University of Dayton Law Review

Volume 2 | Number 2 Article 3

1977

Perma Life Eight Years After: Is the Doctrine of In Pari Delicto Still a Potential Impediment to Private Antitrust Plaintiffs?

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PERMA LIFE EIGHT YEARS AFTER: IS THE DOCTRINE OF IN PARI DELICTO STILL A POTENTIAL IMPEDIMENT TO PRIVATE ANTITRUST PLAINTIFFS?

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The private antitrust action is authorized by section 4 of the Clayton Act.[1] The potential in these actions for recovery of treble damages and attorney's fees not only allows private persons to be compensated for their injuries but acts as a financial incentive for such enforcement.[2] Private enforcement was designed to obviate the necessity for expanded federal enforcement;[3] governmental (public) enforcement, which is sometimes selective and concerned with more flagrant violations, is thus supplemented by the private suit, which discourages antitrust violations by heightening the possibility that violators will be exposed and subjected to the deterrent effect of large damage awards.[4] Private antitrust actions are therefore beneficial to society through their impact on those who might otherwise engage in anti-competitive business conduct. This impact is a necessary complement to public enforcement.

This article will concern itself with the question of whether a private plaintiff who has participated in the alleged antitrust violation or violations upon which suit has been brought, should be barred from seeking a remedy for these violations because of such participation. Specifically, the availability of the defense of *in pari delicto* to defendants in private antitrust actions will be discussed through a review of the decision of the Supreme Court of the United States in *Perma Life Mufflers, Inc. v. International Parts Corp.*[5] which limited the use of *in pari delicto,* and several United States

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1. 15 U.S.C. § 15 (1970):

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

2. P. AREEDA, ANTITRUST ANALYSIS ¶ 159 (2d ed. 1974).

3. *See* Note, *In Pari Delicto and Consent as Defenses in Private Antitrust Suits,* 78 HARV. L. REV. 1241 (1965); *see also* Loevinger, *Private Action—The Strongest Pillar of Antitrust,* 3 ANTITRUST BULL. 167, 168 (1958).

4. *See* P. AREEDA, ANTITRUST ANALYSIS ¶ 159 (2d ed. 1974).

5. 392 U.S. 134 (1968).

Court of Appeals decisions applying the Supreme Court's standard for the use of this defense. The most recent Court of Appeals decision concerning the availability of the *in pari delicto* defense in private antitrust actions, *Javelin Corp. v. Uniroyal, Inc.*,[6] appears to be a more restricted reading of *Perma Life* than that of other circuits which have reviewed the *Perma Life* decision.[7] *Javelin* limits the use of *in pari delicto* to a degree which increases the probability of private plaintiffs recovering damages under circumstances negated by the *Perma Life* case, in contradiction to the underlying policy of the antitrust laws. It is here advocated that the *Javelin* decision should not become the standard by which the use of the *in pari delicto* defense in private antitrust actions is determined. In order to understand why this position is advocated, it is necessary to briefly review the history of the *in pari delicto* defense in private antitrust actions.

I. Historical Application of *in Pari Delicto* in Antitrust Law

The Latin phrase *in pari delicto* means literally "of equal fault." In the antitrust field, however, the concept has been utilized as a complete defense to an action brought by a plaintiff who participated in an alleged antitrust violation, even where the plaintiff's participation was of a *lesser* degree than the defendant's.[8] Prior to the enactment of the Sherman Antitrust Act,[9] Congress rejected several bills which would have provided for the defense of *in pari delicto* indicating an intention to permit recovery even though a plaintiff participated in the scheme.[10] Subsequent additions and amendments to the antitrust laws did not provide for the defense, but several early decisions[11] regarded it as applicable to antitrust actions. Prior to *Perma Life* many courts continued to recognize *in pari delicto* as a defense.[12] The decisions allowing the defense

6. Javelin Corp. v. Uniroyal, Inc., 546 F.2d 276 (9th Cir. 1976).

7. *See, e.g.*, Bernstein v. Universal Pictures, Inc., 517 F.2d 976 (2d Cir. 1975); Kestenbaum v. Falstaff Brewing Corp., 514 F.2d 690 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976); Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3 (4th Cir. 1971); South-East Coal Co. v. Consolidation Coal Co., 434 F.2d 767 (6th Cir. 1970); Premier Electrical Constr. Co. v. Miller-Davis Co., 422 F.2d 1132 (7th Cir.), *cert. denied*, 400 U.S. 828 (1970).

8. *See* Note, *In Pari Delicto and Consent as Defenses in Private Antitrust Suits*, 78 Harv. L. Rev. 1241, 1242 (1965); 47 Texas L. Rev. 322, 323 (1968); *cf.* Eastman Kodak Co. v. Blackmore, 277 F. 694, 700 (2d Cir. 1921).

9. 15 U.S.C. §§ 1-7 (1970).

10. *See* Bushby, *The Unknown Quantity in Private Antitrust Suits — The Defense of In Pari Delicto*, 42 Va. L. Rev. 785, 787 & n.12 (1955).

11. Bishop v. American Preservers Co., 105 F. 845 (C.C.N.D. Ill. 1900); Eastman Kodak Co. v. Blackmore, 277 F. 694 (2d Cir. 1921).

12. *See, e.g.*, Crest Auto Supplies, Inc. v. Ero Mfg. Co., 360 F.2d 896 (7th Cir. 1966);

seemed to base their disinclination to allow recovery to the participating plaintiff on an unwillingness to reward wrongdoers.[13] In at least two situations, however, the participation of the plaintiff was held to foreclose recovery. In the first of these, an exception to the *in pari delicto* defense was recognized in a situation where the plaintiff had withdrawn from the illegal scheme and was seeking damages sustained after his participation had ended.[14] More importantly, in the second, an exception was allowed where "coercion" or disparity in bargaining power forced a plaintiff to enter into the illegal scheme.[15] The "coercion" exception was applied in situations where a plaintiff would lose his investment if he did not participate or would lose his only source of supply by refusing to participate.[16] The rationale for the disparity of bargaining power exception centered on the fact that the plaintiff had only participated in the arrangement "because he had no realistic alternative."[17]

The United States Supreme Court had not, prior to 1968, expressly rejected the defense of *in pari delicto,* but its use was apparently discouraged by the Court's announced policy of stressing the public nature of private antitrust enforcement and "regarding plaintiffs as 'private attorneys general' for the enforcement of antitrust legislation."[18] In *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons,*[19] the Supreme Court rejected the defense of "unclean hands,"[20] stating:

> If petitioner and others were guilty of infractions of the antitrust laws, they could be held responsible in appropriate proceedings brought against them by the Government or by injured private persons. The alleged illegal conduct of petitioner, however, could not legalize the

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Bales v. Kansas City Star Co., 336 F.2d 439 (8th Cir. 1964); Pennsylvania Water & Power Co. v. Consolidated Gas Elec. Light & Power Co., 209 F.2d 131 (4th Cir. 1953), *cert. denied,* 347 U.S. 960 (1954).

13. *See* 47 TEXAS L. REV. 332, 323 (1968); 21 VANDERBILT L. REV. 1083, 1084 (1968).

14. *See, e.g.,* Victor Talking Machine Co. v. Kemeny, 271 F. 810 (3d Cir. 1921).

15. *See* E. ROCKEFELLER, ANTITRUST QUESTIONS AND ANSWERS 589 (1974).

16. *See* 47 TEXAS L. REV. 322, 324 (1968).

17. *Id.*

18. 21 VANDERBILT L. REV. 1083, 1085 (1968). *See, e.g.,* Bruce's Juices, Inc. v. American Can Co., 330 U.S. 743, 751 (1947) where the Court stated: "It is clear Congress intended to use private self-interest as a means of enforcement. . . ."

19. 340 U.S. 211 (1951). Kiefer-Stewart was a liquor wholesaler who brought an action against various distilleries for engaging in price-fixing. The distilleries interposed a defense alleging that Kiefer-Stewart was engaged in a price-fixing agreement with other wholesalers setting minimum resale prices.

20. "Unclean hands," although related to *in pari delicto,* is applicable where the plaintiff violates the law in a manner which is not connected with the alleged illegal activity engaged in by the defendant. *See* 16N VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATIONS § 109.02 (1976).

> unlawful combination by respondents nor immunize them against liability to those they injured.[21]

As a result of the *Kiefer-Stewart* decision, some courts were of the opinion that *in pari delicto* was also no longer viable as a defense to antitrust actions in light of the Supreme Court's avowed interest in buttressing the private antitrust action.[22] In 1959, the Court brushed aside a defendant's attempt to defend against plaintiff's breach of contract suit by alleging the contract was in violation of the antitrust laws,[23] stating that the defense would not lie unless the enforcement of the contract would sanction an illegal restraint of trade.[24] A predilection by the Court against *in pari delicto* seemed apparent.

In *Simpson v. Union Oil Co.*,[25] a decision noted for its effect on resale price maintenance through the device of consignment sales, the Supreme Court, without specific mention of *in pari delicto*, nevertheless seemed to reject its availability as a defense where economic coercion was present. The public aspect of the private treble-damage action which had motivated the Court to reject the defenses noted above seemed to be at the heart of the decision.[26] In several instances Justice Douglas termed the agreement coercive[27] and reasoned that since it was the intention of Congress to prohibit such agreements, a party coerced into accepting them should not be denied recovery for having participated.[28] The *Simpson* decision recognized that economic coercion could include not only the threatened loss of a past investment but also the loss of a coveted economic opportunity.[29]

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21. 340 U.S. at 214.

22. *See, e.g.*, 16N VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 109.02 (1976); Trebuhs Realty Co. v. News Syndicate Co., 107 F. Supp. 595 (S.D.N.Y. 1952) where the court stated that the vindication of the public interest in free competition was "a necessity overriding the particular equities which might exist between the immediate parties." *Id.* at 598. *See also* Affiliated Music Enterprises, Inc. v. Sesac, Inc., 17 F.R.D. 509, 511 (S.D.N.Y. 1955); 48 NW. L. REV. 619 (1953).

23. Kelly v. Kosuga, 358 U.S. 516 (1958).

24. *Id.* at 520-21. *See* ABA ANTITRUST LAW DEVELOPMENTS 297 (1975).

25. 377 U.S. 13 (1964). Simpson, a dealer for Union Oil who sold consignment gasoline at prices set by Union, had his lease cancelled for selling below these fixed prices.

26. *Id.* at 16-17.

27. *Id.* at 17, 22, 24.

28. *See* 21 VANDERBILT L. REV. 1083, 1085 & n.21 (1968).

29. *See* Note, *In Pari Delicto and Consent as Defenses in Private Antitrust Suits*, 78 HARV. L. REV. 1241, 1246 (1965); *The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 263 (1968).

II. *Perma Life* AND ITS IMPORT

Four years later, the Court at last dealt directly with the *in pari delicto* defense in *Perma Life Mufflers, Inc. v. International Parts Corp.*[30] The plaintiffs in that case brought a treble-damage action alleging that their franchise agreements with the franchisor, an automotive parts distributor, violated section 1 of the Sherman Act[31] and section 3 of the Clayton Act.[32] The agreements granted exclusive territorial rights to the plaintiffs who in return agreed to resell the products at prices set by the defendant, buy parts exclusively from the defendant, and do business only at locations consented to by the defendant. After several years of earning substantial profits the plaintiffs sought and were denied the opportunity to open new outlets, to purchase from alternative sources of supply and to vary the fixed prices. The franchise agreements were subsequently terminated, and the plaintiffs brought suit alleging that the agreements had been in restraint of trade and had substantially lessened competition.[33] The Seventh Circuit affirmed the decision of the district court granting summary judgment for the defendants, concluding that plaintiffs' signing of the agreements barred them, through the defense of *in pari delicto,* from asssailing the legality of the franchise agreement under the antitrust laws.[34] The plaintiffs' mere participation in the scheme was sufficient to invoke the defense. The Supreme Court reversed, casting grave doubts upon the continued viability of the *in parti delicto* defense in private antitrust actions.

Mr. Justice Black wrote the principal opinion in *Perma Life.*[35] Recognizing that the elimination by courts of the *in pari delicto* defense could reward wrongdoers, he nevertheless felt that the threat of the treble-damage action as a deterrent to antitrust violations could best be served by removing obstacles to its use. He suggested that "[t]he possible beneficial byproducts of a restriction from a plaintiff's point of view can of course be taken into consideration in computing damages."[36] Furthermore, maintained Justice Black, the doctrine of *in pari delicto* itself, "with its complex scope, contents, and effects, is not to be recognized as a defense to

30. 392 U.S. 134 (1968).

31. 15 U.S.C. § 1 (1970).

32. 15 U.S.C. § 14 (1970).

33. The plaintiffs also alleged that the defendants had violated the Robinson-Patman Act, 15 U.S.C. § 13 (1970). 392 U.S. at 135.

34. Perma Life Mufflers v. International Parts Corp., 376 F.2d 692 (7th Cir. 1967).

35. Justice Black was joined in his opinion by the Chief Justice, and Justices Douglas and Brennan.

36. 392 U.S. at 140.

an antitrust action."[37] Standing alone, this language would not seem to permit a compromise between business morality on the one hand and the interest in competition on the other;[38] however the opinion was limited both by Justice Black's own further comments and the concurring opinions.[39] Justice Black first noted that the Court did not have to decide the question of whether voluntary involvement in the scheme, which he characterized as having to be monopolistic in scope, "could ever be a basis, wholly apart from the idea of *in pari delicto,* for barring a plaintiff's cause of action."[40] Secondly, he emphasized that the plaintiffs in *Perma Life* had not voluntarily entered into the franchise agreement; rather, they had been subject to an unequal, coercive bargaining situation.[41]

In their respective concurring opinions, Justices Fortas, Marshall and White argued for an exclusion of the defense where the plaintiffs did not bear equal responsibility for establishing, promoting or continuing the scheme, or were forced to accept the deal or forego the opportunity.[42] Justice Fortas argued for availability of the defense where the fault was reasonably equal.[43] Justice Marshall emphasized that plaintiffs should be permitted a recovery where duress was present but would not permit a recovery where "petitioners actually participated in the formulation of the entire agreement."[44] Justice White would permit recovery where plaintiffs were coerced into participation but "would deny recovery where plaintiff and defendant bear substantially equal responsibility for injury resulting to one of them."[45] Justice White also countered the public interest argument for facilitating private antitrust actions by observing that where the plaintiff shares equal responsibility for the illegal scheme, "assuring him illegal profits if the agreement in restraint of trade succeeds, and treble damages if it fails, . . . may encourage what the Act was designed to prevent."[46] Since a negation of the *in pari delicto* defense would allow this very anomaly to occur,

37. *Id.*

38. *See* 2 M. HANDLER, TWENTY-FIVE YEARS OF ANTITRUST 771 (1973).

39. Justices White, Fortas, and Marshall wrote concurring opinions. Mr. Justice Harlan, joined by Mr. Justice Stewart, concurred in part and dissented in part.

For additional commentary on the *Perma Life* case, *see* HANDLER, *supra* note 38 at 771-73; *The Supreme Court, 1967 Term,* 82 HARV. L. REV. 63, 261-63; 16N VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 109.02 at 109-14.

40. 392 U.S. at 140.

41. *Id.* at 139-141.

42. *The Supreme Court, 1967 Term,* 82 HARV. L. REV. 63, 262 (1968).

43. 392 U.S. at 147.

44. *Id.* at 150.

45. *Id.* at 146.

46. *Id.*

Justice White felt that "[i]n this situation, it is doubtful that the ends of section 4 would be measurably served."[47] Justice Harlan, joined by Justice Stewart, dissented, arguing that the lower court should reconsider the *in pari delicto* defense from the viewpoint of whether equal fault was present.[48]

Taken as a whole, Justice Black's qualifying language[49] and the concurring and dissenting opinions reveal a less than absolute repudiation of the defense of *in pari delicto*. *Perma Life* can be read simply as a reiteration or expansion of the *Simpson* disaffirmance where coercion was present.[50] It unequivocally struck down the use of *in pari delicto* where the plaintiff had merely participated in the illegal scheme.[51] Despite Justice Black's "absolute" negation of the defense it appeared that, although perhaps not in name, at least in effect, a plaintiff would be subject to the defense of *in pari delicto* where he bore equal responsibility for the formulation or continuation of an illegal scheme which he had entered into on a voluntary basis. The test appeared to be one of "equal guilt"—a true embodiment of the concept of *in pari delicto*. One noted commentator predicted:

> In light of the opinion's stress on the fact that many of the challenged restraints were contrary to the plaintiffs' interests, and the finding that the dealers had been "forced" to accept these terms as a condition of doing business, it may be that Justice Black would not bar the defense when confronted with a different set of facts. In other words, he might not be averse to drawing the various distinctions advocated by the concurring justices. This language seems to indicate that even Justice Black may not be convinced by his own absolute affirmation. If that be so, we would be warranted in treating his broad statement of the rule as mere dictum and the opinion itself as at least a partial retreat from an absolutism which serves only to rigidify antitrust law without providing a just solution to its many perplexities.[52]

It remained, however, for subsequent decisions in the various United States courts of appeals and district courts to determine if the report of the death of *in pari delicto* in *Perma Life* had been greatly exaggerated.

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47. *Id.*
48. *Id.* at 156.
49. *Id.* at 139-141.
50. *See The Supreme Court, 1967 Term*, 82 HARV. L. REV. 63, 263 (1968).
51. *See, e.g.*, 21 VANDERBILT L. REV. 1083, 1087 (1968).
52. HANDLER, *supra* note 38 at 773 (1973).

III. In Pari Delicto After *Perma Life*

A review of the decisions which have dealt with the issue of allowing the defense of *in pari delicto* to be used in private antitrust actions manifests a continued viability for its assertion in certain fact situations. Although the response of some courts to Justice Black's opinion may have evidenced a reluctance to employ the defense by name, one observer has noted that, "While there may be no *pari delicto* defense in antitrust cases according to the Supreme Court there is a defense which looks very much like what many of us used to call the *pari delicto* defense."[53]

The Seventh Circuit in *Premier Electrical Construction Co. v. Miller-Davis Co.*[54] was the first of the circuit courts of appeals to interpret the holding of *Perma Life.*[55] While reversing the lower court's determination that the plaintiff was barred from maintaining its action against defendants under the doctrine of *in pari delicto,*[56] the Seventh Circuit did not rule out the use of the defense. Construing *Perma Life* as standing for a "more limited rule"[57] than Justice Black's apparent absolute prohibition, the court reasoned that plaintiffs were only barred where they bore "equal responsibility for creating and establishing an illegal scheme."[58] Coercion was also recognized as a factor which would immunize the plaintiff from the assertion of *in pari delicto.* The court therefore recognized the defense but reversed and remanded in order to allow the district court to determine the factual question whether there had been unequal bargaining power between the parties. Soon after the *Premier* decision, the Sixth Circuit in *South-East Coal Company v. Consolidation Coal Company*[59] approved a jury instruction which permitted the plaintiff to recover damages, even though he had participated in the alleged conspiracy, if it was found that "the defendants were more responsible than the plaintiff for the formation of the conspiracy."[60] Absent such a finding, the defense of *in*

53. Millstein, *Current Status of Affirmative Defenses, Including the Passing-On Defense, In Pari Delicto and Statutes of Limitations,* 38 Antitrust L. J. 111, 115 (1968) [hereinafter cited as Millstein].

54. 422 F.2d 1132 (7th Cir.), *cert. denied,* 400 U.S. 828 (1970).

55. The plaintiff in *Premier Electric* alleged that defendant had induced it to submit higher electrical subcontract bids to defendant's competitors in a certain project, and assured plaintiff that, in return, it would receive the electrical subcontract, and that defendant then breached this agreement.

56. 292 F. Supp. 213 (N.D. Ill. 1968).

57. 422 F.2d at 1138.

58. *Id.*

59. 434 F.2d 767 (6th Cir. 1970), *cert. denied,* 402 U.S. 983 (1971).

60. *Id.* at 784. The instruction also mentioned the requirement that the plaintiff have withdrawn from the arrangement.

pari delicto would bar recovery. The court also commented on the inapplicability of *in pari delicto* in the presence of other circumstances presumably those in which coercion was present.[61]

One year later, the Fourth Circuit also refused to read *Perma Life* as an absolute rejection of *in pari delicto.*[62] In *Columbia Nitrogen Corporation v. Royster Company*[63] the court focused on the concurring opinions in *Perma Life:*

> these opinions teach that when parties of substantially equal economic strength mutually participate in the formulation and execution of the scheme and bear equal responsibility for the consequent restraint of trade each is barred from seeking treble damages from the other.
>
> We think it plain, therefore, that a party, who voluntarily formulates and equally participates in a non-coercive agreement for reciprocal dealing *until a declining market makes its purchases unprofitable,* cannot maintain an action under 1 of the Sherman Act against its trading partner.[64]

Of equal importance to this court was the concern of Justice White in *Perma Life* that voluntary participants in illegal restraints of trade not be allowed to recover damages therefrom. "Equal responsibility" was seen by the Fourth Circuit as the *sine qua non* of *in pari delicto,* in order that a balance be struck between the purposes of the antitrust laws and the public interest in private enforcement.

In *Greene v. General Foods,*[65] the Fifth Circuit recently suggested that the viability of *in pari delicto* after *Perma Life* was questionable; however, the court did not expressly reject its efficacy. The defense was deemed inapplicable since the facts before the court disclosed the existence of "a great disparity between the plaintiff and the defendant,"[66] thereby raising the spectre of the sort of unequal bargaining positions which, under *Perma Life,* merit a finding that the parties were not "in equal fault." In *Kestenbaum v. Falstaff Brewing Corporation,*[67] however, the same circuit in *dicta* implied that the maintenance of *in pari delicto* defense had not been foreclosed by *Perma Life;* rather, that defense was limited to situa-

61. *Id.*

62. *See* 16N VON KALINOWSKI, ANTITRUST LAWS AND TRADE REGULATION § 109.02 at 109-25 (1976).

63. 451 F.2d 3 (4th Cir. 1971). The defendant in a breach of contract action asserted a counterclaim based on plaintiff's alleged non-coercive reciprocal trade practices to which defendant had voluntarily agreed.

64. *Id.* at 15-16 (emphasis added).

65. 517 F.2d 635 (5th Cir.), *cert. denied,* 424 U.S. 942 (1975).

66. *Id.* at 647.

67. 514 F.2d 690 (5th Cir.), *cert. denied,* 424 U.S. 943 (1975).

tions where the plaintiff voluntarily bore equal responsibility for the illegal scheme.[68]

Two other circuits have also acknowledged support for *in pari delicto* as an affirmative defense. The Second Circuit, also in *dicta,* stated that "a plaintiff may properly be denied antitrust relief when his culpability *is equal* to that of the defendant."[69] The Third Circuit upheld a district court ruling that plaintiff's participation in an illegal scheme was not of sufficient magnitude to subject the plaintiff to the defense of *in pari delicto.*[70]

Several district court cases have cited *Perma Life* for the proposition that the doctrine of *in pari delicto* has been abolished but have, nonetheless, permitted a defense, "wholly apart from the idea of *in pari delicto,* based upon a concept of involvement and participation in the unlawful scheme."[71] These cases accord with the previously mentioned circuit court opinions in recognizing the continued viability of the defense of *in pari delicto* in some form even if not *eo nomine:*

> The bulk of the cases since Perma Life are disinclined to deny the theoretical possibility of a defense in extreme circumstances, but are rigorous in their perusal of any claim that conditions for the theoretically possible defense have been met in a particular instance.[72]

The "extreme circumstances," to which the above commentator alludes as sufficient to invoke *in pari delicto* to bar the private antitrust plaintiff from recovery, may arise in the following situations:

1. Where the plaintiff has instigated the illegal scheme.
2. Where the plaintiff has entered into the illegal scheme voluntarily, with equal bargaining power, and bearing equal responsibility for the formulation and continuation of the scheme.
3. Where the plaintiff voluntarily entered an already existing illegal scheme and participated on an equal basis in its continued success.

The courts have specifically announced that the first two situations will result in the application of the defense.[73] Their opinions can, in

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68. *Id.* at 695 n.4.

69. Bernstein v. Universal Pictures, Inc., 517 F.2d 976, 982 (2d Cir. 1975) (emphasis added); *see also* Pearlstein v. Seudder & German, 429 F.2d 1136 (2d Cir. 1970), *cert. denied,* 401 U.S 1013 (1971).

70. American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230 (3d Cir. 1975).

71. Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp., 58 F.R.D. 357, 360 (S.D.N.Y. 1973); *see also* Dobbins v. Kawasaki Motors Corp., U.S.A., 362 F. Supp. 54 (D. Ore. 1973).

72. L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST (1977) § 250 at 784 n.5.

73. *See, e.g.,* Premier Electrical Constr. Co. v. Miller-Davis Co., note 54 *supra;* Columbia Nitrogen Corp. v. Royster Co., note 63 *supra.*

the view of this author, also be read expansively to include the third situation. The defense would be applicable where the plaintiff did not fully participate or did so because of coercive factors or unequal bargaining power in favor of the defendant. It has also been suggested that a plaintiff, although an equal participant in the allegedly illegal scheme, should not be barred from bringing a cause of action for damages suffered after it has withdrawn therefrom:

> Indeed, if it has plainly withdrawn and started to compete, even a firm which was the initial instigator of the unlawful arrangement ought to be granted a cause of action for any damage done to it by other participants if they take retaliatory action because of the withdrawal. The crucial thing is to assure that notions of fairness inter se do not reduce unduly the likelihood of competitive conditions being restored.[74]

Presumably the plaintiff would not be accorded a recovery for any damages he suffered while still a participant. Permitting a plaintiff to recover after he has ceased to participate in the scheme could provide incentive for such withdrawal.[75] The argument is made, however, that sanctioning the defense in cases of "equal fault" is unsatisfactory as it would allow some antitrust violators to escape punishment in derogation of the public interest.[76] The deterrent effect produced by the fear of being sued by one's unsuccessful partner in an illegal scheme, it is advocated, will serve a greater public purpose than the harm occasioned by permitting a participant to profit from the violation itself.[77]

The law, as an inexact science, often encounters difficulties in defining when "equality or substantial equality is present." Some of these difficulties could be avoided by refusing to implement a test which is ostensibly one of comparative negligence. However, courts which have wrestled with such other complex legal concepts as conscious parallelism and materiality should be able to cope with an additional undefined standard.[78] Justice Black suggests that a plaintiff's profits from the illegal scheme could be offset against his damages. To implement such a policy, however, would render futile many potential suits because the recovery would be insubstantial. Equitable considerations dictate that a voluntary participant

74. SULLIVAN, *supra* note 72, at 784.

75. Note, *In Pari Delicto and Consent as Defenses in Private Antitrust Suits*, 78 HARV. L. REV. 1241, 1244 (1965).

76. *See, e.g.*, 47 TEXAS L. REV. 322, 326 (1968).

77. *Id.*

78. *See* Millstein, *supra* note 53 at 116.

should not recover, even in diminished form, for losses suffered as a result of his acquiesence in an illegal scheme.[79] The alternative, as suggested by Justice Harlan, is to risk "pay[ing] violators three times their losses in doing what public policy seeks to deter them from doing."[80] A plaintiff who actively participates on a voluntary basis in an illegal scheme seems "morally undeserving of compensation."[81] Courts can give recognition to the policies of the antitrust laws by refusing to abolish or strictly limit *in pari delicto* beyond the boundaries set in those cases which have interpreted *Perma Life* as establishing an "equal responsibility" standard.

Permitting factors such as coercion by the defendant and inequality of bargaining power between the parties to obviate *in pari delicto* sufficiently sustains the interest of the public in advancing the efficacy of the private antitrust action. Further limitations on its application would be, in this author's opinion, detrimental to effective antitrust enforcement. The recent Ninth Circuit opinion in *Javelin Corp. v. Uniroyal,*[82] however, promulgates a standard for application of the *in pari delicto* defense which seems to be more restrictive in scope than that embodied in the decisions of the other circuit courts in their interpretations of *Perma Life.*

The *Javelin* case involved a plaintiff who had joined Tire Brands, Inc., a pre-existing association "founded by a group of tire distributors for the purpose of pooling their purchasing power."[83] The association actually functioned as an anti-competitive scheme whereby specified exclusive territories were allocated to each member. At the time it joined the association Javelin was fully aware of the territorial restrictions and "considered the exclusive marketing area an advantage."[84] As Javelin prospered, it developed its own brands and became less dependent on the Uniroyal brand. Consequently, sales by it of the latter brand declined steadily. In 1972, Javelin was expelled from the group "for failure to maintain an acceptable level of quota sales."[85] Javelin "is now one of the largest tire distributing companies in the United States."[86]

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79. For an excellent and more extensive discussion favoring the retention of in pari delicto, *see* Note, *In Pari Delicto and Consent as Defenses in Private Antitrust Suits,* 78 HARV. L. REV. 1241 (1965); *The Supreme Court, 1967 Term,* 82 HARV. L. REV. 63, 260 (1968).

80. 392 U.S. at 154.

81. Note, *In Pari Delicto and Consent as Defenses in Private Antitrust Suits,* 78 HARV. L. REV. 1241, 1244 (1965).

82. 546 F.2d 276 (9th Cir. 1976).

83. *Id.* at 277.

84. *Id.*

85. *Id.* at 278.

86. *Id.*

In 1973 Javelin brought suit alleging that defendants had violated section 1 of the Sherman Act[87] by allocating territories, engaging in tie-in sales and refusing to deal with plaintiff. The district court granted summary judgment for defendants "based upon Javelin being *in pari delicto* in the acts alleged."[88] The court of appeals reversed, holding that the district court was in error in granting summary judgment on this ground.[89]

On the basis of its examination of the *Perma Life* decision, the *Javelin* court found that an "imprecise standard" had been established whereby some degree of involvement by a plaintiff would bar an action. A review of the decisions in the other circuits caused the court to note that "such decisions seem to temper *Perma Life's* apparent abolition of the *in pari delicto* defense."[90] Satisfied that the defense had continued viability, the court held that the *Perma Life* decision mandated that plaintiffs be barred from recovery only in "rare" circumstances.[91] This holding is in contrast to that of other circuits where the defense appears to be available in a wider range of circumstances.[92]

Stressing that courts should encourage private antitrust actions because of a public interest represented by the plaintiff in tandem with its own interest in the suit, the court announced that only "when the illegal conspiracy would not have been formed *but for* the plaintiff's participation, the plaintiff is barred from recovery."[93]

The Ninth Circuit has, therefore, fashioned a standard dependent on the element of essentiality. The plaintiff in order to be barred must have been essential to the formation of the illegal scheme. The use of the "but for" test implies that the court must find that plaintiff's refusal to participate would have prevented the genesis of a conspiracy.[94] Those whose involvement was "equal" but not "essential" to the formation apparently would not be barred. As the *Javelin* court said, while the true instigator of the scheme would clearly be barred, "[w]hether founding members of a conspiracy

87. 15 U.S.C. § 1 (1970).
88. 546 F.2d at 278.
89. *Id.*
90. *Id.* at 279.
91. *Id.*
92. See the cases discussed in the text accompanying notes 54 through 70 *supra.*
93. 546 F.2d at 279 (emphasis added).
94. There is some support in the other circuits for limiting *in pari delicto* to parties who participated in the formulation stage of the conspiracy. *See, e.g.,* South-East Coal Co. v. Consolidation Coal, 434 F.2d 767 (6th Cir. 1970). In this formulation, "equal" participation appears sufficient to invoke the defense.

are barred is a question of fact for the jury."[95] It is admitted by the court that this test will place a "high burden of proof" upon the party raising the *in pari delicto* defense.[96] Additionally, a party who joins a pre-existing conspiracy would be immunized from *in pari delicto* unless its inclusion was essential to the continuation of the scheme.

IV. CONCLUSION

The *Javelin* opinion represents a departure from the previous interpretations of *Perma Life*. The balance achieved in other circuits between the public interest and the policies of the antitrust laws is not reflected in the Ninth Circuit's opinion. The continued viability of the *in pari delicto* defense, at least in the Ninth Circuit, has been jeopardized. Plaintiffs whose participation in the anticompetitive scheme was equal in stature to that of the other participants, but not "essential" to the scheme's success, will be inviolate. The public benefit is not served to any greater degree by permitting those who voluntarily participated on an equal basis in an illegal scheme to recover damages, while those whose involvement was only infinitesimally more culpable are precluded from recovery. It is hoped that, in view of the considerations discussed earlier in this article, other federal courts will continue to follow a path of moderation sanctioning *in pari delicto* in more than "rare circumstances." The weight of opinion relative to the *Perma Life* decision favors such treatment.

It has been the objective of this article to present an analysis of the current status of the affirmative defense of *in pari delicto* in private antitrust actions and to argue for its continued viability. Courts should be flexible in permitting the maintenance of the defense. The *Perma Life* decision did not abolish the *in pari delicto* doctrine and, it is submitted, those circuit courts recognizing its use in circumstances where voluntary, equal responsibility is present have correctly set the standard for its future application. The public interest in penalizing those who would violate the antitrust laws mandates a cautious application of the defense. Thus, the interaction of this factor with the equities of the parties involved and the policies of the antitrust laws argues for an allowance of *in pari delicto* where equal rather than *essential* participation by the accuser is present. Allowing a degree of indefiniteness when "equal re-

95. 546 F.2d at 279.
96. *Id.*

sponsibility" exists is preferable to the outright prohibition of *in pari delicto* or a standard which effectively accomplishes such a prohibition.