Duquesne Law Review

Volume 21
Number 2 *Symposium: The Application of Antitrust Laws to Labor-Related Activities*

Article 4

1983

Remarks of the Honorable Ruggero J. Aldisert

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This discussion on the confrontation of antitrust law and labor law is for me an interlude in another aspect of federal judicial duties which have taken much of my time. I refer to my role as Chairman of the Advisory Committee on Bankruptcy Rules. As to Bankruptcy Rules, you might say, "Why bring that up here?" I bring it up because the latest decision in the field of labor came down from the Third Circuit last Friday. It does not address antitrust law, but it does involve the accommodation of two bodies of federal law and their underlying policies: the Bankruptcy Reform Act of 1978[1] and the National Labor Relations Act.[2] Specifically, it is the first case interpreting the new Bankruptcy Code regarding the question of whether a collective bargaining agreement is an executory contract which the trustee or debtor-in-possession may, with bankruptcy court permission, reject. Last week we set forth guidelines in *In re Bildisco*.[3] It should furnish some direction to both bankruptcy and labor practitioners.

The subject of labor law and antitrust law is, I think, especially important today, and it is especially important to have this discussion in Allegheny County, Western Pennsylvania. It is my experience that the antitrust and labor lawyers in this county are as sensitive to, and as expert in, these issues as any segment of the bar in the United States. Here there is a healthy recognition of the legitimacy of the aims and aspirations of not only the corporate life and business entities but also of the right of labor to organize. I think this is an absolute given in this community. I regret that this is not so throughout the country. As a consequence, federal judges on many levels do not share the twin respect for labor and management that is present in this room. And if one does not recognize and respect all of the national policies implicated in labor law and

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1. 11 U.S.C. §§ 1-151, 326 (Supp. V 1981).

2. 29 U.S.C. §§ 151-169 (1976 and Supp. IV 1980).

3. 682 F.2d 72 (3d Cir. 1982), *cert. granted*, 51 U.S.L.W. 3532 (U.S. Jan. 17, 1983) (Nos. 82-818, 82-582).

antitrust law, then it is difficult to get a true accommodation when precepts appear on collision course.

The subject is important, and not only in the United States. If I may draw on another personal experience, in 1980 I taught a course in American Antitrust Law at the University of Augsburg, in the Federal Republic of Germany. Although the thrust of the course was soon to become focused on the extraterritorial effects of American antitrust law — some of my "students" being practicing lawyers and some indeed being house counsel of Siemens (the large multi-national conglomerate housed in Munich) — in one of the discussion periods I was asked to "tell us more, Judge Aldisert, about the *Muko* case."[4] I can hear that on a street in Philadelphia and not be surprised, but in West Germany I was taken aback. But it's a very important issue there as it is here in Pittsburgh. West Germany is the home of cartels and the home of strong industrial unionism.

In his classic address, *The Path of the Law,* Justice Holmes said, "The prophecies of what the courts will do in fact and nothing more pretentious are what I mean by the law."[5] Predictability in the law, or what Karl Llewellyn called reckonability, is one of the most desired ends of the law. All of us want authoritative materials to achieve this predictability. Judges want it in order to find the grounds for a decision. Counselors need it to give assured prediction to the course of decisions. And individuals and entities demand this for reasonable guidance in conducting themselves according to the demands of the social order.

I regret that insofar as our subject matter is concerned, from the standpoint of statute or case law there is little definitive guidance for judges, counselors, or litigants. We judges who have accepted both the reasoning and the conclusions of the leading scholars have found ourselves not only in the minority, but in a most lonesome minority at that.

So today's program brings together the thoughtful observations of skilled practitioners, from both the private and public sectors, and of scholars who have added to the subject much needed fiber and sinew. For this we all shall be grateful. As a student of the judicial process, I suggest there are two reasons for the unsettled nature of the accommodation between our national antitrust policy

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4. Larry V. Muko v. Southwestern Pa. Bldg. & Constr. Trades Council, 609 F.2d 1368 (3d Cir. 1979) (en banc), *on remand,* 670 F.2d 421 (3d Cir.), *cert. denied,* 103 S. Ct. 229-30 (1982).

5. Holmes, *The Path of Law,* 10 HARV. L. REV. 457, 460-61 (1896).

and our national labor policy. The first is structural — going to the formation of statutory or judicial precepts. The second, intimately related to the first but nonetheless separate and discrete, relates to the inherent difficulty in judicially declaring national public policy.

The purist might say that what is involved here is the spectacle of two bodies of federal statute on collision course — the Sherman[6] and the Clayton Acts[7] on the one hand, against the National Labor Relations Act on the other — and that it is merely a question of statutory construction. But those of us who are active in this field know better. We know that ninety-five percent of antitrust law is judge-made law, and that the same is true of our national labor law, whether manifested by actions brought under section 301 of the Taft-Hartley,[8] or through applications for enforcement or petitions for review of National Labor Relations Board orders.

In reality then, although the fountainhead of our subject is Congressionally declared statutory precept, it is precept of the highest abstraction: legislatively declared public policy of the same specificity as being in favor of motherhood and apple pie and being against sin. Although reasonable men and women might disagree as to the direction the law must take, there should be concurrence that what we are talking about today is, at bottom, not federal statutory law but federal common law. Federal common law, I emphasize, that is alive and kicking, not the federal *general* common law that became moribund in diversity cases after *Erie v. Tompkins*.[9] It is the essence of the common law tradition that public policy may be judicially declared. Although this is primarily the function of the legislature, in those cases where the Congress is unwilling or unable to act, the courts are not only permitted but are required to declare judicially that which should have been declared legislatively.

We see this in state law, in the judicial promulgation of section 402A of the Restatement (Second) of Torts which drastically changed the law of fault in products liability cases. And we also see judicially declared public policy when it comes to what I prefer to call "orthodox" antitrust law and "orthodox" labor law. Here the judiciary has in fact promulgated the principles of law through the years. I use the term "principles of law" or "legal principles" advis-

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6. 15 U.S.C. §§ 1-7 (1976).

7. Pub. L. No. 63-212, 38 Stat. 730 (codified as amended in scattered sections of 15, 18, 29 U.S.C.).

8. Labor Management Relations Act § 301, 29 U.S.C. § 185 (1976).

9. 304 U.S. 64 (1938).

edly as a term of art because the judicial process distinguishes between principles of law and rules of law.

A rule of law in the narrow sense is a precept attaching a definite detailed legal consequence to a definite set of facts. Generally speaking, this forms the basis of our concept of precedent, as our court recently defined it in *Allegheny General Hospital v. NLRB.*[10] A legal principle is a much more abstract precept. It's a broader statement of conduct. There is a higher level of generality in a principle than in a rule. A legal principle does not necessarily decide a case; a rule of law does. A principle, it is said, inclines a decision; a rule decides. And I suggest that in the context of the subject matter of this program the distinction between legal principle and legal rule is critical.

Professor Roscoe Pound has taught us that principles are not made into law in a single decision, but that they evolve rather like a custom and are binding only if they have authoritative support in a line of judgments. In the common law tradition, a principle of law emerges from a series of cases — a sort of connect the dots exercise. I'm suggesting that there is considerable authoritative support in the legal principles that characterize the orthodox antitrust law and orthodox labor law. The same cannot be said when we come to the application of antitrust law to labor related activities. Certainly there is considerable authoritative support in the teachings emanating from *Apex Hosiery Co. v. Leader*[11] in 1940; *United States v. Hutcheson*[12] in 1941; and *Allen-Bradley Co. v. Local 3, International Brotherhood of Electrical Workers*[13] in 1945. But, in my view, *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*[14] in 1965 is a disaster. As a federal appellate judge, conscious of the institutional function of an appellate court, I have great difficulty understanding how the United States Supreme Court can accept certiorari in a case so vitally affecting our national public policy and not produce a majority opinion. It is one thing to assert one's own intellectual, judicial independence. It is quite another to leave the law in shambles as the Court did in 1965.

All of which brings us to *Connell Construction Co. v. Plumbers*

10. 608 F.2d 965 (3d Cir. 1979).
11. 310 U.S. 469 (1940).
12. 312 U.S. 219 (1941).
13. 325 U.S. 797 (1945).
14. 381 U.S. 676 (1965).

& Steamfitters Local 100[15] which followed ten years later. *Connell* was the only authoritative opinion in thirty years, the first since *Allen-Bradley* in 1945, in which the Supreme Court was able to muster a majority opinion in this very important sector of the law. The subject certainly deserves much more consideration by the Supreme Court and perhaps the lawyers can be faulted for not applying for certiorari in some cases. The question yet to be decided is whether this single case, *Connell,* announced a rule of law in the Roscoe Pound sense — i.e., a definite, detailed legal consequence to a definite set of facts — or whether in a single case, contrary to the common law tradition, it promulgated a broader precept, a legal principle designed to cover a vast range of fact situations. At this time we simply do not know.

As you know, the Court has granted certiorari in the Ninth Circuit case of *California State Council of Carpenters v. Associated General Contractors of California,*[16] and pending before it now is a petition for certiorari in *Muko II.*[17] The Court has asked the Solicitor General for an amicus brief on the petition. I hope that they will grant certiorari in *Muko II* and thus hear argument and decide *Council of Carpenters* and *Muko II* at relatively the same time. Then you and I would be able to determine the precise extent of the 1975 *Connell* decision.[18]

This then, is the jurisprudential background against which this program proceeds today.

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15. 421 U.S. 616 (1975).
16. 648 F.2d 527 (9th Cir. 1980), *cert. granted,* 102 S. Ct. 998 (1982).
17. 670 F.2d 421 (3d Cir.), *cert. denied,* 103 S. Ct. 229-30 (1982).
18. The petition for writ of certiorari was denied by the Supreme Court on October 12, 1982. Justice White would have granted certiorari. 103 S. Ct. 229-30 (1982).