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The federal antitrust laws reflect and promote national policy in favor of competition. The federal labor laws foster large-scale organizational activities by labor unions. Quite frequently, union activity has the capacity and effect of interfering with the economic and non-economic objectives of the antitrust laws. As a result, the courts have long struggled to resolve the clash between the pro-competitive purposes of the antitrust laws and the anti-competitive impact of union activity fostered by the labor laws. In *Connell Construction Co. v. Plumbers & Steamfitters Local 100,*[1] the Supreme Court once again attempted to accomodate the goals of the national antitrust and labor laws.

In the consideration of the *Connell* decision and its meaning, attention should be given to the issues raised, resolved, or left open by the Supreme Court's resolution of the dispute therein. First: Are conduct and agreements which are permitted by the labor laws thereby exempted from scrutiny under the antitrust laws? Second: Are conduct or agreements which are prohibited by the labor laws and remedied by the labor laws also subject to sanctions under the antitrust laws? Third: Is *Connell* a "sport" case limited solely to the construction industry and cases which involve section 8(e) of the National Labor Relations Act? Fourth: Is *Connell* limited to only non-collective bargaining contexts or does it have significance for antitrust suits brought within collective bargaining contexts? Fifth: What is *Connell's* practical significance to a lawyer whose client is being damaged by unlawful union conduct, but who has no effective remedy under the labor laws?

To fully understand *Connell,* it is necessary to view the case in

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1. 421 U.S. 616 (1975).

its historical perspective. *Connell* marked another chapter in the ongoing struggle between trade unions and general contractors in the construction industry in Dallas. In an earlier chapter, a trade union council sought an agreement with a construction employers' association. That agreement would have restricted subcontracting to employers which had signed agreements with appropriate local craft unions. The trades council was not the authorized bargaining agent of any of the contractors' employees; moreover, the trades council disavowed any intention to become a bargaining representative. When the employers' association, which bargained for the contractors, refused to sign the restrictive subcontracting agreement, the trades council served the subcontracting agreement on four specific contractors. Those four also refused to sign the agreement, and the trades council subsequently picketed many of their jobsites.

The picketed contractors filed unfair labor practice charges with the NLRB. The NLRB subsequently found that the trades council had violated section 8(b)(7) of the National Labor Relations Act (NLRA) by picketing with a recognitional objective at a time when no question concerning representation could be raised because of contract-bar rules. The Board issued a cease and desist order against the union, and the United States Court of Appeals for the District of Columbia Circuit enforced the Board's order.[2] The Court of Appeals for the District of Columbia Circuit rejected the union's argument that the subcontracting agreement was protected by the construction industry proviso to section 8(e), which prohibits hot cargo agreements, and that Congress could not have intended to limit picketing to achieve such agreements. The Court held that sections 8(b)(7) and 8(e) of the NLRA are aimed at wholly different problems. The Court then held that even though an agreement is lawful under section 8(e), and that picketing to secure the agreement is not prohibited by section 8(b)(4)(A), the picketing may be prohibited by section 8(b)(7) if it has an object that is recognitional.[3]

Connell arose in the aftermath of the District of Columbia Circuit's decision. In *Connell,* Plumbers Local 100 began picketing Dallas general contractors in order to pressure them to sign restrictive agreements limiting their subcontracts for plumbing and mechanical work to firms that had a collective bargaining agree-

2. Dallas Bldg. and Const. Trades Council v. NLRB, 396 F.2d 677 (D.C. Cir. 1968).
3. *Id.* at 682.

ment with Local 100. The general contractors performed none of their plumbing and mechanical work, and Local 100 admittedly had no interest in representing their employees. Consequently, the union was beyond the reach of the District of Columbia Circuit's decision and section 8(b)(7). While the decision in *Connell* does not disclose such fact, the local International Brotherhood of Electrical Workers (IBEW) union likewise had demanded and picketed to obtain the same restrictive subcontracting agreement from a number of general contractors who did not self-perform any electrical work.

In the *Connell* context, Local 100 also had sent a restrictive subcontracting agreement to the K.A.S. Construction Company located near Dallas, Texas, and then picketed the company. K.A.S. refused to sign; instead, it filed an unfair labor practice charge with the NLRB. The NLRB's Regional Director refused to issue a complaint against the union; the Board's General Counsel thereafter denied the company's appeal, thus denying the company any hope of administrative relief under the pertinent federal labor law.[4]

Connell, like K.A.S., also was asked to sign an agreement requiring it to subcontract all plumbing and mechanical work to firms having collective bargaining agreements with Local 100. Local 100 had never sought to represent or act as the collective bargaining representative for Connell's employees. In fact, Local 100 had disclaimed any interest in representing Connell's employees. Local 100 was party to a multi-employer bargaining agreement with the Mechanical Contractors Association of Dallas. The multi-employer agreement contained a "most favored nation clause" which gave Association members the contractual right to insist on terms as favorable as those given by Local 100 to any other employer.

When Connell refused to sign the subcontracting agreement, Local 100 picketed one of Connell's jobsites and halted construction there. Since Connell was aware that it had no reasonable hope for relief from the NLRB, it filed suit in state district court to enjoin the picketing as a violation of the Texas antitrust laws. Local 100 then removed the case to the federal district court. Connell subsequently signed the subcontracting agreement under protest. After removal, Connell amended its complaint to allege that the agreement violated sections 1 and 2 of the Act. Connell sought declaratory and injunctive relief against the union.

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4. 78 L.R.R.M. (BNA) 3012, 3013-14 (N.D. Tex. 1971), *aff'd*, 483 F.2d 1154 (5th Cir. 1973), *rev'd in part, aff'd in part*, 421 U.S. 616 (1975).

The federal district court held that the subcontracting agreement was exempt from federal antitrust laws because it was immunized by the construction industry proviso to section 8(e). The court also held that federal labor legislation preempted the state's antitrust laws. The Court of Appeals for the Fifth Circuit affirmed without reaching the section 8(e) issue, on the ground that the union's goal of organizing nonunion subcontractors involved a legitimate union interest, and therefore the union's efforts to attain that goal were exempt from the federal antitrust laws. The court of appeals also agreed that state law was preempted.[5]

In a five-to-four majority opinion by Justice Powell, the Supreme Court reversed on the question of federal antitrust immunity, and affirmed on the question of state law preemption. The Supreme Court remanded the case for consideration of the claim that the agreement violated the Sherman Act.[6]

The Court's majority opinion acknowledged that a labor union may avail itself of either of two types of exemptions from the operation of the antitrust laws. One type — a statutory exemption — is provided by the Clayton and Norris-LaGuardia Acts, as interpreted by the Supreme Court's decision in *United States v. Hutcheson.*[7] Under the statutory exemption, specific union activities, including secondary picketing and boycotts, concededly were removed from the operation of the antitrust laws. Another type of exemption — the nonstatutory exemption — which was applied by the Supreme Court in *Local 189, Amalgamated Meat Cutters v. Jewel Tea Co.*[8] "has its source in the strong labor policy favoring the association of employees to eliminate competition over wages and working conditions."[9] Justice Powell noted, however, that the statutory exemption does not apply to concerted action or agreements between unions and non-labor parties. He also stated that "while the statutory exemption allows unions to accomplish some restraints by acting unilaterally . . . the nonstatutory exemption offers no similar protection when a union and a nonlabor party agree to restrain competition in a business market."[10]

Justice Powell focused on the goal of Local 100 and found no evidence that the goal was anything but organizational. He ac-

5. 483 F.2d 1154 (5th Cir. 1973), *rev'd in part, aff'd in part,* 421 U.S. 616 (1975).
6. 421 U.S. 616 (1975).
7. 312 U.S. 219 (1941).
8. 381 U.S. 676 (1965).
9. 421 U.S. at 622.
10. *Id.* at 622-23.

knowledged that this "goal was legal, even though a successful organizing campaign ultimately would reduce the competition that unionized employers face from non-union firms."[11] Moreover, there was no evidence of a conspiracy between the union and the members of the multi-employer bargaining unit.[12] Nonetheless, the Court's majority concluded that the restrictive subcontracting agreements were not immune from antitrust scrutiny since "the methods the union chose are not immune from antitrust sanctions simply because the goal is legal."[13]

In the view of the Court's majority, Local 100 had used direct restraints on the commercial market to achieve its clearly lawful organization objective. The majority concluded that the restrictive agreements with Connell and other general contractors "indiscriminately excluded non-union subcontractors from a portion of the market, even if their competitive advantages were not derived from substandard wages and working conditions but rather from more efficient operating methods."[14]

Justice Powell examined the multi-employer contract between Local 100 and the Mechanical Contractors Association to determine the effect on the business market of the union's agreement with Connell. This analysis is significant because the multi-employer contract had not been challenged in the lawsuit. Justice Powell also focused on the most favored nation clause contained in the multi-employer contract, and inferred that it would shelter Association contractors from competition in that portion of the market covered by Local 100's subcontracting agreements with general contractors. The shelter would apply to all subjects included in the multi-employer contract, "even on subjects unrelated to wages, hours, and working conditions."[15]

Justice Powell next speculated that the Local 100's subcontracting agreement with Connell and other general contractors would give the union control over access to the mechanical subcontracting market. The subcontracting agreements restricted subcontracting to any firm that did not have a contract with Local 100, not just to non-union firms in general. In Justice Powell's opinion, this gave Local 100 "complete control over subcontract work offered

11. *Id.* at 625.
12. *Id.* at n.2.
13. *Id.* at 625.
14. *Id.* at 623.
15. *Id.* at 624.

by"[16] Connell and other general contractors which had signed the subcontracting agreements. Moreover, "such control" could result "in significant adverse effects on the market and on consumers - effects unrelated to the union's legitimate goals of organizing workers and standardizing working conditions."[17] For example, the union might refuse to sign contracts with "marginal" or non-resident firms.[18] Thus, according to the majority's understanding of the record:

> Here Local 100, by agreement with several contractors, made nonunion subcontractors ineligible to compete for a portion of the available work. This kind of direct restraint on the business market has substantial anticompetitive effects, both actual and potential, that would not follow naturally from the elimination of competition over wages and working conditions. It contravenes antitrust policies to a degree not justified by congressional labor policy, and therefore cannot claim a nonstatutory exemption from the antitrust laws.[19]

Justice Powell intimated that since there was no collective bargaining relationship whatsoever between Local 100 and Connell, the subcontracting agreement was not protected from antitrust scrutiny by the federal policy favoring collective bargaining. Citing the Court's *Pennington* and *Jewel Tea* decisions as authority, Justice Powell stated: "There can be no argument in this case, whatever its force in other contexts, that a restraint of this magnitude might be entitled to an antitrust exemption if it were included in a lawful collective-bargaining agreement."[20] By implication, Justice Powell suggested that henceforth the validity of market restraints should turn on whether they result from a collectively bargained agreement or whether the anti-competitive effect arises from a separate, non-collectively bargained agreement.

Justice Powell then rejected the union's claim that the subcontracting agreement was permitted by the construction industry proviso to section 8(e) of the NLRA. He referred to the legislative history, and noted that one of the major aims of the 1959 amendments to the NLRA — including section 8(e) — was to limit "top down" organizing campaigns. He noted changes made by Congress in 1959 to limit the ability of a union to utilize such pressure to obtain recognition. It was also clear to him that this attempt to

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16. *Id.*
17. *Id.*
18. *Id.* at 624-25.
19. *Id.* at 625.
20. *Id.* at 625-26.

limit "top down" organizing would be seriously undermined if the proviso to section 8(e) was construed to authorize the subcontracting agreements sought by Local 100. For, if the agreements were in fact protected by the proviso, the union would have an unlimited ability to pressure contractors to deal only with subcontractors who were signatories to agreements with the union, as long as that contractor employed no workers within the union's jurisdiction.

Justice Powell concluded, therefore, that "[a]bsent a clear indication that Congress intended to leave such a glaring loophole in its restrictions on 'top down' organizing," the construction industry proviso should not be construed to authorize the subcontracting agreement in *Connell*.[21] Instead, he concluded that the protection of the proviso to section 8(e) "extends only to agreements in the context of collective-bargaining relationships and, in light of congressional references to the *Denver Building Trades* problem, possibly to common-situs relationships on particular jobsites as well."[22] Since Local 100 had no interest in representing Connell's employees, the subcontracting agreements were held not to be within the protection of the proviso to section 8(e).

Finally, Justice Powell rejected the union's alternative contention that, in any event, the NLRA provides the exclusive remedies for violations of section 8(e), stating:

> [W]hatever significance this legislative choice has for antitrust suits based on those secondary activities prohibited by § 8(b)(4), it has no relevance to the question whether Congress meant to preclude antitrust suits based on the "hot cargo" agreements that it outlawed in 1959. There is no legislative history in the 1959 Congress suggesting that labor-law remedies for § 8(e) violations were intended to be exclusive, or that Congress thought allowing antitrust remedies in cases like the present one would be inconsistent with the remedial scheme of the NLRA.[23]

The Supreme Court majority, however, did not hold that the subcontracting agreement in *Connell* actually violated the Sherman Act. Instead, that question was left for resolution on remand. The case subsequently was settled, however, thereby mooting the entire issue.

Connell was developed and tried on an antitrust theory because the NLRB had refused to issue unfair labor practice complaints on charges based on the same restrictive subcontracting agreement and similar picketing activity. Thus *Connell* ended as an antitrust

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21. *Id.* at 633.
22. *Id.*
23. *Id.* at 634.

case with potentially far-reaching implications for labor-management relations. However, those implications are not very clear.

For instance, was *Connell* limited to the construction industry and, specifically, to situations there which involve so-called "hot cargo" agreements prohibited by section 8(e)? If so, did *Connell* have applicability to secondary behavior once thought to fall within the exclusive domain of the labor laws? Or did *Connell* also have implications outside the construction industry? Was *Connell* limited to non-collective bargaining contexts or did *Connell* also have meaning in some agreements made in collective bargaining contexts?

Recently the Supreme Court handed down its decision in *Woelke & Romero Framing, Inc. v. NLRB*,[24] and two other consolidated cases. The Court therein resolved a critical issue left unanswered in *Connell*. The issue concerned the extent of protection afforded by section 8(e)'s construction industry proviso to agreements sought or obtained within the context of a collective bargaining relationship. In *Connell*, the Court had held that a subcontracting agreement "which is outside the context of a collective-bargaining relationship and not restricted to a particular jobsite . . . may be the basis of a federal antitrust suit . . . ."[25] As a result of this somewhat expansive language, it was unclear whether the construction industry proviso sheltered broad collectively bargained subcontracting agreements which were not limited to particular jobsites or to specific unions.

In *Woelke & Romero*, the Supreme Court unanimously held that the section 8(e) proviso "ordinarily shelters union signatory subcontracting clauses that are sought or negotiated in the context of a collective bargaining relationship, even when not limited in application to particular jobsites at which both union and non-union workers are employed."[26] The Court further held, on procedural grounds, that the courts lack jurisdiction to consider whether section 8(b)(4)(A) is violated when a union pickets to obtain a protected subcontracting clause, if the issue was not properly raised during the proceedings before the NLRB.

The *Woelke & Romero* cases contrast markedly with the *Connell* case. They were instituted solely as labor cases — they were litigated solely as labor cases — and they were decided solely as labor

24. 102 S. Ct. 2071 (1982).
25. 421 U.S. at 635.
26. 102 S. Ct. at 2083.

cases. This is to be explained by the fact that the NLRB's General Counsel issued complaints in the *Woelke & Romero* cases, whereas at the time of *Connell,* he was disinclined to do so, which made it necessary for *Connell* to seek judicial relief on alternate legal theories. Finally, the foremost distinction between the *Woelke & Romero* cases and *Connell* case is that, unlike the agreement in *Connell,* the agreements in *Woelke & Romero* arose within the context of a collective bargaining relationship.

Woelke & Romero and its companion cases resulted from two separate labor disputes. In *Woelke & Romero,* a framing contractor had a collective bargaining relationship with the Carpenters Union. During negotiations, the union demanded inclusion of a clause that would prohibit Woelke from subcontracting work at any jobsite "except to a person, firm or corporation, party to an appropriate, current labor agreement with the appropriate Union, or subordinate body signatory to this agreement."[27] The parties reached an impasse over the union's demand for the union signatory subcontracting clause. In support of the union's demand, two union locals picketed Woelke's construction sites, resulting in some work stoppages.

Woelke filed unfair labor practice charges with the NLRB, asserting that the subcontracting clauses violated section 8(e). Woelke also argued that because the clauses violated section 8(e), the picketing to obtain them violated section 8(b)(4)(A). The Board held that the union signatory subcontracting clauses were secondary in nature; however, the Board further held that the clauses were protected by the construction industry proviso. Although the clauses were not limited in their application to particular jobsites where both union and non-union workers were employed, the Board concluded that they were lawful under *Connell* since they were sought or negotiated "in the context of collective bargaining relationships."[28]

The remaining two cases involved the Pacific Northwest Chapter of the Associated Builders & Contractors, Inc., and the Oregon-Columbia Chapter of the Associated General Contractors of America, Inc. For almost two decades, the Oregon AGC was party to a collective bargaining agreement with the Operating Engineers Union. The agreement contained a subcontracting clause which

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27. *Id.* at 2074.

28. 239 NLRB Dec. (CCH) 241, 250 (1978), *rev'd,* 609 F.2d 1341 (9th Cir. 1979), *enforced on reh'g,* 654 F.2d 1301 (9th Cir. 1979) (en banc), *aff'd in part, vacated in part,* 102 S. Ct. 2071 (1982).

was substantially similar to the one in the agreement to which Woelke and the Carpenters were parties. Specifically, the agreement forbade the Oregon AGC from subcontracting construction jobsite work to "any person, firm or company who does not have an existing labor agreement with the [Engineers] Union covering such work." The agreement also authorized the engineers to take "such action as they deem necessary," including strikes and other economic self-help, to enforce awards obtained through the grievance and arbitration process on matters covered by the agreement.

Like Woelke, the Pacific Northwest Chapter of the Associated Builders & Contractors filed unfair labor practice charges with the NLRB, alleging that the contract violated section 8(e). The Board, relying on the same reasoning it used in *Woelke & Romero,* held that the union signatory subcontracting clauses, standing alone, were protected by the construction industry proviso. However, the Board decided that the enforcement provision of the contract was not protected by the proviso.[29]

A panel of the Ninth Circuit Court of Appeals reviewed the cases, as consolidated, and reversed the Board's decisions. Subsequently, the cases were reheard en banc, and the en banc Court panel enforced the Board's orders in their entirety.[30] The Supreme Court thereafter affirmed the en banc Ninth Circuit on the issue of the scope of the construction industry proviso, but vacated and remanded with instructions to dismiss on jurisdictional grounds that portion of the court of appeal's judgment pertaining to the section 8(b)(4)(A) issue.

Justice Marshall, speaking for the unanimous Court, reviewed the language of section 8(e) and the wording of the subcontracting clauses, and concluded that the clauses were saved by the construction industry proviso. In *Connell,* the Court had reasoned that the proviso did not protect the agreements because they were not sought or obtained in a collective-bargaining relationship. In *Woelke & Romero,* based on the legislative history, Justice Marshall concluded that:

> Congress believed that broad subcontracting clauses similar to those at issue here were part of the pattern of collective-bargaining prior to 1959, and that the Board and the Courts had found them to be lawful. This perception was

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29. 239 NLRB Dec. (CCH) 274, 277 (1978), *rev'd,* 609 F.2d 1341 (9th Cir. 1979), *enforced on reh'g,* 654 F.2d 1301 (9th Cir. 1979) (en banc), *aff'd in part, vacated in part,* 102 S. Ct. 2071 (1982).

30. 654 F.2d 1301 (9th Cir. 1981) (en banc), *aff'd in part, vacated in part,* 102 S. Ct. 2071 (1982).

apparently accurate. Thus, endorsing the clauses at issue here is fully consistent with the legislative history of § 8(e) and the construction industry proviso.[31]

Justice Marshall refused to interpret the proviso as protecting only those clauses designed to prevent jobsite friction. He stated that "the proviso serves a variety of purposes unrelated to the *Denver Building Trades* problem [and] even as a response to *Denver Building Trades,* the proviso is only partly concerned with jobsite friction."[32]

Justice Marshall conceded that the subcontracting agreements in *Woelke & Romero* facilitated top-down organizing. He also conceded that "one of the central aims of the 1959 [Landrum-Griffin] amendments was to restrict the ability of unions to engage in top-down organizing campaigns."[33] In his view, however, Congress was aware that some top-down organizing was inevitable — even if agreements were limited to jobsites having both union and non-union workers. Therefore, the Court's broad construction of the proviso would not lead to results which were unforseen by Congress when it adopted the proviso:

> Such pressure is implicit in the construction industry proviso. The bare assertion that a particular subcontracting agreement encourages top-down organizing pressure does not resolve the issue we confront in this case: how much top-down pressure did Congress intend to tolerate when it decided to exempt construction site projects from § 8(e)? As we have already explained, we believe that Congress endorsed subcontracting agreements obtained in the context of a collective-bargaining relationship — and decided to accept whatever top-down pressure such clauses might entail. Congress concluded that the community of interests on the construction jobsite justified the top-down organizational consequences that might attend the protection of legitimate collective-bargaining objectives.[34]

A recent decision from the Second Circuit Court of Appeals lends support to the conclusion that since the agreements in *Woelke & Romero* were lawful under the NLRA, they therefore would be entitled to antitrust exemption. In *Jou-Jou Designs, Inc. v. International Ladies Garment Workers Union,*[35] the Second Circuit affirmed the dismissal of a federal court complaint alleging Sherman Act violations by the International Ladies Garment Workers Union and another union.

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31. 102 S. Ct. at 2080.
32. *Id.* at 2081.
33. *Id.*
34. *Id.* at 2081-82.
35. 643 F.2d 905, 910 (2d Cir. 1981), *aff'g,* 490 F. Supp. 1376, 1387 (S.D.N.Y. 1980).

Jou-Jou involved attempts by unions in the New York garment industry to obtain so-called "Hazantown Agreements." Generally speaking, Hazantown Agreements are the garment industry equivalent of restrictive subcontracting agreements in the construction industry. Among other things, they require signatory companies to use only outside contractors having collective bargaining agreements with one or more specified union locals. Hazantown Agreements are clearly secondary in nature; however, they are permitted by the garment industry proviso to section 8(e) of the NLRA. In *Jou-Jou,* the Second Circuit was asked to consider whether union attempts — including picketing — to secure such agreements from a sportswear jobber and three affiliated corporations were protected from the antitrust attack by the statutory exemptions to the antitrust laws. The court of appeals concluded that the Hazantown Agreements were exempt from antitrust sanctions because they were "affirmatively sanctioned by labor law" specifically, by the garment industry proviso to section 8(e).

In a case involving the scope of the construction industry proviso, the United States District Court for the Western District of New York reached the same conclusion as the Second Circuit in *In re Bullard Contracting Corp.*[36]

Many questions remain unanswered. For example, when does a union lose its antitrust immunity in the *Connell* context? When does liability attach to the union? Assume the absence of a collective bargaining relationship; and further assume that the existence of some kind of agreement as in *Connell* — or union attempts to secure such an agreement — are found to violate the NLRA. Does such finding mean that the union has automatically lost its nonstatutory antitrust immunity? In *Connell,* the Supreme Court indicated that this might be, or probably is, the result. Very recently, in *Kaiser Steel Corp. v. Mullins,*[37] the Supreme Court made specific reference to its *Connell* decision and reinforced this conclusion. The Third, Eighth, and Ninth Circuits also seem to have reached this conclusion.[38]

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36. 464 F. Supp. 312, 316 (W.D.N.Y. 1979).

37. 102 S. Ct. 851 (1982).

38. Consolidated Express, Inc. v. New York Shipping Ass'n, 641 F.2d 90, 94 (3rd Cir. 1981); Mackey v. National Football League, 543 F.2d 606, 614 (8th Cir. 1976), *cert. dismissed,* 434 U.S. 801 (1977); Ackerman-Chillingworth v. Pacific Elec. Contractors Ass'n., 579 F.2d 484, 503 (9th Cir. 1978) (Hufstedler, J., concurring and dissenting), *cert. denied,* 439 U.S. 1089 (1979). *Accord,* International Ass'n of Heat & Frost Insulators and Asbestos Workers v. United Contractors Ass'n, 483 F.2d 384 (3d Cir. 1973), *modified,* 494 F.2d 1353 (3d Cir. 1974).

However, the Supreme Court has made it clear that loss of the labor exemption is not tantamount to a finding of antitrust liability. In *Federal Maritime Commission v. Pacific Maritime Association,*[39] the Court stated:

> It is plain from our cases that an antitrust case need not be tried and a violation found before a determination can be made that a collective-bargaining agreement is not within the labor exemption, just as it is clear that denying the exemption does not mean there is an antitrust violation.[40]

The Supreme Court specifically referred to its *Connell* decision as an example of just such a case. Thus, it is evident that once an agreement is placed beyond the protection of the exemption, it remains to be proved that a violation has occurred.[41]

The question remains, however, as to what mode of analysis is proper for ascertaining the legality or illegality of *Connell*-type agreements under the antitrust laws. Should such agreements be assessed under traditional antitrust principles — that is, under the rule of reason test or the per se test? Or should other tests be adopted in view of the labor relations — not purely commercial — contexts giving rise to such agreements?

In *Larry V. Muko, Inc. v. Southwestern Pennsylvania Building and Construction Trades Council,*[42] the Third Circuit reaffirmed its prior holding in *Consolidated Express, Inc. v. New York Shipping Association*[43] and held that when union activity is attacked on antitrust grounds, the court first must determine whether the activity is protected by the labor exemption to the antitrust laws. The Third Circuit stated that once it is ascertained that union activity is not protected by the labor exemption "a court must apply traditional antitrust principles in determining whether the activity in question violates the antitrust laws. In most cases the rule of reason will supply the measure of illegality; the per se rule may, however, be invoked where appropriate."[44]

In *Muko,* two building trades council unions pressured a fast-food restaurant chain into agreeing to retain only unionized general contractors to build its restaurant outlets. The company previ-

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39. 435 U.S. 40 (1978).

40. *Id.* at 61.

41. *Accord,* Larry V. Muko, Inc. v. Southwestern Pa. Bldg. and Constr. Trades Council, 670 F.2d 421, 426 (3d Cir.), *cert. denied,* 103 S. Ct. 229-30 (1982); Smitty Baker Coal Co. v. United Mine Workers, 620 F.2d 416, 426 (4th Cir. 1980).

42. 670 F.2d 421 (3d Cir.), *cert. denied,* 103 S. Ct. 229-30 (1982).

43. 602 F.2d 494 (3d Cir. 1979), *vacated and remanded,* 448 U.S. 902 (1980).

44. 670 F.2d at 427-28.

ously had a policy of soliciting bids from contractors on a competitive basis regardless of whether the contractors used union labor, and most of the company's work had been performed by non-union contractors.

The company awarded Muko a contract to build an outlet in a Pittsburgh suburb. Muko was a non-union general contractor with experience in construction of fast-food restaurants. During construction the jobsite was picketed by members of the Southwestern Pennsylvania Building and Construction Trades Council and the Building and Construction Trades Council of Pittsburgh. The Councils had never represented Muko's employees and had no interest in doing so. After construction of the first outlet was completed, the company awarded Muko a contract to construct another outlet.

After the company's first outlet had opened, the Councils distributed handbills urging customers not to patronize the restaurant because it purportedly used contractors who paid less than the prevailing area wages. After reading the handbills, customers would leave the premises.

The company and the Councils subsequently met. At the meeting, the Councils said they wanted future restaurants built by union labor. The company was given a form contract which was used by the Councils' local unions and union contractors in the area. In addition, the company was given a list of contractors having collective bargaining agreements with the local unions.

Bowing to the unions' pressure, the company subsequently sent the unions a letter of intent stating that it would "use only union contractors certified by the [Councils]."[45] The company asked Muko to build as a union contractor. He refused to do so, and subsequently was not asked to bid on any further jobs, although the company had previously expressed satisfaction with his work and had told him he could construct all of the company's restaurants in western Pennsylvania if he continued to offer high quality work at competitive prices. The company thereafter only used union contractors to build some twelve of its restaurants. As a result, the company's costs ran a quarter million dollars higher than the costs would have been if Muko had been retained.

Muko filed a lawsuit against the company and the two Councils. The lawsuit alleged that the company and the Councils had entered into an agreement constituting an unreasonable restraint of

45. *Id.* at 423.

trade in violation of the Sherman and Clayton Acts. At the first trial, the trial court granted a directed verdict in favor of the defendants. On appeal, the Third Circuit — sitting en banc — reversed and remanded the case for a new trial.

The Third Circuit held that a jury could have found that there was an agreement which was not exempt from antitrust scrutiny because, under the *Connell* decision, such an agreement might have "actual or potential anti-competitive effects that would not flow naturally from the elimination of competition over wages and working conditions."[46] The court said that it understood:

> *Connell* to hold, then, that an agreement between a union and a business organization, outside a collective bargaining relationship, which imposes a direct restraint upon a business market, and which is not justified by congressional labor policy because it has actual or potential anticompetitive effects that would not flow naturally from the elimination of competition over wages and working conditions, is not exempt from antitrust scrutiny.[47]

While the Third Circuit did not define the proper standard for measuring any potential antitrust violations, it suggested that traditional antitrust principles would govern such a determination.[48]

At the second trial the jury rendered a verdict in favor of the defendants. The trial court denied Muko's motion for a new trial and motion for judgment notwithstanding the verdict. Muko appealed on two grounds: First, because the trial court purportedly committed legal error by instructing the jury to apply the rule of reason, rather than the per se rule, to the agreement between the restaurant company and the unions; and Second, because even if the trial court was correct in applying the rule of reason, the court purportedly erred in its instructions on the relevant product market.

On appeal, the Third Circuit Panel (Adams, Van Dusen, and Sloviter, JJ.) affirmed the trial court. The panel majority (Judge Sloviter dissented) unanimously agreed that the trial court gave correct instructions regarding the product market. However, the panel majority split over the applicable standard for measuring the potential antitrust liability of the agreement in issue. The panel majority expressly rejected the view that there should be a full-scale rule of reason inquiry in each case where it is claimed that a

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46. 609 F.2d 1368, 1373 (3d Cir. 1979).
47. *Id.*
48. *Id.* at 1376.

non-exempt activity violates the antitrust laws.[49] This view — as the opinion acknowledged — has gained scholarly support, including support from Professor Milton Handler. On the other hand, the panel majority also rejected Muko's view that every labor-antitrust case in which the labor exemption is found to be inapplicable should be held illegal under the per se standard. Instead, the majority took a middle position, stating:

> [W]e adopt a middle position between that advocated by Professor Handler and that proposed by the appellant in the case at hand. While we agree with Professor Handler that the 'factors to be considered in determining the existence of an antitrust *exemption* are separate and distinct from those bearing on the presence of an antitrust *infraction*,' and that 'once such conduct is deemed not exempt, it is incumbent upon the decisionmaker to consider the relative anticompetitiveness of the conduct before imposing antitrust liability,' . . . we do not share Professor Handler's view that union conduct necessarily 'should be measured by the rule of reason in recognition of the peculiar labor relations context in which the restraint arises even if, in a nonlabor context, similar conduct might be per se unlawful.' The mere fact that a labor union is one of the participants in an otherwise illegal combination should not preclude a determination that, in appropriate circumstances, the conduct is unreasonable *per se*. The *per se* rule is, essentially, a short cut employed by a court in determining unreasonableness; as Professor Sullivan has taught, 'the *per se* doctrine is precisely a special case of rule of reason analysis.' If, after extensive experience with a particular kind of union conduct, a court concludes that the conduct invariably restrains competition, it is unnecessary, in our view, for the court to engage in lengthy rule-of-reason analysis when the *per se* rule would yield identical results more efficiently and expeditiously.[50]

In *Muko,* the panel majority understandably cautioned against the "mechanical or imprudent application of the *per se* rule in the labor context."[51] As previously mentioned, loss of antitrust exemption is not tantamount to a finding of an antitrust violation. This was indicated by the Supreme court in *Connell* and acknowledged by the court in *Muko.* Moreover, in *Muko,* in a footnote, the court appeared to reject any argument that conduct which violates the NLRA was therefore violative of the antitrust laws, stating:

> We are . . . unpersuaded by Muko's recitation of the legislative history of § 8(e) of the NLRA, (the so called 'hot cargo' provision) which indicates Congress' intent to make hot cargo agreements illegal *per se* under the labor laws. Even assuming that the defendants' conduct would be deemed illegal under § 8(e), we see no reason to presume that Congress intended the same

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49. 670 F.2d at 426.
50. *Id.* (citations omitted) (emphasis in original).
51. *Id.*

> conduct to be ipso facto violative of the antitrust laws, which were enacted at a different time, for a different purpose and which provide for sharply different relief . . . .[52]

The court acknowledged that group boycotts have traditionally been condemned as conduct which is unreasonable per se. Concededly, the term group boycott encompasses several possible forms of behavior, and not every type has been or should be found unreasonable or unreasonable per se. Accordingly, the Third Circuit, in limiting the application of the per se rule speaks of the "classic" boycott.[53] The court referred to one of its prior decisions, and stated that a concerted activity constitutes a per se illegal group boycott only when "there [is] a purpose either to exclude a person or group from the market, or to accomplish some other anticompetitive objective or both."[54]

In a labor context, the Third Circuit delineated three so-called "core-group" situations in which group boycotts have been deemed illegal per se: "(1) horizontal combinations of traders at one level of distribution having the purpose of excluding direct competitors from the market; (2) vertical combinations, designed to exclude from the market direct competitors of some members of the combinations; and (3) coercive combinations aimed at influencing the trade practices of boycott victims."[55]

When these principles were applied by the panel majority to *Muko's* facts, it was concluded that *Muko* did not involve a classic group boycott against which the per se rule traditionally has been invoked, because: first, one competitor did not engage in concerted action with a supplier or customer to cut another horizontal competitor out of the marketplace. Second, there was no suggestion of attempted price-fixing. Third, neither the restaurant company nor the Councils competed with each other or with Muko; (a) there was no evidence that the restaurant company intended to affect Muko's business: it only sought to maintain the goodwill of its customers in a new market; (b) the Council only sought to ensure payment of the prevailing union wages to Pittsburgh-area construction workers. Fourth, none of the evidence suggested that either the restaurant or the Councils wished, through concerted action, to gain an advantage over Muko in an *economic* or *competitive sense.* Fifth, the restraint involved was limited, not widespread. The re-

52. *Id.* at 427 n.5 (citations omitted).
53. *Id.* at 430.
54. *Id.* (citation omitted).
55. *Id.* at 431 (citations omitted).

fusal to deal involved only one relatively small buyer. Moreover, it did not have the necessary anti-competitive effect of destroying Muko's business. Sixth, pro-competitive effects were demonstrated, since the restaurant company gained a position in the otherwise crowded Pittsburgh area fast food market.[56]

The status of group boycotts under the antitrust laws still is somewhat unclear. In *Connell,* Justice Powell stated that the Clayton and Norris-LaGuardia Acts "exempt specific union activities, including secondary picketing and boycotts, from the operation of the law."[57] In support, he cited *United States v. Hutcheson,* which involved a consumer boycott. There Justice Frankfurter, announcing the Court's opinion, stated:

> [S]o long as a union acts in its self-interest and does not combine with non-labor groups, the licit and the illicit under § 20 are not to be distinguished by any judgment regarding the wisdom or unwisdom, the rightness or wrongness, the selfishness or unselfishness of the end of which the particular union activities are the means.[58]

When *Hutcheson, Connell,* and *Muko* are read together, it is evident that group boycotts are not immunized from antitrust scrutiny. This does not mean, however, that such boycotts will be deemed to have violated the antitrust laws, even where they violate the NLRA. Recent First Circuit and Supreme Court decisions support this conclusion.

In *International Longshoremen's Association v. Allied International, Inc.,*[59] the First Circuit held, inter alia, that a union's political boycott was "in commerce" within the meaning of the NLRA, and that despite its political purpose, the boycott constituted an illegal secondary boycott prohibited by section 8(b)(4)(B) of the NLRA. The case arose when the union responded to Russia's invasion of Afghanistan by ordering its members to stop handling cargoes arriving from or destined for Russia. The union's members obeyed, and refused to service ships carrying Russian cargoes. Allied, an American importer of Russian wood products, responded to the boycott by filing a suit in the federal district court in Boston.

Allied sought judicial relief for violations of both the labor laws and the antitrust laws. Specifically, Allied alleged, among other

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56. *Id.* at 432-33.
57. 421 U.S. at 622.
58. 312 U.S. 219, 232 (1941).
59. 640 F.2d 1368, *aff'd,* 102 S. Ct. 1656 (1982).

things, that the union's activities violated section 8(b)(4)'s prohibition against secondary boycotts and, therefore, that Allied was entitled to damages under section 303 of the Labor Management Relations Act (LMRA). In addition, Allied sought injunctive and monetary relief under the Sherman Act because the union allegedly engaged in an unlawful restraint of trade.

The federal district court denied Allied's request for a preliminary injunction, and granted the union's motion to dismiss. On appeal, the First Circuit held that the complaint alleged a violation of section 8(b)(4), vacated the dismissal of that portion of the complaint, and remanded for further consideration of Allied's prayer for damages and preliminary and permanent injunctive relief.

Regarding Allied's antitrust allegations, the First Circuit held that the complaint failed to establish that the boycott amounted to a violation of the antitrust law. The circuit court stated that it had considered: "[W]hether or not the . . . boycott amounts to a violation of section 1 of the Sherman Act. As such a violation would entitle Allied to treble damages, this issue is not mooted by our holding that a cause of action exists under the NLRA."[60]

The First Circuit found that the union's political dispute with Russia did not relate to a legitimate union interest, and thus, that the boycott was not immunized by the statutory labor exemption.[61] However, the First Circuit then concluded that the boycott did not violate the antitrust laws since:

> [T]his limited refusal to handle goods, undertaken as a political protest by a labor union acting on its own, and ill-designed as a means of gaining a competitive or commercial advantage for the union or its members, is not the sort of evil at which the Sherman Act is aimed.[62]

In the First Circuit's view, a union's mere refusal to work rarely would violate the antitrust laws "absent a specific anticompetitive object or collaboration with non-labor groups . . . . "[63] However, the First Circuit made a comment that bears close attention:

> This conclusion is fortified, though not compelled, by our finding, *supra*, that the facts alleged make out a violation of LMRA § 303(a), 29 U.S.C. § 187(a). While the prohibitions of labor law and antitrust law overlap to some degree, it has been said that, in general, § 303 was enacted as an alternative to subjecting unions to antitrust liability for secondary activities'

60. *Id.* at 1379.
61. *Id.* at 1380.
62. *Id.*
63. *Id.* at 1381.

amounting to a violation of section 8(b)(4) of the Act.[64]

The antitrust issue in *Allied* was not presented to the Supreme Court, which affirmed the First Circuit's holding on the scope of section 8(b)(4).[65] Recently in *Jacksonville Bulk Terminals, Inc., v. International Longshoremen's Association,*[66] the Supreme Court held that a similar union boycott was a "labor dispute" under the Norris-LaGuardia Act and, therefore, could not be enjoined. *Allied's* antitrust implications are unclear since the issue was not presented to, and thus not addressed by, the Supreme Court. Under the Supreme Court's decision in *Jacksonville Bulk Terminals,* however, the union is protected from injunctions sought under the antitrust laws and, most likely, would be immunized against treble money damages as well.

Nearly a decade has passed since the Supreme Court handed down its decision in *Connell.* Subsequent cases have gradually defined, to some degree, the contours of that decision. Regretfully, however, these decisions have not fully clarified many of the ambiguities and difficult questions left in *Connell's* wake. If nothing else, *Connell* has made it clear that the Supreme Court will not countenance the use of anticompetitive, top-down organizational tools by stranger unions which do not represent — nor wish to represent — the employees of companies from which restrictive agreements are sought.

Connell had its day — indeed, a "good day" — in court. Actually, to say a "day" is a mischaracterization because the road that ended with the Supreme Court's decision in *Connell* started much earlier with the *Dallas Building Trades* case. There was a long and arduous course which consumed years of litigation. Undoubtedly, more chapters will be written. Today it is evident that the Supreme Court will not countenance picketing and boycotts by stranger unions which do not seek bargaining relationships but which have an object to force employers to sign restrictive agreements which limit with whom they can do business.

Because *Connell* was ultimately settled, it is not known whether the rule of reason or the per se rule would have been applied in subsequent antitrust litigation. The union's aim in *Connell* was to control the market place through the device of broad restrictive subcontracting agreements — illegally obtained through severe ec-

64. *Id.*
65. 102 S. Ct. 1656 (1982).
66. 102 S. Ct. 2673 (1982).

onomic sanctions — which were tied to a contractors association contract which contained a most favored nation clause. The union's aim was to keep from the market place all subcontractors with whom it did not contract. This was, it is submitted, a classic example of a classic boycott action which would have warranted the imposition of the per se rule.