associations of farmers to market farm products, the court determined that these associations could further associate to accomplish this purpose. This conclusion was not affected by the contention that the sole purpose of the association of cooperatives was to fix prices. The court said that this action "is an integral part of marketing."⁹³ It added: "It would be strange indeed if participation in this portion of the marketing process, standing alone, would subject a cooperative to antitrust liability, when the exercise of the full range of activities covered by Capper-Volstead would not."⁹⁴

A tougher issue was presented by the monopolization claim, on which the district court had ruled that the plaintiff had "no greater burden than if he sued a corporation."⁹⁵ The Supreme Court previously had held that, despite the Capper-Volstead Act, cooperatives are not "free to engage in practices against other persons in order to monopolize trade, or restrain and suppress competition with the cooperative."⁹⁶ However, the Court had not decided whether the ordinary standard in monopolization cases would apply to agricultural cooperatives. If applicable, this standard would make a cooperative liable if it possessed monopoly power in a market and willfully acquired or maintained that power.⁹⁷

In *Fairdale*, the Second Circuit reviewed the legislative history of the statute and concluded that cooperatives may acquire monopoly power in a manner that would violate the "willful acquisition" test. It said:

[W]hile the formation, growth and operation of a powerful cooperative is obviously a "willful acquisition or maintenance of such power," and will rarely result from "a superior product, business acumen, or historic accident," . . . it is exactly what Capper-Volstead permits.⁹⁸

The court held, however, that a cooperative would violate the Sherman Act if it acquired monopoly power by "other, predatory means."⁹⁹

93. *Id.*

94. *Id.*

95. *Id.*

96. *Maryland & Virginia Milk Producers Ass'n*, 362 U.S. at 469.

97. *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966):

The offense of monopoly under § 2 of the Sherman Act has two elements: (1) the possession of monopoly power in the relevant market and (2) willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.

98. 635 F.2d at 1045.

99. *Id.*

Scope of Interstate Commerce Jurisdiction

In *Crane v. Intermountain Health Care, Inc.*,¹⁰⁰ an en banc decision of the Tenth Circuit, the court refused to expansively interpret certain language employed by the Supreme Court last term in defining the scope of jurisdiction under the commerce clause of the Sherman Act. In *McLain v. Real Estate Board of New Orleans, Inc.*,¹⁰¹ the Supreme Court ruled that activity challenged as a violation of the Sherman Act does not have to be an integral part of an interstate transaction in order for the jurisdictional requirements to be met.¹⁰² If jurisdiction is assertedly established under the "effect on commerce" test, it is only required 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."¹⁰³ In the course of reaching this decision, the Court indicated that the full scope of the business engaged in by the alleged tortfeasors, rather than only their anti-competitive conduct, could be considered in applying the effect on commerce test. It said:

To establish the jurisdictional element of a Sherman Act violation it would be sufficient for petitioners to demonstrate a substantial effect on interstate commerce generated by respondents' brokerage activity. Petitioners need not make the more particularized showing of an effect on interstate commerce caused by the alleged conspiracy to fix commission rates, or by those other aspects of respondents' activity that are alleged to be unlawful.¹⁰⁴

The plaintiff in *Crane* was a doctor who claimed to be the victim of a conspiracy to restrain his practice and boycott his services. He sued a corporation that owned seventeen hospitals and the administrator of one of the hospitals. The plaintiff claimed that in considering the jurisdictional issue under the *McClain* ruling, it was appropriate to consider whether interstate commerce was affected by the general business activities of the defendants rather than only their allegedly illegal activities. The Tenth Circuit, however, declined to accept this argument. Conceding that "the cited language arguably supports [the plaintiff's] position,"¹⁰⁵ it adopted a different construction that assertedly honored prior decisions requiring a nexus between interstate commerce and the unlawful conduct.¹⁰⁶

100. 637 F.2d 715 (10th Cir. 1981).

101. 444 U.S. 232 (1980).

102. *Id.* at 244.

103. *Id.* at 246 (citations omitted).

104. *Id.* at 242-43.

105. 637 F.2d at 722.

106. *Id.*

The Tenth Circuit's construction of the language cited from *McClain* is strained. The court argued that the Supreme Court meant only that a general rather than a particularized showing of a logical connection between the challenged activity and interstate commerce is sufficient to satisfy an initial jurisdictional inquiry.¹⁰⁷ It said:

In context, then, the Court was referring to the *challenged activities*, not the brokers' overall business, by its reference to "respondents' brokerage activities" in the passage Dr. Crane relies upon. By stating that plaintiff "need not make the more particularized showing of an effect on interstate commerce caused by the conspiracy . . . or other aspects of respondents' activity that are alleged to be unlawful," the Court was only confirming the principle set forth in *Hospital Building, Burke and Goldfarb* that for jurisdictional purposes a plaintiff need not "make the . . . particularized showing." 444 U.S. at 242, 100 S. Ct. at 509. In other words, an elaborate analysis of interstate impact is not necessary at the jurisdictional stage, only an allegation showing a logical connection as a matter of practical economics between the unlawful conduct and interstate commerce. The emphasis was intended to be that a "particularized" showing is not necessary, not that a showing of a nexus between unlawful conduct and effect is unnecessary.¹⁰⁸

This holding may harmonize *McClain* with the Tenth Circuit's view of other cases, but it does not adequately explain away the plain meaning of the language employed by the Supreme Court.¹⁰⁹ The refusal of the Tenth Circuit to shift the "analytical focus away from the challenged activity and towards the defendant's general or overall business" has the effect of placing a jurisdictional burden on Tenth Circuit plaintiffs that was apparently removed in *McClain*.¹¹⁰

Insurance Cases

In contrast to the decisions tending to limit the application of the antitrust laws, two rulings in the insurance field refused to recognize claims of immunity from antitrust prosecution. In a case decided by the Supreme Court, a claim that the National Health

107. *Id.* at 723.

108. *Id.* (emphasis by the court).

109. A contrary interpretation of *McClain* was rendered in *Western Waste Service v. Universal Waste Control*, 616 F.2d 1094 (9th Cir.), *cert. denied*, 449 U.S. 869 (1980).

110. Although it refused to adopt the plaintiff's interpretation of *McClain*, the court liberally interpreted the allegations of the complaint and determined that the decision of the district court to dismiss it on jurisdictional grounds was "premature." 637 F.2d at 724.

Planning and Resources Development Act of 1974 ("NHPRDA") creates an antitrust immunity was rejected in *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*.¹¹¹ In a decision of the Second Circuit, the antitrust exemption contained in the McCarran-Ferguson Act was strictly construed in *Pireno v. New York State Chiropractic Association*.¹¹²

The *National Gerimedical Hospital* case involved the claim that Blue Cross wrongfully refused to deal with the plaintiff by refusing to enter into an agreement making it a "participating hospital," which would have qualified the plaintiff for the direct reimbursement of the full cost of treatment of individual Blue Cross subscribers. The refusal of Blue Cross to enter the agreement was based on its policy barring the execution of participation agreements with new hospitals that did not meet a clearly evident need for health services in the applicable service area.¹¹³ In determining that the plaintiff failed to satisfy this requirement, Blue Cross relied on the failure of the plaintiff to obtain approval for construction from an agency funded under the NHPRDA to plan the development of health services in the local area. The complaint also alleged a conspiracy between Blue Cross and the planning agency.¹¹⁴

The analysis of the immunity question involved a consideration of familiar principles. As prior decisions indicate, the claim of an implied antitrust immunity "is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system."¹¹⁵ The regulation of an industry is not necessarily evidence of an intent to immunize the industry from antitrust enforcement, though the intent to create an antitrust exception might be inferred when "a regulatory agency has been empowered to authorize or require the type of conduct under antitrust challenge."¹¹⁶

Applied to the case, these principles indicated that an antitrust exception should not be recognized. First, the challenged "refusal to deal" was not mandated by any regulatory body and indeed the regulatory scheme envisioned under the NHPRDA had not been implemented by the State of Missouri when the challenged activity occurred. Thus, the conduct of Blue Cross did not deserve

111. 101 S. Ct. 2415 (1981).

112. 650 F.2d 387 (2d Cir. 1981).

113. 101 S. Ct. at 2417.

114. *Id.* at 2418.

115. *Id.* at 2421 (citing *United States v. National Ass'n of Sec. Dealers*, 422 U.S. 694, 719-20 (1975)).

116. *Id.* at 2421-22.

immunity.¹¹⁷ Second, the Court was unpersuaded that the NHPRDA was intended to exempt all private conduct undertaken in the health planning process from the applicability of the antitrust laws. Although the court recognized that Congress, in passing the NHPRDA, indicated a belief that the health care industry does not respond to classic marketplace forces,¹¹⁸ it nevertheless found the health planning statute and the antitrust laws reconcilable. Thus, there was no implied repeal of the antitrust laws in the NHPRDA.¹¹⁹

In *Pireno*,¹²⁰ a chiropractor complained that a procedure employed by an insurance company and a chiropractic association, which permitted the examination of a chiropractor's fee statements by a "peer review committee," was a means of fixing prices for chiropractic services. The district court dismissed the complaint on the ground that the peer review procedure was part of the "business of insurance" immunized from the application of the antitrust laws by section 2(b) of the McCarran-Ferguson Act.¹²¹ The court of appeals reversed, holding that the "'business of insurance' is to be strictly limited to only the quintessential insurance functions."¹²² It determined that any activity qualifying as the business of insurance would have to involve the "transfer [of] risk from insured to insurer or spread of risk among insureds"¹²³ It found "neither risk transference nor risk spreading in the peer review process,"¹²⁴ holding instead that the procedure was merely a cost-cutting device.¹²⁵

PREDATORY PRICING

The courts of appeals decisions gave definition to the appropriate analysis that should be applied in cases where predatory pricing is alleged to have been used to gain monopoly power. Both decisions were grounded in part on the published views of Professors Areeda and Turner,¹²⁶ which suggest that predation could be proven by evidence that prices were set below marginal costs. Because avail-

117. *Id.* at 2422-23.

118. *Id.* at 2423.

119. *Id.* at 2423, 2424.

120. 650 F.2d 387.

121. 15 U.S.C. § 1012 (1976).

122. 650 F.2d at 392. This holding was based on the court's reading of *Group Life & Health Insurance Co. v. Royal Drug Co.*, 440 U.S. 205 (1979).

123. 650 F.2d at 393.

124. *Id.*

125. *Id.*

126. Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975).

able accounting data usually does not permit a quantification of marginal cost, these commentators suggest the use of average variable cost, as a surrogate for marginal cost, to set the dividing line between predatory and non-predatory pricing.¹²⁷

In *Northeastern Telephone Co. v. American Telephone and Telegraph Co.*,¹²⁸ a case involving charges that a regulated monopoly engaged in predatory activities in the terminal telephone equipment market, the Second Circuit accepted the view of Areeda and Turner that "the relationship between a firm's prices and its marginal costs provides the best single determinant of predatory pricing."¹²⁹ It held that "prices below reasonably anticipated marginal cost will be presumed predatory, while prices above reasonably anticipated marginal cost will be presumed non-predatory."¹³⁰ The court also ruled that average variable cost should be used as a surrogate for marginal cost.

The court rejected arguments that it should adopt an average or fully distributed cost test, even though the defendant was a multi-product firm that was regulated by a state agency. Although a multi-product firm can subsidize losses incurred in the marketing of one product with profits earned in the sales of another, this factor did not persuade the court to deviate from the average variable cost dividing line. It found that a diversified firm suffers the same losses from predatory pricing as does any other firm.¹³¹ In addition, as barriers to entry into the product market were low, the court found that a policy of unremunerative pricing would not be likely to profit the alleged wrongdoer in the long run. Thus, the court declined to adopt "a more stringent test of predation merely because SNET is a diversified firm."¹³²

Nor was the court persuaded by the contention that "fully distributed costs" should be used as the predation standard where a regulated industry is involved. The plaintiff argued that a regulated entity "can allocate all of its joint costs to the monopoly aspects of its business, thereby giving it a permanent advantage over its unregulated competitors."¹³³ However, the court termed this argument "seriously flawed."¹³⁴ It indicated that any diversified firm, not

127. *Id.* at 716-18.

128. 651 F.2d 76 (2d Cir. 1981).

129. *Id.* at 88.

130. *Id.* (footnote omitted).

131. *Id.* at 89.

132. *Id.*

133. *Id.*

134. *Id.* at 90.

just a regulated entity, could employ this type of subsidization. Moreover, the court found that the adoption of the fully distributed cost standard would injure consumers by requiring the dominant firm to set prices at a level higher than that which would maximize consumer welfare.¹³⁵ Furthermore, the court contended that subsidization does not occur so long as price exceeds marginal cost, regardless of whether it exceeds fully distributed costs.¹³⁶ Finally, the court was unwilling to accept the premise that the state regulatory agency would permit the allocation of costs incurred in the unregulated sector to the regulated activities of the company.¹³⁷

As no proof was presented that the defendant's prices were less than its marginal or average variable costs, the jury verdict based on predatory pricing was reversed.¹³⁸ The court also overruled the verdict in a number of other areas.¹³⁹ On one issue, involving the claim that the defendant designed certain equipment to impede competition in the terminal equipment market by restricting access of competing equipment to the telephone network, the court deemed the evidence substantial enough to support a jury verdict.¹⁴⁰ However, it set aside the verdict and remanded the case for a new trial on the ground that the jury interrogatories did not make it clear that the decision on this issue was based solely on the evidence relating to the issue, as opposed to a "spill-over from the practices found not . . . anticompetitive."¹⁴¹

On the equipment design issue, the court also was confronted with the claim that the defendant's actions were immunized from antitrust liability because the telephone company's requirement of a "protective coupler" for use with competing terminal equipment was subject to the review of the Federal Communications Commission.¹⁴² It rejected this contention. First, the court held that the Communications Act does not "expressly authorize the FCC to approve protective coupler designs that unreasonably restrict competition."¹⁴³ Second, it found that the application of the antitrust laws would not so disrupt the regulatory scheme as to make it unworkable. Indeed, the FCC never approved the protective coupler tariff that was filed by the Bell System.¹⁴⁴ Thus, the court determined that the applica-

135. *Id.*

136. *Id.*

137. *Id.*

138. *Id.* at 91.

139. *Id.* at 91-94.

140. *Id.* at 94.

141. *Id.* at 94-95.

142. *Id.* at 82.

143. *Id.* at 83.

144. *Id.* at 83-84.

tion of the Sherman Act to the equipment design issue would not create a conflict with the regulatory scheme.¹⁴⁵

In another predatory pricing case, the Ninth Circuit adopted a variation of the Areeda-Turner analysis in *William Ingles & Sons Baking Co. v. ITT Continental Baking Co.*¹⁴⁶ In *Ingles*, the plaintiff charged that Continental sought to eliminate competition in the wholesale bread market in California by charging predatory and discriminatory prices for its private label bread. It claimed that this conduct violated the "attempt to monopolize" prohibition of section 2 of the Sherman Act and also violated the Robinson-Patman Act. The jury returned a verdict for the plaintiff, but the district court granted motions for judgment notwithstanding the verdict or, alternatively, a new trial. The court of appeals overturned the judgment, but held that the decision to grant a new trial was not an abuse of discretion.¹⁴⁷

On the issue of predatory pricing, the court indicated that the Areeda-Turner line of average variable cost is a useful, but not exclusive, evidentiary standard.¹⁴⁸ It said that an "ultimate standard" for a determination of predation should not employ strict adherence to a particular cost based rule, but should focus on the tendency of a firm's pricing practices "to eliminate rivals and create a market structure enabling the seller to recoup his losses."¹⁴⁹ It erected a standard that would shift the overall burden of proof to the defendant if its prices are shown to have been less than average variable costs. The court stated:

Guided by these principles, we hold that to establish predatory pricing a plaintiff must prove that the anticipated benefits of defendant's price depended on its tendency to discipline or eliminate competition and thereby enhance the firm's long-term ability to reap the benefits of monopoly power. If the defendant's prices were below average total cost but above average variable cost, the plaintiff bears the burden of showing defendant's pricing was predatory. If, however, the plaintiff proves that the defendant's prices were below average variable cost, the plaintiff has established a prima facie case of predatory pricing and the burden shifts to the defendant to prove that the prices were justified without regard to any anticipated destructive effect they might have on competitors.¹⁵⁰

145. *Id.* at 84.

146. 652 F.2d 917 (9th Cir. 1981).

147. *Id.* at 943, 952, 962.

148. *Id.* at 936-37.

149. *Id.* at 939.

150. *Id.* at 940.

The court also commented on the appropriate method for the determination of variable costs. After a review of various considerations, it found that the determination of which costs are variable will vary from case to case.¹⁵¹ However, the "first step" in the analysis generally should be to "compare the costs of production before and after the price reduction"¹⁵² alleged to be predatory. According to the court, "[t]he variable costs would then be those expenses that increased as a result of the output expansion attributable to the price reduction."¹⁵³

With respect to the Robinson-Patman Act claim of primary line injury resulting from predatory price discrimination, the court held that the same burden of proof standard should apply.¹⁵⁴ It recognized some differences exist in the elements of a Sherman Act predation claim and a Robinson-Patman action, including the fact that a Robinson-Patman violation may be established without proof of predatory intent. Thus, the court did not hold that the statutes are fully synchronized.¹⁵⁵ However, when the proof of predatory pricing is the basis for claiming the requisite competitive injury under the Robinson-Patman Act, the court held that no reason exists to apply a different analysis to the predation claim.¹⁵⁶

Two other important antitrust issues were resolved in *Ingles*. First, the court held that a "meeting competition" defense under section 2(b) of the Robinson-Patman Act will apply to market-wide price reductions if the defendant has a reasonable basis for believing that competitors are offering the lower price throughout the market.¹⁵⁷ Second, in reversing a summary judgment dismissing a claim of an intra-enterprise conspiracy, the court held that "two corporations, although part of the same corporate 'family,' are incapable of conspiring unless they function as a single economic unit."¹⁵⁸

MONOPOLIZATION

In *SCM Corp. v. Xerox Corp.*,¹⁵⁹ SCM claimed that the acquisition by Xerox of certain patents and its refusal to license the patents prevented SCM from competing effectively in the "conve-

151. *Id.* at 942.

152. *Id.* at 941.

153. *Id.*

154. *Id.* at 945.

155. *Id.* at 946.

156. *Id.*

157. *Id.* at 950.

158. *Id.* at 959.

159. 645 F.2d 1195 (2d Cir. 1981).

nience office copier" market.¹⁶⁰ After a series of agreements in which Xerox acquired licensing rights to the patents and took on sublicensing obligations, Xerox acquired title to the patents in 1956 under a contract that also abrogated its sublicensing requirements.¹⁶¹ A jury determined that this transaction was the only action of Xerox that caused injury to SCM by excluding it from the office copier market.¹⁶² However, the jury found that this market did not come into existence until 1969, when it was dominated by Xerox.¹⁶³ The question presented to the court was whether a patent acquisition¹⁶⁴ can form the basis for a monopolization claim when it occurs prior to the existence of the relevant market.

SCM argued that the acquisition of the patents by Xerox, which subsequently gave it monopoly power in the convenience office copier market, was actionable because the patents related to a "reasonably foreseeable economic market" and the agreement imposed restraints on competition that were greater than necessary for the development and marketing of the patented products.¹⁶⁵ This "rule of reason" contention failed to persuade the court, which was unwilling to find that a monopolization violation can occur "prior to the commercialization of the patented invention and prior to the appearance of the relevant market. . . ."¹⁶⁶ It held that the proper focus should be upon the market power that would be conferred by the patent in relation to the market position *then held* by the acquiring party.¹⁶⁷ The result proposed by SCM, according to the court, "would severely trample upon the incentives provided by our patent laws and thus undermine the entire patent system."¹⁶⁸

STANDING

In *Chrysler Corp. v. Feders Corp.*,¹⁶⁹ the Sixth Circuit reviewed a decision of a district court that dismissed on the ground of stand-

160. *Id.* at 1197.

161. *Id.* at 1197-99.

162. *Id.* at 1201.

163. *Id.* at 1202.

164. A patent acquisition, as distinguished from the acquisition or maintenance of power pursuant to a patent, can be actionable under the antitrust laws. The patent laws permit a party holding a patent to use it and to exclude others from using the invention. *Id.* at 1205. However, a party with monopoly power may not be able to enlarge this power by acquiring a patent, nor can a party attempt to enlarge the patent monopoly beyond the scope of the patent through the use of its market power. *Id.*

165. *Id.* at 1208.

166. *Id.*

167. *Id.*

168. *Id.* at 1209. The court in *SCM* also rejected claims made under section 1 of the Sherman Act and section 7 of the Clayton Act, and a claim that an allegedly illegal tying arrangement caused injury to SCM.

169. 643 F.2d 1229 (6th Cir. 1981).

ing a suit brought by Chrysler under the Sherman and Clayton Acts. Chrysler had sold to Fedders virtually all of the assets in Chrysler's Airtemp Division, which engaged in the marketing of non-automotive air conditioning systems. However, Chrysler later became dissatisfied with the agreement. It brought suit alleging a number of state law claims against Fedders as well as the antitrust claims. The district court ruled that an allegation of "antitrust injury" is required for a plaintiff to sue under section 4 of the Clayton Act.¹⁷⁰ Characterizing the suit as a breach of contract action, it held that Chrysler lacked standing.¹⁷¹

The court of appeals reiterated two standing requirements already adopted in the Sixth Circuit. They include: "(1) an allegation that the defendant caused the plaintiff injury in fact, and (2) that the interest which the plaintiff seeks to protect is arguably within the zone of interests protected by the relevant antitrust laws."¹⁷² In addition, the court reviewed the 1977 decision of the Supreme Court in *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*¹⁷³ and found that it added a third requirement: "that the pleading of 'antitrust injury' is an essential component of standing under § 4 of the Clayton Act."¹⁷⁴

In *Brunswick*, the plaintiff claimed that it was injured by a bowling equipment manufacturer that purchased and operated certain failing retail outlets; its actions had the effect of preserving competition.¹⁷⁵ Although the plaintiff may have been injured by these activities, the Supreme Court determined that it was not the type of injury that "the antitrust laws were intended to prevent."¹⁷⁶ To permit an action under section 4 of the Clayton Act, the Court said, the "injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation."¹⁷⁷ The Court did not specifically characterize this holding as a ruling on standing, but the Sixth Circuit construed *Brunswick* as adding a third standing requirement.¹⁷⁸

In applying the new element of the standing test, the court of appeals found itself compelled to focus on the "type of injury pleaded and its relationship to the alleged anticompetitive conduct."¹⁷⁹ Under

170. *Id.* at 1231.

171. *Id.*

172. *Id.* at 1233.

173. 429 U.S. 477 (1970).

174. 643 F.2d at 1234.

175. *Id.* at 1233-34.

176. 429 U.S. at 489.

177. *Id.*

178. 643 F.2d at 1234.

179. *Id.* at 1235.

this analysis, it was unable to find any antitrust injury flowing from the alleged subversion by Fedders of the agreement to acquire the assets of the Airtemp Division. The elimination of Chrysler from the market was due to its own voluntary execution of the agreement, not the subsequent actions of Fedders.¹⁸⁰ Therefore, the third prong of the standing requirement was deemed unsatisfied. On the other issues, however, including the claim that Chrysler was injured as a purchaser of air conditioning equipment by the conduct of Fedders, the standing requirements were held to be met.¹⁸¹

TREATMENT OF DISTRIBUTORS

In two decisions of the Ninth Circuit and one ruling of the Third Circuit, the courts rejected claims that actions taken by product suppliers against distributors were violative of the antitrust laws. The allegedly wrongful conduct was held non-actionable even though it occurred after the suppliers received requests to take the action from other customers that were or would be in competition with the affected distributors. The decisions of the Ninth Circuit were grounded in the failure of the plaintiff to show injury to competition flowing from the suppliers' conduct.¹⁸² The Third Circuit refused to permit the inference of a conspiracy between the supplier and the competing distributor in the absence of proof of a conscious commitment to a common scheme.¹⁸³

In one of the Ninth Circuit decisions, the court affirmed a summary judgment dismissing the complaint of a prospective car dealer that had its franchise application rejected by Fiat Distributors, Inc., a supplier, in *Ron Tonkin Gran Turismo, Inc. v. Fiat Distributors, Inc.*¹⁸⁴ The prospective dealer claimed that the franchise would have been awarded except for the intervention of another dealer that already owned a franchise for the sale of Fiat automobiles in the affected market. Although the court assumed that the rejection of the franchise application resulted from concerted action, it upheld the dismissal of the complaint on the ground that the action did not substantially and adversely affect competition.

In refusing to find the alleged concerted conduct actionable, the Ninth Circuit distinguished the holding of the Supreme Court in *Klor's, Inc. v. Broadway-Hale Stores, Inc.*¹⁸⁵ There, the Court held

180. *Id.*

181. *Id.* at 1235-36.

182. *A.H. Cox & Co. v. Star Mach. Co.*, 653 F.2d 1302 (9th Cir. 1981); *Ron Tonkin Gran Turismo, Inc. v. Fiat Distrib., Inc.*, 637 F.2d 1376 (9th Cir. 1981).

183. *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105 (3d Cir. 1980).

184. 637 F.2d 1376 (9th Cir. 1981).

185. 359 U.S. 207 (1959).

that a concerted refusal to deal would be *per se* illegal, requiring no showing of an adverse affect on competition.¹⁸⁶ However, *Klor's* involved allegations that a number of manufacturers and distributors refused to deal with the plaintiff at the behest of a competing dealer, not a claim that one manufacturer and one dealer conspired to exclude another dealer from a market.¹⁸⁷ Noting that *Klor's* has frequently been criticized for failing to delineate the limits of the *per se* rule¹⁸⁸ and that Ninth Circuit precedent indicated that a *per se* rule should not be applied to concerted refusals to deal in the absence of an anticompetitive purpose or effect,¹⁸⁹ the court held that the *per se* rule was inapplicable unless "the challenged activity clearly had, or was likely to have, a pernicious effect on competition and lacked any redeeming virtue."¹⁹⁰ Under this analysis the court found the *per se* rule inapplicable because Fiat possessed only a small share of the relevant market and the potential adverse effect on intrabrand competition of the refusal to appoint an additional dealer could have been offset by a benefit to interbrand competition.¹⁹¹

Under the rule of reason standard, the plaintiff's claim was also rejected, on the same ground. The court held that "[a]ppellant has simply failed to evidence 'significant probative evidence' of a substantially adverse effect on competition."¹⁹²

The other Ninth Circuit decision, *A.H. Cox & Co. v. Star Machinery Co.*,¹⁹³ also turned on the absence of anticompetitive impact. A crane distributor brought an antitrust action after its product line was taken away by the manufacturer and given to a rival distributor. In *Cox*, however, the court refused to view the impact of the distributor termination as primarily horizontal and on this basis pretermitted the application of the *per se* rule.¹⁹⁴ It found that economic impact of a change in distributors "is not altered merely because the dealer initiated the contract or actively sought the change, provided the manufacturer ultimately makes the decision based on its independent business judgment."¹⁹⁵ It recognized a right of a distributor to initiate a change in product lines, especially when

186. *Id.* at 211.

187. *Id.* at 212-13.

188. 637 F.2d at 1382.

189. *Id.* at 1385-86.

190. *Id.* at 1387.

191. *Id.* at 1387-88.

192. *Id.* at 1388.

193. 653 F.2d 1302 (9th Cir. 1981).

194. *Id.* at 1305.

195. *Id.* at 1307.

each distributor has only one product line.¹⁹⁶ Under the rule of reason, the failure of the plaintiff to show any injury to competition was dispositive.¹⁹⁷

In the Third Circuit decision of *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*,¹⁹⁸ the basis for rejecting the distributor's claim was an asserted inadequacy in the proof of concerted action of the supplier and the complainant's rival dealers. The supplier, Texaco, allegedly terminated an agreement with a price-cutting dealer and changed its hauling allowance after complaints were received from other dealers about the price cutting practices. Although Texaco acted in response to the complaints, the court of appeals upheld a directed verdict for Texaco. According to the court, proof of a concerted action requires a showing of a "conscious commitment to a common scheme."¹⁹⁹ The showing that employees of Texaco acted after receiving complaints from the rivals of the discounting dealer was held insufficient to permit an inference of a conspiracy.²⁰⁰

RIGHT OF JURY TRIAL IN COMPLEX ANTITRUST CASES

Although it backed away from taking a stand on whether or not a complexity exception to the right of jury trial exists in antitrust treble damage cases, the Fifth Circuit ruled that a jury trial cannot be denied simply because it would be difficult for a jury to reach a rational decision in *Cetton v. Witco Chemical Corp.*²⁰¹ Expressing no opinion as to the validity of the complexity exception recognized by the Third Circuit in *In re Japanese Electronic Products Antitrust Litigation*,²⁰² the Fifth Circuit ruled that "if such an exception exists, it is only to be applied when the trial judge finds that the case is so complex that a jury *could not* render a rational decision based on a reasonable understanding of the evidence and applicable rules of law."²⁰³

The district court in *Witco* had not ruled that the case was too complex to be understood by a jury. Instead, it determined it would be "most difficult, if not impossible, for a jury to reach a rational decision. . . ." ²⁰⁴ This finding was deemed insufficient to justify

196. *Id.*

197. *Id.* An attempt to monopolize claim was also rejected by the court. *Id.* at 1308-09.

198. 637 F.2d 105 (3d Cir. 1980).

199. *Id.* at 111.

200. *Id.* Rulings of the district court rejecting attempt to monopolize and Robinson-Patman claims were also upheld. *Id.* at 118, 122.

201. 651 F.2d 274 (5th Cir. 1981).

202. 631 F.2d 1069 (3d Cir. 1980). See Fontham, *supra* note 48, at 417-28.

203. 651 F.2d at 276.

204. *Id.*

striking the jury demand whether or not an exception is recognized to the right of a jury trial in complex cases. As the Fifth Circuit pointed out, even the *Japanese Electronic Products* holding set a stricter standard for the denial of a jury trial. There, the Third Circuit stated that for the exception to apply, "[t]he complexity of a suit must be so great that it renders the suit beyond the ability of a jury to decide by rational means with a reasonable understanding of the evidence and applicable legal rules."²⁰⁵

The failure of the Fifth Circuit to decide whether the right of a jury trial can be abrogated at all on the ground of complexity was criticized in the concurring opinion of Judge Tate, who advocated "a square holding that the constitutional right of jury trial in antitrust damage suits . . . prevents any judicial abrogation of this right on the grounds of complexity or inconvenience."²⁰⁶ Judge Tate argued that the authorities are virtually unanimous on the point and the decision of the court would tend "to create uncertainty in the circuit law on an issue where until now there was certainty."²⁰⁷

REAL ESTATE MULTIPLE LISTING SERVICE

In *United States v. Realty Multi-List, Inc.*²⁰⁸ the Fifth Circuit reviewed the admission practices of a real estate multiple listing service operating in Muscogee County, Georgia. The multiple listing corporation, like other multiple listing services, functioned as a trade exchange for the purchase and sale of real estate. It acquired significant market power, having as members the majority of real estate brokers in the county, thousands of listings and more than fifty million dollars in sales.²⁰⁹ The corporation imposed certain limitations on membership, including the requirements that the applicant possess a favorable credit and business reputation and an office open during customary hours of business. In addition, applicants were required to pay membership fees established by the corporation's board of directors that were not necessarily related to the cost of maintaining the multiple listing service.

The court determined that the membership rules, to the extent they excluded applicants from participation in the multiple listing service, constituted a group boycott.²¹⁰ However, it declined to rule

205. *In re Japanese Elec. Prod. Antitrust Litigation*, 631 F.2d 1069, 1088 (3d Cir. 1980).

206. 651 F.2d at 277.

207. *Id.*

208. 629 F.2d 1351 (5th Cir. 1980).

209. *Id.* at 1357.

210. *Id.* at 1365.

that the membership requirements were *per se* illegal. Finding that significant economic advantages flow from the multiple listing approach,²¹¹ the court indicated a "need to know more about the justifications for the particular restraints imposed and their competitive significance before we can judge their legality."²¹² It applied a rule of reason analysis, but found that the requirements were facially unreasonable when imposed by a multiple listing service with significant market power.²¹³

The market power analysis was characterized as the "threshold"²¹⁴ inquiry in determining the validity of the membership rules. The test applied was whether the association possessed sufficient power to deny non-members the opportunity to compete effectively with members.²¹⁵ This test could not be applied with mathematical precision, but the court found that "[a]t the least, when broker participation in the listing service is high, the service itself is economically successful and competition from other listing services is lacking, rules which invite the unjustified exclusion of any broker should be found unreasonable."²¹⁶

In facially evaluating the reasonableness of the membership standards, the Fifth Circuit applied two rules. First, the membership criteria, to be valid, must be "justified by the legitimate competitive needs of the association."²¹⁷ Second, they must be reasonably necessary to the accomplishment of the legitimate goals "and narrowly tailored to that end."²¹⁸ Assuming the existence of the requisite amount of market power, the membership criteria were deemed invalid. The "favorable credit report and business reputation" requirements were too subjective for validation.²¹⁹ The "customary hours" requirement was deemed inadequately tailored to legitimate objectives of the association.²²⁰ The stock purchase requirement was invalid because the association possessed the power to set the admission fee above a level designed to serve its legitimate needs.²²¹

211. *Id.* at 1367-69.

212. *Id.* at 1369.

213. *Id.* at 1374-87.

214. *Id.* at 1372.

215. *Id.* at 1373.

216. *Id.* at 1374. The issue was left open on remand, but the court indicated that the existence of sufficient market power was a "reasonable inference" from the record developed prior to the district court's summary judgment decision. *Id.* at 1389.

217. *Id.* at 1374.

218. *Id.* at 1375.

219. *Id.* at 1383.

220. *Id.* at 1384-85.

221. *Id.* at 1387.

CONSPIRACY INVOLVING RELATED CORPORATIONS

A split among the circuits exists on the issue of whether related corporations can participate in a "conspiracy" in violation of section 1 of the Sherman Act. The Third and Fifth Circuits have held that a parent and its wholly owned subsidiaries, when separately incorporated, together provide the requisite plurality of actors as a matter of law.²²² The Seventh and Ninth Circuits have approached the issue as a question of fact to be decided in light of the circumstances of each case.²²³ In *Ogilvie v. Fotomat Corp.*,²²⁴ the Eighth Circuit joined the Seventh and Ninth Circuits in ruling that a "single enterprise defense" is not foreclosed in cases involving separate but inter-related companies.²²⁵

To foreclose the defense as a matter of law, the court ruled, would elevate "form over substance in a manner inconsistent with the intent of the antitrust laws."²²⁶ According to the court, when separate corporations in reality form a single economic enterprise, the Congressional requirement of a plurality of actors is not met.²²⁷ It held that Fotomat Corp. and its subsidiary, Fotomat Labs, Inc., were not separate actors, applying the following evidentiary analysis:

Fotomat referred to itself and its subsidiary collectively as "the Company." Corporate officers of Fotomat always served as the officers of Fotomat Labs. Moreover, bonuses and other executive remuneration over fixed salaries were based on calculations of Fotomat's profit alone. In addition, Fotomat Labs had no corporate headquarters separate from those of Fotomat. Fotomat Labs never filed separate financial statements to the Securities and Exchange Commission or the Internal Revenue Service. On the contrary, Fotomat filed consolidated statements reflecting the financial condition of its entire organization including both unincorporated divisions and its subsidiary. Finally, the uncontroverted evidence establishes that Fotomat incorporated Fotomat Labs for the purpose of according disparate labor benefits

222. See *Columbia Metal Culvert Co., Inc. v. Kaiser Aluminum & Chem. Corp.*, 579 F.2d 20, 33-34 & n.49 (3d Cir.), cert. denied, 439 U.S. 876 (1978); *H & B Equipment Co., Inc. v. International Harvester Co.*, 577 F.2d 239, 244-45 (5th Cir. 1978).

223. See *Las Vegas Sun, Inc. v. Summa Corp.*, 610 F.2d 614, 617-18 (9th Cir. 1979), cert. denied, 447 U.S. 906 (1980); *Photovest Corp. v. Fotomat Corp.* 606 F.2d 704, 726-27 (7th Cir. 1979), cert. denied, 445 U.S. 917 (1980); *Harvey v. Fearless Farris Wholesale, Inc.*, 589 F.2d 451, 455-58 (9th Cir. 1979).

224. 641 F.2d 581 (8th Cir. 1981).

225. *Id.* at 588.

226. *Id.*

227. *Id.* at 589.

to the two companies' employees and availing itself of certain tax benefits.²²⁸

Thus, the two corporations were held to be incapable of conspiracy under the Sherman Act.

FRANCHISE TYING ARRANGEMENTS

In *Principe v. McDonald's Corp.*,²²⁹ the Fourth Circuit determined that the practice of McDonald's of requiring its franchisees to operate their franchises in premises leased from McDonald's was not an illegal tying arrangement. The court found that the "overall franchise package" offered by McDonald's included the selection of sites and the planning of the type of store to locate on each site.²³⁰ These activities are part of the factors contributing to the overall success of the McDonald's program.²³¹ Thus, the lease arrangement could not be considered a "separate product" from the franchise itself.²³²

The Fourth Circuit refused to accept the plaintiff's argument that *Siegel v. Chicken Delight, Inc.*,²³³ a decision of the Ninth Circuit that distinguished the trademark from other products offered by the franchisor, was controlling. Stating "[f]ranchising has come a long way since the decision in *Chicken Delight*,"²³⁴ the court held that the emphasis on the trademark as the essence of a franchise is too restrictive. It adopted the following rule:

Given the realities of modern franchising, we think the proper inquiry is not whether the allegedly tied products are associated in the public mind with the franchisor's trademark, but whether they are integral components of the business method being franchised. Where the challenged aggregation is an essential ingredient of the franchised system's formula for success, there is but a single product and no tie in exists as a matter of law.²³⁵

Thus, the lease arrangement was held not to be a separate product and no tying arrangement could exist.

228. *Id.*

229. 631 F.2d 303 (4th Cir. 1980).

230. *Id.* at 305-07.

231. *Id.* at 309-10.

232. *Id.* at 309.

233. 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972).

234. 631 F.2d at 309.

235. *Id.*