INDEPENDENT REVIEW PROCESS INTERNATIONAL CENTRE FOR DISPUTE RESOLUTION
ICDR CASE NO. 01-18-0004-2702

AFILIAS DOMAINS NO. 3 LTD.
(Claimant)
v.
INTERNET CORPORATION FOR ASSIGNED NAMES AND NUMBERS
(Respondent)

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106 S.Ct. 1415
Supreme Court of the United States

AT & T TECHNOLOGIES, INC., Petitioner
v.
COMMUNICATIONS WORKERS OF AMERICA et al.

No. 84–1913.
|
Argued Jan. 22, 1986.
|
Decided April 7, 1986.

Synopsis
Union sought intervention of court to compel arbitration of dispute concerning company's layoff of employees. The United States District Court for the Northern District of Illinois, John F. Grady, J., ordered arbitration of arbitrability issue, and employer appealed. The Court of Appeals, 751 F.2d 203, affirmed, and certiorari was granted. The Supreme Court, Justice White, held that it was for court, not arbitrator, to decide in first instance whether parties to collective bargaining agreement intended to arbitrate grievances concerning layoffs predicated on "lack of work" determination by company.

Vacated and remanded.

Justice Brennan filed concurring opinion in which Chief Justice Burger and Justice Marshall joined.

Procedural Posture(s): On Appeal.

****1415 *643** *Syllabus* *

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Petitioner employer and respondent Union are parties to a collective-bargaining agreement covering telephone equipment installation workers. Article 8 of the agreement provides for arbitration of differences arising over interpretation of the agreement. Article 9 provides that subject to certain limitations, but otherwise not subject to the arbitration clause, petitioner is free to exercise certain management functions, including the hiring, placement, and termination of employees. Article 20 prescribes the order in which employees will be laid off "[w]hen lack of work necessitates Layoff." The Union filed a grievance challenging petitioner's decision to lay off 79 installers from its Chicago location, claiming that there was no lack of work at that location and that therefore the layoffs would violate Article 20. But petitioner laid off the installers and refused to submit the grievance to arbitration on the ground that under Article 9 the layoffs were not arbitrable. The Union then sought to compel arbitration by filing suit in Federal District Court, which, after finding that the Union's interpretation of Article 20 was at least "arguable," held that it was for the arbitrator, not the court, to decide whether that interpretation had merit, and, accordingly,

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ordered petitioner to arbitrate. The Court of Appeals affirmed.

Held: The issue whether, because of express exclusion or other evidence, the dispute over interpretation of Article 20 was subject to the arbitration clause, ****1416** should have been decided by the District Court and reviewed by the Court of Appeals, and should not have been referred to the arbitrator. Pp. 1418–20.

(a) Under the principles set forth in the *Steelworkers Trilogy* (*Steelworkers v. American Mfg. Co.,* 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403; *Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409; and *Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424), it was the District Court's duty to interpret the collective-bargaining agreement and to determine whether the parties intended to arbitrate grievances concerning layoffs predicated on a "lack of work" determination by petitioner. If the court should determine that the agreement so provides, then it would be for the arbitrator to determine the relative merits of the parties' substantive interpretations of the agreement. Pp. 1418–20.

***644** (b) This Court will not examine the collective-bargaining agreement for itself and affirm the Court of Appeals on the ground that the parties had agreed to arbitrate the dispute over the layoffs. It is not this Court's function in the first instance to construe collective-bargaining agreements and arbitration clauses, or to consider any other evidence that might demonstrate that a particular grievance was not subject to arbitration. P. 1420.

751 F.2d 203 (CA 7th 1984), vacated and remanded.

WHITE, J., delivered the opinion for a unanimous Court. BRENNAN, J., filed a concurring opinion, in which BURGER, C.J., and MARSHALL, J., joined, *post,* p. ——.

Attorneys and Law Firms

Rex E. Lee argued the cause for petitioner. With him on the briefs were *David W. Carpenter, Gerald D. Skoning, Charles C. Jackson, Howard J. Trienens, Alfred A. Green,* and *Joseph Ramirez.*

Laurence Gold argued the cause for respondents. With him on the brief were *Irving M. Friedman, Stanley Eisenstein, Harold A. Katz, David Silberman,* and *James Coppess.**

* Briefs of *amici curiae* urging reversal were filed for the Chamber of Commerce of the United States by *John S. Irving, Carl L. Taylor,* and *Stephen A. Bokat;* and for the National Association of Manufacturers by *Jan S. Admundson* and *Gary D. Lipkin.*

David E. Feller filed a brief for the National Academy of Arbitrators as *amicus curiae* urging affirmance.

Opinion

Justice WHITE delivered the opinion of the Court.

The issue presented in this case is whether a court asked to order arbitration of a grievance filed under a collective-bargaining agreement

must first determine that the parties intended to arbitrate the dispute, or whether that determination is properly left to the arbitrator.

I

AT & T Technologies, Inc. (AT & T or the Company), and the Communications Workers of America (the Union) are parties to a collective-bargaining agreement which covers telephone equipment installation workers. Article 8 of this agreement ***645** establishes that "differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder" must be referred to a mutually agreeable arbitrator upon the written demand of either party. This Article expressly does not cover disputes "excluded from arbitration by other provisions of this contract."[1] Article 9 provides that, "subject to the limitations contained in the provisions of this contract, but otherwise not subject to the provisions of the arbitration clause," AT & T is free to exercise certain management functions, including the hiring and placement of employees and the termination of employment.[2] "When lack of work necessitates Layoff," Article 20 prescribes the order in which employees are to be laid off.[3]

1 Article 8 provides, in pertinent part, as follows:
"If the National and the Company fail to settle by negotiation any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder, such differences shall (provided that such dispute is not excluded from arbitration by other provisions of this contract, and provided that the grievance procedures as to such dispute have been exhausted) be referred upon written demand of either party to an impartial arbitrator mutually agreeable to both parties." App. 21.

2 Article 9 states:
"The Union recognizes the right of the Company (subject to the limitations contained in the provisions of this contract, but otherwise not subject to the provisions of the arbitration clause) to exercise the functions of managing the business which involve, among other things, the hiring and placement of Employees, the termination of employment, the assignment of work, the determination of methods and equipment to be used, and the control of the conduct of work." *Id.,* at 22.

3 Article 20 provides, in pertinent part, that "[w]hen lack of work necessitates Layoff, Employees shall be Laid-Off in accordance with Term of Employment and by Layoff groups as set forth in the following [subparagraphs stating the order of layoff]." *Id.,* at 23. Article 1.11 defines the term "Layoff" to mean "a termination of employment arising out of a reduction in the force due to lack of work." *Id.,* at 20.

****1417** On September 17, 1981, the Union filed a grievance challenging AT & T's decision to lay off 79 installers from its Chicago base location. The Union claimed that, because there

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was no lack of work at the Chicago location, the ***646** planned layoffs would violate Article 20 of the agreement. Eight days later, however, AT & T laid off all 79 workers, and soon thereafter, the Company transferred approximately the same number of installers from base locations in Indiana and Wisconsin to the Chicago base. AT & T refused to submit the grievance to arbitration on the ground that under Article 9 the Company's decision to lay off workers when it determines that a lack of work exists in a facility is not arbitrable.

The Union then sought to compel arbitration by filing suit in federal court pursuant to § 301(a) of the Labor Management Relations Act, 29 U.S.C. § 185(a).[4] *Communications Workers of America v. Western Electric Co.,* No. 82 C 772 (ND Ill., Nov. 18, 1983). Ruling on cross-motions for summary judgment, the District Court reviewed the provisions of Articles 8, 9, and 20, and set forth the parties' arguments as follows:

4 Section 301(a), 61 Stat. 156, 29 U.S.C. § 185(a) states:

> "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, or between any such organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect of the amount in controversy or without regard to the citizenship of the parties."

> "Plaintiffs interpret Article 20 to require that there be an actual lack of work prior to employee layoffs and argue that there was no such lack of work in this case. Under plaintiffs' interpretation, Article 20 would allow the union to take to arbitration the threshold issue of whether the layoffs were justified by a lack of work. Defendant interprets Article 20 as merely providing a sequence for any layoffs which management, in its exclusive judgment, determines are necessary. Under defendant's interpretation, Article 20 would not allow for an arbitrator to decide whether the layoffs were warranted by a lack of work but only whether the company ***647** followed the proper order in laying off the employees." App. to Pet. for Cert. 10A.
>
> Finding that "the union's interpretation of Article 20 was at least 'arguable,' " the court held that it was "for the arbitrator, not the court to decide whether the union's interpretation has merit," and accordingly, ordered the Company to arbitrate. *Id.,* at 11A.

The Court of Appeals for the Seventh Circuit affirmed. *Communications Workers of America v. Western Electric Co.,* 751 F.2d 203 (1984). The Court of Appeals understood the District Court to have ordered arbitration of the threshold issue of arbitrability. *Id.,* at 205, n. 4. The court acknowledged the "general rule" that the issue of arbitrability is for the courts to decide unless the parties stipulate

otherwise, but noted that this Court's decisions in *Steelworkers v. Warrior & Gulf Navigation Co.,* 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960), and *Steelworkers v. American Mfg. Co.,* 363 U.S. 564, 80 S.Ct. 1343, 4 L.Ed.2d 1403 (1960), caution courts to avoid becoming entangled in the merits of a labor dispute under the guise of deciding arbitrability. From this observation, the court announced an "exception" to the general rule, under which "a court should compel arbitration of the arbitrability issue where the collective bargaining agreement contains a standard arbitration clause, the parties have not clearly excluded the arbitrability issue from arbitration, and deciding the issue would entangle the court in interpretation of substantive provisions of the collective bargaining agreement and thereby involve consideration of the merits of the dispute." 751 F.2d, at 206.

****1418** All of these factors were present in this case. Article 8 was a "standard arbitration clause," and there was "no clear, unambiguous exclusion from arbitration of terminations predicated by a lack of work determination." *Id.,* at 206–207. Moreover, although there were "colorable arguments" on both sides of the exclusion issue, if the court were to decide this question it would have to interpret not only Article 8, but Articles 9 and 20 as well, both of which are "substantive ***648** provisions of the Agreement." The court thus "decline[d] the invitation to decide arbitrability," and ordered AT & T "to arbitrate the arbitrability issue." *Id.,* at 207.

The court admitted that its exception was "difficult to reconcile with the Supreme Court's discussion of a court's duty to decide arbitrability in [*John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964)]." The court asserted, however, that the discussion was "dicta," and that this Court had reopened the issue in *Nolde Brothers, Inc. v. Bakery Workers,* 430 U.S. 243, 255, n. 8, 97 S.Ct. 1067, 1074, n. 8, 51 L.Ed.2d 300 (1977). 751 F.2d, at 206.

We granted certiorari, 474 U.S. 814, 106 S.Ct. 56, 88 L.Ed.2d 46 (1985), and now vacate the Seventh Circuit's decision and remand for a determination of whether the Company is required to arbitrate the Union's grievance.

II

The principles necessary to decide this case are not new. They were set out by this Court over 25 years ago in a series of cases known as the *Steelworkers Trilogy: Steelworkers v. American Mfg. Co., supra; Steelworkers v. Warrior & Gulf Navigation Co., supra;* and *Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960). These precepts have served the industrial relations community well, and have led to continued reliance on arbitration, rather than strikes or lockouts, as the preferred method of resolving disputes arising during the term of a collective-bargaining agreement. We see no reason either to question their continuing validity, or to eviscerate their meaning by creating an exception to their general applicability.

The first principle gleaned from the *Trilogy* is that "arbitration is a matter of contract and a

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party cannot be required to submit to arbitration any dispute which he has not agreed so to submit." *Warrior & Gulf, supra,* 363 U.S., at 582, 80 S.Ct., at 1353; *American Mfg. Co., supra,* 363 U.S., at 570–571, 80 S.Ct., at 1364–1365 (BRENNAN, J., concurring). This axiom recognizes the fact that arbitrators derive their authority to resolve disputes only because the parties have agreed in advance to submit such grievances to ***649** arbitration. *Gateway Coal Co. v. Mine Workers,* 414 U.S. 368, 374, 94 S.Ct. 629, 635, 38 L.Ed.2d 583 (1974).

The second rule, which follows inexorably from the first, is that the question of arbitrability—whether a collective-bargaining agreement creates a duty for the parties to arbitrate the particular grievance—is undeniably an issue for judicial determination. Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties agreed to arbitrate is to be decided by the court, not the arbitrator. *Warrior & Gulf, supra,* 363 U.S., at 582–583, 80 S.Ct., at 1352–1353. See *Operating Engineers v. Flair Builders, Inc.,* 406 U.S. 487, 491, 92 S.Ct. 1710, 1712, 32 L.Ed.2d 248 (1972); *Atkinson v. Sinclair Refining Co.,* 370 U.S. 238, 241, 82 S.Ct. 1318, 1320, 8 L.Ed.2d 462 (1962), overruled in part on other grounds, *Boys Markets, Inc. v. Retail Clerks,* 398 U.S. 235, 90 S.Ct. 1583, 26 L.Ed.2d 199 (1970). Accord, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.,* 473 U.S. 614, 626, 105 S.Ct. 3346, 3353–3354, 87 L.Ed.2d 444 (1985).

The Court expressly reaffirmed this principle in *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 84 S.Ct. 909, 11 L.Ed.2d 898 (1964). The "threshold question" there was whether the court or an arbitrator ****1419** should decide if arbitration provisions in a collective-bargaining contract survived a corporate merger so as to bind the surviving corporation. *Id.,* at 546, 84 S.Ct., at 912. The Court answered that there was "no doubt" that this question was for the courts. " 'Under our decisions, whether or not the company was bound to arbitrate, as well as what issues it must arbitrate, is a matter to be determined by the Court on the basis of the contract entered into by the parties.' ... The duty to arbitrate being of contractual origin, a compulsory submission to arbitration cannot precede judicial determination that the collective bargaining agreement does in fact create such a duty." *Id.,* at 546–547, 84 S.Ct., at 912–913 (citations omitted).

The third principle derived from our prior cases is that, in deciding whether the parties have agreed to submit a particular grievance to arbitration, a court is not to rule on the potential merits of the underlying claims. Whether "arguable" or not, indeed even if it appears to the court to be ***650** frivolous, the union's claim that the employer has violated the collective-bargaining agreement is to be decided, not by the court asked to order arbitration, but as the parties have agreed, by the arbitrator. "The courts, therefore, have no business weighing the merits of the grievance, considering whether there is equity in a particular claim, or determining whether there is particular language in the written instrument which will support the claim. The agreement is to submit all grievances to arbitration, not merely those which the court will deem meritorious." *American Mfg. Co.,* 363 U.S., at 568, 80 S.Ct., at 1346 (footnote omitted).

Finally, it has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Warrior & Gulf,* 363 U.S., at 582–583, 80 S.Ct., at 1352–1353. See also *Gateway Coal Co. v. Mine Workers, supra,* 414 U.S., at 377–378, 94 S.Ct., at 636–637. Such a presumption is particularly applicable where the clause is as broad as the one employed in this case, which provides for arbitration of "any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder...." In such cases, "[i]n the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *Warrior & Gulf, supra,* 363 U.S., at 584–585, 80 S.Ct., at 1353–1354.

This presumption of arbitrability for labor disputes recognizes the greater institutional competence of arbitrators in interpreting collective-bargaining agreements, "furthers the national labor policy of peaceful resolution of labor disputes and thus best accords with the parties' presumed objectives in pursuing collective bargaining." *Schneider Moving & Storage Co. v. Robbins,* 466 U.S. 364, 371–372, 104 S.Ct. 1844, 1849–1850, 80 L.Ed.2d 366 (1984) (citation ***651** omitted). See *Gateway Coal Co., supra,* 414 U.S., at 378–379, 94 S.Ct., at 637–638. The willingness of parties to enter into agreements that provide for arbitration of specified disputes would be "drastically reduced," however, if a labor arbitrator had the "power to determine his own jurisdiction ...." Cox, Reflections Upon Labor Arbitration, 72 Harv.L.Rev. 1482, 1509 (1959). Were this the applicable rule, an arbitrator would not be constrained to resolve only those disputes that the parties have agreed in advance to settle by arbitration, but, instead, would be empowered "to impose obligations outside the contract limited only by his understanding and conscience." *Ibid.* This result undercuts the longstanding federal policy of promoting industrial harmony through the use of collective-bargaining agreements, and is antithetical to the function of a collective- ****1420** bargaining agreement as setting out the rights and duties of the parties.

With these principles in mind, it is evident that the Seventh Circuit erred in ordering the parties to arbitrate the arbitrability question. It is the court's duty to interpret the agreement and to determine whether the parties intended to arbitrate grievances concerning layoffs predicated on a "lack of work" determination by the Company. If the court determines that the agreement so provides, then it is for the arbitrator to determine the relative merits of the parties' substantive interpretations of the agreement. It was for the court, not the arbitrator, to decide in the first instance whether the dispute was to be resolved through arbitration.

The Union does not contest the application of these principles to the present case. Instead, it urges the Court to examine the specific provisions of the agreement for itself and to affirm the Court of Appeals on the ground

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that the parties had agreed to arbitrate the dispute over the layoffs at issue here. But it is usually not our function in the first instance to construe collective-bargaining contracts and arbitration clauses, or to consider any other evidence that might unmistakably demonstrate that a particular grievance was not to ***652** be subject to arbitration. The issue in the case is whether, because of express exclusion or other forceful evidence, the dispute over the interpretation of Article 20 of the contract, the layoff provision, is not subject to the arbitration clause. That issue should have been decided by the District Court and reviewed by the Court of Appeals; it should not have been referred to the arbitrator.

The judgment of the Court of Appeals is vacated, and the case is remanded for proceedings in conformity with this opinion.

It is so ordered.

Justice BRENNAN, with whom THE CHIEF JUSTICE and Justice MARSHALL join, concurring.

I join the Court's opinion and write separately only to supplement what has been said in order to avoid any misunderstanding on remand and in future cases.

The Seventh Circuit's erroneous conclusion that the arbitrator should decide whether this dispute is arbitrable resulted from that court's confusion respecting the "arbitrability" determination that we have held must be judicially made. Despite recognizing that Article 8 of the collective-bargaining agreement "is a standard arbitration clause, providing for arbitration of 'any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder,' " and that "there is no clear, unambiguous exclusion [of this dispute] from arbitration," the Court of Appeals thought that "there [were] colorable arguments both for and against exclusion." *Communications Workers of America v. Western Electric Co.,* 751 F.2d 203, 206–207 (1984). The "colorable arguments" referred to by the Court of Appeals were the parties' claims concerning the meaning of Articles 9 and 20 of the collective-bargaining agreement: the Court of Appeals thought that if the Union's interpretation of Article 20 was correct and management ***653** could not order layoffs for reasons other than lack of work, the dispute was arbitrable; but if AT & T's interpretation of Article 20 was correct and management was free to order layoffs for other reasons, the dispute was not arbitrable under Article 9. *Id.,* at 207. Because these were the very issues that would be presented to the arbitrator if the dispute was held to be arbitrable, the court reasoned that "determining arbitrability would enmesh a court in the merits of th[e] dispute," *ibid.,* and concluded that the arbitrability issue should be submitted to the arbitrator.

The Court of Appeals was mistaken insofar as it thought that determining arbitrability required resolution of the parties' dispute with respect to the meaning of Articles 9 and 20 of the collective-bargaining agreement. This is clear from our opinion in *Steelworkers v. Warrior & Gulf* ****1421** *Navigation Co.,* 363 U.S. 574, 80 S.Ct. 1347, 4 L.Ed.2d 1409 (1960). In *Warrior & Gulf,* the Union challenged management's contracting out of labor that had previously been performed by Company employees. The

parties failed to resolve the dispute through grievance procedures, and the Union requested arbitration; the Company refused, and the Union sued to compel arbitration under § 301 of the Labor Management Relations Act, 29 U.S.C. § 185. The collective-bargaining agreement contained a standard arbitration clause similar to Article 8 of the AT & T/CWA contract, *i.e.,* providing for arbitration of all differences with respect to the meaning or application of the contract. We held that, in light of the congressional policy making arbitration the favored method of dispute resolution, such a provision requires arbitration "unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage." *Warrior & Gulf, supra,* at 582–583, 80 S.Ct., at 1352–1353 (footnote omitted).

The Company in *Warrior & Gulf* relied for its argument that the dispute was not arbitrable on a "Management Functions" clause which, like Article 9 of the AT & T/CWA agreement, ***654** excluded "matters which are strictly a function of management," 363 U.S., at 576, 80 S.Ct., at 1349, from the arbitration provision. We recognized that such a clause "might be thought to refer to any practice of management in which, under particular circumstances prescribed by the agreement, it is permitted to indulge." *Id.,* at 584, 80 S.Ct., at 1353. However, we also recognized that to read the clause this way would make arbitrability in every case depend upon whether management could take the action challenged by the Union; the arbitrability of every dispute would turn upon a resolution of the merits, and "the arbitration clause would be swallowed up by the exception." *Ibid.* Therefore, we held that, where a collective-bargaining agreement contains a standard arbitration clause and the "exception" found in the Management Functions clause is general, "judicial inquiry ... should be limited to the search for an explicit provision which brings the grievance under the cover of the [Management Functions] clause...." *Steelworkers v. American Mfg. Co.,* 363 U.S. 564, 572, 80 S.Ct. 1343, 1365, 4 L.Ed.2d 1403 (1960) (BRENNAN, J., concurring); *Warrior & Gulf, supra,* 363 U.S., at 584, 80 S.Ct., at 1353. "In the absence of any express provision excluding a particular grievance from arbitration, ... only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail...." 363 U.S., at 584–585, 80 S.Ct., at 1353–1354.

The Seventh Circuit misunderstood these rules of contract construction and did precisely what we disapproved of in *Warrior & Gulf* —it read Article 9, a general Management Functions clause, to make arbitrability depend upon the merits of the parties' dispute. As *Warrior & Gulf* makes clear, the judicial inquiry required to determine arbitrability is much simpler. The parties' dispute concerns whether Article 20 of the collective-bargaining agreement limits management's authority to order layoffs for reasons other than lack of work. The question for the court is "strictly confined," *id.,* at 582, 80 S.Ct., at 1353, to whether the parties agreed to submit disputes over the meaning of Article 20 to arbitration. Because the collective-bargaining agreement contains a standard arbitration ***655** clause, the answer must be affirmative unless the contract contains explicit language stating that disputes respecting Article 20 are not subject

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to arbitration, or unless the party opposing arbitration—here AT & T—adduces “the most forceful evidence” to this effect from the bargaining history. Under *Warrior & Gulf,* determining arbitrability does not require the court even to consider which party is correct with respect to the meaning of Article 20.

The Court remands this case so that the court below may apply the proper standard to determine arbitrability. The Court ****1422** states that “it is usually not our function in the first instance to construe collective-bargaining contracts and arbitration clauses, or to consider any other evidence that might unmistakably demonstrate that a particular grievance was not to be subject to arbitration.” *Ante,* at 1420. Of course, we have on numerous occasions construed collective-bargaining agreements “in the first instance”; we did so, for example, in the three cases comprising the *Steelworkers Trilogy.* See also *John Wiley & Sons, Inc. v. Livingston,* 376 U.S. 543, 552–555, 84 S.Ct. 909, 916–917, 11 L.Ed.2d 898 (1964); *Packinghouse Workers v. Needham Packing Co.,* 376 U.S. 247, 249–253, 84 S.Ct. 773, 774–777, 11 L.Ed.2d 680 (1964). Nonetheless, I agree with the Court that we should interpret a collective-bargaining agreement only where there is some special reason to do so. Thus, it is appropriate for this Court to construe a collective-bargaining agreement where—as in the *Steelworkers Trilogy* —our decision announces a new principle of law, since applying this principle may help to clarify our meaning. There is no such need, however, where—as here—we simply reaffirm established principles. Moreover, since the determination left for the Court of Appeals on remand is straightforward and will require little time or effort, concerns for efficient judicial administration do not require us to interpret the agreement. Finally, because the parties have submitted to us only fragmentary pieces of the bargaining history, we are not in a position properly to evaluate whether there is “the most forceful evidence” that the parties ***656** did not intend for this dispute to be arbitrable. Therefore, I join the Court's opinion and concur in the Court's judgment remanding to the Court of Appeals.

All Citations

475 U.S. 643, 106 S.Ct. 1415, 89 L.Ed.2d 648, 121 L.R.R.M. (BNA) 3329, 54 USLW 4339, 104 Lab.Cas. P 11,758

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113 Or.App. 566
Court of Appeals of Oregon.

Jill C. BEALS, David L. Brinduse, Tamra L. Brinduse, Granville Brittsan, Sherry Brittsan, Nancy Bunch, A. Don Crawley, Connie L. Crawley, John E. Del Nero, Lynda C. Del Nero, Frederick A. Dockey, Teresa F. Dockey, Joan E. Hixson, Robert F. Hixson, Kathleen Kastern, April E. Luke, D. Michael Luke, Bonnie J. Mills, James J. Mills, Janice N. Provost, Roger J. Provost, Judy A. Reece, Larry E. Reece, J. David Rhoads, Marilyn A. Rhoads, Penny J. Schultz, Philip G. Schultz, Linda L. Sharber and Robert Sharber, Appellants,
v.
BREEDEN BROS., INC., an Oregon corporation; Breeden Bros. Realty Co., an Oregon corporation; and the City of Eugene, Oregon, Respondents.

16–89–05258; CA A67695 (Control); CA A69865.
|
Argued and Submitted May 11, 1992.
|
Decided June 24, 1992.
|
Reconsideration Denied Sept. 30, 1992.

Synopsis

Homeowners brought action against developer, alleging, inter alia, negligent construction. The Circuit Court, Lane County, Maurice K. Merten, J., dismissed complaints, and appeal was taken. The Court of Appeals, Edmonds, J., held that equitable estoppel was not available to avoid statutes of repose applicable to negligence actions against home builder.

Affirmed.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

****348 *567** Michael L. Williams, Portland, argued the cause for appellants. With him on the briefs was Williams & Troutwine, P.C., Portland.

Douglas G. Schaller, Eugene, argued the cause for respondents Breeden Bros., Inc. and Breeden Bros. Realty Co. With him on the brief were Don Edward Corson, Eugene, and Johnson, Clifton, Larson & Bolin, P.C., Eugene.

John B. Arnold, Eugene, argued the cause for respondent The City of Eugene. With him on the brief was Harrang, Long, Watkinson & Arnold, Eugene.

Before WARREN, P.J., and RIGGS and EDMONDS, JJ.

Opinion

***569** EDMONDS, Judge.

Plaintiffs appeal two judgments that are consolidated in this appeal.[1] The trial ****349** court ruled that plaintiffs' complaints failed to state claims for relief and that the actions had not been commenced timely. ORCP 21 A(8); ORCP 21 A(9). We affirm.

1 The judgments arise from the court's dismissal of most of the allegations in

> plaintiffs' second and fourth amended complaints. An ORCP 67 B judgment was entered. Thereafter, Brinduse, Rhoads and Sharber filed, and the court dismissed most of their fourth amended complaint. Another ORCP 67 B judgment was entered. Plaintiffs' other claims were either dismissed with prejudice or severed for arbitration and are not the subject of the appeal.

In June, 1989, plaintiffs filed this action, alleging claims for negligence, breach of contract, fraud and violation of the Oregon Unlawful Trade Practices Act (UTPA), ORS 646.605 to ORS 646.656, relating to structural damage to their homes allegedly caused by deposits of expansive clay located beneath the surface of the land. Plaintiffs are current or past homeowners in a Eugene residential development. Breeden Bros., Inc. (Breeden Bros.) is the developer of the property, and defendant Breeden Bros. Realty Company, Inc. (Breeden Realty) sells homes and homesites in the development. Except for Rhoads and Sharber, plaintiffs' homes were built between 1972 and 1977 by Breeden Bros. Rhoads and Sharber's homes were built in 1986.

The gravamen of plaintiffs' negligence claim is that Breeden Bros. was negligent in building their homes without proper engineering surveys, excavation and building techniques that would have prevented the structural damage. Their fraud claims allege that defendants Breeden made certain misrepresentations to several of the plaintiffs in response to their complaints about the structural damage. The breach of contract claim is based on a 1974 contract between the City of Eugene (City) and Breeden Bros. in which the latter agreed that the homes it built on the development would comply with City's building code. Last, plaintiffs allege that defendants Breeden violated the provisions of the UTPA that prohibit the misrepresentation of the quality or standard of real estate and the failure to disclose material defects or nonconformities. The court granted defendants' motions to dismiss all of the claims, either in whole or in part.

***570** Plaintiffs make nine interrelated assignments of error. Not all of them are preserved, and not all of them merit discussion. In reviewing defendants' ORCP 21 motions, we assume the truth of all well-pleaded allegations, as well as any facts that might conceivably be adduced as proof of them. *Brennen v. City of Eugene,* 285 Or. 401, 405, 591 P.2d 719 (1979).

A threshold issue regarding plaintiffs' fraud, negligence and contract claims is whether they are barred by ORS 12.115(1) or ORS 12.135(1). ORS 12.115 provides:

> "(1) In no event shall any action for negligent injury to person or property of another be commenced more than 10 years from the date of the act or omission complained of.
>
> "(2) Nothing in this section shall be construed to extend any period of limitation otherwise established by law, including but not limited to the limitations established by ORS 12.110."

ORS 12.135(1) provides:

> "An action against a person, whether in contract, tort or

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otherwise, arising from such person having performed the construction, alteration or repair of any improvement to real property or the supervision or inspection thereof, or from such person having furnished the design, planning, surveying, architectural or engineering services for such improvement, shall be commenced within the applicable period of limitation otherwise established by law; but in any event such action shall be commenced within 10 years from substantial completion or abandonment of such construction, alteration or repair of the improvement to real property."

Plaintiffs assert that defendants Breeden are equitably estopped from asserting those statutes, because they misrepresented the cause of the structural damage.[2] Defendants argue that equitable estoppel is **350 not applicable to assertions of statutes of repose. Although the courts of this state have recognized that a party may be estopped from asserting a Statute of Limitations as a defense, *see, e.g., Charette v. Eisenbraun,* 274 Or. 491, 547 P.2d 612 (1976); *Donohoe v.* ***571** *Mid–Valley Glass Co.,* 84 Or.App. 584, 735 P.2d 11, *rev. den.* 303 Or. 534, 738 P.2d 977 (1987), they have not yet decided whether equitable estoppel may apply to statutes of repose.

2 Plaintiffs also assert that City is estopped to assert ORS 12.115(1) and ORS 12.135(1). However, at oral argument, they conceded that they had failed to plead a basis for their estoppel argument adequately against City. Accordingly, we will not consider those arguments.

ORS 12.115(1) provides that *in no event* shall an action for negligent injury to person or property be commenced more than 10 years from the date of the alleged act or omission.

> "In drafting ORS 12.115(1), the legislature considered the problem of long-delayed tort litigation brought about by delayed discovery and endeavored to prescribe *an ultimate cutoff date* beyond which a specific act or omission is not longer actionable. *Joseph v. Burns,* [260 Or. 493, 491 P.2d 203 (1971)]. The cutoff was intended to occur 'regardless of when the damage resulted or when the act or omission was discovered.' 260 Or. at 500." *Withers v. Milbank,* 67 Or.App. 475, 477, 678 P.2d 770 (1984). (Emphasis supplied.)

Similarly, ORS 12.135(1) provides that, *in any event,* an action against a person arising from such person's having performed the construction, alteration or repair of any improvement to real property *must be* commenced within 10 years after the substantial completion or abandonment of the construction, alteration or repair of the improvement to the property.

Generally, two rationales underlie statutes of repose:

> "The first concerns the lack of reliability and availability of evidence after a lapse of long periods of time. This rationale primarily protects defendants who, without prior notice of pending claims, would necessarily find it extremely difficult, if not impossible, to mount a defense because of the nonpreservation of evidence and the disappearance or death of witnesses after a long lapse of time. However, the reliability of [a] plaintiff's evidence relating to long-past occurrences, transactions or conditions is also a relevant feature.
>
> "The second rationale concerns the public policy of allowing people, after the lapse of a reasonable time, to plan their affairs with a degree of certainty, free from the disruptive burden of protracted and unknown liability; *e.g., Pearson v. Northeast Airlines, Inc.,* 309 F.2d 553, 559 (2d Cir.1962) (*dictum*), *cert. denied* 372 U.S. 912, 83 S.Ct. 726, 9 L.Ed.2d 720 (1963)." *Johnson v. Star Machinery Co.,* 270 Or. 694, 700, 530 P.2d 53 (1974).

***572** We hold that equitable estoppel is not available to avoid ORS 12.115(1) and ORS 12.135(1), because to hold otherwise would thwart the legislature's intent to provide an absolute cutoff date for the bringing of such actions. The trial court did not err in rejecting plaintiffs' arguments.

Next, plaintiffs assert that the trial court erred in granting defendants' motions to dismiss some of the negligence allegations, including the claims of Rhoads and Sharber, on the ground that they are barred by ORS 12.110(1) and ORS 30.275(8). They argue that the two-year limitation periods under those statutes began to run only after discovery of the negligence and that they have alleged sufficient facts to show that they reasonably did not discover the negligence until 1988. Plaintiffs also assert that the trial court erred in dismissing their UTPA claim.

To avoid the bar of a limitation, plaintiffs "must plead *facts* sufficient to show that the delay is excused." *Eldridge v. Eastmoreland General Hospital,* 88 Or.App. 547, 550, 746 P.2d 735 (1987), *aff'd* 307 Or. 500, 769 P.2d 775 (1989). (Emphasis supplied.) Also, to assert a statutory cause of action, they must allege *facts* that bring the case within the statute. *See State Forester v. Obrist,* 237 Or. 63, 67, 390 P.2d 333 (1964). Legal conclusions or mere recitations of statutory language are not facts. *See Smith v. Abel,* 211 Or. 571, 577, 316 P.2d 793 (1957). Because neither the negligence nor the UTPA claim is supported by the requisite allegations of fact, ****351** the trial court did not err in dismissing those claims. [3]

3 The court's dismissal was also predicated on ORS 12.135(1) and ORS 646.638(5), the one-year UTPA limitation. In the light of our disposition, we need not address those arguments.

Finally, plaintiffs assert that the trial court erred in granting City's motion to dismiss the breach of contract claim for failure to state facts sufficient to constitute a claim. ORCP 21 A(8). The contract, which was between Breeden Bros. and City, and which was incorporated by reference into the complaint, provides, in part:

> "CITY is willing to grant approval of said [development] work on condition

that the [Breeden Bros.] undertake certain improvements and provide assurance of maintenance thereof, and satisfy certain requirements.

***573** "NOW, THEREFORE, FOR AND IN CONSIDERATION OF mutual covenants and agreements herein contained as a conditional agreement precedent to the granting of approval of these phases of a [development] up to 190 dwelling units in an RA–PD zoning district by the CITY, the [Breeden Bros.] hereby agrees as follows:

" * * * * *

"c. *Scope of Work:* * * *

"Chapter 70, 'Excavation and Grading of the 1973 edition of the *Uniform Building Code* shall apply to all earthwork and grading.'

"3. It is understood and mutually agreed by the parties hereto that failure or refusal of [Breeden Bros.] to:

"(1) Conform [its] completed work upon the development to the terms of this Agreement or applicable city law * * *

" * * * * *

"may result in the refusal by CITY to grant further building permits for the development." (Emphasis in original.)

Plaintiffs argue that they were intended to be third party beneficiaries under the contract and that, under the contract, City was obligated to enforce the provisions of the building code. However, the contract does not require City to take enforcement measures in the event that Breeden Bros. violates the building code. Therefore, the claim does not allege breach of contract. The court did not err in dismissing plaintiffs' breach of contract claim against City.

Affirmed.

All Citations

113 Or.App. 566, 833 P.2d 348

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38 S.Ct. 242
Supreme Court of the United States

BOARD OF TRADE OF
CITY OF CHICAGO et al.
v.
UNITED STATES.

No. 98.
|
Argued Dec. 18 and 19, 1917.
|
Decided March 4, 1918.

Synopsis

Appeal from the District Court of the United States for the Northern District of Illinois.

Suit by the United States against the Board of Trade of the City of Chicago and others. From a decree in favor of the government, defendants appeal. Reversed, with directions.

Attorneys and Law Firms

****243 *232** Mr. Henry S. Robbins, of Chicago, Ill., for appellants.

Mr. G. Carroll Todd, Asst. Atty. Gen., for the United States.

Opinion

***235** Mr. Justice BRANDEIS delivered the opinion of the Court.

Chicago is the leading grain market in the world. Its Board of Trade is the commercial center through which most of the trading in grain is done. The character of the organization is described in Board of Trade v. Christie Grain & Stock Co., 198 U. S. 236, 25 Sup. Ct. 637, 49 L. Ed. 1031. Its 1600 members include brokers, commission merchants, dealers, millers, ***236** maltsters, manufacturers of corn products and proprietors of elevators. Grains there dealt in are graded according to kind and quality and are sold usually 'Chicago weight, inspection and delivery.' The standard forms of trading are: (a) Spot sales; that is, sales of grain already in Chicago in railroad cars or elevators for immediate delivery by order on carrier or transfer of warehouse receipt. (b) Future sales; that is, agreements for delivery later in the current or in some future month. (c) Sales 'to arrive'; that is, agreements to deliver on arrival grain which is already in transit to Chicago or is to be shipped there within a time specified. On every business day sessions of the Board are held at which all bids and sales are publicly made. Spot sales and future sales are made at the regular sessions of the Board from 9:30 a. m. to 1:15 p. m., except on Saturdays, when the session closes at 12 m. Special sessions, termed the 'call,' are held immediately after the close of the regular session, at which sales 'to arrive' are made. These sessions are not limited as to duration, but last usually about half an hour. At all these sessions transactions are between members only; but they may trade either for themselves or on behalf of others. Members may also trade privately with one another at any place, either during the sessions or after, and they may trade with nonmembers at any time except on the premises occupied by the Board. [1]

Purchases of grain 'to arrive' are made largely from country dealers and farmers throughout the whole territory tributary to

Chicago, which includes besides Illinois and Iowa, Indiana, Ohio, Wisconsin, Minnesota, Missouri, Kansas, Nebraska, and even South and North Dakota. The purchases are sometimes the result of bids to individual country dealers made by telegraph or telephone either during the sessions or after; but most purchases ***237** are made by the sending out from Chicago by the afternoon mails to hundreds of country dealers, offers to buy at the prices named, any number of carloads, subject to acceptance before 9:30 a. m. on the next business day.

In 1906 the Board adopted what is known as the 'call' rule. By it members were prohibited from purchasing or offering to purchase, during the period between the close of the call and the opening of the session on the next business day, any wheat, corn, oats or rye 'to arrive' at a price other than the closing bid at the call. The call was over, with rare exceptions, by 2 o'clock. The change effected was this: Before the adoption of the rule, members fixed their bids throughout the day at such prices as they respectively saw fit; after the adoption of the rule, the bids had to be fixed at the day's closing bid on the call until the opening of the next session.

In 1913 the United States filed in the District Court for the Northern District of Illinois, this suit against the Board and its executive officers and directors, to enjoin the enforcement of the call rule, alleging it to be in violation of the Anti-Trust Law of July 2, 1890, c. 647, 26 Stat. 209. The defendants admitted the adoption and enforcement of the call rule, and averred that its purpose was not to prevent competition or to control prices, but to promote the convenience of members by restricting their hours of business and to break up a monopoly in that branch of the grain trade acquired by four or five warehousemen in Chicago. On motion of the government the allegations concerning the purpose of establishing the regulation were stricken from the record. The case was then heard upon evidence; and a decree was entered which declared that defendants became parties to a combination or conspiracy to restrain interstate and foreign trade and commerce 'by adopting, acting upon and enforcing' the 'call' rule; and enjoined them from* acting ***238** upon the same or from adopting or acting upon any similar rule.

No opinion was delivered by the District Judge. The government proved the existence ****244** of the rule and described its application and the change in business practice involved. It made no attempt to show that the rule was designed to or that it had the effect of limiting the amount of grain shipped to Chicago; or of retarding or accelerating shipment; or if raising or depressing prices; or of discriminating against any part of the public; or that it resulted in hardship to any one. The case was rested upon the bald proposition, that a rule or agreement by which men occupying positions of strength in any branch of trade, fixed prices at which they would buy or sell during an important part of the business day, is an illegal restraint of trade under the Anti-Trust Law. But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or

even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences. The District Court erred, therefore, in striking from the answer ***239** allegations concerning the history and purpose of the call rule and in later excluding evidence on that subject. But the evidence admitted makes it clear that the rule was a reasonable regulation of business consistent with the provisions of the Anti-Trust Law.

First. The nature of the rule: The restriction was upon the period of price-making. It required members to desist from further price-making after the close of the call until 9:30 a. m. the next business day; but there was no restriction upon the sending out of bids after close of the call. Thus it required members who desired to buy grain ‘to arrive’ to make up their minds before the close of the call how much they were willing to pay during the interval before the next session of the Board. The rule made it to their interest to attend the call; and if they did not fill their wants by purchases there, to make the final bid high enough to enable them to purchase from country dealers.

Second. The scope of the rule: It is restricted in operation to grain ‘to arrive.’ It applies only to a small part of the grain shipped from day to day to Chicago, and to an even smaller part of the day's sales; members were left free to purchase grain already in Chicago from any one at any price throughout the day. It applies only during a small part of the business day; members were left free to purchase during the sessions of the Board grain ‘to arrive,’ at any price, from members anywhere and from nonmembers anywhere except on the premises of the Board. It applied only to grain shipped to Chicago; members were left free to purchase at any price throughout the day from either members or non-members, grain ‘to arrive’ at any other market. Country dealers and farmers had available in practically every part of the territory called tributary to Chicago some other market for grain ‘to arrive.’ Thus Missouri, Kansas, Nebraska ***240** and parts of Illinois are also tributary to St. Louis; Nebraska and Iowa, to Omaha; Minnesota, Iowa, South and North Dakota, to Minneapolis or Duluth; Wisconsin and parts of Iowa and of Illinois, to Milwaukee; Ohio, Indiana and parts of Illinois, to Cincinnati; Indiana and parts of Illinois, to Louisville.

Third. The effects of the rule: As it applies to only a small part of the grain shipped to Chicago and to that only during a part of the business day and does not apply at all to grain shipped to other markets, the rule had no appreciable effect on general market prices; nor did it materially affect the total volume of grain coming to Chicago. But within the narrow limits of its operation the rule helped to improve market conditions thus:

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(a) It created a public market for grain 'to arrive.' Before its adoption, bids were made privately. Men had to buy and sell without adequate knowledge of actual market conditions. This was disadvantageous to all concerned, but particularly so to country dealers and farmers.

(b) It brought into the regular market hours of the Board sessions, more of the trading in grain 'to arrive.'

(c) It brought buyers and sellers into more direct relations; because on the call they gathered together for a free and open interchange of bids and offers.

(d) It distributed the business in grain 'to arrive' among a far larger number of Chicago receivers and commission merchants than had been the case there before.

(e) It increased the number of country dealers engaging in this branch of the business; supplied them more regularly with bids from Chicago; and also increased the number of bids received by them from competing markets.

(f) It eliminated risks necessarily incident to a private market, and thus enabled country dealers to do business on a smaller margin. In that way the rule made it possible for them to pay more to farmers without raising the price to consumers.

****245 *241** (g) It enabled country dealers to sell some grain to arrive which they would otherwise have been obliged either to ship to Chicago commission merchants or to sell for 'future delivery.'

(h) It enabled those grain merchants of Chicago who sell to millers and exporters, to trade on a smaller margin and by paying more for grain or selling it for less, to make the Chicago market more attractive for both shippers and buyers of grain.

(i) Incidentally it facilitated trading 'to arrive' by enabling those engaged in these transactions to fulfill their contracts by tendering grain arriving at Chicago on any railroad, whereas formerly shipments had to be made over the particular railroad designated by the buyer.

The restraint imposed by the rule is less severe than that sustained in Anderson v. United States, 171 U. S. 604, 19 Sup. Ct. 50, 43 L. Ed. 300. Every Board of Trade and nearly every trade organization imposes some restrainst upon the conduct of business by its members. Those relating to the hours in which business may be done are common; and they make a special appeal where, as here, they tend to shorten the working day or, at least, limit the period of most exacting activity. The decree of the District Court is reversed with directions to dismiss the bill.

Reversed.

Mr. Justice McREYNOLDS took no part in the consideration or decision of this case.

1 There is an exception as to future sales not here material.

All Citations

246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683, Am.Ann.Cas. 1918D,1207

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99 S.Ct. 1551
Supreme Court of the United States

BROADCAST MUSIC, INC., et al., Petitioners,
v.
COLUMBIA BROADCASTING SYSTEM, INC., et al.
AMERICAN SOCIETY OF COMPOSERS, AUTHORS AND PUBLISHERS, et al., Petitioners,
v.
COLUMBIA BROADCASTING SYSTEM, INC., et al.

Nos. 77–1578, 77–1583.
|
Argued Jan. 15, 1979.
|
Decided April 17, 1979.

Synopsis

Television network brought antitrust suit against licensing agencies for composers, writers and publishers and their members and affiliates, alleging that the system by which the agencies received fees for the issuance of blanket licenses to perform copyrighted musical compositions amounted to illegal price fixing. The United States District Court for the Southern District of New York, 400 F.Supp. 737, dismissed the complaint, and appeal was taken. The Court of Appeals, 562 F.2d 130, reversed and remanded for consideration of the appropriate remedy, holding that the blanket license arrangement was a form of price fixing that was per se illegal under the Sherman Act. Certiorari was granted, and the United States Supreme Court, Mr. Justice White, held that although the blanket license fee was set by the licensing agencies rather than by competition among individual copyright owners and although it was a fee for the use of any compositions covered by the license, where the blanket license arrangement accompanied the integration of sales, monitoring and enforcement against unauthorized copyright use, which would present difficult and expensive problems if left to individual users and copyright owners, and where it appeared that the blanket license had provided an acceptable mechanism for at least a large part of the market for the performing rights to copyrighted musical compositions, the issuance of such blanket licenses did not constitute price fixing that was per se unlawful under the antitrust laws.

Judgment of the Court of Appeals reversed and remanded.

Mr. Justice Stevens concurred in part and dissented in part and filed opinion.

Opinions on remand, 607 F.2d 543 and 620 F.2d 930.

****1553 *1** *Syllabus* [*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Respondent Columbia Broadcasting System, Inc. (CBS), brought this action against

petitioners, American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), and their members and affiliates, alleging, *inter alia,* that the issuance by ASCAP and BMI to CBS of blanket licenses to copyrighted musical compositions at fees negotiated by them is illegal price fixing under the antitrust laws. Blanket licenses give the licensees the right to perform any and all of the compositions owned by the members or affiliates as often as the licensees desire for a stated term. Fees for blanket licenses are ordinarily a percentage of total revenues or a flat dollar amount, and do not directly depend on the amount or type of music used. After a trial limited to the issue of liability, the District Court dismissed the complaint, holding, *inter alia,* that the blanket license was not price fixing and a *per se* violation of the Sherman Act. The Court of Appeals reversed and remanded for consideration of the appropriate remedy, holding that the blanket license issued to television networks was a form of price fixing illegal *per se* under the Sherman Act and established copyright misuse. ***2** *Held:* The issuance by ASCAP and BMI of blanket licenses does not constitute price fixing *per se* unlawful under the antitrust laws. Pp. 1556–1565.

(a) "It is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act." *United States v. Topco Associates, Inc.,* 405 U.S. 596, 607–608, 92 S.Ct. 1126, 1133–1134, 31 L.Ed.2d 515. And though there has been rather intensive antitrust scrutiny of ASCAP and BMI and their blanket licenses, that experience hardly counsels that this Court should outlaw the blanket license as a *per se* restraint of trade. Furthermore, the United States, by its *amicus* brief in the present case, urges that the blanket licenses, which consent decrees in earlier actions by the Government authorize ASCAP and BMI to issue to television networks, are not *per se* violations of the Sherman Act. And Congress, in the Copyright Act of 1976, has itself chosen to employ the blanket license and similar practices. Thus, there is no nearly universal view that the blanket licenses are a form of price fixing subject to automatic condemnation under the Sherman Act, rather than to a careful assessment under the rule of reason generally applied in Sherman Act cases. Pp. 1556–1560.

(b) In characterizing the conduct of issuing blanket licenses under the *per se* rule, this Court's inquiry must focus on whether the effect and, here because it tends to show effect, the purpose of the practice are to threaten the proper operation of a predominantly free-market economy. The blanket license is not a "naked restrain[t] of trade with no purpose except stifling of competition," *White Motor Co. v. United States,* 372 U.S. 253, 263, 83 S.Ct. 696, 702, 9 L.Ed.2d 738, but rather accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright ****1554** use, which would be difficult and expensive problems if left to individual users and copyright owners. Although the blanket license fee is set by ASCAP and BMI rather than by competition among individual copyright owners, and although it is a fee for the use of any of the compositions covered by the license, the license cannot be wholly equated with a simple horizontal arrangement

among competitors and is quite different from anything any individual owner could issue. In light of the background, which plainly indicates that over the years, and in the face of available alternatives including direct negotiation with individual copyright owners, the blanket license has provided an acceptable mechanism for at least a large part of the market for the performing rights to copyrighted musical compositions, it cannot automatically be declared illegal in all of its many manifestations. Rather, it should be subjected to a more discriminating examination under the rule of reason. Pp. 1560–1565.

***3** (c) The Court of Appeals' judgment holding that the licensing practices of ASCAP and BMI are *per se* violations of the Sherman Act, and the copyright misuse judgment dependent thereon, are reversed, and the case is remanded for further proceedings to consider any unresolved issues that CBS may have properly brought to the Court of Appeals, including an assessment under the rule of reason of the blanket license as employed in the television industry. P. 1565.

2 Cir., 562 F.2d 130, reversed and remanded.

Attorneys and Law Firms

Jay H. Topkis, New York City, for petitioners in No. 77–1583.

Amalya L. Kearse, New York City, for petitioners in No. 77–1578.

Frank H. Easterbrook, Washington, D. C., for the United States, as *amicus curiae,* by special leave of Court.

Alan J. Hruska, New York City, for respondents in both cases.

Opinion

***4** Mr. Justice WHITE delivered the opinion of the Court.

This case involves an action under the antitrust and copyright laws brought by respondent Columbia Broadcasting System, Inc. (CBS), against petitioners, American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI), and their members and affiliates.[1] The basic question presented is whether the issuance by ASCAP and BMI to CBS of blanket licenses to copyrighted musical compositions at fees negotiated by them is price fixing *per se* unlawful under the antitrust laws.

1 The District Court certified the case as a defendant class action. 400 F.Supp. 737, 741 n. 2 (S.D.N.Y.1975).

I

CBS operates one of three national commercial television networks, supplying programs to approximately 200 affiliated stations and telecasting approximately 7,500 network programs per year. Many, but not all, of these programs make use of copyrighted music recorded on the soundtrack. CBS also owns television and radio stations in various cities. It is " 'the giant of the world in the use of music rights,' " the " 'No. 1 outlet in the history of entertainment.' "[2]

2 *Id.*, at 771, quoting a CBS witness. CBS is also a leading music publisher, with publishing subsidiaries affiliated with both ASCAP and BMI, and is the world's largest manufacturer and seller of records and tapes. *Ibid.*

Since 1897, the copyright laws have vested in the owner of a copyrighted musical composition the exclusive right to perform the work publicly for profit,[3] but the legal right is not self-enforcing. In 1914, Victor Herbert and a handful of other composers organized ASCAP because those who per formed ***5** copyrighted music for profit were so numerous and widespread, and ****1555** most performances so fleeting, that as a practical matter it was impossible for the many individual copyright owners to negotiate with and license the users and to detect unauthorized uses. "ASCAP was organized as a 'clearing-house' for copyright owners and users to solve these problems" associated with the licensing of music. 400 F.Supp. 737, 741 (S.D.N.Y.1975). As ASCAP operates today, its 22,000 members grant it nonexclusive rights to license nondramatic performances of their works, and ASCAP issues licenses and distributes royalties to copyright owners in accordance with a schedule reflecting the nature and amount of the use of their music and other factors.

3 Act of Jan. 6, 1897, 29 Stat. 481.

BMI, a nonprofit corporation owned by members of the broadcasting industry,[4] was organized in 1939, is affiliated with or represents some 10,000 publishing companies and 20,000 authors and composers, and operates in much the same manner as ASCAP. Almost every domestic copyrighted composition is in the repertory either of ASCAP, with a total of three million compositions, or of BMI, with one million.

4 CBS was a leader of the broadcasters who formed BMI, but it disposed of all of its interest in the corporation in 1959. 400 F.Supp., at 742.

Both organizations operate primarily through blanket licenses, which give the licensees the right to perform any and all of the compositions owned by the members or affiliates as often as the licensees desire for a stated term. Fees for blanket licenses are ordinarily a percentage of total revenues or a flat dollar amount, and do not directly depend on the amount or type of music used. Radio and television broadcasters are the largest users of music, and almost all of them hold blanket licenses from both ASCAP and BMI. Until this litigation, CBS held blanket licenses from both organizations for its television network on a continuous basis since the late 1940's and had never attempted to secure any other form of ***6** license from either ASCAP[5] or any of its members. *Id.*, at 752–754.

5 Unless the context indicates otherwise, references to ASCAP alone in this opinion usually apply to BMI as well. See n. 20, *infra.*

The complaint filed by CBS charged various violations of the Sherman Act[6] and the copyright laws.[7] CBS argued that ASCAP and BMI are unlawful monopolies and that the blanket license is illegal price fixing, an unlawful tying arrangement, a concerted

refusal to deal, and a misuse of copyrights. The District Court, though denying summary judgment to certain defendants, ruled that the practice did not fall within the *per se* rule. 337 F.Supp. 394, 398 (S.D.N.Y.1972). After an 8-week trial, limited to the issue of liability, the court dismissed the complaint, rejecting again the claim that the blanket license was price fixing and a *per se* violation of § 1 of the Sherman Act, and holding that since direct negotiation with individual copyright owners is available and feasible there is no undue restraint of trade, illegal tying, misuse of copyrights, or monopolization. 400 F.Supp., at 781–783.

6 15 U.S.C. §§ 1 and 2.

7 CBS seeks injunctive relief for the antitrust violations and a declaration of copyright misuse. 400 F.Supp., at 741.

Though agreeing with the District Court's factfinding and not disturbing its legal conclusions on the other antitrust theories of liability,[8] the Court of Appeals held that the blanket license issued to television networks was a form of price fixing illegal *per se* under the Sherman Act. 562 F.2d 130, 140 (CA2 1977). This conclusion, without more, settled the issue of liability under the Sherman Act, established copyright misuse,[9] and required reversal of the District ****1556** Court's ***7** judgment, as well as a remand to consider the appropriate remedy.[10]

8 The Court of Appeals affirmed the District Court's rejection of CBS's monopolization and tying contentions but did not rule on the District Court's conclusion that the blanket license was not an unreasonable restraint of trade. *See* 562 F.2d 130, 132, 135, 141 n. 29 (CA2 1977).

9 At CBS's suggestion, the Court of Appeals held that the challenged conduct constituted misuse of copyrights solely on the basis of its finding of unlawful price fixing. *Id.*, at 141 n. 29.

10 The Court of Appeals went on to suggest some guidelines as to remedy, indicating that despite its conclusion on liability the blanket license was not totally forbidden. The Court of Appeals said:

"Normally, after a finding of price-fixing, the remedy is an injunction against the price-fixing—in this case, the blanket license. We think, however, that if on remand a remedy can be fashioned which will ensure that the blanket license will not affect the price or negotiations for direct licenses, the blanket license need not be prohibited in all circumstances. The blanket license is not simply a 'naked restraint' ineluctably doomed to extinction. There is not enough evidence in the present record to compel a finding that the blanket license does not serve a market need for those who wish full protection against infringement suits or who, for some other business reason, deem the blanket license desirable. The blanket license includes a practical covenant not to sue for infringement of any ASCAP copyright as well as an indemnification against suits by others.

> "Our objection to the blanket license is that it reduces price competition among the members and provides a disinclination to compete. We think that these objections may be removed if ASCAP itself is required to provide some form of per use licensing which will ensure competition among the individual members with respect to those networks which wish to engage in per use licensing." *Id.*, at 140 (footnotes omitted).

ASCAP and BMI petitioned for certiorari, presenting the questions of the applicability of the *per se* rule and of whether this constitutes misuse of copyrights. CBS did not cross petition to challenge the failure to sustain its other antitrust claims. We granted certiorari because of the importance of the issues to the antitrust and copyright laws. 439 U.S. 817, 99 S.Ct. 77, 58 L.Ed.2d 107 (1978). Because we disagree with the Court of Appeals' conclusions with respect to the *per se* illegality of the blanket license, we reverse its judgment and remand the cause for further appropriate proceedings.

II

In construing and applying the Sherman Act's ban against contracts, conspiracies, and combinations in restraint of trade, ***8** the Court has held that certain agreements or practices are so "plainly anticompetitive," *National Society of Professional Engineers v. United States,* 435 U.S. 679, 692, 98 S.Ct. 1355, 1365, 55 L.Ed.2d 637 (1978); *Continental T.V., Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36, 50, 97 S.Ct. 2549, 2558, 53 L.Ed.2d 568 (1977), and so often "lack . . . any redeeming virtue," *Northern Pac. R. Co. v. United States,* 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958), that they are conclusively presumed illegal without further examination under the rule of reason generally applied in Sherman Act cases. This *per se* rule is a valid and useful tool of antitrust policy and enforcement.[11] And agreements among competitors to fix prices on their individual goods or services are among those concerted activities that the Court has held to be within the *per se* category.[12] But easy labels do not always supply ready answers.

11 "This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken." *Northern Pac. R. Co. v. United States,* 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958).
See *Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 50 n. 16, 97 S.Ct. 2549, 2558 n. 16, 53 L.Ed.2d 568 (1977); *United States v. Topco Associates, Inc.,* 405 U.S. 596, 609 n. 10, 92 S.Ct. 1126, 1134 n. 10, 31 L.Ed.2d 515 (1972).

12 See cases discussed in n. 14, *infra.*

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A

To the Court of Appeals and CBS, the blanket license involves "price fixing" in the literal sense: the composers and publishing houses have joined together into an organization that sets its price for the blanket license it sells.[13] But this ***9** is not a ****1557** question simply of determining whether two or more potential competitors have literally "fixed" a "price." As generally used in the antitrust field, "price fixing" is a shorthand way of describing certain categories of business behavior to which the *per se* rule has been held applicable. The Court of Appeals' literal approach does not alone establish that this particular practice is one of those types or that it is "plainly anticompetitive" and very likely without "redeeming virtue." Literalness is overly simplistic and often overbroad. When two partners set the price of their goods or services they are literally "price fixing," but they are not *per se* in violation of the Sherman Act. See *United States v. Addyston Pipe & Steel Co.,* 85 F. 271, 280 (CA6 1898), aff'd, 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136 (1899). Thus, it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label "*per se* price fixing." That will often, but not always, be a simple matter.[14]

13 CBS also complains that it pays a flat fee regardless of the amount of use it makes of ASCAP compositions and even though many of its programs contain little or no music. We are unable to see how that alone could make out an antitrust violation or misuse of copyrights:

"Sound business judgment could indicate that such payment represents the most convenient method of fixing the business value of the privileges granted by the licensing agreement. . . . Petitioner cannot complain because it must pay royalties whether it uses Hazeltine patents or not. What it acquired by the agreement into which it entered was the privilege to use any or all of the patents and developments as it desired to use them." *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.,* 339 U.S. 827, 834, 70 S.Ct. 894, 898, 94 L.Ed. 1312 (1950).

See also *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969).

14 Cf., *e. g., United States v. McKesson & Robbins, Inc.,* 351 U.S. 305, 76 S.Ct. 937, 100 L.Ed. 1209 (1956) (manufacturer/wholesaler agreed with independent wholesalers on prices to be charged on products it manufactured); *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940) (firms controlling a substantial part of an industry agreed to purchase "surplus" gasoline with the intent and necessary effect of increasing the price); *United States v. Trenton Potteries Co.,* 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700 (1927) (manufacturers and distributors of 82% of certain vitreous pottery fixtures agreed to sell at uniform prices).

Consequently, as we recognized in *United States v. Topco Associates, Inc.,* 405 U.S. 596, 607–608, 92 S.Ct. 1126, 1133, 31 L.Ed.2d 515 (1972), "[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations . . . ." See ***10** *White Motor Co. v. United States,* 372 U.S. 253, 263, 83 S.Ct. 696, 702, 9 L.Ed.2d 738 (1963). We have never examined a practice like this one before; indeed, the Court of Appeals recognized that "[i]n dealing with performing rights in the music industry we confront conditions both in copyright law and in antitrust law which are *sui generis*." 562 F.2d, at 132. And though there has been rather intensive antitrust scrutiny of ASCAP and its blanket licenses, that experience hardly counsels that we should outlaw the blanket license as a *per se* restraint of trade.

B

This litigation and other cases involving ASCAP and its licensing practices have arisen out of the efforts of the creators of copyrighted musical compositions to collect for the public performance of their works, as they are entitled to do under the Copyright Act. As already indicated, ASCAP and BMI originated to make possible and to facilitate dealings between copyright owners and those who desire to use their music. Both organizations plainly involve concerted action in a large and active line of commerce, and it is not surprising that, as the District Court found, "[n]either ASCAP nor BMI is a stranger to antitrust litigation." 400 F.Supp., at 743.

The Department of Justice first investigated allegations of anticompetitive conduct by ASCAP over 50 years ago.[15] A criminal complaint was filed in 1934, but the Government was granted a midtrial continuance and never returned to the courtroom. In separate complaints in 1941, the United States charged that the blanket license, which was then the only license ****1558** offered by ASCAP and BMI, was an illegal restraint of trade and that arbitrary prices were being charged as the result of an illegal copyright pool.[16] The Government sought ***11** to enjoin ASCAP's exclusive licensing powers and to require a different form of licensing by that organization. The case was settled by a consent decree that imposed tight restrictions on ASCAP's operations.[17] Following complaints relating to the television industry, successful private litigation against ASCAP by movie theaters,[18] and a Government challenge to ASCAP's arrangements with similar foreign organizations, the 1941 decree was reopened and extensively amended in 1950.[19]

15 Cohn, Music, Radio Broadcasters and the Sherman Act, 29 Geo.L.J. 407, 424 n. 91 (1941).

16 *E. g.,* complaint in *United States v. ASCAP,* Civ. No. 13–95 (S.D.N.Y.1941), pp. 3–4.

17 *United States v. ASCAP,* 1940–1943 Trade Cases ¶ 56,104 (S.D.N.Y.1941).

18 See *Alden-Rochelle, Inc. v. ASCAP,* 80 F.Supp. 888 (S.D.N.Y.1948); *M. Witmark & Sons v. Jensen,* 80

F.Supp. 843 (D.C.Minn.1948), appeal dismissed *sub nom. M. Witmark & Sons v. Berger Amusement Co.,* 177 F.2d 515 (CA8 1949).

19 *United States v. ASCAP,* 1950–1951 Trade Cases ¶ 62,595 (S.D.N.Y.1950).

Under the amended decree, which still substantially controls the activities of ASCAP, members may grant ASCAP only nonexclusive rights to license their works for public performance. Members, therefore, retain the rights individually to license public performances, along with the rights to license the use of their compositions for other purposes. ASCAP itself is forbidden to grant any license to perform one or more specified compositions in the ASCAP repertory unless both the user and the owner have requested it in writing to do so. ASCAP is required to grant to any user making written application a nonexclusive license to perform all ASCAP compositions either for a period of time or on a per-program basis. ASCAP may not insist on the blanket license, and the fee for the per-program license, which is to be based on the revenues for the program on which ASCAP music is played, must offer the applicant a genuine economic choice between the per-program license and the more common blanket license. If ASCAP and a putative licensee are unable to agree on a fee within 60 days, the applicant may apply to the District Court ***12** for a determination of a reasonable fee, with ASCAP having the burden of proving reasonableness.[20]

20 BMI is in a similar situation. The original decree against BMI is reported as *United States v. BMI,* 1940–1943 Trade Cases ¶ 56,096 (E.D.Wis.1941). A new consent judgment was entered in 1966 following a monopolization complaint filed in 1964. *United States v. BMI,* 1966 Trade Cases ¶ 71,941 (S.D.N.Y.). The ASCAP and BMI decrees do vary in some respects. The BMI decree does not specify that BMI may only obtain nonexclusive rights from its affiliates or that the District Court may set the fee if the parties are unable to agree. Nonetheless, the parties stipulated, and the courts below accepted, that “CBS could secure direct licenses from BMI affiliates with the same ease or difficulty, as the case may be, as from ASCAP members.” 400 F.Supp., at 745.

The 1950 decree, as amended from time to time, continues in effect, and the blanket license continues to be the primary instrument through which ASCAP conducts its business under the decree. The courts have twice construed the decree not to require ASCAP to issue licenses for selected portions of its repertory.[21] It also remains true that the decree guarantees the legal availability of direct licensing of performance rights by ASCAP members; and the District Court found, and in this respect the Court of Appeals agreed, that there are no practical impediments preventing direct dealing by the television networks if they so desire. Historically, they have not done so. Since 1946, CBS and other television networks have taken blanket licenses from ASCAP and BMI. It was not until this suit ****1559** arose that the CBS network demanded any other kind of license.[22]

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21 *United States v. ASCAP (Application of Shenandoah Valley Broadcasting, Inc.),* 208 F.Supp. 896 (S.D.N.Y.1962), aff'd, 331 F.2d 117 (CA2), cert. denied, 377 U.S. 997, 84 S.Ct. 1917, 12 L.Ed.2d 1048 (1964); *United States v. ASCAP (Application of National Broadcasting Co.),* 1971 Trade Cases ¶ 73,491 (S.D.N.Y.1970). See also *United States v. ASCAP (Motion of Metromedia, Inc.),* 341 F.2d 1003 (CA2 1965).

22 National Broadcasting Co. did, in 1971, request an annual blanket license for 2,217 specific ASCAP compositions most frequently used on its variety shows. It intended to acquire the remaining rights to background and theme music through direct transactions by it and its program packagers. See *United States v. ASCAP (Application of National Broadcasting Co.), supra.*

***13** Of course, a consent judgment, even one entered at the behest of the Antitrust Division, does not immunize the defendant from liability for actions, including those contemplated by the decree, that violate the rights of nonparties. See *Sam Fox Publishing Co. v. United States,* 366 U.S. 683, 690, 81 S.Ct. 1309, 1313, 6 L.Ed.2d 604 (1961), which involved this same decree. But it cannot be ignored that the Federal Executive and Judiciary have carefully scrutinized ASCAP and the challenged conduct, have imposed restrictions on various of ASCAP's practices, and, by the terms of the decree, stand ready to provide further consideration, supervision, and perhaps invalidation of asserted anticompetitive practices.[23] In these circumstances, we have a unique indicator that the challenged practice may have redeeming competitive virtues and that the search for those values is not almost sure to be in vain.[24] Thus, although CBS is not bound by the Antitrust Division's actions, the decree is a fact of economic and legal life in this industry, and the Court of Appeals should not have ignored it completely in analyzing the practice. See *id.,* at 694–695, 81 S.Ct., at 1315–1316. That fact alone might not remove a naked price-fixing scheme from the ambit of the *per se* rule, but, as discussed *infra,* Part III, here we are uncertain whether the practice on its face has the effect, or could have been spurred by the purpose, of restraining competition among the individual composers.

23 1950–1951 Trade Cases ¶ 62,595, p. 63,756.

24 Cf. *Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S., at 50 n. 16, 97 S.Ct., at 2558 n.16. Moreover, unthinking application of the *per se* rule might upset the balancing of economic power and of procompetitive and anticompetitive effect presumably worked out in the decree.

After the consent decrees, the legality of the blanket license was challenged in suits brought by certain ASCAP members against individual radio stations for copyright infringement. The stations raised as a defense that the blanket license was a form of price fixing illegal under the Sherman Act. The parties ***14** stipulated that it would be nearly impossible for each radio station to negotiate with each copyright

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holder separate licenses for the performance of his works on radio. Against this background, and relying heavily on the 1950 consent judgment, the Court of Appeals for the Ninth Circuit rejected claims that ASCAP was a combination in restraint of trade and that the blanket license constituted illegal price fixing. *K–91, Inc. v. Gershwin Publishing Corp.,* 372 F.2d 1 (1967), cert. denied, 389 U.S. 1045, 88 S.Ct. 761, 19 L.Ed.2d 838 (1968).

The Department of Justice, with the principal responsibility for enforcing the Sherman Act and administering the consent decrees relevant to this case, agreed with the result reached by the Ninth Circuit. In a submission *amicus curiae* opposing one station's petition for certiorari in this Court, the Department stated that there must be "some kind of central licensing agency by which copyright holders may offer their works in a common pool to all who wish to use them." Memorandum for United States as *Amicus Curiae* on Pet. for Cert. in *K–91, Inc. v. Gershwin Publishing Corp.,* O.T. 1967, No. 147, pp. 10–11. And the Department elaborated on what it thought that fact meant for the proper application of the antitrust laws in this area:

"The Sherman Act has always been discriminatingly applied in the light of economic realities. There are situations in which competitors have been permitted to form joint selling agencies or other pooled activities, subject to strict limitations ****1560** under the antitrust laws to guarantee against abuse of the collective power thus created. *Associated Press v. United States,* 326 U.S. 1 [65 S.Ct. 1416, 89 L.Ed. 2013]; *United States v. St. Louis Terminal,* 224 U.S. 383 [32 S.Ct. 507, 56 L.Ed. 810]; *Appalachian Coals, Inc. v. United States,* 288 U.S. 344 [53 S.Ct. 471, 77 L.Ed. 825]; *Chicago Board of Trade v. United States,* 246 U.S. 231 [38 S.Ct. 242, 62 L.Ed. 683]. This case appears to us to involve such a situation. The extraordinary number of users spread across the land, the ease with which a performance may be broadcast, the sheer volume ***15** of copyrighted compositions, the enormous quantity of separate performances each year, the impracticability of negotiating individual licenses for each composition, and the ephemeral nature of each performance all combine to create unique market conditions for performance rights to recorded music." *Id.,* at 10 (footnote omitted).

The Department concluded that, in the circumstances of that case, the blanket licenses issued by ASCAP to individual radio stations were neither a *per se* violation of the Sherman Act nor an unreasonable restraint of trade.

As evidenced by its *amicus* brief in the present case, the Department remains of that view. Furthermore, the United States disagrees with the Court of Appeals in this case and urges that the blanket licenses, which the consent decree authorizes ASCAP to issue to television networks, are not *per se* violations of the Sherman Act. It takes no position, however, on whether the practice is an unreasonable restraint of trade in the context of the network television industry.

Finally, we note that Congress itself, in the new Copyright Act, has chosen to employ the blanket license and similar practices. Congress created a compulsory blanket license for secondary transmissions by cable television systems and provided that "[n]otwithstanding any provisions of the antitrust laws, . . . any

claimants may agree among themselves as to the proportionate division of compulsory licensing fees among them, may lump their claims together and file them jointly or as a single claim, or may designate a common agent to receive payment on their behalf." 17 U.S.C. App. § 111(d)(5)(A). And the newly created compulsory license for the use of copyrighted compositions in jukeboxes is also a blanket license, which is payable to the performing-rights societies such as ASCAP unless an individual copyright holder can prove his entitlement to a share. § 116(c)(4). Moreover, in requiring noncommercial broadcasters to pay for their use of copyrighted music, Congress again provided that "[n]otwithstanding ***16** any provision of the antitrust laws" copyright owners "may designate common agents to negotiate, agree to, pay, or receive payments." § 118(b). Though these provisions are not directly controlling, they do reflect an opinion that the blanket license, and ASCAP, are economically beneficial in at least some circumstances.

There have been District Court cases holding various ASCAP practices, including its licensing practices, to be violative of the Sherman Act,[25] but even so, there is no nearly universal view that either the blanket or the per-program licenses issued by ASCAP at prices negotiated by it are a form of price fixing subject to automatic condemnation under the Sherman Act, rather than to a careful assessment under the rule of reason.

25 See cases cited n. 18, *supra*. Those cases involved licenses sold to individual movie theaters to "perform" compositions already on the motion pictures' soundtracks. ASCAP had barred its members from assigning performing rights to movie producers at the same time recording rights were licensed, and the theaters were effectively unable to engage in direct transactions for performing rights with individual copyright owners.

III

Of course, we are no more bound than is CBS by the views of the Department of Justice, the results in the prior lower court ****1561** cases, or the opinions of various experts about the merits of the blanket license. But while we must independently examine this practice, all those factors should caution us against too easily finding blanket licensing subject to *per se* invalidation.

A

As a preliminary matter, we are mindful that the Court of Appeals' holding would appear to be quite difficult to contain. If, as the court held, there is a *per se* antitrust violation whenever ASCAP issues a blanket license to a television network for a single fee, why would it not also be automatically illegal for ASCAP to negotiate and issue blanket licenses to ***17** individual radio or television stations or to other users who perform copyrighted music for profit?[26] Likewise, if the present network licenses issued through ASCAP on behalf of its members are *per se* violations, why would it not be equally illegal for the members to authorize ASCAP to issue licenses establishing various categories of uses that a network might have for

copyrighted music and setting a standard fee for each described use?

26 Certain individual television and radio stations, appearing here as *amici curiae*, argue that the *per se* rule should extend to ASCAP's blanket licenses with them as well. The television stations have filed an antitrust suit to that effect. *Buffalo Broadcasting Co. v. ASCAP*, 78 Civ. 5670 (SDNY, filed Nov. 27, 1978).

Although the Court of Appeals apparently thought the blanket license could be saved in some or even many applications, it seems to us that the *per se* rule does not accommodate itself to such flexibility and that the observations of the Court of Appeals with respect to remedy tend to impeach the *per se* basis for the holding of liability.[27]

27 See n. 10, *supra.* The Court of Appeals would apparently not outlaw the blanket license across the board but would permit it in various circumstances where it is deemed necessary or sufficiently desirable. It did not even enjoin blanket licensing with the television networks, the relief it realized would normally follow a finding of *per se* illegality of the license in that context. Instead, as requested by CBS, it remanded to the District Court to require ASCAP to offer in addition to blanket licensing some competitive form of per-use licensing. But per-use licensing by ASCAP, as recognized in the consent decrees, might be even more susceptible to the *per se* rule than blanket licensing.

The rationale for this unusual relief in a *per se* case was that "[t]he blanket license is not simply a 'naked restraint' ineluctably doomed to extinction." 562 F.2d, at 140. To the contrary, the Court of Appeals found that the blanket license might well "serve a market need" for some. *Ibid.* This, it seems to us, is not the *per se* approach, which does not yield so readily to circumstances, but in effect is a rather bobtailed application of the rule of reason, bobtailed in the sense that it is unaccompanied by the necessary analysis demonstrating why the particular licensing system is an undue competitive restraint.

***18** CBS would prefer that ASCAP be authorized, indeed directed, to make all its compositions available at standard per-use rates within negotiated categories of use. 400 F.Supp., at 747 n. 7.[28] But if this in itself or in conjunction with blanket licensing constitutes illegal price fixing by copyright owners, CBS urges that an injunction issue forbidding ASCAP to issue any blanket license or to negotiate any fee except on behalf of an individual member for the use of his own copyrighted work or works.[29] Thus, we are called upon to determine that blanket licensing is unlawful across the board. We are quite sure, however, that the *per se* rule does not require any such holding.

28 Surely, if ASCAP abandoned the issuance of all licenses and confined its activities to policing the market and suing infringers, it could hardly be said that member copyright owners would

be in violation of the antitrust laws by not having a common agent issue per-use licenses. Under the copyright laws, those who publicly perform copyrighted music have the burden of obtaining prior consent. Cf. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S., at 139–140, 89 S.Ct., at 1585–1586.

29 In its complaint, CBS alleged that it would be "wholly impracticable" for it to obtain individual licenses directly from the composers and publishing houses, but it now says that it would be willing to do exactly that if ASCAP were enjoined from granting blanket licenses to CBS or its competitors in the network television business.

****1562** B

In the first place, the line of commerce allegedly being restrained, the performing rights to copyrighted music, exists at all only because of the copyright laws. Those who would use copyrighted music in public performances must secure consent from the copyright owner or be liable at least for the statutory damages for each infringement and, if the conduct is willful and for the purpose of financial gain, to criminal penalties.[30] Furthermore, nothing in the Copyright Act of 1976 indicates in the slightest that Congress intended to weaken the rights of copyright owners to control the public ***19** performance of musical compositions. Quite the contrary is true.[31] Although the copyright laws confer no rights on copyright owners to fix prices among themselves or otherwise to violate the antitrust laws, we would not expect that any market arrangements reasonably necessary to effectuate the rights that are granted would be deemed a *per se* violation of the Sherman Act. Otherwise, the commerce anticipated by the Copyright Act and protected against restraint by the Sherman Act would not exist at all or would exist only as a pale reminder of what Congress envisioned.[32]

30 17 U.S.C. App. § 506.

31 See Koenigsberg, The 1976 Copyright Act: Advances for the Creator, 26 Cleve.St.L.Rev. 515, 524, 528 (1977).

32 Cf. *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963).
Because a musical composition can be "consumed" by many different people at the same time and without the creator's knowledge, the "owner" has no real way to demand reimbursement for the use of his property except through the copyright laws *and* an effective way to enforce those legal rights. See *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151, 162, 95 S.Ct. 2040, 2047, 45 L.Ed.2d 84 (1975). It takes an organization of rather large size to monitor most or all uses and to deal with users on behalf of the composers. Moreover, it is inefficient to have too many such organizations duplicating each other's monitoring of use.

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C

More generally, in characterizing this conduct under the *per se* rule, [33] our inquiry must focus on whether the effect and, here because it tends to show effect, see *United States v. United States Gypsum Co.*, 438 U.S. 422, 436 n. 13, 98 S.Ct. 2864, 2873 n. 13, 57 L.Ed.2d 854 (1978), the purpose of the practice are to threaten the proper operation of our predominantly free-market economy—that is, whether the practice facially appears to be one that would always or ***20** almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to "increase economic efficiency and render markets more, rather than less, competitive." *Id*. at 441 n. 16, 98 S.Ct., at 2875 n. 16; see *National Society of Professional Engineers v. United States*, 435 U.S., at 688, 98 S.Ct., at 1363; *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S., at 50 n. 16, 97 S.Ct., at 2558 n. 16; *Northern Pac. R. Co. v. United States*, 356 U.S., at 4, 78 S.Ct., at 517.

33 The scrutiny occasionally required must not merely subsume the burdensome analysis required under the rule of reason, see *National Society of Professional Engineers v. United States*, 435 U.S. 679, 690–692, 98 S.Ct. 1355, 1364–1366, 55 L.Ed.2d 637 (1978), or else we should apply the rule of reason from the start. That is why the *per se* rule is not employed until after considerable experience with the type of challenged restraint.

The blanket license, as we see it, is not a "naked restrain[t] of trade with no purpose except stifling of competition," *White Motor Co. v. United States*, 372 U.S. 253, 263, 83 S.Ct. 696, 702, 9 L.Ed.2d 738 (1963), but rather accompanies the integration of sales, monitoring, and enforcement against unauthorized copyright use. See L. Sullivan, Handbook of the Law of Antitrust § 59, p. 154 (1977). As we have already indicated, ASCAP and the blanket license developed together out of the practical situation in the marketplace: thousands of users, thousands of copyright owners, and millions of compositions. Most users want unplanned, rapid, and indemnified access to any and all of the repertory of compositions, ****1563** and the owners want a reliable method of collecting for the use of their copyrights. Individual sales transactions in this industry are quite expensive, as would be individual monitoring and enforcement, especially in light of the resources of single composers. Indeed, as both the Court of Appeals and CBS recognize, the costs are prohibitive for licenses with individual radio stations, nightclubs, and restaurants, 562 F.2d, at 140, n. 26, and it was in that milieu that the blanket license arose.

A middleman with a blanket license was an obvious necessity if the thousands of individual negotiations, a virtual impossibility, were to be avoided. Also, individual fees for the use of individual compositions would presuppose an intricate schedule of fees and uses, as well as a difficult and expensive reporting problem for the user and policing task for the copyright owner. Historically, the market for public-performance rights organized itself largely around the single-fee blanket ***21** license, which gave unlimited access to the repertory and reliable protection against

infringement. When ASCAP's major and user-created competitor, BMI, came on the scene, it also turned to the blanket license.

With the advent of radio and television networks, market conditions changed, and the necessity for and advantages of a blanket license for those users may be far less obvious than is the case when the potential users are individual television or radio stations, or the thousands of other individuals and organizations performing copyrighted compositions in public. [34] But even for television network licenses, ASCAP reduces costs absolutely by creating a blanket license that is sold only a few, instead of thousands, [35] of times, and that obviates the need for closely monitoring the networks to see that they do not use more than they pay for. [36] ASCAP also provides the necessary resources for blanket sales and enforcement, resources unavailable to the vast majority of composers and publishing houses. Moreover, a bulk license of some type is a necessary consequence of the integration necessary to achieve these efficiencies, and a necessary consequence of an aggregate license is that its price must be established.

34 And of course changes brought about by new technology or new marketing techniques might also undercut the justification for the practice.

35 The District Court found that CBS would require between 4,000 and 8,000 individual license transactions per year. 400 F.Supp., at 762.

36 To operate its system for distributing the license revenues to its members, ASCAP relies primarily on the networks' records of which compositions are used.

D

This substantial lowering of costs, which is of course potentially beneficial to both sellers and buyers, differentiates the blanket license from individual use licenses. The blanket license is composed of the individual compositions plus the aggregating service. Here, the whole is truly greater than the ***22** sum of its parts; it is, to some extent, a different product. The blanket license has certain unique characteristics: It allows the licensee immediate use of covered compositions, without the delay of prior individual negotiations [37] and great flexibility in the choice of musical material. Many consumers clearly prefer the characteristics and cost advantages of this marketable ****1564** package, [38] and even small-performing rights societies that have occasionally arisen to compete with ASCAP and BMI have offered blanket licenses. [39] Thus, to the extent the blanket license is a different product, ASCAP is not really a joint sales agency offering the individual goods of many sellers, but is a separate seller offering its blanket license, of which the individual compositions are raw material. [40] ASCAP, ***23** in short, made a market in which individual composers are inherently unable to compete fully effectively. [41]

37 See Timberg, The Antitrust Aspects of Merchandising Modern Music: The ASCAP Consent Judgment of 1950, 19 Law & Contemp.Prob. 294, 297 (1954) ("The disk-jockey's itchy fingers and

the bandleader's restive baton, it is said, cannot wait for contracts to be drawn with ASCAP's individual publisher members, much less for the formal acquiescence of a characteristically unavailable composer or author"). Significantly, ASCAP deals only with nondramatic performance rights. Because of their nature, dramatic rights, such as for musicals, can be negotiated individually and well in advance of the time of performance. The same is true of various other rights, such as sheet music, recording, and synchronization, which are licensed on an individual basis.

38 Cf. *United States v. Grinnell Corp.*, 384 U.S. 563, 572–573, 86 S.Ct. 1698, 1704–1705, 16 L.Ed.2d 778 (1966); *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 356–357, 83 S.Ct. 1715, 1737–1738, 10 L.Ed.2d 915 (1963).

39 Comment, Music Copyright Associations and the Antitrust Laws, 25 Ind.L.J. 168, 170 (1950). See also Garner, *United States v. ASCAP* : The Licensing Provisions of the Amended Final Judgment of 1950, 23 Bull.Copyright Soc. 119, 149 (1975) ("no performing rights are licensed on other than a blanket basis in any nation in the world").

40 Moreover, because of the nature of the product—a composition can be simultaneously "consumed" by many users—composers have numerous markets and numerous incentives to produce, so the blanket license is unlikely to cause decreased output, one of the normal undesirable effects of a cartel. And since popular songs get an increased share of ASCAP's revenue distributions, composers compete even within the blanket license in terms of productivity and consumer satisfaction.

41 Cf. *United States v. Socony-Vacuum Oil Co.*, 310 U.S., at 217, 60 S.Ct., at 841 (distinguishing *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683 (1918), on the ground that among the effects of the challenged rule there "was the creation of a public market"); *United States v. Trenton Potteries Co.*, 273 U.S., at 401, 47 S.Ct., at 381 (distinguishing *Chicago Bd. of Trade* on the ground that it did not involve "a price agreement among competitors in an open market").

E

Finally, we have some doubt—enough to counsel against application of the *per se* rule—about the extent to which this practice threatens the "central nervous system of the economy," *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n. 59, 60 S.Ct. 811, 845 n. 59, 84 L.Ed. 1129 (1940), that is, competitive pricing as the free market's means of allocating resources. Not all arrangements among actual or potential competitors that have an impact on price are *per se* violations of the Sherman Act or even unreasonable restraints. Mergers among competitors eliminate competition, including

price competition, but they are not *per se* illegal, and many of them withstand attack under any existing antitrust standard. Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all.

Here, the blanket-license fee is not set by competition among individual copyright owners, and it is a fee for the use of any of the compositions covered by the license. But the blanket license cannot be wholly equated with a simple horizontal arrangement among competitors. ASCAP does set the price for its blanket license, but that license is quite different from anything any individual owner could issue. The individual composers and authors have neither agreed not to sell individually in any other market nor use the blanket ***24** license to mask price fixing in such other markets.[42] Moreover, the substantial restraints placed on ASCAP and its members by the consent decree must not be ignored. The District Court found that there was no legal, practical, or conspiratorial impediment to CBS's obtaining individual licenses; CBS, in short, had a real choice.

42 "CBS does not claim that the individual members and affiliates ('sellers') of ASCAP and BMI have agreed among themselves as to the prices to be charged for the particular 'products' (compositions) offered by each of them." 400 F.Supp., at 748.

With this background in mind, which plainly enough indicates that over the years, and in the face of available alternatives, the blanket license has provided an acceptable mechanism for at least a large ****1565** part of the market for the performing rights to copyrighted musical compositions, we cannot agree that it should automatically be declared illegal in all of its many manifestations. Rather, when attacked, it should be subjected to a more discriminating examination under the rule of reason. It may not ultimately survive that attack, but that is not the issue before us today.

IV

As we have noted, n. 27, *supra*, the enigmatic remarks of the Court of Appeals with respect to remedy appear to have departed from the court's strict, *per se* approach and to have invited a more careful analysis. But this left the general import of its judgment that the licensing practices of ASCAP and BMI under the consent decree are *per se* violations of the Sherman Act. We reverse that judgment, and the copyright misuse judgment dependent upon it, see n. 9, *supra*, and remand for further proceedings to consider any unresolved issues that CBS may have properly brought to the Court of Appeals.[43] Of course, this will include an assessment under ***25** the rule of reason of the blanket license as employed in the television industry, if that issue was preserved by CBS in the Court of Appeals.[44]

43 It is argued that the judgment of the Court of Appeals should nevertheless be affirmed on the ground that the blanket license is a tying arrangement in violation of § 1 of the Sherman Act or on the ground that ASCAP and BMI have monopolized the relevant market contrary to § 2. The District Court

and the Court of Appeals rejected both submissions, and we do not disturb the latter's judgment in these respects, particularly since CBS did not file its own petition for certiorari challenging the Court of Appeals' failure to sustain its tying and monopolization claims.

44 The Court of Appeals did not address the rule-of-reason issue, and BMI insists that CBS did not preserve the question in that court. In any event, if the issue is open in the Court of Appeals, we prefer that that court first address the matter. Because of the United States' interest in the enforcement of the consent decree, we assume it will continue to play a role in this litigation on remand.

The judgment of the Court of Appeals is reversed, and the cases are remanded to that court for further proceedings consistent with this opinion.

It is so ordered.

Mr. Justice STEVENS, dissenting.

The Court holds that ASCAP's blanket license is not a species of price fixing categorically forbidden by the Sherman Act. I agree with that holding. The Court remands the cases to the Court of Appeals, leaving open the question whether the blanket license as employed by ASCAP and BMI is unlawful under a rule-of-reason inquiry. I think that question is properly before us now and should be answered affirmatively.

There is ample precedent for affirmance of the judgment of the Court of Appeals on a ground that differs from its rationale, provided of course that we do not modify its judgment.[1] In this litigation, the judgment of the Court of Appeals was ***26** not that blanket licenses may never be offered by ASCAP and BMI. Rather, its judgment directed the District Court to fashion relief requiring them to offer additional forms of license as well.[2] Even though that judgment may not be consistent with its stated conclusion that the blanket license is "illegal *per se* " as a kind of price fixing, it is entirely consistent with a conclusion that petitioners' exclusive all-or-nothing blanket-license policy violates the rule of reason.[3]

1 See *United States v. New York Telephone Co.,* 434 U.S. 159, 166 n. 8, 98 S.Ct. 364, 369 n. 8, 54 L.Ed.2d 376; *Dayton Board of Education v. Brinkman,* 433 U.S. 406, 419, 97 S.Ct. 2766, 2775, 53 L.Ed.2d 851; *Massachusetts Mutual Life Ins. Co. v. Ludwig,* 426 U.S. 479, 480–481, 96 S.Ct. 2158, 2159, 48 L.Ed.2d 784; *United States v. American Railway Express Co.,* 265 U.S. 425, 435, 44 S.Ct. 560, 563, 68 L.Ed. 1087.

2 562 F.2d 130, 140–141 (CA2 1977).

3 See *ante,* at 1561 n. 27 (describing relief ordered by Court of Appeals as "unusual" for a *per se* case, and suggesting that that court's decision appears more consistent with a rule-of-reason approach).

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****1566** The Court of Appeals may well so decide on remand. In my judgment, however, a remand is not necessary.[4] The record before this Court is a full one, reflecting extensive discovery and eight weeks of trial. The District Court's findings of fact are thorough and well supported. They clearly reveal that the challenged policy does have a significant adverse impact on competition. I would therefore affirm the judgment of the Court of Appeals.

4 That the rule-of-reason issues have been raised and preserved throughout seems to me clear. See 562 F.2d, at 134. ("CBS contends that the blanket licensing method is not only an illegal tie-in or blockbooking which in practical terms is coercive in effect, but is also an illegal price-fixing device, a per se violation . . . "); *id*., at 141 n. 29. ("As noted, CBS also claims violation of § 2 of the Sherman Act. We need not go into the legal arguments on this point because they are grounded on its factual claim that there are barriers to direct licensing and 'bypass' of the ASCAP blanket license. The District Court, as noted rejected this contention and its findings are not clearly erroneous. The § 2 claim must therefore fail at this time and on this record"); Brief for Respondents 41.

I

In December 1969, the president of the CBS television network wrote to ASCAP and BMI requesting that each "promptly ... grant a new performance rights license which ***27** will provide, effective January 1, 1970, for payments measured by the actual use of your music."[5] ASCAP and BMI each responded by stating that it considered CBS's request to be an application for a license in accordance with the provisions of its consent decree and would treat it as such,[6] even though neither decree provides for licensing on a per-composition or per-use basis.[7] Rather than pursuing further discussion, CBS instituted this suit.

5 400 F.Supp. 737, 753 (S.D.N.Y.1975).

6 ASCAP responded in a letter from its general counsel, stating that it would consider the request at its next board of directors meeting, and that it regarded it as an application for a license consistent with the decree. The letter from BMI's president stated: "The BMI Consent Decree provides for several alternative licenses and we are ready to explore any of these with you." *Id.,* at 753–754.

7 See *ante*, at 1558, and n. 21.

Whether or not the CBS letter is considered a proper demand for per-use licensing is relevant, if at all, only on the question of relief. For the fact is, and it cannot seriously be questioned, that ASCAP and BMI have steadfastly adhered to the policy of only offering overall blanket or per-program licenses,[8] notwithstanding requests for more limited authorizations. Thus, ASCAP rejected a 1971 request by NBC for licenses for 2,217 specific compositions,[9] as well as an earlier request by a group of television stations for more limited authority

than the blanket licenses which they were then ***28** purchasing.[10] Neither ASCAP nor BMI has ever offered to license anything less than its entire portfolio, even on an experimental basis. Moreover, if the response to the CBS letter were not sufficient to characterize their consistent policy, the defense of this lawsuit surely is. It is the refusal to license anything less than the entire repertoire—rather than the decision to offer blanket licenses themselves—that raises the serious antitrust questions in this case.

8 The 1941 decree requires ASCAP to offer per-program licenses as an alternative to the blanket license. *United States v. ASCAP,* 1940–1943 Trade Cases ¶ 56,104, p. 404 (S.D.N.Y.). Analytically, however, there is little difference between the two. A per-program license also covers the entire ASCAP repertoire; it is therefore simply a miniblanket license. As is true of a long-term blanket license, the fees set are in no way dependent on the quantity or quality of the music used. See *infra*, at 1568–1569, *infra*.

9 See *United States v. ASCAP* (*Application of National Broadcasting Co.*), 1971 Trade Cases ¶ 73,491 (S.D.N.Y.1970).

10 See *United States v. ASCAP* (*Application of Shenandoah Valley Broadcasting, Inc.*), 208 F.Supp. 896 (S.D.N.Y.1962), aff'd, 331 F.2d 117 (CA2 1964), cert. denied, 377 U.S. 997, 84 S.Ct. 1917, 12 L.Ed.2d 1048.

****1567** II

Under our prior cases, there would be no question about the illegality of the blanket-only licensing policy if ASCAP and BMI were the exclusive sources of all licenses. A copyright, like a patent, is a statutory grant of monopoly privileges. The rules which prohibit a patentee from enlarging his statutory monopoly by conditioning a license on the purchase of unpatented goods,[11] or by refusing to grant a license under one patent unless the licensee also takes a license under another, are equally applicable to copyrights.[12]

11 *Mercoid Corp. v. Mid-Continent Investment Co.,* 320 U.S. 661, 64 S.Ct. 268, 88 L.Ed. 376; *Ethyl Gasoline Corp. v. United States,* 309 U.S. 436, 60 S.Ct. 618, 84 L.Ed. 852; *International Business Machines Corp. v. United States,* 298 U.S. 131, 56 S.Ct. 701, 80 L.Ed. 1085; *United Shoe Machinery Corp. v. United States,* 258 U.S. 451, 42 S.Ct. 363, 66 L.Ed. 708.

12 Indeed, the leading cases condemning the practice of "blockbooking" involved copyrighted motion pictures, rather than patents. See *United States v. Paramount Pictures,* 334 U.S. 131, 68 S.Ct. 915, 92 L.Ed. 1260; *United States v. Loew's Inc.,* 371 U.S. 38, 83 S.Ct. 97, 9 L.Ed.2d 11.

It is clear, however, that the mere fact that the holder of several patents has granted a single package license covering them all does not establish any illegality. This point was settled

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by *Automatic Radio Mfg. Co. v. Hazeltine Research, Inc.,* 339 U.S. 827, 834, 70 S.Ct. 894, 898, 94 L.Ed. 1312, and reconfirmed in ***29** *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 137–138, 89 S.Ct. 1562, 1583–1585, 23 L.Ed.2d 129. The Court is therefore unquestionably correct in its conclusion that ASCAP's issuance of blanket licenses covering its entire inventory is not, standing alone, automatically unlawful. But both of those cases identify an important limitation on this rule. In the former, the Court was careful to point out that the record did not present the question whether the package license would have been unlawful if Hazeltine had refused to license on any other basis. 339 U.S., at 831, 70 S.Ct. at 896. And in the latter case, the Court held that the package license was illegal because of such a refusal. 395 U.S., at 140–141, 89 S.Ct., at 1585–1586.

Since ASCAP offers only blanket licenses, its licensing practices fall on the illegal side of the line drawn by the two *Hazeltine* cases. But there is a significant distinction: unlike Hazeltine, ASCAP does not have exclusive control of the copyrights in its portfolio, and it is perfectly possible—at least as a legal matter—for a user of music to negotiate directly with composers and publishers for whatever rights he may desire. The availability of a practical alternative alters the competitive effect of a blockbooking or blanket-licensing policy. ASCAP is therefore quite correct in its insistence that its blanket license cannot be categorically condemned on the authority of the blockbooking and package-licensing cases. While these cases are instructive, they do not directly answer the question whether the ASCAP practice is unlawful.

The answer to that question depends on an evaluation of the effect of the practice on competition in the relevant market. And, of course, it is well settled that a sales practice that is permissible for a small vendor, at least when no coercion is present, may be unreasonable when employed by a company that dominates the market.[13] We ****1568** therefore must consider ***30** what the record tells us about the competitive character of this market.

13 See *Tampa Electric Co. v. Nashville Coal Co.,* 365 U.S. 320, 334, 81 S.Ct. 623, 631, 5 L.Ed.2d 580 (upholding requirements contract on the ground that "[t]here is here neither a seller with a dominant position in the market as in *Standard Fashion* [*Co. v. Magrane-Houston Co.,* 258 U.S. 346, 42 S.Ct. 360, 66 L.Ed. 653]; nor myriad outlets with substantial sales volume, coupled with an industry-wide practice of relying upon exclusive contracts, as in *Standard Oil* [*Co. v. United States*, 337 U.S. 293, 69 S.Ct. 1051, 93 L.Ed. 1371]; nor a plainly restrictive tying arrangement as in *International Salt* [*Co. v. United States,* 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed.2d 20]"); *Times-Picayune Publishing Co. v. United States,* 345 U.S. 594, 610–612, 73 S.Ct. 872, 881–882, 97 L.Ed. 1277 (upholding challenged advertising practice because, while the volume of commerce affected was not " 'insignificant or insubstantial,' " seller was found not to occupy a "dominant position" in the relevant market). While our cases make clear that a violation of the Sherman Act requires both that

the volume of commerce affected be substantial and that the seller enjoy a dominant position, see *id.*, at 608–609, 73 S.Ct., at 880–881, proof of actual compulsion has not been required, but cf. *Royster Drive-In Theatres, Inc. v. American Broadcasting-Paramount Theatres, Inc.,* 268 F.2d 246, 251 (CA2 1959), cert. denied, 361 U.S. 885, 80 S.Ct. 156, 4 L.Ed.2d 121; *Milwaukee Towne Corp. v. Loew's, Inc.,* 190 F.2d 561 (CA7 1951), cert. denied, 342 U.S. 909, 72 S.Ct. 303, 96 L.Ed. 680. The critical question is one of the likely practical effect of the arrangement: whether the "court believes it probable that performance of the contract will foreclose competition in a substantial share of the line of commerce affected." *Tampa Electric Co. v. Nashville Coal Co., supra,* 365 U.S., at 327, 81 S.Ct., at 628.

III

The market for music at issue here is wholly dominated by ASCAP-issued blanket licenses.[14] Virtually every domestic copyrighted composition is in the repertoire of either ASCAP or BMI. And again, virtually without exception, the only means that has been used to secure authority to perform such compositions is the blanket license.

14 As in the majority opinion, my references to ASCAP generally encompass BMI as well.

The blanket all-or-nothing license is patently discriminatory.[15] The user purchases full access to ASCAP's entire ***31** repertoire, even though his needs could be satisfied by a far more limited selection. The price he pays for this access is unrelated either to the quantity or the quality of the music he actually uses, or, indeed, to what he would probably use in a competitive system. Rather, in this unique all-or-nothing system, the price is based on a percentage of the user's advertising revenues,[16] a measure that reflects the customer's ability to pay[17] but is totally unrelated to factors—such as the cost, quality, or quantity of the product—that normally affect price in a competitive market. The ASCAP system requires users to buy more music than they want at a price which, while not beyond their ability to pay and perhaps not even beyond what is "reasonable" for the access they are getting,[18] may well be far higher than what they would choose to spend for music in ***32** a competitive system. It is a classic example of economic discrimination.

15 See Cirace, *CBS v. ASCAP:* An Economic Analysis of A Political Problem, 47 Ford.L.Rev. 277, 286 (1978) ("the all-or-nothing bargain allows the monopolist to reap the benefits of perfect price discrimination without confronting the problems posed by dealing with different buyers on different terms").

16 For many years prior to the commencement of this action, the BMI blanket-license fee amounted to 1.09% of net receipts from sponsors after certain specified deductions. 400 F.Supp., at 743. The fee for access to ASCAP's larger repertoire was set at 2.5% of net receipts; in recent

years, however, CBS has paid a flat negotiated fee, rather than a percentage, to ASCAP. 23 Jt.App. in CA2 No. 75–7600, pp. E1051–E1052, E1135.

17 See Cirace, *supra*, at 288:
"This history indicates that, from its inception, ASCAP exhibited a tendency to discriminate in price. A license fee based upon a percentage of gross revenue is discriminatory in that it grants the same number of rights to different licensees for different total dollar amounts, depending upon their ability to pay. The effectiveness of price discrimination is significantly enhanced by the all-or-nothing blanket license."

18 Under the ASCAP consent decree, on receipt of an application, ASCAP is required to "advise the applicant in writing of the fee which it deems reasonable for the license requested." If the parties are unable to agree on the fee within 60 days of the application, the applicant may apply to the United States District Court for the Southern District of New York for the determination of a "reasonable fee." *United States v. ASCAP,* 1950–1951 Trade Cases ¶ 62,595, p. 63,754 (S.D.N.Y.1950). The BMI decree contains no similar provision for judicial determination of a reasonable fee.

The record plainly establishes that there is no price competition between separate musical compositions.[19] Under a blanket license, it is no more expensive for a network ****1569** to play the most popular current hit in prime time than it is to use an unknown composition as background music in a soap opera. Because the cost to the user is unaffected by the amount used on any program or on all programs, the user has no incentive to economize by, for example, substituting what would otherwise be less expensive songs for established favorites or by reducing the quantity of music used on a program. The blanket license thereby tends to encourage the use of more music, and also of a larger share of what is really more valuable music, than would be expected in a competitive system characterized by separate licenses. And since revenues are passed on to composers on a basis reflecting the character and frequency of the use of their music,[20] the tendency is to increase the rewards of the established composers at the expense of those less well known. Perhaps the prospect is in any event unlikely, but the blanket license does not present a new songwriter with any opportunity to try to ***33** break into the market by offering his product for sale at an unusually low price. The absence of that opportunity, however unlikely it may be, is characteristic of a cartelized rather than a competitive market.[21]

19 ASCAP's economic expert, Robert Nathan, was unequivocal on this point:
"Q. Is there price competition under this system between separate musical compositions?
"A. No sir." Tr. 3983.

20 See 562 F.2d, at 136 n. 15.
In determining royalties ASCAP distinguishes between feature, theme, and background uses of music. The 1950 amended decree requires ASCAP

to distribute royalties on "a basis which gives primary consideration to the performance of the compositions." The 1960 decree provided for the additional option of receiving royalties under a deferred plan which provides additional compensation based on length of membership and the recognized status of the individual's works. See *United States v. ASCAP,* 1960 Trade Cases ¶ 69,612, pp. 76,469–76,470 (S.D.N.Y.1960).

21 See generally 2 P. Areeda & D. Turner, Antitrust Law 280–281, 342–345 (1978); Cirace, *supra,* n. 15, at 286–292.

The current state of the market cannot be explained on the ground that it could not operate competitively, or that issuance of more limited—and thus less restrictive—licenses by ASCAP is not feasible. The District Court's findings disclose no reason why music-performing rights could not be negotiated on a per-composition or per-use basis, either with the composer or publisher directly or with an agent such as ASCAP. In fact, ASCAP now compensates composers and publishers on precisely those bases.[22] If distributions of royalties can be calculated on a per-use and per-composition basis, it is difficult to see why royalties could not also be collected in the same way. Moreover, the record also shows that where ASCAP's blanket-license scheme does not govern, competitive markets do. A competitive market for "synch" rights exists,[23] and after the use of blanket licenses in the motion picture industry was discontinued,[24] such a market promptly developed in that industry.[25] In sum, the record demonstrates that the market at issue here is one that could be highly competitive, but is not competitive at all.

22 See n. 20, *supra*.

23 The "synch" right is the right to record a copyrighted song in synchronization with the film or videotape, and is obtained separately from the right to perform the music. It is the latter which is controlled by ASCAP and BMI. See *CBS, Inc. v. ASCAP,* 400 F.Supp., at 743.

24 See *Alden-Rochelle, Inc. v. ASCAP,* 80 F.Supp. 888 (S.D.N.Y.1948).

25 See 400 F.Supp., at 759–763; 5 Jt.App. in CA2 No. 75–7600, pp. 775–777 (testimony of Albert Berman, managing director of the Harry Fox Agency, Inc.). Television synch rights and movie performance and synch rights are handled by the Fox Agency, which serves as the broker for thousands of music publishers.

***34** IV

Since the record describes a market that could be competitive and is not, and since that market is dominated by two firms engaged in a single, blanket method of dealing, it surely seems logical to conclude that trade has been restrained unreasonably. ASCAP argues, however, that at least as to CBS, there has been no restraint at all since the network is free to deal directly with copyright holders.

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****1570** The District Court found that CBS had failed to establish that it was compelled to take a blanket license from ASCAP. While CBS introduced evidence suggesting that a significant number of composers and publishers, satisfied as they are with the ASCAP system, would be "disinclined" to deal directly with the network, the court found such evidence unpersuasive in light of CBS's substantial market power in the music industry and the importance to copyright holders of network television exposure.[26] Moreover, it is arguable that CBS could go further and, along with the other television networks, use its economic resources to exploit destructive competition among purveyors of music by driving the price of performance rights down to a far lower level. But none of this demonstrates that ASCAP's practices are lawful, or that ASCAP cannot be held liable for injunctive relief at CBS's request.

26 See 400 F.Supp., at 767–771.

The fact that CBS has substantial market power does not deprive it of the right to complain when trade is restrained. Large buyers, as well as small, are protected by the antitrust laws. Indeed, even if the victim of a conspiracy is himself a wrongdoer, he has not forfeited the protection of the law.[27] Moreover, a conclusion that excessive competition would cause one side of the market more harm than good may justify a legislative exemption from the antitrust laws, but does not ***35** constitute a defense to a violation of the Sherman Act.[28] Even though characterizing CBS as an oligopolist may be relevant to the question of remedy, and even though free competition might adversely affect the income of a good many composers and publishers, these considerations do not affect the legality of ASCAP's conduct.

27 See *Perma Life Mufflers, Inc. v. International Parts Corp.,* 392 U.S. 134, 138–140, 88 S.Ct. 1981, 1984–1985, 20 L.Ed.2d 982; *Simpson v. Union Oil Co.,* 377 U.S. 13, 16–17, 84 S.Ct. 1051, 1054–1055, 12 L.Ed.2d 98; *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211, 214, 71 S.Ct. 259, 261, 95 L.Ed. 219.

28 See *National Society of Professional Engineers v. United States,* 435 U.S. 679, 689–690, 98 S.Ct. 1355, 1364, 55 L.Ed.2d 637.

More basically, ASCAP's underlying argument that CBS must be viewed as having acted with complete freedom in choosing the blanket license is not supported by the District Court's findings. The District Court did not find that CBS could cancel its blanket license "tomorrow" and continue to use music in its programming and compete with the other networks. Nor did the District Court find that such a course was without any risk or expense. Rather, the District Court's finding was that within a year, during which it would continue to pay some millions of dollars for its annual blanket license, CBS would be able to develop the needed machinery and enter into the necessary contracts.[29] In other words, although the barriers to direct dealing by CBS as an alternative to paying for a blanket license are real and significant, they are not insurmountable.

29 See 400 F.Supp., at 762–765.

Far from establishing ASCAP's immunity from liability, these District Court findings, in my judgment, confirm the illegality of its conduct. Neither CBS nor any other user has been willing to assume the costs and risks associated with an attempt to purchase music on a competitive basis. The fact that an attempt by CBS to break down the ASCAP monopoly might well succeed does not preclude the conclusion that smaller and less powerful buyers are totally foreclosed from a competitive market.[30] Despite its size, CBS itself ***36** may not obtain ****1571** music on a competitive basis without incurring unprecedented costs and risks. The fear of unpredictable consequences, coupled with the certain and predictable costs and delays associated with a change in its method of purchasing music, unquestionably inhibits any CBS management decision to embark on a competitive crusade. Even if ASCAP offered CBS a special bargain to forestall any such crusade, that special arrangement would not cure the marketwide restraint.

30 For an individual user, the transaction costs involved in direct dealing with individual copyright holders may well be prohibitively high, at least in the absence of any broker or agency routinely handling such requests. Moreover, the District Court found that writers and publishers support and prefer the ASCAP system to direct dealing. *Id.*, at 767. While their apprehension at direct dealing with CBS could be overcome, the District Court found, by CBS's market power and the importance of television exposure, a similar conclusion is far less likely with respect to other users.

Whatever management decision CBS should or might have made, it is perfectly clear that the question whether competition in the market has been unduly restrained is not one that any single company's management is authorized to answer. It is often the case that an arrangement among competitors will not serve to eliminate competition forever, but only to delay its appearance or to increase the costs of new entry. That may well be the state of this market. Even without judicial intervention, the ASCAP monopoly might eventually be broken by CBS, if the benefits of doing so outweigh the significant costs and risks involved in commencing direct dealing.[31] But that hardly means that the blanket-licensing ***37** policy at issue here is lawful. An arrangement that produces marketwide price discrimination and significant barriers to entry unreasonably restrains trade even if the discrimination and the barriers have only a limited life expectancy. History suggests, however, that these restraints have an enduring character.

31 The risks involved in such a venture appear to be substantial. One significant risk, which may be traced directly to ASCAP and its members, relates to music "in the can"—music which has been performed on shows and movies already in the network's inventory, but for which the network must still secure performing rights. The networks accumulate substantial inventories of shows "in the can." And, as the Government has pointed out as *amicus curiae* :

> "If they [the networks and television stations] were to discontinue the blanket license, they then would be required to obtain performance rights for these already-produced shows. This attempt would create an opportunity for the copyright owners, as a condition of granting performing rights, to attempt to obtain the entire value of the shows 'in the can.' It would produce, in other words, a case of bilateral monopoly. Because pricing is indeterminate in a bilateral monopoly, television networks would not terminate their blanket licenses until they had concluded an agreement with every owner of copyrighted music 'in the can' to allow future performance for an identified price; the networks then would determine whether that price was sufficiently low that termination of the blanket license would be profitable. But the prospect of such negotiations offers the copyrights owners an ability to misuse their rights in a way that ensures the continuation of blanket licensing despite a change in market conditions that may make other forms of licensing preferable." Brief for United States as *Amicus Curiae* 24–25.
>
> This analysis is in no sense inconsistent with the findings of the District Court. The District Court did reject CBS's coercion argument as to music "in the can." But as the Government again points out, the District Court's findings were addressed essentially to a tie-in claim; "the court did not consider the possibility that the copyright owners' self-interested, non-coercive demands for compensation might nevertheless make the cost of CBS' dropping the blanket license sufficiently high that ASCAP and BMI could take this 'termination penalty' into account in setting fees for the blanket license." *Id.,* at 25 n. 23.

Antitrust policy requires that great aggregations of economic power be closely scrutinized. That duty is especially important when the aggregation is composed of statutory monopoly privileges. Our cases have repeatedly stressed the need to limit the privileges conferred by patent and copyright strictly to the scope of the statutory grant. The record in this case plainly discloses that the limits have been exceeded and that ASCAP and BMI exercise monopoly powers that far exceed the sum of the privileges of the individual copyright holders. ***38** Indeed, ASCAP itself argues that its blanket license constitutes a product that is significantly different from the sum of its component parts. I agree with that premise, but I conclude that the aggregate is a monopolistic restraint of trade proscribed by the Sherman Act.

All Citations

441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1, 201 U.S.P.Q. 497, 1979-1 Trade Cases P 62,558, 1978-81 Copr.L.Dec. P 25,064

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97 S.Ct. 690
Supreme Court of the United States

BRUNSWICK CORPORATION, Petitioner,
v.
PUEBLO BOWL-O-MAT, INC., et al.

No. 75-904.
|
Argued Nov. 3, 1976.
|
Decided Jan. 25, 1977.

Synopsis

Operators of bowling centers brought action against manufacturer of bowling equipment alleging that manufacturer's acquisition of bowling centers violated antitrust laws. The United States District Court for the District of New Jersey denied manufacturer's motions for judgment n. o. v. and entered judgment on damages claims, 364 F.Supp. 316, granted injunctive relief and ordered divestiture, 389 F.Supp. 996, and appeals were taken. The Court of Appeals, 523 F.2d 262, reversed and remanded for further proceedings because of errors in instructions. Certiorari was granted. The Supreme Court, Mr. Justice Marshall, held that plaintiffs' loss of income that would have accrued had the failing centers acquired by manufacturer of bowling equipment gone bankrupt was not the type of injury the Clayton Act was intended to forestall; that for plaintiffs to recover treble damages on account of section 7 violations, they must prove injury which reflects the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation; and as plaintiffs did not prove any cognizable damages after two trials and ten years of litigation, defendant was entitled to judgment on the damages claim notwithstanding the verdict.

Judgment of Court of Appeals vacated and case remanded.

****691** *Syllabus* [*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

***477** Respondents, bowling centers in three distinct markets, brought this antitrust action against petitioner, one of the two largest bowling equipment manufacturers and the largest operator of bowling centers, claiming that petitioner's acquisitions of competing bowling centers that had defaulted in payments for bowling equipment that they had purchased from petitioner might substantially lessen competition or tend to create a monopoly in violation of s 7 of the Clayton Act. Respondents sought treble damages pursuant to s 4 of the Act as well as injunctive and other relief. At trial they sought to prove that petitioner because of its size had the capacity to lessen competition in the markets it had entered by driving smaller competitors out of business. To establish damages, respondents attempted to show that had petitioner allowed the defaulting centers to close, respondents' profits would have increased. The jury returned a verdict for damages in ****692** favor of respondents, which

the District Court trebled in accordance with s 4. The Court of Appeals, while endorsing the legal theories upon which respondents' claim was based, reversed the case and remanded for further proceedings because of errors in the trial court's instructions to the jury. The court concluded that a properly instructed jury could have found that a “giant” like petitioner entering a market of “pygmies” might lessen horizontal retail competition. The court also concluded that there was sufficient evidence to permit a jury to find that but for petitioner's actions, the acquired centers would have gone out of business. The court held that if a jury were to make such findings, respondents would be entitled to damages for threefold the income they would have earned. Petitioner's petition for certiorari challenged the theory that the Court of Appeals had approved for awarding damages. Held:

1. For plaintiffs in an antitrust action to recover treble damages on account of s 7 violations, they must prove more than that they suffered injury which was causally linked to an illegal presence in the market; they must prove injury of the type that the antitrust laws were intended to prevent and that flows from that which makes the defendants' acts unlawful. The injury must reflect the anticompetitive effect ***478** of either the violation or of anticompetitive acts made possible by the violation. Pp. 695-698.

(a) Section 4 is essentially a remedial provision, and to recover damages respondents must prove more than that petitioner violated s 7. Pp. 696-697.

(b) Congress has condemned mergers only when they may produce anticompetitive effects; yet under the Court of Appeals' holding, once a merger is found to violate s 7, all dislocations that the merger caused are actionable regardless of whether the dislocations have anything to do with the reason the merger was condemned. Here if the acquisitions were unlawful it is because they brought a “deep pocket” parent into a market of “pygmies,” but respondents' injury is unrelated to the size of either the acquiring company or its competitors; it would have suffered the identical loss but without any recourse had the acquired centers secured refinancing or had they been bought by a “shallow pocket” parent. Pp. 696-697.

2. Petitioner is entitled under Fed.Rule Civ.Proc. 50(b) to judgment on the damages claim notwithstanding the verdict, since respondents' case was based solely on their novel theory, rejected herein, of damages ascribable to profits they would have received had the acquired centers been closed, and since respondents have not shown any reason to require a new trial. P. 698.

3. Respondents remain free on remand to seek equitable relief. P. 698.

3 Cir., 523 F.2d 262, vacated and remanded.

Attorneys and Law Firms

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Malcolm A. Hoffmann, New York City, for respondents.

Opinion

Mr. Justice MARSHALL delivered the opinion of the Court.

This case raises important questions concerning the interrelationship of the antimerger and private damages action provisions of the Clayton Antitrust Act.

***479** I

Petitioner is one of the two largest manufacturers of bowling equipment in the United States. Respondents are three of the 10 bowling centers owned by Treadway Companies, Inc. Since 1965, petitioner has acquired and operated a large number of bowling centers, including six in the markets in which respondents operate. Respondents instituted this action contending that these acquisitions violated various provisions of the antitrust laws.

In the late 1950's, the bowling industry expanded rapidly, and petitioner's sales of lanes, automatic pinsetters, and ancillary ****693** equipment rose accordingly.[1] Since this equipment requires a major capital expenditure $12,600 for each lane and pinsetter, App. A1576 most of petitioner's sales were for secured credit.

1 Sales of automatic pinsetters, for example, went from 1,890 in 1956, to 16,288 in 1961. App. A1866.

In the early 1960's, the bowling industry went into a sharp decline. Petitioner's sales quickly dropped to preboom levels. Moreover, petitioner experienced great difficulty in collecting money owed it; by the end of 1964 over $100,000,000, or more than 25%, of petitioner's accounts were more than 90 days delinquent. Id., at A1884. Repossessions rose dramatically, but attempts to sell or lease the repossessed equipment met with only limited success.[2] Because petitioner had borrowed close to $250,000,000 to finance its credit sales, id., at A1900, it was, as the Court of Appeals concluded, "in serious financial difficulty." NBO Industries Treadway Cos., Inc. v. Brunswick Corp., 523 F.2d 262, 267 (CA3 1975).

2 Repossessions of pinsetters increased from 300 in 1961 to 5,996 in 1965. Ibid. In 1963, petitioner resold over two-thirds of the pinsetters repossessed; more typically, only one-third were resold, and in 1965, less than one-quarter were resold. Id., at A1879.

To meet this difficulty, petitioner began acquiring and ***480** operating defaulting bowling centers when their equipment could not be resold and a positive cash flow could be expected from operating the centers. During the seven years preceding the trial in this case, petitioner acquired 222 centers, 54 of which it either disposed of or closed. Ibid. These acquisitions made petitioner by far the largest operator of bowling centers, with over five times as many centers as its next largest competitor. Ibid. Petitioner's net worth in 1965 was more than eight times greater, and its gross revenue more than seven times greater, than the total for the 11 next largest bowling chains. App. A1675. Nevertheless, petitioner controlled only 2% of the bowling centers in the United States. Id., at A1096.

At issue here are acquisitions by petitioner in the three markets in which respondents are located: Pueblo, Colo., Poughkeepsie, N. Y., and Paramus, N. J. In 1965, petitioner acquired one defaulting center in Pueblo, one in Poughkeepsie, and two in the Paramus area. In 1969, petitioner acquired a third defaulting center in the Paramus market, and in 1970 petitioner acquired a fourth. Petitioner closed its Poughkeepsie center in 1969 after three years of unsuccessful operation; the Paramus center acquired in 1970 also proved unsuccessful, and in March 1973 petitioner gave notice that it would cease operating the center when its lease expired. The other four centers were operational at the time of trial.

Respondents initiated this action in June 1966, alleging, inter alia, that these acquisitions might substantially lessen competition or tend to create a monopoly in violation of s 7 of the Clayton Act, 15 U.S.C. s 18.[3] Respondents sought ***481** damages, pursuant to s 4 of the Act, 15 U.S.C. s 15, for three times “the reasonably expectable profits to be made (by respondents) from the operation of their bowling centers.” App. A24. Respondents also sought a divestiture order, an injunction against future acquisitions, and such “other further and different relief” as might be appropriate under s 16 of the Act, 15 U.S.C. s 26. App. A27.

3 The complaint contained two additional counts. Count one alleged that petitioner had violated s 1 of the Sherman Act, 15 U.S.C. s 1, by fixing resale prices for bowling supplies sold by petitioner to respondents. This count was abandoned prior to trial. Count two alleged that by virtue of the acquisitions and other acts, petitioner was guilty of monopolization or an attempt to monopolize in violation of s 2 of the Sherman Act, 15 U.S.C. s 2. The jury found for petitioner on this count, and respondents did not appeal.

The complaint also named as plaintiffs National Bowl-O-Mat, the predecessor to Treadway Companies, and the seven other bowling center subsidiaries of Treadway. These plaintiffs were unsuccessful on all counts, however, and they did not appeal the judgments entered against them.

****694** Trial was held in the spring of 1973, following an initial mistrial due to a hung jury. To establish a s 7 violation, respondents sought to prove that because of its size, petitioner had the capacity to lessen competition in the markets it had entered by driving smaller competitors out of business. To establish damages, respondents attempted to show that had petitioner allowed the defaulting centers to close, respondents' profits would have increased. At respondents' request, the jury was instructed in accord with respondents' theory as to the nature of the violation and the basis for damages. The jury returned a verdict in favor of respondents in the amount of $2,358,030, which represented the minimum estimate by respondents of the additional income they would have realized had the acquired centers been closed. Id., at A1737. As required by law, the District Court trebled the damages.[4] It also awarded respondents costs and attorneys' ***482** fees totaling $446,977.32, and, sitting as a court of equity, it ordered petitioner to divest itself of the centers involved here, Treadway

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Cos. v. Brunswick Corp., 389 F.Supp. 996 (N.J.1974). Petitioner appealed. [5]

4 Judgment ultimately was entered for $6,575,040, which is $499,050 less than three times the jury's damages award, after respondent Pueblo Bowl-O-Mat consented to a remittitur which the District Court proposed as an alternative to a retrial on damages. Treadway Cos. v. Brunswick Corp., 364 F.Supp. 316, 324-326 (N.J.1973). The remittitur was deemed necessary because the jury apparently awarded damages to that respondent in accord with its minimum claim dating back to 1963, when the alleged s 2 violation began, rather than back to 1965, when the alleged s 7 violation began. The District Court thought that the jury might have been confused by the instruction to use the same methods for calculating damages under the two sections. Ibid.

5 Petitioner's appeal and respondents' cross-appeal with respect to the amount of the attorneys' fee award initially were dismissed by the Court of Appeals for want of jurisdiction because the District Court had neither disposed of respondents' equitable claim nor certified the judgment entered on the legal claims pursuant to Fed.Rule Civ.Proc. 54(b). Treadway Cos. v. Brunswick Corp., 500 F.2d 1400 (CA3 1974) (order reported); App. A1563-A1566 (per curiam opinion reprinted). The District Court then certified the previously entered judgment, and the parties reappealed. While the appeals were pending, the District Court granted equitable relief, and the appeal from that judgment was consolidated with the pending appeals.

The Court of Appeals, while endorsing the legal theories upon which respondents' claim was based, reversed the judgment and remanded the case for further proceedings. NBO Industries Treadway Cos. v. Brunswick Corp., supra. The court found that a properly instructed jury could have concluded that petitioner was a "giant" whose entry into a "market of pygmies" might lessen horizontal retail competition, because such a "giant"

"has greater ease of entry into the market, can accomplish cost-savings by investing in new equipment, can resort to low or below cost sales to sustain itself against competition for a longer period, and can obtain more favorable credit terms." 523 F.2d, at 268.

The court also found that there was sufficient evidence to permit a jury to conclude that but for petitioner's actions, the acquired centers would have gone out of business. ***483** Id., at 273, 275-277. And the court held that if a jury were to make such findings, respondents would be entitled to damages for threefold the income they would have earned. After reviewing the instructions on these issues, however, the court decided that the jury had not been properly charged and that therefore a new trial was required. Id., at 275-277. [6] It also ****695** decided that since "an essential predicate" for the District Court's grant of equitable relief was the jury verdict on the s 7 claim, the equitable decree should be vacated as well. Id., at 277-278. And it concluded

that in any event equitable relief "should be restricted to preventing those practices by which a deep pocket market entrant harms ***484** competition. . . . (D)ivestiture was simply inappropriate." Id., at 279.

6 With respect to the instruction on the issue of liability, the court concluded that since petitioner's acquisitions "did not increase concentration," the District Court had erred by focusing on the size of the market shares acquired by petitioner rather than on "indicators of qualitative substantiality" such as the "relative financial strength of Brunswick, Treadway, and other competitors," or "any retail market advantage" enjoyed by petitioner because of its status as financier and manufacturer. NBO Industries Treadway Cos. v. Brunswick Corp., 523 F.2d, at 274-275 (CA3 1975). With respect to the instruction on damages, the Court of Appeals concluded that the District Court had failed to direct the jury to decide whether petitioner's actions were responsible for keeping the acquired centers in business before considering how much additional income respondents would have earned if the acquired centers had been closed. Id., at 276-277.
The Court of Appeals also held, id., at 275, that in instructing the jury on the statutory requirement that the acquired company be "engaged . . . in commerce," the District Court had not anticipated this Court's decision in United States v. American Bldg. Maint. Industries, 422 U.S. 271, 95 S.Ct. 2150, 45 L.Ed.2d 177 (1975), which read the "in commerce" requirement more restrictively than had the leading decision of the Third Circuit, Transamerica Corp. v. Board of Governors, 206 F.2d 163, cert. denied, 346 U.S. 901, 74 S.Ct. 225, 98 L.Ed. 401 (1953). Indeed, the court indicated that there might not be sufficient evidence in the record to satisfy the "in commerce" test. 523 F.2d at 271. The court concluded, however, that given the change in the law, it would be "unjust" to find the evidence insufficient and thereby deny plaintiffs an opportunity to meet the new test on retrial.

Both sides petitioned this Court for writs of certiorari. Brunswick's petition challenged the theory the Court of Appeals had approved for awarding damages; the plaintiffs' petition challenged the Court of Appeals' conclusions with respect to the jury instructions and the appropriateness of a divestiture order.[7] We granted Brunswick's petition.[8] 424 U.S. 908, 96 S.Ct. 1101, 47 L.Ed.2d 311 (1976).

7 Both petitions also questioned the Court of Appeals' decision to require relitigation of the "in commerce" issue, see n. 6, supra. Brunswick maintained it was entitled to a directed verdict on this issue; plaintiffs argued that they had satisfied the new test and that therefore no new trial was required.

8 The grant of certiorari excluded the question Brunswick sought to present concerning the sufficiency of the evidence that the acquired companies

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were engaged "in commerce," see nn. 6, 7, supra.

No action has been taken with respect to respondents' petition.

II

The issue for decision is a narrow one. Petitioner does not presently contest the Court of Appeals' conclusion that a properly instructed jury could have found the acquisitions unlawful. Nor does petitioner challenge the Court of Appeals' determination that the evidence would support a finding that had petitioner not acquired these centers, they would have gone out of business and respondents' income would have increased. Petitioner questions only whether antitrust damages are available where the sole injury alleged is that competitors were continued in business, thereby denying respondents an anticipated increase in market shares.[9]

9 Petitioner raises this issue directly through the first question presented, and indirectly through the second, which asks:

"Does not the 'failing company' principle require dismissal of a treble-damage action based on alleged violations of Section 7 of the Clayton Act where the plaintiffs' entire damage theory is based on the premise that the 'acquired' businesses would have failed and disappeared from the market had the defendant not kept them alive by making the challenged 'acquisitions?' " Pet. for Cert. 3.

In light of our holding, we have no occasion to consider the applicability of the failing-company defense to the conglomerate-like acquisitions involved here.

***485** To answer that question it is necessary to examine the antimerger and treble-damages provisions of the Clayton Act. Section 7 of the Act proscribes mergers whose effect "may be substantially to lessen competition, or to tend to create a monopoly." (Emphasis added.) It is, as we have observed many times, a prophylactic measure, intended "primarily to arrest apprehended consequences of intercorporate relationships before those relationships could work their evil . . . ." United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586, 597, 77 S.Ct. 872, 879, 1 L.Ed.2d 1057 (1957). See also Brown Shoe Co. v. United States, 370 U.S. 294, 317-318, 82 S.Ct. 1502, 8 L.Ed.2d 510 (1962); ****696** United States v. Philadelphia Nat. Bank, 374 U.S. 321, 362-363, 83 S.Ct. 1715, 10 L.Ed.2d 915 (1963); United States v. Penn-Olin Chemical Co., 378 U.S. 158, 170-171, 84 S.Ct. 1710, 12 L.Ed.2d 775 (1964); United States v. Von's Grocery Co., 384 U.S. 270, 277, 86 S.Ct. 1478, 16 L.Ed.2d 555 (1966); FTC v. Procter & Gamble Co., 386 U.S. 568, 577-578, 87 S.Ct. 1224, 18 L.Ed.2d 303 (1967); Gulf Oil Corp. v. Copp Paving Co., 419 U.S. 186, 201, 95 S.Ct. 392, 42 L.Ed.2d 378 (1974).

Section 4, in contrast, is in essence a remedial provision. It provides treble damages to "(a)ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws . . . ." Of course, treble damages also play an important role in penalizing wrongdoers and deterring wrongdoing, as we also have frequently observed. Perma Life Mufflers v. International Parts Corp., 392 U.S.

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134, 139, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968); Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495, 502, 89 S.Ct. 1252, 22 L.Ed.2d 495 (1969); Zenith Radio Corp. v. Hazeltine Research, 395 U.S. 100, 130, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969); Hawaii v. Standard Oil Co., 405 U.S. 251, 262, 92 S.Ct. 885, 31 L.Ed.2d 184 (1972). It nevertheless is true that the treble-damages provision, which makes awards available only to injured parties, and measures the awards by a ***486** multiple of the injury actually proved, is designed primarily as a remedy. [10]

10 Treble-damages antitrust actions were first authorized by s 7 of the Sherman Act, 26 Stat. 210 (1890). The discussions of this section on the floor of the Senate indicate that it was conceived of primarily as a remedy for "(t) he people of the United States as individuals," especially consumers. 21 Cong.Rec. 1767-1768 (1890) (remarks of Sen. George); see id., at 2612 (Sens. Teller and Reagan), 2615 (Sen. Coke), 3146-3149. Treble damages were provided in part for punitive purposes, id., at 3147 (Sen. George), but also to make the remedy meaningful by counterbalancing "the difficulty of maintaining a private suit against a combination such as is described" in the Act. Id., at 2456 (Sen. Sherman).
When Congress enacted the Clayton Act in 1914, it "extend(ed) the remedy under section 7 of the Sherman Act" to persons injured by virtue of any antitrust violation. H.R.Rep.No.627, 63d Cong., 2d Sess., 14 (1914). The initial House debates concerning provisions related to private damages actions reveal that these actions were conceived primarily as "open(ing) the door of justice to every man, whenever he may be injured by those who violate the antitrust laws, and giv(ing) the injured party ample damages for the wrong suffered." 51 Cong.Rec. 9073 (1914) (remarks of Rep. Webb); see, e. g., id., at 9079 (Rep. Volstead), 9270 (Rep. Carlin), 9414-9417, 9466-9467, 9487-9495. The House debates following the conference committee report, however, indicate that the sponsors of the bill also saw treble-damages suits as an important means of enforcing the law. Id., at 16274-16275 (Rep. Webb), 16317-16319 (Rep. Floyd). In the Senate there was virtually no discussion of the enforcement value of private actions, even though the bill was attacked as lacking meaningful sanctions, e. g., id., at 15818-15821 (Sen. Reed), 16042-16046 (Sen. Norris).

Intermeshing a statutory prohibition against acts that have a potential to cause certain harms with a damages action intended to remedy those harms is not without difficulty. Plainly, to recover damages respondents must prove more than that petitioner violated s 7, since such proof establishes only that injury may result. Respondents contend that the only additional element they need demonstrate is that they are in a worse position than they would have been had petitioner not committed those acts. The Court of Appeals agreed, ***487** holding compensable any loss "causally linked" to "the mere presence of the violator in the market."

523 F.2d, at 272-273. Because this holding divorces antitrust recovery from the purposes of the antitrust laws without a clear statutory command to do so, we cannot agree with it.

Every merger of two existing entities into one, whether lawful or unlawful, has the potential for producing economic readjustments that adversely affect some persons. But Congress has not condemned mergers on that account; it has condemned them only when they may produce anticompetitive effects. Yet under the Court of Appeals' holding, once a merger is found to violate s 7, all dislocations caused by the merger are actionable, regardless of whether ****697** those dislocations have anything to do with the reason the merger was condemned. This holding would make s 4 recovery entirely fortuitous, and would authorize damages for losses which are of no concern to the antitrust laws.[11]

[11] See Areeda, Antitrust Violations Without Damage Recoveries, 89 Harv.L.Rev. 1127, 1130-1136 (1976); Symposium, Private Enforcement of the Antimerger Laws, 31 Record of N.Y.C.B.A., 239, 260-261 (1976).

Both of these consequences are well illustrated by the facts of this case. If the acquisitions here were unlawful, it is because they brought a "deep pocket" parent into a market of "pygmies." Yet respondents' injury the loss of income that would have accrued had the acquired centers gone bankrupt bears no relationship to the size of either the acquiring company or its competitors. Respondents would have suffered the identical "loss" but no compensable injury had the acquired centers instead obtained refinancing or been purchased by "shallow pocket" parents as the Court of Appeals itself acknowledged, 523 F.2d, at 279.[12] Thus, respondents' injury was not of "the type that the statute was ***488** intended to forestall," Wyandotte Co. v. United States, 389 U.S. 191, 202, 88 S.Ct. 379, 386, 19 L.Ed.2d 407 (1967).[13]

[12] Conversely, had petitioner acquired thriving centers acquisitions at least as violative of s 7 as the instant acquisitions respondents would not have lost any income that they otherwise would have received.

[13] For instances in which plaintiffs unsuccessfully sought damages for injuries unrelated to the reason the merger was prohibited, see Reibert v. Atlantic Richfield, Co., 471 F.2d 727 (CA10), cert. denied, 411 U.S. 938, 93 S.Ct. 1900, 36 L.Ed.2d 399 (1973); Peterson v. Borden Co., 50 F.2d 644 (CA7 1931); Kirihara v. Bendix Corp., 306 F.Supp. 72 (Haw. 1969); Goldsmith v. St. Louis-San Francisco R. Co., 201 F.Supp. 867 (WDNC 1962).

But the antitrust laws are not merely indifferent to the injury claimed here. At base, respondents complain that by acquiring the failing centers petitioner preserved competition, thereby depriving respondents of the benefits of increased concentration. The damages respondents obtained are designed to provide them with the profits they would have realized had competition been reduced. The antitrust laws, however, were enacted for "the protection of competition not competitors,"

Brown Shoe Co. v. United States, 370 U.S., at 320, 82 S.Ct., at 1521. It is inimical to the purposes of these laws to award damages for the type of injury claimed here.

Of course, Congress is free, if it desires, to mandate damages awards for all dislocations caused by unlawful mergers despite the peculiar consequences of so doing. But because of these consequences, "we should insist upon a clear expression of a congressional purpose," Hawaii v. Standard Oil Co., 405 U.S., at 264, 92 S.Ct., at 892, before attributing such an intent to Congress. We can find no such expression in either the language or the legislative history of s 4. To the contrary, it is far from clear that the loss of windfall profits that would have accrued had the acquired centers failed even constitutes "injury" within the meaning of s 4. And it is quite clear that if respondents were injured, it was not "by reason of anything forbidden in the antitrust laws": while respondents' loss occurred "by reason of" the unlawful acquisitions, it did not occur "by reason of" that which made the acquisitions unlawful.

***489** We therefore hold that the plaintiffs to recover treble damages on account of s 7 violations, they must prove more than injury causally linked to an illegal presence in the market. Plaintiffs must prove antitrust injury, which is to say injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation. It should, in short, be "the type of loss that the claimed violations . . . would be likely to cause." ****698** Zenith Radio Corp. v. Hazeltine Research, 395 U.S., at 125, 89 S.Ct., at 1577.[14]

14 See generally GAF Corp. v. Circle Floor Co., 463 F.2d 752 (CA2 1972), cert. dismissed, 413 U.S. 901 (1973); Comment, Section 7 of the Clayton Act: The Private Plaintiff's Remedies, 7 B.C.Ind. & Comm.L.Rev. 333 (1966); Comment, Treble Damage Actions for Violations of Section 7 of the Clayton Act, 38 U.Chi.L.Rev. 404 (1971).
This does not necessarily mean, as the Court of Appeals feared, 523 F.2d at 272, that s 4 plaintiffs must prove an actual lessening of competition in order to recover. The short-term effect of certain anticompetitive behavior predatory below-cost pricing, for example may be to stimulate price competition. But competitors may be able to prove antitrust injury before they actually are driven from the market and competition is thereby lessened. Of course, the case for relief will be strongest where competition has been diminished. See, e. g., Calnetics Corp. v. Volkswagen of America, Inc., 532 F.2d 674 (CA9 1976); Metric Hosiery Co. v. Spartans Industries, Inc., 50 F.R.D. 50 (S.D.N.Y.1970); Klingsberg, Bull's Eyes and Carom Shots: Complications and Conflicts on Standing to Sue and Causation Under Section 4 of the Clayton Act, 16 Antitrust Bull. 351, 364 (1971).

III

We come, then, to the question of appropriate disposition of this case. At the very least, petitioner is entitled to a new trial, not only because of the instructional errors noted by the Court of Appeals that are not at issue here, see n. 6, supra, but also because the District Court's instruction ***490** as to the basis for damages was inconsistent with our holding as outlined above. Our review of the record, however, persuades us that a new trial on the damages claim is unwarranted. Respondents based their case solely on their novel damages theory which we have rejected. While they produced some conclusory testimony suggesting that in operating the acquired centers petitioner had abused its deep pocket by engaging in anticompetitive conduct,[15] they made no attempt to prove that they had lost any income as a result of such predation.[16] Rather, their entire proof of damages was based on their claim to profits that would have been earned had the acquired centers closed. Since respondents did not prove any cognizable damages and have not offered any justification for allowing respondents, after two trials and over 10 years of litigation, yet a third opportunity to do so, it follows that, petitioner is entitled, in accord with its motion made pursuant to Rule 50(b), to judgment on the damages claim notwithstanding the verdict. Neely v. Eby Constr. Co., 386 U.S. 317, 326-330, 87 S.Ct. 1072, 18 L.Ed.2d 75 (1967); United States v. Generes, 405 U.S. 93, 106-107, 92 S.Ct. 827, 31 L.Ed.2d 62 (1972).

15 Respondents' testimony concerned price reductions at three centers, App. A.170, A420, A431; unjustified capital expenses at three centers, id., at A503-A506, A829-A830; and extravagant "give-aways," id., at A169-A170, A222-A223, A413-A414, A569. This testimony is rather unimpressive when viewed against both petitioner's contemporaneous business records which reveal that it did not lower prices when it took over the centers, Defendant's Exhibits D-32, D-33, D-36, D-38, and respondents' own exhibits, which demonstrate that petitioner made a profit at two centers, App. A1700, generated a positive cash flow at three others, id., at A1717, A1720, and closed the two centers that were unsuccessful, id., at A1725, A1733.

16 One of respondents' witnesses did testify that he knew of one bowling league in Pueblo that had shifted from a respondent to petitioner after petitioner installed faster automatic pinsetters. Id., at 508. Assuming, arguendo, that such installations were not cost justified and constituted a form of predation, respondents still made no attempt to quantify the loss.

***491** Respondents' complaint also prayed for equitable relief, and the Court of Appeals held that if respondents established a s 7 violation, they might be entitled to an injunction against "those practices by which a deep pocket market entrant harms competition." 523 F.2d, at 279. Because petitioner has not contested this holding, respondents remain free, on remand, to seek such a decree.

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The judgment of the Court of Appeals is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

All Citations

429 U.S. 477, 97 S.Ct. 690, 50 L.Ed.2d 701, 1977-1 Trade Cases P 61,255

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920 F.2d 446
United States Court of Appeals,
Seventh Circuit.

Joseph F. CADA, Plaintiff–Appellant,
v.
BAXTER HEALTHCARE CORPORATION, Defendant–Appellee.

No. 90–1888.
|
Argued Oct. 31, 1990.
|
Decided Dec. 13, 1990.
|
Rehearing Denied Jan. 17, 1991.

Synopsis

In age discrimination action, the United States District Court for the Northern District of Illinois, Harry D. Leinenweber, J., granted summary judgment for employer on ground that suit was time barred and dismissed action, and appeal was taken. The Court of Appeals, Posner, Circuit Judge, held that neither doctrine of equitable tolling nor discovery rule extended time within which employee could bring action.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Attorneys and Law Firms

***448** John A. Cook and Mercedes Matias, Hough, Cook, Weatherhead & Kinsella, Chicago, Ill., for plaintiff-appellant.

David J. Parsons, Dana S. Connell, and Kathryn A. Mrkonich, Wildman, Harrold, Allen & Dixon, Chicago, Ill., for defendant-appellee.

Before WOOD, Jr., POSNER and EASTERBROOK, Circuit Judges.

Opinion

POSNER, Circuit Judge.

The plaintiff, Joseph Cada, complains that the defendant, Baxter Healthcare, fired him in violation of the Age Discrimination in Employment Act, 29 U.S.C. §§ 621 *et seq.* The district court granted summary judgment for the defendant on the ground that the suit was time-barred, and dismissed the suit. The appeal presents fascinating and important questions regarding statutes of limitations generally and the age discrimination statute of limitations in particular.

Cada was the manager of Baxter's "creative services" department, the principal function of which was to produce the catalog of the company's drug products (the "armamentarium," as such catalogs are known). On the catalog project Cada reported to Jim Becks, the company's director of sales and marketing, although in all other respects he reported to Jim Stauner, the vice president for marketing. In April 1987 Becks was promoted to vice president for business planning and development but retained supervisory authority over the catalog project. The project was chronically behind schedule and over budget, and shortly after his promotion Becks asked Cada for a comprehensive report. Armed with this report Becks discussed the project with

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the company's president and the other vice presidents in a series of meetings late in April. They decided that the department should be reorganized to emphasize more aggressive tactics for marketing Baxter's products and that Cada was not the man to head up the reorganized department. On May 5 Becks met with Cada to inform him that the department would be reorganized and that he assumed Cada would be retiring because he was approaching 65. When Cada responded that he was not planning to retire, ***449** Becks told him that in that event he would be terminated about two weeks after a new manager for the department was hired, probably in July. Cada claims that he did not believe Becks had the authority to fire him and was even unsure whether Becks was attempting to fire him, as distinct from urging him to take early retirement.

Right after the meeting with Becks, Cada did two things. He went to the company's human resources department and obtained a packet of outplacement and benefit forms, which he filled out a few days later. And he tried to see Stauner, whom he considered his real supervisor. Stauner was unavailable and it was not till May 22 that they were able to meet. At that meeting Stauner told him that the decision to fire Cada had been made by Becks and that he, Stauner, could do nothing about it. On July 7 Cada's replacement appeared. She was a young woman. Three weeks after she started work, Cada was terminated. He filed his complaint with the Equal Employment Opportunity Commission on March 4, 1988, which was more than 300 days after his meeting with Becks on May 5, 1987, but less than 300 days after his meeting with Stauner on May 22. The administrative statute of limitations in the age discrimination law is 300 days for cases filed in Illinois. *Davidson v. Board of Governors,* 920 F.2d 441, 442 (7th Cir.1990).

In *Delaware State College v. Ricks,* 449 U.S. 250, 101 S.Ct. 498, 66 L.Ed.2d 431 (1980), the question was whether a cause of action for discrimination accrued when the plaintiff was denied tenure, allegedly on discriminatory grounds, or when his employment contract expired a year later; the Court held that it was the former. Baxter argues that, similarly, the date on which Cada was told he was terminated—May 5—was the date on which the statute of limitations started to run, not May 22 when the termination was confirmed by Stauner, or the end of July when Cada actually left Baxter's employ. Against this argument, which persuaded the district judge, Cada hurls a barrage of counterarguments: that Becks had no authority to fire Cada, so there was no adverse personnel action on May 5—the decision to terminate was made by Stauner on May 22 when he met with Cada; that whatever Becks's actual authority, Cada sincerely and reasonably believed that Becks was not authorized to fire him; and that not until Cada learned that his replacement was young and relatively inexperienced did he realize he was a victim of age discrimination, so the statute of limitations did not begin to run until then (July 7).

To Cada's point about Becks's authority to fire him on May 5, Baxter's first reply is that all that matters is that a reasonable person in Cada's position would have thought he was being fired. This cannot be right. Suppose someone had forged a letter from Becks to Cada, announcing that Cada was fired, which Cada received on May 1. Would the statute of limitations have

begun to run on May 1? Surely no, though at argument Baxter's counsel said yes. Or suppose a year earlier Cada had gone to a fortune teller, who had gazed into her crystal ball and there seen Cada drawing unemployment benefits. Would the statute of limitations have begun to run on that day? Again the answer is no. The statute of limitations does not begin to run until the defendant takes some action, whatever the plaintiff knows or thinks. *Ricks* does not hold that the statute of limitations begins to run as soon as the handwriting is on the wall. The point was not that when Ricks was denied tenure he knew his days were numbered. The point was that the denial of tenure was an adverse personnel action forbidden if done for discriminatory reasons; it was irrelevant that the full consequences of the action were not felt till later, when Ricks, unprotected by tenure, was let go upon the expiration of his employment contract. In our forged-letter and crystal-ball cases the employee learned his fate before any adverse personnel action was taken, and until it is taken his claim has not accrued and the statute of limitations has not begun to run. Compare *In re UNR Industries, Inc.,* 725 F.2d 1111, 1119 (7th Cir.1984).

So if Becks was merely telling Cada that he had better take early retirement because ***450** he, Becks, was going to advise Stauner, Cada's direct superior, to fire him, then no adverse personnel action was taken at the May 5 meeting and the statute of limitations did not begin to run then, any more than it would have begun to run in *Ricks* if and when a faculty member had told Ricks a month before the vote on tenure that he was going to vote against him. But Baxter submitted to the district court a mass of testimonial material all to the effect that, before May 5, the president of the division of Baxter in which Cada worked had authorized Becks to reorganize the creative services department and in the process to jettison Cada. This evidence, which was not contradicted, showed that Becks was authorized to fire Cada and that he did so at the May 5 meeting. By Cada's own version of the meeting of May 22 with Stauner, Stauner merely made clear at that meeting that Becks had been acting within his actual authority when he fired Cada. The May 5 meeting was the equivalent of the tenure vote in *Ricks.* It was the making and communication to Cada of the decision to fire him effective within a few weeks after Cada's replacement came on board.

We just said "communication," but suppose the decision was not *clearly* communicated to Cada. Suppose, as Cada's deposition suggests, that Becks pussyfooted around and as a result Cada failed to get the message until his interview with Stauner on May 22. And suppose further that until his replacement appeared on July 7, Cada could not be reasonably confident that he had been fired because of his age. Would it not be unreasonable to hold that the statute of limitations began to run before he was in full possession of the information—that he had indeed been fired and that he had been replaced by a much younger person—which he needed in order to decide whether he had a claim against Baxter under the age discrimination law?

Unfortunately it is not possible to answer this question with a simple yes or no. We must first distinguish between the *accrual* of the plaintiff's claim and the *tolling* of the statute

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of limitations, then between two doctrines of tolling, last between different kinds of information that Cada may or may not have possessed. Accrual is the date on which the statute of limitations begins to run. It is not the date on which the wrong that injures the plaintiff occurs, but the date—often the same, but sometimes later—on which the plaintiff discovers that he has been injured. The rule that postpones the beginning of the limitations period from the date when the plaintiff is wronged to the date when he discovers he has been injured is the "discovery rule" of federal common law, which is read into statutes of limitations in federal-question cases (even when those statutes of limitations are borrowed from state law) in the absence of a contrary directive from Congress. *Suslick v. Rothschild Securities Corp.,* 741 F.2d 1000, 1004 (7th Cir.1984), overruled on other grounds in *Short v. Belleville Shoe Mfg. Co.,* 908 F.2d 1385 (7th Cir.1990); *Jensen v. Snellings,* 841 F.2d 600, 606 (5th Cir.1988); *Cullen v. Margiotta,* 811 F.2d 698, 725 (2d Cir.1987); *Nichols v. Hughes,* 721 F.2d 657, 659 (9th Cir.1983); *Trotter v. International Longshoremen's & Warehousemen's Union,* 704 F.2d 1141, 1143 (9th Cir.1983) (per curiam). The discovery rule is implicit in the holding of *Ricks* that the statute of limitations began to run "at the time the tenure decision was made *and communicated* to Ricks," 449 U.S. at 258, 101 S.Ct. at 504 (emphasis added). If Cada did not discover that he had been injured, i.e., that a decision to terminate him had been made, until May 22, the statute of limitations did not begin to run till that day and his suit is not time-barred.

It may not be time-barred even if the statute of limitations began to run earlier. Tolling doctrines stop the statute of limitations from running even if the accrual date has passed. Two tolling doctrines might be pertinent here (others include the plaintiff's incapacity and the defendant's fugitive status). One, a general equity principle not limited to the statute of limitations context, is equitable estoppel, which comes into play if the defendant takes active steps to prevent the plaintiff from suing in time, as by promising not to plead ***451** the statute of limitations. *Holmberg v. Armbrecht,* 327 U.S. 392, 396–97, 66 S.Ct. 582, 584–85, 90 L.Ed. 743 (1946); *Mull v. ARCO Durethene Plastics, Inc.,* 784 F.2d 284, 292 (7th Cir.1986); *Taylor v. Meirick,* 712 F.2d 1112, 1118 (7th Cir.1983). Equitable estoppel in the limitations setting is sometimes called fraudulent concealment, but must not be confused with efforts by a defendant in a fraud case to conceal the fraud. To the extent that such efforts succeed, they postpone the date of accrual by preventing the plaintiff from discovering that he is a victim of a fraud. *Jensen v. Snellings, supra,* 841 F.2d at 606–07. They are thus within the domain of the discovery rule. Fraudulent concealment in the law of limitations presupposes that the plaintiff has discovered, or, as required by the discovery rule, should have discovered, that the defendant injured him, and denotes efforts by the defendant—above and beyond the wrongdoing upon which the plaintiff's claim is founded—to prevent the plaintiff from suing in time.

If Baxter had told Cada that it would not plead the statute of limitations as a defense to any suit for age discrimination that he might bring, this would be a case for equitable estoppel; so also if Baxter had presented Cada with

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forged documents purporting to negate any basis for supposing that Cada's termination was related to his age. Cada tries to bring himself within the doctrine by contending that the reorganization of the creative services department was a ruse to conceal the plan to fire him because of his age. This merges the substantive wrong with the tolling doctrine, ignoring our earlier distinction between two types of fraud. It implies that a defendant is guilty of fraudulent concealment unless it tells the plaintiff, “We're firing you because of your age.” It would eliminate the statute of limitations in age discrimination cases.

The second tolling doctrine is equitable tolling. It permits a plaintiff to avoid the bar of the statute of limitations if despite all due diligence he is unable to obtain vital information bearing on the existence of his claim. *Holmberg v. Armbrecht, supra,* 327 U.S. at 397, 66 S.Ct. at 585; *Mull v. ARCO Durethene Plastics, Inc., supra,* 784 F.2d at 291. Equitable tolling is frequently confused both with fraudulent concealment on the one hand and with the discovery rule—governing, as we have seen, accrual—on the other. It differs from the former in that it does not assume a wrongful—or any—effort by the defendant to prevent the plaintiff from suing. It differs from the latter in that the plaintiff is assumed to know that he has been injured, so that the statute of limitations has begun to run; but he cannot obtain information necessary to decide whether the injury is due to wrongdoing and, if so, wrongdoing by the defendant. If a reasonable man in Cada's position would not have known until July 7 that he had been fired in possible violation of the age discrimination act, he could appeal to the doctrine of equitable tolling to suspend the running of the statute of limitations for such time as was reasonably necessary to conduct the necessary inquiry. The qualification “possible” is important. If a plaintiff were entitled to have all the time he needed to be *certain* his rights had been violated, the statute of limitations would never run—for even after judgment, there is no certainty.

The rule in the federal courts is that both tolling doctrines—equitable estoppel and equitable tolling—are, just like the discovery rule, grafted on to federal statutes of limitations. *Holmberg v. Armbrecht, supra,* 327 U.S. at 397, 66 S.Ct. at 585; *Irwin v. Veterans Administration,* 498 U.S. 89, ——, 111 S.Ct. 453, 456–57, 112 L.Ed.2d 435 (1990). To this as to most legal generalizations, there are exceptions. Neither tolling doctrine applies to statutes of repose, *Short v. Belleville Shoe Mfg. Co., supra,* 908 F.2d at 1391; their very purpose is to set an outer limit unaffected by what the plaintiff knows. Neither applies to a jurisdictional statute of limitations. *Hardin v. City Title & Escrow Co.,* 797 F.2d 1037, 1040–41 (D.C.Cir.1986). These exceptions are inapplicable to the age discrimination law, and we have held therefore that both tolling doctrines apply to cases under that law. ***452** *Mull v. ARCO Durethene Plastics, Inc., supra,* 784 F.2d at 291–92.

Many cases, it is true, in the age discrimination field as in other areas, fuse the two doctrines, presumably inadvertently. The most recent example in this circuit is *Stark v. Dynascan Corp.,* 902 F.2d 549, 551 (7th Cir.1990), which quotes from an earlier case the erroneous statement that “to invoke equitable tolling, the

plaintiff must therefore show that the defendant attempted to mislead him." In fact that is what the plaintiff must show if he is trying to invoke equitable *estoppel.* For equitable *tolling* all he need show is that he could not by the exercise of reasonable diligence have discovered essential information bearing on his claim. The fusion of the two doctrines in *Stark* was inadvertent. Had it been deliberate, the court would have had to circulate its opinion to the full court before publication, because it would have been overruling *Mull*—not to mention the Supreme Court (see below). 7th Cir.R. 40(f). That was not done.

Cerbone v. International Ladies' Garment Workers' Union, 768 F.2d 45 (2d Cir.1985), fuses the two tolling doctrines in a different way by saying that equitable tolling differs from equitable estoppel only in that the plaintiff does not know he has a claim in the former case and does in the latter; in both cases the defendant has taken steps to prevent the plaintiff from suing. Plainly, the second part of this proposition is incorrect. *Holmberg* makes clear that equitable tolling does not require any conduct by the defendant. 327 U.S. at 397, 66 S.Ct. at 585. See also *Irwin v. Veterans Administration, supra,* 498 U.S. at ——, 111 S.Ct. at 457. The first part of the proposition may be a correct generalization—the commonest case of equitable estoppel to plead the statute of limitations is where the defendant has promised not to plead it, and in such a case the plaintiff knows full well that he has a cause of action—but it should not be understood as creating a rule.

If the discovery rule extended the statute of limitations to May 22, then Cada is home free; and likewise if the statute of limitations was tolled between May 5 and July 7 (when he discovered that he had been replaced by a younger person), for his suit was, at worst, untimely by only two weeks. We consider the possibility of tolling first. The question is whether the statute of limitations was tolled for at least two weeks. Here the essential thing to grasp is that while it is entirely clear that the discovery rule if applicable gives the plaintiff the entire statute of limitations period in which to sue, counting from the date of discovery, and it is only a little less clear that if fraudulent concealment is shown the court must subtract from the period of limitations the entire period in which the tolling condition is in effect, *Orr v. Midland–Ross Corp.,* 600 F.2d 24, 33 (6th Cir.1979), for otherwise the defendant would obtain a benefit from his inequitable conduct, it is not at all clear that equitable tolling—a doctrine that adjusts the rights of two innocent parties—is as generous. When Cada discovered on July 7 that he had been replaced by a young and (as it seemed to him) inexperienced employee, he still had eight months in which to file his claim before the statute of limitations expired. He offers no excuse for the delay. When asked at his deposition when it was that he had first considered filing a complaint, he answered, "When I started kicking myself in the fanny for letting it go so long." And remember that we are speaking not of a judicial complaint, but of an administrative complaint. There is no duty of precomplaint inquiry in EEOC proceedings as distinct from federal court actions (Fed.R.Civ.P. 11). Cada could have prepared an adequate administrative complaint within days of July 7.

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We do not think equitable tolling should bring about an automatic extension of the statute of limitations by the length of the tolling period or any other definite term. Cf. *EEOC v. O'Grady,* 857 F.2d 383, 392 (7th Cir.1988). It is, after all, an equitable doctrine. It gives the plaintiff extra time if he needs it. If he doesn't need it there is no basis for depriving the defendant of the protection of the statute of limitations. Statutes of limitations are not ***453** arbitrary obstacles to the vindication of just claims, and therefore they should not be given a grudging application. They protect important social interests in certainty, accuracy, and repose. The statute of limitations is short in age discrimination cases as in most employment cases because delay in the bringing of suit runs up the employer's potential liability; every day is one more day of backpay entitlements. We should not trivialize the statute of limitations by promiscuous application of tolling doctrines. When we are speaking not of equitable estoppel but of equitable tolling, we are (to repeat) dealing with two innocent parties and in these circumstances the negligence of the party invoking the doctrine can tip the balance against its application—as it did, for example, in the *Irwin* case cited earlier.

It might seem that a rule of automatic extension would be much simpler to administer. The simplicity would be delusive. Inquiry would shift from how much time the plaintiff needed after he discovered the essential information bearing on his claim in order to prepare his complaint to how much information really was essential. Suppose that on the day the adverse personnel action occurred the plaintiff had 90 percent of the information he needed to be sure he had a colorable claim, and the other 10 percent came in the next day. Would this mean he had 301 days to file his administrative complaint? Or is 90 percent enough? Since it is rare that by the end of the day of the adverse action the plaintiff will have all the requisite information, the automatic-extension rule would extend the statute of limitations in virtually all cases, making the ostensibly fixed deadline illusory.

In most cases in which equitable tolling is invoked, the statute of limitations has run *before* the plaintiff obtained information essential to deciding whether he had a claim. This pattern in the cases recognizes implicitly that the statute of limitations is not automatically delayed by the time it takes to obtain such information, since as we have said that will usually be sometime after the claim arose. When as here the necessary information is gathered after the claim arose but before the statute of limitations has run, the presumption should be that the plaintiff could bring suit within the statutory period and should have done so. The presumption will be more easily rebuttable the nearer the date of obtaining the information is to the date at which the statutory period runs out. In this case the interval was eight months, huge in the circumstances. We hold that a plaintiff who invokes equitable tolling to suspend the statute of limitations must bring suit within a reasonable time after he has obtained, or by due diligence could have obtained, the necessary information. Cada failed to do this.

The only string left on Cada's bow is the discovery rule, which pushes back the beginning of the limitations period. The rule is not applicable here. Cada's action on May 5

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in going from the meeting with Becks—whom he knew to be his supervisor on the catalog project and to have been recently promoted—directly to the human resources office to pick up severance forms is compelling, as well as uncontested, evidence, which no rational jury would be entitled to discount, that he knew he had been fired. *Ricks* establishes that it is the date of firing or other adverse personnel action, not the date on which the action takes effect and the plaintiff is terminated, that—provided it is communicated to the employee, and it was here—is the date of accrual. If the plaintiff cannot within the statutory period gather the necessary information to prepare his complaint, he may be able to get more time under the equitable tolling doctrine, but we have just seen that Cada is not entitled to the benefit of that doctrine. His suit was time-barred. The judgment dismissing it is

AFFIRMED.

All Citations

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277 F.3d 499
United States Court of Appeals,
Fourth Circuit.

CONTINENTAL AIRLINES, INC.; Continental Express, Incorporated, Plaintiffs–Appellees,
v.
UNITED AIRLINES, INCORPORATED; Dulles Airport Airline Management Council, Defendants–Appellants.
Association of Flight Attendants, AFL–CIO, Amicus Curiae.

No. 01–1435.
|
Argued Sept. 27, 2001.
|
Decided Jan. 15, 2002.

Synopsis

Airline brought antitrust action against management council consisting of airlines serving airport, and primary air carrier at airport, challenging agreement under which templates limiting the size of carry-on baggage that passengers could use were installed at baggage screening machines in airport. After parties cross-moved for summary judgment, the United States District Court for the Eastern District of Virginia, Ellis, J., granted summary judgment to plaintiff, 126 F.Supp.2d 962, and 136 F.Supp.2d 542. Defendants appealed. The Court of Appeals, Diana Gribbon Motz, Circuit Judge, held that district court had improperly used an abbreviated "quick look" analysis in determining whether program created an unreasonable restraint of trade in violation of Sherman Act, in light of unresolved facts relating to unique architectural configuration of airport, and possible pro-competitive effects of program.

Vacated and remanded.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Attorneys and Law Firms

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Before DIANA GRIBBON MOTZ, KING, and GREGORY, Circuit Judges.

Vacated and remanded by published opinion. Judge MOTZ wrote the opinion, in which Judge KING and Judge GREGORY joined.

OPINION

DIANA GRIBBON MOTZ, Circuit Judge.

Continental Airlines, Inc. and Continental Express, Inc. (collectively "Continental"), brought this antitrust action in April 2000

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to challenge the installation of templates, which limit the size of carry-on baggage, at Dulles Airport. Continental alleges that in agreeing to install the templates, United Air Lines, Inc. ("United"), the primary air carrier at Dulles, and the Dulles Airport Airline Management Council ("AMC"), an unincorporated association of all airlines serving Dulles, unreasonably restrained trade in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 (1997). Applying an abbreviated "quick-look" analysis, the district court granted summary judgment to Continental, awarded Continental $254,426.85 in trebled damages, and permanently enjoined the use of templates at Dulles. *See Continental Airlines, Inc. v. United Air Lines, Inc.,* 126 F.Supp.2d 962 (E.D.Va.2001) (granting summary judgment) (hereafter *Continental*); *Continental Airlines, Inc. v. United Air Lines, Inc.,* 136 F.Supp.2d 542 (E.D.Va.2001) (granting treble damages and an injunction) (hereafter *Continental II*). Because issues of material fact remain disputed and because both the unique architectural configuration of Dulles Airport and the competitive effects of templates require thorough consideration in a less "quick look," we vacate the judgment of the district court and remand for further proceedings.

I.

Before setting forth the factual background giving rise to this case, we take note of the tragic events of September 11, 2001. Those events and their ramifications have not yet mooted any aspect of this case; although the Federal Aviation Administration ("FAA") has now restricted the number of carry-on bags permitted to each passenger, to date it has not limited their size. Yet we recognize that the tragedies of September 11 now affect any discussion of air travel. Their implications for security[1] cannot be overlooked and, on remand, the district court and the parties will undoubtedly have to deal with these issues in considering any prospective relief. Having said that, we turn to the world before September 11, and the facts underlying this case.

1 Throughout we use "security" to refer to concerns about hijacking and other crimes, and "safety" to refer to concerns about on-board accidents, such as baggage falling from storage bins.

A.

In the mid–1990s, an increased volume of air travel and a growing desire to avoid checking luggage meant passengers carried more and more baggage onto commercial flights. "[M]any aircraft did not have sufficient under-seat or overhead bin storage space to stow securely the number and size of bags brought onboard by the increasing number of passengers." *Continental,* 126 F.Supp.2d at 965. The Association of Flight Attendants, joined by United and some other airlines, lobbied Congress and the FAA to limit the size of ***504** carry-on baggage. Those efforts have failed; instead the FAA simply requires each airline to scan carry-on baggage to "control the size and amount carried on board in accordance with an approved carry-on baggage program in [the airline's] operations specifications." 14 C.F.R. § 121.589(a) (2001). In compliance

with this regulation, each airline has published an FAA tariff stating numerical and size limitations on carry-on luggage that it may enforce.

The increased volume of carry-on baggage has been linked to several problems: delays, inconvenience to late boarding passengers from full overhead bins, conflict between airline staff and passengers, and reduced on-board safety if baggage cannot be properly stowed. Carry–On Baggage Program, 52 Fed.Reg. 21,472, at 21,475 (June 5, 1987) (codified at 14 C.F.R. pt. 121).[2] Airlines have explored various ways to respond to the increase in carry-on baggage, including one critical to this lawsuit—the use of baggage templates.

2 The Association of Flight Attendants has testified before Congress, and filed an amicus brief in support of United and AMC, stating that oversized carry-on baggage constitutes a safety risk on board aircraft. The Association maintains that "oversized [carry-on] baggage creates a myriad of difficulties to passenger and crew, ranging in seriousness from inconvenient delays to outright physical injury," that bin expansion has not been sufficient to alleviate these problems and that templates "are the single most effective system available to airlines to control oversize carry-on baggage." The Association states that in 1996 approximately 3700 flight attendants employed by four carriers suffered injuries associated with carry-on baggage, and that each year, across all carriers, falling carry-on baggage reportedly injures approximately 4500 passengers. Because many injuries are not reported, the Association estimates that the total number of carry-on injuries is closer to 20,000 per year.

Baggage templates are pieces of plastic or stainless steel, mounted on hinges, that cover the mouths of x-ray baggage screening machines. When the templates are down, they narrow the mouth of the x-ray machine, preventing oversize baggage from passing through. Generally, even when they are down, the templates permit all baggage sized within the published FAA tariff of any airline to pass through. Templates can be flipped upward to allow authorized larger baggage to bypass the templates. Absent this authorization, when baggage does not fit through the template, it must be checked.

In 1997 Continental experimented with templates at its hub in Houston. Frequent fliers in a focus group tested by Continental found the templates annoying, and templates could not be used in at least one of Continental's hubs because another carrier objected. Thus, in 1998 Continental decided not to install templates, opting instead to expand its overhead bins and provide for more equipment and employees to permit passengers to carry on or gate-check as much luggage as they wished.

In May 1999, a Continental customer advisory board urged the airline to "[e]ncourage people to check bags" and complained of early boarding passengers usurping all carry-on baggage space ("People in row 25 are putting bags in overhead bins in row 7."). The majority of the group stated their belief "that a baggage template is a good idea." Similarly,

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Continental's Senior Vice President for Airport Services agreed in deposition that templates could reduce or eliminate monopolization of space by early-boarding passengers, flight delays caused by the need to find space for carry-on baggage, conflict between airline crew and passengers over carry-ons, and hazards to crew taking excess ***505** carry-on baggage down the jetway to the aircraft.

Nevertheless, Continental rejected templates and other ways to reduce carry-on baggage. Instead, it focused on providing more space for carry-on baggage, and on increasing its gate-checking services, so that when space on board had been exhausted, additional carry-on baggage could be checked at the gate (or at the side of smaller planes) without delaying flights. Continental has received press attention as well as a number of awards, which it attributes to its excellent customer service, including its liberal carry-on baggage policy. It also maintains that this policy has attracted many high-revenue customers.

United has also expanded its overhead bins to meet the problems of increased carry-on baggage. (In fact, according to Continental's Manager for Product Marketing, United began a program of bin expansion before "Continental followed as a competitive response.") In addition, however, United has sought to impose a strict limit on carry-on baggage, restricting each passenger to two carry-on bags of limited size. Finding it difficult to enforce the size limitation because of the subjectivity of the process, United looked for a more objective way to measure size and decided to try baggage templates. United expected many benefits from the use of templates, including a smoother boarding process, better on-time performance, increased passenger comfort, and greater on-board safety.

United initially experimented with templates in mid 1998 at its Los Angeles and Chicago hubs, with mixed results. The test reduced delays by up to 65% in Los Angeles and up to 72% in Chicago. However, United received complaints from high-revenue customers, who threatened to move their business, and an internal United study determined that during the 1998 calendar year, while its "template program ha[d] helped improve carry-on perceptions compared to American and U.S. Airways ... Continental's larger bins ha[d] provided a solution with more customer value." Nevertheless, United management decided to proceed with a plan to address the problems associated with carry-on baggage by consistently enforcing the number and size restrictions of its carry-on policy, educating consumers as to the benefits of the policy combined with larger overhead bins, and deploying templates wherever possible. (Airlines other than United and Continental, including American, Southwest, and Delta, also considered templates, and a number, like United, adopted them.) At present United has installed templates at security checkpoints used by its passengers in at least twenty-five domestic airports.

B.

In late 1998, United sought to install templates at Dulles, a United hub and one of the fastest growing airports in the country. This presented a special problem because the configuration of Dulles is, as Continental's Chief Executive

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Officer testified, "unique." Most airports have a number of security checkpoints, so that at most only a few airlines share any given security checkpoint. By contrast, at Dulles every non-connecting passenger for every flight must be screened at one of two common security checkpoints located in the main terminal, which in turn lead to a common "sterile" area. Once in the sterile area, passengers take shuttles to the midfield concourse from which their flights depart. The combination of security checkpoints that must be shared by all airlines, a single sterile area also common to all, and the use of mobile shuttles, distinguishes Dulles from every other major airport in the United States.

***506** The twenty-nine airlines that serve Dulles are members of the AMC, an unincorporated association mandated by the FAA.[3] The AMC holds monthly meetings to resolve operating issues that necessarily affect more than one carrier at Dulles. For example, federal law charges all airlines with the responsibility for airport security. 14 C.F.R. § 108.5–.9 (2001). The AMC is thus responsible for the installation, maintenance, and management of security checkpoints at Dulles. As a member of the AMC, each airline receives one vote, regardless of size. Thus, United, with 38 of the 120 gates (making it the largest carrier at Dulles), and Continental, with one gate, each have one vote on the AMC.[4]

3 The Metropolitan Washington Airport Authority ("MWAA"), created by a compact between the District of Columbia and the Commonwealth of Virginia, is the landlord of Dulles. A MWAA representative also attends AMC meetings but has no vote. United and AMC maintained that MWAA's authority to "plan, establish, operate ... and protect" Dulles afford them state-action immunity. *See Parker v. Brown,* 317 U.S. 341, 351–52, 63 S.Ct. 307, 87 L.Ed. 315 (1943). For the reasons stated by the district court, we agree that "the state-action doctrine does not insulate defendants' agreement." *Continental,* 126 F.Supp.2d at 986.

4 Less than 2% of the passengers flying out of Dulles fly Continental or Continental Express. Continental Airlines itself flies only a direct non-stop from Dulles to Houston. Those planes are used on three trips per day during the business week and two trips per day on weekends. Continental Express, which flies direct, non-stop flights to Cleveland and Newark only, does not use planes with expanded overhead bins, but allows plane-side checking of luggage.

After some deliberation, the AMC agreed to allow United to install templates at the east checkpoint, through which most of United's passengers pass, for a one-month trial period beginning December 30, 1998. The west checkpoint became congested because passengers circumvented the templates by avoiding the east checkpoint. Once the trial period ended, the Chairman of the AMC asked United to remove the templates. United was in the middle of changing station managers and increasing service at Dulles and did not remove the templates quickly. Irritated, the AMC hired a contractor to remove the templates from the

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east checkpoint in June 1999; United paid for the removal.

Later in 1999, a new United station manager formally asked the AMC to consider reinstalling baggage templates, at least at the east checkpoint. After extensive discussion, the AMC agreed that it would survey the twenty-six carriers eligible to vote on the issue to determine whether they favored templates and to identify any specific areas of concern. Of the carriers responding to the survey, fifteen, including United, favored the templates and five, including Continental, opposed the templates. The survey form instructed that failure to return the ballot would be deemed a vote in favor of templates; in accord with this policy, six airlines that did not respond were included with the fifteen voting in favor of templates to make the final vote 21–5.

One concern that surfaced both in the survey results and in subsequent AMC discussions was the desire not to repeat the mistakes of the prior tests by installing templates at one checkpoint but not the other. Deposition testimony revealed that no one participating in the AMC template discussions, including Continental's representative and those of other carriers that did not favor the installation of templates, perceived that any member of the AMC ***507** voting to install templates at Dulles had an anticompetitive purpose in doing so.

The airlines met to discuss implementation of the template program. Several airlines expressed concern that high-revenue passengers not be limited by templates. The AMC focused on an alternative system of tokens, called “medallions,” that airlines could distribute to their passengers, who would present the medallions to have the templates lifted for their bags. The AMC adopted the medallion option as part of the template implementation. All AMC members were asked to estimate the number of medallions they required and an initial distribution of medallions was made in proportion to each airline's first-class, business-class, and full coach fare passengers. The templates were installed at Dulles on April 15, 2000.

C.

Shortly thereafter, Continental filed this action, asserting that the Dulles template program violated Section 1 of the Sherman Act. *See* 15 U.S.C.A. § 1. After filing suit, Continental distributed medallions to its customers until it ran out of its initial supply. Thereafter, it made no attempt to obtain more medallions. Instead, Continental had its employees (and later contractual workers hired by Continental at a cost of approximately $10,000 a month) lift the templates for Continental's passengers who wished to carry on larger bags. The employees also distributed literature notifying customers that Continental was not responsible for the “problems caused” by the template restriction, attributing the decision to install templates at Dulles solely to United (not mentioning the majority vote of the AMC), and relating that Continental was “seeking remedies to the problems caused by United[ ].” *Continental II,* 136 F.Supp.2d at 548 n. 7.

Nonetheless, the record reveals few complaints about the Dulles templates. The Metropolitan

Washington Airport Authority received no complaints about the templates and did not believe passengers found them confusing. Similarly, no complaints about the templates were lodged with the AMC. United received one written complaint and Continental fewer than five. Northwest Airlines, which had opposed installation of the templates, received no complaints and found the template program worked so well that it ultimately found distribution of medallions to be unnecessary.

Continental's station manager testified at deposition that Continental was "able to get all customers [with oversized bags] through the security checkpoint [by lifting the templates] with or without" the contract workers. Continental did not reduce flights or reassign planes as a result of the templates. Continental does not claim that the Dulles templates or the costs of Continental's method of dealing with them affected any ticket price.

The district court granted summary judgment to Continental. The court ruled that the template program constituted a horizontal restraint on output with "manifest" anticompetitive impact, and so required no further proof of anticompetitive effects. *Continental,* 126 F.Supp.2d at 977. Although antitrust law would ordinarily condemn joint restraints on output as illegal *per se,* because airlines must cooperate at airports, the district court determined to employ a "quick-look" analysis. *Id.* at 976, 978. Accordingly, the court examined each asserted procompetitive justification for the template program—safety, timely departures, and passenger comfort. *Id.* The court rejected all three, finding "no record support" for the proposition that the template program "promote[d] competition among carriers" ***508** in any way. *Id.* at 979. Having found anticompetitive impact with no redeeming procompetitive justifications, and thus having found an antitrust violation, the district court ruled that Continental had suffered antitrust injury. *Id.* at 982–84. After another hearing, the court awarded Continental $254,426.85 in trebled damages for its costs in hiring employees to lift the templates, and enjoined United and the AMC from using templates at Dulles. *Continental II,* 136 F.Supp.2d at 552–53.

We review a district court's award of summary judgment *de novo. M & M Med. Supplies & Serv., Inc. v. Pleasant Valley Hosp.,* 981 F.2d 160, 163 (4th Cir.1992). "The evidence of the nonmovant[s] is to be believed, and all justifiable inferences are to be drawn in [their] favor." *Anderson v. Liberty Lobby,* 477 U.S. 242, 255, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986). If after examining the entire record, in light of the controlling legal principles, a reviewing court concludes that material facts remain genuinely disputed, it must hold the grant of summary judgment improper. *See, e.g., Eastman Kodak Co. v. Image Tech. Servs., Inc.,* 504 U.S. 451, 477–78, 112 S.Ct. 2072, 119 L.Ed.2d 265 (1992). We turn now to those controlling legal principles and then to their application to the above facts. [5]

5 Although we are "mindful" that United and AMC's "version of any disputed issue of fact ... is presumed correct," *Eastman Kodak,* 504 U.S. at 456, 112 S.Ct. 2072, we have included above some facts that Continental proffers and United and AMC dispute

in order to give the reader a better understanding of the issues in controversy.

II.

Section 1 of the Sherman Act prohibits "[e]very ... combination in restraint of trade." 15 U.S.C.A. § 1. The Supreme Court, however, long ago established that Section 1 only outlaws restraints that are "unreasonably restrictive of competitive conditions." *Standard Oil Co. v. United States,* 221 U.S. 1, 58, 31 S.Ct. 502, 55 L.Ed. 619 (1911). Thus, to prevail on a claim that a horizontal restraint, an agreement among competitors, violates Section 1, a plaintiff must prove that the restraint is unreasonable. A plaintiff cannot prove the unreasonableness of a restraint merely by showing that it caused economic injury. Rather, because "[t]he antitrust laws were enacted for the protection of competition, not competitors," a plaintiff must show that the net effect of a challenged restraint is harmful to competition. *Atlantic Richfield Co. v. USA Petroleum Co.,* 495 U.S. 328, 338, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990) (citation and emphasis omitted). A proven antitrust violation is a necessary predicate to recovery of antitrust damages. *Lee–Moore Oil Co. v. Union Oil Co.,* 599 F.2d 1299, 1306 (4th Cir.1979); *see also Atlantic Richfield,* 495 U.S. at 339–41, 110 S.Ct. 1884; *Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.,* 429 U.S. 477, 489, 97 S.Ct. 690, 50 L.Ed.2d 701 (1977).

Having proven an antitrust violation, an antitrust plaintiff seeking damages must show an injury "of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Id.* Lost profits and the costs of finding alternatives to mitigate the damages caused by an antitrust violation may constitute antitrust injury. *Lee–Moore Oil Co.,* 599 F.2d at 1304–06.

In determining whether a plaintiff has proved that a horizontal agreement violates Section 1, the Supreme Court has authorized three methods of analysis: (1) *per se* analysis, for obviously anticompetitive restraints, (2) quick-look ***509** analysis, for those with some procompetitive justification, and (3) the full "rule of reason," for restraints whose net impact on competition is particularly difficult to determine. The boundaries between these levels of analysis are fluid; "there is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment." *California Dental Ass'n v. FTC,* 526 U.S. 756, 780–81, 119 S.Ct. 1604, 143 L.Ed.2d 935 (1999). Instead, the three methods are best viewed as a continuum, on which the "amount and range of information needed" to evaluate a restraint varies depending on how "highly suspicious" and how "unique" the restraint is. *See* 11 Herbert Hovenkamp, *Antitrust Law* ¶ 1911a (1998); *see also California Dental,* 526 U.S. at 779–81, 119 S.Ct. 1604. In all cases, however, "the criterion to be used in judging the validity of a restraint on trade is its impact on competition." *NCAA v. Bd. of Regents of Univ. of Okla.,* 468 U.S. 85, 104, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984).

The first approach, *per se* analysis, permits courts to make "categorical judgments" that certain practices, including price fixing,

horizontal output restraints, and market-allocation agreements, are illegal *per se. Northwest Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.,* 472 U.S. 284, 289, 105 S.Ct. 2613, 86 L.Ed.2d 202 (1985); *see also NCAA,* 468 U.S. at 100, 104 S.Ct. 2948. Practices suitable for *per se* analysis have been found over the years to "be one[s] that would always or almost always tend to restrict competition and decrease output," and that are not "designed to increase economic efficiency and render markets more, rather than less, competitive." *Broad. Music, Inc. v. CBS,* 441 U.S. 1, 19–20, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979) (citations omitted) (hereafter *BMI*). Such restrictions "have such predictable and pernicious anticompetitive effect, and such limited potential for procompetitive benefit, that they are deemed unlawful *per se* " without any need to conduct a detailed study of the markets on which the restraints operate or the actual effect of those restraints on competition. *State Oil Co. v. Khan,* 522 U.S. 3, 10, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997).

At the other end of the spectrum, if the reasonableness of a restraint cannot be determined without a thorough analysis of its net effects on competition in the relevant market, courts must apply a full rule-of-reason analysis. *See Oksanen v. Page Mem'l Hosp.,* 945 F.2d 696, 709 (4th Cir.1991). In such cases a plaintiff "must prove what market ... was restrained and that the defendants played a significant role in the relevant market" because "[a]bsent this market power, any restraint on trade created by defendant's action is unlikely to implicate" Section 1. *Id.* The required analysis varies by case and may extend to a "plenary market examination," *California Dental,* 526 U.S. at 779, 119 S.Ct. 1604, covering "the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed," *Nat'l Soc'y of Prof'l Eng'rs v. United States,* 435 U.S. 679, 692, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978), as well as the availability of reasonable, less restrictive alternatives. *NCAA,* 468 U.S. at 106, 114, 104 S.Ct. 2948; *BMI,* 441 U.S. at 20–23, 99 S.Ct. 1551.

Sometimes, the anticompetitive impact of a restraint is clear from a quick look, as in a *per se* case, but procompetitive justifications for it also exist. Such intermediate cases may "involve[ ] an industry in which horizontal restraints on competition are essential if the product is to be available at all," ***510** *NCAA,* 468 U.S. at 101, 104 S.Ct. 2948, or in which a horizontal restraint otherwise plausibly "increase [s] economic efficiency and renders markets more, rather than less, competitive." *BMI,* 441 U.S. at 20, 99 S.Ct. 1551 (citation omitted). For these cases, "abbreviated or 'quick-look' analysis" fills in the continuum between *per se* analysis and the full rule of reason. *California Dental,* 526 U.S. at 770, 119 S.Ct. 1604.

The Supreme Court, in *California Dental,* recently explained and illustrated at some length the subtlety that the quick-look analysis may require. The Court emphasized that even when a court eschews a full rule-of-reason analysis and so forgoes detailed examination of the relevant market, it must carefully consider a challenged restriction's possible procompetitive justifications. *Id.* at 773–75, 119 S.Ct. 1604.

In *California Dental,* the Court reviewed a decision of the Ninth Circuit, which had applied quick-look analysis to FTC factual findings based on a full evidentiary record. *California Dental Ass'n v. FTC,* 128 F.3d 720, 726–30 (9th Cir.1997). An association of dentists had restricted its members' advertising, banning claims of superior quality and imposing such detailed disclosure requirements for price advertisements that dentists effectively could not advertise "across the board discounts" or even "low" or "affordable" prices. *Id.* at 723–24. The Ninth Circuit accepted that the advertising restrictions had obvious anticompetitive effects, because they reduced the price information available to consumers. *Id.* at 727–28. The appeals court limited its analysis to determining whether the proffered justifications for the restrictions had any procompetitive effect, and rejected those justifications because of an asserted lack of record support for them. *Id.* at 728 (finding "no evidence that the rule has in fact led to increased disclosure and transparency of dental pricing").

The Supreme Court vacated the Ninth Circuit's analysis as too cursory. Ordinarily, advertising restrictions could be expected to harm competition, but the challenged restrictions affected a market for professional services, in which patients typically have much less information about the quality of service than the professionals who serve them. 526 U.S. at 771–73, 119 S.Ct. 1604. The high court instructed that although quick-look analysis does "carr[y] the day when the great likelihood of anticompetitive effects can easily be ascertained," a quick look, or at least the kind of quick look employed by the Ninth Circuit, does not suffice if a challenged restraint "might plausibly be thought to have a net procompetitive effect, or possibly no effect at all on competition." *Id.* at 770, 771, 119 S.Ct. 1604. Only if "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets" would summary review like that conducted by the Ninth Circuit be proper. *Id.* at 770, 119 S.Ct. 1604. Otherwise, determination of a restraint's impact on competition "call[s] for more than cursory treatment." *Id.* at 773, 119 S.Ct. 1604. "What is required ... is an enquiry meet for the case, looking to the circumstances, details, and logic of a restraint." *Id.* at 781, 119 S.Ct. 1604. Because the Ninth Circuit failed to provide this, the Supreme Court vacated its judgment and remanded the case for further proceedings. *Id.*

In quick-look cases involving plausible procompetitive justifications, which require "more than cursory treatment" of "question[s] susceptible to empirical but not *a priori* analysis," *id.* at 773, 774, 119 S.Ct. 1604, a full record may often ***511** be necessary. [6] Certainly courts have been wary of summary judgment in the context of quick-look analysis. In fact, the parties have not cited, and we have not found, a single case in which the Supreme Court has approved a quick-look analysis in which the parties received less than a full evidentiary hearing, either before an administrative agency or in court. *See FTC v. Indiana Fed'n of Dentists,* 476 U.S. 447, 451, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986); *NCAA,* 468 U.S. at 88, 104 S.Ct. 2948; *Nat'l Soc'y of Prof'l Eng'rs,* 435 U.S. at 685–86, 98 S.Ct. 1355; *see also California Dental,* 526 U.S. at 762–63, 119 S.Ct. 1604.

6 We recognize, of course, that summary judgment can be appropriate in antitrust cases. *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.,* 475 U.S. 574, 582, 588, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (holding that summary judgment was properly granted after years of detailed discovery where plaintiffs' predatory-pricing theory was "economically irrational and practically infeasible"). But "[l]egal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored." *Eastman Kodak,* 504 U.S. at 466–67, 112 S.Ct. 2072. The Supreme Court has resisted the argument that such presumptions should replace factual findings, preferring to "resolve antitrust claims on a case-by-case basis, focusing on the 'particular facts disclosed by the record.' " *Id.* at 467, 112 S.Ct. 2072 (citing numerous cases).

These principles govern our examination of the case at hand. For the reasons that follow, we believe that application of them to the facts of this case requires that we vacate the district court's judgment. In a nutshell, although the district court demonstrated mastery of many intricacies of antitrust law, it performed too quick an analysis on an insufficiently developed factual record.

III.

In several ways, the district court's approach resembles that of the Ninth Circuit in *California Dental.*

Like the Ninth Circuit, the district court applied quick-look analysis because it accepted that the challenged restraint had obvious anti-competitive effects. *Compare California Dental,* 128 F.3d at 727 (finding "a fairly naked restraint" (citation omitted)), *with Continental,* 126 F.Supp.2d at 977 (finding "manifest" anticompetitive effects). Then, again like the Ninth Circuit, the district court determined that the proffered procompetitive justifications for the alleged restraint were implausible because of a perceived lack of record support for those justifications. *Compare California Dental,* 128 F.3d at 728 ("[T]he record provides no evidence that [the restraint] has, in fact, led to increased [procompetitive effects]."), *with Continental,* 126 F.Supp.2d at 979 ("There is no record support for the proposition that an agreement to standardize carry-on baggage size ... promotes competition.").

In *California Dental,* even though the lower court relied on fact-finding based on a fully developed record, the Supreme Court vacated the Ninth Circuit's judgment rejecting procompetitive justifications because the appeals court failed to "scrutinize the assumption of relative anticompetitive tendencies." 526 U.S. at 781, 119 S.Ct. 1604. Here, given the similar difficulty in the district court's analysis, rendered on summary judgment without any fact-finding, we too must vacate the district court's judgment.

Specifically, in holding the proffered procompetitive justifications for the template

program "implausible," the district court underestimated the significance of some undisputed material facts and wrongly ruled that other genuine disputes were immaterial. [7] We discuss each problem in turn.

7 That both sides moved for summary judgment does not establish the absence of material factual disputes. Cross motions for summary judgment neither "establish the propriety of deciding a case on summary judgment," *Columbia Union College v. Clarke,* 159 F.3d 151, 168 (4th Cir.1998), nor "establish that there is no issue of fact requiring that summary judgment be granted to one side or another." *Id., citing* *World–Wide Rights Ltd. P'ship v. Combe, Inc.,* 955 F.2d 242, 244 (4th Cir.1992) (internal quotation marks and citations omitted).

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Although the district court properly noted that airlines must cooperate to share airports, rejecting *per se* analysis on that basis, *Continental,* 126 F.Supp.2d at 976, it failed to recognize the extent to which Dulles's indisputably unique architectural configuration requires careful consideration of the template program's competitive effect.

At Dulles, all embarking passengers on all airlines must pass through one of two common security checkpoints, and (because of the congestion problem revealed if templates are installed at just one checkpoint) the two checkpoint locations cannot vary in their treatment of carry-on baggage. Unlike other airports, Dulles cannot use multiple checkpoints to permit variety in its many airlines' treatment of carry-on baggage. In other words, Dulles's checkpoints constitute a single "bottleneck facility that [can]not feasibly be duplicated," and therefore "must be shared among rivals." *Paddock Publ'ns, Inc. v. Chicago Tribune Co.,* 103 F.3d 42, 45 (7th Cir.1996). Absent an efficient way to differentiate among various airlines' passengers at the checkpoints, *but see* Part IV, the x-ray machines at the checkpoints must have mouths of some uniform size, and the airlines must cooperate in determining that size: either small, as United and the AMC prefer, or larger, as Continental prefers.

Of course, although operation of the x-ray machines themselves require cooperation, security concerns do not require the airlines to cooperate on the use of templates or justify the airlines' agreement to do so. *See* 14 C.F.R. §§ 108.5–.9 (2001); *see generally* 11 Herbert Hovenkamp, *Antitrust Law* § 1906. Templates are not security devices, and no one in this litigation even contends that the need for the airlines to cooperate *on security* justifies the Dulles template program. [8] *Cf.* *NCAA,* 468 U.S. at 114, 104 S.Ct. 2948 ("[I]t cannot be said that 'the agreement on price is necessary to market the product at all.' " (citation omitted)). But unless an efficient way to differentiate among the passengers of different airlines emerges, Dulles's unique architecture does force all of its airlines to cooperate on a single decision as to the use of templates. When the economic implications of physical or geographical limitations require coordination among competitors, the Supreme ***513** Court

has long applied Section 1 of the Sherman Act with flexibility.

8 In fact, according to FAA commentary, airlines' carry-on programs are "required to include at least one baggage control point located outside the airplane (but not located at the passenger security screening point)." Carry–On Baggage Program, 52 Fed.Reg. at 21,473; *see also* 14 C.F.R. § 121.589(a) (noting requirement of "an approved carry-on baggage program"); Carry–On Baggage Program, 51 Fed.Reg. 19,134, 19,136 (May 27, 1986) (noting that an approved program "would encompass" a baggage-control point not at the checkpoint). Neither the FAA nor the parties attempt any explanation of this requirement; apparently, it mandates that each airline institute "at least one baggage control point ... outside the airplane" that is not "located at the passenger screening point," but does *not* prohibit additional "baggage control point [s]" at the "passenger screening points." Thus, Continental does not contend that the FAA bars use of the templates at "security screening points" and we have found nothing in FAA regulations prohibiting this. Indeed, the FAA has apparently not opposed the installation of templates at security screening points in many airports throughout the country.

More than ninety years ago, the Court considered a railroad terminal in which the "geographical and topographical situation" required all railroad companies passing through the city to use one terminal, just as all airline passengers may have to pass through one type of security checkpoint at Dulles. *United States v. Terminal R.R. Ass'n,* 224 U.S. 383, 397, 32 S.Ct. 507, 56 L.Ed. 810 (1912). The Court held that because of the unique configuration of the railroad terminus, competing railway companies could legally combine (indeed, were legally required to do so) to control the facility. Here, if the airlines did not have to share the check-points—if Continental had a security checkpoint at Dulles that served only its passengers—Section 1 would not permit the AMC to require it to use templates. However, as in *Terminal Railroad Association,* the presence of unique architectural constraints requires flexibility in applying Section 1.[9]

9 We note that in *Terminal Railroad Association,* physical alternatives such as construction of another bridge were theoretically possible, but would apparently not have been economically efficient. *See* 13 Herbert Hovenkamp, *Antitrust Law* § 2221b1 (1999) (noting "[g]reat economies result[ing] from the fact that a single channel existed for bringing rail-road traffic ... into and through St. Louis"). Here, the nature and economic efficiency of a number of proposed alternatives to the template program may require resolution on remand. *See* Part IV.

Moreover, beyond the general need for greater cooperation at Dulles than at other airports, United and Continental each make a more specific claim, related to Dulles's unique configuration, as to why their respective preferred outcomes benefit competition. Each

argues that only a uniform policy in accordance with its preference will make possible an entire service that would not otherwise be available at Dulles: assertedly, Continental must win to offer flights with carry-on largesse, and United must win to offer flights with carry-on rigor. The district court may ultimately have to choose between two procompetitive claims; either outcome would both help and hurt competition, and which helps competition more than the other may be far from plain. *See* Part IV.

In such a situation, the Supreme Court has advised that a fuller examination is necessary. In *California Dental,* too, the context of the restraint plausibly had a similar mixed effect on competition. Ordinarily, the restraint at issue—advertising restrictions—hurts competition, but the restrictions in *California Dental* occurred in a "professional context," 526 U.S. at 774, 119 S.Ct. 1604, a market in which patients had much less information on the quality of service than their dentists had. At bottom, the restrictions' net impact on the information available to patients was unclear. Accordingly, the restraint's net effect could not be determined—it might even have been nil. *Id.* at 778, 119 S.Ct. 1604. The Supreme Court simply could not be sure how such a restraint would affect competition.

We have a similar difficulty. Here also, the context in which the restraint operates—an airport with unique features—makes it possible that the restraint yields both positive and negative effects on competition. Because the airlines must share the checkpoints, a decision that aids one airline's service may necessarily hamper another's. Therefore, without additional analysis, it is as difficult for us as it was for the Supreme Court in *California Dental* to determine the nature of the challenged restraint's net effect on competition. The district court's failure to give careful consideration to Dulles' unique architecture ***514** when it examined the templates' impact on competition thus requires us to vacate its judgment.

B.

The district court also erred in ruling that factual disputes over the proffered procompetitive justifications for the templates—improved on-board safety, more timely departures, and a better on-board experience for passengers—were immaterial. The court recognized the existence of genuine factual disputes as to the justifications, but miscalculated in ruling that they were not material. The district court concluded that "the flying public wants ... sufficient onboard carry-on storage capacity and flexible carry-on policies," and that United's "attendant incidental" problems with safety, timeliness, and passenger comfort only occurred because United had failed to meet that desire. *Continental,* 126 F.Supp.2d at 980. Even if the templates did improve safety, timeliness, and comfort, they were not procompetitive because, according to the district court, customers preferred that such problems be solved through generous carry-on policies like that of Continental. Thus in the district court's view, the proffered justifications for the templates were, as a matter of law, not "plausible or material." *Id.* at 981.

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Again, the district court's rationale resembles the Ninth Circuit's in *California Dental.* The Ninth Circuit found no record evidence that the challenged restrictions had the asserted positive effects, and further suggested that they were unlikely to have such effects. *California Dental,* 128 F.3d at 728. Here, the district court recognized a dispute as to whether the templates had the asserted positive effects, but ruled that even if so, there was "no record support for the proposition" that achieving safety, timeliness, and comfort through templates "promote[d] competition." *Continental,* 126 F.Supp.2d at 979. In essence, each court dismissed the proffered procompetitive justifications because it found them implausible. *Compare California Dental,* 128 F.3d at 728, *with Continental,* 126 F.Supp.2d at 979–81. The Supreme Court held that the "plausibility of competing claims" as to the effect of the challenged restriction—that is, the possibility that the restriction might have procompetitive effects or no effect at all—"rule[d] out the indulgently abbreviated review" of the Ninth Circuit. 526 U.S. at 778, 119 S.Ct. 1604. So it is here.

Review of the record in this case simply does not support the conclusion that the proffered justifications for the template program are, as a matter of law, implausible. Rather, the record reveals factual disputes as to whether the proffered justifications plausibly enhance competition. Continental has, to be sure, offered evidence indicating that these justifications are illusory. But United has submitted evidence that a size restriction on carry-on luggage can improve on-board safety, on-time takeoffs, and passengers' flying experience, and that templates increase its efficiency in offering a new output, a service with these improved features. Moreover, evidence in the record, including studies by both airlines, also supports the view that some customers value and have sought such benefits, achieved by restricting carry-on baggage, including by the use of templates. *See also* Carry–On Baggage Program, 52 Fed.Reg. at 21,472, 21,473.

Given this record, we cannot conclude that these justifications are indisputably implausible. Like the advertising restrictions at issue in *California Dental,* installation of templates at Dulles might "plausibly be thought to have a net procompetitive effect, or possibly no effect at all." 526 U.S. at 771, 119 S.Ct. 1604.

***515** IV.

In addition to its dismissal of the templates' possible procompetitive justifications, which mirrors the Ninth Circuit action that the Supreme Court disapproved in *California Dental,* the district court erred in a more fundamental respect. It failed to recognize that the parties genuinely disputed whether, given the lifting and medallion alternatives, the template program actually restrained trade, i.e., whether the program actually restricted Continental's carry-on service. Continental offered evidence that even with medallions and lifting, some of its passengers were unable to avoid the templates. But United offered evidence to the contrary including the fact that no other airline found the medallion solution inadequate and the testimony of Continental's general manager at Dulles that,

after installation of the templates, Continental was still able "to get all customers" with oversized bags to its gate. On this record, there is thus a genuine dispute as to whether the template program affected the ability of any Continental passenger to proceed directly to the gate with all desired carry-on baggage. The district court overlooked not just the existence but the central importance of this dispute: If all of Continental's passengers reached the gate with all desired luggage, Continental has not shown a restraint of trade.

The district court only addressed the lifting and medallion options in finding that Continental had demonstrated antitrust injury. We agree with the district court that Continental unquestionably incurred costs in supplying labor to lift the templates for its passengers. [10] We further agree that *if related to a violation of the antitrust laws,* those costs would "flow[ ] from that which makes defendants' acts unlawful" under the Sherman Act, *Brunswick Corp.,* 429 U.S. at 489, 97 S.Ct. 690, and would be recoverable as mitigation damages. *Continental,* 126 F.Supp.2d at 983, *citing Lee–Moore,* 599 F.2d at 1306. But whether there was a violation of the antitrust laws is very much in dispute. The parties disagree as to whether the template program prevented Continental passengers from bringing their desired luggage to the gate. If it is proved that the program did not do this, then the template program did not affect trade by restraining output.

10 As for the medallions, the district court originally ruled that they provided no solution for "low yield" Continental passengers, and thus that Continental suffered antitrust injury despite the medallions. *Continental,* 126 F.Supp.2d at 982–83. The court invited the defendants to "seek reconsideration of [its] ruling" if they cold produce evidence to the contrary. *Id.* at 982 n. 53. United did seek reconsideration and offered evidence that the medallions were fully available to all passengers of any airline that wished to use them. The court never resolved the resulting factual dispute, but instead apparently concluded that in any event, medallions presented no solution, because passengers would have to wait at Continental's ticket counter to obtain the medallions. *Continental II,* 136 F.Supp.2d at 551. The factual basis for this conclusion is unclear; the district court cites none and Continental refers only to a single affidavit of one of its managers, created after the district court issued its initial opinion. Given the sparseness of this evidence, we believe the district court erred in implicitly concluding as a matter of law that even if the medallions were available to all Continental passengers, Continental could not continue to provide its service. *See id.*

If Continental cannot show any effect on price or output, then it has shown only that it incurred costs in hiring people to lift the templates. Those costs may establish a presumption that Continental lost profits when its costs rose with no corresponding increase in revenue. *Continental II,* 136 F.Supp.2d at 545–46. But to be recovered as antitrust damages, a ***516** competitor's loss of profits must "stem[ ] from a competition-reducing aspect or effect of the

defendant's behavior," *Atlantic Richfield,* 495 U.S. at 344, 110 S.Ct. 1884 (original emphasis deleted), that is, from "acts that reduce output or raise prices to consumers." *Chicago Prof'l Sports Ltd. P'ship v. NBA,* 961 F.2d 667, 670 (7th Cir.1992); *see also Bd. of Trade of Chicago v. United States,* 246 U.S. 231, 240, 38 S.Ct. 242, 62 L.Ed. 683 (1918) (noting that the challenged restraint had not affected price or reduced output, and that it might have increased output); *cf. Brunswick Corp.,* 429 U.S. at 489, 97 S.Ct. 690 (noting that antitrust injury "should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation"). Thus, Continental cannot recover its costs of hiring template lifters unless it can demonstrate that the template program had any anticompetitive effect, something it has not yet done.

Before concluding, we note that we recognize the seeming unfairness in "punishing" Continental for perhaps finding a way in which its passengers could avoid the templates. Of course,"[a]n antitrust plaintiff is not obliged to pursue any imaginable alternative, regardless of cost or efficiency, before it can complain that a practice has restrained competition." *CBS, Inc. v. ASCAP,* 620 F.2d 930, 936 (2d Cir.1980) (on remand from *BMI,* 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1). However, a market innovation "does not restrain trade if an alternative opportunity ... is realistically available." *Buffalo Broad. Co. v. ASCAP,* 744 F.2d 917, 925 (2d Cir.1984) (citation omitted). Whether an alternative is "realistic [ ]" depends on its cost. *Id.* at 926. Here the antitrust plaintiff —Continental—may have come up with a fully effective alternative, the cost of which apparently did not affect ticket prices. The templates are not "a restraint unless it were proven that there are no realistically available alternatives." *Id.* at 933.

The Supreme Court's consideration of alternatives in *BMI* guides the proper analysis of alternatives here. In that case, the challenged restraint added an entirely new good, a blanket license to perform multiple pieces of music, to the market, without eliminating the goods that had previously been available, individual licenses to perform single pieces of music. *BMI,* 441 U.S. at 21–24, 99 S.Ct. 1551. The Court accepted the restraint's potential legitimacy, because permitting the challenged restraint offered "real choice." *Id.* at 24, 99 S.Ct. 1551; *cf. NCAA,* 468 U.S. at 106, 104 S.Ct. 2948 (considering whether a "real choice" was available). Here, United argues, and the facts may show, that only templates permit United to add an entire service to the market, as in *BMI.*

Unlike the situation in *BMI,* however, here the same argument weighs on the other side as well, complicating the problem. Continental argues, and the facts may show, that the addition of United's service would simultaneously eliminate Continental's own entire service. If neither side is able to offer its service through an efficient alternative, the district court may thus have to balance the relative contributions to competition of the two services. *See Continental,* 126 F.Supp.2d at 981 n. 52 (discussing United's alternatives); 13 Herbert Hovenkamp, *Antitrust Law* § 2132d. "[E]ven efficient ventures may ... be organized in alternative ways that will reduce dangers to competition." 13 Herbert

Hovenkamp, *Antitrust Law* § 2100c; *see also* 11 Herbert Hovenkamp, *Antitrust Law,* § 1912i.

The district court will have an opportunity to consider the issues we have discussed on a full record. Of course, the resolution of some disputes could obviate the need to reach others. Given the multiple factual disputes at present, we express no view as to which issues the district ***517** court may need to reach, let alone what their outcomes might be. We merely rule that "we cannot reach these conclusions as a matter of law on a record this sparse." *Eastman Kodak,* 504 U.S. at 486, 112 S.Ct. 2072.

V.

For all of these reasons, we vacate the judgment of the district court granting summary judgment, damages, and an injunction in favor of Continental, and remand the case for further proceedings consistent with this opinion. We leave to the district court the "question whether on remand it can effectively assess" the alleged restraint by a modified quick-look analysis, or whether it must undertake "a more extensive rule-of-reason analysis." *California Dental,* 526 U.S. at 768 n. 8, 119 S.Ct. 1604; *see also* *California Dental v. Federal Trade Comm.,* 224 F.3d 942, 947 & n. 2 (9th Cir.2000) (on remand from *California Dental,* 526 U.S. 756, 119 S.Ct. 1604, 143 L.Ed.2d 935).

VACATED AND REMANDED.

All Citations

277 F.3d 499, 2002-1 Trade Cases P 73,535

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97 S.Ct. 2549
Supreme Court of the United States

CONTINENTAL T. V., INC., et al., Petitioners,
v.
GTE SYLVANIA INCORPORATED.

No. 76-15.
|
Argued Feb. 28, 1977.
|
Decided June 23, 1977.

Synopsis

In private antitrust action involving validity of franchise agreement between manufacturer of television sets and retailer barring retailer from selling franchised products from location other than that specified in the agreement, the United States District Court for the Northern District of California entered judgment in favor of retailer and manufacturer appealed. The Court of Appeals, 537 F.2d 980, reversed and remanded and retailer petitioned for certiorari. The Supreme Court, Mr. Justice Powell, held that although the retail customer restriction in United States v. Arnold, Schwinn & Company was indistinguishable from the location restriction at issue, the facts of the case did not present a situation justifying a per se rule, and location restriction should be judged under the traditional rule of reason standard.

Affirmed.

Mr. Justice White filed an opinion concurring in the judgment.

Mr. Justice Brennan filed a dissenting statement in which Mr. Justice Marshall joined.

Procedural Posture(s): On Appeal.

****2550** Syllabus *

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***36** In an attempt to improve its market position by attracting more aggressive and competent retailers, respondent manufacturer of television sets limited the number of retail franchises granted for any given area and required each franchisee to sell respondent's products only from the location or locations at which it was franchised. Petitioner Continental, one of respondent's franchised retailers, claimed that respondent had violated s 1 of the Sherman Act by entering into and enforcing franchise agreements that prohibited the sale of respondent's products other than from specified locations. The District Court rejected respondent's requested jury instruction that the location restriction was illegal only if it unreasonably restrained or suppressed competition. Instead, relying on United States v. Arnold, Schwinn & Co., 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249, the District Court instructed the jury that it was a per se violation of s 1 if respondent entered into a contract, combination, or conspiracy with one or more of its retailers, pursuant to which it attempted to restrict the locations from

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which the retailers resold the merchandise they had purchased from respondent. The jury found that the location restriction violated s 1, and treble damages were assessed against respondent. Concluding that Schwinn was distinguishable, the Court of Appeals reversed, holding that respondent's location restriction had less potential for competitive harm than the restrictions invalidated in Schwinn and thus should be judged under the "rule of reason." Held:

1. The statement of the per se rule in Schwinn is broad enough to cover the location restriction used by respondent. And the retail-customer restriction in Schwinn is functionally indistinguishable from the location restriction here, the restrictions in both cases limiting the retailer's freedom to dispose of the purchased products and reducing, but not eliminating, intrabrand competition. Pp. 2554-2556.

2. The justification and standard for the creation of per se rules was stated in Northern Pac. R. Co. v. United States, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545: "There are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively ***37** presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they ****2551** have caused or the business excuse for their use." Under this standard, there is no justification for the distinction drawn in Schwinn between restrictions imposed in sale and nonsale transactions. Similarly, the facts of this case do not present a situation justifying a per se rule. Accordingly, the per se rule stated in Schwinn is overruled, and the location restriction used by respondent should be judged under the traditional rule-of-reason standard. Pp. 2556-2563.

537 F.2d 980, affirmed.

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Opinion

Mr. Justice POWELL delivered the opinion of the Court.

Franchise agreements between manufacturers and retailers frequently include provisions barring the retailers from selling franchised products from locations other than those specified in the agreements. This case presents important questions concerning the appropriate antitrust analysis of these restrictions under s 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. s 1, and the Court's decision in United States v. Arnold, Schwinn & Co., 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967).

***38** I

Respondent GTE Sylvania Inc. (Sylvania) manufactures and sells television sets through its Home Entertainment Products Division. Prior to 1962, like most other television manufacturers, Sylvania sold its televisions to independent or company-owned distributors who in turn resold to a large and diverse group of retailers. Prompted by a decline in its market

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share to a relatively insignificant 1% to 2% of national television sales,[1] Sylvania conducted an intensive reassessment of its marketing strategy, and in 1962 adopted the franchise plan challenged here. Sylvania phased out its wholesale distributors and began to sell its televisions directly to a smaller and more select group of franchised retailers. An acknowledged purpose of the change was to decrease the number of competing Sylvania retailers in the hope of attracting the more aggressive and competent retailers thought necessary to the improvement of the company's market position.[2] To this end, Sylvania limited the number of franchises granted for any given area and required each franchisee to sell his Sylvania products only from the location or locations at which he was franchised.[3] A franchise did not constitute an exclusive territory, and Sylvania retained sole discretion to increase the number of retailers in an area in light of the success or failure of existing retailers in developing their market. The revised marketing strategy appears to have been successful during the period at issue here, for by 1965 Sylvania's share of national television sales had increased to approximately 5%, and the ***39** company ranked as the Nation's eighth largest manufacturer of color television sets.

1 RCA at that time was the dominant firm with as much as 60% to 70% of national television sales in an industry with more than 100 manufacturers.

2 The number of retailers selling Sylvania products declined significantly as a result of the change, but in 1965 there were at least two franchised Sylvania retailers in each metropolitan center of more than 100,000 population.

3 Sylvania imposed no restrictions on the right of the franchisee to sell the products of competing manufacturers.

This suit is the result of the rupture of a franchiser-franchisee relationship that had previously prospered under the revised Sylvania plan. Dissatisfied with its sales in the city of San Francisco,[4] Sylvania decided in the spring of 1965 to franchise Young ****2552** Brothers, an established San Francisco retailer of televisions, as an additional San Francisco retailer. The proposed location of the new franchise was approximately a mile from a retail outlet operated by petitioner Continental T. V., Inc. (Continental), one of the most successful Sylvania franchisees.[5] Continental protested that the location of the new franchise violated Sylvania's marketing policy, but Sylvania persisted in its plans. Continental then canceled a large Sylvania order and placed a large order with Phillips, one of Sylvania's competitors.

4 Sylvania's market share in San Francisco was approximately 2.5% half its national and northern California average.

5 There are in fact four corporate petitioners: Continental T. V., Inc., A & G Sales, Sylpac, Inc., and S. A. M. Industries, Inc. All are owned in large part by the same individual, and all conducted business under the trade style of “Continental T. V.” We adopt the convention used by the court below

of referring to petitioners collectively as "Continental."

During this same period, Continental expressed a desire to open a store in Sacramento, Cal., a desire Sylvania attributed at least in part to Continental's displeasure over the Young Brothers decision. Sylvania believed that the Sacramento market was adequately served by the existing Sylvania retailers and denied the request.[6] In the face of this denial, Continental advised Sylvania in early September 1965, that it was in the process of moving Sylvania merchandise from its San Jose, Cal., warehouse to a new retail location that it had leased in Sacramento. Two weeks later, allegedly for unrelated reasons, Sylvania's credit department reduced Continental's ***40** credit line from $300,000 to $50,000.[7] In response to the reduction in credit and the generally deteriorating relations with Sylvania, Continental withheld all payments owed to John P. Maguire & Co., Inc. (Maguire), the finance company that handled the credit arrangements between Sylvania and its retailers. Shortly thereafter, Sylvania terminated Continental's franchises, and Maguire filed this diversity action in the United States District Court for the Northern District of California seeking recovery of money owed and of secured merchandise held by Continental.

6 Sylvania had achieved exceptional results in Sacramento, where its market share exceeded 15% in 1965.

7 In its findings of fact made in conjunction with Continental's plea for injunctive relief, the District Court rejected Sylvania's claim that its actions were prompted by independent concerns over Continental's credit. The jury's verdict is ambiguous on this point. In any event, we do not consider it relevant to the issue before us.

The antitrust issues before us originated in cross-claims brought by Continental against Sylvania and Maguire. Most important for our purposes was the claim that Sylvania had violated s 1 of the Sherman Act by entering into and enforcing franchise agreements that prohibited the sale of Sylvania products other than from specified locations.[8] At the close of evidence in the jury trial of Continental's claims, Sylvania requested the District Court to instruct the jury that its location restriction was illegal only if it unreasonably restrained or suppressed competition. App. 5-6, 9-15. Relying on this Court's decision in United States v. Arnold, Schwinn & Co., supra, the District Court rejected the proffered instruction in favor of the following one:

8 Although Sylvania contended in the District Court that its policy was unilaterally enforced, it now concedes that its location restriction involved understandings or agreements with the retailers.

"Therefore, if you find by a preponderance of the evidence that Sylvania entered into a contract, combination or conspiracy with one or more of its dealers pursuant to which Sylvania exercised dominion or control over the ***41** products sold to the dealer, after having parted with title and risk to the products, you must find any effort thereafter to restrict outlets or store locations from which its dealers resold the merchandise which they had purchased

from Sylvania to be a violation of Section 1 of the Sherman Act, ****2553** regardless of the reasonableness of the location restrictions." App. 492.

In answers to special interrogatories, the jury found that Sylvania had engaged "in a contract, combination or conspiracy in restraint of trade in violation of the antitrust laws with respect to location restrictions alone," and assessed Continental's damages at $591,505, which was trebled pursuant to 15 U.S.C. s 15 to produce an award of.$1,774,515. App. 498, 501.[9]

9 The jury also found that Maguire had not conspired with Sylvania with respect to this violation. Other claims made by Continental were either rejected by the jury or withdrawn by Continental. Most important was the jury's rejection of the allegation that the location restriction was part of a larger scheme to fix prices. A pendent claim that Sylvania and Maguire had willfully and maliciously caused injury to Continental's business in violation of California law also was rejected by the jury, and a pendent breach-of-contract claim was withdrawn by Continental during the course of the proceedings. The parties eventually stipulated to a judgment for Maguire on its claim against Continental.

On appeal, the Court of Appeals for the Ninth Circuit, sitting en banc, reversed by a divided vote. 537 F.2d 980 (1976). The court acknowledged that there is language in Schwinn that could be read to support the District Court's instruction but concluded that Schwinn was distinguishable on several grounds. Contrasting the nature of the restrictions, their competitive impact, and the market shares of the franchisers in the two cases, the court concluded that Sylvania's location restriction had less potential for competitive harm than the restrictions invalidated in Schwinn and thus should be judged under the "rule of reason" rather than the per se rule stated in Schwinn. The court found support for its ***42** position in the policies of the Sherman Act and in the decisions of other federal courts involving nonprice vertical restrictions.[10]

10 There were two major dissenting opinions. Judge Kilkenny argued that the present case is indistinguishable from Schwinn and that the jury had been correctly instructed. Agreeing with Judge Kilkenny's interpretation of Schwinn, Judge Browning stated that he found the interpretation responsive to and justified by the need to protect " 'individual traders from unnecessary restrictions upon their freedom of action.' " 537 F.2d, at 1021. See n. 21, infra.

We granted Continental's petition for certiorari to resolve this important question of antitrust law. 429 U.S. 893, 97 S.Ct. 252, 50 L.Ed.2d 176 (1976).[11]

11 This Court has never given plenary consideration to the question of the proper antitrust analysis of location restrictions. Before Schwinn such restrictions had been sustained in Boro Hall Corp. v. General Motors Corp., 124 F.2d 822 (CA2 1942). Since the decision in Schwinn, location

restrictions have been sustained by three Courts of Appeals, including the decision below. Salco Corp. v. General Motors Corp., 517 F.2d 567 (CA10 1975); Kaiser v. General Motors Corp., 396 F.Supp. 33 (ED Pa.1975), affirmance order, 530 F.2d 964 (CA3 1976).

II

A

We turn first to Continental's contention that Sylvania's restriction on retail locations is a per se violation of s 1 of the Sherman Act as interpreted in Schwinn. The restrictions at issue in Schwinn were part of a three-tier distribution system comprising, in addition to Arnold, Schwinn & Co. (Schwinn), 22 intermediate distributors and a network of franchised retailers. Each distributor had a defined geographic area in which it had the exclusive right to supply franchised retailers. Sales to the public were made only through franchised retailers, who were authorized to sell Schwinn bicycles only from specified locations. In support of this limitation, Schwinn prohibited both distributors and retailers from selling Schwinn bicycles to nonfranchised retailers. At the retail level, therefore, Schwinn was able to control the number of retailers of ***43** its bicycles in any given area according to its view of the needs of that market.

****2554** As of 1967 approximately 75% of Schwinn's total sales were made under the "Schwinn Plan." Acting essentially as a manufacturer's representative or sales agent, a distributor participating in this plan forwarded orders from retailers to the factory. Schwinn then shipped the ordered bicycles directly to the retailer, billed the retailer, bore the credit risk, and paid the distributor a commission on the sale. Under the Schwinn Plan, the distributor never had title to or possession of the bicycles. The remainder of the bicycles moved to the retailers through the hands of the distributors. For the most part, the distributors functioned as traditional wholesalers with respect to these sales, stocking an inventory of bicycles owned by them to supply retailers with emergency and "fill-in" requirements. A smaller part of the bicycles that were physically distributed by the distributors were covered by consignment and agency arrangements that had been developed to deal with particular problems of certain distributors. Distributors acquired title only to those bicycles that they purchased as wholesalers; retailers, of course, acquired title to all of the bicycles ordered by them.

In the District Court, the United States charged a continuing conspiracy by Schwinn and other alleged co-conspirators to fix prices, allocate exclusive territories to distributors, and confine Schwinn bicycles to franchised retailers. Relying on United States v. Bausch & Lomb Co., 321 U.S. 707, 64 S.Ct. 805, 88 L.Ed. 1024 (1944), the Government argued that the nonprice restrictions were per se illegal as part of a scheme for fixing the retail prices of Schwinn bicycles. The District Court rejected the price-fixing allegation because of a failure of proof and held that Schwinn's limitation of retail bicycle sales to franchised retailers was permissible under s 1. The court found a s 1 violation, however, in "a conspiracy to divide certain borderline or overlapping counties in the territories served by four Midwestern ***44**

cycle distributors." 237 F.Supp. 323, 342 (ND Ill.1965). The court described the violation as a "division of territory by agreement between the distributors . . . horizontal in nature," and held that Schwinn's participation did not change that basic characteristic. Ibid. The District Court limited its injunction to apply only to the territorial restrictions on the resale of bicycles purchased by the distributors in their roles as wholesalers. Ibid.

Schwinn came to this Court on appeal by the United States from the District Court's decision. Abandoning its per se theories, the Government argued that Schwinn's prohibition against distributors' and retailers' selling Schwinn bicycles to nonfranchised retailers was unreasonable under s 1 and that the District Court's injunction against exclusive distributor territories should extend to all such restrictions regardless of the form of the transaction. The Government did not challenge the District Court's decision on price fixing, and Schwinn did not challenge the decision on exclusive distributor territories.

The Court acknowledged the Government's abandonment of its per se theories and stated that the resolution of the case would require an examination of "the specifics of the challenged practices and their impact upon the marketplace in order to make a judgment as to whether the restraint is or is not 'reasonable' in the special sense in which s 1 of the Sherman Act must be read for purposes of this type of inquiry." 388 U.S., at 374, 87 S.Ct., at 1863. Despite this description of its task, the Court proceeded to articulate the following "bright line" per se rule of illegality for vertical restrictions: "Under the Sherman Act, it is unreasonable without more for a manufacturer to seek to restrict and confine areas or persons with whom an article may be traded after the manufacturer has parted with dominion over it." Id., at 379, 87 S.Ct., at 1865. But the Court expressly stated that the rule of reason governs when "the manufacturer retains title, dominion, and risk with ***45** respect to the product and the position and function of the dealer in question are, in fact, indistinguishable from ****2555** those of an agent or salesman of the manufacturer." Id., at 380, 87 S.Ct., at 1866.

Application of these principles to the facts of Schwinn produced sharply contrasting results depending upon the role played by the distributor in the distribution system. With respect to that portion of Schwinn's sales for which the distributors acted as ordinary wholesalers, buying and reselling Schwinn bicycles, the Court held that the territorial and customer restrictions challenged by the Government were per se illegal. But, with respect to that larger portion of Schwinn's sales in which the distributors functioned under the Schwinn Plan and under the less common consignment and agency arrangements, the Court held that the same restrictions should be judged under the rule of reason. The only retail restriction challenged by the Government prevented franchised retailers from supplying nonfranchised retailers. Id., at 377, 87 S.Ct., at 1864. The Court apparently perceived no material distinction between the restrictions on distributors and retailers, for it held:

"The principle is, of course, equally applicable to sales to retailers, and the decree should similarly enjoin the making of any sales to retailers upon any condition, agreement or understanding limiting the retailer's freedom as to where and to whom it will resell the products." Id., at 378, 87 S.Ct., at 1865.

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Applying the rule of reason to the restrictions that were not imposed in conjunction with the sale of bicycles, the Court had little difficulty finding them all reasonable in light of the competitive situation in "the product market as a whole." Id., at 382, 87 S.Ct., at 1867.

B

In the present case, it is undisputed that title to the television sets passed from Sylvania to Continental. Thus, the Schwinn per se rule applies unless Sylvania's restriction on ***46** locations falls outside Schwinn's prohibition against a manufacturer's attempting to restrict a "retailer's freedom as to where and to whom it will resell the products." Id., at 378, 87 S.Ct., at 1865. As the Court of Appeals conceded, the language of Schwinn is clearly broad enough to apply to the present case. Unlike the Court of Appeals, however, we are unable to find a principled basis for distinguishing Schwinn from the case now before us.

Both Schwinn and Sylvania sought to reduce but not to eliminate competition among their respective retailers through the adoption of a franchise system. Although it was not one of the issues addressed by the District Court or presented on appeal by the Government, the Schwinn franchise plan included a location restriction similar to the one challenged here. These restrictions allowed Schwinn and Sylvania to regulate the amount of competition among their retailers by preventing a franchisee from selling franchised products from outlets other than the one covered by the franchise agreement. To exactly the same end, the Schwinn franchise plan included a companion restriction, apparently not found in the Sylvania plan, that prohibited franchised retailers from selling Schwinn products to nonfranchised retailers. In Schwinn the Court expressly held that this restriction was impermissible under the broad principle stated there. In intent and competitive impact, the retail-customer restriction n Schwinn is indistinguishable from the location restriction in the present case. In both cases the restrictions limited the freedom of the retailer to dispose of the purchased products as he desired. The fact that one restriction was addressed to territory and the other to customers is irrelevant to functional anti-trust analysis, and indeed, to the language and broad thrust of the opinion in Schwinn.[12] ****2556** As Mr. Chief Justice Hughes stated in ***47** Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360, 377, 53 S.Ct. 471, 474, 480, 77 L.Ed. 825 (1933): "Realities must dominate the judgment. . . . The Anti-Trust Act aims at substance."

12 The distinctions drawn by the Court of Appeals and endorsed in Mr. Justice White's separate opinion have no basis in Schwinn. The intrabrand competitive impact of the restrictions at issue in Schwinn ranged from complete elimination to mere reduction; yet, the Court did not even hint at any distinction on this ground. Similarly, there is no suggestion that the per se rule was applied because of Schwinn's prominent position in its industry. That position was the same whether the bicycles were sold or consigned, but the Court's analysis was quite different. In light of Mr. Justice White's emphasis on the "superior consumer

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acceptance" enjoyed by the Schwinn brand name, post, at 2565, we note that the Court rejected precisely that premise in Schwinn. Applying the rule of reason to the restrictions imposed in nonsale transactions, the Court stressed that there was "no showing that (competitive bicycles were) not in all respects reasonably interchangeable as articles of competitive commerce with the Schwinn product" and that it did "not regard Schwinn's claim of product excellence as establishing the contrary." 388 U.S., at 381, and n. 7, 87 S.Ct., at 1867. Although Schwinn did hint at preferential treatment for new entrants and failing firms, the District Court below did not even submit Sylvania's claim that it was failing to the jury. Accordingly, Mr. Justice White's position appears to reflect an extension of Schwinn in this regard. Having crossed the "failing firm" line, Mr. Justice White attempts neither to draw a new one nor to explain why one should be drawn at all.

III

Sylvania argues that if Schwinn cannot be distinguished, it should be reconsidered. Although Schwinn is supported by the principle of stare decisis, Illinois Brick Co. v. Illinois, 431 U.S. 720, 736, 97 S.Ct. 2061, 2070, 52 L.Ed.2d 707 (1977), we are convinced that the need for clarification of the law in this area justifies reconsideration. Schwinn itself was an abrupt and largely unexplained departure from White Motor Co. v. United States, 372 U.S. 253, 83 S.Ct. 696, 9 L.Ed.2d 738 (1963), where only four years earlier the Court had refused to endorse a per se rule for vertical restrictions. Since its announcement, Schwinn has been the subject of continuing controversy and confusion, both in the scholarly journals and in the federal courts. The great weight of scholarly opinion ***48** has been critical of the decision,[13] and a number of the federal courts confronted with analogous vertical restrictions have sought to limit its reach.[14] ****2557** In our view, the experience of the ***49** past 10 years should be brought to bear on this subject of considerable commercial importance.

13 A former Assistant Attorney General in charge of the Antitrust Division has described Schwinn as "an exercise in barren formalism" that is "artificial and unresponsive to the competitive needs of the real world." Baker, Vertical Restraints in Times of Change: From White to Schwinn to Where?, 44 Antitrust L.J. 537 (1975). See, e. g., Handler, The Twentieth Annual Antitrust Review 1967, 53 Va.L.Rev. 1667 (1967); McLaren, Territorial and Customer Restrictions, Consignments, Suggested Retail Prices and Refusals to Deal, 37 Antitrust L.J. 137 (1968); Pollock, Alternative Distribution Methods After Schwinn, 63 Nw.U.L.Rev. 595 (1968); Posner, Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions, 75 Colum.L.Rev. 282 (1975); Robinson, Recent Antitrust Developments: 1974, 75 Colum.L.Rev. 243 (1975); Note, Vertical Territorial and Customer Restrictions in the

Franchising Industry, 10 Colum.J.L. & Soc.Prob. 497 (1974); Note, Territorial and Customer Restrictions: A Trend Toward a Broader Rule of Reason?, 40 Geo.Wash.L.Rev. 123 (1971); Note, Territorial Restrictions and Per Se Rules A Re-evaluation of the Schwinn and Sealy Doctrines, 70 Mich.L.Rev. 616 (1972). But see Louis, Vertical Distributional Restraints Under Schwinn and Sylvania : An Argument for the Continuing Use of a Partial Per Se Approach, 75 Mich.L.Rev. 275 (1976); Zimmerman, Distribution Restrictions After Sealy and Schwinn, 12 Antitrust Bull. 1181 (1967). For a more inclusive list of articles and comments, see 537 F.2d, at 988 n. 13.

14 Indeed, as one commentator has observed, many courts "have struggled to distinguish or limit Schwinn in ways that are a tribute to judicial ingenuity." Robinson, supra, n. 13, at 272. Thus, the statement in Schwinn at post-sale vertical restrictions as to customers or territories are "unreasonable without more," 388 U.S., at 379, 87 S.Ct., at 1865, has been interpreted to allow an exception to the per se rule where the manufacturer proves "more" by showing that the restraints will protect consumers against injury and the manufacturer against product liability claims. See, e. g., Tripoli Co. v. Wella Corp., 425 F.2d 932, 936-938 (CA3 1970) (en banc). Similarly, the statement that Schwinn's enforcement of its restrictions had been " 'firm and resolute,' " 388 U.S., at 372, 87 S.Ct., at 1862, has been relied upon to distinguish cases lacking that element. See, e. g., Janel Sales Corp. v. Lanvin Parfums, Inc., 396 F.2d 398, 406 (CA2 1968). Other factual distinctions have been drawn to justify upholding territorial restrictions that would seem to fall within the scope of the Schwinn per se rule. See, e. g., Carter-Wallace, Inc. v. United States, 449 F.2d 1374, 1379-1380, 196 Ct.Cl. 35, 44-46 (1971) (per se rule inapplicable when purchaser can avoid restraints by electing to buy product at higher price); Colorado Pump & Supply Co. v. Febco, Inc., 472 F.2d 637 (CA10 1973) (apparent territorial restriction characterized as primary responsibility clause). One Court of Appeals has expressly urged us to consider the need in this area for greater flexibility. Adolph Coors Co. v. FTC, 497 F.2d 1178, 1187 (CA10 1974). The decision in Schwinn and the developments in the lower courts have been exhaustively surveyed in ABA Antitrust Section, Monograph No. 2, Vertical Restrictions Limiting Intrabrand Competition (1977) (ABA Monograph No. 2).

(1-3) The traditional framework of analysis under s 1 of the Sherman Act is familiar and does not require extended discussion. Section 1 prohibits "(e) very contract, combination . . ., or conspiracy, in restraint of trade or commerce." Since the early years of this century a judicial gloss on this statutory language has established the "rule of reason" as the prevailing standard of analysis. Standard Oil Co. v. United States, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911).

Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.[15] Per se rules of illegality ***50** are appropriate only when they relate to conduct that is manifestly anticompetitive. As the Court explained in Northern Pac. R. Co. v. United States, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958), "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use."[16]

15 One of the most frequently cited statements of the rule of reason is that of Mr. Justice Brandeis in Chicago Board of Trade v. United States, 246 U.S. 231, 238, 38 S.Ct. 242, 244, 62 L.Ed. 683 (1918):

"The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences."

16 Per se rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its pro-competitive consequences. Cases that do not fit the generalization may arise, but a per se rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them. Once established, per se rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system of the more complex rule-of-reason trials, see Northern Pac. R. Co. v. United States, 356 U.S., at 5, 78 S.Ct., at 518; United States v. Topco Associates, Inc., 405 U.S. 596, 609-610, 92 S.Ct. 1126, 1134, 31 L.Ed.2d 515 (1972), but those advantages are not sufficient in themselves to justify the creation of per se rules. If it were otherwise, all of antitrust law would be reduced to per se rules, thus introducing an unintended and undesirable rigidity in the law.

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In essence, the issue before us is whether Schwinn 's per se rule can be justified under the demanding standards of Northern Pac. R. Co. The Court's refusal to endorse a per se rule in White Motor Co. was based on its uncertainty as to whether vertical restrictions satisfied those standards. Addressing this question for the first time, the Court stated:

"We need to know more than we do about the actual impact of these arrangements on competition to decide whether they have such a 'pernicious effect on ****2558** competition and lack . . . any redeeming virtue' (Northern Pac. R. Co. v. United States, supra, 356 U.S. p. 5, 78 S.Ct. 514) and therefore should ***51** be classified as per se violations of the Sherman Act." 372 U.S., at 263, 83 S.Ct., at 702.

Only four years later the Court in Schwinn announced its sweeping per se rule without even a reference to Northern Pac. R. Co. and with no explanation of its sudden change in position. [17] We turn now to consider Schwinn in light of Northern Pac. R. Co.

17 After White Motor Co., the Courts of Appeals continued to evaluate territorial restrictions according to the rule of reason. Sandura Co. v. FTC, 339 F.2d 847 (CA6 1964); Snap-On Tools Corp. v. FTC, 321 F.2d 825 (CA7 1963). For an exposition of the history of the antitrust analysis of vertical restrictions before Schwinn, see ABA Monograph No. 2, pp. 6-8.

The market impact of vertical restrictions [18] is complex because of their potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition. ***52** [19] Significantly, the Court in Schwinn did not distinguish among the challenged restrictions on the basis of their individual potential for intrabrand harm or interbrand benefit. Restrictions that completely eliminated intrabrand competition among Schwinn distributors were analyzed no differently from those that merely moderated intrabrand competition among retailers. The pivotal factor was the passage of title: All restrictions were held to be per se illegal where title had passed, and all were evaluated and sustained under the rule of reason where it had not. The location restriction at issue here would be subject to the same pattern of analysis under Schwinn.

18 As in Schwinn, we are concerned here only with nonprice vertical restrictions. The per se illegality of price restrictions has been established firmly for many years and involves significantly different questions of analysis and policy. As Mr. Justice White notes, post, at 2568, some commentators have argued that the manufacturer's motivation for imposing vertical price restrictions may be the same as for nonprice restrictions. There are, however, significant differences that could easily justify different treatment. In his concurring opinion in White Motor Co. v. United States, Mr. Justice Brennan noted that, unlike nonprice restrictions, "(r)esale price maintenance is not only designed to, but almost invariably does in fact, reduce price competition not only among sellers of the affected product, but quite as much between that product

and competing brands." 372 U.S., at 268, 83 S.Ct., at 704. Professor Posner also recognized that "industry-wide resale price maintenance might facilitate cartelizing." Posner, supra, n. 13, at 294 (footnote omitted); see R. Posner, Antitrust: Cases, Economic Notes and Other Materials 134 (1974); E. Gellhorn, Antitrust Law and Economics 252 (1976); Note, 10 Colum.J.L. & Soc.Prob., supra, n. 13, at 498 n. 12. Furthermore, Congress recently has expressed its approval of a per se analysis of vertical price restrictions by repealing those provisions of the Miller-Tydings and McGuire Acts allowing fair trade pricing at the option of the individual States. Consumer Goods Pricing Act of 1975, 89 Stat. 801, amending 15 U.S.C. ss 1, 45(a). No similar expression of congressional intent exists for nonprice restrictions.

19 Interbrand competition is the competition among the manufacturers of the same generic product television sets in this case and is the primary concern of antitrust law. The extreme example of a deficiency of interbrand competition is monopoly, where there is only one manufacturer. In contrast, intrabrand competition is the competition between the distributors wholesale or retail of the product of a particular manufacturer.

The degree of intrabrand competition is wholly independent of the level of interbrand competition confronting the manufacturer. Thus, there may be fierce intrabrand competition among the distributors of a product produced by a monopolist and no intrabrand competition among the distributors of a product produced by a firm in a highly competitive industry. But when interbrand competition exists, as it does among television manufacturers, it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product.

It appears that this distinction between sale and nonsale transactions resulted from the Court's effort to accommodate the perceived intrabrand harm and interbrand benefit of vertical restrictions. The per se rule for sale transactions reflected the view that vertical restrictions are "so obviously destructive" **2559 of intrabrand competition[20] that their use would "open the door to exclusivity of outlets and limitation of territory *53 further than prudence permits." 388 U.S., at 379-380, 87 S.Ct., at 1865-1866.[21] Conversely, the continued adherence to the traditional rule of reason for nonsale transactions reflected the view that the restrictions have too great a potential for the promotion of interbrand competition to justify complete prohibition.[22] *54 The Court's opinion provides no analytical support for these contrasting positions. Nor is there even an assertion in the opinion that the competitive impact of vertical restrictions is significantly affected by the form of the transaction. Nonsale transactions appear to be excluded from the per se rule, not because of a greater danger of intrabrand harm or a greater promise of interbrand benefit, but rather because of the

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Court's unexplained belief that a complete per se prohibition would be too "inflexibl(e)." Id., at 379, 87 S.Ct., at 1865.

20 The Court did not specifically refer to intrabrand competition, but this meaning is clear from the context.

21 The Court also stated that to impose vertical restrictions in sale transactions would "violate the ancient rule against restraints on alienation." 388 U.S., at 380, 87 S.Ct., at 1866. The isolated reference has provoked sharp criticism from virtually all of the commentators on the decision, most of whom have regarded the Court's apparent reliance on the "ancient rule" as both a misreading of legal history and a perversion of antitrust analysis. See, e. g., Handler, supra, n. 13, at 1684-1686; Posner, supra, n. 13, at 295-296; Robinson, supra, n. 13, at 270-271; but see Louis, supra, n. 13 at 276 n. 6. We quite agree with Mr. Justice Stewart's dissenting comment in Schwinn that "the state of the common law 400 or even 100 years ago is irrelevant to the issue before us: the effect of the antitrust laws upon vertical distributional restraints in the American economy today." 388 U.S., at 392, 87 S.Ct., at 1872.

We are similarly unable to accept Judge Browning's interpretation of Schwinn. In this dissent below he argued that the decision reflects the view that the Sherman Act was intended to prohibit restrictions on the autonomy of independent businessmen even though they have no impact on "price, quality, and quantity of goods and services," 537 F.2d, at 1019. This view is certainly not explicit in Schwinn, which purports to be based on an examination of the "impact (of the restrictions) upon the marketplace." 388 U.S., at 374, 87 S.Ct., at 1863. Competitive economies have social and political as well as economic advantages, see e. g., Northern Pac. R. Co. v. United States, 356 U.S., at 4, 78 S.Ct., at 517, but an antitrust policy divorced from market considerations would lack any objective benchmarks. As Mr. Justice Brandeis reminded us: "Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence." Chicago Board of Trade v. United States, 246 U.S., at 238, 38 S.Ct., at 244. Although Mr. Justice White's opinion endorses Judge Browning's interpretation, post, at 2566-2567, it purports to distinguish Schwinn on grounds inconsistent with that interpretation, post, at 2569.

22 In that regard, the Court specifically stated that a more complete prohibition "might severely hamper smaller enterprises resorting to reasonable methods of meeting the competition of giants and of merchandising through independent dealers." 388 U.S., at 380, 87 S.Ct., at 1866. The Court also broadly hinted that it would recognize additional exceptions to the per se rule for new entrants in an industry and for failing firms, both of which were mentioned in White Motor as candidates for such exceptions. 388

U.S., at 374, 87 S.Ct., at 1863. The Court might have limited the exceptions to the per se rule to these situations, which present the strongest arguments for the sacrifice of intrabrand competition for interbrand competition. Significantly, it chose instead to create the more extensive exception for nonsale transactions which is available to all businesses, regardless of their size, financial health, or market share. This broader exception demonstrates even more clearly the Court's awareness of the "redeeming virtues" of vertical restrictions.

****2560** Vertical restrictions reduce intrabrand competition by limiting the number of sellers of a particular product competing for the business of a given group of buyers. Location restrictions have this effect because of practical constraints on the effective marketing area of retail outlets. Although intrabrand competition may be reduced, the ability of retailers to exploit the resulting market may be limited both by the ability of consumers to travel to other franchised locations and, perhaps more importantly, to purchase the competing products of other manufacturers. None of these key variables, however, is affected by the form of the transaction by which a manufacturer conveys his products to the retailers.

Vertical restrictions promote interbrand competition by allowing the manufacturer to achieve certain efficiencies in the distribution of his products. These "redeeming virtues" are implicit in every decision sustaining vertical restrictions under the rule of reason. Economists have identified a number ***55** of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers. See, e. g., Preston, Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards, 30 Law & Contemp.Prob. 506, 511 (1965).[23] For example, new manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer. Established manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products. Service and repair are vital for many products, such as automobiles and major household appliances. The availability and quality of such services affect a manufacturer's goodwill and the competitiveness of his product. Because of market imperfections such as the so-called "free rider" effect, these services might not be provided by retailers in a purely competitive situation, despite the fact that each retailer's benefit would be greater if all provided the services than if none did. Posner, supra, n. 13, at 285; cf. P. Samuelson, Economics 506-507 (10th ed. 1976).

23 Marketing efficiency is not the only legitimate reason for a manufacturer's desire to exert control over the manner in which his products are sold and serviced. As a result of statutory and common-law developments, society increasingly demands that manufacturers assume direct responsibility for the safety and quality of their products. For

example, at the federal level, apart from more specialized requirements, manufacturers of consumer products have safety responsibilities under the Consumer Product Safety Act, 15 U.S.C. s 2051 et seq. (1970 ed., Supp. V), and obligations for warranties under the Consumer Product Warranties Act, 15 U.S.C. s 2301 et seq. (1970 ed., Supp. V). Similar obligations are imposed by state law. See, e. g., Cal.Civ.Code Ann. s 1790 et seq. (West 1973). The legitimacy of these concerns has been recognized in cases involving vertical restrictions. See, e. g., Tripoli Co. v. Wella Corp., 425 F.2d 932 (CA3 1970).

***56** Economists also have argued that manufacturers have an economic interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of their products. Bork, The Rule of Reason and the Per Se Concept: Price Fixing and the Market Division (II), 75 Yale L.J. 373, 403 (1966); Posner, supra, n. 13, at 283, 287-288. [24] Although the view that the manufacturer's interest necessarily corresponds with that of the public is not universally shared, even the leading critic of vertical restrictions concedes that Schwinn 's distinction between sale and nonsale transactions is essentially unrelated to any relevant economic impact. Comanor, Vertical Territorial and Customer Restrictions: White Motor and Its Aftermath, 81 Harv.L.Rev. 1419, 1422 (1968). [25] Indeed, to the extent that the form of the transaction is related ****2561** to interbrand benefits, the Court's distinction is inconsistent with its articulated concern for the ability of smaller firms to compete effectively with larger ones. Capital requirements and administrative expenses may prevent smaller firms from using the exception for nonsale transactions. See, e. g., Baker, supra, n. 13, at 538; Phillips, Schwinn Rules and the "New Economics" of Vertical ***57** Relation, 44 Antitrust L.J. 573, 576 (1975); Pollock, supra, n. 13, at 610. [26]

24 "Generally a manufacturer would prefer the lowest retail price possible, once its price to dealers has been set, because a lower retail price means increased sales and higher manufacturer revenues." Note, 88 Harv.L.Rev. 636, 641 (1975). In this context, a manufacturer is likely to view the difference between the price at which it sells to its retailers and their price to the consumer as his "cost of distribution," which it would prefer to minimize. Posner, supra, n. 13, at 283.

25 Professor Comanor argues that the promotional activities encouraged by vertical restrictions result in product differentiation and, therefore, a decrease in interbrand competition. This argument is flawed by its necessary assumption that a large part of the promotional efforts resulting from vertical restrictions will not convey socially desirable information about product availability, price, quality, and services. Nor is it clear that a per se rule would result in anything more than a shift to less efficient methods of obtaining the same promotional effects.

26 We also note that per se rules in this area may work to the ultimate detriment of the small businessmen who operate as franchisees. To the extent that a per se rule prevents a firm from using the franchise system to achieve efficiencies that it perceives as important to its successful operation, the rule creates an incentive for vertical integration into the distribution system, thereby eliminating to that extent the role of independent businessmen. See, e. g., Keck, The Schwinn Case, 23 Bus.Law. 669 (1968); Pollock, supra, n. 13, at 608-610.

(4) We conclude that the distinction drawn in Schwinn between sale and nonsale transactions is not sufficient to justify the application of a per se rule in one situation and a rule of reason in the other. The question remains whether the per se rule stated in Schwinn should be expanded to include non-sale transactions or abandoned in favor of a return to the rule of reason. We have found no persuasive support for expanding the per se rule. As noted above, the Schwinn Court recognized the undesirability of "prohibit(ing) all vertical restrictions of territory and all franchising . . .." 388 U.S., at 379-380, 87 S.Ct., at 1866.[27] And even Continental does not urge us to hold that all such restrictions are per se illegal.

27 Continental's contention that balancing intrabrand and interbrand competitive effects of vertical restrictions is not a "proper part of the judicial function," Brief for Petitioners 52, is refuted by Schwinn itself. United States v. Topco Associates, Inc., 405 U.S., at 608, 92 S.Ct., at 1134, is not to the contrary, for it involved a horizontal restriction among ostensible competitors.

(5, 6) We revert to the standard articulated in Northern Pac. R. Co., and reiterated in White Motor, for determining whether vertical restrictions must be "conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." 356 U.S., at 5, 78 S.Ct., at 518. Such restrictions, in varying forms, are widely used in our free market economy. As indicated above, there is substantial scholarly and judicial authority ***58** supporting their economic utility. There is relatively little authority to the contrary.[28] Certainly, there has been no showing in this case, either generally or with respect to Sylvania's agreements, that vertical restrictions have or are likely to have a "pernicious effect on competition" or that they "lack . . . any redeeming virtue." Ibid.[29] Accordingly, we conclude ****2562** that the per se rule stated in Schwinn must be overruled.[30] In so holding we do not foreclose the possibility that particular applications of vertical restrictions might justify per se prohibition under Northern Pac. R. Co. But we do make clear that departure from the rule-of-reason standard ***59** must be based upon demonstrable economic effect rather than as in Schwinn upon formalistic line drawing.

28 There may be occasional problems in differentiating vertical restrictions from horizontal restrictions originating in agreements among the retailers. There is no doubt that restrictions in the latter category would be illegal per

se, see, e. g., United States v. General Motors Corp., 384 U.S. 127, 86 S.Ct. 1321, 16 L.Ed.2d 415 (1966); United States v. Topco Associates, Inc., supra, but we do not regard the problems of proof as sufficiently great to justify a per se rule.

29 The location restriction used by Sylvania was neither the least nor the most restrictive provision that it could have used. See ABA Monograph No. 2, pp. 20-25. But we agree with the implicit judgment in Schwinn that a per se rule based on the nature of the restriction is, in general, undesirable. Although distinctions can be drawn among the frequently used restrictions, we are inclined to view them as differences of degree and form. See Robinson, supra, n. 13, at 279-280; Averill, Sealy, Schwinn and Sherman One: An Analysis and Prognosis, 15 N.Y.L.F. 39, 65 (1969). We are unable to perceive significant social gain from channeling transactions into one form or another. Finally, we agree with the Court in Schwinn that the advantages of vertical restrictions should not be limited to the categories of new entrants and failing firms. Sylvania was faltering, if not failing, and we think it would be unduly artificial to deny it the use of valuable competitive tools.

30 The importance of stare decisis is, of course, unquestioned, but as Mr. Justice Frankfurter stated in Helvering v. Hallock, 309 U.S. 106, 119, 60 S.Ct. 444, 451, 84 L.Ed. 604 (1940), "stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience."

(7) In sum, we conclude that the appropriate decision is to return to the rule of reason that governed vertical restrictions prior to Schwinn. When anticompetitive effects are shown to result from particular vertical restrictions they can be adequately policed under the rule of reason, the standard traditionally applied for the majority of anticompetitive practices challenged under s 1 of the Act. Accordingly, the decision of the Court of Appeals is

Affirmed.

Mr. Justice REHNQUIST took no part in the consideration or decision of this case.

Mr. Justice WHITE, concurring in the judgment.

Although I agree with the majority that the location clause at issue in this case is not a per se violation of the Sherman Act and should be judged under the rule of reason, I cannot agree that this result requires the overruling of United States v. Arnold, Schwinn & Co., 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967). In my view this case is distinguishable from Schwinn because there is less potential for restraint of intrabrand competition and more potential for stimulating interbrand competition. As to intrabrand competition, Sylvania, unlike Schwinn, did not restrict the

customers to whom or the territories where its purchasers could sell. As to interbrand competition, Sylvania, unlike Schwinn, had an insignificant market share at the time it adopted its challenged distribution practice and enjoyed no consumer preference that would allow its retailers to charge a premium over other brands. In two short paragraphs, the majority disposes of the view, adopted after careful analysis by the Ninth Circuit en banc below, that these differences provide a "principled basis for distinguishing Schwinn," ante, at 2556, despite holdings by three Courts of Appeals and the District Court on remand in Schwinn that ***60** the per se rule established in that case does not apply to location clauses such as Sylvania's. To reach out to overrule one of this Court's recent interpretations of the Sherman Act, after such a cursory examination of the necessity for doing so, is surely an affront to the principle that considerations of stare decisis are to be given particularly strong weight in the area of statutory construction. Illinois Brick Co. v. Illinois, 431 U.S. 720, 736-737, 97 S.Ct. 2061, 2070, 52 L.Ed.2d 707 (1977); Runyon v. McCrary, 427 U.S. 160, 175, 96 S.Ct. 2586, 2596, 49 L.Ed.2d 415 (1976); Edelman v. Jordan, 415 U.S. 651, 671, 94 S.Ct. 1347, 1359, 39 L.Ed.2d 662 (1974).

One element of the system of interrelated vertical restraints invalidated in Schwinn was a retail-customer restriction prohibiting franchised retailers from selling Schwinn products to nonfranchised retailers. The Court rests its inability to distinguish Schwinn entirely on this retail-customer restriction, finding it "(i)n intent and competitive ****2563** impact . . . indistinguishable from the location restriction in the present case," because "(i)n both cases the restrictions limited the freedom of the retailer to dispose of the purchased products as he desired." Ante, at 2556. The customer restriction may well have, however, a very different "intent and competitive impact" than the location restriction: It prevents discount stores from getting the manufacturer's product and thus prevents intrabrand price competition. Suppose, for example, that interbrand competition is sufficiently weak that the franchised retailers are able to charge a price substantially above wholesale. Under a location restriction, these franchisers are free to sell to discount stores seeking to exploit the potential for sales at prices below the prevailing retail level. One of the franchised retailers may be tempted to lower its price and act in effect as a wholesaler for the discount house in order to share in the profits to be had from lowering prices and expanding volume.[1]

1 The franchised retailers would be prevented from engaging in discounting themselves if, under the Colgate doctrine, see infra, at 2567, the manufacturer could lawfully terminate dealers who did not adhere to his suggested retail price.

***61** Under a retail-customer restriction, on the other hand, the franchised dealers cannot sell to discounters, who are cut off altogether from the manufacturer's product and the opportunity for intrabrand price competition. This was precisely the theory on which the Government successfully challenged Schwinn's customer restrictions in this Court. The District Court in that case found that "(e)ach one of (Schwinn's franchised retailers) knows also that he is not a wholesaler and that he cannot sell as a wholesaler or act as an agent for some other unfranchised dealer, such as a discount house

retailer who has not been franchised as a dealer by Schwinn." 237 F.Supp. 323, 333 (ND Ill.1965). The Government argued on appeal, with extensive citations to the record, that the effect of this restriction was "to keep Schwinn products out of the hands of discount houses and other price cutters so as to discourage price competition in retailing . . .." Brief for United States, O.T. 1966, No. 25, p. 26. See id., at 29-37. [2]

2 Given the Government's emphasis on the inhibiting effect of the Schwinn restrictions on discounting activities, the Court may well have been referring to this effect when it condemned the restrictions as "obviously destructive of competition." 388 U.S., at 379, 87 S.Ct., at 1865. But the Court was also heavily influenced by its concern for the freedom of dealers to control the disposition of products they purchased from Schwinn. See infra, at 2566-2568. In any event, the record in Schwinn illustrates the potentially greater threat to intrabrand competition posed by customer as opposed to location restrictions.

It is true that, as the majority states, Sylvania's location restriction inhibited to some degree "the freedom of the retailer to dispose of the purchased products" by requiring the retailer to sell from one particular place of business. But the retailer is still free to sell to any type of customer including discounters and other unfranchised dealers from any area. I think this freedom implies a significant difference for the effect of a location clause on intrabrand competition. The ***62** District Court on remand in Schwinn evidently thought so as well, for after enjoining Schwinn's customer restrictions as directed by this Court it expressly sanctioned location clauses, permitting Schwinn to "designat(e) in its retailer franchise agreements the location of the place or places of business for which the franchise is issued." 291 F.Supp. 564, 565-566 (ND Ill.1968).

An additional basis for finding less restraint of intrabrand competition in this case, emphasized by the Ninth Circuit en banc, is that Schwinn involved restrictions on competition among distributors at the ****2564** wholesale level. As Judge Ely wrote for the six-member majority below:

"(Schwinn) had created exclusive geographical sales territories for each of its 22 wholesaler bicycle distributors and had made each distributor the sole Schwinn outlet for the distributor's designated area. Each distributor was prohibited from selling to any retailers located outside its territory. . . .

". . . Schwinn's territorial restrictions requiring dealers to confine their sales to exclusive territories prescribed by Schwinn prevented a dealer from competing for customers outside his territory. . . . Schwinn's restrictions guaranteed each wholesale distributor that it would be absolutely isolated from all competition from other Schwinn wholesalers." 537 F.2d 980, 989-990 (1976).

Moreover, like its franchised retailers, Schwinn's distributors were absolutely barred from selling to nonfranchised retailers, further limiting the possibilities of intrabrand price competition.

The majority apparently gives no weight to the Court of Appeals' reliance on the difference between the competitive effects of Sylvania's location clause and Schwinn's interlocking "system of vertical restraints affecting both wholesale and retail distribution." Id., at 989. It also ignores post-Schwinn ***63** decisions of the Third and Tenth Circuits upholding the validity of location clauses similar to Sylvania's here. Salco Corp. v. General Motors Corp., 517 F.2d 567 (CA10 1975); Kaiser v. General Motors Corp., 530 F.2d 964 (CA3 1976), aff'g 396 F.Supp. 33 (ED Pa.1975). Finally, many of the scholarly authorities the majority cites in support of its overruling of Schwinn have not had to strain to distinguish location clauses from the restrictions invalidated there. E.g., Robinson, Recent Antitrust Developments: 1974, 75 Colum.L.Rev. 243, 278 (1975) (outcome in Sylvania not preordained by Schwinn because of marked differences in the vertical restraints in the two cases); McLaren, Territorial and Customer Restrictions, Consignments, Suggested Retail Prices and Refusals to Deal, 37 Antitrust L.J. 137, 144-145 (1968) (by implication Schwinn exempts location clauses from its per se rule); Pollock, Alternative Distribution Methods After Schwinn, 63 Nw.U.L.Rev. 595, 603 (1968) ("Nor does the Schwinn doctrine outlaw the use of a so-called 'location clause' . . .").

Just as there are significant differences between Schwinn and this case with respect to intrabrand competition, there are also significant differences with respect to interbrand competition. Unlike Schwinn, Sylvania clearly had no economic power in the generic product market. At the time they instituted their respective distribution policies, Schwinn was "the leading bicycle producer in the Nation," with a national market share of 22.5%, 388 U.S., at 368, 374, 87 S.Ct., at 1860, 1863, whereas Sylvania was a "faltering, if not failing" producer of television sets, with "a relatively insignificant 1% to 2%" share of the national market in which the dominant manufacturer had a 60% to 70% share. Ante, at 2551, 2562 n. 29. Moreover, the Schwinn brand name enjoyed superior consumer acceptance and commanded a premium price as, in the District Court's words, "the Cadillac of the bicycle industry." 237 F.Supp., at 335. This premium gave Schwinn dealers a margin of ***64** protection from interbrand competition and created the possibilities for price cutting by discounters that the Government argued were forestalled by Schwinn's customer restrictions.[3] Thus, judged by the criteria ****2565** economists use to measure market power product differentiation and market share[4] Schwinn enjoyed a substantially stronger position in the bicycle market than did Sylvania in the television market. This Court relied on Schwinn's market position as one reason not to apply the rule of reason to the vertical restraints challenged there. "Schwinn was not a newcomer, seeking to break into or stay in the bicycle business. It was not a 'failing company.' On the contrary, at the initiation of these practices, it was the leading bicycle producer in the Nation." 388 U.S., at 374, 87 S.Ct., at 1863. And the Court of Appeals below found "another significant distinction between our case and Schwinn " in Sylvania's "precarious market share," which "was so small when it adopted its locations practice that it was

threatened with expulsion from the television market." 537 F.2d, at 991. [5]

3 Relying on the finding of the District Court, the Government argued: "(T)he declared purpose of the Schwinn franchising system (was) to establish and exploit a distinctive identity and superior consumer acceptance for the Schwinn brand name as the Cadillac of bicycles, thereby enabling the charging of a premium price . . .. This scheme could not possibly succeed, and doubtless would long ago have been abandoned, if in the consumer's mind other bicycles were just as good as Schwinn's." Brief for United States, O.T. 1966, No. 25, p. 36.

4 See, e.g., F. Scherer, Industrial Market Structure and Economic Performance 10-11 (1970); P. Samuelson, Economics 485-491 (10th ed. 1976).

5 Schwinn's national market share declined to 12.8% in the 10 years following the institution of its distribution program, at which time it ranked second behind a firm with a 22.8% share. 388 U.S., at 368-369, 87 S.Ct., at 1859-60. In the three years following the adoption of its locations practice, Sylvania's national market share increased to 5%, placing it eighth among manufacturers of color television sets. Ante, at 2551-2552. At this time Sylvania's shares of the San Francisco, Sacramento, and northern California markets were respectively 2.5%, 15%, and 5%. Ante, at 2552 nn. 4, 6. The District Court made no findings as to Schwinn's share of local bicycle markets.

***65** In my view there are at least two considerations, both relied upon by the majority to justify overruling Schwinn, that would provide a "principled basis" for instead refusing to extend Schwinn to a vertical restraint that is imposed by a "faltering" manufacturer with a "precarious" position in a generic product market dominated by another firm. The first is that, as the majority puts it, "when interbrand competition exists, as it does among television manufacturers, it provides a significant check on the exploitation of intrabrand market power because of the ability of consumers to substitute a different brand of the same product." Ante, at 2559 n. 19. See also ante, at 2560. [6] Second is the view, argued forcefully in the economic literature cited by the majority, that the potential benefits of vertical restraints in promoting interbrand competition are particularly strong where the manufacturer imposing the restraints is seeking to enter a new market or to expand a small market share. Ibid. [7] The majority even recognizes that Schwinn "hinted" at an exception for new entrants and failing firms from its per se rule. Ante, at 2560 n. 22.

6 For an extensive discussion of this effect of interbrand competition, see ABA Antitrust Section, Monograph No. 2, Vertical Restrictions Limiting Intrabrand Competition 60-67 (1977).

7 Preston, Restrictive Distribution Arrangements: Economic Analysis and Public Policy Standards, 30 Law & Contemp.Prob. 506, 511 (1965);

Posner, Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions, 75 Colum.L.Rev. 282, 293 (1975); Scherer, supra, n. 4, at 510.

In other areas of antitrust law, this Court has not hesitated to base its rules of per se illegality in part on the defendant's market power. Indeed, in the very case from which the majority draws its standard for per se rules, Northern Pac. R. Co. v. United States, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958), the ***66** Court stated the reach of the per se rule against tie-ins under s 1 of the Sherman Act as extending to all defendants with "sufficient economic power with respect to the tying product to appreciably restrain free competition in the ****2566** market for the tied product. . . ." 356 U.S., at 6, 78 S.Ct., at 518. And the Court subsequently approved an exception to this per se rule for "infant industries" marketing a new product. United States v. Jerrold Electronics Corp., 187 F.Supp. 545 (ED Pa.1960), aff'd per curiam, 365 U.S. 567, 81 S.Ct. 755, 5 L.Ed.2d 806 (1961). See also United States v. Philadelphia National Bank, 374 U.S. 321, 363, 83 S.Ct. 1715, 1741, 10 L.Ed.2d 915 (1963), where the Court held presumptively illegal a merger "which produces a firm controlling an undue percentage share of the relevant market . . . ." I see no doctrinal obstacle to excluding firms with such minimal market power as Sylvania's from the reach of the Schwinn rule. [8]

[8] Cf. Sandura Co. v. FTC, 339 F.2d 847, 850 (CA6 1964) (territorial restrictions on distributors imposed by small manufacturer "competing with and losing ground to the 'giants' of the floor-covering industry" is not per se illegal); Baker, Vertical Restraints in Times of Change: From White to Schwinn to Where?, 44 Antitrust L.J. 537, 545-547 (1975) (presumptive illegality of territorial restrictions imposed by manufacturer with "any degree of market power"). The majority's failure to use the market share of Schwinn and Sylvania as a basis for distinguishing these cases is the more anomalous for its reliance, see infra, at 2567-2568, on the economic analysis of those who distinguish the anticompetitive effects of distribution restraints on the basis of the market shares of the distributors. See Posner, supra, at 299; Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division (II), 75 Yale L.J. 373, 391-429 (1966).

I have, moreover, substantial misgivings about the approach the majority takes to overruling Schwinn. The reason for the distinction in Schwinn between sale and nonsale transactions was not, as the majority would have it, "the Court's effort to accommodate the perceived intrabrand harm and interbrand benefit of vertical restrictions," ante, at 2559, the reason was rather, as Judge Browning argued in dissent below, the notion in many of our cases involving vertical restraints that independent ***67** businessmen should have the freedom to dispose of the goods they own as they see fit. Thus the first case cited by the Court in Schwinn for the proposition that "restraints upon alienation . . . are beyond the power of the manufacturer to impose upon its vendees and . . . are violations of s 1 of the Sherman

Act," 388 U.S., at 377, 87 S.Ct., at 1865, was this Court's seminal decision holding, a series of resale-price-maintenance agreements per se illegal Dr. Miles Medical Co. v. John D. Park & Sons Co., 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502 (1911). In Dr. Miles the Court stated that "a general restraint upon alienation is ordinarily invalid," citing Coke on Littleton, and emphasized that the case involved "agreements restricting the freedom of trade on the part of dealers who own what they sell." Id., at 404, 407-408, 31 S.Ct., at 383, 384. Mr. Justice Holmes stated in dissent: "If (the manufacturer) should make the retail dealers also agents in law as well as in name and retain the title until the goods left their hands I cannot conceive that even the present enthusiasm for regulating the prices to be charged by other people would deny that the owner was acting within his rights." Id., at 411, 31 S.Ct., at 386.

This concern for the freedom of the businessman to dispose of his own goods as he sees fit is most probably the explanation for two subsequent cases in which the Court allowed manufacturers to achieve economic results similar to that in Dr. Miles where they did not impose restrictions on dealers who had purchased their products. In United States v. Colgate & Co., 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919), the Court found no antitrust violation in a manufacturer's policy of refusing to sell to dealers who failed to charge the manufacturer's suggested retail price and of terminating dealers who did not adhere to that price. It stated that the Sherman Act did not "restrict the long recognized right of trader or manufacturer engaged in an entirely private ****2567** business, freely to exercise his own independent discretion as to parties with whom he will deal." Id., at 307, 39 S.Ct., at 468. In United States v. General Electric Co., 272 U.S. 476, 47 S.Ct. 192, 71 L.Ed. 362 (1926), the Court upheld resale-price-maintenance ***68** agreements made by a patentee with its dealers who obtained its goods on a consignment basis. The Court distinguished Dr. Miles on the ground that the agreements there were "contracts of sale rather than of agency" and involved "an attempt by the Miles Medical Company . . . to hold its purchasers, after the purchase at full price, to an obligation to maintain prices on a resale by them." 272 U.S., at 487, 47 S.Ct., at 196. By contrast, a manufacturer was free to contract with his agents to "(fix) the price by which his agents transfer the title from him directly to (the) consumer . . . however comprehensive as a mass or whole in (the) effect (of these contracts)." Id., at 488, 47 S.Ct., at 196. Although these two cases have been called into question by subsequent decisions, see United States v. Parke, Davis & Co., 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960), and Simpson v. Union Oil Co., 377 U.S. 13, 84 S.Ct. 1051, 12 L.Ed.2d 98 (1964), their rationale runs through our case law in the area of distributional restraints. In Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211, 213, 71 S.Ct. 259, 260, 95 L.Ed. 219 (1951), the Court held that an agreement to fix resale price was per se illegal under s 1 because "such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment." Accord, Albrecht v. Herald Co., 390 U.S. 145, 152, 88 S.Ct. 869, 872, 19 L.Ed.2d 998 (1968). See generally Judge Browning's dissent below, 537 F.2d, at 1018-1022; ABA

Antitrust Section, Monograph No. 2, Vertical Restrictions Limiting Intrabrand Competition 29-31, 82-83, 87-91, 96-97 (1977); Blake & Jones, Toward a Three-Dimensional Antitrust Policy, 65 Colum.L.Rev. 422, 427-436 (1965).

After summarily rejecting this concern, reflected in our interpretations of the Sherman Act, for "the autonomy of independent businessmen," ante, at 2559 n. 21, the majority not surprisingly finds "no justification" for Schwinn's distinction between sale and nonsale transactions because the distinction is "essentially unrelated to any relevant economic impact." Ante, at 2561. But while according some weight to the businessman' s ***69** interest in controlling the terms on which he trades in his own goods may be anathema to those who view the Sherman Act as directed solely to economic efficiency,[9] this principle is without question more deeply embedded in our cases than the notions of "free rider" effects and distributional efficiencies borrowed by the majority from the "new economics of vertical relationships." Ante, at 2559-2561. Perhaps the Court is right in partially abandoning this principle and in judging the instant nonprice vertical restraints solely by their "relevant economic impact"; but the precedents which reflect this principle should not be so lightly rejected by the Court. The rationale of Schwinn is no doubt difficult to discern from the opinion, and it may be wrong; it is not, however, the aberration the majority makes it out to be here.

9 E.g., Bork, Legislative Intent and the Policy of the Sherman Act, 9 J.Law & Econ. 7 (1966); Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division (I), 74 Yale L.J. 775 (1965).

I have a further reservation about the majority's reliance on "relevant economic impact" as the test for retaining per se rules regarding vertical restraints. It is common ground among the leading advocates of a purely economic approach to the question of distribution restraints that the economic arguments in favor of allowing vertical nonprice restraints generally apply to vertical price restraints as well.[10] Although ****2568 *70** the majority asserts that "the per se illegality of price restrictions . . . involves significantly different questions of analysis and policy," ante, at 2558 n. 18, I suspect this purported distinction may be as difficult to justify as that of Schwinn under the terms of the majority's analysis. Thus Professor Posner, in an article cited five times by the majority, concludes: "I believe that the law should treat price and nonprice restrictions the same and that it should make no distinction between the imposition of restrictions in a sale contract and their imposition in an agency contract." Posner, supra, n. 7, at 298. Indeed, the Court has already recognized that resale price maintenance may increase output by inducing "demand-creating activity" by dealers (such as additional retail outlets, advertising and promotion, and product servicing) that outweighs the additional sales that would result from lower prices brought about by dealer price competition. Albrecht v. Herald Co., supra, 390 U.S., at 151 n. 7, 88 S.Ct., at 872 n. 7. These same output-enhancing possibilities of nonprice vertical restraints are relied upon by the majority as evidence of their social utility and economic soundness, ante, at 2561, and as a justification for judging them under the rule of reason. The effect, if not the intention, of the Court's opinion is necessarily to call

into question the firmly established per se rule against price restraints.

10 Professor Posner writes, for example: "There is no basis for choosing between (price fixing and market division) on social grounds. If resale price maintenance is like dealer price fixing, and therefore bad, a manufacturer's assignment of exclusive territories is like market division, and therefore bad too . . ..

"(If helping new entrants break into a market) is a good justification for exclusive territories, it is an equally good justification for resale price maintenance, which as we have seen is simply another method of dealing with the free-rider problem. . . .

In fact, any argument that can also be made on behalf of exclusive territories can also be made on behalf of resale price maintenance. " Posner, supra, n. 7, at 292-293. (Footnote omitted.)

See Bork, supra, n. 8, at 391-464.

Although the case law in the area of distributional restraints has perhaps been less than satisfactory, the Court would do well to proceed more deliberately in attempting to improve it. In view of the ample reasons for distinguishing Schwinn from this case and in the absence of contrary congressional action, I would adhere to the principle that

"each case arising under the Sherman Act must be determined upon the particular facts disclosed by the record, and . . . the opinions in those cases must be read in the light of their facts and of a clear recognition of the essential differences in the facts of those cases, and in the facts of any new case to which the rule of earlier decisions ***71** is to be applied." Maple Flooring Manufacturers Association v. United States, 268 U.S. 563, 579, 45 S.Ct. 578, 583, 69 L.Ed. 1093 (1925).

In order to decide this case, the Court need only hold that a location clause imposed by a manufacturer with negligible economic power in the product market has a competitive impact sufficiently less restrictive than the Schwinn restraints to justify a rule-of-reason standard, even if the same weight is given here as in Schwinn to dealer autonomy. I therefore concur in the judgment.

Mr. Justice BRENNAN with whom Mr. Justice MARSHALL joins, dissenting.

I would not overrule the per se rule stated in United States v. Arnold, Schwinn & Co., 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967), and would therefore reverse the decision of the Court of Appeals for the Ninth Circuit.

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104 S.Ct. 2731
Supreme Court of the United States

COPPERWELD CORPORATION, et al., Petitioners
v.
INDEPENDENCE TUBE CORPORATION.

No. 82-1260.
|
Argued Dec. 5, 1983.
|
Decided June 19, 1984.

Synopsis

Tubing company sued another tubing company and its parent corporation as well as tubing mill manufacturer and others for, Sherman Act conspiracy. The United States District Court for the Northern District of Illinois, Eastern Division, Hubert L. Will, J., found that the parent subsidiary had conspired to violate section 1 of the Act and awarded treble damages. The Court of Appeals for the Seventh Circuit affirmed, 691 F.2d 310. Certiorari was granted. The Supreme Court, Chief Justice Burger, held that a parent corporation and its wholly owned subsidiary were not legally capable of conspiring with each other under section 1 of the Sherman Act.

Judgment of Court of Appeals reversed.

Justice Stevens, with whom Justice Brennan and Justice Marshall joined, filed a dissenting opinion.

Syllabus [a1]

a1 The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

Petitioner Copperweld Corp. purchased petitioner Regal Tube Co., a manufacturer of steel tubing, from Lear Siegler, Inc., which had operated Regal as an unincorporated division, and which under the sale agreement was bound not to compete with Regal for five years. Copperweld then transferred Regal's assets to a newly formed, wholly owned subsidiary. Shortly before Copperweld acquired Regal, David Grohne, who previously had been an officer of Regal, became an officer of Lear Siegler, and, while continuing to work for Lear Siegler, formed respondent corporation to compete with Regal. Respondent then gave Yoder Co. a purchase order for a tubing mill, but Yoder voided the order when it received a letter from Copperweld warning that Copperweld would be greatly concerned if Grohne contemplated competing with Regal and promising to take the necessary steps to protect Copperweld's rights under the noncompetition agreement with Lear Siegler. Respondent then arranged to have a mill supplied by another company. Thereafter, respondent filed an action in Federal District Court against petitioners and Yoder. The jury found, inter alia, that petitioners had conspired to violate § 1 of the Sherman Act but that Yoder was not part of the conspiracy, and

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awarded treble damages against petitioners. The ****2733** Court of Appeals affirmed. Noting that the exoneration of Yoder from antitrust liability left a parent corporation and its wholly owned subsidiary as the only parties to the § 1 conspiracy, the court questioned the wisdom of subjecting an "intra-enterprise" conspiracy to antitrust liability, but held that such liability was appropriate "when there is enough separation between the two entities to make treating them as two independent actors sensible," and that there was sufficient evidence for the jury to conclude that Regal was more like a separate corporate entity than a mere service arm of the parent.

Held: Petitioner Copperweld and its wholly owned subsidiary, petitioner Regal, are incapable of conspiring with each other for purposes of § 1 of the Sherman Act. Pp. 2736–2745.

(a) While this Court has previously seemed to acquiesce in the "intra-enterprise conspiracy" doctrine, which provides that § 1 liability is not ***753** foreclosed merely because a parent and its subsidiary are subject to common ownership, the Court has never explored or analyzed in detail the justifications for such a rule. Pp. 2736–2739.

(b) Section 1 of the Sherman Act, in contrast to § 2, reaches unreasonable restraints of trade effected by a "contract, combination ... or conspiracy" between separate entities, and does not reach conduct that is "wholly unilateral." Pp. 2740–2741.

(c) The coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate, and their general corporate objectives are guided or determined not by two separate corporate consciousnesses, but one. With or without a formal "agreement," the subsidiary acts for the parent's benefit. If the parent and subsidiary "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny. In reality, the parent and subsidiary always have a "unity of purpose or a common design." The "intra-enterprise conspiracy" doctrine relies on artificial distinctions, looking to the form of an enterprise's structure and ignoring the reality. Antitrust liability should not depend on whether a corporate subunit is organized as an unincorporated division or a wholly owned subsidiary. Here, nothing in the record indicates any meaningful difference between Regal's operations as an unincorporated division of Lear Siegler and its later operations as a wholly owned subsidiary of Copperweld. Pp. 2742–2744.

(d) The appropriate inquiry in this case is not whether the coordinated conduct of a parent and its wholly owned subsidiary may ever have anticompetitive effects or whether the term "conspiracy" will bear a literal construction that includes a parent and its subsidiaries, but rather whether the logic underlying Congress' decision to exempt unilateral conduct from scrutiny under § 1 of the Sherman Act similarly excludes the conduct of a parent and subsidiary. It can only be concluded that the coordinated

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behavior of a parent and subsidiary falls outside the reach of § 1. Any anticompetitive activities of corporations and their wholly owned subsidiaries meriting antitrust remedies may be policed adequately without resort to an "intra-enterprise conspiracy" doctrine. A corporation's initial acquisition of control is always subject to scrutiny under § 1 of the Sherman Act and § 7 of the Clayton Act, and thereafter the enterprise is subject to § 2 of the Sherman Act and § 5 of the Federal Trade Commission Act. Pp. 2744–2745.

691 F.2d 310 (CA7 1982), reversed.

Attorneys and Law Firms

***754** *Erwin N. Griswold* argued the cause for petitioners. With him on the briefs were *William R. Jentes, Sidney N. Herman, Robert E. Shapiro,* and *Donald I. Baker.*

Deputy Solicitor General Wallace argued the cause for the United States as *amicus curiae* urging reversal. With him on the brief were *Solicitor General Lee, Assistant Attorney General Baxter, Deputy Assistant Attorney General Collins, Carolyn F. Corwin, Barry Grossman,* and *Nancy C. Garrison.*

Victor E. Grimm argued the cause for respondent. With him on the brief were *John R. Myers* and *Scott M. Mendel.**

* *J. Randolf Wilson, Russell H. Carpenter, Jr., Stephen A. Bokat, Cynthia Wicker, William E. Blasier,* and *Quentin Riegel* filed a brief for the Chamber of Commerce of the United States et al. as *amici curiae* urging reversal.

A brief of *amici curiae* urging affirmance was filed for the State of Alabama et al. by *Robert K. Corbin,* Attorney General of Arizona, and *Richard A. Alcorn* and *Charles L. Eger,* Assistant Attorneys General; *Charles A. Graddick,* Attorney General of Alabama, and *Richard Owen,* Assistant Attorney General; *John Steven Clark,* Attorney General of Arkansas, and *Jeffrey A. Bell,* Assistant Attorney General; *Duane Woodard,* Attorney General of Colorado, and *Thomas P. McMahon,* Assistant Attorney General; *Neil F. Hartigan,* Attorney General of Illinois, and *Robert E. Davy,* Assistant Attorney General; *Thomas J. Miller,* Attorney General of Iowa, and *John R. Perkins,* Assistant Attorney General; *Robert T. Stephan,* Attorney General of Kansas, and *Wayne E. Hundley,* Deputy Attorney General; *Steven L. Beshear,* Attorney General of Kentucky, and *James M. Ringo,* Assistant Attorney General; *Hubert H. Humphrey III,* Attorney General of Minnesota, and *Stephen P. Kilgriff,* Assistant Attorney General; *Bill Allain,* Attorney General of Mississippi, and *Robert Sanders,* Special Assistant Attorney General; *Mike Greely,* Attorney General of Montana, and *Joe R. Roberts,* Assistant Attorney General; *Paul L. Douglas,* Attorney General of Nebraska, and *Dale A. Comer,* Assistant Attorney General; *Robert O. Wefald,* Attorney General of North Dakota, and *Alan C. Hoberg,* Assistant Attorney General; *Michael C. Turpen,* Attorney General of Oklahoma, and *James B. Franks,* Assistant Attorney General; *Dave Frohnmayer,* Attorney General of Oregon; *John J. Easton, Jr.,* Attorney General of Vermont, and *Glenn R. Jarrett,* Assistant Attorney General; *Ken Eikenberry,* Attorney General of Washington, *John R. Ellis,* Deputy Attorney General, and *Jon P. Ferguson,*

Assistant Attorney General; *Bronson C. La Follette,* Attorney General of Wisconsin, and *Michael L. Zaleski,* Assistant Attorney General; *Joseph I. Lieberman,* Attorney General of Connecticut, and *Robert M. Langer,* Assistant Attorney General; *Charles M. Oberly,* Attorney General of Delaware, and *Vincent M. Amberly,* Deputy Attorney General; *James E. Tierney,* Attorney General of Maine, and *Stephen L. Wessler,* Senior Assistant Attorney General; *Stephen H. Sachs,* Attorney General of Maryland, and *Charles O. Monk II,* Assistant Attorney General; *Frank J. Kelley,* Attorney General of Michigan, and *Edwin M. Bladen,* Assistant Attorney General; *Paul Bardacke,* Attorney General of New Mexico; *Rufus L. Edmisten,* Attorney General of North Carolina, and *H.A. Cole, Jr.,* Special Deputy Attorney General; *Dennis J. Roberts II,* Attorney General of Rhode Island, and *Faith A. LaSalle,* Special Assistant Attorney General; *Mark V. Meierhenry,* Attorney General of South Dakota, and *Dennis R. Holmes,* Deputy Attorney General; *William M. Leech, Jr.,* Attorney General of Tennessee, and *William J. Haynes, Jr.,* Deputy Attorney General; *David L. Wilkinson,* Attorney General of Utah, *Stephen G. Schwendiman,* Chief, Assistant Attorney General, and *Suzanne M. Dallimore,* Assistant Attorney General; *A.G. McClintock,* Attorney General of Wyoming, and *Gay Vanderpoel,* Senior Assistant Attorney General; *Inez Smith Reid,* Acting Corporation Council for the District of Columbia, and *Francis S. Smith,* Assistant Corporation Council.

Briefs of *amici curiae* were filed for the Canadian Manufacturers Association et al. by *John DeQ. Briggs III, Scott E. Flick,* and *Jan Schneider;* and for Kaiser Aluminum & Chemical Corporation by *Milton Handler* and *John A. Moore.*

Opinion

***755** Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari to determine whether a parent corporation and its wholly owned subsidiary are legally capable of ****2734** conspiring with each other under § 1 of the Sherman Act.

I

A

The predecessor to petitioner Regal Tube Co. was established in Chicago in 1955 to manufacture structural steel ***756** tubing used in heavy equipment, cargo vehicles, and construction. From 1955 to 1968 it remained a wholly owned subsidiary of C.E. Robinson Co. In 1968 Lear Siegler, Inc., purchased Regal Tube Co. and operated it as an unincorporated division. David Grohne, who had previously served as vice president and general manager of Regal, became president of the division after the acquisition.

In 1972 petitioner Copperweld Corp. purchased the Regal division from Lear Siegler; the sale agreement bound Lear Siegler and its subsidiaries not to compete with Regal in the United States for five years. Copperweld then transferred Regal's assets to a newly formed, wholly owned Pennsylvania corporation, petitioner Regal Tube Co. The new subsidiary continued to conduct its

manufacturing operations in Chicago but shared Copperweld's corporate headquarters in Pittsburgh.

Shortly before Copperweld acquired Regal, David Grohne accepted a job as a corporate officer of Lear Siegler. After the acquisition, while continuing to work for Lear Siegler, Grohne set out to establish his own steel tubing business to compete in the same market as Regal. In May 1972 he formed respondent Independence Tube Corp., which soon secured an offer from the Yoder Co. to supply a tubing mill. In December 1972 respondent gave Yoder a purchase order to have a mill ready by the end of December 1973.

When executives at Regal and Copperweld learned of Grohne's plans, they initially hoped that Lear Siegler's noncompetition agreement would thwart the new competitor. Although their lawyer advised them that Grohne was not bound by the agreement, he did suggest that petitioners might obtain an injunction against Grohne's activities if he made use of any technical information or trade secrets belonging to Regal. The legal opinion was given to Regal and Copperweld along with a letter to be sent to anyone with whom Grohne attempted to deal. The letter warned that Copperweld would be "greatly concerned if [[[[Grohne] contemplates ***757** entering the structural tube market ... in competition with Regal Tube" and promised to take "any and all steps which are necessary to protect our rights under the terms of our purchase agreement and to protect the know-how, trade secrets, etc., which we purchased from Lear Siegler." Petitioners later asserted that the letter was intended only to prevent third parties from developing reliance interests that might later make a court reluctant to enjoin Grohne's operations.

When Yoder accepted respondent's order for a tubing mill on February 19, 1973, Copperweld sent Yoder one of these letters; two days later Yoder voided its acceptance. After respondent's efforts to resurrect the deal failed, respondent arranged to have a mill supplied by another company, which performed its agreement even though it too received a warning letter from Copperweld. Respondent began operations on September 13, 1974, nine months later than it could have if Yoder had supplied the mill when originally agreed.

Although the letter to Yoder was petitioners' most successful effort to discourage those contemplating doing business with respondent, it was not their only one. Copperweld repeatedly contacted banks that were considering financing respondent's operations. One or both petitioners also approached real estate firms that were considering providing plant space to respondent and contacted prospective suppliers and customers of the new company.

B

In 1976 respondent filed this action in the District Court against petitioners and Yoder. [1] The jury found that ***758** Copperweld ****2735** and Regal had conspired to violate § 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 1, but that Yoder was not part of the conspiracy. It also found that Copperweld, but not Regal, had interfered with respondent's contractual relationship with Yoder; that Regal, but not Copperweld, had interfered with

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respondent's contractual relationship with a potential customer of respondent, Deere Plow & Planter Works, and had slandered respondent to Deere; and that Yoder had breached its contract to supply a tubing mill.

1 The chairman of the board and chief executive officer of both Copperweld and Regal, Phillip H. Smith, was also named as a defendant. In addition, respondents originally charged petitioners and Smith with an attempt to monopolize the market for structural steel tubing in violation of § 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 2. Before trial respondent dismissed Smith as a defendant and dismissed its § 2 monopolization count.
Petitioners counterclaimed on the ground that respondent and Grohne had used proprietary information belonging to Regal, had competed unfairly by hiring away key Regal personnel, and had interfered with prospective business relationships by filing the lawsuit on the eve of a large Copperweld debenture offering. At the close of the evidence, the court directed a verdict against petitioners on their counterclaims. The disposition of these claims is not at issue before this Court.

At a separate damages phase, the judge instructed the jury that the damages for the antitrust violation and for the inducement of the Yoder contract breach should be identical and not double counted. The jury then awarded $2,499,009 against petitioners on the antitrust claim, which was trebled to $7,497,027. It awarded $15,000 against Regal alone on the contractual interference and slander counts pertaining to Deere. The court also awarded attorney's fees and costs after denying petitioners' motions for judgment n.o.v. and for a new trial.

C

The United States Court of Appeals for the Seventh Circuit affirmed. 691 F.2d 310 (1982). It noted that the exoneration of Yoder from antitrust liability left a parent corporation and its wholly owned subsidiary as the only parties to the § 1 conspiracy. The court questioned the wisdom of subjecting an "intra-enterprise" conspiracy to antitrust liability, when the same conduct by a corporation and an unincorporated ***759** division would escape liability for lack of the requisite two legal persons. However, relying on its decision in Photovest Corp. v. Fotomat Corp., 606 F.2d 704 (1979), cert. denied, 445 U.S. 917, 100 S.Ct. 1278, 63 L.Ed.2d 601 (1980), the Court of Appeals held that liability was appropriate "when there is enough separation between the two entities to make treating them as two independent actors sensible." 691 F.2d, at 318. It held that the jury instructions took account of the proper factors for determining how much separation Copperweld and Regal in fact maintained in the conduct of their businesses.[2] It also held that there was sufficient evidence for the jury to conclude that Regal was more like a separate corporate entity than a mere service arm of the parent.

2 The jury was instructed to consider many different factors: for instance, whether Copperweld and Regal had separate management staffs, separate

corporate officers, separate clients, separate records and bank accounts, separate corporate offices, autonomy in setting policy, and so on. The jury also was instructed to consider "any other facts that you find are relevant to a determination of whether or not Copperweld and Regal are separate and distinct companies." App. to Pet. for Cert. B–9.

We granted certiorari to reexamine the intra-enterprise conspiracy doctrine, 462 U.S. 1131, 103 S.Ct. 3109, 77 L.Ed.2d 1365 (1983), and we reverse.

II

Review of this case calls directly into question whether the coordinated acts of a parent and its wholly owned subsidiary can, in the legal sense contemplated by § 1 of the Sherman Act, constitute a combination or conspiracy.[3] The so-called "intra- ****2736** enterprise conspiracy" doctrine provides that § 1 liability is not foreclosed merely because a parent and its subsidiary are subject to common ownership. The doctrine derives from declarations in several of this Court's opinions.

3 Section 1 of the Sherman Act provides in pertinent part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony." 26 Stat. 209, as amended, 15 U.S.C. § 1.

***760** In no case has the Court considered the merits of the intra-enterprise conspiracy doctrine in depth. Indeed, the concept arose from a far narrower rule. Although the Court has expressed approval of the doctrine on a number of occasions, a finding of intra-enterprise conspiracy was in all but perhaps one instance unnecessary to the result.

The problem began with United States v. Yellow Cab Co., 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947). The controlling shareholder of the Checker Cab Manufacturing Corp., Morris Markin, also controlled numerous companies operating taxicabs in four cities. With few exceptions, the operating companies had once been independent and had come under Markin's control by acquisition or merger. The complaint alleged conspiracies under §§ 1 and 2 of the Sherman Act among Markin, Checker, and five corporations in the operating system. The Court stated that even restraints in a vertically integrated enterprise were not "necessarily" outside of the Sherman Act, observing that an unreasonable restraint

"may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent. Similarly, any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed. The corporate interrelationships of the conspirators, in other words, are not determinative of the

applicability of the Sherman Act. That statute is aimed at substance rather than form. See Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360–361, 376–377 [53 S.Ct. 471, 474–475, 480, 77 L.Ed. 825].

"And so in this case, the common ownership and control of the various corporate appellees are impotent to liberate the alleged combination and conspiracy from the impact of the Act. The complaint charges that the restraint of interstate trade was not only effected by the combination of the appellees but was the primary object ***761** of the combination. The theory of the complaint ... is that 'dominating power' over the cab operating companies 'was not obtained by normal expansion ... but by deliberate, calculated purchase for control.' " Id., at 227–228, 67 S.Ct., at 1565–1566 (emphasis added) (quoting United States v. Reading Co., 253 U.S. 26, 57, 40 S.Ct. 425, 432, 64 L.Ed. 760 (1920)).

It is the underscored language that later breathed life into the intra-enterprise conspiracy doctrine. The passage as a whole, however, more accurately stands for a quite different proposition. It has long been clear that a pattern of acquisitions may itself create a combination illegal under § 1, especially when an original anti-competitive purpose is evident from the affiliated corporations' subsequent conduct.[4] The Yellow Cab passage is most fairly read in light of this settled rule. In Yellow Cab, the affiliation of the defendants was irrelevant because the original acquisitions were themselves illegal.[5] An ****2737** affiliation "flowing from an illegal conspiracy" would not avert sanctions. Common ownership and control were irrelevant because restraint of trade was "the primary object of the combination," which was created in a " 'deliberate, ***762** calculated' " manner. Other language in the opinion is to the same effect.[6]

4 Under the arrangements condemned in Northern Securities Co. v. United States, 193 U.S. 197, 354, 24 S.Ct. 436, 463, 48 L.Ed. 679 (1904) (plurality opinion), "all the stock [a railroad holding company] held or acquired in the constituent companies was acquired and held to be used in suppressing competition between those companies. It came into existence only for that purpose." In Standard Oil Co. v. United States, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911), and United States v. American Tobacco Co., 221 U.S. 106, 31 S.Ct. 632, 55 L.Ed. 663 (1911), the trust or holding company device brought together previously independent firms to lessen competition and achieve monopoly power. Although the Court in the latter case suggested that the contracts between affiliated companies, and not merely the original combination, could be viewed as the conspiracy, id., at 184, 31 S.Ct., at 650, the Court left no doubt that "the combination in and of itself" was a restraint of trade and a monopolization, id., at 187, 31 S.Ct., at 651.

5 Contrary to the dissent's suggestion, post, at 2746–2751, n. 18, our point is not that Yellow Cab found only the initial acquisition illegal; our point is that the illegality of the initial acquisition was a predicate for

its holding that any post-acquisition conduct violated the Act.

6 When discussing the fact that some of the affiliated Chicago operating companies did not compete to obtain exclusive transportation contracts held by another of the affiliated companies, the Court stated:

"[T]he fact that the competition restrained is that between affiliated corporations cannot serve to negative the statutory violation where, as here, the affiliation is assertedly one of the means of effectuating the illegal conspiracy not to compete." 332 U.S., at 229, 67 S.Ct., at 1566 (emphasis added).

The passage quoted in text is soon followed by a cite to United States v. Crescent Amusement Co., 323 U.S. 173, 189, 65 S.Ct. 254, 262, 89 L.Ed. 160 (1944). Crescent Amusement found violations of §§ 1 and 2 by film exhibitors affiliated (in most cases) by 50 percent ownership. The exhibitors used the monopoly power they possessed in certain towns to force film distributors to give them favorable terms in other towns. The Court found it unnecessary to view the distributors as part of the conspiracy, id., at 183, 65 S.Ct., at 259, so the Court plainly viewed the affiliated entities themselves as the conspirators. The Crescent Amusement Court, however, in affirming an order of divestiture, noted that such a remedy was appropriate when "creation of the combination is itself the violation." Id., at 189, 65 S.Ct., at 262. This suggests that both Crescent Amusement and Yellow Cab, which cited the very page on which this passage appears, stand for a narrow rule based on the original illegality of the affiliation.

The dissent misconstrues a later passage in Crescent Amusement stating that divestiture need not be limited to those affiliates whose "acquisition was part of the fruits of the conspiracy," 323 U.S., at 189, 65 S.Ct., at 262. See post, at 2747. This meant only that divestiture could apply to affiliates other than those who were driven out of business by the practices of the original conspirators and who were then acquired illegally to increase the combination's monopoly power. See 323 U.S., at 181, 65 S.Ct., at 258. It did not mean that affiliates acquired for lawful purposes were subject to divestiture.

The Court's opinion relies on Appalachian Coals, Inc. v. United States, 288 U.S. 344, 53 S.Ct. 471, 77 L.Ed. 825 (1933); however, examination of that case reveals that it gives very little support for the broad doctrine Yellow Cab has been thought to announce. On the contrary, the language of Chief Justice Hughes speaking for the Court in Appalachian Coals supports a contrary conclusion. After observing that "[t]he restrictions the Act imposes are not mechanical or artificial," 288 U.S., at 360, 53 S.Ct., at 474, he went on to state:

***763** "The argument that integration may be considered a normal expansion of business, while a combination of independent producers in a common selling agency should be treated as abnormal—that one is a legitimate

enterprise and the other is not—makes but an artificial distinction. The Anti–Trust Act aims at substance." Id., at 377, 53 S.Ct., at 480. [7]

7 Appalachian Coals does state that the key question is whether there is an unreasonable restraint of trade or an attempt to monopolize. "If there is, the combination cannot escape because it has chosen corporate form; and, if there is not, it is not to be condemned because of the absence of corporate integration." 288 U.S., at 377, 53 S.Ct., at 480. Appalachian Coals, however, validated a cooperative selling arrangement among independent entities. The statement that intracorporate relationships would be subject to liability under § 1 is thus dictum. The statement may also envision merely the limited rule in Yellow Cab pertaining to acquisitions that are themselves anticompetitive.

As we shall see, infra, at 2742–2744, it is the intra-enterprise conspiracy doctrine itself that "makes but an artificial distinction" at the expense of substance.

The ambiguity of the Yellow Cab holding yielded the one case giving support to the intra-enterprise conspiracy doctrine. [8] In Kiefer–Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951), the Court held that two wholly owned subsidiaries of a liquor distiller ****2738** were guilty under § 1 of the Sherman Act for jointly refusing to supply a wholesaler who declined to abide by a maximum resale pricing scheme. The Court offhandedly dismissed the defendants' argument ***764** that "their status as 'mere instrumentalities of a single manufacturing-merchandizing unit' makes it impossible for them to have conspired in a manner forbidden by the Sherman Act." Id., at 215, 71 S.Ct., at 261. With only a citation to Yellow Cab and no further analysis, the Court stated that the

> "suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws"

and stated that this rule was "especially applicable" when defendants 'hold themselves out as competitors." 340 U.S., at 215, 71 S.Ct., at 261.

8 In two cases decided soon after Yellow Cab on facts similar to Crescent Amusement, see n. 6, supra, affiliated film exhibitors were found to have conspired in violation of § 1. Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 68 S.Ct. 947, 92 L.Ed. 1245 (1948); United States v. Griffith, 334 U.S. 100, 68 S.Ct. 941, 92 L.Ed. 1236 (1948). Griffith simply assumed that the companies were capable of conspiring with each other; Schine cited Yellow Cab and Crescent Amusement for the proposition, 334 U.S., at 116, 68 S.Ct., at 951. In both cases, however, an intra-enterprise conspiracy holding was unnecessary not only because the Court found

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a § 2 violation, but also because the affiliated exhibitors had conspired with independent film distributors. See ibid.; Griffith, supra, at 103, n. 6, 109, 68 S.Ct., at 943, n. 6, 946.

Unlike the Yellow Cab passage, this language does not pertain to corporations whose initial affiliation was itself unlawful. In straying beyond Yellow Cab, the Kiefer–Stewart Court failed to confront the anomalies an intra-enterprise doctrine entails. It is relevant nonetheless that, were the case decided today, the same result probably could be justified on the ground that the subsidiaries conspired with wholesalers other than the plaintiff.[9] An intra-enterprise conspiracy doctrine thus would no longer be necessary to a finding of liability on the facts of Kiefer–Stewart.

9 Although the plaintiff apparently never acquiesced in the resale price maintenance scheme, Kiefer–Stewart Co. v. Joseph E. Seagram & Sons, Inc., 182 F.2d 228, 231 (CA7 1950), rev'd, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951), one of the subsidiaries did gain the compliance of other wholesalers after once terminating them for refusing to abide by the pricing scheme. See 182 F.2d, at 231; 340 U.S., at 213, 71 S.Ct., at 260. A theory of combination between the subsidiaries and the wholesalers could now support § 1 relief, whether or not it could have when Kiefer–Stewart was decided. See Albrecht v. Herald Co., 390 U.S. 145, 149–150, and n. 6, 88 S.Ct. 869, 871–872, and n. 6, 19 L.Ed.2d 998 (1968); United States v. Parke, Davis & Co., 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960).

Later cases invoking the intra-enterprise conspiracy doctrine do little more than cite Yellow Cab or Kiefer–Stewart, and in none of the cases was the doctrine necessary to the result reached. Timken Roller Bearing Co. v. United States, 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199 (1951), involved restrictive horizontal agreements ***765** between an American corporation and two foreign corporations in which it owned 30 and 50 percent interests respectively. The Timken Court cited Kiefer–Stewart to show that "[t]he fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws." 341 U.S., at 598, 71 S.Ct., at 974. But the relevance of this statement is unclear. The American defendant in Timken did not own a majority interest in either of the foreign corporate conspirators and, as the District Court found, it did not control them.[10] Moreover, as in Yellow Cab, there was evidence that the stock acquisitions were themselves designed to effectuate restrictive practices.[11] The Court's reliance on the intra-enterprise conspiracy doctrine was in no way necessary to the result.

10 See United States v. Timken Roller Bearing Co., 83 F.Supp. 284, 11–312 (ND Ohio 1949), aff'd as modified, 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199 (1951). The agreement of an individual named Dewar, who owned 24 and 50 percent of the foreign corporations respectively, was apparently required

for the American defendant to have its way.

11 For almost 20 years before they became affiliated by stock ownership, two of the corporations had been party to the sort of restrictive agreements the Timken Court condemned. Three Justices upholding antitrust liability were of the view that Timken's "interests in the [[[[foreign] companies were obtained as part of a plan to promote the illegal trade restraints" and that the "intercorporate relationship" was "the core of the conspiracy." Id., at 600–601, 71 S.Ct., at 975–976. Because two Justices found no antitrust violation at all, see id., at 605, 71 S.Ct., at 978 (Frankfurter, J., dissenting); id., at 606, 71 S.Ct., at 978 (Jackson, J., dissenting), and two Justices did not take part, apparently only Chief Justice Vinson and Justice Reed were prepared to hold that there was a violation even if the initial acquisition itself was not illegal. See id., at 601–602, 71 S.Ct., at 976–977 (Reed, J., joined by Vinson, C.J., concurring).

****2739** The same is true of Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968), which involved a conspiracy among a parent corporation and three subsidiaries to impose various illegal restrictions on plaintiff franchisees. The Court did suggest that, because the defendants
"availed themselves of the privilege of doing business through separate corporations, the fact of common ownership ***766** could not save them from any of the obligations that the law imposes on separate entities [citing Yellow Cab and Timken]." Id., at 141–142, 88 S.Ct., at 1985–1986.

But the Court noted immediately thereafter that "[i]n any event" each plaintiff could "clearly" charge a combination between itself and the defendants or between the defendants and other franchise dealers. Ibid. Thus, for the same reason that a finding of liability in Kiefer–Stewart could today be justified without reference to the intra-enterprise conspiracy doctrine, see n. 9, supra, the doctrine was at most only an alternative holding in Perma Life Mufflers.

In short, while this Court has previously seemed to acquiesce in the intra-enterprise conspiracy doctrine, it has never explored or analyzed in detail the justifications for such a rule; the doctrine has played only a relatively minor role in the Court's Sherman Act holdings.

III

Petitioners, joined by the United States as amicus curiae, urge us to repudiate the intra-enterprise conspiracy doctrine.[12] The central criticism is that the doctrine gives undue significance to the fact that a subsidiary is separately incorporated and thereby treats as the concerted activity of two ***767** entities what is really unilateral behavior flowing from decisions of a single enterprise.

12 The doctrine has long been criticized. See, e.g., Areeda, Intraenterprise Conspiracy in Decline, 97 Harv.L.Rev.

451 (1983); Handler & Smart, The Present Status of the Intracorporate Conspiracy Doctrine, 3 Cardozo L.Rev. 23 (1981); Kempf, Bathtub Conspiracies: Has Seagram Distilled a More Potent Brew?, 24 Bus.Law. 173 (1968); McQuade, Conspiracy, Multicorporate Enterprises, and Section 1 of the Sherman Act, 41 Va.L.Rev. 183 (1955); Rahl, Conspiracy and the Anti–Trust Laws, 44 Ill.L.Rev. 743 (1950); Sprunk, Intra–Enterprise Conspiracy, 9 ABA Antitrust Section Rep. 20 (1956); Stengel, Intra–Enterprise Conspiracy Under Section 1 of the Sherman Act, 35 Miss.L.J. 5 (1963); Willis & Pitofsky, Antitrust Consequences of Using Corporate Subsidiaries, 43 N.Y.U.L.Rev. 20 (1968); Note, "Conspiring Entities" Under Section 1 of the Sherman Act, 95 Harv.L.Rev. 661 (1982); Note, Intra–Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard, 75 Mich.L.Rev. 717 (1977).

We limit our inquiry to the narrow issue squarely presented: whether a parent and its wholly owned subsidiary are capable of conspiring in violation of § 1 of the Sherman Act. We do not consider under what circumstances, if any, a parent may be liable for conspiring with an affiliated corporation it does not completely own.

A

The Sherman Act contains a "basic distinction between concerted and independent action." Monsanto Co. v. Spray–Rite Service Corp., 465 U.S. 752, 761, 104 S.Ct. 1464, 1469, 79 L.Ed.2d 775 (1984). The conduct of a single firm is governed by § 2 alone and is unlawful only when it threatens actual monopolization. [13] It is not enough that a single firm appears to "restrain trade" unreasonably, for even a vigorous competitor may leave that impression. For instance, an efficient firm may **2740 capture unsatisfied customers from an inefficient rival, whose own ability to compete may suffer as a result. This is the rule of the marketplace and is precisely the sort of competition that promotes the consumer interests that the Sherman Act aims to foster. [14] In part because it is sometimes difficult to *768 distinguish robust competition from conduct with long-run anti-competitive effects, Congress authorized Sherman Act scrutiny of single firms only when they pose a danger of monopolization. Judging unilateral conduct in this manner reduces the risk that the antitrust laws will dampen the competitive zeal of a single aggressive entrepreneur.

13 Section 2 of the Sherman Act provides in pertinent part:
"Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." 26 Stat. 209, as amended, 15 U.S.C. § 2.
By making a conspiracy to monopolize unlawful, § 2 does reach both concerted and unilateral behavior. The point remains, however, that purely unilateral conduct is illegal only under

§ 2 and not under § 1. Monopolization without conspiracy is unlawful under § 2, but restraint of trade without a conspiracy or combination is not unlawful under § 1.

14 For example, the Court has declared that § 2 does not forbid market power to be acquired "as a consequence of a superior product, [or] business acumen." United States v. Grinnell Corp., 384 U.S. 563, 571, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966). We have also made clear that the "antitrust laws ... were enacted for 'the protection of competition, not competitors.' " Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc., 429 U.S. 477, 488, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977) (damages for violation of Clayton Act § 7) (quoting Brown Shoe Co. v. United States, 370 U.S. 294, 320, 82 S.Ct. 1502, 1521, 8 L.Ed.2d 510 (1962)).

Section 1 of the Sherman Act, in contrast, reaches unreasonable restraints of trade effected by a "contract, combination ... or conspiracy" between *separate* entities. It does not reach conduct that is "wholly unilateral." Albrecht v. Herald Co., 390 U.S. 145, 149, 88 S.Ct. 869, 871, 19 L.Ed.2d 998 (1968); accord, Monsanto Co. v. Spray–Rite Corp., supra, at 761, 104 S.Ct., at 1469. Concerted activity subject to § 1 is judged more sternly than unilateral activity under § 2. Certain agreements, such as horizontal price fixing and market allocation, are thought so inherently anticompetitive that each is illegal per se without inquiry into the harm it has actually caused. See generally Northern Pacific R. Co. v. United States, 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545 (1958). Other combinations, such as mergers, joint ventures, and various vertical agreements, hold the promise of increasing a firm's efficiency and enabling it to compete more effectively. Accordingly, such combinations are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect. See, e.g., Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977); Chicago Board of Trade v. United States, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683 (1918). Whatever form the inquiry takes, however, it is not necessary to prove that concerted activity threatens monopolization.

The reason Congress treated concerted behavior more strictly than unilateral behavior is readily appreciated. Concerted activity inherently is fraught with anticompetitive ***769** risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. Of course, such mergings of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly.

B

The distinction between unilateral and concerted conduct is necessary for a proper understanding of the terms "contract, combination ... or conspiracy" in § 1. Nothing in the literal meaning of those terms excludes coordinated conduct among officers or employees of the same company. But it is perfectly plain that an internal "agreement" to implement a single, unitary firm's policies does not raise the antitrust dangers that § 1 was designed to police. The officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly ****2741** bring together economic power that was previously pursuing divergent goals. Coordination within a firm is as likely to result from an effort to compete as from an effort to stifle competition. In the marketplace, such coordination may be necessary if a business enterprise is to compete effectively. For these reasons, officers or employees of the same firm do not provide the plurality of actors imperative for a § 1 conspiracy.[15]

15 See, e.g., Schwimmer v. Sony Corp. of America, 677 F.2d 946, 953 (CA2), cert. denied, 459 U.S. 1007, 103 S.Ct. 362, 74 L.Ed.2d 398 (1982); Tose v. First Pennsylvania Bank, N.A., 648 F.2d 879, 893–894 (CA3), cert. denied, 454 U.S. 893, 102 S.Ct. 390, 70 L.Ed.2d 208 (1981); Morton Buildings of Nebraska, Inc. v. Morton Buildings, Inc., 531 F.2d 910, 916–917 (CA8 1976); Greenville Publishing Co. v. Daily Reflector, Inc., 496 F.2d 391, 399 (CA4 1974) (dictum); Chapman v. Rudd Paint & Varnish Co., 409 F.2d 635, 643, n. 9 (CA9 1969); Poller v. Columbia Broadcasting System, Inc., 109 U.S.App.D.C. 170, 174, 284 F.2d 599, 603 (1960), rev'd on other grounds, 368 U.S. 464, 82 S.Ct. 486, 7 L.Ed.2d 458 (1962); Nelson Radio & Supply Co. v. Motorola, Inc., 200 F.2d 911, 914 (CA5 1952), cert. denied, 345 U.S. 925, 73 S.Ct. 783, 97 L.Ed. 1356 (1953). Accord, Report of the Attorney General's National Committee to Study the Antitrust Laws 31 (1955). At the same time, many courts have created an exception for corporate officers acting on their own behalf. See, e.g., H & B Equipment Co. v. International Harvester Co., 577 F.2d 239, 244 (CA5 1978) (dictum); Greenville Publishing, supra; Johnston v. Baker, 445 F.2d 424, 427 (CA3 1971).

Nothing in the language of the Sherman Act is inconsistent with the view that corporations cannot conspire with their own officers. It is true that a "person" under the Act includes both an individual and a corporation. 15 U.S.C. § 7. But § 1 does not declare every combination between two "persons" to be illegal. Instead it makes liable every "person" engaging in a combination or conspiracy "hereby declared to be illegal." As we note, the principles governing § 1 liability plainly exclude from unlawful combinations or conspiracies the activities of a single firm.

***770** There is also general agreement that § 1 is not violated by the internally coordinated conduct of a corporation and one of its unincorporated divisions.[16] Although this Court has not previously addressed the

question,[17] there can be little doubt that the operations of a corporate enterprise organized into divisions must be judged as the conduct of a single actor. The existence of an unincorporated division reflects no more than a firm's decision to adopt an organizational division of labor. A division within a corporate structure pursues the common interests of the whole rather than interests separate from those of the corporation itself; a business enterprise establishes divisions to further its own interests in the most efficient manner. Because coordination between a corporation ***771** and its division does not represent a sudden joining of two independent sources of economic power previously pursuing separate interests, it is not an activity that warrants § 1 scrutiny.

16 See 691 F.2d 310, 316 (CA7 1982) (decision below); Cliff Food Stores, Inc. v. Kroger, Inc., 417 F.2d 203, 205–206 (CA5 1969); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 83–84 (CA9 1969), cert. denied, 396 U.S. 1062, 90 S.Ct. 752, 24 L.Ed.2d 755 (1970); Poller v. Columbia Broadcasting System, Inc., 109 U.S.App.D.C., at 174, 284 F.2d at 603.

17 The Court left this issue unresolved in Poller v. Columbia Broadcasting System, Inc., 368 U.S., at 469, n. 4, 82 S.Ct., at 489, n. 4.

Indeed, a rule that punished coordinated conduct simply because a corporation delegated certain responsibilities to autonomous units might well discourage corporations from creating divisions with their presumed benefits. This would serve no useful antitrust purpose but could well deprive consumers of the efficiencies that decentralized management may bring.

C

For similar reasons, the coordinated activity of a parent and its wholly owned subsidiary must be viewed as that of a single enterprise for purposes of § 1 of the Sherman Act. A parent and its wholly owned subsidiary have a complete unity of interest. Their objectives are common, not disparate; their general corporate actions are guided or determined not by two separate corporate consciousnesses, but one. They are not unlike a multiple team of ****2742** horses drawing a vehicle under the control of a single driver. With or without a formal "agreement," the subsidiary acts for the benefit of the parent, its sole shareholder. If a parent and a wholly owned subsidiary do "agree" to a course of action, there is no sudden joining of economic resources that had previously served different interests, and there is no justification for § 1 scrutiny.

Indeed, the very notion of an "agreement" in Sherman Act terms between a parent and a wholly owned subsidiary lacks meaning. A § 1 agreement may be found when "the conspirators had a unity of purpose or a common design and understanding, or a meeting of minds in an unlawful arrangement." American Tobacco Co. v. United States, 328 U.S. 781, 810, 66 S.Ct. 1125, 1139, 90 L.Ed. 1575 (1946). But in reality a parent and a wholly owned subsidiary always have a "unity

of purpose or a common design." They share a common purpose whether or not the parent keeps a tight rein over the subsidiary; the parent may assert ***772** full control at any moment if the subsidiary fails to act in the parent's best interests. [18]

18 As applied to a wholly owned subsidiary, the so-called "single entity" test is thus inadequate to preserve the Sherman Act's distinction between unilateral and concerted conduct. Followed by the Seventh Circuit below as well as by other Courts of Appeals, this test sets forth various criteria for evaluating whether a given parent and subsidiary are capable of conspiring with each other. See n. 2, supra; see generally Ogilvie v. Fotomat Corp., 641 F.2d 581 (CA8 1981); Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614 (CA9 1979), cert. denied, 447 U.S. 906, 100 S.Ct. 2988, 64 L.Ed.2d 855 (1980); Photovest Corp. v. Fotomat Corp., 606 F.2d 704 (CA7 1979), cert. denied, 445 U.S. 917, 100 S.Ct. 1278, 63 L.Ed.2d 601 (1980). These criteria measure the "separateness" of the subsidiary: whether it has separate control of its day-to-day operations, separate officers, separate corporate headquarters, and so forth. At least when a subsidiary is wholly owned, however, these factors are not sufficient to describe a separate economic entity for purposes of the Sherman Act. The factors simply describe the manner in which the parent chooses to structure a subunit of itself. They cannot overcome the basic fact that the ultimate interests of the subsidiary and the parent are identical, so the parent and the subsidiary must be viewed as a single economic unit.

The intra-enterprise conspiracy doctrine looks to the form of an enterprise's structure and ignores the reality. Antitrust liability should not depend on whether a corporate subunit is organized as an unincorporated division or a wholly owned subsidiary. A corporation has complete power to maintain a wholly owned subsidiary in either form. The economic, legal, or other considerations that lead corporate management to choose one structure over the other are not relevant to whether the enterprise's conduct seriously threatens competition. [19] Rather, a corporation may adopt the subsidiary form of organization for valid management and related purposes. Separate incorporation may improve ***773** management, avoid special tax problems arising from multistate operations, or serve other legitimate interests. [20] Especially in view of the increasing complexity of corporate operations, a business enterprise should be free to structure itself in ways that serve efficiency of control, economy of operations, and other factors dictated by business judgment without increasing its exposure to antitrust liability. Because there is nothing inherently anticompetitive about a corporation's decision ****2743** to create a subsidiary, the intra-enterprise conspiracy doctrine "impose[s] grave legal consequences upon organizational distinctions that are of de minimis meaning and effect." Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co., 370 U.S. 19, 29, 82 S.Ct. 1130, 1136, 8 L.Ed.2d 305 (1962). [21]

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19 Because an "agreement" between a parent and its wholly owned subsidiary is no more likely to be anticompetitive than an agreement between two divisions of a single corporation, it does not matter that the parent "availed [itself] of the privilege of doing business through separate corporations," Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 141, 88 S.Ct. 1981, 1985, 20 L.Ed.2d 982 (1968). The purposeful choice of a parent corporation to organize a subunit as a subsidiary is not itself a reason to heighten antitrust scrutiny, because it is not laden with anticompetitive risk.

20 For example, "[s]eparate incorporation may reduce federal or state taxes or facilitate compliance with regulatory or reporting laws. Local incorporation may also improve local identification. Investors or lenders may prefer to specialize in a particular aspect of a conglomerate's business. Different parts of the business may require different pension or profit-sharing plans or different accounting practices." Areeda, 97 Harv.L.Rev., at 453.

21 Sunkist Growers provides strong support for the notion that separate incorporation does not necessarily imply a capacity to conspire. The defendants in that case were an agricultural cooperative, its wholly owned subsidiary, and a second cooperative comprising only members of the first. The Court refused to find a § 1 or § 2 conspiracy among them because they were "one 'organization' or 'association' even though they have formally organized themselves into three separate legal entities." 370 U.S., at 29, 82 S.Ct., at 1136. Although this holding derived from statutory immunities granted to agricultural organizations, the reasoning of Sunkist Growers supports the broader principle that substance, not form, should determine whether a separately incorporated entity is capable of conspiring under § 1.

If antitrust liability turned on the garb in which a corporate subunit was clothed, parent corporations would be encouraged to convert subsidiaries into unincorporated divisions. Indeed, this is precisely what the Seagram company did after this Court's decision in Kiefer–Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951).[22] Such an ***774** incentive serves no valid antitrust goals but merely deprives consumers and producers of the benefits that the subsidiary form may yield.

22 See Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (CA9 1969), cert. denied, 396 U.S. 1062, 90 S.Ct. 752, 24 L.Ed.2d 755 (1970).

The error of treating a corporate division differently from a wholly owned subsidiary is readily seen from the facts of this case. Regal was operated as an unincorporated division of Lear Siegler for four years before it became

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a wholly owned subsidiary of Copperweld. Nothing in this record indicates any meaningful difference between Regal's operations as a division and its later operations as a separate corporation. Certainly nothing suggests that Regal was a greater threat to competition as a subsidiary of Copperweld than as a division of Lear Siegler. Under either arrangement, Regal might have acted to bar a new competitor from entering the market. In one case it could have relied on economic power from other quarters of the Lear Siegler corporation; instead it drew on the strength of its separately incorporated parent, Copperweld. From the standpoint of the antitrust laws, there is no reason to treat one more harshly than the other. As Chief Justice Hughes cautioned, "[r]ealities must dominate the judgment." Appalachian Coals, Inc. v. United States, 288 U.S., at 360, 53 S.Ct., at 474.[23]

23 The dissent argues that references in the legislative history to "trusts" suggest that Congress intended § 1 to govern the conduct of all affiliated corporations. See post, at 2750–2751. But those passages explicitly refer to combinations created for the very purpose of restraining trade. None of the cited debates refers to the postacquisition conduct of corporations whose initial affiliation was lawful. Indeed, Senator Sherman stated:

"It is the unlawful combination, tested by the rules of common law and human experience, that is aimed at by this bill, and not the lawful and useful combination." 121 Cong.Rec. 2457 (1890).

D

Any reading of the Sherman Act that remains true to the Act's distinction between unilateral and concerted conduct will necessarily disappoint those who find that distinction arbitrary. It cannot be denied that § 1's focus on concerted ***775** behavior leaves a "gap" in the Act's proscription against unreasonable restraints of trade. See post, at 2751. An unreasonable restraint of trade may be effected not only by two independent firms acting in concert; a single firm may restrain trade to precisely the same extent if it alone possesses the combined market power of those same two firms. Because the Sherman Act does not prohibit unreasonable restraints of trade as such—but only restraints effected by a contract, combination, or conspiracy—it leaves untouched a single firm's anticompetitive ****2744** conduct (short of threatened monopolization) that may be indistinguishable in economic effect from the conduct of two firms subject to § 1 liability.

We have already noted that Congress left this "gap" for eminently sound reasons. Subjecting a single firm's every action to judicial scrutiny for reasonableness would threaten to discourage the competitive enthusiasm that the antitrust laws seek to promote. See supra, at 2741–2742. Moreover, whatever the wisdom of the distinction, the Act's plain language leaves no doubt that Congress made a purposeful choice to accord different treatment to unilateral and concerted conduct. Had Congress intended to outlaw unreasonable restraints of trade as such, § 1's requirement of a contract, combination, or conspiracy would be superfluous, as would the entirety of § 2.[24]

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Indeed, this Court has recognized ***776** that § 1 is limited to concerted conduct at least since the days of United States v. Colgate & Co., 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919). Accord, post, at 2751.

24 Even if common-law intracorporate conspiracies were firmly established when Congress passed the Sherman Act, the obvious incompatibility of an intracorporate conspiracy with § 1 is sufficient to refute the dissent's suggestion that Congress intended to incorporate such a definition. See post, at 2749–2750. Moreover, it is far from clear that intracorporate conspiracies were recognized at common law in 1890. Even today courts disagree whether corporate employees can conspire with themselves or with the corporation for purposes of certain statutes, such as 42 U.S.C. § 1985(3). Compare, e.g., Novotny v. Great Am. Fed. Sav. & Loan Assn., 584 F.2d 1235 (CA3 1978) (en banc), vacated and remanded on other grounds, 442 U.S. 366, 99 S.Ct. 2345, 60 L.Ed.2d 957 (1979), with Dombrowski v. Dowling, 459 F.2d 190 (CA7 1972). And in 1890 it was disputed whether a corporation could itself be guilty of a crime that required criminal intent, such as conspiracy. Commentators appear to agree that courts began finding corporate liability for such crimes only around the turn of the century. See generally Edgerton, Corporate Criminal Responsibility, 36 Yale L.J. 827, 828, and n. 11 (1927); Miller, Corporate Criminal Liability: A Principle Extended to Its Limits, 38 Fed. Bar J. 49 (1979); Note, 60 Harv.L.Rev. 283, 284, and n. 9 (1946). Of course, Congress changed that common-law rule when it explicitly provided that a corporation could be guilty of a § 1 conspiracy. But the point remains that the Sherman Act did not import a pre-existing common-law tradition recognizing conspiracies between corporations and their own employees.

The appropriate inquiry in this case, therefore, is not whether the coordinated conduct of a parent and its wholly owned subsidiary may ever have anticompetitive effects, as the dissent suggests. Nor is it whether the term “conspiracy” will bear a literal construction that includes parent corporations and their wholly owned subsidiaries. For if these were the proper inquiries, a single firm's conduct would be subject to § 1 scrutiny whenever the coordination of two employees was involved. Such a rule would obliterate the Act's distinction between unilateral and concerted conduct, contrary to the clear intent of Congress as interpreted by the weight of judicial authority. See n. 15, supra. Rather, the appropriate inquiry requires us to explain the logic underlying Congress' decision to exempt unilateral conduct from § 1 scrutiny, and to assess whether that logic similarly excludes the conduct of a parent and its wholly owned subsidiary. Unless we second-guess the judgment of Congress to limit § 1 to concerted conduct, we can only conclude that the coordinated behavior of a parent and its wholly owned subsidiary falls outside the reach of that provision.

Although we recognize that any "gap" the Sherman Act leaves is the sensible result of a purposeful policy decision by Congress, we also note that the size of any such gap is open ***777** to serious question. Any anticompetitive activities of corporations and their wholly owned subsidiaries meriting antitrust remedies may be policed adequately without resort to an intra-enterprise conspiracy doctrine. A corporation's initial acquisition of control will always be subject to scrutiny under § 1 of the Sherman Act and § 7 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 18. Thereafter, the enterprise is fully subject to § 2 of the Sherman Act and § 5 of the Federal Trade Commission Act, 38 Stat. 719, ****2745** 15 U.S.C.§ 45. That these statutes are adequate to control dangerous anticompetitive conduct is suggested by the fact that not a single holding of antitrust liability by this Court would today be different in the absence of an intra-enterprise conspiracy doctrine. It is further suggested by the fact that the Federal Government, in its administration of the antitrust laws, no longer accepts the concept that a corporation and its wholly owned subsidiaries can "combine" or "conspire" under § 1.[25] Elimination of the intra-enterprise conspiracy doctrine with respect to corporations and their wholly owned subsidiaries will therefore not cripple antitrust enforcement. It will simply eliminate treble damages from private state tort suits masquerading as antitrust actions.

25 "[T]he [intra-enterprise conspiracy] doctrine has played a relatively minor role in government enforcement actions, and the government has not relied on the doctrine in recent years." Brief for United States as Amicus Curiae 26, n. 42.

IV

We hold that Copperweld and its wholly owned subsidiary Regal are incapable of conspiring with each other for purposes of § 1 of the Sherman Act. To the extent that prior decisions of this Court are to the contrary, they are disapproved and overruled. Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.

***778** Justice WHITE took no part in the consideration or decision of this case.

Justice STEVENS, with whom Justice BRENNAN and Justice MARSHALL join, dissenting.

It is safe to assume that corporate affiliates do not vigorously compete with one another. A price-fixing or market-allocation agreement between two or more such corporate entities does not, therefore, eliminate any competition that would otherwise exist. It makes no difference whether such an agreement is labeled a "contract," a "conspiracy," or merely a policy decision, because it surely does not unreasonably restrain competition within the meaning of the Sherman Act. The Rule of Reason has always given the courts adequate latitude to examine the substance rather than the form of an arrangement when answering the question whether collective action has restrained competition within the meaning of § 1.

Today the Court announces a new per se rule: a wholly owned subsidiary is incapable of conspiring with its parent under § 1 of the Sherman Act. Instead of redefining the word "conspiracy," the Court would be better advised to continue to rely on the Rule of Reason. Precisely because they do not eliminate competition that would otherwise exist but rather enhance the ability to compete, restraints which enable effective integration between a corporate parent and its subsidiary—the type of arrangement the Court is properly concerned with protecting—are not prohibited by § 1. Thus, the Court's desire to shield such arrangements from antitrust liability provides no justification for the Court's new rule.

In contrast, the case before us today presents the type of restraint that has precious little to do with effective integration between parent and subsidiary corporations. Rather, the purpose of the challenged conduct was to exclude a potential competitor of the subsidiary from the market. The jury apparently concluded that the two defendant corporations— ***779** Copperweld and its subsidiary Regal—had successfully delayed Independence's entry into the steel tubing business by applying a form of economic coercion to potential suppliers of financing and capital equipment, as well as to potential customers. Everyone seems to agree that this conduct was tortious as a matter of state law. This type of exclusionary conduct is plainly distinguishable from vertical integration designed to achieve competitive efficiencies. If, as seems to be the case, the challenged conduct was manifestly anticompetitive, it should not be immunized from scrutiny under § 1 of the Sherman Act.

****2746** I

Repudiation of prior cases is not a step that should be taken lightly. As the Court wrote only days ago: "[A]ny departure from the doctrine of stare decisis demands special justification." Arizona v. Rumsey, 467 U.S. 203, 212, 104 S.Ct. 2305, 2311, 81 L.Ed.2d 164 (1984). It is therefore appropriate to begin with an examination of the precedents.

In United States v. Yellow Cab Co., 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947), the Court explicitly stated that a corporate subsidiary could conspire with its parent:

"The fact that these restraints occur in a setting described by the appellees as a vertically integrated enterprise does not necessarily remove the ban of the Sherman Act. The test of illegality under the Act is the presence or absence of an unreasonable restraint on interstate commerce. Such a restraint may result as readily from a conspiracy among those who are affiliated or integrated under common ownership as from a conspiracy among those who are otherwise independent." Id., at 227, 67 S.Ct., at 1565.

The majority attempts to explain Yellow Cab by suggesting that it dealt only with unlawful acquisition of subsidiaries. Ante, at 2737. But the Court mentioned acquisitions only as an additional consideration separate from the passage ***780** quoted above,[1] and more important, the Court explicitly held that restraints imposed by the corporate parent on the affiliates that it already owned in themselves violated § 1.[2]

1 The language I have quoted, most of which is overlooked by the majority, makes it clear that the Court's adoption of the concept of conspiracy between affiliated corporations was unqualified. As the first word of the sentence indicates, the Court's following statement: "Similarly, any affiliation or integration flowing from an illegal conspiracy cannot insulate the conspirators from the sanctions which Congress has imposed," 332 U.S., at 227, 67 S.Ct., at 1565, expresses a separate if related point.

2 "[B]y preventing the cab operating companies under their control from purchasing cabs from manufacturers other than CCM, the appellees deny those companies the opportunity to purchase cabs in a free, competitive market. The Sherman Act has never been thought to sanction such a conspiracy to restrain the free purchase of goods in interstate commerce." Id., at 226–227, 67 S.Ct., at 1564–1565 (footnote omitted).

At least three cases involving the motion picture industry also recognize that affiliated corporations may combine or conspire within the meaning of § 1. In United States v. Crescent Amusement Co., 323 U.S. 173, 65 S.Ct. 254, 89 L.Ed. 160 (1944), as the Court recognizes, ante, at 2737, n. 6, the only conspirators were affiliated corporations. The majority's claim that the case involved only unlawful acquisitions because of the Court's comments concerning divestiture of the affiliates cannot be squared with the passage immediately following that cited by the majority, which states that there had been unlawful conduct going beyond the acquisition of subsidiaries:
"That principle is adequate here to justify divestiture of all interest in some of the affiliates since their acquisition was part of the fruits of the conspiracy. But the relief need not, and under these facts should not, be so restricted [to divestiture]. The fact that the companies were affiliated induced joint action and agreement. Common control was one of the instruments in bringing about unity of purpose and unity of action and in making the conspiracy effective. If that affiliation continues, ***781** there will be tempting opportunity for these exhibitors to continue to act in combination against the independents." 323 U.S., at 189–190, 65 S.Ct., at 262–263 (emphasis supplied).

Similarly, in Schine Chain Theatres, Inc. v. United States, 334 U.S. 110, 68 S.Ct. 947, 92 L.Ed. 1245 (1948), the Court held that concerted action by parents and subsidiaries constituted an unlawful conspiracy.[3] ****2747** That was also the holding in United States v. Griffith, 334 U.S. 100, 109, 68 S.Ct. 941, 946, 92 L.Ed. 1236 (1948). The majority's observation that in these cases there were alternative grounds that could have been used to reach the same result, ante, at 2738, n. 8, disguises neither the fact that the holding that actually appears in these opinions rests on conspiracy between affiliated entities, nor that today's holding is inconsistent with what was actually held in these cases.

3 "[T]he combining of the open and closed towns for the negotiation of films for the circuit was a restraint

of trade and the use of monopoly power in violation of § 1 and § 2 of the Act. The concerted action of the parent company, its subsidiaries, and the named officers and directors in that endeavor was a conspiracy which was not immunized by reason of the fact that the members were closely affiliated rather than independent. See United States v. Yellow Cab Co., 332 U.S. 218, 227 [67 S.Ct. 1560, 1565, 91 L.Ed. 2010]; United States v. Crescent Amusement Co., 323 U.S. 173 [[[65 S.Ct. 254, 89 L.Ed. 160]." 334 U.S., at 116, 68 S.Ct., at 951.

In Kiefer–Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951), the Court's holding was plain and unequivocal:

"Respondents next suggest that their status as 'mere instrumentalities of a single manufacturing-merchandizing unit' makes it impossible for them to have conspired in a manner forbidden by the Sherman Act. But this suggestion runs counter to our past decisions that common ownership and control does not liberate corporations from the impact of the antitrust laws. E.g. United States v. Yellow Cab Co., 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010. The rule is especially applicable where, as here, respondents hold themselves out as competitors." Id., at 215, 71 S.Ct., at 261.

***782** This holding is so clear that even the Court, which is not wanting for inventiveness in its reading of the prior cases, cannot explain it away. The Court suggests only that today Kiefer–Stewart might be decided on alternative grounds, ante, at 2738, ignoring the fact that today's holding is inconsistent with the ground on which the case actually was decided.[4]

4 In Kiefer–Stewart, Seagram unsuccessfully argued that Yellow Cab was confined to cases concerning unlawful acquisitions, see Brief for Respondents, O.T.1950, No. 297, p. 21. Thus the Kiefer–Stewart Court considered and rejected exactly the same argument embraced by today's majority.

A construction of the statute that reaches agreements between corporate parents and subsidiaries was again embraced by the Court in Timken Roller Bearing Co. v. United States, 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199 (1951),[5] and Perma Life Mufflers, Inc. v. United States, 392 U.S. 134, 88 S.Ct. 1981, 20 L.Ed.2d 982 (1968).[6] The majority only notes that there might have been other grounds for decision available in these cases, ante, at 2739, but again it cannot deny that its new rule is inconsistent with what the Court actually did write in these cases.

5 "The fact that there is common ownership or control of the contracting corporations does not liberate them from the impact of the antitrust laws. E.g., Kiefer–Stewart Co. v. Seagram & Sons, [340 U.S.,] at 215 [71 S.Ct., at 261]. Nor do we find any support in reason or authority for the proposition that agreements between legally separate persons and companies to suppress competition among themselves and others can be justified by labeling the project a 'joint

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venture.' Perhaps every agreement and combination to restrain trade could be so labeled." 341 U.S., at 598, 71 S.Ct., at 974.

6 "There remains for consideration only the Court of Appeals' alternative holding that the Sherman Act claim should be dismissed because respondents were all part of a single business entity and were therefore entitled to cooperate without creating an illegal conspiracy. But since respondents Midas and International availed themselves of the privilege of doing business through separate corporations, the fact of common ownership could not save them from any of the obligations that the law imposes on separate entities. See Timken Co. v. United States, 341 U.S. 593, 598 [[[[71 S.Ct. 971, 974, 95 L.Ed. 1199] (1951); United States v. Yellow Cab Co., 332 U.S. 218, 227 [67 S.Ct. 1560, 1565, 91 L.Ed. 2010] (1947)." 392 U.S., at 141–142, 88 S.Ct., at 1985–1986.

***783** Thus, the rule announced today is inconsistent with what this Court has held on at least seven previous occasions.[7] Perhaps ****2748** most illuminating is the fact that until today, whether they favored the doctrine or not, it had been the universal conclusion of both the lower courts[8] and the commentators[9] that this Court's cases establish that a parent ***784** and a wholly owned subsidiary corporation are capable of conspiring in violation of § 1. In this very case the Court of Appeals observed:

7 Also pertinent is United States v. Citizens & Southern National Bank, 422 U.S. 86, 95 S.Ct. 2099, 45 L.Ed.2d 41 (1975), in which the Court wrote: "The central message of the Sherman Act is that a business entity must find new customers and higher profits through internal expansion—that is, by competing successfully rather than by arranging treaties with its competitors. This Court has held that even commonly owned firms must compete against each other, if they hold themselves out as distinct entities. 'The corporate interrelationships of the conspirators ... are not determinative of the applicability of the Sherman Act.' United States v. Yellow Cab Co., 332 U.S. 218, 227 [67 S.Ct. 1560, 1565, 91 L.Ed. 2010]. See also Kiefer–Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 215 [71 S.Ct. 259, 261, 95 L.Ed. 219]; Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 [71 S.Ct. 971, 974, 95 L.Ed. 1199]; Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 141–142 [88 S.Ct. 1981, 1985–1986, 20 L.Ed.2d 982]." Id., at 116–117, 95 S.Ct., at 2116–2117.

8 See, e.g., William Inglis & Sons Baking Co. v. ITT Continental Baking Co., 668 F.2d 1014, 1054 (CA9), cert. denied, 459 U.S. 825, 103 S.Ct. 57, 74 L.Ed.2d 61 (1982); Ogilvie v. Fotomat Corp., 641 F.2d 581, 587–588 (CA8 1981); Las Vegas Sun, Inc. v. Summa Corp., 610 F.2d 614, 617–618 (CA9 1979), cert. denied, 447 U.S. 906, 100

S.Ct. 2988, 64 L.Ed.2d 855 (1980); Photovest Corp. v. Fotomat Corp., 606 F.2d 704, 726 (CA7 1979), cert. denied, 445 U.S. 917, 100 S.Ct. 1278, 63 L.Ed.2d 601 (1980); Columbia Metal Culvert Co. v. Kaiser Aluminum & Chemical Corp., 579 F.2d 20, 33–35 and, n. 49 (CA3), cert. denied, 439 U.S. 876, 99 S.Ct. 214, 58 L.Ed.2d 190 (1978); H & B Equipment Co. v. International Harvester Co., 577 F.2d 239, 244–245 (CA5 1978); George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc., 508 F.2d 547, 557 (CA1 1974), cert. denied, 421 U.S. 1004, 95 S.Ct. 2407, 44 L.Ed.2d 673 (1975).

9 See, e.g., Report of the Attorney General's National Committee to Study the Antitrust Laws 30–36 (1955) (hereinafter cited as Attorney General's Committee Report); L. Sullivan, Law of Antitrust § 114 (1977); Areeda, Intraenterprise Conspiracy in Decline, 97 Harv.L.Rev. 451 (1983); Handler, Through the Antitrust Looking Glass—Twenty–First Annual Antitrust Review, 57 Calif.L.Rev. 182, 182–193 (1969); Handler & Smart, The Present Status of the Intracorporate Conspiracy Doctrine, 3 Cardozo L.Rev. 23, 26–61 (1981); McQuade, Conspiracy Multicorporate Enterprises, and Section 1 of the Sherman Act, 41 Va.L.Rev. 183, 188–212 (1955); Willis & Pitofsky, Antitrust Consequences of Using Corporate Subsidiaries, 43 N.Y.U.L.Rev. 20, 22–24 (1968); Comment, Intraenterprise Antitrust Conspiracy: A Decisionmaking Approach, 71 Calif.L.Rev. 1732, 1739–1745 (1983) (hereinafter cited as Comment, Decisionmaking); Comment, All in the Family: When Will Internal Discussions Be Labeled Intra–Enterprise Conspiracy?, 14 Duquesne L.Rev. 63 (1975); Note, "Conspiring Entities" Under Section 1 of the Sherman Act, 95 Harv.L.Rev. 661 (1982); Note, Intra–Enterprise Conspiracy Under Section 1 of the Sherman Act: A Suggested Standard, 75 Mich.L.Rev. 717, 718–727 (1977) (hereinafter cited as Note, Suggested Approach).

"[T]he salient factor is that the Supreme Court's decisions, while they need not be read with complete literalism, of course they cannot be ignored. It is no accident that every Court of Appeals to consider the question has concluded that a parent and its subsidiary have the same capacity to conspire, whether or not they can be found to have done so in a particular case." 691 F.2d 310, 317 (CA7 1982) (footnotes omitted).

Thus, we are not writing on a clean slate. "[W]e must bear in mind that considerations of stare decisis weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation." Illinois Brick Co. v. Illinois, 431 U.S. 720, 736, 97 S.Ct. 2061, 2069, 52 L.Ed.2d 707 (1977). [10] There can be no doubt that the Court today changes what has been taken to be the long-settled rule: a rule that Congress did not revise at any point in the last four decades. At a minimum there should be a strong presumption against the approach taken today by the Court.

It is to the merits of that approach that I now turn.

10 See also Monsanto Co. v. Spray–Rite Service Co., 465 U.S. 752, 769, 104 S.Ct. 1464, 1473, 79 L.Ed.2d 775 (1984) (BRENNAN, J., concurring).

II

The language of § 1 of the Sherman Act is sweeping in its breadth: "Every contract, combination in the form of trust or ***785** otherwise, or conspiracy, in restraint of trade or commerce among the several States, ... is declared to be illegal." ****2749** 15 U.S.C. § 1. This Court has long recognized that Congress intended this language to have a broad sweep, reaching any form of combination:

"[I]n view of the many new forms of contracts and combinations which were being evolved from existing economic conditions, it was deemed essential by an all-embracing enumeration to make sure that no form of contract or combination by which an undue restraint of interstate or foreign commerce was brought about could save such restraint from condemnation. The statute under this view evidenced the intent not to restrain the right to make and enforce contracts, whether resulting from combination or otherwise, which did not unduly restrain interstate or foreign commerce, but to protect that commerce from being restrained by methods, whether old or new, which would constitute an interference that is an undue restraint." Standard Oil Co. v. United States, 221 U.S. 1, 59–60, 31 S.Ct. 502, 515–516, 55 L.Ed. 619 (1911).

This broad construction is illustrated by the Court's refusal to limit the statute to actual agreements. Even mere acquiescence in an anticompetitive scheme has been held sufficient to satisfy the statutory language.[11]

11 See Albrecht v. Herald Co., 390 U.S. 145, 149, 88 S.Ct. 869, 871, 19 L.Ed.2d 998 (1968); United States v. Parke, Davis & Co., 362 U.S. 29, 44, 80 S.Ct. 503, 511, 4 L.Ed.2d 505 (1960). See also Monsanto Co. v. Spray–Rite Service Co., 465 U.S. 752, 764, n. 9, 104 S.Ct. 1464, 1471, n. 9, 79 L.Ed.2d 775 (1984).

Since the statute was written against the background of the common law,[12] reference to the common law is particularly enlightening in construing the statutory requirement of a "contract, combination in the form of trust or otherwise, or conspiracy." Under the common law, the question whether ***786** affiliated corporations constitute a plurality of actors within the meaning of the statute is easily answered. The well-settled rule is that a corporation is a separate legal entity; the separate corporate form cannot be disregarded.[13] The Congress that passed the Sherman Act was well acquainted with this rule. See 21 Cong.Rec. 2571 (1890) (remarks of Sen. Teller) ("Each corporation is a creature by itself"). Thus it has long been the law of criminal conspiracy that the officers of even a single corporation are capable of conspiring with each other or the corporation.[14] This Court has held that a corporation can conspire with its employee,[15] and ****2750** that a labor union can "combine" with its business agent

within the meaning of § 1.[16] This concept explains the Timken Court's statement that the affiliated corporations in that case made ***787** "agreements between legally separate persons," 341 U.S., at 598, 71 S.Ct., at 975. Thus, today's holding that agreements between parent and subsidiary corporations involve merely unilateral conduct is at odds with the way that this Court has traditionally understood the concept of a combination or conspiracy, and also at odds with the way in which the Congress that enacted the Sherman Act surely understood it.

12 E.g., Associated General Contractors of California, Inc. v. Carpenters, 459 U.S. 519, 531–532, 103 S.Ct. 897, 904–905, 74 L.Ed.2d 723 (1983); National Society of Professional Engineers v. United States, 435 U.S. 679, 687–688, 98 S.Ct. 1355, 1363–1364, 55 L.Ed.2d 637 (1978); Standard Oil, 221 U.S., at 59, 31 S.Ct., at 515.

13 See, e.g., Schenley Corp. v. United States, 326 U.S. 432, 437, 66 S.Ct. 247, 249, 90 L.Ed. 181 (1946) (per curiam); New Colonial Ice Co. v. Helvering, 292 U.S. 435, 440–442, 54 S.Ct. 788, 790–791, 78 L.Ed. 1348 (1934); Burnet v. Clark, 287 U.S. 410, 535 S.Ct. 207, 77 L.Ed. 397 (1932); Louisville, C. & C.R. Co. v. Letson, 2 How. 497, 558–559, 11 L.Ed. 353 (1844); Bank of the United States v. Deveaux, 5 Cranch 61, 3 L.Ed. 38 (1809).

14 Attorney General's Committee Report, supra n. 9, at 30–31 (citing Barron v. United States, 5 F.2d 799 (CA1 1925); Mininsohn v. United States, 101 F.2d 477 (CA3 1939); Egan v. United States, 137 F.2d 369 (CA8), cert. denied, 320 U.S. 788, 64 S.Ct. 195, 88 L.Ed. 474 (1943)). See also, e.g., United States v. Hartley, 678 F.2d 961, 971–972 (CA11 1982), cert. denied, 459 U.S. 1170, 103 S.Ct. 815, 74 L.Ed.2d 1014 (1983); Alamo Fence Co. of Houston v. United States, 240 F.2d 179 (CA5 1957); Patterson v. United States, 222 F. 599, 618–619 (CA6), cert. denied, 238 U.S. 635, 35 S.Ct. 939, 59 L.Ed. 1499 (1915); Union Pacific Coal Co. v. United States, 173 F. 737 (CA8 1909); United States v. Consolidated Coal Co., 424 F.Supp. 577, 579–581 (SD Ohio 1976); United States v. Griffin, 401 F.Supp. 1222, 1224–1225 (SD Ind.1975), aff'd mem. sub nom. United States v. Metro Management Corp., 541 F.2d 284 (CA7 1976); United States v. Bridell, 180 F.Supp. 268, 273 (ND Ill.1960); United States v. Kemmel, 160 F.Supp. 718 (MD Pa.1958); Welling, Intracorporate Plurality in Criminal Conspiracy Law, 33 Hastings L.J. 1155, 1191–1199 (1982).

15 See Hyde v. United States, 225 U.S. 347, 367–368, 32 S.Ct. 793, 802–803, 56 L.Ed. 1114 (1912). See also United States v. Sampson, 371 U.S. 75, 83 S.Ct. 173, 9 L.Ed.2d 136 (1962); Fong Foo v. United States, 369 U.S. 141, 82 S.Ct. 671, 7 L.Ed.2d 629 (1962) (per curiam); Lott v. United States, 367 U.S. 421, 81 S.Ct. 1563, 6 L.Ed.2d 940 (1961); Nye & Nissen v. United States,

336 U.S. 613, 69 S.Ct. 766, 93 L.Ed. 919 (1949).

16 See Duplex Printing Press Co. v. Deering, 254 U.S. 443, 465, 41 S.Ct. 172, 176, 65 L.Ed. 349 (1921).

Holding that affiliated corporations cannot constitute a plurality of actors is also inconsistent with the objectives of the Sherman Act. Congress was particularly concerned with "trusts," hence it named them in § 1 as a specific form of "combination" at which the statute was directed. Yet "trusts" consisted of affiliated corporations. As Senator Sherman explained:
"Because these combinations are always in many States and, as the Senator from Missouri says, it will be very easy for them to make a corporation within a State. So they can; but that is only one corporation of the combination. The combination is always of two or more, and in one case of forty-odd corporations, all bound together by a link which holds them under the name of trustees, who are themselves incorporated under the laws of one of the States." 21 Cong.Rec. 2569 (1890).

The activities of these "combinations" of affiliated corporations were of special concern: "[A]ssociated enterprise and capital are not satisfied with partnerships and corporations competing with each other, and have invented a new form of combination commonly called trusts, that seeks to avoid competition by combining the controlling corporations, partnerships, and individuals engaged in the same business, and placing the power and property of the combination under the government of a few individuals, and often under the control of a single man called a trustee, a chairman, or a president.

***788** "The sole object of such a combination is to make competition impossible. It can control the market, raise or lower prices, as will best promote its selfish interests, reduce prices in a particular locality and break down competition and advance prices at will where competition does not exist. Its governing motive is to increase the profits of the parties composing it. The law of selfishness, uncontrolled by competition, compels it to disregard the interest of the consumer. It dictates terms to transportation companies, it commands the price of labor without fear of strikes, for in its field it allows no competitors.... It is this kind of a combination we have to deal with now." Id., at 2457. [17]

17 See also 21 Cong.Rec. 2562 (1890) (remarks of Sen. Teller); id., at 2570 (remarks of Sen. Sherman); id., at 2609 (remarks of Sen. Morgan).

Thus, the corporate subsidiary, when used as a device to eliminate competition, was one of the chief evils to which the Sherman Act was addressed. [18] The anomaly ****2751** in today's holding is that the corporate devices most similar to the original "trusts" are now those which free an enterprise from antitrust scrutiny.

18 This legislative history thus demonstrates the error in the majority's conclusion that only acquisitions of corporate affiliates fall within § 1. See ante, at 2737. The conduct of the trusts that Senator Sherman and others

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objected to went much further than mere acquisitions. Indeed, the irony of the Court's approach is that, had it been adopted in 1890, it would have meant that § 1 would have no application to trust combinations which had already been formed—the very trusts to which Senator Sherman was referring.

I cannot believe that the Court really intends to express doubt as to whether the Congress that passed the Sherman Act thought conspiracy doctrine could apply to corporations. Ante, at 2744, n. 24. If that were not the case, then the Sherman Act would have no application to corporations. Since, as is clear and as the Court concedes, the Sherman Act does apply to corporations, there can be no doubt that Congress intended to apply the law of conspiracy to agreements between corporations.

***789** III

The Court's reason for rejecting the concept of a combination or conspiracy among a parent corporation and its wholly owned subsidiary is that it elevates form over substance—while in form the two corporations are separate legal entities, in substance they are a single integrated enterprise and hence cannot comprise the plurality of actors necessary to satisfy § 1. Ante, at 2742–2744. In many situations the Court's reasoning is perfectly sensible, for the affiliation of corporate entities often is procompetitive precisely because, as the Court explains, it enhances efficiency. A challenge to conduct that is merely an incident of the desirable integration that accompanies such affiliation should fail. However, the protection of such conduct provides no justification for the Court's new rule, precisely because such conduct cannot be characterized as an unreasonable restraint of trade violative of § 1. Conversely, the problem with the Court's new rule is that it leaves a significant gap in the enforcement of § 1 with respect to anticompetitive conduct that is entirely unrelated to the efficiencies associated with integration.

Since at least United States v. Colgate & Co., 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919), § 1 has been construed to require a plurality of actors. This requirement, however, is a consequence of the plain statutory language, not of any economic principle. As an economic matter, what is critical is the presence of market power, rather than a plurality of actors.[19] From a competitive standpoint, a decision of a single firm possessing power to reduce output and raise prices above competitive levels has the same consequence as a decision by two firms acting together who have acquired an equivalent amount of market ***790** power through an agreement not to compete.[20] Unilateral conduct by a firm with market power has no less anticompetitive potential than conduct by a plurality of actors which generates or exploits the same power,[21] and probably more, since the ****2752** unilateral actor avoids the policing problems faced by cartels.

19 Market power is the ability to raise prices above those that would be charged in a competitive market. See Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 27, n. 46, 104 S.Ct. 1551, 1556, n. 46, 80 L.Ed.2d

2 (1984); United States Steel Corp. v. Fortner Enterprises, Inc., 429 U.S. 610, 620, 97 S.Ct. 861, 867, 51 L.Ed.2d 80 (1977); United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 391, 76 S.Ct. 994, 1005, 100 L.Ed. 1264 (1956).

20 Significantly, the Court never suggests that the plurality-of-actors requirement has any intrinsic economic significance. Rather, it suggests that the requirement has evidentiary significance: combinations are more likely to signal anticompetitive conduct than is unilateral activity: "In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction." Ante, at 2741. That is true, but it is also true of any ordinary commercial contract between separate entities, as can be seen if one substitutes the word "contract" for "conspiracy" in the passage I have quoted. The language of the Sherman Act indicates that it treats "contracts" and "conspiracies" as equivalent concepts—both satisfy the multiplicity-of-actors requirement—and yet one of the most fundamental points in antitrust jurisprudence, dating at least to Standard Oil, is that there is nothing inherently anticompetitive about a contract. Similarly, an agreement to act "for common benefit" in itself is unremarkable—all agreements are in some sense a restraint of trade be they contracts or conspiracies. It is only when trade is unreasonably restrained that § 1 is implicated. The Court's evidentiary concern lacks merit.

21 We made this point in the context of resale price maintenance in United States v. Parke, Davis & Co., 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960): "The Sherman Act forbids combinations of traders to suppress competition. True, there results the same economic effect as is accomplished by a prohibited combination to suppress price competition if each customer, although induced to do so solely by a manufacturer's announced policy, independently decides to observe specified resale prices. So long as Colgate is not overruled, this result is tolerated but only when it is the consequence of a mere refusal to sell in the exercise of a manufacturer's right 'freely to exercise his own independent discretion as to parties with whom he will deal.' " Id., at 44, 80 S.Ct., at 512 (quoting Colgate, 250 U.S., at 307, 39 S.Ct., at 468).

The rule of Yellow Cab thus has an economic justification. It addresses a gap in antitrust enforcement by reaching anticompetitive agreements between affiliated corporations which ***791** have sufficient market power to restrain marketwide competition, but not sufficient power to be considered monopolists within the ambit of § 2 of the Act.[22] The

doctrine is also useful when a third party declines to join a conspiracy to restrain trade among affiliated corporations, and is harmed as a result through a boycott or similar tactics designed to penalize the refusal. In such cases, since there has been no agreement with the third party, only an agreement between the affiliated corporations can be the basis for § 1 inquiry.[23] Finally, it must be remembered that not all persons who restrain trade wear grey flannel suits. Businesses controlled by organized crime often attempt to gain control of an industry through violence or intimidation of competitors; in such cases § 1 can be applied to separately incorporated businesses which benefit from such tactics, but which may be ultimately controlled by a single criminal enterprise.[24]

22 "[I]t is the potential which this conspiracy concept holds for the development of a rational enforcement policy which, if anything, will ultimately attract the courts. If conduct of a single corporation which restrains trade were to violate Section 1, a forceful weapon would be available to the government with which to challenge conduct which in oligopolistic industries creates or reinforces entry barriers. Excessive advertising in the cereal, drug, or detergent industries, annual style changes in the auto industry, and other such practices could be reached as soon as they threatened to inhibit competition; there would be no need to wait until a 'dangerous probability' of monopoly had been reached, the requirement under Section 2 'attempt' doctrine. Nor would a single firm restraint of trade rule be overbroad. It would in no way threaten single firm activity—setting a price, deciding what market it would deal in, or the like —which did not threaten competitive conditions." L. Sullivan supra, n. 9, § 114, at 324 (footnotes omitted).

23 This was the case in Kiefer–Stewart, for example. Seagram had refused to sell liquor to Kiefer–Stewart unless it agreed to an illegal resale price maintenance scheme. Kiefer–Stewart refused to agree, and as a result was injured by losing access to Seagram's products. See 340 U.S., at 213, 71 S.Ct., at 260.

24 See United States v. Turkette, 452 U.S. 576, 588–593, 101 S.Ct. 2524, 2531–2534, 69 L.Ed.2d 246 (1981) (discussing congressional findings underlying the Organized Crime Control Act of 1970). Section 1 of the Sherman Act has on occasion been used against various types of racketeering activity. See Hartwell, Criminal RICO and Antitrust, 52 Antitrust L.J. 311, 312–313 (1983); McLaren, Antitrust and Competition —Review of the Past Year and Suggestions for the Future, in New York State Bar Assn., 1971 Antitrust Law Symposium 1, 3 (1971).

***792** The rule of Yellow Cab and its progeny is not one that condemns every parent-subsidiary relationship. A single firm, no matter what its corporate structure may be, is not expected to compete with itself.[25] Functional integration

by its very nature requires unified action; hence in itself it has never been sufficient to establish the **2753 existence of an unreasonable restraint of trade: "In discussing the charge in the Yellow Cab case, we said that the fact that the conspirators were integrated did not insulate them from the act, not that corporate integration violated the act." United States v. Columbia Steel Co., 334 U.S. 495, 522, 68 S.Ct. 1107, 1121, 92 L.Ed. 1533 (1948). Restraints that act only on the parent or its subsidiary as a consequence of an otherwise lawful integration do not violate § 1 of the Sherman Act.[26] But if the behavior at issue is unrelated to any functional integration between the affiliated corporations and *793 imposes a restraint on third parties of sufficient magnitude to restrain marketwide competition, as a matter of economic substance, as well as form, it is appropriate to characterize the conduct as a "combination or conspiracy in restraint of trade."[27]

25 See Comment, Decisionmaking, supra n. 9, at 1753–1757; Note, Suggested Standard, supra n. 9, at 735–738. Professor Sullivan elaborates:

"Picture, at one end of the spectrum, a family business which operates one retail store in each of three or four adjacent communities. All of the stores are managed as a unit by one individual, the founder of the business who sets policy, does all the buying, decides on all the advertising, sets prices, and hires and fires all employees other than family members. The fact that each store is operated by a separate corporation should not convert a family business into a cartel.... If there is, as a practical matter, an integrated ownership and management, this small business is a single firm. And a single firm cannot compete with itself. Hence it cannot restrain price competition with itself, or divide markets with itself, or act as a common purchasing agent for itself or otherwise restrain competition with itself, regardless of how many separate corporations the single firm may, for reasons unrelated to the act, be divided into." L. Sullivan, supra n. 9, § 114, at 326–327.

26 Thus, the Court is wrong to suggest, ante, at 2742, 2744–2745, and n. 24, that Yellow Cab could reach truly unilateral conduct involving only the employees of a single firm.

27 If the rule of Yellow Cab and its progeny could be easily circumvented through, for example, use of unincorporated divisions instead of subsidiaries, then there would be reason to question its efficacy as a tool for rational antitrust enforcement. However, the Court is incorrect when it asserts, ante, at 2742, 2743, that there is no economic substance in a distinction between unincorporated divisions, which cannot provide a plurality of actors, and wholly owned subsidiaries, which under Yellow Cab can. If that were the case, incorporated subsidiaries would never be used to achieve integration—the ready availability of an unincorporated alternative would always be employed in order to avoid antitrust liability. The answer is provided by the Court itself—the use of subsidiaries often

makes possible operating efficiencies that are unavailable through the use of unincorporated divisions. Ante, at 2743. We may confidently assume that any corporate parent whose contingent antitrust liability exceeds the savings it realizes through the use of subsidiaries already utilizes unincorporated divisions instead of corporate subsidiaries. Thus, it is more than merely a question of form when a decision is made to use corporate subsidiaries instead of unincorporated divisions, and the rule is not that easily circumvented.

For example, in Yellow Cab the Court read the complaint as alleging that integration had assisted the parent in excluding competing manufacturers from the marketplace, 332 U.S., at 226–227, 67 S.Ct., at 1564–1565, leading the Court to conclude that "restraint of interstate trade was not only effected by the combination of the appellees but was the primary object of the combination." Id., at 227, 67 S.Ct., at 1565. Similarly, in Crescent Amusement the Court noted that corporate affiliation between exhibitors enhanced their buying power and "was one of the instruments in ... making the conspiracy effective" in excluding independents from the market. 323 U.S., at 189–190, 65 S.Ct., at 262–263. Thus, in both cases the Court found that the affiliation enhanced the ability of the parent corporation to exclude the competition of third parties, and hence raised entry ***794** barriers faced by actual and potential competitors. When conduct restrains trade not merely by integrating affiliated corporations but rather by restraining the ability of others to compete, that conduct has competitive significance drastically different from procompetitive integration. [28] In ****2754** these cases, the affiliation assisted exclusionary conduct; it was not the competitive equivalent of unilateral integration but instead generated power to restrain marketwide competition.

28 See L. Sullivan, supra n. 9, § 114, at 328 ("To have two competitors acting concertedly two separate firms, not just persons, are needed. Thus 'concerted action' by two 'legal persons' which is limited solely to the internal management of a single firm does not restrain competition; but 'concerted action' by two 'legal persons' which erects barriers to entry by another separate firm, a competitor or potential competitor, can be a restraint of trade"); see also Willis & Pitofsky, supra n. 9, at 38–41. The Attorney General's National Committee to Study the Antitrust Laws made the same point in 1955:

"The substance of the Supreme Court decisions is that concerted action between a parent and subsidiary or between subsidiaries which has for its purpose or effect coercion or unreasonable restraint on the trade of strangers to those acting in concert is prohibited by Section 1. Nothing in these opinions should be interpreted as justifying the conclusion that concerted action solely between a parent and subsidiary or subsidiaries, the purpose and effect of which is not coercive restraint of the trade of strangers to the corporate family, violates Section 1. Where such concerted action restrains

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no trade and is designed to restrain no trade other than that of the parent and its subsidiaries, Section 1 is not violated." Attorney General's Committee Report, supra n. 9, at 34.

There are other ways in which corporate affiliation can operate to restrain competition. A wholly owned subsidiary might market a "fighting brand" or engage in other predatory behavior that would be more effective if its ownership were concealed than if it was known that only one firm was involved. A predator might be willing to accept the risk of bankrupting a subsidiary when it could not afford to let a division incur similar risks. Affiliated corporations might enhance their power over suppliers by agreeing to refuse to deal with those who deal with an actual or potential competitor ***795** of one of them; such a threat might be more potent coming from both corporations than from only one.[29]

29 Professor Sullivan provides another example: "[P]icture a parent corporation and its wholly owned subsidiary (or two corporations wholly owned by the same parent or stockholder group) which operate, respectively, a newspaper and a radio station in the same city. If the radio station, which has no local competitors, were to deny advertising to a local business because the latter advertised in a rival newspaper, the integration between the two corporations, however close in terms of ownership or management or both, would not protect them from a charge of conspiracy to restrain trade.... [T]he concerted action here involved is not merely carrying on the business of a single integrated firm, it is action which is aimed at restraining trade by utilizing such market power as is possessed by the firm because of its radio station in order to erect a competitive barrier in front of a competitor of the firm's newspaper." L. Sullivan, supra n. 9, § 114, at 327 (footnote omitted).

In this case, it may be that notices to potential suppliers of respondent emanating from Copperweld carried more weight than would notices coming only from Regal. There was evidence suggesting that Regal and Copperweld were not integrated, and that the challenged agreement had little to do with achieving procompetitive efficiencies and much to do with protecting Regal's market position. The Court does not even try to explain why their common ownership meant that Copperweld and Regal were merely obtaining benefits associated with the efficiencies of integration. Both the District Court and the Court of Appeals thought that their agreement had a very different result—that it raised barriers to entry and imposed an appreciable marketwide restraint. The Court's discussion of the justifications for corporate affiliation is therefore entirely abstract—while it dutifully lists the procompetitive justifications for corporate affiliation, ante, at 2743, it fails to explain how any of them relate to the conduct at issue in this case. What is challenged here is not the fact of integration between Regal and Copperweld, but their specific agreement with respect to Independence. That agreement concerned the exclusion of ***796** Independence from the market, and not any efficiency resulting from

integration. The facts of this very case belie the conclusion that affiliated corporations are incapable of engaging in the kind of conduct that threatens marketwide competition. The Court does not even attempt to assess the competitive significance of the conduct under challenge here—it never tests its economic assumptions against the concrete facts before it. Use of economic theory without reference to the competitive impact of the particular economic arrangement at issue is properly criticized when it produces overly broad per se rules of antitrust liability;[30] criticism is no less warranted when a per se rule of antitrust immunity is adopted in the same way.

30 E.g., Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977).

In sum, the question that the Court should ask is not why a wholly owned subsidiary should be treated differently from a corporate division, since the immunity accorded that type of arrangement is a necessary consequence of Colgate. Rather the question should be why two corporations that engage in a predatory course of conduct which produces a marketwide restraint ****2755** on competition and which, as separate legal entities, can be easily fit within the language of § 1, should be immunized from liability because they are controlled by the same godfather. That is a question the Court simply fails to confront. I respectfully dissent.

All Citations

467 U.S. 752, 104 S.Ct. 2731, 81 L.Ed.2d 628, 1984-2 Trade Cases P 66,065

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882 F.2d 862
United States Court of Appeals,
Fourth Circuit.

FIRST UNITED METHODIST CHURCH OF HYATTSVILLE, Plaintiff–Appellant,
v.
UNITED STATES GYPSUM COMPANY, Defendant–Appellee.

No. 88–1612.
|
Argued June 9, 1989.
|
Decided Aug. 10, 1989.

Synopsis
Church brought action against manufacturer of asbestos-containing acoustical plaster to recover costs of removal. The United States District Court for the District of Maryland, Joseph C. Howard, J., granted summary judgment in favor of manufacturer, and church appealed. The Court of Appeals, K.K. Hall, Circuit Judge, held that: (1) action was barred by statute of repose; (2) statute of repose was not tolled by alleged fraudulent concealment of the manufacturer; and (3) statute of repose was not preempted by Comprehensive Environmental Response, Compensation, and Liability Act.

Affirmed.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Attorneys and Law Firms

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***864** Before RUSSELL and HALL, Circuit Judges, and BUTZNER, Senior Circuit judge.

Opinion

K.K. HALL, Circuit Judge:

The First United Methodist Church of Hyattsville, Maryland ("First United") appeals the district court's grant of partial summary judgment in favor of United States Gypsum Company ("USG") based on a Maryland statute of repose, § 5–108 Md.Cts. & Jud.Proc.Code Ann. Specifically, the district court held that the repose period of § 5–108(a) was not preempted by the Comprehensive Environmental Response and Compensation Act of 1980 ("CERCLA"), 42 U.S.C. § 9658. Finding no error, we affirm.

I.

In 1961, First United undertook construction of a new church building. At the direction of the building's architect, an asbestos-containing acoustical plaster, manufactured by USG, was applied to the building's ceilings. The church was consecrated on May 20, 1962, and has been

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in continuous use ever since. In 1969, a portion of the ceiling was replaced and asbestos-laden plaster was again used.

In July, 1985, First United became concerned over the possibility that asbestos materials may have been used in the construction of the church. In August, the presence of danger from the acoustical plaster was discovered and First United's Board of Trustees directed its removal from the building.

On June 15, 1988, First United brought suit against USG in Maryland state court alleging that the plaster posed a health hazard to those who frequently occupied the building. The Church sought to recover the cost of the removal of the plaster, an amount in excess of $225,000.00. USG removed the case to federal court without opposition.

First United's complaint advanced the state law theories of strict liability, negligence, breach of express and implied warranties, and fraud. On July 26, USG filed a motion for partial summary judgment on all claims arising from installation of the plaster which occurred before June 17, 1966, interposing Maryland's 20–year statute of repose as a complete defense. § 5–108(a) Md.Cts. & Jud.Proc.Code Ann. On October 13, the district court granted the motion and, finding no reason for just delays, entered a final judgment pursuant to Fed.R.Civ.P. 54(b) as to all pre–1966 claims. This appeal followed.

II.

First United makes several arguments against the application of the statute of repose to its claims. The church's primary contention is that manufacturers are not in the class of persons protected by the statute. Alternatively, First United argues that even if the statute applies, USG's fraudulent concealment of the hazards of its plaster serve to toll the statute's running. Finally, the church argues that the time limits of § 5–108, as applied to its claims, have been preempted by CERCLA's § 9658, which establishes a uniform statute of limitations for all state law property damage actions based on the release of any hazardous substance into the environment. We address these arguments in turn.

The statute of repose reads in pertinent part:

> § 5–108. Injury to person or property occurring after completion of improvement to realty.
>
> (a) *Injury occurring more than 20 years later.*—Except as provided by this section, no cause of action for damages accrues and a person may not seek contribution or indemnity for damages incurred when wrongful death, personal injury, or injury to real or personal property resulting from the defective and unsafe condition of an improvement to real property occurs more than 20 years after the date the entire improvement first becomes available for its intended use.

First United bases its narrow reading of this broad grant of immunity on a passage from the statute's legislative history that characterizes the statute as protecting "builders, contractors, landlords, and ***865** realtors." *See Allentown*

Plaza Associates v. Suburban Propane Gas Corp., 43 Md.App. 337, 342–44, 405 A.2d 326 (1979) (discussing the Revisor's Note to § 5–108). According to First United's argument, because USG as manufacturer of the plaster does not fit into one of these categories, it cannot have benefit of the statute. We do not agree.

While a statute's legislative history is often helpful in resolving ambiguity, one of the time-honored maxims of statutory construction is that when the language of a statute is clear, there is no need to rely on its legislative history. *Ex Parte Collett,* 337 U.S. 55, 61, 69 S.Ct. 944, 947, 93 L.Ed. 1207 (1949). Such is the case here. This statute unequivocally states that "no cause of action for damages accrues" after the 20–year time limit. And, it is completely silent as to any limitation on the class of persons it protects. To remove manufacturers from the ambit of § 5–108(a) as First United suggests, would be flatly inconsistent with this language's plain mandate. We are not alone in reaching this result.

In *J.H. Westerman Co. v. Fireman's Fund Ins. Co.,* 499 A.2d 116 (D.C.App.1985), the District of Columbia court was forced to construe its nearly-identical statute of repose. In concluding that manufacturers were covered by the statute, the court reasoned that this language creates an immunity which turns on the defendant's connection to the improvement rather than on the type of service the defendant rendered or product it provided. *Id.* at 120. We find this reasoning persuasive and hold that § 5–108(a) works to insulate from liability manufacturers of products used in improvements made to real property. [1]

1 *See also Whiting–Turner Contracting Co. v. Coupard,* 304 Md. 340, 349, 499 A.2d 178 (1985) (court in dicta commented that statute protects "suppliers of building materials").

III.

First United next contends that even if § 5–108(a) applies, USG's fraudulent concealment of the hazards of its plaster tolls the time limits of the statute. [2] We disagree.

2 Predictably, USG argues that First United's lack of due diligence, not USG's fraud, was the reason that this action was not timely filed. This, of course, is the quintessential question of fact in fraudulent concealment cases; however, our disposition of this issue obviates any need for its resolution.

The common law principle of equitable tolling of limitations periods has been codified in Maryland:

> If a party is kept in ignorance of a cause of action by the fraud of an adverse party, the cause of action shall be deemed to accrue at the time when the party discovered, or by the exercise of ordinary diligence should have discovered the fraud.

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(An.Code 1957, art. 57, § 14; 1973, 1st Sp.Sess., Ch. 2, § 1)

§ 5–203 Md.Cts. & Jud.Proc.Ann.[3] As the language of this provision indicates, it is intended to give relief to victims of fraud by tolling the time of accrual of a cause of action for purposes of an applicable statute of limitations. *E.g., Butcher v. Robertshaw Controls Co.,* 550 F.Supp. 692, 703 (D.Md.1981). However, as the Maryland courts have repeatedly recognized, § 5–108 is a statute of repose, not a statute of limitations, and the time of accrual has been set by the Maryland General Assembly. *Hilliard & Bartko Joint Venture v. Fedco Systems, Inc.,* 309 Md. 147, 159, 522 A.2d 961 (1987); *Whiting–Turner,* 304 Md. at 350, 499 A.2d 178; *Allentown Plaza,* 43 Md.App. at 338 n. 2, 405 A.2d 326; *see also President and Directors, of Georgetown College v. Madden,* 505 F.Supp. 557, 571 (D.Md.1980). These are meaningful distinctions.

3 The statute has recently been amended, however, the amendment is not applicable "to any actions arising from events occurring before July 1, 1987," and thus has no effect on the instant dispute. See § 2, Ch. 592, Acts 1987.

A statute of limitations is a procedural device that operates as a defense to limit the remedy available from an existing cause of action. *Goad v. Celotex Corp.,* 831 F.2d 508, 511 (4th Cir.1987), *cert. denied,* ***866** 487 U.S. 1218, 108 S.Ct. 2871, 101 L.Ed.2d 906 (1988). A statute of repose creates a substantive right in those protected to be free from liability after a legislatively-determined period of time. *Id.* Statutes of limitations are motivated by considerations of fairness to defendants and are intended to encourage prompt resolution of disputes by providing a simple procedural mechanism to dispose of stale claims. *Harig v. Johns–Manville Products Corp.,* 284 Md. 70, 75, 394 A.2d 299 (1978). Statutes of repose are based on considerations of the economic best interests of the public as a whole and are substantive grants of immunity based on a legislative balance of the respective rights of potential plaintiffs and defendants struck by determining a time limit beyond which liability no longer exists. *Whiting–Turner,* 304 Md. at 349–50, 499 A.2d 178. Thus, as a general rule, a statute of limitations is tolled by a defendant's fraudulent concealment of a plaintiff's injury because it would be inequitable to allow a defendant to use a statute intended as a device of fairness to perpetrate a fraud. Conversely, a statute of repose is typically an absolute time limit beyond which liability no longer exists and is not tolled for any reason because to do so would upset the economic balance struck by the legislative body. *Knox v. AC & S, Inc.,* 690 F.Supp. 752, 759 (S.D.Ind.1988).

These general principles counsel that we should not lightly disturb the Maryland General Assembly's judgment on the time limit set by § 5–108(a). We recognize, as the Maryland court has recognized, the unique public policy concerns embodied in the 20–year repose period:

> [The statute is] a response to the problems arising from the expansion of liability

> based on the defective and unsafe condition of an improvement to real property.... If a legislative body concludes that it will address the problem of expanded liability ... it must balance the interests of those potentially subject to liability, of those directly suffering injury, and of the public in having improvements built safely and at a reasonable cost.

Whiting–Turner, 304 Md. at 349–50, 499 A.2d 178.

Further, it appears that a purpose of the statute was to inextricably tie the accrual of a property damage action to the date an improvement was placed into use precisely because tolling mechanisms, such as the one urged by First United, had expanded the liability of potential defendants. *Id.* at 349, 499 A.2d 178. Lastly, we note that had the Maryland General Assembly desired that § 5–203 apply to § 5–108, it could have expressly provided so as it has done in the medical malpractice arena. See § 5–109(f)(2) Md.Cts. & Jud.Code Ann. (amended in 1987 to show the applicability of § 5–203). In view of these considerations, it would be inappropriate for us to construe § 5–108(a) to provide for anything other than the 20–year repose period Maryland's lawmakers have chosen and consequently, we hold that § 5–203 does not operate to toll that period. [4]

4 *See Glenn v. Morelos,* 79 Md.App. 90, 555 A.2d 1064 (1989) (court refused to recognize fraud tolling exception to § 5–109 prior to its amendment).

IV.

Lastly, we turn to First United's claim that § 5–108's repose period cannot preclude this action because it has been preempted by § 9658 of CERCLA. We cannot agree.

In relevant part § 9658 states:

> (a) State Statutes of Limitations for Hazardous Substance Cases
>
> (1) Exception to State Statutes
>
> In the case of any action brought under State law for personal injury, or property damages, which are caused or contributed to by exposure to any *hazardous substance,* or pollutant or contaminant, *released into the environment* from a *facility,* if the applicable limitations period for such action (as specified in the State statute of limitations or under common law) provides a commencement date which is earlier than the federally required commencement date, such period shall commence at the ***867** federally required commencement date in lieu of the date specified in such State statute....
>
> (b)(4) Federally Required Commencement Date
>
> (a) In General

Except as provided in subparagraph (B), the term "federally required commencement date" means the date the plaintiff knew (or reasonably should have known) that the personal injury or property damages referred to in subsection (a)(1) were caused or contributed to by the hazardous substance or pollutant or contaminant concerned....

(i) The terms used in this section shall have the same meanings as when used in subchapter I of this chapter. (emphasis added).

First United argues that because—(1) asbestos is unquestionably a hazardous substance, *see Knox,* 690 F.Supp. at 755; (2) the church building falls within the broad definition of a "facility" codified at 42 U.S.C. § 9601(9); and (3) the escape of asbestos fibers from USG's plaster falls within the scope of the phrase "release into the environment" as the terms "environment" and "release" are defined in 42 U.S.C. § 9601(8), (22)[5]—it must follow that the time limits of § 5–108(a), which extinguished this action even before the church knew that it existed, must give way to the "federally required commencement date" of 42 U.S.C. § 9658. This argument fails to persuade because the premise on which it rests—that CERCLA is intended to apply to recover costs incurred for removing asbestos products which are part of the structure of a building—is unsound.[6]

5 This proposition in First United's syllogism is by no means a given. *See Knox,* 690 F.Supp. at 757 (defining "release" in terms of "spills and disposals of wastes"); *Covalt v. Carey Canada Inc.,* 860 F.2d 1434 (7th Cir.1988) (§ 9658 does not preempt state law because interior of workplace is not "environment" for purposes of asbestosis suit based on work place exposure).

6 We emphasize that our holding is limited to the facts at hand, that is to claims for the cost of removing asbestos from the structure of a building, that was installed as part of that structure, and that creates a hazard only within that building. We express no opinion as to the validity under CERCLA of any other genre of asbestos actions.

We acknowledge that CERCLA, as all remedial statutes, must be given a broad interpretation to effect its ameliorative goals. *United States v. Mottolo,* 605 F.Supp. 898, 902 (D.N.H.1985). We also recognize that the statute reaches far more than hazardous waste sites; in fact, it has been said that through CERCLA, "Congress sought to deal with every conceivable area where hazardous substances come to be located...." *State of N.Y. v. General Elec. Co.,* 592 F.Supp. 291, 296 (N.D.N.Y.1984). However, to infer that Congress, by enacting CERCLA, intended to preempt state statutes of repose as applied to private asbestos-removal actions, is to stretch the statute far beyond its intended reach. We need look no further than the language of the statute to reach this conclusion.

In 42 U.S.C. § 9604(a)(3), Congress limited the President's authority to respond to the asbestos-removal problem:

The President shall not provide for a removal or remedial action under this section in response to a release or threat of release

---

(B) from products which are part of the structure of, and result in exposure within, residential buildings or business or community structures; ...[7]

7 This limitation is subject to exception if, in the President's discretion, he determines that such a situation "constitutes a public health or environmental emergency and no other person with the authority and capability to respond to the emergency will do so in a timely manner." 42 U.S.C. § 9604(a)(4).

First United argues that this limitation on the President's authority to act in no way limits the scope of § 9658 because cost recovery actions brought by private parties typically are not subject to the procedural requirements placed on similar actions brought by the government.[8] *See U.S.* ***868** *Conservation Chemical Co.,* 619 F.Supp. 162, 208–09 (W.D.Mo.1985) (§ 9604(c)(3) requirement of cooperative agreement before proceeding with a response not applicable to private cost recovery actions under § 9607); *Walls v. Waste Resource Corp.,* 823 F.2d 977, 979–81 (6th Cir.1987) (60 day notice requirement of § 9612(a) not applicable). We do not dispute this general rule; however, it would be anomalous indeed if Congress had seen fit to limit the President's authority to respond to a particular type of environmental hazard while placing no such limits on members of the general public. To resolve this ambiguity we turn to the provision's legislative history. There, it is made clear that § 9604(a)(3)(B) represents much more than a procedural limitation on the President's authority; instead, it is a substantive limitation of the breadth of CERCLA itself.

8 USG makes the counter-argument on this point that since First United has not pleaded a cause of action under CERCLA, it cannot avail itself of the preemptive effect of § 9658. See *Knox,* 690 F.Supp. at 757–58. Because we decide that CERCLA does not preempt § 5–108(a), we need not reach this issue.

Section 9604(a)(3) originated as § 112(b) of Senate Bill 51, which was the Senate's version of the Superfund Amendments and Reauthorization Act of 1986. P.L. 99–499, 100 Stat. 1613 ("SARA"). *See Retirement Community Developers, Inc. v. Merine,* 713 F.Supp. 153 (D.Md.1989). The Senate Report accompanying this section stated, under a heading entitled Clarifying the program's scope, that:

> CERCLA response authorities are extremely broad, but there are nevertheless situations, some of which may be life-threatening, which are not within the law's scope. The Agency [Environmental Protection Agency] has encountered some difficulties, primarily political, in restraining CERCLA responses to the scope of the law. For this reason, S. 51 proposes to make more explicit certain areas which the law does not cover.

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> Specifically, S. 51 makes more clear the exclusion from remedial or removal action of a release or a threat of a release:
>
> ...—from products which are part of the structure of, and result in exposure within a facility....
>
> The Environmental Protection Agency has received requests to take removal or remedial action in situations where the contamination was from building materials used in the structure and was creating an indoor hazard. This section would clarify that such situations are not subject to remedial or removal action.

S.Rep. No. 11, 99th Cong., 1st Sess. 16–17 (1985) U.S.Code Cong. & Admin.News 1986, p. 2835. Although the compromise bill eventually passed as SARA was not Senate Bill 51, the exact language of § 112(b) as proposed by the Senate was adopted. H.R.Conf.Rep. No. 962, 99th Cong. 2nd Sess. 190 (1986) *reprinted in* 1986 U.S.Code Cong. & Admin.News 2835, 3276, 3283. Thus, the Senate Report remains an authoritative guide to interpreting this provision.[9] In view of this clear expression of Congressional intent, we will not expand CERCLA to encompass asbestos-removal actions.[10]

9 First United contends that the Conference Report's characterization of § 112(b) supports its view that the section limits only the President's authority to act. While the Conference Committee's brief explanation of § 112(b) does not discuss the substantive limits the provision is intended to effect, the Committee expressly adopted the Senate's provision without stating that the Committee intended to modify its original meaning in any way. H.R.Conf.Rep. No. 962, 99th Cong. 2nd Sess. 190 (1986) *reprinted in* 1986 U.S.Code Cong. & Admin.News 3276, 3283. Consequently, we conclude that the Senate's explanation of § 112(b) remains viable.

10 *But see Prudential Ins. Co. of America, et al v. U.S. Gypsum, et al.,* 711 F.Supp. 1244 (D.N.J.1989). In a CERCLA asbestos-removal action, the district court held that the plaintiffs did not state a CERCLA claim because the sale of asbestos building materials was not a "disposal" of a hazardous substance as defined by CERCLA. However, the court went on, in dicta, to comment that it believed that the limits of § 9604(a)(3) did not apply to private asbestos removal actions. With this dictum we respectfully disagree.

Having drawn this conclusion, it follows naturally that § 9658 does not preempt § 5–108(a) as applied to asbestos-removal actions. Congress could not have intended ***869** for § 9658 to preempt state law in an area which CERCLA's legislative history expressly places outside "the scope of the law."[11] To conclude otherwise would be contrary to the principles of comity which demand that in our federal system, state law not be preempted unless it is the "clear and manifest purpose of Congress." *Baker, Watts & Co. v. Miles & Stockbridge,* 876 F.2d 1101, 1107 (4th Cir.1989) (en banc) (quotation omitted).

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11 A report to Congress on the intended effect of § 9658 supports this reasoning:

> The remedies discussed in this report are legal remedies for personal injury, environmental damages and reduction of property value resulting from the spills of hazardous substances and disposal of hazardous wastes *for which CERCLA provides cleanup and remedial activities.* (emphasis added).

Injuries and Damages from Hazardous Wastes—Analysis and Improvement of Legal Remedies; A Report to Congress in Compliance with Section 301(e) of the Comprehensive Environmental Response, Compensation and Liability Act of 1980, 97th Cong. 2d Sess.

In closing, we note that this interpretation of CERCLA fully comports with the most fundamental guide to statutory construction—common sense. To extend CERCLA's strict liability scheme to all past and present owners of buildings containing asbestos as well as to all persons who manufactured, transported, and installed asbestos products into buildings, would be to shift literally billions of dollars of removal cost liability based on nothing more than an improvident interpretation of a statute that Congress never intended to apply in this context.[12] *Merine,* at 158. Certainly, if Congress had intended for CERCLA to address the monumental asbestos problem, it would have said so more directly when it passed SARA. In fact, the only mention of this problem in SARA's legislative history that either party has raised, or that this Court has found on its own, points to Congress' intent to the contrary. While CERCLA is unquestionably a far-reaching remedial statute that must be interpreted with an eye toward this nation's environmental problems, it cannot reasonably be interpreted to encompass the asbestos-removal problem. Accordingly, we affirm the district court's holding that § 9658 does not preempt § 5–108(a).

12 It is for this reason, that Congress simply did not intend for CERCLA to remedy the asbestos-removal problem, that we decline to follow the reasoning of *Prudential, Knox* and *Covalt* in rejecting First United's preemption argument. Instead of recognizing the fact that CERCLA is out of context in this situation, these courts rejected similar attempts to invoke the statute by construing CERCLA's key terms in a way to exclude asbestos-removal actions. *Covalt,* 860 F.2d at 1438–39 (defining "environment" to exclude the interior of a workplace); *Knox,* 690 F.Supp. at 756–57 (defining "release" in terms of "spills" or "disposal"); *Prudential,* at 1254–55 (defining "disposal" to exclude the sale of a product for consumer use). We find this analysis unsatisfactory because it runs the risk of unnecessarily restricting the scope of CERCLA merely to dispose of claims that the statute was never intended to encompass in the first place. It is far better to simply acknowledge the inapplicability of CERCLA to

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asbestos-removal claims than to restrict its operative terms.

V.

In sum, we hold that § 5–108(a) protects manufacturers of goods used in improvements to real property and that the 20–year repose period of § 5–108(a) is not subject to the tolling provision of § 5–203. We also hold that because CERCLA does not authorize response cost recovery actions for removal of asbestos from the structure of a building, § 9658 of CERCLA does not preempt the repose period of § 5–108(a). Accordingly, we affirm the district court's ruling that all of First United's pre–1966 claims are barred.

AFFIRMED.

All Citations

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Court of Appeal, First District,
Division 5, California.

HOMESITE INSURANCE,
INC., Plaintiff and Respondent,
v.
Bhupinder DHALIWAL,
Defendant and Appellant.

A131226
|
Filed April 19, 2012

(Solano County Super. Ct. No. FCS027596)

Attorneys and Law Firms

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Opinion

Bruiniers, J.

***1** In this subrogation action between an insurer and a home builder over alleged construction defects, the parties dispute the scope of their agreement to arbitrate the claims and the scope of the arbitrator's authority. The homebuilder, Bhupinder Dhaliwal, unsuccessfully challenged the arbitrator's authority to consider certain claims during the arbitration proceeding, and subsequently filed a petition in the superior court seeking to vacate or correct the arbitration award of both damages and costs against him. The insurer, Homesite Insurance, Inc. (Homesite), petitioned for confirmation. The trial court confirmed the award. We affirm that decision.

I. BACKGROUND

In 2003, Edward Curiel bought a single family residence built and owned by Bhupinder Dhaliwal. The home flooded in 2004, allegedly due to faulty construction, including faulty plumbing, resulting in $33,021.13 in damage. Additional damage of $1,948.46 was claimed due to bathroom leaks in 2005, and Curiel's real estate agent purportedly paid some of the repair cost totaling $19,156.28.[1] The Contractors State License Board reportedly investigated and concluded Dhaliwal's construction of the home was grossly below accepted trade standards.[2]

1 An amended complaint filed in July 2006, alleged that the 2004 flooding caused $33,021.13 in damages, and “Curiel also incurred uninsured losses, totaling $21,104.74 [the sum of

$1,948.46 and $19,156.28] for repair work."

2 Dhaliwal contended that most of the damage claimed by Curiel was caused by a leaky water filtration system that Curiel himself installed after the home sale, and the balance of the damage claim was the cost incurred by Curiel in rebuilding a deck for aesthetic reasons.

Curiel and his real estate agent assigned their claims to Curiel's insurer, Homesite, and in 2006, Homesite filed suit against Dhaliwal for negligence. Dhaliwal answered the complaint with a general denial.

Petition to Compel Arbitration

The purchase agreement between Dhaliwal and Curiel (Purchase Agreement) included a dispute resolution provision requiring mediation of "any dispute or claim arising between them out of this Agreement, or any resulting transaction," and binding arbitration of "any dispute or claim in Law or equity arising between them out of this Agreement or any resulting transaction, which is not settled through mediation." (Purchase Agreement, ¶ 17.) The Purchase Agreement further provided that California law would control the arbitrator's rulings and "[i]n all other respects, the arbitration shall be conducted in accordance with Part III, Title 9 of the California Code of Civil Procedure [§ 1280 et seq.]." (Purchase Agreement, ¶ 17, subd. B(1).)

The Purchase Agreement also included a cost–shifting provision. The original form contract, which constituted Curiel's offer to Dhaliwal, stated, "In any action, proceeding, or arbitration between Buyer and Seller arising out of this Agreement, the prevailing Buyer or Seller shall be entitled to reasonable attorney fees and costs from the non–prevailing Buyer or Seller," with exceptions not relevant here. (Purchase Agreement, ¶ 22.) Both parties initialed the arbitration provision in the Purchase Agreement, but Dhaliwal's attached counteroffer stated, "In the event of a dispute, each party to pay their own attorney fees." Curiel accepted the counteroffer.

***2** In July 2007, after unsuccessful attempts at mediation, Dhaliwal (then proceeding pro se) petitioned to compel arbitration pursuant to the arbitration provision of the Purchase Agreement. Homesite filed a non–opposition and the court granted the petition in August. [3]

3 Homesite argues that Dhaliwal expressly asked the trial court to order all of the parties' disputes, including both tort and contract claims, to arbitration and that the court's order so provided. This is a distortion of the record. Dhaliwal's petition to compel arbitration *quoted* the Purchase Agreement arbitration provision, which applies to "any dispute or claim in Law or equity," but then specifically cited the claims alleged in Homesite's complaint, argued they were covered by the arbitration provision, and asked the court to "issue an order compelling [arbitration of] *this dispute* .... " (Italics added.) The court's order simply states, "the court grants the petition to compel arbitration." (Capitalization omitted.)

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The Subsequent Arbitration Agreement

According to the court's case management minute orders, between August 2007 and November 2008, the parties worked to develop a detailed agreement to govern their arbitration proceeding (Arbitration Agreement). The central focus of the parties in this appeal is on whether there was ever a meeting of the minds on the terms of Arbitration Agreement. As we discuss *post,* we find it ultimately makes no difference.

Two versions of the Arbitration Agreement are in the record: (1) "Trial Exhibit J" and (2) "Exhibit F" to Dhaliwal's pre–arbitration hearing "Motion to Limit Evidence of Damages for Trial." The printed text is the same in both versions. [4] The Arbitration Agreement states, "3. A dispute has arising [*sic*] ... concerning the condition of the Property as constructed and sold to Curiel by Dhaliwal.... [¶] ... [¶] 5. By this Agreement, the parties agree and hereby stipulate that all claims and causes of action arising out of Dhaliwal's construction of the Property and/or Dhaliwal's sale of the Property to Curiel, including the claims and causes of action alleged in [the superior court action] shall be submitted to binding arbitration in accordance with the terms and conditions set forth herein." Paragraph 41 of the Arbitration Agreement states, "Pending an award of costs, the costs of the arbitration shall be shared equally by the parties." The "Award" section authorizes the arbitrator to "grant any remedy or relief that the arbitrator deems just and equitable." The Arbitration Agreement also includes provisions for an expedited arbitration schedule, discovery, briefing, and the hearing itself.

4 Only one of the versions (Trial Exhibit J) includes a title page. That title page is captioned, "Agreement Concerning Rules and Procedures for Arbitration Between Homesite Insurance as Assignee of Edward Curiel and Bhupinder S. Dhaliwal."

Both submitted versions of the Arbitration Agreement are signed by a Homesite representative (apparently Gregory E. Deetman, Homesite's attorney) and Dhaliwal. On both, Deetman's signature is dated September 26, 2008, and Dhaliwal's signature is dated October 26, 2008. Also, each page of each document is initialed by both Deetman and Dhaliwal.

The significant difference between the two documents relates to the Award provisions on page 6. On both documents, three instances of the word "award" and one instance of the phrase "award of costs" are marked with a handwritten asterisk that references the following note on the bottom of the page: " *Limited to the actual cost (as verified by receipt) incurred by each party in repairing the damage to the house." [5] On Exhibit F, however, but not on Trial Exhibit J, the following additional handwritten note appears to the left of the " *Limited to ..." note: "Not agreed to, to be decided by the arbitrator." [6]

5 The full phrase is visible only on the copy of Trial Exhibit J, page 6, that Dhaliwal submitted with his motion to augment the record. We granted that motion on October 17, 2011. (The last few words of the phrase are obscured

even on this copy, but Homesite does not dispute that those final words are "the damage to the house," as represented by Dhaliwal in his opening brief.) On Exhibit F, the only visible writing is " *Limited to the actual cost (as verified by receipt)." However, Homesite again does not dispute that the entire phrase quoted in the main text appears on Exhibit F. The discrepancy appears to have been a result of the photocopying process.

6 Although the copy of Exhibit F in the record before us is only partially legible, the parties agreed in the arbitration proceeding and in the trial court that the note in fact reads, "Not agreed to, to be decided by the arbitrator."

The Arbitration Proceedings

***3** As noted, the parties both ostensibly accepted the Arbitration Agreement in about October 2008. The parties negotiated selection of an arbitrator from November 2008 to June 2009, and ultimately selected the Honorable Margaret J. Kemp, retired. In October 2009, Dhaliwal retained counsel.

Homesite filed a statement of damages that included $287,000 in home repairs that had not been included in the $54,125.87 amount claimed in Homesite's complaint and amended complaint.

In January 2010, Dhaliwal moved to limit evidence of damages in the arbitration proceeding to "subrogation damages as plead" in Homesite's complaint. Dhaliwal argued that, after the parties signed the Arbitration Agreement,[7] Homesite "claimed additional damages against defendant, based on an assignment of rights from [Curiel], for alleged defects [for] which Homesite had made no payment to its insured." Dhaliwal argued that as subrogee Homesite was limited to recovering only the funds it paid to its insured. The arbitrator denied Dhaliwal's motion, ruling that Curiel's assignment of his rights to Homesite was broad and enforceable and that the additional claims fell within the broad scope–of–arbitration language in the Arbitration Agreement.[8]

7 Notably, in support of this motion Dhaliwal submitted Exhibit F, the version of the Arbitration Agreement that includes Deetman's note, "Not agreed to, to be decided by the arbitrator." Moreover, Dhaliwal wrote in his moving papers that the parties "entered into a[n] [Arbitration Agreement], a copy of which is attached hereto and marked Exhibit F."

8 The arbitrator gave Homesite leave to amend its complaint to include additional construction defect issues. In litigating his petition to vacate the arbitration award, Dhaliwal represented that Homesite never amended its complaint following that order, and Homesite does not contest that representation. However, the arbitrator ultimately ruled on and awarded damages for several construction defect claims that were

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not raised in Homesite's complaint or amended complaint.

During the arbitration hearing, Dhaliwal argued there had been no meeting of the minds on the Arbitration Agreement, and it was therefore unenforceable. He argued that the scope of the arbitration should be limited to the causes of action pled in the amended complaint (a cause of action for negligence with damages totaling $54,125.87), not additional defect damages. To resolve this issue, the arbitrator asked the parties to submit declarations describing the circumstances of the drafting and signing of the Arbitration Agreement and deferred a ruling on the issue until she issued her final award. The parties offered conflicting accounts of the drafting of the document. Homesite's attorney (Deetman) averred that Dhaliwal proposed the handwritten changes to the Award provisions in October 2008; that Deetman rejected the changes by writing the “Not agreed to ...” notation on the document at an October 22, 2008 case management conference; that Dhaliwal orally told the court he would sign the agreement at a November 26, 2008 case management conference; and that following that hearing Dhaliwal signed the Arbitration Agreement (which then bore the “Not agreed to ...” note) but mistakenly dated his signature October 26 rather than November 26. Dhaliwal averred that he wrote his modifications to the Award section of the Arbitration Agreement on October 26 and he signed and initialed the document that same day, prior to Deetman's addition of his “Not agreed to ...” notation.[9] Dhaliwal alleged that he did not see the “Not agreed to ...” note until the arbitration hearing.

9 Dhaliwal averred that his intent in modifying the Award section of the Arbitration Agreement was to prevent Homesite from expanding the scope of the arbitration beyond the claims that were alleged in its complaint and amended complaint.

***4** The arbitrator ruled: “After due consideration, the arbitrator finds the declaration of Mr. Deetman to be the more persuasive. In addition to the declarations, the arbitrator takes judicial notice of the arbitration management telephone conferences which occurred when Mr. Dhaliwal was in propria persona, and in which he repeatedly expressed a desire to wrap up all the claims of [Homesite] in one proceeding. The arbitrator finds that there was a meeting of the minds and a contract of binding arbitration was reached between the parties to resolve all the claims in a single proceeding.” The arbitrator then decided the following additional claims arising from the alleged construction defects in the home: misplacement and inadequate bracing of roof trusses; defective installation of stucco; misattachment of roof tiles, flashing and gutters; deficient draining; inadequate support of and access to the heating, ventilation and air conditioning system; front door defects, low–quality concrete in the patio; plumbing deficiencies; electrical problems; as well as minor miscellaneous expenses totaling $565.45.

On the merits, the arbitrator found that, because the home was new construction, “as is” provisions in the Purchase Agreement were unenforceable under California law. Instead, the home was sold with an implied warranty of good workmanship. The court awarded

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damages for some of the alleged defects and denied relief for others either because no damage had been proven or because Dhaliwal had not been given the opportunity to repair the defect. The arbitrator awarded $35,297.81 for damage caused by the leaky water filtration system, and over $55,000 for other defects requiring repair, for a total of $93,207.01 in damages.

Arbitrator's Cost Award

Homesite requested $34,831.72 in costs as the prevailing party, including $21,485 in expert witness fees and $10,134 in arbitration fees. Dhaliwal moved to tax costs, specifically objecting to these two items.

In objecting to the arbitration fees, Dhaliwal relied on Code of Civil Procedure section 1284.2, which states, "Unless the arbitration agreement otherwise provides or the parties to the arbitration otherwise agree, each party to the arbitration shall pay his pro rata share of the expenses and fees of the neutral arbitrator...." Homesite relied on paragraph 41 of the Arbitration Agreement, which states that "[p]ending an award of costs, the costs of the arbitration shall be shared equally by the parties." Homesite argued this language clearly implies that the parties intended the arbitrator to have discretion to award arbitration fees as an element of costs. Dhaliwal again contended that Homesite could not rely on provisions of the Arbitration Agreement because there was no meeting of the minds as to that agreement. Dhaliwal argued that the arbitration provision of the Purchase Agreement, incorporating section 1284.2, controlled.

On the expert witness fees, Dhaliwal asserted that section 1033.5, subdivision (b)(1) barred the recovery of expert witness fees as costs unless expert testimony was ordered by the court. Homesite, citing *Bussey v. Affleck* (1990) 225 Cal.App.3d 1162 (*Bussey*), responded that because the Purchase Agreement expressly allowed an award of costs, any type of costs, including expert witness fees could be awarded even if not separately authorized by section 1033.5.

The arbitrator awarded Homesite both the requested arbitration fees and the expert witness fees. Noting that she had already decided the Arbitration Agreement was enforceable,[10] the arbitrator implicitly accepted Homesite's argument that paragraph 41 of the Arbitration Agreement implied that arbitration fees could be awarded as costs. On the expert witness fees, she found that *Bussey, supra,* 225 Cal.App.3d 1162, "holds that the parties may modify by agreement the scope of costs to be awarded. Here the arbitrator finds that such a modification occurred in the [Arbitration Agreement[11]] and awards the expert costs in the amount of $21,485.00."

10 The arbitrator wrote, "The arbitrator has already decided in the underlying decision that there was a binding agreement for arbitration in this matter, and that agreement provides that pending an award of costs the fees will [be] shared by the parties." The reference to the language of paragraph 41 of the Arbitration Agreement makes clear that the arbitrator was referring to the Arbitration Agreement and not the

arbitration provision in the Purchase Agreement. Similarly, the arbitrator's statement that it had previously found the agreement enforceable demonstrates that she was referring to the Arbitration Agreement. As noted *ante,* the arbitrator found in its decision on the merits that *the Arbitration Agreement* was enforceable.

11 The arbitrator's order refers simply to the "arbitration agreement." However, for the reasons stated in the previous footnote the arbitrator clearly was referring to the Arbitration Agreement and not the arbitration provision in the Purchase Agreement.

Petitions to Vacate, Correct or Confirm Arbitration Award

***5** In September 2010, Dhaliwal petitioned the trial court to vacate or correct the arbitration award on the ground that the arbitrator exceeded her powers. He once again argued there had been no meeting of the minds on the Arbitration Agreement. Therefore, the arbitrator did not have authority to expand the scope of the arbitration to encompass claims not alleged in Homesite's complaint or to award damages for those claims. He also challenged the arbitrator's award of arbitration and expert witness fees as legally erroneous. Homesite opposed Dhaliwal's petition and filed its own petition asking the court to confirm the arbitration award.

The trial court ruled: "Keeping in mind that the arbitrator's assessment of her contractual authority must be given substantial deference, the Court is unable to conclude that the arbitrator exceeded her authority. (See, Code Civ. Proc.[,] § 1286.2[, subd.](a); *Advanced Micro Devices[, Inc.] v. Intel Corp.* (1994) 9 Cal.4th 362, 372–373 [(*Advanced Micro Devices*)]; *O'Flaherty v. Belgum* (2004) 115 Cal.App.4th 1044, 1056.) The arbitrator's express finding that there had been a meeting of the minds as to the agreement governing the terms and condition[s] for conducting the arbitration ordered by the Court, based partially on a credibility determination of competing declarations submitted by the parties, is not arbitrary and is supported by the evidence as presented in the petition. This agreement gave the arbitrator broad authority to consider all issues arising out of the construction and sale of the subject property, including claims or causes of action that were not included in the complaint in the court action. ([Arbitration Agreement,] ¶ 5.)

"Moreover, the arbitrator did not exceed her authority in awarding costs of the arbitration to [Homesite], the prevailing party. The [Purchase Agreement] specifically allowed the award of costs to the prevailing party in 'any action, proceeding, or arbitration.' ([Purchase Agreement,] ¶ 22.) Defendant's counteroffer required each party to pay their own attorney's fees in any dispute, but did not alter the term authorizing an award of costs. ([Purchase Agreement.]) Nothing in the [Arbitration Agreement] affected the arbitrator's authority to award costs. ([Arbitration Agreement.]) [¶] Costs normally disallowed by statute or in excess of that prescribed by statute may be authorized by agreement between the parties. (Code Civ. Proc., §§ 1033.5[, subd.](b), 1284.2; [*Bussey, supra,*] 225 Cal.App.3d [at pp.] 1166–

1167.)" The court entered judgment consistent with the arbitration award.

II. DISCUSSION

"It is well settled that the scope of judicial review of arbitration awards is extremely narrow. (*Moncharsh v. Heily & Blase* (1992) 3 Cal.4th 1 (*Moncharsh*); [*Advanced Micro Devices, supra,*] 9 Cal.4th 362....) Courts may not review either the merits of the controversy or the sufficiency of the evidence supporting the award. [Citation.] Furthermore, with limited exceptions, '... an arbitrator's decision is not generally reviewable for errors of fact or law, whether or not such error appears on the face of the award and causes substantial injustice to the parties.' (*Moncharsh, supra,* 3 Cal.4th at p. 6; see also pp. 25–28.) These rules 'vindicate[ ] the intentions of the parties that the award be final' (*id.* at p. 11) and support the ' "strong public policy in favor of arbitration as a speedy and relatively inexpensive means of dispute resolution." ' (*Id.* at p. 9, quoting *Ericksen, Arbuthnot, McCarthy, Kearney & Walsh, Inc. v. 100 Oak Street* (1983) 35 Cal.3d 312, 322 [(*Ericksen*)].)

"Consistent with this policy, the Legislature has specifically set forth, in Code of Civil Procedure section 1286.2, subdivisions [(a)(1) through (a)(6)], the *only* grounds which will justify vacating an arbitration award. Subdivision [(a)(4)] is the relevant subdivision here. Under that subdivision, a court '*shall* ' vacate the award if it determines that '[t]he arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted.' (Code Civ. Proc., § 1286.2, subd. [(a)(4)].) In determining whether the arbitrators exceeded their powers, courts must give 'substantial deference to the arbitrators' own assessments of their contractual authority....' ([*Advanced Micro Devices*], *supra,* 9 Cal.4th at p. 373.) A deferential standard is in keeping with the general rule of arbitral finality and ensures that judicial intervention in the process is minimized. (*Ibid.*) 'A rule of judicial review under which courts would independently redetermine the scope of an arbitration agreement already interpreted by the arbitrator would invite frequent and protracted judicial proceedings, contravening the parties' expectations of finality.' (*Ibid.*)" (*California Faculty Assn. v. Superior Court* (1998) 63 Cal.App.4th 935, 943–944, parallel citations omitted.)

***6** "In determining whether private arbitrators have exceeded their powers, ... this court conducts a de novo review, independently of the trial court, of the question whether the arbitrator exceeded the authority granted him by the parties' agreement to arbitrate. [Citations.]' [Citations.] In undertaking our review, however, 'we must draw every reasonable inference to support the award. [Citations.]' [Citation.] [¶] In short, we review the superior court's order de novo, while the arbitrator's award is entitled to deferential review. ([*Advanced Micro Devices*], *supra,* 9 Cal.4th at p. 376, fn. 9.)" (*Ajida Technologies, Inc. v. Roos Instruments, Inc.* (2001) 87 Cal.App.4th 534, 541.)

A. *Scope of Arbitration*

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We observe first that the issue here has never been about the arbitrability of the claims against Dhaliwal, but rather about the permissible scope of the arbitration. Dhaliwal argues that the arbitrator was limited to deciding the issues raised in Homesite's complaint and amended complaint. He insists that the arbitrator exceeded her authority by ruling, pursuant to the expanded scope of arbitration in the Arbitration Agreement, on claims involving other alleged construction defects. He contends that the trial court, rather than the arbitrator, should have decided the enforceability issue, that the trial court should have found the Arbitration Agreement unenforceable, and that the trial court should therefore have vacated or corrected the arbitrator's award because she exceeded her powers. (See *Advanced Micro Devices, supra,* 9 Cal.4th at p. 372 [holding an arbitrator may exceed his or her authority by deciding a particular issue]; see also *Morris v. Zuckerman* (1968) 69 Cal.2d 686, 690 (*Morris*).)

It appears that the dispute over the enforceability of the Arbitration Agreement has obscured the point that the parties' original agreement to arbitrate in the Purchase Agreement unquestionably covers all issues that were decided by the arbitrator. "An appellant bears the burden to show not only that the trial court erred, but also that the error was prejudicial in that it resulted in a miscarriage of justice. [Citations.]" (*Hoffman Street, LLC v. City of West Hollywood* (2009) 179 Cal.App.4th 754, 772–773.)

Dhaliwal does not dispute the enforceability of the arbitration provision in the Purchase Agreement. Indeed, Dhaliwal himself successfully petitioned to compel arbitration of the construction defect claims pursuant to that provision. The Purchase Agreement arbitration provision applies to "*any* dispute or claim in Law or equity arising between [the parties] out of this Agreement or any resulting transaction, which is not settled through mediation." (Italics added.) Dhaliwal makes no argument that the additional construction defect disputes raised during the arbitration would not fall within the scope of this arbitration provision. Nor could he. The additional claims decided by the arbitrator are disputes which arose out of the Purchase Agreement, i.e., arising from the sale of the home under an implied warranty of good workmanship.

Instead, Dhaliwal argues that arbitration pursuant to the Purchase Agreement "was subject to the statutory rules regarding arbitration, including the limitation that the arbitration could only contemplate issues alleged in the most recently filed complaint. Cal.Code Civ. Proc. § 1280 et seq." The cited statutes, however, impose no such restraint. The scope of arbitrable issues is determined not by statute, but by the arbitration agreement itself. (See *Bono v. David* (2007) 147 Cal.App.4th 1055, 1061–1062.)

***7** Because we find that all of the claims decided by the arbitrator were arbitrable under the Purchase Agreement, Dhaliwal's challenge to the scope of arbitration under the Arbitration Agreement is immaterial. Even assuming the trial court had the exclusive authority in the first instance to determine enforceability of the Arbitration Agreement and, in exercising that authority, had found it to be unenforceable, the additional construction defect claims asserted

by Homesite were subject to mandatory arbitration in any event under the terms of the Purchase Agreement.

B. *The Cost Award*

Dhaliwal next argues that the arbitrator exceeded her powers in awarding arbitration costs and expert witness fees as costs because they were not authorized by the parties' arbitration agreement (or agreements). The arbitrator clearly relied on the Arbitration Agreement to award the disputed costs. Again, Dhaliwal contends the trial court should have found there was no meeting of the minds, that the Arbitration Agreement was unenforceable, and that this issue is dispositive on the cost award. Dhaliwal also claims legal error in the arbitrator's award of expert witness fees. We find that whether there was a meeting of the minds on the terms of the Arbitration Agreement was a question for the arbitrator to decide, and that neither the arbitrator's decision on that issue nor her interpretation of the Arbitration Agreement are subject to judicial review.

"Unless the parties clearly and unmistakably provide otherwise, the question of whether the parties *agreed to arbitrate* is to be decided by the court, not the arbitrator." (*United Public Employees v. City and County of San Francisco* (1997) 53 Cal.App.4th 1021, 1026, italics added.) Although the Arbitration Agreement includes such an agreement to arbitrate the parties' disputes, we have already concluded that the enforceability of that particular provision of the Arbitration Agreement is immaterial to the issue of whether the disputes were properly submitted to arbitration. The parties' Purchase Agreement, the enforceability of which is not in question, itself requires arbitration of the parties' disputes.

Once it is established that the parties' *disputes* are subject to arbitration, all other questions related to the disputes are submitted to the arbitrator, whose decisions are not reviewable for legal or factual error. "It is for the arbitrators to determine which issues [are] actually 'necessary' to the ultimate decision [on the submitted disputes]. [Citation.]" (*Morris, supra,* 69 Cal.2d at p. 690; Code Civ. Proc., § 1283.4.) "Likewise, any doubts as to the meaning or extent of an arbitration agreement are for the arbitrators and not the court to resolve. [Citations.]" (*Id.* at pp. 690–691.) Even questions about the enforceability of the very contract that contains the arbitration clause are submitted to the arbitrator as long as there is no dispute that the parties freely agreed to the arbitration clause itself. (See *Ericksen, supra,* 35 Cal.3d at p. 323; *Rosenthal v. Great Western Fin. Securities Corp.* (1996) 14 Cal.4th 394, 415 (*Rosenthal*), citing *Prima Paint v. Flood & Conklin* (1967) 388 U.S. 395, 404.) "By entering into the arbitration agreement, the parties established their intent that disputes coming within the agreement's scope be determined by an arbitrator rather than a court; this contractual intent must be respected...." (*Rosenthal,* at p. 416; cf. *Engalla v. Permanente Medical Group, Inc.* (1997) 15 Cal.4th 951, 973 [where the claim of fraudulent inducement is specifically directed to the arbitration provision itself, issue must be decided by the court].)

***8** Moreover, "arbitrators are not generally limited to making their award ' "on principles of dry law." ' (*Moncharsh, supra,* 3 Cal.4th at

p. 11.) ... [P]arties who submit their disputes to arbitration ' " 'may expect not only to reap the advantages that flow from the use of that nontechnical, summary procedure, but also to find themselves bound by an award reached by paths neither marked nor traceable and not subject to judicial review.' [Citations.]" ' (*Ibid.*)" (*Advanced Micro Devices, supra,* 9 Cal.4th at pp. 388–389.) Specifically with respect to remedies, "[a]rbitrators are not obliged to read contracts literally, and an award may not be vacated merely because the court is unable to find the relief granted was authorized by a specific term of the contract. [Citation.] The remedy awarded, however, must bear some rational relationship to the contract and the breach." (*Id.* at p. 381.)

Here, the principal contested issue is whether the parties actually agreed in the Arbitration Agreement to authorize the arbitrator to award arbitration costs and expert witness fees to a prevailing party. This issue involves not the arbitrability of the parties' disputes, but the arbitrator's choice of remedies after resolving the underlying disputes. The choice of remedy is indisputably an issue for the arbitrator. (*Advanced Micro Devices, supra,* 9 Cal.4th at p. 373["[i]n providing for judicial vacation or correction of an award, our statutes ... do not distinguish between the arbitrators' power to decide an issue and their authority to choose an appropriate remedy"].) The arbitrator ruled that the parties had a meeting of the minds on the Arbitration Agreement and that the cost provisions of that agreement authorized her to award arbitration and expert witness fees to the prevailing party. We have no power to review those decisions for legal or factual error. Thus, we cannot and do not entertain Dhaliwal's argument that *Bussey, supra,* 225 Cal.App.3d 1162 is no longer good law, and that the arbitrator erred in relying on it. The remedies ordered by the arbitrator will be upheld because they are rationally related to the parties' contract. (See *Advanced Micro Devices,* at p. 381.)

The trial court properly denied Dhaliwal's motion to vacate or correct the award and granted Homesite's petition to confirm the award.

III. DISPOSITION

The judgment is affirmed. Dhaliwal shall bear Homesite's costs on appeal.

We concur:

Jones, P.J.

Simons, J.

All Citations

Not Reported in Cal.Rptr., 2012 WL 1354528

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73 Cal.App.4th 1214
Court of Appeal, Fourth District, Division 3, California.

In re the MARRIAGE OF David REESE and Joanne Guy.
David Reese, Respondent,
v.
Joanne Guy, Respondent;
Philip A. Levy, Appellant.

No. G020962.
|
Aug. 2, 1999.

Synopsis

Former husband brought proceeding to modify child custody order. Former wife sought sanctions against former husband and his attorney for filing false documents, and former husband and his attorney brought cross-motion for sanctions. The Superior Court, Orange County, Super. Ct. No. D280521, Robert B. Hutson, J., imposed $20,000 in sanctions against former wife and her attorney. Former wife's attorney appealed. The Court of Appeal, Seymour, Judge of Orange County Superior Court, sitting by assignment, held that: (1) notice to former wife and her attorney that sanctions were being sought for violating certificate of merit did not provide constitutionally sufficient notice that sanctions might be awarded for frivolous actions or delaying tactics; (2) sanctions against former wife would be reversed in interest of justice, even though only attorney had appealed; and (3) former husband's attorney's custom of signing declarations under penalty of perjury on behalf of clients and witnesses was improper.

Reversed.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

****340 *1216** O'Flaherty & Belgum, Robert M. Dato, Anaheim, and Philip A. Levy, Newport Beach, for Appellant.

Nancy Bennett Bunn, for Respondent David Reese.

****341** No appearance for Respondent Joanne Guy.

***1217** OPINION

SEYMOUR, J. [*]

[*] Judge of the Orange County Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

In this case we hold that when a motion for sanctions against a party and her attorney has been noticed under Code of Civil Procedure section 128.7, [1] the trial court may not impose sanctions under section 128.5. We reverse the order awarding sanctions against Joanne Guy and her attorney Philip A. Levy.

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1 All further statutory references are to the Code of Civil Procedure unless otherwise indicated.

* * *

This appeal arises from a 1988 petition for dissolution of the marriage of David Reese and Joanne Guy. A 1993 child custody order gave Reese primary physical custody of their son and allowed Guy visitation.

In June 1996, Reese's attorney, Nancy Bunn, filed an order to show cause (OSC) to modify the custody order. The motion was supported by declarations of Reese and his friend, Jeanine Veldhuis. Reese would later explain that either he or his brother had signed Veldhuis's name to the declaration after obtaining her approval of its contents. Veldhuis denied she had ever seen, signed, or authorized anyone else to sign a declaration on her behalf. When Levy indicated he would depose Veldhuis regarding her purported declaration, Bunn took the OSC off calendar. Reese subsequently obtained a restraining order against Veldhuis prohibiting her from telephoning him.

On July 10, 1996, Bunn refiled the OSC to modify the custody order. The new motion was supported by three declarations under penalty of perjury of David Reese. Reese's signature was followed by the initials, "N.B." Bunn would later explain that she had signed these declarations on Reese's behalf after reviewing their contents with him. The motion was also supported by the declaration under penalty of perjury of Janice Cua, another friend of Reese's. Bunn also signed this declaration with Cua's name followed by her initials. Bunn would later explain that this declaration was identical to one which had been filed with the court on an earlier motion. Cua had personally signed the original declaration and Bunn had simply made a new copy of it, signed Cua's name and filed it with the new motion. On August 1, Bunn took the second OSC off calendar.

On August 2, Guy filed a motion for monetary sanctions against Reese and Bunn under section 128.5 on the grounds they had filed false documents, inter alia, the Veldhuis, Reese and Cua declarations which had not been ***1218** signed by the declarants. She also claimed Reese had threatened Veldhuis when she disavowed the signature on her declaration.

Guy's motion for sanctions came on for hearing on August 29. The court, concerned about the gravity of the charges that false declarations had been filed, continued it for two months for a full evidentiary hearing. Guy filed an amended motion for sanctions adding as an additional ground that Bunn, not Reese, had signed Reese's income and expense declarations. Levy attempted to take Bunn's deposition, but the trial court granted her motion for a protective order.

On October 15, Reese and Bunn went on the offensive by filing a cross-motion for $10,000 in sanctions against Levy and

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Guy. The notice stated sanctions were sought under sections 128.7 (sanctions against attorney or unrepresented party for violation of certificate of merit created by signing or presenting papers to the court); section 575.2, California Rules of Court, rule 227, **342 and Superior Court of Orange County Local Rules, rule 454 (sanctions for violating local court rules); and section 2023 (misuse of discovery process). The notice stated sanctions were sought because Guy and Levy had abused the discovery process, ignored local court rules, filed pleadings to harass Reese, and caused needless delay in the proceedings. The motion was not "pre-served" on Levy as required by section 128.7, subdivision (c)(1). The moving papers suggested that requirement be ignored because it was unreasonable under the circumstances.

Both sanctions motions came on for hearing on October 31. Guy called Veldhuis as a witness; she testified in accord with her earlier declaration and deposition that she had not seen, signed, or authorized the signing of her declaration. With respect to Bunn's practice of signing declarations under penalty of perjury on behalf of her client and witnesses, Bunn explained she believed that to be a well-accepted practice in family law courts and argued there was no legal requirement that a declarant personally sign his or her declaration stating, "That is not what the code says. [Section 2015.5] simply says in the State of California we do not have to have affidavits. We can have statements signed under penalty of perjury and outside of California if we stay within the laws of the State of California. That is all the code section says. *I can have the consent of my client to sign his name, and I have done so.* [¶] And until I know that I can't, I'm going to continue to do so with his consent and his knowledge after he has read the document." (Emphasis added.)

The court took the matter under submission. Two months later, it entered a seven-page order denying Guy's motion and granting Reese's, imposing $20,000 in sanctions against Guy and Levy.

***1219** In its written order, the court concluded attorney Bunn had not engaged in any sanctionable conduct. She reasonably believed that her client, Reese, had properly obtained Veldhuis's signature on the declaration. When she learned Veldhuis had not signed the declaration, Bunn promptly withdrew the motion. The court did not make any comment on whether Reese's conduct in signing Veldhuis's name to the declaration was sanctionable or on whether Bunn's practice of signing her client's and witness's declarations under penalty of perjury was improper or sanctionable.

As to Reese's cross-motion for sanctions, the trial court concluded that because the dissolution petition was filed in 1988, section 128.7 was inapplicable. Nonetheless, the court found sanctions could be awarded under section 128.5 and awarded them under that section alone.

The trial court made several findings in support of sanctions against Levy and

Guy: (1) Levy unreasonably thwarted Reese's efforts to obtain a custody modification; (2) Levy filed a sanctions motion accusing Bunn of intentionally submitting forged documents; (3) Levy's efforts to depose Bunn were a “fishing expedition”; (4) the Veldhuis declaration would not have caused great harm to Guy in any event; (5) it was “highly” probable that Levy's motive for harassing Bunn was economic because he was representing Guy pro bono; (6) Levy showed “bad faith and not a desire to promote settlement” when he advised the court that a civil action filed by Reese and Guy's minor child against Reese had been dismissed without prejudice, but could be refiled when the child reached 18 years; (7) Levy engaged in a “fishing expedition” when he deposed Reese because he questioned him about financial matters instead of focusing on custody issues; and (8) Levy “had the audacity” to call Veldhuis as a witness at the hearing on the sanctions motion when he knew that Veldhuis had been ordered by the court not to telephone Reese. Finally, the trial court suggested that in the event Levy and Guy appealed the $20,000 sanctions order, we too should sanction them. Levy has appealed; Guy has not.

****343** I

Levy contends the order imposing sanctions must be reversed. We agree. Notice that sanctions were sought under section 128.7 was not sufficient to warn Levy or Guy that sanctions might be awarded under section 128.5. Therefore, the order imposing sanctions against them must be reversed.

***1220** Reese's motion for sanctions was brought under section 128.7 and several other sections which we need not discuss here.[2] The trial court correctly concluded sanctions could not be imposed under section 128.7 because that section is only applicable to actions filed on or after January 1, 1995. (§ 128.7, subd. (i).) This proceeding began in 1988. Additionally, Reese did not comply with section 128.7's pre-filing requirement (§ 128.7, subd. (c)(1)).[3]. Nonetheless, the trial court found sanctions were appropriate under section 128.5, which had not been mentioned in the notice of motion or in Reese's moving papers. It held notice under section 128.7 sufficed. We disagree.

2 The court did not find sanctions appropriate under any of the other statutes noticed in Reese's motion, and there is no argument on appeal any of those statutes support the sanctions order.

3 Reese argued below that the trial court is free to disregard this safe harbor requirement, but cited no authority in support of that suggestion. The safe harbor provisions are mandatory. (See *Malovec v. Hamrell* (1999) 70 Cal.App.4th 434, 441, 82 Cal.Rptr.2d 712.)

Adequate notice that sanctions are being considered is mandated by statute and the due process clauses of the federal (U.S. Const., 14th Amend.) and state (Cal. Const., art. I, § 7) Constitutions. (*In re Marriage of Flaherty* (1982) 31 Cal.3d 637, 652, 183 Cal.Rptr. 508, 646 P.2d 179; *Lesser v. Huntington Harbor Corp.*(1985) 173 Cal.App.3d 922, 930, 219 Cal.Rptr. 562.) Because of the significant differences between sections 128.7 and 128.5, a motion for sanctions under only the former does not provide a basis for imposition of sanctions under the latter.

Section 128.7 was an experimental statute when adopted in 1994. It was originally slated to be automatically repealed on January 1, 1999, but the repeal date has been extended to January 1, 2003. (See Stats.1998, ch. 121, § 2.) Under section 128.7, an attorney or *unrepresented party* who files a pleading, motion or similar paper impliedly certifies it has legal and factual merit. That certification includes: The paper is not presented for an improper purpose (i.e., to harass, cause unnecessary delay, or increase costs of litigation); the legal contentions are warranted; and the factual contentions have evidentiary support. (§ 128.7, subd. (b).) The attorney or *unrepresented party* is subject to sanctions for violation of this certification.

Section 128.5 authorizes the trial court to sanction a party, the party's attorney, or both for "bad-faith actions or tactics that are frivolous or solely intended to cause unnecessary delay." (§ 128.5, subd. (a).) A bad faith action or tactic is considered "frivolous" if it is "totally and completely without merit" or instituted "for the sole purpose of harassing an opposing party." (§ 128.5, subd. (b)(2).) Whether an action is frivolous is governed by an objective standard: Any reasonable attorney would agree it is totally and ***1221** completely without merit. (*Finnie v. Town of Tiburon* (1988) 199 Cal.App.3d 1, 12, 244 Cal.Rptr. 581.) But there must also be a showing of an improper purpose, i.e., *subjective* bad faith on the part of the attorney or party to be sanctioned. (*Campbell v. Cal–Gard Surety Services, Inc.* (1998) 62 Cal.App.4th 563, 574, 73 Cal.Rptr.2d 64.)

Because of the differences between the two statutes, notice under one does not suffice for the other. First, under section 128.7, only an attorney or *unrepresented party* may be sanctioned. It does not authorize sanctions against the represented party. Under section 128.5, the party, attorney, or both, may be sanctioned. ****344** Thus, a motion for sanctions against Guy under section 128.7, under which she could not be sanctioned, did not put her on constitutionally adequate notice. Secondly, section 128.7 imposes a lower threshold for sanctions against an attorney. It requires only that the conduct be objectively unreasonable. But under section 128.5, there must also be a showing of subjective bad faith. (See *Llamas v. Diaz* (1990) 218 Cal.App.3d 1043, 1047, 267 Cal.Rptr. 427.) Since

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Guy and Levy were not put on notice that sanctions were sought against them under section 128.5, there was no reason for them to put forward any defense of their subjective intent. Therefore, it was wholly improper for the court to draw conclusions about it.

Although only Levy has appealed the order imposing sanctions, we reverse the order as to Guy as well. We find support for so doing in *Estate of McDill* (1975) 14 Cal.3d 831, 122 Cal.Rptr. 754, 537 P.2d 874. In that case the probate court awarded one-half of the decedent's estate to her two nieces, her next of kin, and the other half to the cousins of the decedent's predeceased husband. The Supreme Court ruled the entire estate should have been distributed to the decedent's two nieces (*id.* at p. 840, 122 Cal.Rptr. 754, 537 P.2d 874), but only one of them had appealed. In deciding to reverse the judgment as to both nieces, the court noted, "As a general rule, where only one of several parties appeals from a judgment, the appeal includes only that portion of the judgment adverse to the appealing party's interest, and the judgment is considered final as to the nonappealing parties. [Citations.] That general rule has an important exception, however: '[W]here the part [of a judgment] appealed from is so interwoven and connected with the remainder, ... that the appeal from a part of it ... involves a consideration of the whole, ... if a reversal is ordered it should extend to the entire judgment. The appellate court, in such cases, must have power to do that which justice requires and may extend its reversal as far as may be deemed necessary to accomplish that end.' [Citation.]" (*Ibid.*) The court extended the rule to apply where only one party appealed an adverse judgment (*ibid.*), and the rule has been invoked to reverse an entire sanctions award even though only one sanctioned party appealed. (See ***1222** *Eby v. Chaskin* (1996) 47 Cal.App.4th 1045, 1049, 55 Cal.Rptr.2d 517 [reversing entire sanctions order against two lawyers even though one did not appeal].)

Here, the order was joint and several against Guy and Levy, and the lack of notice affected both. The conclusion is inescapable that Guy did not appeal the order because she feared even more sanctions on appeal. The written order focused almost exclusively on the conduct of Levy, not Guy. It would be manifestly unjust to let this sanction order stand against Guy when it was an improper order in the first place and she had been specifically warned by the trial court not to appeal it.[4]

4 The written order stated, "If [ ] Levy decides to appeal this judgment, this court believes that the court of appeals [*sic*] stated [*sic*] that 'after considering the undue burden this appeal has placed on the legal system and the consumption of this court's time ...' a sanction of not less than three times the plaintiff's

expenses in opposing the motion to dismiss was determined to be an appropriate sanction." The obvious import of this purely gratuitous comment is that Levy and Guy were being warned not to appeal the sanctions order. Guy, who is not an attorney, would most certainly have believed she would face triple sanctions if she did.

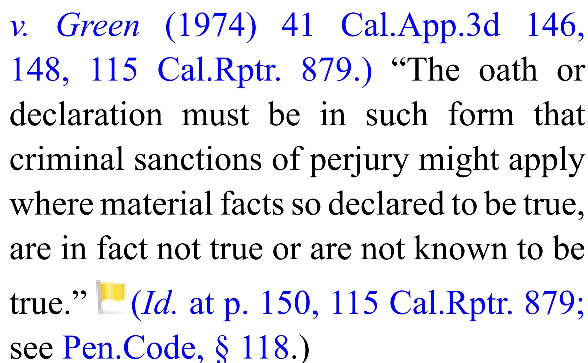
We are deeply troubled by the trial court's admonition. This court is not accustomed to being advised by the trial court as to when appellate sanctions are appropriate, and we consider it highly inappropriate for a trial court to attempt to dissuade a litigant from exercising his or her right to appeal. (See *MacDonald v. Superior Court* (1977) 75 Cal.App.3d 692, 696, 141 Cal.Rptr. 667 [shutting off appeal otherwise authorized by law is not within powers of trial court whose judgment is the subject of the appeal].)

****345** Although we reverse the order for procedural reasons, we will comment briefly on some of the substantive issues. To the extent sanctions were imposed against Levy and Guy for having sought sanctions, it was improper. Guy sought sanctions against Reese and Bunn for their having signed declarations on behalf of others. That motion was not "totally and completely without merit." (§ 128.5)

Bunn's custom of signing declarations under penalty of perjury on behalf of her clients and witnesses, even though we believe she was not intending to deceive the court by so doing, is completely improper. She argues this is a common practice in family law court. If that is so, the informality of family law proceedings has gone too far.[5] (See *County of Alameda v. Moore* (1995) 33 Cal.App.4th 1422, 1427, 40 Cal.Rptr.2d 18.)

5 In another opinion, *In re Marriage of Reese and Guy* (April 29, 1997) G019576 [nonpub. opn.], we cautioned these very same parties that the informality of the family court proceedings had gone too far and the court had erred in accepting as evidence Bunn's unsworn statement in argument as to certain amounts Reese had paid.

Section 2015.5 permits submission of unsworn declarations provided they are certified by the declarant to be true under penalty of perjury, *subscribed by him or her.* "Subscribe" means "to sign *with one's own hand.*" (*People v. Pierce* (1967) 66 Cal.2d 53, 59, fn. 5, 56 Cal.Rptr. 817, 423 P.2d 969, ***1223** emphasis added; see also *Dodge v. Free* (1973) 32 Cal.App.3d 436, 443, 108 Cal.Rptr. 311.) The whole point of permitting a declaration *under penalty of perjury,* in lieu of a sworn statement, is to help ensure that declarations contain a truthful factual representation and are made in good faith. (*Ancora–Citronelle Corp.*



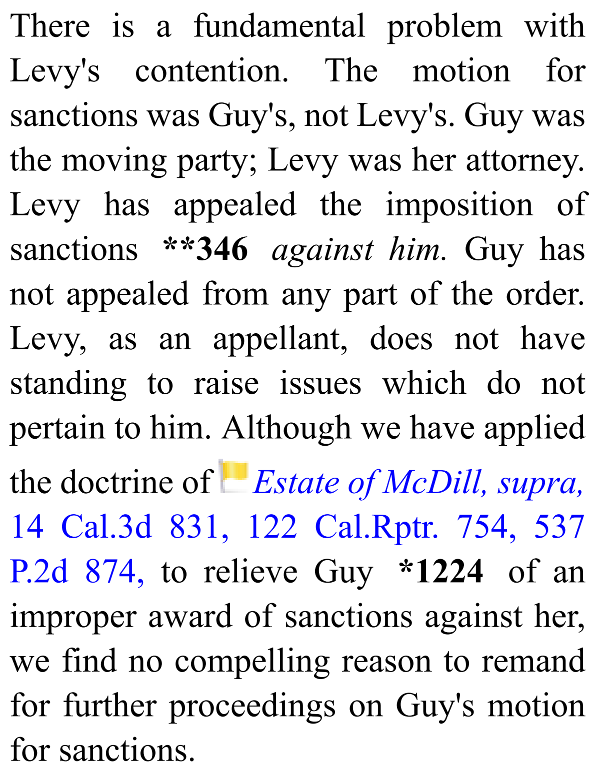
v. Green (1974) 41 Cal.App.3d 146, 148, 115 Cal.Rptr. 879.) “The oath or declaration must be in such form that criminal sanctions of perjury might apply where material facts so declared to be true, are in fact not true or are not known to be true.” (*Id.* at p. 150, 115 Cal.Rptr. 879; see Pen.Code, § 118.)

Bunn argues her clients *are* subject to criminal prosecution if they knowingly give her false information in preparation of their declaration which she signs for them. But what tremendous mischief this would make if we were to approve this practice. If Bunn's client denies being familiar with, or having authorized a declaration which turns out to be false, Bunn would have to be the chief prosecution witness against her client. In other words, every time Bunn conveniently signs her client's name to a declaration under penalty of perjury, she creates an inherent conflict between herself and her client.

Our criticism is not reserved solely for Bunn. The sanctions requested were not premised entirely on Levy's and Guy's complaints about Bunn's practice with respect to signing declarations. The trial court made findings with regards to a course of improper and obstreperous conduct by Levy in this case. Had Reese's motion been procedurally proper, and not in large part premised on the declarations issue, we might well find much of Levy's other conduct in this case to be sanctionable. We need not address that conduct here, but caution Levy that future sanctions may be upheld.

II

Levy also argues the trial court erred in denying Guy's motion for sanctions against Bunn and Reese. The trial court did not make any specific findings as to whether Reese's signing Veldhuis's declaration or Bunn's signing Reese's and Cua's declarations was improper. Levy argues their conduct was sanctionable *per se* and Guy's motion for sanctions should have been granted.



There is a fundamental problem with Levy's contention. The motion for sanctions was Guy's, not Levy's. Guy was the moving party; Levy was her attorney. Levy has appealed the imposition of sanctions ****346** *against him.* Guy has not appealed from any part of the order. Levy, as an appellant, does not have standing to raise issues which do not pertain to him. Although we have applied the doctrine of *Estate of McDill, supra,* 14 Cal.3d 831, 122 Cal.Rptr. 754, 537 P.2d 874, to relieve Guy ***1224** of an improper award of sanctions against her, we find no compelling reason to remand for further proceedings on Guy's motion for sanctions.

The order imposing sanctions on Guy and Levy is reversed. Each party shall bear its own costs on appeal.

CROSBY, Acting P.J., and RYLAARSDAM, J., concur.

All Citations

73 Cal.App.4th 1214, 87 Cal.Rptr.2d 339, 99 Cal. Daily Op. Serv. 6202, 1999 Daily Journal D.A.R. 7909

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127 S.Ct. 2705
Supreme Court of the United States

LEEGIN CREATIVE LEATHER PRODUCTS, INC., Petitioner,
v.
PSKS, INC., dba Kay's Kloset ... Kay's Shoes.

No. 06–480.
|
Argued March 26, 2007.
|
Decided June 28, 2007.

Synopsis
Background: Retailer sued manufacturer, alleging that manufacturer's policy of requiring retailers to follow its suggested retail prices constituted violation of Sherman Act. The United States District Court for the Eastern District of Texas, after ruling that per se illegality applied to vertical minimum-resale-price agreements, entered judgment on jury verdict in retailer's favor. The United States Court of Appeals for the Fifth Circuit affirmed, 171 Fed.Appx. 464. Certiorari was granted.

Holdings: The United States Supreme Court, Justice Kennedy, held that:

application of per se rule is unwarranted as to vertical agreements to fix minimum resale prices, overruling *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502;

administrative convenience of per se rule cannot justify its application to vertical resale price maintenance agreements;

alleged higher prices caused by vertical minimum-resale-price agreements did not justify application of per se rule; and

stare decisis did not compel continued application of per se rule to vertical resale price maintenance agreements.

Reversed and remanded.

Justice Breyer filed dissenting opinion joined by Justices Stevens, Souter and Ginsburg.

Procedural Posture(s): On Appeal.

****2707 *877** *Syllabus* [*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

Given its policy of refusing to sell to retailers that discount its goods below suggested prices, petitioner (Leegin) stopped selling to respondent's (PSKS) store. PSKS filed suit, alleging, *inter alia,* that Leegin violated the antitrust laws by entering into vertical agreements with its retailers to set minimum resale prices. The District Court excluded expert testimony about Leegin's pricing policy's procompetitive effects on the

ground that *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502, makes it *per se* illegal under § 1 of the Sherman Act for a manufacturer and its distributor to agree on the minimum price the distributor can charge for the manufacturer's goods. At trial, PSKS alleged that Leegin and its retailers had agreed to fix prices, but Leegin argued that its pricing policy was lawful under § 1. The jury found for PSKS. On appeal, the Fifth Circuit declined to apply the rule of reason to Leegin's vertical price-fixing agreements and affirmed, finding that *Dr. Miles' per se* rule rendered irrelevant any procompetitive justifications for Leegin's policy.

Held: Dr. Miles is overruled, and vertical price restraints are to be judged by the rule of reason. Pp. 2712 – 2725.

(a) The accepted standard for testing whether a practice restrains trade in violation ****2708** of § 1 is the rule of reason, which requires the factfinder to weigh "all of the circumstances," *Continental T. V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 49, 97 S.Ct. 2549, 53 L.Ed.2d 568, including "specific information about the relevant business" and "the restraint's history, nature, and effect," *State Oil Co. v. Khan,* 522 U.S. 3, 10, 118 S.Ct. 275, 139 L.Ed.2d 199. The rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and those with procompetitive effect that are in the consumer's best interest. However, when a restraint is deemed "unlawful *per se,*" *ibid.,* the need to study an individual restraint's reasonableness in light of real market forces is eliminated, *Business Electronics Corp. v. Sharp Electronics Corp.,* 485 U.S. 717, 723, 108 S.Ct. 1515, 99 L.Ed.2d 808. Resort to *per se* rules is confined to restraints "that would always or almost always tend to restrict competition and decrease output." *Ibid.* Thus, a *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue, see *Broadcast Music, Inc. v. Columbia Broadcasting* ***878** *System, Inc.,* 441 U.S. 1, 9, 99 S.Ct. 1551, 60 L.Ed.2d 1, and only if they can predict with confidence that the restraint would be invalidated in all or almost all instances under the rule of reason, see *Arizona v. Maricopa County Medical Soc.,* 457 U.S. 332, 344, 102 S.Ct. 2466, 73 L.Ed.2d 48. Pp. 2712 – 2714.

(b) Because the reasons upon which *Dr. Miles* relied do not justify a *per se* rule, it is necessary to examine, in the first instance, the economic effects of vertical agreements to fix minimum resale prices and to determine whether the *per se* rule is nonetheless appropriate. Were this Court considering the issue as an original matter, the rule of reason, not a *per se* rule of unlawfulness, would be the appropriate standard to judge vertical price restraints. Pp. 2713 – 2720.

(1) Economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance, and the few recent studies on the subject also cast doubt on the conclusion that the practice meets the criteria for a *per se* rule. The justifications for vertical price restraints are similar to those for other vertical restraints. Minimum resale price maintenance can stimulate interbrand competition among manufacturers selling different brands of the same type of product by reducing intrabrand competition among retailers selling the same

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brand. This is important because the antitrust laws' "primary purpose ... is to protect interbrand competition," *Khan, supra,* at 15, 118 S.Ct. 275. A single manufacturer's use of vertical price restraints tends to eliminate intrabrand price competition; this in turn encourages retailers to invest in services or promotional efforts that aid the manufacturer's position as against rival manufacturers. Resale price maintenance may also give consumers more options to choose among low-price, low-service brands; high-price, high-service brands; and brands falling in between. Absent vertical price restraints, retail services that enhance interbrand competition might be underprovided because discounting retailers can free ride on retailers who furnish services and then capture some of the demand those services generate. Retail price maintenance can also increase interbrand competition by facilitating market entry for new firms and brands and by encouraging retailer services that would not be provided even absent free riding. Pp. 2714 – 2716.

(2) Setting minimum resale prices may also have anticompetitive effects; and unlawful price fixing, designed solely to obtain monopoly profits, is an ever–present temptation. Resale price maintenance may, for example, facilitate a manufacturer ****2709** cartel or be used to organize retail cartels. It can also be abused by a powerful manufacturer or retailer. Thus, the potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated. Pp. 2716 – 2718.

(3) Notwithstanding the risks of unlawful conduct, it cannot be stated with any degree of confidence that retail price maintenance "always ***879** or almost always tend[s] to restrict competition and decrease output," *Business Electronics, supra,* at 723, 108 S.Ct. 1515. Vertical retail price agreements have either procompetitive or anticompetitive effects, depending on the circumstances in which they were formed; and the limited empirical evidence available does not suggest efficient uses of the agreements are infrequent or hypothetical. A *per se* rule should not be adopted for administrative convenience alone. Such rules can be counterproductive, increasing the antitrust system's total cost by prohibiting procompetitive conduct the antitrust laws should encourage. And a *per se* rule cannot be justified by the possibility of higher prices absent a further showing of anticompetitive conduct. The antitrust laws primarily are designed to protect interbrand competition from which lower prices can later result. Respondent's argument overlooks that, in general, the interests of manufacturers and consumers are aligned with respect to retailer profit margins. Resale price maintenance has economic dangers. If the rule of reason were to apply, courts would have to be diligent in eliminating their anticompetitive uses from the market. Factors relevant to the inquiry are the number of manufacturers using the practice, the restraint's source, and a manufacturer's market power. The rule of reason is designed and used to ascertain whether transactions are anticompetitive or procompetitive. This standard principle applies to vertical price restraints. As courts gain experience with these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from

the market and to provide more guidance to businesses. Pp. 2717 – 2720.

(c) *Stare decisis* does not compel continued adherence to the *per se* rule here. Because the Sherman Act is treated as a common-law statute, its prohibition on "restraint[s] of trade" evolves to meet the dynamics of present economic conditions. The rule of reason's case-by-case adjudication implements this common-law approach. Here, respected economics authorities suggest that the *per se* rule is inappropriate. And both the Department of Justice and the Federal Trade Commission recommend replacing the *per se* rule with the rule of reason. In addition, this Court has "overruled [its] precedents when subsequent cases have undermined their doctrinal underpinnings." *Dickerson v. United States,* 530 U.S. 428, 443, 120 S.Ct. 2326, 147 L.Ed.2d 405. It is not surprising that the Court has distanced itself from *Dr. Miles'* rationales, for the case was decided not long after the Sherman Act was enacted, when the Court had little experience with antitrust analysis. Only eight years after *Dr. Miles,* the Court reined in the decision, holding that a manufacturer can suggest resale prices and refuse to deal with distributors who do not follow them, *United States v. Colgate & Co.,* 250 U.S. 300, 307–308, 39 S.Ct. 465, 63 L.Ed. 992; and more ***880** recently the Court has tempered, limited, or overruled once strict vertical restraint prohibitions, see, *e.g., GTE Sylvania,* 433 U.S., at 57–59, 97 S.Ct. 2549. The *Dr. Miles* rule is also inconsistent with a principled framework, for it makes little economic sense when analyzed with the Court's other vertical restraint cases. Deciding that procompetitive ****2710** effects of resale price maintenance are insufficient to overrule *Dr. Miles* would call into question cases such as *Colgate* and *GTE Sylvania*. Respondent's arguments for reaffirming *Dr. Miles* based on *stare decisis* do not require a different result. Pp. 2720 – 2725.

171 Fed.Appx. 464, reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C.J., and SCALIA, THOMAS, and ALITO, JJ., joined. BREYER, J., filed a dissenting opinion, in which STEVENS, SOUTER, and GINSBURG, JJ., joined, *post*, p. 2725.

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Opinion

Justice KENNEDY delivered the opinion of the Court.

***881** In *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502 (1911), the Court established the rule that it is *per se* illegal under § 1 of the Sherman Act, 15 U.S.C. § 1, for a manufacturer to agree with its distributor to set the minimum price the distributor can charge for the manufacturer's goods. The question presented by the instant case is ***882** whether the Court should overrule the *per se* rule and allow resale price maintenance agreements to be judged by the rule of reason, the usual standard applied to determine if there is a violation of § 1. The Court has abandoned the rule of *per se* illegality for other vertical restraints a manufacturer imposes on its distributors. Respected economic analysts, furthermore, conclude that vertical price restraints can have procompetitive effects. We now hold that *Dr. Miles* should be overruled and that vertical price restraints are to be judged by the rule of reason.

I

Petitioner, Leegin Creative Leather Products, Inc. (Leegin), designs, manufactures, and distributes leather goods and accessories. In 1991, Leegin began to sell belts under the brand name "Brighton." The Brighton brand has now expanded into a variety of women's fashion accessories. It is sold across the United States in over 5,000 retail establishments, for the most part independent, small boutiques and specialty stores. Leegin's president, Jerry Kohl, also has an interest in about 70 stores that sell Brighton products. Leegin asserts that, at least for its products, small retailers treat customers better, ****2711** provide customers more services, and make their shopping experience more satisfactory than do larger, often impersonal retailers. Kohl explained: "[W]e want the consumers to get a different experience than they get in Sam's Club or in Wal–Mart. And you can't get that kind of experience or support or customer service from a store like Wal–Mart." 5 Record 127.

Respondent, PSKS, Inc. (PSKS), operates Kay's Kloset, a women's apparel store in Lewisville, Texas. Kay's Kloset buys from about 75 different manufacturers and at one time sold the Brighton brand. It first started purchasing Brighton goods from Leegin in 1995. Once it began selling the brand, the store promoted Brighton. For example, it ran Brighton advertisements and had Brighton days in the store. ***883** Kay's Kloset became the destination retailer in the area to buy Brighton products. Brighton was the store's most important brand and once accounted for 40 to 50 percent of its profits.

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In 1997, Leegin instituted the "Brighton Retail Pricing and Promotion Policy." 4 *id.,* at 939. Following the policy, Leegin refused to sell to retailers that discounted Brighton goods below suggested prices. The policy contained an exception for products not selling well that the retailer did not plan on reordering. In the letter to retailers establishing the policy, Leegin stated:

> "In this age of mega stores like Macy's, Bloomingdales, May Co. and others, consumers are perplexed by promises of product quality and support of product which we believe is lacking in these large stores. Consumers are further confused by the ever popular sale, sale, sale, etc.
>
> "We, at Leegin, choose to break away from the pack by selling [at] specialty stores; specialty stores that can offer the customer great quality merchandise, superb service, and support the Brighton product 365 days a year on a consistent basis.
>
> "We realize that half the equation is Leegin producing great Brighton product and the other half is you, our retailer, creating great looking stores selling our products in a quality manner." *Ibid.*

Leegin adopted the policy to give its retailers sufficient margins to provide customers the service central to its distribution strategy. It also expressed concern that discounting harmed Brighton's brand image and reputation.

A year after instituting the pricing policy Leegin introduced a marketing strategy known as the "Heart Store Program." See *id.,* at 962–972. It offered retailers incentives to become Heart Stores, and, in exchange, retailers pledged, among other things, to sell at Leegin's suggested prices. Kay's Kloset became a Heart Store soon after Leegin created ***884** the program. After a Leegin employee visited the store and found it unattractive, the parties appear to have agreed that Kay's Kloset would not be a Heart Store beyond 1998. Despite losing this status, Kay's Kloset continued to increase its Brighton sales.

In December 2002, Leegin discovered Kay's Kloset had been marking down Brighton's entire line by 20 percent. Kay's Kloset contended it placed Brighton products on sale to compete with nearby retailers who also were undercutting Leegin's suggested prices. Leegin, nonetheless, requested that Kay's Kloset cease discounting. Its request refused, Leegin stopped selling to the store. The loss of the Brighton brand had a considerable negative impact on the store's revenue from sales.

****2712** PSKS sued Leegin in the United States District Court for the Eastern District of Texas. It alleged, among other claims, that Leegin had violated the antitrust laws by "enter[ing] into agreements with retailers to charge only those prices fixed by Leegin." *Id.,* at 1236. Leegin planned to introduce expert testimony describing the procompetitive effects of its pricing policy. The District Court excluded the testimony, relying on the *per se* rule established by *Dr. Miles*. At trial PSKS argued that the Heart Store program, among other things, demonstrated Leegin and its retailers had agreed to fix prices. Leegin responded that it had established a unilateral

pricing policy lawful under § 1, which applies only to concerted action. See *United States v. Colgate & Co.,* 250 U.S. 300, 307, 39 S.Ct. 465, 63 L.Ed. 992 (1919). The jury agreed with PSKS and awarded it $1.2 million. Pursuant to 15 U.S.C. § 15(a), the District Court trebled the damages and reimbursed PSKS for its attorney's fees and costs. It entered judgment against Leegin in the amount of $3,975,000.80.

The Court of Appeals for the Fifth Circuit affirmed. 171 Fed.Appx. 464 (2006) *(per curiam)*. On appeal Leegin did not dispute that it had entered into vertical price-fixing agreements with its retailers. Rather, it contended that the ***885** rule of reason should have applied to those agreements. The Court of Appeals rejected this argument. *Id.,* at 466–467. It was correct to explain that it remained bound by *Dr. Miles* "[b]ecause [the Supreme] Court has consistently applied the *per se* rule to [vertical minimum price-fixing] agreements." 171 Fed.Appx., at 466. On this premise the Court of Appeals held that the District Court did not abuse its discretion in excluding the testimony of Leegin's economic expert, for the *per se* rule rendered irrelevant any procompetitive justifications for Leegin's pricing policy. *Id.,* at 467. We granted certiorari to determine whether vertical minimum resale price maintenance agreements should continue to be treated as *per se* unlawful. 549 U.S. 1092, 127 S.Ct. 763, 166 L.Ed.2d 590 (2006).

II

Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." Ch. 647, 26 Stat. 209, as amended, 15 U.S.C. § 1. While § 1 could be interpreted to proscribe all contracts, see, *e.g., Board of Trade of Chicago v. United States,* 246 U.S. 231, 238, 38 S.Ct. 242, 62 L.Ed. 683 (1918), the Court has never "taken a literal approach to [its] language," *Texaco Inc. v. Dagher,* 547 U.S. 1, 5, 126 S.Ct. 1276, 164 L.Ed.2d 1 (2006). Rather, the Court has repeated time and again that § 1 "outlaw[s] only unreasonable restraints." *State Oil Co. v. Khan,* 522 U.S. 3, 10, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997).

The rule of reason is the accepted standard for testing whether a practice restrains trade in violation of § 1. See *Texaco, supra,* at 5, 126 S.Ct. 1276. "Under this rule, the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." *Continental T. V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 49, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977). Appropriate factors to take into account include "specific information about the relevant business" and "the restraint's history, nature, and effect." *Khan, supra,* at 10, 118 S.Ct. 275. Whether the businesses ***886** involved have market power is a further, significant consideration. See, *e.g., Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 768, 104 S.Ct. 2731, 81 L.Ed.2d 628 (1984) (equating the rule of ****2713** reason with "an inquiry into market power and market structure designed to assess [a restraint's] actual effect"); see also *Illinois Tool Works Inc. v. Independent Ink, Inc.,* 547 U.S. 28, 45–46, 126 S.Ct. 1281, 164 L.Ed.2d 26 (2006). In its design and function

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the rule distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest.

The rule of reason does not govern all restraints. Some types "are deemed unlawful *per se*." *Khan, supra,* at 10, 118 S.Ct. 275. The *per se* rule, treating categories of restraints as necessarily illegal, eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work, *Business Electronics Corp. v. Sharp Electronics Corp.,* 485 U.S. 717, 723, 108 S.Ct. 1515, 99 L.Ed.2d 808 (1988); and, it must be acknowledged, the *per se* rule can give clear guidance for certain conduct. Restraints that are *per se* unlawful include horizontal agreements among competitors to fix prices, see *Texaco, supra,* at 5, 126 S.Ct. 1276, or to divide markets, see *Palmer v. BRG of Ga., Inc.,* 498 U.S. 46, 49–50, 111 S.Ct. 401, 112 L.Ed.2d 349 (1990) *(per curiam)*.

Resort to *per se* rules is confined to restraints, like those mentioned, "that would always or almost always tend to restrict competition and decrease output." *Business Electronics, supra,* at 723, 108 S.Ct. 1515 (internal quotation marks omitted). To justify a *per se* prohibition a restraint must have "manifestly anticompetitive" effects, *GTE Sylvania, supra,* at 50, 97 S.Ct. 2549, and "lack ... any redeeming virtue," *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.,* 472 U.S. 284, 289, 105 S.Ct. 2613, 86 L.Ed.2d 202 (1985) (internal quotation marks omitted).

As a consequence, the *per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue, see *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,* 441 U.S. 1, 9, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979), and only if courts can predict with confidence that it would be invalidated ***887** in all or almost all instances under the rule of reason, see *Arizona v. Maricopa County Medical Soc.,* 457 U.S. 332, 344, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982). It should come as no surprise, then, that "we have expressed reluctance to adopt *per se* rules with regard to restraints imposed in the context of business relationships where the economic impact of certain practices is not immediately obvious." *Khan, supra,* at 10, 118 S.Ct. 275 (internal quotation marks omitted); see also *White Motor Co. v. United States,* 372 U.S. 253, 263, 83 S.Ct. 696, 9 L.Ed.2d 738 (1963) (refusing to adopt a *per se* rule for a vertical nonprice restraint because of the uncertainty concerning whether this type of restraint satisfied the demanding standards necessary to apply a *per se* rule). And, as we have stated, a "departure from the rule-of-reason standard must be based upon demonstrable economic effect rather than ... upon formalistic line drawing." *GTE Sylvania, supra,* at 58–59, 97 S.Ct. 2549.

III

The Court has interpreted *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373, 31 S.Ct. 376, as establishing a *per se* rule against a vertical agreement between a manufacturer and its distributor to set minimum resale prices. See, *e.g., Monsanto Co. v. Spray–*

Rite Service Corp., 465 U.S. 752, 761, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984). In *Dr. Miles* the plaintiff, a manufacturer of medicines, sold its products only to distributors who ****2714** agreed to resell them at set prices. The Court found the manufacturer's control of resale prices to be unlawful. It relied on the common-law rule that "a general restraint upon alienation is ordinarily invalid." 220 U.S., at 404–405, 31 S.Ct. 376. The Court then explained that the agreements would advantage the distributors, not the manufacturer, and were analogous to a combination among competing distributors, which the law treated as void. *Id.,* at 407–408, 31 S.Ct. 376.

The reasoning of the Court's more recent jurisprudence has rejected the rationales on which *Dr. Miles* was based. By relying on the common-law rule against restraints on alienation, *id.,* at 404–405, 31 S.Ct. 376, the Court justified its decision ***888** based on "formalistic" legal doctrine rather than "demonstrable economic effect," *GTE Sylvania,* 433 U.S., at 58–59, 97 S.Ct. 2549. The Court in *Dr. Miles* relied on a treatise published in 1628, but failed to discuss in detail the business reasons that would motivate a manufacturer situated in 1911 to make use of vertical price restraints. Yet the Sherman Act's use of "restraint of trade" "invokes the common law itself, ... not merely the static content that the common law had assigned to the term in 1890." *Business Electronics, supra,* at 732, 108 S.Ct. 1515. The general restraint on alienation, especially in the age when then-Justice Hughes used the term, tended to evoke policy concerns extraneous to the question that controls here. Usually associated with land, not chattels, the rule arose from restrictions removing real property from the stream of commerce for generations. The Court should be cautious about putting dispositive weight on doctrines from antiquity but of slight relevance. We reaffirm that "the state of the common law 400 or even 100 years ago is irrelevant to the issue before us: the effect of the antitrust laws upon vertical distributional restraints in the American economy today." *GTE Sylvania, supra*, at 53, n. 21, 97 S.Ct. 2549 (internal quotation marks omitted).

Dr. Miles, furthermore, treated vertical agreements a manufacturer makes with its distributors as analogous to a horizontal combination among competing distributors. See 220 U.S., at 407–408, 31 S.Ct. 376. In later cases, however, the Court rejected the approach of reliance on rules governing horizontal restraints when defining rules applicable to vertical ones. See, *e.g., Business Electronics, supra,* at 734, 108 S.Ct. 1515 (disclaiming the "notion of equivalence between the scope of horizontal *per se* illegality and that of vertical *per se* illegality"); *Maricopa County, supra,* at 348, n. 18, 102 S.Ct. 2466 (noting that "horizontal restraints are generally less defensible than vertical restraints"). Our recent cases formulate antitrust principles in accordance with the appreciated differences in economic effect between vertical and horizontal agreements, differences the *Dr. Miles* Court failed to consider.

***889** The reasons upon which *Dr. Miles* relied do not justify a *per se* rule. As a consequence, it is necessary to examine, in the first instance, the economic effects of vertical agreements to fix minimum resale prices, and to determine whether the *per se*

rule is nonetheless appropriate. See *Business Electronics*, 485 U.S., at 726, 108 S.Ct. 1515.

A

Though each side of the debate can find sources to support its position, it suffices to say here that economics literature is replete with procompetitive justifications for a manufacturer's use of resale price maintenance. See, *e.g.,* Brief for Economists as *Amici Curiae* 16 ("In the theoretical literature, it is essentially undisputed ****2715** that minimum [resale price maintenance] can have procompetitive effects and that under a variety of market conditions it is unlikely to have anticompetitive effects"); Brief for United States as *Amicus Curiae* 9 ("[T]here is a widespread consensus that permitting a manufacturer to control the price at which its goods are sold may promote *inter*brand competition and consumer welfare in a variety of ways"); ABA Section of Antitrust Law, Antitrust Law and Economics of Product Distribution 76 (2006) ("[T]he bulk of the economic literature on [resale price maintenance] suggests that [it] is more likely to be used to enhance efficiency than for anticompetitive purposes"); see also H. Hovenkamp, The Antitrust Enterprise: Principle and Execution 184–191 (2005) (hereinafter Hovenkamp); R. Bork, The Antitrust Paradox 288–291 (1978) (hereinafter Bork). Even those more skeptical of resale price maintenance acknowledge it can have procompetitive effects. See, *e.g.,* Brief for William S. Comanor et al. as *Amici Curiae* 3 ("[G]iven [the] diversity of effects [of resale price maintenance], one could reasonably take the position that a *rule of reason* rather than a *per se* approach is warranted"); F. Scherer & D. Ross, Industrial Market Structure and Economic Performance 558 (3d ed.1990) (hereinafter Scherer & Ross) ("The overall balance ***890** between benefits and costs [of resale price maintenance] is probably close").

The few recent studies documenting the competitive effects of resale price maintenance also cast doubt on the conclusion that the practice meets the criteria for a *per se* rule. See Bureau of Economics Staff Report to the FTC, T. Overstreet, Resale Price Maintenance: Economic Theories and Empirical Evidence 170 (1983) (hereinafter Overstreet) (noting that "[e]fficient uses of [resale price maintenance] are evidently not unusual or rare"); see also Ippolito, Resale Price Maintenance: Empirical Evidence From Litigation, 34 J. Law & Econ. 263, 292–293 (1991) (hereinafter Ippolito).

The justifications for vertical price restraints are similar to those for other vertical restraints. See *GTE Sylvania,* 433 U.S., at 54–57, 97 S.Ct. 2549. Minimum resale price maintenance can stimulate interbrand competition—the competition among manufacturers selling different brands of the same type of product —by reducing intrabrand competition—the competition among retailers selling the same brand. See *id.,* at 51–52, 97 S.Ct. 2549. The promotion of interbrand competition is important because "the primary purpose of the antitrust laws is to protect [this type of] competition." *Khan,* 522 U.S., at 15, 118 S.Ct. 275. A single manufacturer's use of vertical price restraints tends to eliminate intrabrand price competition; this in turn encourages retailers to invest in tangible or intangible services or promotional efforts that

aid the manufacturer's position as against rival manufacturers. Resale price maintenance also has the potential to give consumers more options so that they can choose among low-price, low-service brands; high-price, high-service brands; and brands that fall in between.

Absent vertical price restraints, the retail services that enhance interbrand competition might be underprovided. This is because discounting retailers can free ride on retailers who furnish services and then capture some of the increased demand those services generate. *GTE Sylvania, supra,* at 55, 97 S.Ct. 2549. Consumers might learn, for example, about ***891** the benefits of a manufacturer's product from a retailer that invests in fine showrooms, offers product demonstrations, or hires and trains knowledgeable employees. R. Posner, Antitrust Law 172–173 (2d ed.2001) (hereinafter Posner). Or consumers might decide to buy the product because ****2716** they see it in a retail establishment that has a reputation for selling high-quality merchandise. Marvel & McCafferty, Resale Price Maintenance and Quality Certification, 15 Rand J. Econ. 346, 347–349 (1984) (hereinafter Marvel & McCafferty). If the consumer can then buy the product from a retailer that discounts because it has not spent capital providing services or developing a quality reputation, the high-service retailer will lose sales to the discounter, forcing it to cut back its services to a level lower than consumers would otherwise prefer. Minimum resale price maintenance alleviates the problem because it prevents the discounter from undercutting the service provider. With price competition decreased, the manufacturer's retailers compete among themselves over services.

Resale price maintenance, in addition, can increase interbrand competition by facilitating market entry for new firms and brands. "[N]ew manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer." *GTE Sylvania, supra,* at 55, 97 S.Ct. 2549; see Marvel & McCafferty 349 (noting that reliance on a retailer's reputation "will decline as the manufacturer's brand becomes better known, so that [resale price maintenance] may be particularly important as a competitive device for new entrants"). New products and new brands are essential to a dynamic economy, and if markets can be penetrated by using resale price maintenance there is a procompetitive effect.

Resale price maintenance can also increase interbrand competition by encouraging retailer services that would not ***892** be provided even absent free riding. It may be difficult and inefficient for a manufacturer to make and enforce a contract with a retailer specifying the different services the retailer must perform. Offering the retailer a guaranteed margin and threatening termination if it does not live up to expectations may be the most efficient way to expand the manufacturer's market share by inducing the retailer's performance and allowing it to use its own initiative and experience in providing valuable services. See Mathewson & Winter, The Law and Economics of Resale Price Maintenance, 13

Rev. Indus. Org. 57, 74–75 (1998) (hereinafter Mathewson & Winter); Klein & Murphy, Vertical Restraints as Contract Enforcement Mechanisms, 31 J. Law & Econ. 265, 295 (1988); see also Deneckere, Marvel, & Peck, Demand Uncertainty, Inventories, and Resale Price Maintenance, 111 Q.J. Econ. 885, 911 (1996) (noting that resale price maintenance may be beneficial to motivate retailers to stock adequate inventories of a manufacturer's goods in the face of uncertain consumer demand).

B

While vertical agreements setting minimum resale prices can have procompetitive justifications, they may have anticompetitive effects in other cases; and unlawful price fixing, designed solely to obtain monopoly profits, is an ever–present temptation. Resale price maintenance may, for example, facilitate a manufacturer cartel. See *Business Electronics,* 485 U.S., at 725, 108 S.Ct. 1515. An unlawful cartel will seek to discover if some manufacturers are undercutting the cartel's fixed prices. Resale price maintenance could assist the cartel in identifying price-cutting manufacturers who benefit from the lower prices they offer. Resale price maintenance, furthermore, could discourage a manufacturer from cutting prices to retailers with the concomitant benefit of cheaper prices to ****2717** consumers. See *ibid.;* see also Posner 172; Overstreet 19–23.

***893** Vertical price restraints also “might be used to organize cartels at the retailer level.” *Business Electronics, supra,* at 725–726, 108 S.Ct. 1515. A group of retailers might collude to fix prices to consumers and then compel a manufacturer to aid the unlawful arrangement with resale price maintenance. In that instance the manufacturer does not establish the practice to stimulate services or to promote its brand but to give inefficient retailers higher profits. Retailers with better distribution systems and lower cost structures would be prevented from charging lower prices by the agreement. See Posner 172; Overstreet 13–19. Historical examples suggest this possibility is a legitimate concern. See, *e.g.,* Marvel & McCafferty, The Welfare Effects of Resale Price Maintenance, 28 J. Law & Econ. 363, 373 (1985) (hereinafter Marvel) (providing an example of the power of the National Association of Retail Druggists to compel manufacturers to use resale price maintenance); Hovenkamp 186 (suggesting that the retail druggists in *Dr. Miles* formed a cartel and used manufacturers to enforce it).

A horizontal cartel among competing manufacturers or competing retailers that decreases output or reduces competition in order to increase price is, and ought to be, *per se* unlawful. See *Texaco,* 547 U.S., at 5, 126 S.Ct. 1276; *GTE Sylvania,* 433 U.S., at 58, n. 28, 97 S.Ct. 2549. To the extent a vertical agreement setting minimum resale prices is entered upon to facilitate either type of cartel, it, too, would need to be held unlawful under the rule of reason. This type of agreement may also be useful evidence for a plaintiff attempting to prove the existence of a horizontal cartel.

Resale price maintenance, furthermore, can be abused by a powerful manufacturer or retailer. A dominant retailer, for example, might request resale price maintenance to forestall innovation in distribution that decreases costs.

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A manufacturer might consider it has little choice but to accommodate the retailer's demands for vertical price restraints if the manufacturer believes it needs access to the retailer's ***894** distribution network. See Overstreet 31; 8 P. Areeda & H. Hovenkamp, Antitrust Law 47 (2d ed.2004) (hereinafter Areeda & Hovenkamp); cf. *Toys "R" Us, Inc. v. FTC,* 221 F.3d 928, 937–938 (C.A.7 2000). A manufacturer with market power, by comparison, might use resale price maintenance to give retailers an incentive not to sell the products of smaller rivals or new entrants. See, *e.g.,* Marvel 366–368. As should be evident, the potential anticompetitive consequences of vertical price restraints must not be ignored or underestimated.

C

Notwithstanding the risks of unlawful conduct, it cannot be stated with any degree of confidence that resale price maintenance "always or almost always tend[s] to restrict competition and decrease output." *Business Electronics, supra,* at 723, 108 S.Ct. 1515 (internal quotation marks omitted). Vertical agreements establishing minimum resale prices can have either procompetitive or anticompetitive effects, depending upon the circumstances in which they are formed. And although the empirical evidence on the topic is limited, it does not suggest efficient uses of the agreements are infrequent or hypothetical. See Overstreet 170; see also *id.,* at 80 (noting that for the majority of enforcement actions brought by the Federal Trade Commission between 1965 and 1982, "the use of [resale price maintenance] was not likely motivated by collusive dealers who had successfully coerced their suppliers"); Ippolito 292 (reaching a similar conclusion). ****2718** As the rule would proscribe a significant amount of procompetitive conduct, these agreements appear ill suited for *per se* condemnation.

Respondent contends, nonetheless, that vertical price restraints should be *per se* unlawful because of the administrative convenience of *per se* rules. See, *e.g., GTE Sylvania, supra,* at 50, n. 16, 97 S.Ct. 2549 (noting "*per se* rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system"). That argument suggests ***895** *per se* illegality is the rule rather than the exception. This misinterprets our antitrust law. *Per se* rules may decrease administrative costs, but that is only part of the equation. Those rules can be counterproductive. They can increase the total cost of the antitrust system by prohibiting procompetitive conduct the antitrust laws should encourage. See Easterbrook, Vertical Arrangements and the Rule of Reason, 53 Antitrust L.J. 135, 158 (1984) (hereinafter Easterbrook). They also may increase litigation costs by promoting frivolous suits against legitimate practices. The Court has thus explained that administrative "advantages are not sufficient in themselves to justify the creation of *per se* rules," *GTE Sylvania,* 433 U.S., at 50, n. 16, 97 S.Ct. 2549, and has relegated their use to restraints that are "manifestly anticompetitive," *id.,* at 49–50, 97 S.Ct. 2549. Were the Court now to conclude that vertical price restraints should be *per se* illegal based on administrative costs, we would undermine, if not overrule, the traditional

"demanding standards" for adopting *per se* rules. *Id.,* at 50, 97 S.Ct. 2549. Any possible reduction in administrative costs cannot alone justify the *Dr. Miles* rule.

Respondent also argues the *per se* rule is justified because a vertical price restraint can lead to higher prices for the manufacturer's goods. See also Overstreet 160 (noting that "price surveys indicate that [resale price maintenance] in most cases increased the prices of products sold"). Respondent is mistaken in relying on pricing effects absent a further showing of anticompetitive conduct. Cf. *id.,* at 106 (explaining that price surveys "do not necessarily tell us anything conclusive about the welfare effects of [resale price maintenance] because the results are generally consistent with both procompetitive and anticompetitive theories"). For, as has been indicated already, the antitrust laws are designed primarily to protect interbrand competition, from which lower prices can later result. See *Khan,* 522 U.S., at 15, 118 S.Ct. 275. The Court, moreover, has evaluated other vertical restraints under the rule of reason even though prices can be ***896** increased in the course of promoting procompetitive effects. See, *e.g., Business Electronics,* 485 U.S., at 728, 108 S.Ct. 1515. And resale price maintenance may reduce prices if manufacturers have resorted to costlier alternatives of controlling resale prices that are not *per se* unlawful. See *infra,* at 2721 – 2724; see also Marvel 371.

Respondent's argument, furthermore, overlooks that, in general, the interests of manufacturers and consumers are aligned with respect to retailer profit margins. The difference between the price a manufacturer charges retailers and the price retailers charge consumers represents part of the manufacturer's cost of distribution, which, like any other cost, the manufacturer usually desires to minimize. See *GTE Sylvania,* 433 U.S., at 56, n. 24, 97 S.Ct. 2549; see also *id.,* at 56, 97 S.Ct. 2549 ("Economists ... have argued that manufacturers have an economic interest in maintaining as much intrabrand competition as is consistent with the efficient distribution of their products"). A manufacturer ****2719** has no incentive to overcompensate retailers with unjustified margins. The retailers, not the manufacturer, gain from higher retail prices. The manufacturer often loses; interbrand competition reduces its competitiveness and market share because consumers will "substitute a different brand of the same product." *Id.,* at 52, n. 19, 97 S.Ct. 2549; see *Business Electronics, supra,* at 725, 108 S.Ct. 1515. As a general matter, therefore, a single manufacturer will desire to set minimum resale prices only if the "increase in demand resulting from enhanced service ... will more than offset a negative impact on demand of a higher retail price." Mathewson & Winter 67.

The implications of respondent's position are far reaching. Many decisions a manufacturer makes and carries out through concerted action can lead to higher prices. A manufacturer might, for example, contract with different suppliers to obtain better inputs that improve product quality. Or it might hire an advertising agency to promote awareness of its goods. Yet no one would think these actions violate the ***897** Sherman Act because they lead to higher prices. The antitrust laws do not require manufacturers to produce generic goods that

consumers do not know about or want. The manufacturer strives to improve its product quality or to promote its brand because it believes this conduct will lead to increased demand despite higher prices. The same can hold true for resale price maintenance.

Resale price maintenance, it is true, does have economic dangers. If the rule of reason were to apply to vertical price restraints, courts would have to be diligent in eliminating their anticompetitive uses from the market. This is a realistic objective, and certain factors are relevant to the inquiry. For example, the number of manufacturers that make use of the practice in a given industry can provide important instruction. When only a few manufacturers lacking market power adopt the practice, there is little likelihood it is facilitating a manufacturer cartel, for a cartel then can be undercut by rival manufacturers. See Overstreet 22; Bork 294. Likewise, a retailer cartel is unlikely when only a single manufacturer in a competitive market uses resale price maintenance. Interbrand competition would divert consumers to lower priced substitutes and eliminate any gains to retailers from their price-fixing agreement over a single brand. See Posner 172; Bork 292. Resale price maintenance should be subject to more careful scrutiny, by contrast, if many competing manufacturers adopt the practice. Cf. Scherer & Ross 558 (noting that "except when [resale price maintenance] spreads to cover the bulk of an industry's output, depriving consumers of a meaningful choice between high-service and low-price outlets, most [resale price maintenance arrangements] are probably innocuous"); Easterbrook 162 (suggesting that "every one of the potentially-anticompetitive outcomes of vertical arrangements depends on the uniformity of the practice").

The source of the restraint may also be an important consideration. If there is evidence retailers were the impetus ***898** for a vertical price restraint, there is a greater likelihood that the restraint facilitates a retailer cartel or supports a dominant, inefficient retailer. See Brief for William S. Comanor et al. as *Amici Curiae* 7–8. If, by contrast, a manufacturer adopted the policy independent of retailer pressure, the restraint is less likely to promote anticompetitive conduct. Cf. Posner 177 ("It makes all the difference whether minimum retail prices are imposed by the manufacturer in order to evoke point-of-sale services or by the dealers in order to obtain monopoly profits"). A manufacturer also has an incentive to protest inefficient retailer-induced ****2720** d price restraints because they can harm its competitive position.

As a final matter, that a dominant manufacturer or retailer can abuse resale price maintenance for anticompetitive purposes may not be a serious concern unless the relevant entity has market power. If a retailer lacks market power, manufacturers likely can sell their goods through rival retailers. See also *Business Electronics, supra*, at 727, n. 2, 108 S.Ct. 1515 (noting "[r]etail market power is rare, because of the usual presence of interbrand competition and other dealers"). And if a manufacturer lacks market power, there is less likelihood it can use the practice to keep competitors away from distribution outlets.

The rule of reason is designed and used to eliminate anticompetitive transactions from

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the market. This standard principle applies to vertical price restraints. A party alleging injury from a vertical agreement setting minimum resale prices will have, as a general matter, the information and resources available to show the existence of the agreement and its scope of operation. As courts gain experience considering the effects of these restraints by applying the rule of reason over the course of decisions, they can establish the litigation structure to ensure the rule operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses. Courts can, for example, devise rules over time for offering proof, or even presumptions ***899** where justified, to make the rule of reason a fair and efficient way to prohibit anticompetitive restraints and to promote procompetitive ones.

For all of the foregoing reasons, we think that were the Court considering the issue as an original matter, the rule of reason, not a *per se* rule of unlawfulness, would be the appropriate standard to judge vertical price restraints.

IV

We do not write on a clean slate, for the decision in *Dr. Miles* is almost a century old. So there is an argument for its retention on the basis of *stare decisis* alone. Even if *Dr. Miles* established an erroneous rule, "*[s]tare decisis* reflects a policy judgment that in most matters it is more important that the applicable rule of law be settled than that it be settled right." *Khan,* 522 U.S., at 20, 118 S.Ct. 275 (internal quotation marks omitted). And concerns about maintaining settled law are strong when the question is one of statutory interpretation. See, *e.g., Hohn v. United States,* 524 U.S. 236, 251, 118 S.Ct. 1969, 141 L.Ed.2d 242 (1998).

Stare decisis is not as significant in this case, however, because the issue before us is the scope of the Sherman Act. *Khan, supra,* at 20, 118 S.Ct. 275 ("[T]he general presumption that legislative changes should be left to Congress has less force with respect to the Sherman Act"). From the beginning the Court has treated the Sherman Act as a common-law statute. See *National Soc. of Professional Engineers v. United States,* 435 U.S. 679, 688, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978); see also *Northwest Airlines, Inc. v. Transport Workers,* 451 U.S. 77, 98, n. 42, 101 S.Ct. 1571, 67 L.Ed.2d 750 (1981) ("In antitrust, the federal courts ... act more as common-law courts than in other areas governed by federal statute"). Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on "restraint[s] of trade" evolve to meet the dynamics of present economic conditions. The case-by-case adjudication contemplated by the rule of reason has implemented this common-law approach. See *National Soc. of Professional* ***900** *Engineers, supra,* at 688, 98 S.Ct. 1355. Likewise, the boundaries of ****2721** the doctrine of *per se* illegality should not be immovable. For "[i]t would make no sense to create out of the single term 'restraint of trade' a chronologically schizoid statute, in which a 'rule of reason' evolves with new circumstances and new wisdom, but a line of *per se* illegality remains forever fixed where it was." *Business Electronics,* 485 U.S., at 732, 108 S.Ct. 1515.

A

Stare decisis, we conclude, does not compel our continued adherence to the *per se* rule against vertical price restraints. As discussed earlier, respected authorities in the economics literature suggest the *per se* rule is inappropriate, and there is now widespread agreement that resale price maintenance can have procompetitive effects. See, *e.g.,* Brief for Economists as *Amici Curiae* 16. It is also significant that both the Department of Justice and the Federal Trade Commission—the antitrust enforcement agencies with the ability to assess the long-term impacts of resale price maintenance—have recommended that this Court replace the *per se* rule with the traditional rule of reason. See Brief for United States as *Amicus Curiae* 6. In the antitrust context the fact that a decision has been "called into serious question" justifies our reevaluation of it. *Khan, supra,* at 21, 118 S.Ct. 275.

Other considerations reinforce the conclusion that *Dr. Miles* should be overturned. Of most relevance, "we have overruled our precedents when subsequent cases have undermined their doctrinal underpinnings." *Dickerson v. United States,* 530 U.S. 428, 443, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). The Court's treatment of vertical restraints has progressed away from *Dr. Miles* ' strict approach. We have distanced ourselves from the opinion's rationales. See *supra,* at 2713 – 2714; see also *Khan, supra,* at 21, 118 S.Ct. 275 (overruling a case when "the views underlying [it had been] eroded by this Court's precedent"); *Rodriguez de Quijas v. Shearson/American Express, Inc.,* 490 U.S. 477, 480–481, 109 S.Ct. 1917, 104 L.Ed.2d 526 (1989) (same). This is unsurprising, for the case was decided not long after enactment of the ***901** Sherman Act when the Court had little experience with antitrust analysis. Only eight years after *Dr. Miles,* moreover, the Court reined in the decision by holding that a manufacturer can announce suggested resale prices and refuse to deal with distributors who do not follow them. *Colgate,* 250 U.S., at 307–308, 39 S.Ct. 465.

In more recent cases the Court, following a common-law approach, has continued to temper, limit, or overrule once strict prohibitions on vertical restraints. In 1977, the Court overturned the *per se* rule for vertical nonprice restraints, adopting the rule of reason in its stead. *GTE Sylvania,* 433 U.S., at 57–59, 97 S.Ct. 2549 (overruling *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967)); see also 433 U.S., at 58, n. 29, 97 S.Ct. 2549 (noting "that the advantages of vertical restrictions should not be limited to the categories of new entrants and failing firms"). While the Court in a footnote in *GTE Sylvania* suggested that differences between vertical price and nonprice restraints could support different legal treatment, see *id.,* at 51, n. 18, 97 S.Ct. 2549, the central part of the opinion relied on authorities and arguments that find unequal treatment "difficult to justify," *id.,* at 69–70, 97 S.Ct. 2549 (White, J., concurring in judgment).

Continuing in this direction, in two cases in the 1980's the Court defined legal rules to limit the reach of *Dr. Miles* and to accommodate the doctrines enunciated in ****2722** *GTE Sylvania* and *Colgate.* See *Business Electronics, supra,* at 726–728, 108 S.Ct. 1515; *Monsanto,*

465 U.S., at 763–764, 104 S.Ct. 1464. In *Monsanto,* the Court required that antitrust plaintiffs alleging a § 1 price-fixing conspiracy must present evidence tending to exclude the possibility a manufacturer and its distributors acted in an independent manner. *Id.,* at 764, 104 S.Ct. 1464. Unlike Justice Brennan's concurrence, which rejected arguments that *Dr. Miles* should be overruled, see 465 U.S., at 769, 104 S.Ct. 1464, the Court "decline[d] to reach the question" whether vertical agreements fixing resale prices always should be unlawful because neither party suggested otherwise, *id.,* at 761–762, n. 7, 104 S.Ct. 1464. In ***902** *Business Electronics* the Court further narrowed the scope of *Dr. Miles*. It held that the *per se* rule applied only to specific agreements over price levels and not to an agreement between a manufacturer and a distributor to terminate a price-cutting distributor. 485 U.S., at 726–727, 735–736, 108 S.Ct. 1515.

Most recently, in 1997, after examining the issue of vertical maximum price-fixing agreements in light of commentary and real experience, the Court overruled a 29–year–old precedent treating those agreements as *per se* illegal. *Khan,*, 522 U.S., at 22, 118 S.Ct. 275 (overruling *Albrecht v. Herald Co.,* 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968)). It held instead that they should be evaluated under the traditional rule of reason. 522 U.S., at 22, 118 S.Ct. 275. Our continued limiting of the reach of the decision in *Dr. Miles* and our recent treatment of other vertical restraints justify the conclusion that *Dr. Miles* should not be retained.

The *Dr. Miles* rule is also inconsistent with a principled framework, for it makes little economic sense when analyzed with our other cases on vertical restraints. If we were to decide the procompetitive effects of resale price maintenance were insufficient to overrule *Dr. Miles,* then cases such as *Colgate* and *GTE Sylvania* themselves would be called into question. These later decisions, while they may result in less intrabrand competition, can be justified because they permit manufacturers to secure the procompetitive benefits associated with vertical price restraints through other methods. The other methods, however, could be less efficient for a particular manufacturer to establish and sustain. The end result hinders competition and consumer welfare because manufacturers are forced to engage in second-best alternatives and because consumers are required to shoulder the increased expense of the inferior practices.

The manufacturer has a number of legitimate options to achieve benefits similar to those provided by vertical price restraints. A manufacturer can exercise its *Colgate* right to refuse to deal with retailers that do not follow its suggested prices. See 250 U.S., at 307, 39 S.Ct. 465. The economic effects of unilateral ***903** and concerted price setting are in general the same. See, *e.g., Monsanto,* 465 U.S., at 762–764, 104 S.Ct. 1464. The problem for the manufacturer is that a jury might conclude its unilateral policy was really a vertical agreement, subjecting it to treble damages and potential criminal liability. *Ibid.; Business Electronics, supra,* at 728, 108 S.Ct. 1515. Even with the stringent standards in *Monsanto* and *Business Electronics,* this danger can lead, and has led, rational manufacturers to take wasteful measures. See, *e.g.,* Brief for PING, Inc., as *Amicus Curiae* 9–18.

A manufacturer might refuse to discuss its pricing policy with its distributors except through counsel knowledgeable of the subtle intricacies of the law. Or it might terminate longstanding distributors for minor violations without seeking an explanation. See *ibid*. The increased costs these burdensome ****2723** measures generate flow to consumers in the form of higher prices.

Furthermore, depending on the type of product it sells, a manufacturer might be able to achieve the procompetitive benefits of resale price maintenance by integrating downstream and selling its products directly to consumers. *Dr. Miles* tilts the relative costs of vertical integration and vertical agreement by making the former more attractive based on the *per se* rule, not on real market conditions. See *Business Electronics, supra,* at 725, 108 S.Ct. 1515; see generally Coase, The Nature of the Firm, 4 Economica, New Series 386 (1937). This distortion might lead to inefficient integration that would not otherwise take place, so that consumers must again suffer the consequences of the suboptimal distribution strategy. And integration, unlike vertical price restraints, eliminates all intrabrand competition. See, *e.g., GTE Sylvania, supra*, at 57, n. 26, 97 S.Ct. 2549.

There is yet another consideration. A manufacturer can impose territorial restrictions on distributors and allow only one distributor to sell its goods in a given region. Our cases have recognized, and the economics literature confirms, that these vertical nonprice restraints have impacts similar to ***904** those of vertical price restraints; both reduce intrabrand competition and can stimulate retailer services. See, *e.g., Business Electronics, supra,* at 728, 108 S.Ct. 1515; *Monsanto, supra,* at 762–763, 104 S.Ct. 1464; see also Brief for Economists as *Amici Curiae* 17–18. Cf. Scherer & Ross 560 (noting that vertical nonprice restraints "can engender inefficiencies at least as serious as those imposed upon the consumer by resale price maintenance"); Steiner, How Manufacturers Deal with the Price–Cutting Retailer: When Are Vertical Restraints Efficient? 65 Antitrust L.J. 407, 446–447 (1997) (indicating that "antitrust law should recognize that the consumer interest is often better served by [resale price maintenance]—contrary to its per se illegality and the rule-of-reason status of vertical nonprice restraints"). The same legal standard (*per se* unlawfulness) applies to horizontal market division and horizontal price fixing because both have similar economic effect. There is likewise little economic justification for the current differential treatment of vertical price and nonprice restraints. Furthermore, vertical nonprice restraints may prove less efficient for inducing desired services, and they reduce intrabrand competition more than vertical price restraints by eliminating both price and service competition. See Brief for Economists as *Amici Curiae* 17–18.

In sum, it is a flawed antitrust doctrine that serves the interests of lawyers—by creating legal distinctions that operate as traps for the unwary—more than the interests of consumers—by requiring manufacturers to choose second-best options to achieve sound business objectives.

B

Respondent's arguments for reaffirming *Dr. Miles* on the basis of *stare decisis* do not require a different result. Respondent looks to congressional action concerning vertical price restraints. In 1937, Congress passed the Miller–Tydings Fair Trade Act, 50 Stat. 693, which made vertical price restraints legal if authorized by a fair trade law ***905** enacted by a State. Fifteen years later, Congress expanded the exemption to permit vertical price-setting agreements between a manufacturer and a distributor to be enforced against other distributors not involved in the agreement. McGuire Act, 66 Stat. 632. In 1975, however, Congress repealed both Acts. Consumer Goods Pricing Act, 89 Stat. 801. That the *Dr. Miles* rule applied to vertical ****2724** price restraints in 1975, according to respondent, shows Congress ratified the rule.

This is not so. The text of the Consumer Goods Pricing Act did not codify the rule of *per se* illegality for vertical price restraints. It rescinded statutory provisions that made them *per se* legal. Congress once again placed these restraints within the ambit of § 1 of the Sherman Act. And, as has been discussed, Congress intended § 1 to give courts the ability "to develop governing principles of law" in the common-law tradition. *Texas Industries, Inc. v. Radcliff Materials, Inc.,* 451 U.S. 630, 643, 101 S.Ct. 2061, 68 L.Ed.2d 500 (1981); see *Business Electronics,* 485 U.S., at 731, 108 S.Ct. 1515 ("The changing content of the term 'restraint of trade' was well recognized at the time the Sherman Act was enacted"). Congress could have set the *Dr. Miles* rule in stone, but it chose a more flexible option. We respect its decision by analyzing vertical price restraints, like all restraints, in conformance with traditional § 1 principles, including the principle that our antitrust doctrines "evolv[e] with new circumstances and new wisdom." *Business Electronics, supra,* at 732, 108 S.Ct. 1515; see also Easterbrook 139.

The rule of reason, furthermore, is not inconsistent with the Consumer Goods Pricing Act. Unlike the earlier congressional exemption, it does not treat vertical price restraints as *per se* legal. In this respect, the justifications for the prior exemption are illuminating. Its goal "was to allow the States to protect small retail establishments that Congress thought might otherwise be driven from the marketplace by large-volume discounters." ***906** *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,* 445 U.S. 97, 102, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). The state fair trade laws also appear to have been justified on similar grounds. See Areeda & Hovenkamp 298. The rationales for these provisions are foreign to the Sherman Act. Divorced from competition and consumer welfare, they were designed to save inefficient small retailers from their inability to compete. The purpose of the antitrust laws, by contrast, is "the protection of *competition,* not *competitors.*" *Atlantic Richfield Co. v. USA Petroleum Co.,* 495 U.S. 328, 338, 110 S.Ct. 1884, 109 L.Ed.2d 333 (1990) (internal quotation marks omitted). To the extent Congress repealed the exemption for some vertical price restraints to end its prior practice of encouraging anticompetitive conduct, the rule of reason promotes the same objective.

Respondent also relies on several congressional appropriations in the mid–1980's in which Congress did not permit the Department of Justice or the Federal Trade Commission to use funds to advocate overturning *Dr. Miles*. See, *e.g.,* 97 Stat. 1071. We need not pause long in addressing this argument. The conditions on funding are no longer in place, see, *e.g.,* Brief for United States as *Amicus Curiae* 21, and they were ambiguous at best. As much as they might show congressional approval for *Dr. Miles,* they might demonstrate a different proposition: that Congress could not pass legislation codifying the rule and reached a short-term compromise instead.

Reliance interests do not require us to reaffirm *Dr. Miles*. To be sure, reliance on a judicial opinion is a significant reason to adhere to it, *Payne v. Tennessee,* 501 U.S. 808, 828, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991), especially "in cases involving property and contract rights," *Khan,* 522 U.S., at 20, 118 S.Ct. 275. The reliance interests here, however, like the reliance interests in *Khan,* cannot justify an inefficient rule, especially because the narrowness of the rule has allowed manufacturers ****2725** to set minimum resale prices in other ways. And while the *Dr. Miles* rule is longstanding, resale price maintenance was legal under fair trade laws ***907** in a majority of States for a large part of the past century up until 1975.

It is also of note that during this time "when the legal environment in the [United States] was most favorable for [resale price maintenance], no more than a tiny fraction of manufacturers ever employed [resale price maintenance] contracts." Overstreet 6; see also *id.,* at 169 (noting that "no more than one percent of manufacturers, accounting for no more than ten percent of consumer goods purchases, ever employed [resale price maintenance] in any single year in the [United States]"); Scherer & Ross 549 (noting that "[t]he fraction of U.S. retail sales covered by [resale price maintenance] in its heyday has been variously estimated at from 4 to 10 percent"). To the extent consumers demand cheap goods, judging vertical price restraints under the rule of reason will not prevent the market from providing them. Cf. Easterbrook 152–153 (noting that "S.S. Kresge (the old K–Mart) flourished during the days of manufacturers' greatest freedom" because "discount stores offer a combination of price and service that many customers value" and that "[n]othing in restricted dealing threatens the ability of consumers to find low prices"); Scherer & Ross 557 (noting that "for the most part, the effects of the [Consumer Goods Pricing Act] were imperceptible because the forces of competition had already repealed the [previous antitrust exemption] in their own quiet way").

For these reasons the Court's decision in *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373, 31 S.Ct. 376, 55 L.Ed. 502 (1911), is now overruled. Vertical price restraints are to be judged according to the rule of reason.

V

Noting that Leegin's president has an ownership interest in retail stores that sell Brighton, respondent claims Leegin

participated in an unlawful horizontal cartel with competing ***908** retailers. Respondent did not make this allegation in the lower courts, and we do not consider it here.

The judgment of the Court of Appeals is reversed, and the case is remanded for proceedings consistent with this opinion.

It is so ordered.

Justice BREYER, with whom Justice STEVENS, Justice SOUTER, and Justice GINSBURG join, dissenting.

In *Dr. Miles Medical Co. v. John D. Park & Sons Co.,* 220 U.S. 373, 394, 408–409, 31 S.Ct. 376, 55 L.Ed. 502 (1911), this Court held that an agreement between a manufacturer of proprietary medicines and its dealers to fix the minimum price at which its medicines could be sold was "invalid ... under the [Sherman Act, 15 U.S.C. § 1]." This Court has consistently read *Dr. Miles* as establishing a bright-line rule that agreements fixing minimum resale prices are *per se* illegal. See, *e.g., United States v. Trenton Potteries Co.,* 273 U.S. 392, 399–401, 47 S.Ct. 377, 71 L.Ed. 700 (1927); *NYNEX Corp. v. Discon, Inc.,* 525 U.S. 128, 133, 119 S.Ct. 493, 142 L.Ed.2d 510 (1998). That *per se* rule is one upon which the legal profession, business, and the public have relied for close to a century. Today the Court holds that courts must determine the lawfulness of minimum resale price maintenance by applying, not a bright-line *per se* rule, but a circumstance-specific "rule of reason." *Ante,* at 2725. And in doing so it overturns *Dr. Miles.*

The Court justifies its departure from ordinary considerations of *stare decisis* by ****2726** pointing to a set of arguments well known in the antitrust literature for close to half a century. See *ante,* at 2715 – 2716. Congress has repeatedly found in these arguments insufficient grounds for overturning the *per se* rule. See, *e.g.,* Hearings on H.R. 10527 et al. before the Subcommittee on Commerce and Finance of the House Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., 74–76, 89, 99, 101–102, 192–195, 261–262 (1958). And, ***909** in my view, they do not warrant the Court's now overturning so well-established a legal precedent.

I

The Sherman Act seeks to maintain a marketplace free of anticompetitive practices, in particular those enforced by agreement among private firms. The law assumes that such a marketplace, free of private restrictions, will tend to bring about the lower prices, better products, and more efficient production processes that consumers typically desire. In determining the lawfulness of particular practices, courts often apply a "rule of reason." They examine both a practice's likely anticompetitive effects and its beneficial business justifications. See, *e.g., National Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.,* 468 U.S. 85, 109–110, and n. 39, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984); *National Soc. of Professional Engineers v. United States,* 435 U.S. 679, 688–691, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978); *Board of Trade of Chicago v. United States,* 246 U.S. 231, 238, 38 S.Ct. 242, 62 L.Ed. 683 (1918).

Nonetheless, sometimes the likely anticompetitive consequences of a particular practice are so serious and the potential justifications so few (or, *e.g.,* so difficult to prove) that courts have departed from a pure "rule of reason" approach. And sometimes this Court has imposed a rule of *per se* unlawfulness —a rule that instructs courts to find the practice unlawful all (or nearly all) the time. See, *e.g., NYNEX, supra,* at 133, 119 S.Ct. 493; *Arizona v. Maricopa County Medical Soc.,* 457 U.S. 332, 343–344, and n. 16, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982); *Continental T. V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 50, n. 16, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977); *United States v. Topco Associates, Inc.,* 405 U.S. 596, 609–611, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972); *United States v. Socony–Vacuum Oil Co.,* 310 U.S. 150, 213–214, 60 S.Ct. 811, 84 L.Ed. 1129 (1940) (citing and quoting *Trenton Potteries, supra,* at 397–398, 47 S.Ct. 377).

The case before us asks which kind of approach the courts should follow where minimum resale price maintenance is at issue. Should they apply a *per se* rule (or a variation) that ***910** would make minimum resale price maintenance always (or *almost* always) unlawful? Should they apply a "rule of reason"? Were the Court writing on a blank slate, I would find these questions difficult. But, of course, the Court is not writing on a blank slate, and that fact makes a considerable legal difference.

To best explain why the question would be difficult were we deciding it afresh, I briefly summarize several classical arguments for and against the use of a *per se* rule. The arguments focus on three sets of considerations, those involving: (1) potential anticompetitive effects, (2) potential benefits, and (3) administration. The difficulty arises out of the fact that the different sets of considerations point in different directions. See, *e.g.,* 8 P. Areeda, Antitrust Law ¶¶ 1628–1633, pp. 330–392 (1st ed.1989) (hereinafter Areeda); 8 P. Areeda & H. Hovenkamp, Antitrust Law ¶¶ 1628–1633, pp. 288–339 (2d ed.2004) (hereinafter Areeda & Hovenkamp); Easterbrook, Vertical Arrangements and the Rule of Reason, 53 Antitrust L.J. 135, 146–152 (1984) ****2727** (hereinafter Easterbrook); Pitofsky, In Defense of Discounters: The No–Frills Case for a *Per Se* Rule Against Vertical Price Fixing, 71 Geo. L.J. 1487 (1983) (hereinafter Pitofsky); Scherer, The Economics of Vertical Restraints, 52 Antitrust L.J. 687, 706–707 (1983) (hereinafter Scherer); Posner, The Next Step in the Antitrust Treatment of Restricted Distribution: Per Se Legality, 48 U. Chi. L.Rev. 6, 22–26 (1981); Brief for William S. Comanor et al. as *Amici Curiae* 7–10.

On the one hand, agreements setting minimum resale prices may have serious anticompetitive consequences. *In respect to dealers:* Resale price maintenance agreements, rather like horizontal price agreements, can diminish or eliminate price competition among dealers of a single brand or (if practiced generally by manufacturers) among multibrand dealers. In doing so, they can prevent dealers from offering customers the lower prices that many customers prefer; they can prevent dealers from responding to changes ***911** in demand, say, falling demand, by cutting prices; they can encourage dealers to substitute service, for price, competition, thereby threatening wastefully to attract too many resources

into that portion of the industry; they can inhibit expansion by more efficient dealers whose lower prices might otherwise attract more customers, stifling the development of new, more efficient modes of retailing; and so forth. See, *e.g.,* 8 Areeda & Hovenkamp ¶ 1632c, at 319–321; Steiner, The Evolution and Applications of Dual–Stage Thinking, 49 The Antitrust Bulletin 877, 899–900 (2004); Comanor, Vertical Price–Fixing, Vertical Market Restrictions, and the New Antitrust Policy, 98 Harv. L.Rev. 983, 990–1000 (1985).

In respect to producers: Resale price maintenance agreements can help to reinforce the competition-inhibiting behavior of firms in concentrated industries. In such industries firms may tacitly collude, *i.e.,* observe each other's pricing behavior, each understanding that price cutting by one firm is likely to trigger price competition by all. See 8 Areeda & Hovenkamp ¶ 1632d, at 321–323; P. Areeda & L. Kaplow, Antitrust Analysis ¶¶ 231–233, pp. 276–283 (4th ed.1988) (hereinafter Areeda & Kaplow). Cf. *United States v. Container Corp. of America,* 393 U.S. 333, 89 S.Ct. 510, 21 L.Ed.2d 526 (1969); Areeda & Kaplow ¶¶ 247–253, at 327–348. Where that is so, resale price maintenance can make it easier for each producer to identify (by observing retail markets) when a competitor has begun to cut prices. And a producer who cuts wholesale prices *without* lowering the minimum resale price will stand to gain little, if anything, in increased profits, because the dealer will be unable to stimulate increased consumer demand by passing along the producer's price cut to consumers. In either case, resale price maintenance agreements will tend to prevent price competition from “breaking out”; and they will thereby tend to stabilize producer prices. See Pitofsky 1490–1491. Cf., *e.g., Container Corp., supra,* at 336–337, 89 S.Ct. 510.

***912** Those who express concern about the potential anticompetitive effects find empirical support in the behavior of prices before, and then after, Congress in 1975 repealed the Miller–Tydings Fair Trade Act, 50 Stat. 693, and the McGuire Act, 66 Stat. 631. Those Acts had permitted (but not required) individual States to enact “fair trade” laws authorizing minimum resale price maintenance. At the time of repeal minimum resale price maintenance was lawful in 36 States; it was unlawful in 14 States. See Hearings on S. 408 before the Subcommittee on Antitrust and Monopoly of the Senate Committee on the Judiciary, 94th Cong., 1st Sess., 173 (1975) ****2728** (hereinafter Hearings on S. 408) (statement of Thomas E. Kauper, Assistant Attorney General, Antitrust Division). Comparing prices in the former States with prices in the latter States, the Department of Justice argued that minimum resale price maintenance had raised prices by 19% to 27%. See Hearings on H.R. 2384 before the Subcommittee on Monopolies and Commercial Law of the House Committee on the Judiciary, 94th Cong., 1st Sess., 122 (1975) (hereinafter Hearings on H.R. 2384) (statement of Keith I. Clearwaters, Deputy Assistant Attorney General, Antitrust Division).

After repeal, minimum resale price maintenance agreements were unlawful *per se* in every State. The Federal Trade Commission (FTC) staff, after studying numerous price surveys, wrote that collectively the surveys

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"indicate [d] that [resale price maintenance] in most cases increased the prices of products sold with [resale price maintenance]." Bureau of Economics Staff Report to the FTC, T. Overstreet, Resale Price Maintenance: Economic Theories and Empirical Evidence 160 (1983) (hereinafter Overstreet). Most economists today agree that, in the words of a prominent antitrust treatise, "resale price maintenance tends to produce higher consumer prices than would otherwise be the case." 8 Areeda & Hovenkamp ¶ 1604b, at 40 (finding "[t]he evidence ... persuasive on this point"). See also Brief for William S. Comanor et al. as *Amici Curiae* 4 ("It is uniformly ***913** acknowledged that [resale price maintenance] and other vertical restraints lead to higher consumer prices").

On the other hand, those favoring resale price maintenance have long argued that resale price maintenance agreements can provide important consumer benefits. The majority lists two: First, such agreements can facilitate new entry. *Ante,* at 2715 – 2716. For example, a newly entering producer wishing to build a product name might be able to convince dealers to help it do so—if, but only if, the producer can assure those dealers that they will later recoup their investment. Without resale price maintenance, late-entering dealers might take advantage of the earlier investment and, through price competition, drive prices down to the point where the early dealers cannot recover what they spent. By assuring the initial dealers that such later price competition will not occur, resale price maintenance can encourage them to carry the new product, thereby helping the new producer succeed. See 8 Areeda & Hovenkamp ¶¶ 1617a, 1631b, at 193–196, 308. The result might be increased competition at the producer level, *i.e.,* greater *inter*-brand competition, that brings with it net consumer benefits.

Second, without resale price maintenance a producer might find its efforts to sell a product undermined by what resale price maintenance advocates call "free riding." *Ante,* at 2715 – 2716. Suppose a producer concludes that it can succeed only if dealers provide certain services, say, product demonstrations, high quality shops, advertising that creates a certain product image, and so forth. Without resale price maintenance, some dealers might take a "free ride" on the investment that others make in providing those services. Such a dealer would save money by not paying for those services and could consequently cut its own price and increase its own sales. Under these circumstances, dealers might prove unwilling to invest in the provision of necessary services. See, *e.g.,* 8 Areeda & Hovenkamp ¶¶ 1611–1613, ***914** 1631c, at 126–165, 309–313; R. Posner, Antitrust Law 172–173 (2d ed.2001); R. Bork, The Antitrust Paradox 290–291 (1978) (hereinafter Bork); Easterbrook 146–149.

****2729** Moreover, where a producer and not a group of dealers seeks a resale price maintenance agreement, there is a special reason to believe some such benefits exist. That is because, other things being equal, producers should want to encourage price competition among their dealers. By doing so they will often increase profits by selling more of their product. See *Sylvania,* 433 U.S., at 56, n. 24, 97 S.Ct. 2549; Bork 290. And that is so, even if the producer possesses sufficient market power to earn a supernormal profit. That is to say, other

things being equal, the producer will benefit by charging his dealers a competitive (or even a higher-than-competitive) wholesale price while encouraging price competition among them. Hence, if the producer is the moving force, the producer must have some special reason for wanting resale price maintenance; and in the absence of, say, concentrated producer markets (where that special reason might consist of a desire to stabilize wholesale prices), that special reason may well reflect the special circumstances just described: new entry, "free riding," or variations on those themes.

The upshot is, as many economists suggest, sometimes resale price maintenance can prove harmful; sometimes it can bring benefits. See, *e.g.,* Brief for Economists as *Amici Curiae* 16; 8 Areeda & Hovenkamp ¶¶ 1631–1632, at 306–328; Pitofsky 1495; Scherer 706–707. But before concluding that courts should consequently apply a rule of reason, I would ask such questions as, how often are harms or benefits likely to occur? How easy is it to separate the beneficial sheep from the antitrust goats?

Economic discussion, such as the studies the Court relies upon, can *help* provide answers to these questions, and in doing so, economics can, and should, inform antitrust law. But antitrust law cannot, and should not, precisely replicate ***915** economists' (sometimes conflicting) views. That is because law, unlike economics, is an administrative system the effects of which depend upon the content of rules and precedents only as they are applied by judges and juries in courts and by lawyers advising their clients. And that fact means that courts will often bring their own administrative judgment to bear, sometimes applying rules of *per se* unlawfulness to business practices even when those practices sometimes produce benefits. See, *e.g.,* F. Scherer & D. Ross, Industrial Market Structure and Economic Performance 335–339 (3d ed.1990) (hereinafter Scherer & Ross) (describing some circumstances under which price-fixing agreements could be more beneficial than "unfettered competition," but also noting potential costs of moving from a *per se* ban to a rule of reasonableness assessment of such agreements).

I have already described studies and analyses that suggest (though they cannot prove) that resale price maintenance can cause harms with some regularity—and certainly when dealers are the driving force. But what about benefits? How often, for example, will the benefits to which the Court points occur in practice? I can find no economic consensus on this point. There is a consensus in the literature that "free riding" takes place. But "free riding" often takes place in the economy without any legal effort to stop it. Many visitors to California take free rides on the Pacific Coast Highway. We all benefit freely from ideas, such as that of creating the first supermarket. Dealers often take a "free ride" on investments that others have made in building a product's name and reputation. The question is how often the "free riding" problem is serious enough significantly to deter dealer investment.

****2730** To be more specific, one can easily *imagine* a dealer who refuses to provide important presale services, say, a detailed

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explanation of how a product works (or who fails to provide a proper atmosphere in which to sell expensive perfume or alligator billfolds), lest customers use that "free" service (or ***916** enjoy the psychological benefit arising when a high-priced retailer stocks a particular brand of billfold or handbag) and then buy from another dealer at a lower price. Sometimes this must happen in reality. But does it happen often? We do, after all, live in an economy where firms, despite *Dr. Miles* ' *per se* rule, still sell complex technical equipment (as well as expensive perfume and alligator billfolds) to consumers.

All this is to say that the ultimate question is not whether, but *how much,* "free riding" of this sort takes place. And, after reading the briefs, I must answer that question with an uncertain "sometimes." See, *e.g.,* Brief for William S. Comanor et al. as *Amici Curiae* 6–7 (noting "skepticism in the economic literature about how often [free riding] actually occurs"); Scherer & Ross 551–555 (explaining the "severe limitations" of the free-rider justification for resale price maintenance); Pitofsky, Why *Dr. Miles* Was Right, 8 Regulation, No. 1, pp. 27, 29–30 (Jan./ Feb.1984) (similar analysis).

How easily can courts identify instances in which the benefits are likely to outweigh potential harms? My own answer is, *not very easily*. For one thing, it is often difficult to identify *who*—producer or dealer—is the moving force behind any given resale price maintenance agreement. Suppose, for example, several large multibrand retailers all sell resale-price-maintained products. Suppose further that small producers set retail prices because they fear that, otherwise, the large retailers will favor (say, by allocating better shelf space) the goods of other producers who practice resale price maintenance. Who "initiated" this practice, the retailers hoping for considerable insulation from retail competition, or the producers, who simply seek to deal best with the circumstances they find? For another thing, as I just said, it is difficult to determine just when, and where, the "free riding" problem is serious enough to warrant legal protection.

***917** I recognize that scholars have sought to develop checklists and sets of questions that will help courts separate instances where anticompetitive harms are more likely from instances where only benefits are likely to be found. See, *e.g.,* 8 Areeda & Hovenkamp ¶¶ 1633c–1633e, at 330–339. See also Brief for William S. Comanor et al. as *Amici Curiae* 8–10. But applying these criteria in court is often easier said than done. The Court's invitation to consider the existence of "market power," for example, *ante,* at 2720, invites lengthy time-consuming argument among competing experts, as they seek to apply abstract, highly technical, criteria to often ill-defined markets. And resale price maintenance cases, unlike a major merger or monopoly case, are likely to prove numerous and involve only private parties. One cannot fairly expect judges and juries in such cases to apply complex economic criteria without making a considerable number of mistakes, which themselves may impose serious costs. See, *e.g.,* H. Hovenkamp, The Antitrust Enterprise 105 (2005) (litigating a rule of reason case is "one of the most costly procedures in antitrust practice"). See also Bok, Section 7 of the Clayton Act and the Merging of Law and Economics, 74 Harv. L.Rev. 226, 238–

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247 (1960) (describing lengthy FTC efforts to apply complex criteria in a merger case).

****2731** Are there special advantages to a bright-line rule? Without such a rule, it is often unfair, and consequently impractical, for enforcement officials to bring criminal proceedings. And since enforcement resources are limited, that loss may tempt some producers or dealers to enter into agreements that are, on balance, anticompetitive.

Given the uncertainties that surround key items in the overall balance sheet, particularly in respect to the "administrative" questions, I can concede to the majority that the problem is difficult. And, if forced to decide now, at most I might agree that the *per se* rule should be slightly modified to allow an exception for the more easily identifiable ***918** and temporary condition of "new entry." See Pitofsky 1495. But I am not now forced to decide this question. The question before us is not what should be the rule, starting from scratch. We here must decide whether to change a clear and simple price-related antitrust rule that the courts have applied for nearly a century.

II

We write, not on a blank slate, but on a slate that begins with *Dr. Miles* and goes on to list a century's worth of similar cases, massive amounts of advice that lawyers have provided their clients, and untold numbers of business decisions those clients have taken in reliance upon that advice. See, *e.g., United States v. Bausch & Lomb Optical Co.,* 321 U.S. 707, 721, 64 S.Ct. 805, 88 L.Ed. 1024 (1944); *Sylvania,* 433 U.S., at 51, n. 18, 97 S.Ct. 2549 ("The *per se* illegality of [vertical] price restrictions has been established firmly for many years ..."). Indeed, a Westlaw search shows that *Dr. Miles* itself has been cited dozens of times in this Court and hundreds of times in lower courts. Those who wish this Court to change so well-established a legal precedent bear a heavy burden of proof. See *Illinois Brick Co. v. Illinois,* 431 U.S. 720, 736, 97 S.Ct. 2061, 52 L.Ed.2d 707 (1977) (noting, in declining to overrule an earlier case interpreting § 4 of the Clayton Act, that "considerations of *stare decisis* weigh heavily in the area of statutory construction, where Congress is free to change this Court's interpretation of its legislation"). I am not aware of any case in which this Court has overturned so well-established a statutory precedent. Regardless, I do not see how the Court can claim that ordinary criteria for overruling an earlier case have been met. See, *e.g., Planned Parenthood of Southeastern Pa. v. Casey,* 505 U.S. 833, 854–855, 112 S.Ct. 2791, 120 L.Ed.2d 674 (1992). See also *Federal Election Comm'n v. Wisconsin Right to Life, Inc.,* 551 U.S. 449, at 500 – 501, 127 S.Ct. 2652, 168 L.Ed.2d 329, 2007 WL 1804336 (SCALIA, J., concurring in part and concurring in judgment).

***919** A

I can find no change in circumstances in the past several decades that helps the majority's position. In fact, there has been one important change that argues strongly to the contrary. In 1975, Congress repealed the McGuire and Miller–Tydings Acts. See Consumer Goods

Pricing Act of 1975, 89 Stat. 801. And it thereby consciously *extended Dr. Miles*' *per se* rule. Indeed, at that time the Department of Justice and the FTC, then urging application of the *per se* rule, discussed virtually every argument presented now to this Court as well as others not here presented. And they explained to Congress why Congress should reject them. See Hearings on S. 408, at 176–177 (statement of Thomas E. Kauper, Assistant Attorney General, Antitrust Division); *id.,* at 170–172 (testimony of Lewis A. Engman, Chairman of the FTC); Hearings on H.R. 2384, at 113–114 (testimony ****2732** of Keith I. Clearwaters, Deputy Assistant Attorney General, Antitrust Division). Congress fully understood, and consequently intended, that the result of its repeal of McGuire and Miller–Tydings would be to make minimum resale price maintenance *per se* unlawful. See, *e.g.,* S.Rep. No. 94–466, pp. 1–3 (1975), U.S.Code Cong. & Admin.News 1975, pp. 1569, 1570–71 ("Without [the exemptions authorized by the Miller–Tydings and McGuire Acts,] the agreements they authorize would violate the antitrust laws.... [R]epeal of the fair trade laws generally will prohibit manufacturers from enforcing resale prices"). See also *Sylvania, supra,* at 51, n. 18, 97 S.Ct. 2549 ("Congress recently has expressed its approval of a *per se* analysis of vertical price restrictions by repealing those provisions of the Miller–Tydings and McGuire Acts allowing fair-trade pricing at the option of the individual States").

Congress did not prohibit this Court from reconsidering the *per se* rule. But enacting major legislation premised upon the existence of that rule constitutes important public ***920** reliance upon that rule. And doing so aware of the relevant arguments constitutes even stronger reliance upon the Court's keeping the rule, at least in the absence of some significant change in respect to those arguments.

Have there been any such changes? There have been a few economic studies, described in some of the briefs, that argue, contrary to the testimony of the Justice Department and the FTC to Congress in 1975, that resale price maintenance is not harmful. One study, relying on an analysis of litigated resale price maintenance cases from 1975 to 1982, concludes that resale price maintenance does not ordinarily involve producer or dealer collusion. See Ippolito, Resale Price Maintenance: Empirical Evidence from Litigation, 34 J. Law & Econ. 263, 281–282, 292 (1991). But this study equates the failure of plaintiffs to *allege* collusion with the *absence* of collusion—an equation that overlooks the superfluous nature of allegations of horizontal collusion in a resale price maintenance case and the tacit form that such collusion might take. See H. Hovenkamp, Federal Antitrust Policy § 11.3c, p. 464, n. 19 (3d ed.2005); *supra,* at 2711 – 2713.

The other study provides a theoretical basis for concluding that resale price maintenance "need not lead to higher retail prices." Marvel & McCafferty, The Political Economy of Resale Price Maintenance, 94 J. Pol. Econ. 1074, 1075 (1986). But this study develops a theoretical model "under the assumption that [resale price maintenance] is efficiency-enhancing." *Ibid.* Its only empirical support is a 1940 study that the authors acknowledge is much criticized. See *id.,* at 1091. And many other economists

take a different view. See Brief for William S. Comanor et al. as *Amici Curiae* 4.

Regardless, taken together, these studies at most may offer some mild support for the majority's position. But they cannot constitute a major change in circumstances.

Petitioner and some *amici* have also presented us with newer studies that show that resale price maintenance sometimes ***921** brings consumer benefits. Overstreet 119–129 (describing numerous case studies). But the proponents of a *per se* rule have always conceded as much. What is remarkable about the majority's arguments is that *nothing* in this respect *is new.* See *supra,* at 2711, 2716 (citing articles and congressional testimony going back several decades). The only new feature of these arguments lies in the fact that the most current advocates of overruling *Dr. Miles* have abandoned a host of ****2733** other not-very-persuasive arguments upon which prior resale price maintenance proponents used to rely. See, *e.g.,* 8 Areeda ¶ 1631a, at 350–352 (listing " '[t]raditional' justifications" for resale price maintenance).

The one arguable exception consists of the majority's claim that "even absent free riding," resale price maintenance "may be the most efficient way to expand the manufacturer's market share by inducing the retailer's performance and allowing it to use its own initiative and experience in providing valuable services." *Ante,* at 2716. I cannot count this as an exception, however, because I do not understand how, in the absence of free riding (and assuming competitiveness), an established producer would need resale price maintenance. Why, on these assumptions, would a dealer not "expand" its "market share" as best that dealer sees fit, obtaining appropriate payment from consumers in the process? There may be an answer to this question. But I have not seen it. And I do not think that we should place significant weight upon justifications that the parties do not explain with sufficient clarity for a generalist judge to understand.

No one claims that the American economy has changed in ways that might support the majority. Concentration in retailing has increased. See, *e.g.,* Brief for Respondent 18 (since minimum resale price maintenance was banned nationwide in 1975, the total number of retailers has dropped while the growth in sales per store has risen); Brief for American Antitrust Institute as *Amicus Curiae* 17, n. 20 (citing private study reporting that the combined sales of the 10 largest ***922** retailers worldwide has grown to nearly 30% of total retail sales of top 250 retailers; also quoting 1999 Organisation for Economic Co-operation and Development report stating that the " 'last twenty years have seen momentous changes in retail distribution including significant increases in concentration' "); Mamen, Facing Goliath: Challenging the Impacts of Supermarket Consolidation on our Local Economies, Communities, and Food Security, The Oakland Institute, 1 Policy Brief, No. 3, pp. 1, 2 (Spring 2007), http://www.oaklandinstitute.org/pdfs/facing_goliath.pdf (as visited June 25, 2007, and available in Clerk of Court's case file) (noting that "[f]or many decades, the top five food retail firms in the U.S. controlled less than 20 percent of the market"; from 1997 to 2000, "the top five firms increased their market

share from 24 to 42 percent of all retail sales"; and "[b]y 2003, they controlled over half of all grocery sales"). That change, other things being equal, may enable (and motivate) more retailers, accounting for a greater percentage of total retail sales volume, to seek resale price maintenance, thereby making it more difficult for price-cutting competitors (perhaps internet retailers) to obtain market share.

Nor has anyone argued that concentration among manufacturers that might use resale price maintenance has diminished significantly. And as far as I can tell, it has not. Consider household electrical appliances, which a study from the late 1950's suggests constituted a significant portion of those products subject to resale price maintenance at that time. See Hollander, United States of America, in Resale Price Maintenance 67, 80–81 (B. Yamey ed.1966). Although it is somewhat difficult to compare census data from 2002 with that from several decades ago (because of changes in the classification system), it is clear that at least some subsets of the household electrical appliance industry are *more* concentrated, in terms of manufacturer market power, now than they were then. For instance, the top eight domestic manufacturers of household cooking appliances accounted for 68% ****2734 *923** of the domestic market (measured by value of shipments) in 1963 (the earliest date for which I was able to find data), compared with 77% in 2002. See Dept. of Commerce, Bureau of Census, 1972 Census of Manufactures, Special Report Series, Concentration Ratios in Manufacturing, No. MC72(SR)–2, p. SR2–38 (1975) (hereinafter 1972 Census); Dept. of Commerce, Bureau of Census, 2002 Economic Census, Concentration Ratios: 2002, No. EC02–31SR–1, p. 55 (2006) (hereinafter 2002 Census). The top eight domestic manufacturers of household laundry equipment accounted for 95% of the domestic market in 1963 (90% in 1958), compared with 99% in 2002. 1972 Census, at SR2–38; 2002 Census, at 55. And the top eight domestic manufacturers of household refrigerators and freezers accounted for 91% of the domestic market in 1963, compared with 95% in 2002. 1972 Census, at SR2–38; 2002 Census, at 55. Increased concentration among manufacturers increases the likelihood that producer-originated resale price maintenance will prove more prevalent today than in years past, and more harmful. At the very least, the majority has not explained how these, or other changes in the economy, could help support its position.

In sum, there is no relevant change. And without some such change, there is no ground for abandoning a well-established antitrust rule.

B

With the preceding discussion in mind, I would consult the list of factors that our case law indicates are relevant when we consider overruling an earlier case. Justice SCALIA, writing separately in another of our cases this Term, well summarizes that law. See *Wisconsin Right to Life, Inc.,* 551 U.S. at 499 – 503, 127 S.Ct. 2652, 2684 –2686, 2007 WL 1804336 (opinion concurring in part and concurring in judgment). And every relevant factor he mentions argues against overruling *Dr. Miles* here.

First, the Court applies *stare decisis* more "rigidly" in statutory than in constitutional cases. See *Glidden Co. v.* ***924** *Zdanok,* 370 U.S. 530, 543, 82 S.Ct. 1459, 8 L.Ed.2d 671 (1962); *Illinois Brick Co.,* 431 U.S., at 736, 97 S.Ct. 2061. This is a statutory case.

Second, the Court does sometimes overrule cases that it decided wrongly only a reasonably short time ago. As Justice SCALIA put it, "[o]verruling a *constitutional* case decided just a few years earlier is far from unprecedented." *Wisconsin Right to Life,* 551 U.S., at 501, 127 S.Ct. 2652, 2685, 2007 WL 1804336 (emphasis added). We here overrule one *statutory* case, *Dr. Miles,* decided 100 years ago, and we overrule the cases that reaffirmed its *per se* rule in the intervening years. See, *e.g., Trenton Potteries,* 273 U.S., at 399–401, 47 S.Ct. 377; *Bausch & Lomb,* 321 U.S., at 721, 64 S.Ct. 805; *United States v. Parke, Davis & Co.,* 362 U.S. 29, 45–47, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960); *Simpson v. Union Oil Co. of Cal.,* 377 U.S. 13, 16–17, 84 S.Ct. 1051, 12 L.Ed.2d 98 (1964).

Third, the fact that a decision creates an "unworkable" legal regime argues in favor of overruling. See *Payne v. Tennessee,* 501 U.S. 808, 827–828, 111 S.Ct. 2597, 115 L.Ed.2d 720 (1991); *Swift & Co. v. Wickham,* 382 U.S. 111, 116, 86 S.Ct. 258, 15 L.Ed.2d 194 (1965). Implementation of the *per se* rule, even with the complications attendant the exception allowed for in *United States v. Colgate & Co.,* 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919), has proved practical over the course of the last century, particularly when compared with the many complexities of litigating a case under the "rule of reason" regime. No one has shown how moving from the *Dr. Miles* regime to "rule of reason" analysis ****2735** would make the legal regime governing minimum resale price maintenance more "administrable," *Wisconsin Right to Life,* 551 U.S., at 501 – 502, 127 S.Ct. 2652, 2685, 2007 WL 1804336 (opinion of SCALIA, J.), particularly since *Colgate* would remain good law with respect to *unreasonable* price maintenance.

Fourth, the fact that a decision "unsettles" the law may argue in favor of overruling. See *Sylvania,* 433 U.S., at 47, 97 S.Ct. 2549; *Wisconsin Right to Life,* 551 U.S., at 501 – 502, 127 S.Ct. 2652, 2685 – 2686, 2007 WL 1804336 (opinion of SCALIA, J.). The *per se* rule is well-settled law, as the Court itself has previously recognized. *Sylvania, supra,* at 51, n. 18, 97 S.Ct. 2549. It is the majority's change here that will unsettle the law.

***925** Fifth, the fact that a case involves property rights or contract rights, where reliance interests are involved, argues against overruling. *Payne, supra,* at 828, 111 S.Ct. 2597. This case involves contract rights and perhaps property rights (consider shopping malls). And there has been considerable reliance upon the *per se* rule. As I have said, Congress relied upon the continued vitality of *Dr. Miles* when it repealed Miller–Tydings and McGuire. *Supra,* at 2716 – 2717. The Executive Branch argued for repeal on the assumption that *Dr. Miles* stated the law. *Supra*, at 2716 – 2717. Moreover, whole sectors of the economy have come to rely upon the *per se* rule. A factory outlet store tells us that the rule "form[s] an essential part of the regulatory background against which [that firm] and many other discount retailers have financed, structured, and operated their businesses." Brief for

Burlington Coat Factory Warehouse Corp. as *Amicus Curiae* 5. The Consumer Federation of America tells us that large low-price retailers would not exist without *Dr. Miles;* minimum resale price maintenance, "by stabilizing price levels and preventing low-price competition, erects a potentially insurmountable barrier to entry for such low-price innovators." Brief for Consumer Federation of America as *Amicus Curiae* 5, 7–9 (discussing, *inter alia,* comments by Wal–Mart's founder 25 years ago that relaxation of the *per se* ban on minimum resale price maintenance would be a " 'great danger' " to Wal–Mart's then-relatively-nascent business). See also Brief for American Antitrust Institute as *Amicus Curiae* 14–15, and sources cited therein (making the same point). New distributors, including internet distributors, have similarly invested time, money, and labor in an effort to bring yet lower cost goods to Americans.

This Court's overruling of the *per se* rule jeopardizes this reliance, and more. What about malls built on the assumption that a discount distributor will remain an anchor tenant? What about home buyers who have taken a home's distance ***926** from such a mall into account? What about Americans, producers, distributors, and consumers, who have understandably assumed, at least for the last 30 years, that price competition is a legally guaranteed way of life? The majority denies none of this. It simply says that these "reliance interests ..., like the reliance interests in [*State Oil Co. v.*]*Khan,*, 522 U.S. 3, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997) cannot justify an inefficient rule." *Ante,* at 2724.

The Court minimizes the importance of this reliance, adding that it "is also of note" that at the time resale price maintenance contracts were lawful " 'no more than a tiny fraction of manufacturers ever employed' " the practice. *Ibid.* (quoting Overstreet 6). By "tiny" the Court means manufacturers that accounted for up to " 'ten percent of consumer goods purchases' " annually. *Ante*, at 907, 127 S.Ct. 2705, 168 L.Ed.2d 623. That figure in today's economy equals just over $300 billion. ****2736** See Dept. of Commerce, Bureau of Census, Statistical Abstract of the United States: 2007, p. 649 (126th ed.) (over $3 trillion in U.S. retail sales in 2002). Putting the Court's estimate together with the Justice Department's early 1970's study translates a legal regime that permits all resale price maintenance into retail bills that are higher by an average of roughly $750 to $1,000 annually for an American family of four. Just how much higher retail bills will be after the Court's decision today, of course, depends upon what is now unknown, namely, how courts will decide future cases under a "rule of reason." But these figures indicate that the amounts involved are important to American families and cannot be dismissed as "tiny."

Sixth, the fact that a rule of law has become "embedded" in our "national culture" argues strongly against overruling. *Dickerson v. United States,* 530 U.S. 428, 443–444, 120 S.Ct. 2326, 147 L.Ed.2d 405 (2000). The *per se* rule forbidding minimum resale price maintenance agreements has long been "embedded" in the law of antitrust. It involves price, the economy's " 'central nervous system.' " ***927** *National Soc. of Professional Engineers,* 435 U.S., at 692, 98 S.Ct. 1355

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(quoting *Socony–Vacuum Oil,* 310 U.S., at 226, n. 59, 60 S.Ct. 811). It reflects a basic antitrust assumption (that consumers often prefer lower prices to more service). It embodies a basic antitrust objective (providing consumers with a free choice about such matters). And it creates an easily administered and enforceable bright line, "Do not agree about price," that businesses as well as lawyers have long understood.

The only contrary *stare decisis* factor that the majority mentions consists of its claim that this Court has "[f]rom the beginning ... treated the Sherman Act as a common-law statute," and has previously overruled antitrust precedent. *Ante,* at 2720, 2721 – 2722. It points in support to *State Oil Co.* v. *Khan,* 522 U.S. 3, 118 S.Ct. 275, 139 L.Ed.2d 199 (1997), overruling *Albrecht v. Herald Co.,* 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968), in which this Court had held that *maximum* resale price agreements were unlawful *per se,* and to *Sylvania,* overruling *United States v. Arnold, Schwinn & Co.,* 388 U.S. 365, 87 S.Ct. 1856, 18 L.Ed.2d 1249 (1967), in which this Court had held that producer-imposed territorial limits were unlawful *per se*.

The Court decided *Khan,* however, 29 years after *Albrecht*—still a significant period, but nowhere close to the century *Dr. Miles* has stood. The Court specifically noted the *lack* of any significant reliance upon *Albrecht*. 522 U.S., at 18–19, 118 S.Ct. 275 (*Albrecht* has had "little or no relevance to ongoing enforcement of the Sherman Act"). *Albrecht* had far less support in traditional antitrust principles than did *Dr. Miles*. Compare, *e.g.,* 8 Areeda & Hovenkamp ¶ 1632, at 316–328 (analyzing potential harms of minimum resale price maintenance), with *id.,* ¶ 1637, at 352–361 (analyzing potential harms of maximum resale price maintenance). See also, *e.g.,* Pitofsky 1490, n. 17. And Congress had nowhere expressed support for *Albrecht's* rule. *Khan, supra,* at 19, 118 S.Ct. 275.

In *Sylvania,* the Court, in overruling *Schwinn,* explicitly distinguished *Dr. Miles* on the ground that while Congress had "recently ... expressed its approval of a *per se* analysis of vertical price restrictions" by repealing the Miller–Tydings ***928** and McGuire Acts, "[n]o similar expression of congressional intent exists for nonprice restrictions." 433 U.S., at 51, n. 18, 97 S.Ct. 2549. Moreover, the Court decided *Sylvania* only a decade after *Schwinn*. And it based its overruling on a generally perceived need to avoid "confusion" in the ****2737** law, 433 U.S., at 47–49, 97 S.Ct. 2549, a factor totally absent here.

The Court suggests that it is following "the common-law tradition." *Ante,* at 2724. But the common law would not have permitted overruling *Dr. Miles* in these circumstances. Common-law courts rarely overruled well-established earlier rules outright. Rather, they would over time issue decisions that gradually eroded the scope and effect of the rule in question, which might eventually lead the courts to put the rule to rest. One can argue that modifying the *per se* rule to make an exception, say, for new entry, see Pitofsky 1495, could prove consistent with this approach. To swallow up a century-old precedent, potentially affecting many billions of dollars of sales, is not. The reader should compare today's "common-law" decision with Justice Cardozo's decision in *Allegheny College v. National*

Chautauqua Cty. Bank of Jamestown, 246 N.Y. 369, 159 N.E. 173 (1927), and note a gradualism that does not characterize today's decision.

Moreover, a Court that rests its decision upon economists' views of the economic merits should also take account of legal scholars' views about common-law overruling. Professors Hart and Sacks list 12 factors (similar to those I have mentioned) that support judicial "adherence to prior holdings." They all support adherence to *Dr. Miles* here. See H. Hart & A. Sacks, The Legal Process 568–569 (W. Eskridge & P. Frickey eds.1994). Karl Llewellyn has written that the common-law judge's "conscious reshaping" of prior law "must so move as to hold the degree of movement down to the degree to which need truly presses." The Bramble Bush 156 (1960). Where here is the pressing need? The Court notes that the FTC argues here in favor of a rule of reason. See *ante,* at 2720 – 2721. But both Congress and the FTC, ***929** unlike courts, are well equipped to gather empirical evidence outside the context of a single case. As neither has done so, we cannot conclude with confidence that the gains from eliminating the *per se* rule will outweigh the costs.

In sum, every *stare decisis* concern this Court has ever mentioned counsels against overruling here. It is difficult for me to understand how one can believe both that (1) satisfying a set of *stare decisis* concerns justifies over-ruling a recent constitutional decision, *Wisconsin Right to Life, Inc.,* 551 U.S., at 499 – 503, 127 S.Ct. 2652, 2684 – 2686, 2007 WL 1804336 (SCALIA, J., joined by KENNEDY and THOMAS, JJ., concurring in part and concurring in judgment), but (2) failing to satisfy any of those same concerns nonetheless permits overruling a longstanding statutory decision. Either those concerns are relevant or they are not.

* * *

The only safe predictions to make about today's decision are that it will likely raise the price of goods at retail and that it will create considerable legal turbulence as lower courts seek to develop workable principles. I do not believe that the majority has shown new or changed conditions sufficient to warrant overruling a decision of such long standing. All ordinary *stare decisis* considerations indicate the contrary. For these reasons, with respect, I dissent.

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MAGNESS PETROLEUM COMPANY, Plaintiff and Appellant,
v.
WARREN RESOURCES OF CALIFORNIA, INC., et al.,
Defendants and Respondents.

No. B156183.
Court of Appeal, Second District, California.
Nov. 18, 2002.

SUMMARY

The trial court denied a joint venturer's petition to compel arbitration before the American Arbitration Association (AAA) of its dispute initiated against its partner, and instead the court granted defendant's petition for arbitration before a retired judge associated with Judicial Arbitration and Mediation Services, Inc. The joint venture agreement required arbitration of the current dispute before AAA. However, the parties had stipulated in writing to arbitrate an earlier dispute before the retired judge. During pendency of the earlier arbitration, the parties orally agreed to the retired judge's jurisdiction over all future disputes. (Superior Court of Los Angeles County, No. BS071728, Alan G. Buckner, Judge.)

The Court of Appeal reversed the order denying plaintiff's petition to compel arbitration before the AAA and remanded to the trial court with directions to vacate its order and enter a new order granting plaintiff's petition and denying defendant's petition. The court held that an oral modification of a written agreement to arbitrate is not specifically enforceable, and the trial court therefore erred in denying plaintiff's petition. Arbitration agreements must be in writing, and although Code Civ. Proc., § 1280, subd. (f), allows a written agreement to be extended or renewed by an oral agreement, a modification is not an extension or renewal. Further, there were no circumstances in this case, such as estoppel or waiver, justifying an exception to the rule that arbitration agreements must be in writing. (Opinion by Boland, J., with Cooper, P. J., and Rubin, J., concurring.)

HEADNOTES

Classified to California Digest of Official Reports

(1a, 1b, 1c)
Arbitration and Award § 6--Arbitration Agreements-- Modification--By Oral Stipulation.
In an action between partners in a ***902** joint venture, the trial court erred in denying plaintiff's petition to compel arbitration before the American Arbitration Association, as the parties' agreement required, and instead granting defendant's petition for arbitration before a retired judge associated with Judicial Arbitration and Mediation Services, Inc., who had heard an earlier dispute between the parties, and the parties orally agreed to the retired judge's jurisdiction over all future disputes. An oral modification of a written agreement to arbitrate is not specifically enforceable. The statutory scheme governing arbitration

agreements (Code Civ. Proc., § 1281 et seq.) does not permit a court to enforce an oral modification of an agreement to arbitrate. Arbitration agreements must be in writing, and although Code Civ. Proc., § 1280, subd. (f), allows a written agreement to be extended or renewed by an oral agreement, a modification is not an extension or renewal. Further, there were no circumstances justifying an exception to the rule that arbitration agreements must be in writing. There was no showing that plaintiff waived, or should be estopped from asserting, its rights under the statute permitting courts to enforce only written agreements to arbitrate, there was no transcript of the proceeding at which counsel purported to have orally stipulated to the retired judge's jurisdiction over all future disputes, and there was no statement in the retired judge's award purporting to reserve jurisdiction over future disputes.

[See 6 Witkin, Cal. Procedure (4th ed. 1997) Proceedings Without Trial, § 490 et seq.; Knight et al., Cal. Practice Guide: Alternative Dispute Resolution (The Rutter Group 2001) ¶ 5:14 et seq.; West's Key Number Digest, Arbitration 🔑 26.]

(2)
Arbitration and Award § 28--Judicial Action on Award--Enforcement-- Where agreement to Arbitrate Was Oral.
Although an oral agreement to arbitrate is not enforceable, the enforcement of agreements to arbitrate is distinct from the enforcement of a written arbitration award. Thus, where the parties have arbitrated and a written award has been made, the courts may enforce the award even if the underlying agreement to arbitrate was oral.

(3)
Arbitration and Award § 6--Arbitration Agreements--Form and Content-- Choice of Arbitrator.
Arbitration is a matter of contract, and the powers of the arbitrator derive from and cannot exceed the contract to arbitrate and the parties' submission to arbitration. This principle applies to the selection of an arbitrator. A selection that is not authorized by the arbitration contract confers no authority on the ***903** person selected. Accordingly, an agreement to utilize a particular arbitrator is no different from the balance of an agreement to arbitrate and is ordinarily enforceable only if it is in writing.

(4)
Arbitration and Award § 5--Arbitration Agreements--Waiver and Estoppel.
Under certain limited circumstances, such as demonstrating waiver, estoppel, or an oral agreement reflected in a written court or other record, courts permit exceptions to the statutory rule that only written agreements to arbitrate may be enforced. Thus, a party may expressly waive rights under the statute that permits courts to enforce only written agreements. In addition, a written agreement not yet signed may be enforceable if the parties orally agree to the proposed written terms with the intention that the oral agreement should thereupon become binding.

COUNSEL

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Hanna & Morton, Edward S. Renwick; Clements, O'Neill, Pierce, Nickens & Wilson and Jesse R. Pierce for Defendants and Respondents.

BOLAND, J.

Summary

This case presents the question whether Magness Petroleum Company and Warren Resources of California, Inc., partners in a joint venture, are required to arbitrate their current dispute before the American Arbitration Association (AAA), or before G. Keith Wisot, a retired judge associated with Judicial Arbitration and Mediation Services, Inc. (JAMS). The joint venture agreement required arbitration of the current dispute before AAA. However, the parties stipulated in writing to arbitrate an earlier dispute before Judge Wisot. During pendency of the earlier arbitration, Judge Wisot concluded-based on his recollection and notes of an arbitration session-that the parties orally agreed to his jurisdiction over all future disputes.

We conclude an oral modification of a written agreement to arbitrate is not specifically enforceable, and the trial court therefore erred in denying the ***904** petition of Magness Petroleum Company to compel arbitration before AAA in accordance with the written agreement of the parties.

Factual and Procedural Background

Magness Petroleum Company is a joint venturer with Warren Resources of California, Inc., and several related entities under the terms of a written agreement. The joint venture relates to a multimillion-dollar drilling program for the production of oil and gas in an oilfield known as the Wilmington Town Unit. Disputes arose within a few months after the joint venture agreement was signed, and the parties have agreed on little since that time. This appeal raises the single question whether an oral agreement to arbitrate the current dispute before Judge Wisot of JAMS is enforceable under Code of Civil Procedure section 1281 et seq. The resolution of this point requires a recitation of circumstances surrounding the arbitration of previous disputes between the parties.

1. *The first dispute.*

Magness sued Warren in September 1999, asserting claims for breach of contract, dissolution of the joint venture, an accounting and declaratory relief. Warren sought an order compelling arbitration. The arbitration clause in the joint venture agreement stated that any dispute was to be "determined and settled by binding arbitration in the State of California, pursuant to the rules of the American Arbitration Association then in effect."

On December 2, 1999, the parties through counsel entered into a written "Stipulation and Agreement To Arbitrate." In that document, the parties agreed to submit to binding arbitration "the various claims, disputes and controversies which have arisen between [them] with respect to or arising from these agreements and which will be presented at the arbitration hearing, including without limitation, those referenced in the Complaint, and hereby appoint The

Honorable Keith G. Wisot (Ret.) as the neutral arbitrator to decide all of the disputes hereby submitted, to make a final determination as to all such disputes and to make his award as provided in this Stipulation and Agreement."

Hearings were held in January and February 2000, with final arguments on February 28, 2000. Judge Wisot rendered his findings orally on March 3, 2000. The parties submitted proposed modifications to the findings, and the arbitrator signed an interim award on June 19, 2000. Accounting issues were submitted to Arthur Andersen, which issued a report on November 17, 2000. After further briefing, a hearing and argument on the accounting issues, ***905** Judge Wisot issued a final award on February 19, 2001. In that award, the arbitrator found the joint venture was valid and enforceable, declared various rights and duties of the parties under the joint venture agreement, resolved accounting claims with a net award to Warren, and made the following reservation of jurisdiction: "The Arbitrator further reserves jurisdiction, pursuant to the parties' December 2, 1999 Stipulation and Agreement to Arbitrate, to make appropriate Orders to implement this Final Award, including Injunctive Order, as may be necessary."

2. *The second dispute.*

On May 19, 2000, a month before the interim award and nine months before the final award in the first dispute, Warren filed a document with JAMS styled as a complaint for declaratory judgment, application for temporary restraining order and application for preliminary injunction. Warren's complaint was filed with the same caption and case number as the pending first dispute. Warren sought a declaratory judgment that Magness had no right to drill any wells other than joint venture wells on the Wilmington Town Unit, and an order restraining Magness from drilling three nonjoint venture wells.

Magness responded to Warren's complaint with a motion to transfer the complaint to AAA or to dismiss it, and with an opposition on the merits, indicating in each that it was "specially appearing." Magness argued the first dispute had been tried and submitted, and the December 2, 1999 Stipulation and Agreement To Arbitrate did not cover any other disputes.

On June 6, 2000, Judge Wisot denied Warren's request for a temporary restraining order, and ordered the parties to show cause why the complaint should not be dismissed or, in the alternative, why a preliminary injunction should not issue. The show cause hearing was calendared for July 7, 2000. In the June 6 order, Judge Wisot stated the order was made pursuant to the December 2, 1999 written stipulation, and "FURTHER PURSUANT to the STIPULATION OF THE PARTIES entered between the parties and in the notes of the arbitrator on February 28, 2000 providing that the arbitrator shall retain jurisdiction over future disputes if the Joint Venture Agreement between the parties is not dissolved ...." ***906**

At the hearing on July 7, 2000, Judge Wisot denied Magness's motion to dismiss.[1] He then denied Warren's request for a preliminary injunction as moot, since Magness had no present intent to drill the wells. Warren then withdrew its complaint without prejudice. Judge Wisot observed that, "having determined that I do have jurisdiction for further disputes

for the various disputes that may arise under the joint venture agreement, ... I've made that determination, [and] will await some future dispute."

1 At the hearing on July 7, 2000, and in a supporting declaration, Magness's counsel stated that in closing arguments on February 28, 2000, he had urged dissolution of the joint venture and retention of jurisdiction by Judge Wisot over the dissolution. Judge Wisot stated: "That is not the way I heard it on February 28, and that is not what I entered in my notes. [¶] And when I reflect on that, it seems to me that if I did determine that the joint venture was to be dissolved, then there is what the law calls inherent power to make orders and enforcement. [¶] ... [¶] So I'm respectful of the limitations of my authority, but I'm not respectful of a change in the position of a party that was clearly identified on February 28, to be a stipulation to retain jurisdiction in the event that the joint venture is not dissolved. [¶] That would have been a new feature of vesting jurisdiction that would have given meaning to the party's December 2, 1999 stipulation of the various disputes. And that's what I took it to be."

3. *The current dispute.*

On August 8, 2001, almost six months after issuance of the final award in the first dispute, Magness filed a demand for arbitration and statement of claim with AAA, seeking dissolution of the joint venture and a final accounting, or in the alternative declaratory relief as to drilling rights of the parties. Warren then filed a petition to compel arbitration before Judge Wisot. Magness opposed the petition and filed a counterpetition to compel arbitration before AAA.

A hearing was held in the trial court on November 20, 2001. On January 3, 2002, Warren's petition was granted and Magness's petition was denied. The court recited the finding in Judge Wisot's June 6, 2000 order that the parties stipulated on February 28, 2000, to his jurisdiction over future disputes. The court found that "the fact and effect of the parties' 28 February 2000 Stipulation, vesting continuing jurisdiction in Judge Wisot, is clearly evidenced" by Judge Wisot's statements and colloquies with counsel for Magness at the July 7, 2000 hearing. (See, e.g., fn. 1, *ante*.) The court also cited Judge Wisot's reservation of jurisdiction in the final award (quoted *ante*).

Magness filed both this appeal and a petition for a writ prohibiting enforcement of the trial court's order compelling arbitration before JAMS. We previously issued a writ of supersedeas staying the portion of the trial court's order compelling arbitration before Judge Wisot of JAMS, and denied Warren's motion to dismiss the appeal. ***907**

Discussion

The parties differ regarding the issue presented to this court for decision. Warren states the question is whether substantial evidence supports the trial court's finding of an oral stipulation to Judge Wisot's jurisdiction to hear future disputes. Magness concedes the trial court found an oral stipulation. However, it argues the stipulation was ineffective as a

matter of law, because it was not placed on the record, failed to conform to minimum legal requirements for a valid stipulation, and cannot operate to modify the written agreement between the parties.[2] (1a) We believe the question is one of law: whether an oral agreement to arbitrate future disputes before a particular arbitrator may be enforced by the court on a petition to compel arbitration. We conclude it may not.

2 The only written agreements to arbitrate are in the joint venture agreement, which calls for arbitration under AAA rules, and the December 2, 1999 stipulation. The latter was specifically confined to disputes that would be "presented at the arbitration hearing" and were "hereby submitted" to Judge Wisot, for "a final determination as to all such disputes" and for "his award as provided in this Stipulation and Agreement." Warren does not argue that either of these writings constitutes an agreement to arbitrate the current dispute before Judge Wisot.

1. *The statutory scheme on its face does not permit the court to enforce an oral agreement to arbitrate future disputes before Judge Wisot, even where the oral agreement modifies a written agreement.*

An oral agreement to arbitrate is not ordinarily enforceable. The statutory scheme for the enforcement of arbitration agreements applies only to written agreements. (Code Civ. Proc., § 1281 et seq.) (2)**(See fn. 3)** The statute expressly requires a court to order arbitration if it finds an agreement exists, "[o]n petition of a party to an arbitration agreement alleging the existence of a written agreement to arbitrate a controversy and that a party thereto refuses to arbitrate such controversy ...." (Code Civ. Proc., § 1281.2; *Law Offices of Ian Herzog v. Law Offices of Joseph M. Fredrics* (1998) 61 Cal.App.4th 672, 677 [71 Cal.Rptr.2d 771] ["the statutes permit the courts to specifically enforce only written agreements to arbitrate"].)[3] (1b) Moreover, the statute expressly describes the circumstances under which a written agreement to arbitrate is deemed to include an oral or implied provision. The term ***908** "written agreement" "shall be deemed to include a written agreement which has been extended or renewed by an oral or implied agreement." (Code Civ. Proc., § 1280, subd. (f).)

3 The enforcement of agreements to arbitrate is distinct from the enforcement of a written arbitration award. Where the parties have arbitrated and a written award has been made, the courts may enforce the award even if the underlying agreement to arbitrate was oral. (*Law Offices of Ian Herzog v. Law Offices of Joseph M. Fredrics, supra*, 61 Cal.App.4th at p. 677 [distinguishing between statutory provisions governing the specific enforcement of a written agreement to arbitrate (§§ 1281-1281.95) and provisions governing enforcement of written awards in disputes which were arbitrated based on either oral or written agreements (§§ 1280, subd. (b), 1285-1287.6)].)

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We see no basis in those words, nor has one been discovered in case law, for interpreting the statutory definition of "written agreement" to include an oral agreement revising or modifying a written agreement that has not expired. [4] First, the statute on its face addresses only a written agreement that has been "extended or renewed" by an oral agreement. No cases specifically construe this provision. However, the ordinary meaning of "extend" is "lengthen or make larger in space or time." (Oxford American Dict. of Current English (1999) p. 274.) Similarly, "renew" is defined as "revive; make new again; restore to the original state." (*Id.* at p. 677.) Neither of these definitions, nor any secondary definitions of either word, leave any room to argue that either word also means "modify," "revise" or "change." Second, the cases that cite Code of Civil Procedure section 1280, subdivision (f), do not support an interpretation that would allow oral modifications other than extensions or renewals of the original agreement. The cases are few and none are directly on point, but they have one thing in common: they uniformly involve an arbitration agreement that has expired or has been terminated, and address the question whether there was an oral or implied extension or renewal of the expired or terminated written agreement. [5] In short, the statutory definition, and the cases citing it, provide no support for the proposition that a court may enforce an oral modification of a written ***909** agreement to arbitrate. The only oral agreements enforceable under the statute are oral agreements to extend or renew an expired agreement, not oral agreements to modify an existing written agreement.

4 Warren does not argue that this section of the statute applies in this case. The point is addressed only to ensure a complete analysis.

5 There are three cases:
1. In *Berman v. Renart Sportswear Corp.* (1963) 222 Cal.App.2d 385 [35 Cal.Rptr. 218], both parties admitted the existence of a written agency contract for the period ending October 31, 1962, with an arbitration clause. The dispute, however, was over an alleged subsequent oral agency agreement. The defendant denied any agreement, but contended that if there was one, it was an oral extension of the earlier written agreement and included the arbitration clause. The trial court correctly denied the defendant's petition for an order directing arbitration, because defendant's petition did not positively assert any extension of the original written contract, merely stating there were "alleged" extensions or renewals of the contract. Without a positive position by defendant, the trial court could not determine whether a contract to arbitrate existed. (*Id.* at p. 389.) The court, after quoting Code of Civil Procedure section 1280, subdivision (f), observed that "the existence of such an oral extension is still an essential prerequisite to arbitration." (*Berman,* at p. 388.)
2. In *Paud v. Alco Plating Corp.* (1971) 21 Cal.App.3d 362 [98 Cal.Rptr. 706], the employer contended the arbitrator exceeded his jurisdiction

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by awarding vacation pay accruing after the expiration of a collective bargaining agreement. The court cited Code of Civil Procedure section 1280, subdivision (f), and pointed out there was evidence suggesting an oral or implied agreement between the employer and employees to extend or renew the written agreement, and the trial court properly referred that question to the arbitrator. The court said it was "up to [the arbitrator] to decide the extent to which the oral or implied agreements extended the right to arbitration beyond the termination of the written agreement." (21 Cal.App.3d at p. 369.)

3. In *Ajida Technologies, Inc. v. Roos Instruments, Inc.* (2001) 87 Cal.App.4th 534, 545 [104 Cal.Rptr.2d 686], the court held that "a party's contractual duty to arbitrate disputes may survive termination of the agreement giving rise to that duty." The question was one of first impression, and one of the sources of guidance cited by the court was the statutory scheme recognizing that written agreements to arbitrate may be extended or renewed by oral or implied agreement. (*Ibid.*) The court upheld an arbitral award, concluding the arbitrators did not exceed their authority in extending the arbitration and fee provisions from the parties' terminated contract to future controversies. (87 Cal.App.4th at p. 537.) The court concluded the challenged provisions on future dispute resolution were "rationally drawn from the parties' agreement as interpreted in the arbitration proceeding," and "it is not irrational to extend its operation to controversies arising from the very award that interprets the agreement." (*Id.* at p. 544.)

Warren contends the oral stipulation may be enforced because it was not an oral agreement to arbitrate, but was merely an oral agreement to use a particular arbitrator. It asserts that nothing in the law prevents such an oral agreement. The assertion is not correct. (3) It is well established that arbitration is a matter of contract, and the powers of the arbitrator derive from and cannot exceed the contract to arbitrate and the parties' submission to arbitration. (*American Home Assurance Co. v. Benowitz* (1991) 234 Cal.App.3d 192, 200 [285 Cal.Rptr. 626].) The same principle applies to the selection of an arbitrator. "A selection that is not authorized by the arbitration contract ... confers no authority on the person selected." (*Id.* at pp. 200-201.) Accordingly, an agreement to utilize a particular arbitrator is no different from the balance of an agreement to arbitrate, and is ordinarily enforceable only if it is in writing.

2. *Oral modifications, like oral agreements to arbitrate, may be enforced only under limited circumstances demonstrating waiver, estoppel or agreement reflected in a written record, none of which are present in this case.*

(4) Under certain limited circumstances-demonstrating waiver, estoppel or an oral agreement reflected in a written court or other record-courts permit exceptions to the statutory rule that only written agreements to arbitrate may be enforced. Thus a party may expressly

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waive rights under the statute that permits courts to enforce only written agreements. (*Law Offices of Ian Herzog v. Law Offices of Joseph M. Fredrics, supra*, 61 Cal.App.4th 672, 679-680 [oral stipulation in open court that the parties could be ordered ***910** to arbitration "expressly stat[ed] that no written stipulation was required"; under doctrines of waiver and judicial estoppel, party could not later contend that a written agreement was required].) In addition, a written agreement not yet signed may be enforceable if the parties orally agree to the proposed written terms with the intention that the oral agreement should thereupon become binding. (*Banner Entertainment, Inc. v. Superior Court* (1998) 62 Cal.App.4th 348, 358 [72 Cal.Rptr.2d 598].)[6] Similarly, an oral settlement agreement with arbitration provisions may be formalized in open court. (See *Vandenberg v. Superior Court* (1999) 21 Cal.4th 815, 830 fn. 8 [88 Cal.Rptr.2d 366, 982 P.2d 229]; Knight et al., Cal. Practice Guide: Alternative Dispute Resolution (The Rutter Group 2001) ¶¶ 5:14 to 5:14.4, pp. 5-7 to 5-8 (rev. # 1, 2001).)

6 The court in *Banner Entertainment* specifically noted that "[w]e do not mean to suggest by this recitation of a basic principle of contract law that an enforceable agreement to arbitrate need not be in written form." (*Banner Entertainment, Inc. v. Superior Court, supra*, 62 Cal.App.4th at p. 358, fn. 6.) The critical issue was "whether a *proposed* written agreement is binding on a party who has not signed it." (*Ibid.*) In *Banner Entertainment*, the court concluded the proposed written agreement at issue was not an enforceable agreement to arbitrate. (*Id.* at p. 357.)

(1c) No such circumstances exist in this case. Moreover, no precedent exists for distinguishing between an oral agreement to arbitrate and an oral modification of a written agreement to arbitrate; neither may be enforced on a petition to compel arbitration. Cases involving the oral modification of a written arbitration agreement arise in the context of the confirmation of an arbitration award, not on a petition to compel arbitration, and are resolved on grounds of waiver and estoppel. (*Librascope Inc. v. Precision Lodge No. 1600, Internat. Assn. of Machinists* (1961) 189 Cal.App.2d 71, 75-76 [10 Cal.Rptr. 795] [upholding confirmation of an arbitration award, even though the award was not made within 10 days of the arbitration hearing as required by the collective bargaining agreement; "[t]he time fixed by the submission for making the award may be waived by the parties or they may be estopped by their action or inaction from claiming lapse of time as a termination of the arbiter's authority so that under the particular circumstances an award made after the expiration of the specified time may be valid"];[7] see *Bank of Coronado v. Shreve* (1921) 51 Cal.App. 353, 355-356 [196 P. 787] [party ***911** who participated in hearings after expiration of 30-day period allowed for decision under arbitration agreement was estopped from claiming award was void because not made within thirty days].) In short, if circumstances demonstrate waiver or estoppel, the parties may be held to an oral agreement to extend an arbitrator's authority to decide a controversy previously submitted. However, nothing in *Librascope* or any other case supports the proposition that a court may

compel arbitration under an oral agreement, or an oral modification of a written agreement, in the absence of circumstances demonstrating waiver, estoppel or agreement reflected in a written record. [8]

7 The court found the party against whom the award was rendered had admitted by its conduct that the time for an award had been extended by mutual consent. (*Librascope Inc. v. Precision Lodge No. 1600, Internat. Assn. of Machinists, supra*, 189 Cal.App.2d at p. 76.) Other cases, like *Librascope*, contain general language to the effect that the parties may "alter the terms of the submission even after the original award is delivered," and "may agree on further action by the arbitrators as a continuation of the original submission," and may "enlarge the powers of the arbitrators." (E.g., *Jannis v. Ellis* (1957) 149 Cal.App.2d 751, 753 [308 P.2d 750].) These cases likewise arise on petitions to confirm the award, and in any event involve written agreements. (*Jannis v. Ellis, supra*, 149 Cal.App.2d at pp. 752-754 [arbitrators' authority ends when award is delivered, unless the parties resubmit the matter to them; parties entered into a written stipulation requesting clarification of the award, and petition to confirm award as clarified was timely]; *Goossen v. Adair* (1960) 185 Cal.App.2d 810, 817 [8 Cal.Rptr. 855] [parties may by their voluntary act abandon one arbitration proceeding and proceed with another covering the subject matter embraced in the abandoned proceeding; agreement was in writing].)

8 We recognize that policy considerations militate against permitting a party to renege on an agreement to use a particular arbitrator for future disputes after that arbitrator has indicated a current dispute will be resolved in the other party's favor. This is particularly so where, as here, the arbitrator has accumulated a great deal of information about complex documents and transactions that will also be necessary to the resolution of future disputes between the parties. However, the solution to that problem is a simple one, merely requiring the agreement on the arbitrator to be reduced to writing; lawyers do such things every day. Moreover, the requirement of a writing when parties agree on an arbitrator for future disputes is beneficial for arbitrators and litigants alike. It eliminates an area of potential dispute between the parties, and it avoids any possible appearance of self-interest that may arise when an arbitrator must decide on his or her own jurisdiction over further disputes. Finally, we are also aware that arbitration is intended to be more informal than a court proceeding. However, the underlying agreement to arbitrate, including the agreement upon an arbitrator (*American Home Assurance Co. v. Benowitz, supra*, 234 Cal.App.3d at pp. 200-201), does not partake of that informality, as it is the instrument by which parties waive a fundamental right. Changes in such

agreements, even if they occur during the course of an arbitration, are no less significant.

In sum, we discern no basis in statute or case law, or in the circumstances of this case, for an exception to the statutory rule that oral agreements to arbitrate may not be enforced. There is no showing that Magness waived, or should be estopped from asserting, its rights under the statute permitting courts to enforce only written agreements to arbitrate. There is no transcript of the proceeding at which counsel are said to have orally stipulated to Judge Wisot's jurisdiction over all future disputes,[9] and no statement in Judge ***912** Wisot's final award purporting to reserve jurisdiction over future disputes.[10] We therefore conclude the trial court erred in refusing to enforce Magness's petition to compel arbitration before the AAA in accordance with the parties' written agreement.

9 The oral stipulation was offered by counsel, not by the parties. In court proceedings, attorneys have authority to bind their clients at any stage of a proceeding by an agreement filed with the clerk or entered upon the minutes of the court, "and not otherwise ...." (Code Civ. Proc., § 283.) While our decision is not based on this ground, we see no reason why parties to an arbitration should be bound by their attorneys on the basis of a less than comparable showing, that is, on statements not transcribed in the record of the proceeding. Moreover, an arbitrator is not competent to testify in a subsequent civil proceeding as to any statement made at the prior proceeding. (Evid. Code, § 703.5.) Thus, it is difficult to discern any legal basis upon which to admit the arbitrator's recollection regarding an oral stipulation between the parties in a prior proceeding as evidence that such a stipulation was entered.

10 Warren contends Judge Wisot's June 6, 2000 order, in which he refers to the oral stipulation as a basis for his jurisdiction, was not merely an interim order but rather was "a new award in a new arbitration." Warren makes the same argument with respect to Judge Wisot's denial of Magness's motion to dismiss during the hearing on July 7, 2000. The record belies these claims. The order is a show cause order, and no award was ever issued. Indeed, the claim which precipitated the show cause order was withdrawn at the hearing. Warren also argues that Magness submitted the issue of the arbitrator's jurisdiction over future disputes to Judge Wisot, and is therefore bound by the arbitrator's decision. This argument fails for the same reason; no award was ever issued incorporating that jurisdictional finding.

Disposition

The order denying Magness's petition to compel arbitration before the American Arbitration Association is reversed, and the cause is remanded to the trial court with directions to vacate its order and enter a new order granting Magness's petition and denying

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Warren's petition. Magness is to recover its costs on appeal.

A petition for a rehearing was denied December 17, 2002, and the opinion was modified to read as printed above. ***913**

Cooper, P. J., and Rubin, J., concurred.

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Court of Appeal, First District, Division 5, California.

Claudia MCHENRY,
Plaintiff and Appellant,
v.
Richard A. LUKASKO, et al.,
Defendants and Respondents.

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(Sonoma County Super. Ct. No. SCV–252574)

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Opinion

SIMONS, J.

***1** In this lawsuit alleging the fraudulent transfer of real property, plaintiff Claudia McHenry (Plaintiff) appeals from the judgment issued after a bench trial in favor of defendants Richard A. Lukasko and Alma Lukasko (Defendants).[1] In its statement of decision, the trial court concluded Plaintiff's claims were barred by the applicable statutes of limitations. We affirm.

1 For convenience, we will refer to Defendants individually by their first names. No disrespect is intended.

BACKGROUND[2]

2 We recite only those facts relevant to our resolution of this appeal.

Plaintiff and Richard were divorced in 1997 pursuant to a marital settlement agreement. Richard subsequently married Alma. In June 2002, during postjudgment proceedings between Plaintiff and Richard, Richard declared in a court filing that his only asset was certain real property located in Sonoma County (the Property). In February 2003, Plaintiff obtained an award of approximately $240,000 against Richard for a violation of their marital settlement agreement.

Less than two weeks before the hearing which resulted in Plaintiff's February 2003 award, Defendants executed a grant deed transferring the Property to Alma's brother, Benjamin Wong (the Wong Deed). On the face of the Wong Deed was the handwritten notation, “GIFT.” The Wong Deed was recorded the same day.

In March 2003, Plaintiff recorded an abstract of judgment for her $240,000 award against

Richard. The following month, Plaintiff's attorney at the time, Dennis O'Brien, wrote to two financial institutions which held mortgage liens on the Property. The letters referred to and enclosed the Wong Deed, and indicated that copies of the letters were sent to Plaintiff.[3] At the bench trial in the instant litigation, Plaintiff did not deny receiving copies of these letters, but testified she did not recall seeing them and she did not always read her mail. O'Brien testified that in 2003, he "was exploring" whether the Wong Deed was "a fraudulent transfer." When asked whether anything prevented him from filing a lawsuit for fraudulent transfer at that time, he responded, "Let's just say that what I did or did not do would be the result of communication between myself and my client."

3 The letters asked the banks whether, pursuant to their deeds of trust, they had provided advance consent to the transfer of the Property to Wong and whether they were requiring immediate payment in full on the loans. Apparently, the banks never responded.

Title to the Property was transferred again in the following years. Defendants divorced in the fall of 2003 and their September 2003 marital settlement agreement distributed the Property to Alma. In October 2003, Wong executed a grant deed transferring the Property to Alma. In December 2007, after Defendants married each other for the second time, Alma transferred title to the Lukasko Family Trust.

In 2012, Plaintiff filed the instant lawsuit against Defendants. She asserts two causes of action: violation of the Uniform Fraudulent Transfer Act (UFTA; Civ. Code[4] §§ 3439 et seq.)[5] and cancellation (§ 3412).[6] Following a bench trial, the trial court issued a lengthy statement of decision finding, inter alia, Plaintiff's causes of action accrued in April 2003, when Plaintiff had knowledge (or imputed knowledge) of the Wong Deed and reason to suspect the transfer was fraudulent; Plaintiff's 2012 lawsuit was therefore barred by the applicable four-year statutes of limitations; and Plaintiff was not entitled to equitable relief from the statutes of limitations. Judgment against Plaintiff issued accordingly.

4 All undesignated section references are to the Civil Code.

5 "A transfer made or obligation incurred by a debtor is voidable as to a creditor whose claim arose before the transfer was made or the obligation was incurred if the debtor made the transfer or incurred the obligation without receiving a reasonably equivalent value in exchange for the transfer or obligation and the debtor was insolvent at that time or the debtor became insolvent as a result of the transfer or obligation." (§ 3439.05, subd. (a).) Effective January 1, 2016, the UFTA was renamed the Uniform Voidable Transactions Act. (Stats. 2015, ch. 44, § 2–3.)

6 "A written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application,

be so adjudged, and ordered to be delivered up or canceled." (§ 3412.)

DISCUSSION

I. *Summary Judgment Orders*

***2** Plaintiff first argues certain factual findings in the statement of decision improperly conflict with findings contained in two previous orders in this action—issued by a different bench officer—denying Defendants' motions for summary judgment based on the statute of limitations. We reject the challenge.

Plaintiff first argues the summary judgment orders constitute law of the case. " 'The law of the case doctrine states that when, in deciding an appeal, an appellate court "states in its opinion a principle or rule of law necessary to the decision, that principle or rule becomes the law of the case and must be adhered to throughout its subsequent progress, both in the lower court and upon subsequent appeal." ' " (*Cerna v. City of Oakland* (2008) 161 Cal.App.4th 1340, 1354.) The trial court's summary judgment orders cannot be law of the case because "the doctrine of law of the case applies only to appellate court decisions." (*AT & T Communications, Inc. v. Superior Court* (1994) 21 Cal.App.4th 1673, 1680.) Defendants sought writ relief from the summary judgment orders; in both writ proceedings, this court issued summary denials finding writ relief inappropriate.[7] "A summary denial of a petition for writ of mandate is not a denial on the merits and does not become law of the case." (*Bank of America, N.A. v. Superior Court* (2013) 212 Cal.App.4th 1076, 1097.) Therefore, neither the summary judgment orders nor this court's orders denying writ relief are law of the case.

7 On our own motion, we take judicial notice of the records in these prior writ proceedings.

Plaintiff also cites authorities providing one trial court bench officer cannot vacate the decision of another bench officer. (E.g., *People v. Saez* (2015) 237 Cal.App.4th 1177, 1184 [" 'the power of one [trial court] judge to vacate an order made by another judge is limited' "].) The statement of decision issued after a bench trial did not vacate the orders denying summary judgment. "All that is needed in an order denying a motion for summary judgment or adjudication is (1) specification of one or more material facts in controversy and (2) specific reference to the conflicting evidence indicating that such triable issue exists. [Citations.] And, of course, an order denying the motion simply establishes the existence of a triable issue of fact. It does not decide the issue." (*Transport Ins. Co. v. TIG Ins. Co.* (2012) 202 Cal.App.4th 984, 1009.) Plaintiff's authorities are therefore inapposite.

II. *Statutes of Limitations*

With one exception discussed below in Part III, Plaintiff does not dispute the trial court's finding that the applicable statutes of limitations were four years (see § 3439.09; Code Civ. Proc., § 343). Her primary contentions are the trial court erred in finding (1) the causes of action for the Wong Deed transfer accrued in April 2003, when Plaintiff discovered or had reason to discover the Wong Deed was fraudulent;[8] (2) Plaintiff was not

entitled to equitable tolling; and (3) Plaintiff was not entitled to equitable estoppel.

8 In the trial court, Plaintiff also contended the subsequent transfers of the Property extended the statutes of limitations. The statement of decision rejected this argument, noting that Richard did not hold title to the Property through the end of the limitations period. To the extent Plaintiff addresses the subsequent transfers in her appellate briefs, her only argument is that the statement of decision conflicted with the orders denying summary judgment. As we have already rejected Plaintiff's only argument on this issue, we need not address it further.

***3** All three of these issues are questions of fact as to which Plaintiff had the burden of proof. (*Cleveland v. Internet Specialties West, Inc.* (2009) 171 Cal.App.4th 24, 31 [“It is plaintiff's burden to show he was not negligent in failing to discover his injury sooner, and whether he exercised reasonable diligence ‘ “ ‘is a question of fact for the court or jury to decide.’ ” ’ ”]; *Hopkins v. Kedzierski* (2014) 225 Cal.App.4th 736, 745 (*Hopkins*) [“equitable estoppel and equitable tolling present questions of fact”]; *Aguilera v. Heiman* (2009) 174 Cal.App.4th 590, 598 [“[e]quitable tolling requires that three essential elements be satisfied by the party seeking the tolling”]; *Ashou v. Liberty Mutual Fire Ins. Co.* (2006) 138 Cal.App.4th 748, 766 (*Ashou*) [“ ‘ “ ‘[f]our elements must ordinarily be proved to establish an equitable estoppel’ ” ’ ”].)

“ ‘In the case where the trier of fact has expressly or implicitly concluded that the party with the burden of proof did not carry the burden and that party appeals, it is misleading to characterize the failure-of-proof issue as whether substantial evidence supports the judgment.... [¶] Thus, where the issue on appeal turns on a failure of proof at trial, the question for a reviewing court becomes whether the evidence compels a finding in favor of the appellant as a matter of law. [Citations.] Specifically, the question becomes whether the appellant's evidence was (1) “uncontradicted and unimpeached” and (2) “of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding.” [Citation.]’ [Citation.] The appellate court cannot substitute its factual determinations for those of the trial court; it must view all factual matters most favorably to the prevailing party and in support of the judgment. [Citation.] ‘ “All conflicts, therefore, must be resolved in favor of the respondent.” ’ ” (*Dreyer's Grand Ice Cream, Inc. v. County of Kern* (2013) 218 Cal.App.4th 828, 838 (*Dreyer's*).)

A. *Accrual of Plaintiff's Causes of Action*

“ ‘[S]tatutes of limitation do not begin to run until a cause of action accrues.’ [Citation.] ‘[A] cause of action accrues at “the time when the cause of action is complete with all of its elements.” ’ [Citation.] ‘An important exception to the general rule of accrual is the “discovery rule,” which postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. [Citations.] [¶] A plaintiff has reason to discover a cause of action when he or she “has reason at least to suspect a factual

basis for its elements." [Citations.]' [Citation.] A potential plaintiff 'discovers the cause of action when he at least suspects a factual basis, as opposed to a legal theory, for its elements, even if he lacks knowledge thereof —when, simply put, he at least "suspects ... that someone has done something wrong" to him [citation], "wrong" being used, not in any technical sense, but rather in accordance with its "lay understanding." ' " (*Rosas v. BASF Corporation* (2015) 236 Cal.App.4th 1378, 1389.)

The statement of decision found that "Plaintiff had actual or imputed [through her then-attorney] knowledge of the [Wong Deed] on or about April 8, 2003." The statement of decision further found "that the 'Gift' transfer, by [Defendants] of [the Property] to a relative of [Alma], would have caused a reasonable person in Plaintiff's position to suspect that [Defendants] had done something 'wrong' that might adversely affect her judgment lien against [the Property]." The trial court concluded the applicable 4–year statutes of limitations thus expired in April 2007. [9]

[9] The trial court also found Plaintiff's UFTA claim was barred by the 7–year statute of repose. (§ 3439.09, subd. (c) ["Notwithstanding any other provision of law, a cause of action under this chapter with respect to a transfer or obligation is extinguished if no action is brought or levy made within seven years after the transfer was made or the obligation was incurred."].) The parties dispute whether equitable tolling and equitable estoppel apply to statutes of repose. We need not decide the issue because we affirm the trial court's findings that the 4–year statutes of limitations bar the claims and (as discussed *post*) that Plaintiff has not established an entitlement to either doctrine.

***4** Plaintiff argues neither she nor her attorney [10] could have suspected the Wong Deed was a fraudulent transfer unless the financial institutions holding mortgages on the Property answered the letters from Plaintiff's counsel. (See fn. 3, *ante*.) We disagree. The trial court's findings are supported by the evidence. That Plaintiff's counsel did not learn whether the banks had provided advance consent for the transfer of the Property to Wong or whether they were requiring immediate payment in full on the loans does not "compel[ ] a finding in favor of the appellant as a matter of law." (*Dreyer's, supra,* 218 Cal.App.4th at p. 838.)

[10] Plaintiff does not challenge the trial court's finding imputing to her "O'Brien's [her then-attorney] knowledge of [the Wong Deed] and his belief it was fraudulent, as well as everything that a reasonable investigation would have disclosed ...."

B. *Equitable Tolling*

"[E]quitable tolling may apply to toll the statute of limitations on a claim during the period in which a plaintiff pursues another remedy for the harm that the plaintiff suffered." (*Hopkins, supra,* 225 Cal.App.4th at p. 746.) "[T]o prove the applicability of the equitable tolling doctrine, a party must establish 'three elements: "timely notice, and lack of prejudice, to the

defendant, and reasonable and good faith conduct on the part of the plaintiff." ' " (*Id.* at p. 747.) Courts have also applied equitable tolling when " 'the plaintiff uses reasonable care and diligence in attempting to learn the facts that would disclose the defendant's fraud or other misconduct.' [Citation.] .... 'To establish that equitable tolling applies, a plaintiff must prove the following elements: fraudulent conduct by the defendant resulting in concealment of the operative facts, failure of the plaintiff to discover the operative facts that are the basis of its cause of action within the limitations period, and due diligence by the plaintiff until discovery of those facts.' " (*Sagehorn v. Engle* (2006) 141 Cal.App.4th 452, 460–461, fn. omitted.)

The statement of decision rejected Plaintiff's equitable tolling claim, finding, inter alia, "Plaintiff failed to establish that she 'use[d] reasonable care and diligence in attempting to learn the facts that would disclose the defendant's fraud or other misconduct' ...." Plaintiff points to an email sent from Alma to the adult children of Plaintiff and Richard in February 2007 (two months before the 4–year limitations period expired), in which Alma states Plaintiff's recorded abstract of judgment has prevented Defendants from refinancing their mortgages on the Property; in this email, Alma refers to the Property as "our [Defendants'] property." One of the children forwarded this email to Plaintiff. Plaintiff argues this email constitutes fraudulent concealment of the fact that Richard no longer held title to the Property. Even assuming (without deciding) that is the case, the evidence has no bearing on the trial court's finding that Plaintiff did not establish she exercised reasonable diligence—one of the elements of equitable tolling—and therefore does not "compel[ ] a finding in favor of the appellant as a matter of law." (*Dreyer's, supra,* 218 Cal.App.4th at p. 838.)

C. *Equitable Estoppel*

" ' " 'Four elements must ordinarily be proved to establish an equitable estoppel: (1) The party to be estopped must know the facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting the estoppel had the right to believe that it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; and, (4) he must rely upon the conduct to his injury.' " ' " (*Ashou, supra,* 138 Cal.App.4th at pp. 766–767.)

***5** The statement of decision describes Plaintiff's argument that Alma's February 2007 email, described above, " 'lulled [Plaintiff] into a false sense of security.' " The trial court found Plaintiff failed to establish that Alma intended for Plaintiff to rely on her email (which was not sent to Plaintiff). The trial court also found Plaintiff failed to prove she relied on the email to her injury: "Plaintiff testified that she did not change her position based on the email. Plaintiff's position remained unchanged through the end of the limitations period several weeks later and for many years thereafter." To the extent Plaintiff continues to rely on Alma's 2007 email on appeal, she fails to demonstrate any error in the trial court's findings.

Plaintiff also points to correspondence from Richard or his counsel to Plaintiff's counsel in 2011. " ' " 'Equitable estoppel ... addresses ... the circumstances in which a party will

be estopped from asserting the statute of limitations as a defense to an admittedly untimely action because his conduct has induced another into forbearing suit *within the applicable limitations period*.' " ' " (*Hopkins, supra,* 225 Cal.App.4th at p. 755, fn. 14, italics added.) Conduct taking place after the limitations period expired cannot have induced Plaintiff into forbearing suit during the limitations period. (See Turner & Banke, Cal. Practice Guide: Civil Procedure Before Trial, Statutes of Limitations (The Rutter Group 2017) ¶ 7:43 ["The conduct that gives rise to the estoppel must occur *before expiration* of the statute of limitations."].)

Finally, Plaintiff points to Alma's failure to file a quiet title action to remove the cloud on title created by Plaintiff's recorded abstract. Plaintiff points to no evidence that Alma intended Plaintiff to rely on her failure to file a quiet title action to delay the instant lawsuit, or that Plaintiff did so rely. The bare fact that Alma has not filed such an action does not "compel[ ] a finding in favor of the appellant as a matter of law." (*Dreyer's, supra,* 218 Cal.App.4th at p. 838.)

III. *Additional Arguments*

Plaintiff argues the Wong Deed was void or voidable. Her brief asserts, "there is no statute of limitations because time does not validate a void act." Plaintiff cites no authority for this proposition and has therefore forfeited the argument. (*Cahill v. San Diego Gas & Electric Co.* (2011) 194 Cal.App.4th 939, 956.) Even if it were not forfeited, we would reject it. As explained at length in *Walters v. Boosinger* (2016) 2 Cal.App.5th 421, "[c]ourts have ... concluded that an action to cancel a deed on the ground that the deed is void is subject to a statute of limitations." (*Id.* at p. 428; see also *id.* at pp. 428–433.) Plaintiff's arguments regarding the voidness or voidability of the Wong Deed are thus irrelevant, as the statutes of limitations bar her claims.

Plaintiff argues (1) Defendants' community is liable for Richard's debt to Plaintiff, and (2) when Defendants divorced in 2003, the marital settlement agreement's division of property was unfair. We express no opinion on these issues, neither of which is raised by the action before us.

Plaintiff contends she has standing to assert the cancellation claim. We need not decide the issue because, assuming she has standing, the claim is barred by the statute of limitations.

Finally, Plaintiff argues that if her claims are barred by the statutes of limitations, and Alma's quiet title claim is also barred by the statute of limitations (an issue on which we express no opinion), then "there is effectively no resolution" to the parties' dispute. As Plaintiff concedes, this "is not an issue on this appeal," and we decline to address it.

DISPOSITION

The judgment is affirmed. Defendants shall recover their costs on appeal.

We concur.

JONES, P.J.

BRUINIERS, J.

All Citations

Not Reported in Cal.Rptr., 2018 WL 2112411

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186 Cal.App.2d 200, 8 Cal.Rptr. 789, 41 Lab.Cas. P 50,095

MEAT CUTTERS LOCAL NUMBER 439, Appellant,
v.
OLSON BROTHERS, INC. (a Corporation), Respondent.

Civ. No. 24750.
District Court of Appeal, Second District, Division 1, California.
Nov. 7, 1960.

HEADNOTES

(1)
Arbitration § 50--Award--Appeal.
Courts are bound by an arbitrator's findings of fact, and the sufficiency of the evidence is not a proper subject of review.

See **Cal.Jur.2d,** Arbitration and Award, §§ 52, 53.

(2)
Arbitration § 37.1--Award--Court Review.
In the absence of some limiting clause in the arbitration agreement, the merits of an award, either on questions of fact or of law, may not be reviewed except as provided by statute.

(3)
Arbitration § 18--Arbitrators--Powers.
An arbitrator's powers are broad, but he cannot bind the parties with an award based on an issue or dispute not properly submitted to him.

(4)
Arbitration § 18--Arbitrators--Powers.
An arbitrator's jurisdiction or authority to act is derived from, and limited by, the arbitration agreement or submission, and such limitation applies to submissions directed by judicial order under Code Civ. Proc., § 1282, as well as to voluntary agreements to arbitrate.

(5)
Arbitration § 43--Award--Modification.
To enforce the limitation on an arbitrator's jurisdiction or authority imposed by the terms of the arbitration agreement or submission, a court will modify or vacate an award embracing matters not properly submitted to the arbitrator.

(6)
Arbitration § 37.1--Award--Court Review.
The limitation on the jurisdiction or authority of an arbitrator to act imposed by the arbitration agreement or submission creates a valid field for judicial interpretation, and it is in the determination of whether a decided issue was properly before an arbitrator, or an issue before him was not decided, that the agreement or order of submission falls under a court's scrutiny.

(7)
Labor § 3a--Collective Bargaining Contracts--Arbitration.
Under an order submitting to arbitration questions as to whether an employee was discharged in violation of a collective bargaining agreement, whether he was entitled to be reinstated with full rights and be paid wages during the period he was discharged,

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and whether he was paid a proper rate of pay for his classification of work, the arbitrator's award providing that the ***201** employee was not discharged in violation of the agreement and that he was entitled to reinstatement to the extent that he was entitled to exercise his seniority rights on the date of his release from work was proper, considering the circumstances of the employee's separation, the parties' negotiations prior to arbitration, the collective bargaining agreement provisions and the true purpose of arbitration procedure, since the submission of the issue of reinstatement implied a determination of the status of the employee's separation, whatever it might be, and the arbitrator could thus determine that the employee had been "laid off" in violation of the terms of the collective bargaining agreement after having decided that the employee had not been wrongfully discharged.

See **Cal.Jur.2d,** Labor, § 63 et seq.; **Am.Jur.,** Labor, § 96 et seq.

SUMMARY

APPEAL from orders of the Superior Court of Los Angeles County vacating portion of an arbitration award and confirming award as partially vacated. V. P. Lucas, Judge. Reversed with directions.

COUNSEL
David Sokol for Appellant.
Gibson, Dunn & Crutcher and William G. Tucker for Respondent.

LILLIE, J.

This appeal is from two orders vacating that portion of an arbitration award entitling an employee to reinstatement and confirming the award as partially vacated, and denying appellant's motion to confirm the award in full.

Pertinent facts, as reflected in the opinion of the arbitrator, relate to the termination of employment by respondent employer of one Guthary, member of appellant union. On November 28, 1958, respondent's plant manager told Guthary there would no longer be any maintenance work at its Fontana plant; Guthary did not ask if any other work which he could perform was available nor did he assert he was entitled to displace any other employee because of his seniority, although there were several employees having less seniority than he doing work of a type within his capabilities. The manager offered Guthary no other job. On December 1, 1958, a representative of appellant union wrote respondent demanding Guthary be reinstated with back pay on the ground his "discharge" was without cause; respondent replied that Guthary's "separation" from its payroll was due solely to economic conditions and did not constitute a discharge. Negotiations between the union representative and respondent followed ***202** and ended when the latter rejected an offer that Guthary would withdraw his pending case before the Labor Commissioner if respondent would agree to arbitrate the issues of differential pay and reinstatement. Two months later Guthary sued respondent in the municipal court for wages under the union contract and penalties under the Labor Code; respondent answered that Guthary had not complied with the grievance and arbitration provisions of the collective bargaining agreement. Thus, relying on section 1282, Code of Civil Procedure, appellant petitioned the superior court for an

order directing arbitration of three issues: the matter of pay differential, the reinstatement of Guthary, and the amount of differential in pay and back wages due him; respondent opposed the petition. The court granted the petition and directed the parties to proceed to arbitration. Although the judgment did not specify the issues to be submitted, the lower court found the following disputes to exist and that appellant was entitled to an order directing arbitration thereon: "(a) Whether or not Milford Guthary was discharged in violation of said Collective Bargaining Agreement; and the remedy therefor; (b) Whether or not Milford Guthary is entitled to be reinstated with full rights and be paid his wages during the period during which he was discharged"; and (c) whether Guthary was paid a proper rate of pay for his classification of work. (Conclusions of law, par. 3.)

After taking evidence and hearing extended argument the arbitrator concluded that Guthary had not been discharged in violation of the collective bargaining agreement (award, par. III); and, although the award does not so declare, found that Guthary had been laid off in violation of the agreement (opinion, November 12, 1959). This latter finding was made in accord with the evidence and provisions of the collective bargaining agreement, relative to the arbitrator's determination of the second submitted issue-whether Guthary was entitled to reinstatement with full rights and back pay. Thus, the award provided in pertinent part: "(a) Milford Guthary was not discharged in violation of the Agreement; (and) (b) Milford Guthary is entitled to reinstatement with full rights and back pay from November 28, 1958, to the extent that he was entitled to exercise his seniority rights on that date." (Award, par. III.)

Contending that the sole issue before the arbitrator relative to Guthary's termination was-whether he had been wrongfully discharged-and that the second submitted issue (his ***203** reinstatement) was predicated entirely upon a finding that he had been discharged in violation of the agreement, and arguing that since the arbitrator found Guthary had *not* been wrongfully discharged he exceeded his power by deciding the issue that in fact he had been laid off in violation of the collective bargaining agreement and thus was entitled to reinstatement, respondent moved the superior court either to modify that portion of the award holding Guthary was entitled to reinstatement and back pay, or to vacate the same, and confirm the award as modified or vacated. Granting the motion, the superior court ordered that portion of the award relative to reinstatement vacated, and confirmed the award as partially vacated.

The question before us is whether the arbitrator made an award on an issue not directed by the court to be submitted to him. Appellant claims that under the superior court's order directing arbitration, the manner in which Guthary was terminated and, if in violation of the collective bargaining agreement his remedy therefor, were issues properly before the arbitrator; respondent urges that the arbitrator, having found Guthary was not wrongfully discharged, then had no power to decide whether he was entitled to reinstatement under any other provision of the collective bargaining agreement.

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(1) Although we do not here have any direct question of factual review, inasmuch as consideration of some of the evidence is necessary to a decision whether the determination of Guthary's termination as a "lay off" under the agreement was implicit in the issue of reinstatement, it should be borne in mind that courts are bound by the arbitrator's findings of fact (*Crofoot v. Blair Holdings Corp.,* 119 Cal.App.2d 156 [260 P.2d 156]); and the sufficiency of the evidence is not a proper subject of review. (*Pacific Vegetable Oil Corp. v. C. S. T., Ltd.,* 29 Cal.2d 228 [174 P.2d 441].) (2) Moreover, in holding that "The merits of the controversy between the parties are not subject to judicial review" (*Pacific Vegetable Oil Corp. v. C. S. T., Ltd., supra,* 29 Cal.2d 228, 233 [174 P.2d 441]), the courts have made it clear that this limitation applies whether the problem raised be one of law or fact (*Sapp v. Barenfeld,* 34 Cal.2d 515, 523 [212 P.2d 233]); and the rule is that "in the absence of some limiting clause in the arbitration agreement, the merits of the award, either on questions of fact or of law, may not be reviewed except as ***204** provided in the statute." (*Crofoot v. Blair Holdings Corp., supra,* 119 Cal.App.2d 156, 186 [260 P.2d 156].)

(3) Unquestionably the powers conferred upon an arbitrator are broad (*Drake v. Stein,* 116 Cal.App.2d 779 [254 P.2d 613]; *Pacific Vegetable Oil Corp. v. C. S. T., Ltd., supra,* 29 Cal.2d 228 [174 P.2d 441]), but it is well established that he cannot bind the parties with an award based on an issue or dispute not properly submitted to him. (*Crofoot v. Blair Holdings Corp.,* 119 Cal.App.2d 156 [260 P.2d 156].) (4) "The arbitrators' jurisdiction or authority to act is derived from, and limited by, the arbitration agreement or submission" (*Bierlein v. Johnson,* 73 Cal.App.2d 728, 733 [166 P.2d 644]), and the limitation applies as well to submissions directed by judicial order under section 1282, Code of Civil Procedure (*Doyle v. Hunt Construction Co.,* 123 Cal.App.2d 51 [266 P.2d 152]), as to voluntary agreements to arbitrate. (5) To enforce this limitation the court will modify or vacate an award embracing matters not properly submitted to the arbitrator. (Code Civ. Proc., § 1289, subd. (b); *Flores v. Barman,* 130 Cal.App.2d 282 [279 P.2d 81]; *Bierlein v. Johnson, supra,* 73 Cal.App.2d 728 [166 P.2d 644].) Thus, in the case at bar, if the arbitrator exceeded his power in determining in connection with the issue of Guthary's reinstatement that there was a "lay off" in violation of the collective bargaining agreement, the action of the lower court was well taken. (*Screen Cartoonists Guild v. Walt Disney Productions,* 74 Cal.App.2d 414 [168 P.2d 983]; *Bierlein v. Johnson, supra,* 73 Cal.App.2d 728 [166 P.2d 644].)

(6) This limitation on the jurisdiction or authority of an arbitrator to act, creates a valid field for judicial interpretation; and it is in the determination of whether a decided issue was properly before the arbitrator or an issue before him was not decided, that the agreement or order of submission falls under the scrutiny of the court. (7) In the instant case, the superior court, granting the petition under section 1282, fixed the scope of arbitration when it framed the issues it directed the parties to submit in its findings of fact and conclusions of law; but we conclude that the strict adherence to the language of the court respondent seeks

to impose here assaults the real purpose of arbitration proceedings and defeats the original intent of both parties to settle the issue of Guthary's separation, whatever its nature, and if in violation of the agreement, the issue of his reinstatement. Considering ***205** the circumstances of Guthary's termination, the negotiations between the parties prior to arbitration, the provisions of the collective bargaining agreement and the true purpose of the arbitration procedure, we interpret as implicit in the issue of reinstatement a determination of the status of Guthary's separation, whatever it might be; and conclude that the arbitrator's finding that Guthary was not wrongfully discharged did not preclude a determination of the issue of reinstatement on any other ground under the agreement.

Respondent, reminding us that it did not voluntarily submit and strenuously objected to arbitration, advances the position that a determination of the "reinstatement" issue was wholly dependent upon a finding that Guthary was wrongfully discharged; and the arbitrator, having found to the contrary, Guthary's reinstatement ceased to be an issue for arbitration. It also complains that up to the day of the hearing Guthary contended his "discharge" was wrongful and respondent was not placed on notice or informed that the arbitrator would consider and determine if there had been a "lay off." Any suggestion that respondent was thus taken by surprise and not then "prepared to litigate any issue other than wrongful discharge" (respondent's brief, p. 13), not only lacks materiality to the sole issue before us, but is without merit in view of the prior lengthy negotiations of the parties, respondent's acknowledged claim at the outset that the "separation" of Guthary was in effect a layoff caused from loss of a job function for economic reasons, and the fact that the matter was argued at length by both parties before, and substantial evidence thereon was received by, the arbitrator (opinion, November 12, 1959, p. 14). Immediately upon the termination of Guthary's employment a controversy arose as to its nature-Guthary claiming it to be a "wrongful discharge," respondent labeling it a "separation" for economic causes (which appears in this instance to actually constitute a "lay off" (opinion, p. 14)); but regardless of what it consisted or whether Guthary ever knew the technical nature of his termination, the undisputed fact remains that he was out of a job, he always believed his release from employment was in violation of the collective bargaining agreement and thus was entitled to reinstatement, and at the outset sought the same with full rights and back pay.

Under the collective bargaining agreement, only specified situations merit reinstatement with full rights and back wages-"dismissal, demotion or lay off" (art. XV (3)). Respondent ***206** at all times contended the "separation," due to economic conditions and actually constituting a "lay off" for lack of work due to loss of a job function, was proper and thus Guthary was not entitled to reinstatement; on the other hand, although up to the hearing he proceeded under the theory that he had been wrongfully discharged, Guthary at all times asserted his right to reinstatement and the real substance of his claim was that his release from employment was not in accord with the collective bargaining agreement and thus he should be reinstated. Both parties knew that the remedy of reinstatement was open

to an employee if his termination constituted a “dismissal” or “lay off” in violation of the agreement (art. XV (3)). It is only too obvious that from the beginning, the matter of “dismissal” and “lay off” had been in the contemplation of the parties; and its consideration by the arbitrator could hardly have found the parties not “prepared to litigate any issue other than wrongful discharge.” Actually, the arbitrator found in accord with respondent's contention-that there was no wrongful discharge and that what it terms a “separation” constituted a “lay off” due to the elimination of a job function, which was right and proper within the prerogative of the employer (art. XIII). Thus, the finding that Guthary's termination constituted a “lay off” was clearly within, not only the issues framed by the superior court, but that submitted by the contention of respondent. However, since certain “prerogatives of Management (are) subject to the grievance provisions set forth” (art. III), it must have been within the contemplation of the parties that if the arbitrator found the “lay off” to be the result of a proper cause, he could, and necessarily would determine if the “lay off” was done in accord with Guthary's seniority benefits guaranteed under the agreement (art. II). The arbitrator found as a fact that it was not in that no proffer of other work within his capabilities was made to Guthary while there were employees within the plant of equal ability.

As to an interpretation of the three issues specified in the superior court's findings of fact and conclusions of law, it may well be that “the remedy therefor” mentioned in the first issue (a) refers solely to “discharge” in violation of the collective bargaining agreement. That remedy under the agreement appears to include reinstatement (art. XV (3)) “if ... such dismissal, demotion or lay off constituted a violation of this article when the Employee shall be reinstated with full rights and shall be paid his wages for the period during which he ***207** was suspended, demoted or dismissed.” Thus what reason would the court have had in adding as a second issue (b)-whether Guthary was entitled to reinstatement-had it not entertained the possibility of a finding that Guthary's “separation” constituted other than a discharge in violation of the agreement? In effect, the court directed the parties to submit these issues-was Guthary discharged in violation of the collective bargaining agreement; if so, what is his remedy; and if not, is he, under the agreement, entitled to reinstatement; and we so read the directive of the superior court even in the light of the use of the term “discharged” in the second issue (b), which we deem only to designate the time period under consideration and as not having to do with the nature of the “separation.”

The authenticity of such interpretation of the scope of arbitration is borne out by the conduct of the parties at the arbitration hearing. Argued extensively by both sides was the question whether the remedies conferred upon the employee by article XV of the collective bargaining agreement for a violation of that article are equally applicable to a “lay off” in violation of article II. The fact that this matter of remedy, subject to an interpretation of the agreement, was strongly controverted by respondent before the arbitrator is persuasive in our determination that the issue of reinstatement (b) neither

related to wrongful discharge nor was believed by respondent to relate alone to discharge in violation of the agreement.

The arbitrator determined that the remedy under article XV (reinstatement) applied to a violation of article II (seniority benefits); this interpretation of the provisions of the collective bargaining agreement, within the scope of the power conferred on the arbitrator by article XV, section 4, is conclusive on this court. (*Stove Mounters' Intl. Union v. Rheem Mfg. Co.,* 168 Cal.App.2d 690 [336 P.2d 181].) Our interpretation of the scope of arbitration set forth in the issues framed by the superior court, and our holding that the question of "lay off" is implicit in and necessarily embraced within the issue of "reinstatement," are secured by the rule that although "the award must be limited to the particular matter submitted, it may well extend to questions that necessarily arise therefrom (6 C.J.S., arbitration and award, p. 222, § 80(b).)" (*Stove Mounters' Intl. Union v. Rheem Mfg. Co.,* 168 Cal.App.2d 690 [336 P.2d 181]; *Straus v. North Hollywood Hospital, Inc.,* 150 Cal.App.2d 306 [***208** 309 P.2d 541]); and aided by the underlying purpose of the arbitration process to settle controversies between employee and employer speedily, effectively and with finality. To hold that an arbitrator, directed to determine whether the employee is entitled to reinstatement, cannot within the confines of that issue properly determine whether he was laid off or discharged, and that the award did not embrace the whole issue of Guthary's rights, if any, under his separation, defeats the theory and purpose of arbitration and is not compatible with broad principles of justice and equity.

Respondent argues, with citations of various authority, that a wrongful discharge is far different in legal contemplation and factual effect than a lay off. This is obviously true for such distinction is recognized by the United States Bureau of Labor Statistics (*Handbook 1936,* pp. 803- 804), the United States Supreme Court (*Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275 [66 S.Ct. 1105, 90 L.Ed. 1230, 167 A.L.R. 110]), federal and state jurisdictions, the collective bargaining agreement itself and indeed, by the arbitrator who found there was a "lay off" in contrast to a "wrongful discharge." But we do not believe this distinction to be such as to preclude a determination of the same and resulting consequences.

For the foregoing reasons the order vacating subparagraph (b) of the award and confirming the same and the order denying appellant's motion to confirm the award in full are reversed and the cause is remanded with directions to the lower court to confirm the arbitration award in full.

Wood, P. J., and Fourt, J., concurred. ***209**

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69 Cal.2d 686, 446 P.2d 1000, 72 Cal.Rptr. 880

B. R. MORRIS, Plaintiff and Appellant,
v.
E. K. ZUCKERMAN,
Defendant and Respondent.

L. A. No. 29586.
Supreme Court of California
Nov. 26, 1968.

HEADNOTES

(1a, 1b)
Arbitration and Award § 25--Award--Validity--Compliance With Submission.
In an arbitration dispute in which defendant was one of two joint purchaser-developers of realty and the plaintiffs were the codeveloper's subsequently formed corporate *alter ego* and the seller's successor in interest, the arbitrators did not exceed the scope of the submission agreement in determining that, under a condition subsequent in the original contract, defendant's obligation to join in the execution of a proposed agreement between the plaintiffs to buy and sell a portion of the realty was itself conditional upon defendant's sharing such portion as tenant-in-common with the corporation, where the proposed agreement was clearly an attempt by the plaintiffs to 'squeeze out' defendant, where the arbitrators' decision was based principally upon a finding of a fiduciary relationship among all the parties, and where plaintiffs, urging a wide scope of arbitrability to facilitate an equitable decision, had actually raised, submitted evidence of, and argued, the relationship issue.

See **Cal.Jur.2d, Rev.,** Arbitration and Award, § 44; **Am.Jur.2d,** Arbitration and Award, § 124.

(2a, 2b)
Arbitration and Award § 18, 37.1--Arbitrators--PowersAward-- Court Review.
In arbitration proceedings, it is for the arbitrators and not the courts to determine which issues are 'necessary,' within the meaning of Code Civ. Proc., § 1283.4, to determine the controversy, and, in deciding the ultimate issue submitted to them, arbitrators can apply both legal and equitable principles.

(3)
Arbitration and Award § 9.5, 37.1--Agreements to Arbitrate--Power to ConstrueAwards--Court Review.
Any doubts as to the meaning or extent of an arbitration agreement must be resolved by the arbitrators and not by a reviewing court.

See **Am.Jur.2d,** Arbitration and Award, § 145.

(4)
Arbitration and Award § 37.1, 43, 45--Award--Court ReviewModification or Vacation by CourtEvidence.
Although a court, following an arbitration proceeding, may vacate an award if it determines that the arbitrators have exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted (Code Civ. Proc., § 1286.2, subd. ***687** (d)), it may not substitute its judgment for that of the arbitrators, and neither the merits of the controversy nor the sufficiency of the evidence

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to support the arbitrators' award are matters for judicial review.

SUMMARY

APPEAL from a judgment of the Superior Court of Los Angeles County. Robert H. Patton, Judge. Affirmed.

Proceeding to review an arbitration award in a contract dispute relating to the development of a large parcel of real property. Judgment denying petition to vacate the award and confirming the award as to defendant affirmed.

COUNSEL
Eddy S. Feldman for Plaintiff and Appellant.
Musick, Peeler & Garrett and Edward J. Riordan for Defendant and Respondent.

McCOMB, J.

Plaintiff appeals from a judgment denying his petition to vacate an arbitrators' award, as corrected, and confirming the award as requested by defendant.

Facts: On September 18, 1952, Mutual Housing Association, as 'Seller,' and Grandview Building Co., as 'Buyer,' entered into an agreement with respect to certain undeveloped real property in the Brentwood area of Los Angeles. By virtue of a written assignment in 1956, Mutual Withdrawees, Inc. (hereinafter referred to as 'MWI') succeeded to the rights of Mutual Housing Association.

On January 2, 1963, in accordance with a plan for the dissolution of Grandview, that portion of the property which had not been developed pursuant to the 1952 agreement was conveyed to Grandview's sole shareholders, plaintiff and defendant, each receiving an undivided one-half interest. Each agreed to be personally bound by the 1952 agreement, and MWI consented in writing to the transfer on or about January 19, 1963.

Under the 1952 agreement, the 'Seller' (then Mutual Housing Association, Inc., now MWI) retained certain interests in the property, including a security interest under a deed of trust and the right to receive a share of the proceeds on a sale of the property by Grandview.

The obligations of the 'Buyer' (then Grandview, now plaintiff and defendant) under the 1952 agreement included the following: (1) To complete the subdivision improvements in 'Tract 15905'; (2) to make engineering studies of the ***688** property; (3) to subdivide and record not less than 12 lots during each calendar year after December 31, 1952; (4) to make installment payments of principal and interest on deeds of trust encumbering the property; and (5) to pay the 'Seller' a proportionate share of all net sales proceeds received. [1]

1 The pertinent provisions reads: 'To pay Seller amounts determined as follows:
'(1) Out of the sales proceeds Buyer shall first reimburse itself for development costs, as hereinafter defined;
'(2) Out of the sales proceeds in excess of the development costs, Buyer shall pay to Seller sums allocated as follows:
(a) Out of the first Five Hundred Thousand Dollars ($500,000.00) of

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> such excess, fifty per cent (50%) thereof;
> (b) Out of the next Three Hundred Thousand Dollars ($300,000.00) of such excess, thirty-three and one-third per cent (33 1/3%) thereof;
> (c) Out of the remaining excess, twenty-five per cent (25%) thereof.'

Grandview fulfilled each of its obligations as 'Buyer' under the 1952 agreement except the one referred to in (3) above. In no calendar year after December 31, 1954, did either Grandview or its successors (plaintiff and defendant) record 12 lots. The pertinent provision of the 1952 agreement provided that in the event of such a default, the 'Seller' was authorized to 'demand that Buyer put the remaining unrecorded property up for sale, and Buyer hereby agrees, upon receipt of such demand so to do at such prices as are determined by Seller.'

By letter of November 24, 1959, MWI demanded, pursuant to the above clause, that Grandview 'place all of the remaining unrecorded property on the market for sale at a total price of $1,640,000.' Grandview by letter dated February 1, 1960, acknowledged receipt of the demand and indicated its compliance therewith.

On February 14, 1964, MWI entered into an agreement for the sale of the remaining unrecorded property to 'Dayton Realty Co., a Corporation or nominee,' for $1,700,000. Dayton Realty Co. is wholly owned by plaintiff and his wife and is controlled by plaintiff.

Although MWI was aware of defendant's rights under the 1952 agreement, it negotiated the proposed agreement with plaintiff alone and gave no notice of the transaction to defendant until February 18, 1964, at which time it demanded that both plaintiff and defendant execute the proposed agreement as successors in interest of Grandview.

On February 28, 1964, defendant communicated his willingness to sign the proposed agreement on the condition that ***689** his right to participate as a 'buyer' thereunder with plaintiff, acting through Dayton, be acknowledged. His offer, however, was rejected.

On or about March 5, 1964, MWI, Dayton, and plaintiff opened an escrow relating to the proposed sale to Dayton. By letter dated March 27, 1964, MWI again demanded that defendant sign the proposed agreement, together with escrow instructions which had been sent to him. Defendant refused to do so, and MWI thereupon demanded arbitration, pursuant to paragraph 21 of the 1952 agreement. [2]

2 Paragraph 21 reads: 'In the event a dispute arises between the parties hereto, each of them shall select one disinterested person and the two persons so selected shall select a third disinterested person, and the three persons so selected shall be designated as the 'arbitrators.' A decision by the majority of the arbitrators shall be binding and conclusive upon the disputants and either of them may take the necessary legal steps to have such determination given the force and effect of a judgment. The cost of arbitration shall be apportioned by the arbitrators to the disputants in

any proportion which a majority of them deems just. If, for any reason, the arbitrators cannot be chosen in accordance with the above provisions, then the dispute or difference shall be arbitrated under the provisions of Part 3, Title X [*sic*] of the Code of Civil Procedure of the State of California.'

After arbitrators had been duly selected, plaintiff, defendant, and MWI submitted the following controversy to them: 'Whether Mr. E. K. Zuckerman, as one of the successors to Grandview Building Co., is required under the terms and conditions of the agreement between Mutual Housing Association, Inc., and Grandview Building Co., dated September 18, 1952, to execute that certain proposed agreement of sale and set forth in a document dated February 14, 1964, entitled 'Agreement of Sale' and other documents necessary or convenient to carry out its terms.'

Extensive hearings were held, and, upon submission, briefs were presented on behalf of all the parties. Thereafter, the arbitrators made their award, which was, in pertinent part, to the following effect: (1) Defendant is required under the terms and conditions of the 1952 agreement to execute the proposed agreement of sale and other documents necessary or convenient to carry out its terms, on the following conditions: (a) That plaintiff, Dayton, and MWI modify the proposed agreement so as to provide for the sale of the subject property to defendant and Dayton as tenants in common, each as to an undivided one-half interest, and (b) that the distribution of proceeds of sale be computed according to the terms set forth in the 1952 agreement. (2) If the conditions set forth above ***690** are not complied with, defendant is not required to execute the proposed agreement.

Plaintiff filed a petition in the superior court to vacate the award upon all the grounds specified by section 1286.2 of the Code of Civil Procedure[3] and for a rehearing before new arbitrators under section 1286.8, but principally upon the ground that the arbitrators had exceeded their powers. Defendant, Dayton, and MWI were named as respondents. After both a hearing and a rehearing, the superior court entered its order confirming the award and denying the petition to vacate the award.

3 Section 1286.2 of the Code of Civil Procedure provides: 'Subject to Section 1286.4, the court shall vacate the award if the court determines that:
'(a) The award was procured by corruption, fraud or other undue means;
'(b) There was corruption in any of the arbitrators;
'(c) The rights of such party were substantially prejudiced by misconduct of a neutral arbitrator;
'(d) The arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted; or
'(e) The rights of such party were substantially prejudiced by the refusal of the arbitrators to postpone the hearing upon sufficient cause being shown therefor or by the refusal of the arbitrators to hear evidence material to the controversy or by other conduct

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of the arbitrators contrary to the provisions of this title.‘

(1a) Question: *Did the arbitrators go beyond the scope of the submission agreement in making their determination?*

No. Plaintiff contends that the submission agreement called for a ‘yes‘ or ‘no‘ answer and that the arbitrators were not authorized to make their determination dependent upon conditions. Section 1283.4 of the Code of Civil Procedure, however, provides: ‘The award shall be in writing and signed by the arbitrators concurring therein. It shall include a determination of *all the questions submitted to the arbitrators the decision of which is necessary in order to determine the controversy.*‘ (Italics added.)

(2a) It is for the arbitrators to determine which issues were actually ‘necessary‘ to the ultimate decision. (See *Grunwald-Marx, Inc. v. Los Angeles Joint Board,* 52 Cal.2d 568, 589-590 [343 P.2d 23].) (3) Likewise, any doubts as to the meaning or extent of an arbitration agreement are for the arbitrators and not the court to resolve. (See *O'Malley v. Wilshire Oil Co.,* 59 Cal.2d 482, 490-491 [30 Cal.Rptr. 452, 381 P.2d 188] (collective bargaining agreement); *Morris v. Zuckerman,* 257 Cal.App.2d 91, 94-97 [64 Cal.Rptr. 714]; ***691** *Cook v. Superior Court,* 240 Cal.App.2d 880, 885-886 [50 Cal.Rptr. 81].)

(4) It should be noted, also, that ‘Neither the merits of the controversy ... nor the sufficiency of the evidence to support the arbitrator's award are matters for judicial review.‘ (*Jordan v. Pacific Auto Ins. Co.,* 232 Cal.App.2d 127, 135 [7] [42 Cal.Rptr. 556].) Although the court may vacate an award if it determines that ‘[t]he arbitrators exceeded their powers and the award cannot be corrected without affecting the merits of the decision upon the controversy submitted‘ (Code Civ. Proc., § 1286.2, subd. (d)), it may not substitute its judgment for that of the arbitrators.

(2b) Arbitrators can apply both legal and equitable principles in deciding the ultimate issue submitted to them. (*Sapp v. Barenfeld,* 34 Cal.2d 515, 523 [12] [212 P.2d 233].) (1b) In the present case, it is clear that the fiduciary relationship between all the parties was the principal ground determining the arbitrators' award[4] and that such issue was actually submitted to them. ***692**

4 The arbitrators filed with their award an opinion setting forth the facts and controlling principles on which the award was made. The salient points of the opinion are summarized below.
(1) The proposed agreement of sale to Dayton was actually a sale to plaintiff of property owned by plaintiff and defendant as cotenants, subject to the legal and equitable rights of plaintiff, defendant, and MWI under the 1952 agreement.
(2) Defendant cannot be required to convey his interest in the property to plaintiff's controlled corporation; even in foreclosure plaintiff would have acquired only an equitable lien on the interests of his cotenant.
(3) On February 14, 1964, plaintiff and defendant were bound to each other as fiduciaries with respect to the subject property, even though they had dissolved or liquidated their

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other joint venture or partnership affairs, and even though there had been strained relations, disputes, and quarrels concerning the business in which they were associated.

(4) As a cotenant with plaintiff, defendant was entitled to share equally the benefits and burdens of any contract entered into by plaintiff relating to the acquisition of any outstanding adversary claimed title or interest in the common property. Thus, plaintiff is precluded from buying in the entire interest in the subject property for his exclusive benefit, since this would completely undermine defendant's interest in the common title.

(5) Although MWI was fully aware of defendant's equitable and legal rights in the property, it gave defendant no opportunity to exercise these rights, in that (i) MWI negotiated the proposed agreement with plaintiff alone and without adequate notice thereof to defendant and (ii) MWI rejected defendant's offer to join as a vendee with plaintiff, though this was defendant's right under the law, and it endeavored to frustrate that right by dealing with plaintiff alone to the prejudice of defendant. By virtue of the 1952 agreement, MWI occupied a status akin to that of a fiduciary to both plaintiff and defendant, despite their default with regard to the subject property.

(6) Although the proposed agreement is reasonable in its terms and fair as to price, it is nevertheless unfair and oppressive in its ultimate effect as to defendant, since (i) it forecloses him from participating therein, though this is his legal right and he signified his willingness to accept the benefits and burdens of the agreement in a timely manner, and (ii) it would require defendant to resort to expensive litigation to vindicate his right to participate with plaintiff in the transaction with MWI. Having chosen to deal with plaintiff with full knowledge of defendant's rights, MWI and plaintiff were precluded by their fiduciary status from acting in concert with each other but without affording defendant the opportunity to exercise his right as a partner or cotenant of plaintiff.

(7) To require defendant to sign the contract in its present form would effectuate a forfeiture of defendant's rights as a cotenant and a copartner unless he applied to a court of equity to sustain his rights. Such forfeitures are abhorrent to both law and equity, which also deplores circuity or multiplicity of actions.

(8) The ‘squeeze-out‘ technique, whereby one fiduciary attempts unfairly to eliminate his cofiduciary from further interest in the common enterprise, cannot receive the sanction of the courts.

(9) It would be against good conscience and equity to require defendant to sign the proposed agreement unless his rights to be a copurchaser with plaintiff are recognized.

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(10) In accordance with section 1283.4 of the Code of Civil Procedure, the board makes its award in order to determine all the questions submitted to it 'the decision of which is necessary to determine the controversy.'

In a supplement to the opinion, rendered for purposes of clarification only, the arbitrators confirmed that the findings contained in their opinion (e.g., that plaintiff and defendant were joint venturers, that MWI occupied a status akin to a fiduciary, and that plaintiff and defendant were cotenants) pertained only to the subject matter of the 1952 agreement and to the property described therein.

In written 'Contentions of Law and Fact,' filed by MWI with the arbitrators at the commencement of the hearings and adopted by plaintiff, it is stated that the 1952 agreement was 'essentially one of joint venture.' It is also stated, '... MHA [Mutual Housing Association] contracted with Grandview in the form of Exhibit 1 [the agreement of September 18, 1952] to bail MHA out of its difficulties and to form a joint venture for an eventual recoupment of MHA's investment.' Numerous other references are made to the fact that the parties regarded themselves as joint venturers.

Likewise, in MWI's 'Contentions of Law and Fact,' the contentions of MWI, and thus of plaintiff, are set forth, as follows: '1. Zuckerman must sign Exhibits 3 and 11 because the plain language of the contract gives him no discretion to do otherwise.

'2. A party to a contract is required to act reasonably and there is no reasonable grounds [*sic*] for Zuckerman withholding his signature.

'3. Zuckerman is quasi-estopped to say that the agreement should not be signed when he is taking the position that he is the buyer under the agreement.' ***693**

The second contention set forth above required the arbitrators to analyze the terms and conditions of the proposed agreement with Dayton, as well as the escrow instructions, to determine the reasonableness and fairness of the proposed transaction as to defendant in light of the respective rights and duties of the parties under the 1952 agreement. This, of necessity, required the arbitrators to determine whether or not a fiduciary relationship existed between the parties by virtue of the 1952 agreement. Likewise, the third contention raised as an issue defendant's claim of a right to join with Dayton as the purchaser under the proposed contract, and the relationship between the parties was of importance in determining whether defendant had such a right.

Significantly, plaintiff himself at all times urged that the scope of authority of the arbitrators was all-encompassing for the purpose of deciding the case equitably. Counsel for plaintiff stated to the arbitrators in the conclusion of his reply brief filed with them: '*What can this Board do?* It can leave things as they are; order Zuckerman to sign and perform M-3 [the proposed sale agreement], or in the event of his non-obedience to the award, that the Clerk of the Court sign those documents necessary and convenient thereto on his behalf and that of his wife; *or the Board can so order with*

any conditions which it deems appropriate to safeguard the rights of all concerned.‘ (Italics added.)

It is apparent that the relationship between plaintiff and defendant at all times bore all the indicia of a joint venture. Likewise, even as to MWI and its relationship to plaintiff and defendant, some aspects of a joint venture relationship existed, in that the 1952 agreement was an overall transaction for land development by which MWI was to receive not merely payments on trust deed notes but proceeds or ‘profits‘ from ensuing sales, in accordance with a schedule of diminishing percentages of such proceeds or profits as sales were made over the years. The relationships were so viewed by all the parties. As indicated above, the issue was raised before the arbitrators, and the relevancy of evidence pertaining to the issue of ‘fiduciary relationship,‘ as well as the issue of ‘division of proceeds,‘ was considered by the arbitrators and ruled upon. [5]

5 With respect to the ‘division of proceeds‘ issue, it should be noted that plaintiff's counsel exhibited to the arbitrators a chart purporting to show how the sales proceeds would be distributed.

It is clear that the instant case presents an attempt by ***694** plaintiff and MWI to ‘freeze out‘ defendant. It was readily apparent to the arbitrators that the 1952 agreement contemplated a sale of the property on the market-an arm's length third party sale, and not a sale from one to another of the three joint venturers. The conditions which they attached to the award, namely, that defendant be included in the proposed sale agreement and that the distribution of the proceeds of the sale be computed according to the terms of the agreement of September 18, 1952, were in recognition of that purpose.

To hold that the arbitrators were without power to consider the nature of the 1964 contract, its relation to the 1952 contract, and whether it would result, if executed, in the perpetration of a fraud or in the taking of an unfair advantage by plaintiff over defendant, would be a limited and unwarranted interpretation of the submission agreement.

The controversy submitted clearly involved the enforcement of the 1952 agreement, which spelled out the relationship of the parties to each other, and the parties advised the arbitrators that their contentions involved the issue of their relationships. They submitted evidence on such issues and argued for their adjudication. None of them may now be heard to say that the arbitrators exceeded their authority in deciding those issues.

The judgment is affirmed.

Traynor, C. J., Peters, J., Tobriner, J., Mosk, J., Burke, J., and Sullivan, J., concurred.
Appellant's petition for a rehearing was denied December 24, 1968. ***695**

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779 F.2d 592
United States Court of Appeals,
Eleventh Circuit.

NATIONAL BANCARD CORPORATION (NaBANCO), a Florida Corporation, Plaintiff-Appellant,
v.
VISA U.S.A., INC., Defendant-Appellee.

No. 84–5818.
|
Jan. 10, 1986.

Synopsis

Processing agent for various member banks in credit card system filed action against system operator, alleging that interchange fee was unlawful restraint of trade. The United States District Court for the Southern District of Florida, William M. Hoeveler, J., 596 F.Supp. 1231, held that the interchange fee did not constitute an unlawful restraint of trade, and processing agent appealed. The Court of Appeals, Henderson, Circuit Judge, held that district court properly determined that the fee was not naked restraint of competition and therefore not per se price fixing.

Affirmed.

Attorneys and Law Firms

***593** James M. Landis, Carlton, Fields, Ward, Emmanuel, Smith & Cutler, P.A., Sylvia H. Walbolt, Tampa, Fla., for plaintiff-appellant.

Paul C. Huck, Fleming and Huck, P.A., Miami, Fla., M. Laurence Popofsky, Heller, Ehrman, White & McAuliffe, Stephen V. Bomse, Meryl Macklin, San Francisco, Cal., for defendant-appellee.

Appeal from the United States District Court for the Southern District of Florida.

Before JOHNSON and HENDERSON, Circuit Judges, and ALLGOOD, * District Judge.

* Honorable Clarence W. Allgood, U.S. District Judge for the Northern District of Alabama, sitting by designation.

Opinion

HENDERSON, Circuit Judge:

National Bancard Corp. (NaBanco) filed this suit against VISA U.S.A. (VISA), alleging that VISA violated Section 1 of the Sherman Act, 15 U.S.C. § 1, by fixing certain bank credit card interchange rates. After a bench trial that consumed approximately nine weeks, the United States District Court for the Southern District of Florida, in an exhaustive opinion, concluded ***594** that NaBanco failed in its efforts to prove a violation of the antitrust laws. *See National Bancard Corp. v. VISA, U.S.A., 596 F.Supp. 1231 (S.D.Fla.1984)* (hereinafter cited as *NaBanco*).

NaBanco appeals from this judgment, claiming that the district court erred in applying the rule of reason rather than the per se rule to the facts of the case. Alternatively, NaBanco contends that even under a rule of reason analysis VISA's conduct was violative of Section 1 of the Sherman Act.

The factual background to this case revolves around the workings of the bank credit card industry in general and VISA's operational procedures in specific.[1] Bank credit card transactions generally can involve four different entities: (1) cardholders who use the cards to purchase goods and services; (2) merchants who accept the cards in exchange for goods and services; (3) banks that issue cards to cardholders (card-issuing banks); (4) banks that contract with merchants to accept the credit cards (merchant-signing banks). In some instances only three parties are implicated because the card-issuing bank also contracts with the merchant to accept the card.[2]

1 The district court's opinion provides an interesting and detailed history of the American credit card business and other payments systems. See *NaBanco,* 596 F.Supp. at 1236–38 & nn 4–8.

2 These three-party dealings generally are known as "on-us" transactions. Since no interchange occurs, no fee is charged in "on-us" purchases. VISA's precursor, BankAmericard, was purely a three-party bank card because cards were issued and merchants were recruited only by Bank of America. The BankAmericard gave way to VISA in 1977. "On-us" transactions often occur even when several banks issue cards and sign merchants because the same bank that issued the card may have signed the merchant to accept the card. Obviously, this would occur most often in a card-issuing bank's surrounding community.

In a typical four-party transaction, a consumer is issued a bank credit card by a card-issuing bank, Bank X. A merchant-signing bank, Bank Y, contracts with a shopowner to join the VISA network and accept the VISA card. The cardholder then uses the card to purchase goods from the merchant, who furnishes the cardholder with the merchandise and then sends the cardholder's charge receipt (the paper) to Bank Y, the bank with which the shopowner has signed a VISA contract. Bank Y "buys" the paper from the merchant pursuant to their contract, but at less than face value. This discounted amount is known as the "merchant discount." Bank Y then must "interchange" the paper with Bank X, so that Bank X can bill the cardholder in accordance with the terms of their contract.

The difficulties in a credit card or "cashless" transaction arise because each such transaction generates a trail of paperwork. This transactional paper representing the exchange is transferred among the parties until each eventually bears the burden that it has contracted to assume. This case concerns certain fees that attach in the transfer, or interchange, of this paper between the merchant-signing bank and the card-issuing bank.

The present action arose as a result of the "Issuer's Reimbursement Fee" (IRF) that the VISA system imposes when the merchant-signing bank forwards the cardholder's paper to the card-issuing bank for collection. In the VISA system this fee, a small fixed percentage of each charge, is levied only when the interchange is conducted through VISA's computerized service known as BASE

II. Significantly, the parties to the interchange are not required to use BASE II. Merchant and issuer institutions are free to negotiate a different rate and bypass the BASE II system entirely.

In today's technology, the majority of these transactions are automated, so that the banks' and merchants' computers actually credit each others' computerized accounts. The effect, however, is the same as if each party were to present the paper in person and receive cash in exchange.

***595** For the merchant-signing bank to profit from its middleman position, the payment it receives from the card-issuing bank must be greater than the discounted amount the merchant bank originally paid the merchant. In practical terms, the IRF may not exceed the merchant discount for the merchant-signing bank to benefit from the transaction. Because each merchant-signing bank negotiates the amount of its discount with the merchant, each may ensure that it maintains such a profit margin by setting the merchant discount accordingly.

On the other hand, the card-issuing bank is responsible for collecting all sums due and payable by its cardholders. All risk of loss resulting from nonpayment, default or any other reason falls solely on the issuer bank. Additionally, until recently, card-issuing banks did not charge an annual user fee to each cardholder for fear of losing patrons to competing bank cards that made no such charge. The card-issuing banks also traditionally have provided a so-called “convenience period” for their customers. This period, usually comprising several weeks, allows cardholders to avoid any interest payments if their account is paid in full before the next billing cycle—in effect an interest-free loan.

The IRF ostensibly is designed to shift to the merchant-signing bank some of the costs —from risk of loss, lack of user fee, and convenience period expense—that fall solely on the card-issuing banks. NaBanco contends that this practice constitutes horizontal price fixing and is therefore a per se violation of Section 1 of the Sherman Act. NaBanco further asserts that even if the rule of reason is invoked, VISA's IRF is unreasonably anticompetitive. VISA, however, maintains that the BASE II IRF helps create a product that could not exist otherwise and therefore is neither subject to traditional per se attack nor in contravention of the Sherman Act when subjected to rule of reason evaluation.

The purpose of the IRF, and the basis of NaBanco's attack on it, are intertwined in the development of BankAmericard, VISA, and NaBanco.[3] The Bank of America (BA) originally marketed the three-party BankAmericard on a statewide basis in California. In 1966 BA decided to expand its system nationwide by licensing local banks to use the BankAmericard name, thereby making BankAmericard a four-party transaction. As part of the new national system, a variable interchange fee system was created. Each merchant-signing bank was required to inform the card-issuing bank of either the actual or average merchant discount it charged. The fee was based on this information.

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3 For an in-depth background of the parties, see *NaBanco,* 596 F.Supp. at 1238–40.

After the original BankAmericard network expanded, the variable interchange fee system did not work effectively. A for-profit nonstock-membership corporation, NBI, was therefore formed in 1970. NBI's board of directors adopted a new uniform fee system, the IRF, in late 1971. NBI became VISA in 1977.

VISA, which included over 13,000 members in 1983, has two types of membership. "Proprietary" members both issue cards and sign merchants. In 1983 they made up approximately 14% of all VISA members. "Agent" members choose only to sign merchants to participate in the VISA system. The sole significant difference between proprietary and agent members is that only proprietary members may vote, or serve on, VISA's board of directors. Thus, agent members have no input in determining VISA policies, including the existence and amount of the IRF. It is important to note that VISA members voluntarily choose the type of membership they desire and may elect to issue cards and thereby gain a voice in the VISA decisionmaking process. The various members also compete vigorously against one another to issue cards and sign merchants.

NaBanco does not belong to the VISA system. It serves as a processing agent for VISA members and receives all or part of the merchant discount of the VISA member to whom it provides a processing service. For purposes of this decision, however, ***596** NaBanco stands in the exact position of an agent member.[4]

4 NaBanco cannot be a member of VISA because it is not eligible for federal deposit insurance. Nevertheless, NaBanco acts as a processing agent for merchant-signing VISA members. As such, it receives the cardholder paper from merchants, reimburses merchants, and then exchanges the paper with the card-issuing banks. NaBanco also has served as an agent of card-issuing VISA members. *NaBanco,* 596 F.Supp. at 1239–40. The district court properly held that NaBanco had standing to pursue this antitrust action. *Id.* at 1241–47.

NaBanco's basic complaint is that the IRF reduces or eliminates its ability to compete with proprietary VISA members that both issue cards and sign merchants. Because "on-us" transactions (in which the card-issuing and merchant-signing bank is the same) involve no interchange, and therefore are not subject to the IRF, proprietary members conducting "on-us" transactions can reduce the merchant discount they charge. NaBanco alleges that it is unable to compete because it must keep its merchant discount higher than the IRF to ensure a profit. Merchants therefore do not choose to contract with NaBanco because they receive a better merchant discount from proprietary VISA members. *See NaBanco,* 596 F.Supp. at 1240.

Because both "on-us" and IRF transactions involve many of the same costs, NaBanco

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claims that by reducing the merchant discount in "on-us" transactions, proprietary VISA members demonstrate that the IRF is not cost related. According to this argument, the IRF is either unnecessary or intentionally set at a level to discourage purely merchant-signing competitors. When NaBanco seeks to sign and service merchants, it competes with merchant-signing banks that also issue VISA cards. NaBanco alleges that banks that also issue cards have set the IRF to keep purely merchant-signing banks from being able to compete. Therefore, in NaBanco's view these proprietary members are equivalent to a group of competitors who have agreed to sell goods to each other (or, in this case, to themselves) at a lower rate than that offered to NaBanco. NaBanco urges that, because the individual card-issuing and merchant-signing banks individually can and should negotiate the interchange fee, the IRF system, as constituted, amounts to horizontal price fixing and is per se violative of Section 1 of the Sherman Act.

As stated earlier, NaBanco essentially challenges (1) the district court's application of the per se rule, and (2) its finding that the IRF is procompetitive under the rule of reason.

Findings of fact by the district court may be reversed only when they are clearly erroneous. Fed.R.Civ.P. 52(a). The reviewing court, looking at all the evidence, must be "left with the definite and firm conviction that a mistake has been committed." *United States v. Gypsum,* 333 U.S. 364, 395, 68 S.Ct. 525, 542, 92 L.Ed. 746, 766 (1948). "If the district court's account of the evidence is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it.... Where there are two permissible views of the evidence, the factfinder's choice between them cannot be clearly erroneous." *Anderson v. Bessemer City,* 470 U.S. 564, ——, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518, 528 (1985). This standard governs the district court's findings on the second issue.

Errors of law are freely reviewable and not protected by the clearly erroneous rule. *See Pullman-Standard v. Swint,* 456 U.S. 273, 287, 102 S.Ct. 1781, 1786, 72 L.Ed.2d 66, 79 (1982). Whether to apply a per se or rule of reason analysis is a question of law, and therefore freely reviewable, yet it is predicated on a factual inquiry into the restraint's competitive effect. *See NCAA v. Board of Regents of University of Oklahoma,* 468 U.S. 85, ——, 104 S.Ct., 2948, 2962, 82 L.Ed.2d 70, 85 (1984) ("the essential inquiry remains the same—whether or not the challenged restraint enhances competition."). As the Supreme Court has noted, "no bright line separat[es] per se from Rule of Reason analysis." *Id.*, 468 U.S. at —— n. 26, 104 S.Ct. at 2962 n 26, 82 L.Ed.2d at 86 n. 26.

***597** It is axiomatic that Section 1 of the Sherman Act, if read literally, would strike down every contract. *NCAA,* 468 U.S. at ——, 104 S.Ct. at 2959, 82 L.Ed.2d at 82; *Chicago Board of Trade v. United States,* 246 U.S. 231, 238, 38 S.Ct. 242, 244, 62 L.Ed. 683, 687 (1918); *Abadir & Co. v. First Mississippi Corp.,* 651 F.2d 422, 425 (5th Cir.1981). [5] The Supreme Court, however, "repeatedly [has] recognized [that] the Sherman Act was intended to prohibit only unreasonable restraints of trade." *NCAA,* 468 U.S. at ——, 104 S.Ct. at 2959, 82 L.Ed.2d at 82; *see*

National Society of Professional Engineers v. United States, 435 U.S. 679, 687–88, 98 S.Ct. 1355, 1363, 55 L.Ed.2d 637, 648 (1978) (hereinafter cited as *Engineers*).

5 In *Bonner v. City of Prichard,* 661 F.2d 1206 (11th Cir.1981) (en banc), this court adopted as precedent all decisions of the former Fifth Circuit Court of Appeals decided prior to October 1, 1981.

To provide the needed flexibility to Section 1, the courts adopted the rule of reason, which is grounded in the common law.[6] *Engineers,* 435 U.S. at 688, 98 S.Ct. at 1363, 55 L.Ed.2d at 648; *Abadir,* 651 F.2d at 425. The Supreme Court has clearly articulated that the rule of reason is the vehicle by which the Sherman Act—the "comprehensive charter of economic liberty," *Northern Pacific Railway Co. v. United States,* 356 U.S. 1, 4, 78 S.Ct. 514, 517, 2 L.Ed.2d 545, 549 (1958)—is to be implemented. *See Arizona v. Maricopa County Medical Society,* 457 U.S. 332, 343, 102 S.Ct. 2466, 2472, 73 L.Ed.2d 48, 58 (1982) (hereinafter cited as *Maricopa*); *Engineers,* 435 U.S. at 687–89, 98 S.Ct. 1363–64, 55 L.Ed.2d at 647–49; *Chicago Board of Trade,* 246 U.S. at 238–39, 38 S.Ct. at 244, 62 L.Ed. at 687; *Standard Oil Co. of New Jersey v. United States,* 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619 (1911). As this court's predecessor has held, the rule of reason is the "basic test for the legality of a business practice which allegedly operates to restrain trade." *United States v. Multi-List, Inc.,* 629 F.2d 1351, 1362 (5th Cir.1980); *see Continental TV, Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36, 49, 97 S.Ct. 2549, 2557, 53 L.Ed.2d 568, 579–80 (1977) (hereinafter cited as *Sylvania*); *Abadir,* 651 F.2d at 425.

6 The best common law basis for the rule of reason is Mitchel v. Reynolds, 24 Eng.Rep. 347 (1711). *Mitchel* involved the enforceability of a vendor's covenant not to compete with a vendee with respect to the sale of a bakery. The covenant was upheld as reasonable because it was ancillary to the contract, which was procompetitive. *See Engineers,* 435 U.S. at 688–89, 98 S.Ct. at 1363–64, 55 L.Ed.2d at 648.

The rule of reason[7] necessitates an "elaborate inquiry into the reasonableness of a challenged business practice." *Maricopa,* 457 U.S. at 343, 102 S.Ct. at 2472, 73 L.Ed.2d at 58. It therefore is a time-consuming process that entails significant costs. *Id.* Other difficulties constricting the use of the rule of reason include the general lack of judicial expertise in sophisticated economic analysis as well as the lack of certainty that such case law produces. *Id.*

7 The classic statement defining the rule of reason was provided by Justice Brandeis in *Chicago Bd. of Trade,* 246 U.S. at 238, 38 S.Ct. at 244, 62 L.Ed. at 687.

> The true test of legality is whether the restraint imposed is such as merely regulates or perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition. To determine that question the

> court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and to predict consequences.

Given these drawbacks to rule of reason scrutiny, the courts have developed a per se rule that applies a conclusive presumption that certain restraints automatically are unreasonable, and therefore illegal, without further investigation.[8] The need ***598** for efficiency and certainty in effect outweigh specific fact settings in which an action held to be per se unreasonable might be decided differently under the rule of reason. *See Maricopa,* 457 U.S. at 344 & n 16, 102 S.Ct. at 2473 & n 16, 73 L.Ed.2d at 58 & n 16. In short, "[t]he per se rule is the trump card of antitrust law. When an antitrust plaintiff successfully plays it, he need only tally his score." *United States v. Realty Multi-List, Inc.,* 629 F.2d 1351, 1362–63 (5th Cir.1980) (hereinafter cited as *Multi-List*).

8 The per se rule was set forth by the Supreme Court in *Northern Pacific Ry. Co. v. United States,* 356 U.S. 1, 5, 78 S.Ct. 514, 518, 2 L.Ed.2d 545, 549 (1958): "there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *See Broadcast Music, Inc. v. Columbia Broadcasting Co.,* 441 U.S. 1, 8, 99 S.Ct. 1551, 1556, 60 L.Ed.2d 1, 9 (1979); *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975); *United States v. Topco Assocs Inc.,* 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972); *International Salt Co. v. United States,* 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20 (1947); *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940).

The Supreme Court has recognized that "whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition." *NCAA,* 468 U.S. at ––––, 104 S.Ct. at 2962, 82 L.Ed.2d at 85–86. Thus, "no bright line separat[es] per se from Rule of Reason analysis. Per se rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct." *Id.,* 468 U.S. at –––– n. 26, 104 S.Ct. at 2962 n. 26, 82 L.Ed.2d at 86 n. 26. Certain types of practices, however, have emerged as traditionally per se violations. *See United States v. Parke, Davis*

& Co., 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960) (vertical price fixing agreements); *Timken Roller Bearing Co. v. United States,* 341 U.S. 593, 71 S.Ct. 971, 95 L.Ed. 1199 (1951) (horizontal market divisions); *International Salt Co. v. United States,* 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20 (1947) (tying arrangements); *Fashion Originators' Guild v. FTC,* 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941) (group boycotts).

Until *Broadcast Music, Inc. v. Columbia Broadcasting Co.,* 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979) (hereinafter cited as *BMI*), horizontal price fixing consistently was held to fall in the per se category.[9] In *BMI,* however, the Supreme Court warned that "[l]iteralness is overly simplistic and often overbroad," *id.* at 9, 99 S.Ct. at 1557, 60 L.Ed.2d at 9, and refused to use the per se rule even though the Court held that the practice in question literally was price fixing.

9 "A price fixing agreement between competitors is the classic example of [a per se] arrangement." *Jefferson Parish Hospital District No. 2 v. Hyde,* 466 U.S. 2, 104 S.Ct. 1551, 1556, 80 L.Ed.2d 2, 11 (1984). *See, Arizona v. Maricopa County Medical Soc'y,* 457 U.S. 332, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982); *Catalano, Inc. v. Target Sales, Inc.,* 446 U.S. 643, 100 S.Ct. 1925, 64 L.Ed.2d 580 (1980); *National Soc'y of Professional Engineers v. United States,* 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978); *Albrecht v. Herald Co.,* 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951); *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940); *United States v. Trenton Potteries Co.,* 273 U.S. 392, 47 S.Ct. 377, 71 L.Ed. 700 (1927); *Amey, Inc. v. Gulf Abstract & Title, Inc.,* 758 F.2d 1486 (11th Cir.1985); *L.A. Draper & Son v. Wheelabrator-Frye, Inc.,* 735 F.2d 414 (11th Cir.1984); *Construction Aggregate Transport, Inc. v. Florida Rock Inds., Inc.,* 710 F.2d 752 (11th Cir.1983); *Joe Regueira, Inc. v. American Distilling Co.,* 642 F.2d 826 (5th Cir.1981); P. Areeda, *The Rule of Reason in Antitrust Analysis* 22 (1981).

In *BMI,* Broadcast Music, Inc. (BMI) and the American Society of Composers, Authors, Composers and Publishers (ASCAP) issued blanket licenses to copyrighted music compositions. The fees for these licenses were set by ASCAP and BMI and clearly qualified as price fixing in a strict sense. *BMI,* 441 U.S. at 8, 99 S.Ct. at 1556, 60 L.Ed.2d at 9. The Court, however, noted that

> this is not a question simply of determining whether two or more potential competitors have literally "fixed" a "price." ***599** As generally used in the antitrust field, "price fixing" is a shorthand way of describing certain categories of business behavior to which the per se rule has been held applicable. The Court of Appeals' literal

> approach does not alone establish that this particular practice is one of those types or that it is "plainly anticompetitive" and very likely without "redeeming virtue." ... Thus, it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label "per se price fixing."

Id., 441 U.S. at 8–9, 99 S.Ct. at 1556–57, 60 L.Ed.2d at 9–10. *See* *Cha-Car, Inc. v. Calder Race Courses, Inc.,* 752 F.2d 609, 613 (11th Cir.1985) ("The *per se* doctrine should not be extended to restraints of trade that are of ambiguous effect; any departure from the rule of reason standard must be based upon demonstrable economic effect, rather than formalistic line drawing."). Consequently, while some price fixing is per se illegal, other arrangements that literally fix prices are judged under the rule of reason.

In an effort to delineate which factors distinguish these categories, the Court went on to set out the analytic framework for consideration. The "inquiry must focus on whether ... the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to 'increase economic efficiency and render markets more, rather than less, competitive.' " *BMI,* 441 U.S. at 19–20, 99 S.Ct. at 1562–63, 60 L.Ed.2d at 16 (quoting *United States v. United States Gypsum Co.,* 438 U.S. 422, 441 n. 16, 98 S.Ct. 2864, 2875 n. 16, 57 L.Ed.2d 854, 872 n. 16 (1978)). Because the blanket license was not a " 'naked restraint of trade with no purpose except stifling of competition,' but rather accompanie[d] the integration of sales, monitoring, and enforcement against unauthorized copyright use," it was not illegal per se. *BMI,* 441 U.S. at 20, 99 S.Ct. at 1563, 60 L.Ed.2d at 16 (quoting *White Motor Co. v. United States,* 372 U.S. 253, 263, 83 S.Ct. 696, 702, 9 L.Ed.2d 738, 746 (1963)).

The blanket license in *BMI* was a practical necessity because it was virtually impossible for thousands of composers to negotiate individually over the use of each song, for each user to report amount of use, and for each composer to police the use of his works by authorized and unauthorized users. Thus, the blanket license arrangement "created a forum for buyers and sellers ... and yielded improvements in the market for performing rights of copyrighted compositions which were unrelated to price." *United States v. Southern Motor Carriers' Rate Conference,* 672 F.2d 469, 479 (5th Cir. Unit B 1982), *aff'd,* 702 F.2d 532 (5th Cir. Unit B 1983) (en banc), *rev'd on other grounds,* 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985).[10]

10 In *Stein v. Reynolds Securities, Inc.,* 667 F.2d 33, 34 (11th Cir.1982), the Eleventh Circuit Court of Appeals adopted as precedent all decisions of Unit B of the former Fifth Circuit Court of Appeals.

BMI 's underlying teaching therefore appears to be that courts should look to whether the restraint at issue potentially could create an efficiency enhancing integration to which the restraint is ancillary. In other words, the issue is whether the price fixing "*achieve[s] purposes unrelated to price formation.*" *Southern Motor Carriers,* 672 F.2d at 479 (emphasis in the original), *aff'd,* 702 F.2d 532 (5th Cir. Unit B 1983) (en banc), *rev'd on other grounds,* 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985). This analytic framework closely parallels the approach proposed by Professor, now Judge, Robert H. Bork. *See* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division,* 75 Yale L.J. 373, 474 (1966) (no per se analysis if restraint "accompanies a contract integration" and "is ancillary to the contract integration").

As could be expected, defendants charged with horizontal price fixing ecstatically embraced *BMI,* viewing it as an alluring oasis of hope in a previously barren ***600** desert.[11] The Supreme Court, however, has refused to view *BMI* in such sweeping terms, instead declining to find it applicable to any and all subsequent litigants.[12]

11 *BMI* is just one of several cases that appeared to signal a retreat from rigid application of the per se rule. In *Jefferson Parish Hospital District No. 2 v. Hyde,* 466 U.S. 2, 104 S.Ct. 1551, 80 L.Ed.2d 2 (1984), the Court refused to apply the per se rule summarily to a tying arrangement, instead noting that in-depth market analysis was required to determine the procompetitive aspects of the tie-in. *See NCAA,* 468 U.S. at ——, 104 S.Ct. at 2959–63, 82 L.Ed.2d at 85–89; *Continental TV, Inc. v. GTE Sylvania, Inc.,* 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977) (reversing an earlier holding that some types of vertical market division were per se violative; Court required more extensive evidence of economic utility of the restraint). These cases demonstrate that "invocation of [the per se rule] must be limited to those situations which fairly fall within its rationale," rather than a formalistic approach. *United States v. Realty Multi-List, Inc.,* 629 F.2d 1351, 1363 (5th Cir.1980).

12 For example, the Court twice rejected the Ninth Circuit's determination that antitrust defendants qualified for rule of reason analysis under *BMI. See Arizona v. Maricopa County Medical Soc'y,* 457 U.S. 332, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982); *Catalano, Inc. v. Target Sales, Inc.,* 446 U.S. 643, 100 S.Ct. 1925, 64 L.Ed.2d 580 (1980). The Court also refused to extend *BMI* to the NCAA. See *NCAA v. Board of Regents of University of Oklahoma,* 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984). Similarly, the former Fifth Circuit Court of Appeals addressed *BMI*'s availability only on one occasion, and refused to find it applicable. *See United States v. Southern Motor Carriers Rate Conference, Inc.,* 672 F.2d 469, 479–80 (5th Cir. Unit B 1982), *aff'd,* 702 F.2d 532 (5th Cir. Unit B 1982) (en banc),

rev'd on other grounds, 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985).

In this case the district court held that the IRF qualified for rule of reason treatment under *BMI. NaBanco,* 596 F.Supp. at 1252–56. Whether the IRF charged by VISA is price fixing [13] subject to the per se rule, depends in large part on how *BMI* is analyzed and applied. Unfortunately, subsequent cases have left us without clear standards for determining the application of the per se rule in price fixing cases.

13 From an economist's viewpoint, the VISA IRF may not even qualify as a "price," because it would be driven upward by unrestrained competition. See Baxter Deposition, Vol. I, at 57 (Feb. 25, 1981). Professor Baxter, who appeared as a witness for VISA, subsequently published his research in bank transactional paper. See Baxter, *Bank Interchange of Transactional Paper: Legal and Economic Perspectives,* 26 J.L. & Econ. 541 (1981). The article includes an excellent explanation of the economic arguments favoring an interchange fee of some sort. It concludes that the economics of the system indicate that interchange fees are not horizontal price fixing, but rather act as equilibratory devices necessary to avoid "chaotic results ... higher fees and instability within card systems." *Id.* at 586. In Baxter's opinion, such a fee is legally valid so long as all members of a four-party payment system have the option to bypass the required fee and negotiate their own fee. *Id. See* In Re UATP—1976, 85–11 C.A.B. 2481, 2506 (1980). As mentioned earlier, the Base II system is not mandatory and may be bypassed if the VISA members so choose.

In *Catalano, Inc. v. Target Sales, Inc.,* 446 U.S. 643, 100 S.Ct. 1925, 64 L.Ed.2d 580 (1980), the Court reversed the decision of the Ninth Circuit Court of Appeals that beer wholesalers who agreed to stop extending credit to beer retailers had not committed a per se violation of Section 1. The Court concluded that granting an interest free credit period was the equivalent to a discounted price for that period of time and thus "must be characterized as an inseparable part of the price." *Id.,* 446 U.S. at 648, 100 S.Ct. at 1928, 64 L.Ed.2d at 585. The Court then summarily applied the per se rule and disposed of the case without inquiring into whether the agreement accomplished any efficiency creating integration among the wholesalers, thus failing to engage in the analysis suggested in *BMI.* [14]

14 Commentators have approved the result in *Catalano* while criticizing its economics. *See* W. Liebler, *Antitrust Adviser,* 30–31 (2d ed. 1984); P. Areeda, *supra* n. 8 at 33–34.

Similarly, in *Arizona v. Maricopa County Medical Society,* 643 F.2d 553 (9th Cir.1980), *rev'd,* 457 U.S. 332, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982), the Court held that an agreement among physicians to set limits on fees was per se illegal. The doctors in an association voted on the maximum fees they would charge in full payment for services rendered

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to policyholders of certain ***601** approved insurance plans. The Ninth Circuit Court of Appeals felt the plan should be subjected to the rule of reason. The Supreme Court disagreed. The Court apparently abandoned its *BMI* standards and followed a formalistic approach which indicated that all price fixing was per se violative even if it created efficiencies. *Maricopa,* 457 U.S. at 351, 102 S.Ct. at 2476, 73 L.Ed.2d at 63. The dissent pointed out the inconsistency between *BMI* and *Maricopa* and stressed that the court "must determine whether the procompetitive economics that the arrangement purportedly makes possible are substantial and realizable in the absence of such an agreement." *Id.,* 457 U.S. at 362, 102 S.Ct. at 2482, 73 L.Ed.2d at 70. [15]

15 One commentator maintains that the Court's position in *Maricopa* "made it impossible for the majority to articulate a principled explanation of the Court's unanimous decision in [*BMI*]." W. Liebeler, *supra* note 14 at 35. *See generally Maricopa,* 457 U.S. at 361–67, 102 S.Ct. at 2482–85, 73 L.Ed.2d at 70–73. (Powell, J., dissenting).

BMI and *Sylvania* indicate that even if the IRF literally qualifies as price fixing, it may be subject to the rule of reason if it is no greater than reasonably necessary to achieve a legitimate commercial objective (i.e., has a procompetitive purpose), has no substantial anticompetitive impact, and is no broader than necessary to accomplish its procompetitive goals. *See United States v. Jerrold Electronics Corp.,* 187 F.Supp. 545, 556 (E.D.Pa.1960), *aff'd mem.,* 365 U.S. 567, 81 S.Ct. 755, 5 L.Ed.2d 806 (1961). Thus, if interchange reimbursement could be left to individual negotiation without threatening the existence and functioning of the VISA system, any effort to impose a set fee would be properly categorized as per se unreasonable. The question is whether the restraint is necessary for the existence of the product.

It is equally true that the Sherman Act allows restraints that are necessary to the procompetitive production of a joint venture's product. "Joint ventures and other cooperative agreements are ... not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all." *BMI,* 441 U.S. at 23, 99 S.Ct. at 1564, 60 L.Ed.2d at 18–19; *see NCAA,* 468 U.S. at ——, 104 S.Ct. at 2967, 82 L.Ed.2d at 84; *Multi-List,* 629 F.2d at 1368. Such arrangements normally are subject to rule of reason analysis because whatever restraint they impose is ancillary and counterbalanced by otherwise unattainable procompetitive benefits. *Maricopa,* 457 U.S. at 365, 102 S.Ct. at 2484, 73 L.Ed.2d at 72 (Powell, J., dissenting). A partnership is the best example of such a venture. *See BMI,* 441 U.S. at 9, 99 S.Ct. at 1556, 60 L.Ed.2d at 9–10. The issue thus posed is whether the IRF, as an element of the cost of doing business, must be set by the joint manufacturers.

According to NaBanco, three distinct markets exist—one each for card-issuing services, merchant-signing services and "IRF-like" interchange services. It argues that the card-issuing banks sell receivables to merchant-signing banks with the issuing banks directly fixing the prices of those sales through their control of VISA's board of directors. It is this

conduct that NaBanco characterizes as price fixing and subject to the per se rule.

We agree with the district court, however, that the evidence adduced at the trial instead demonstrates a complex market relationship between "cardholder and merchant demands for the VISA service suggestive of a joint venture." *NaBanco,* 596 F.Supp. at 1253. This joint enterprise is not subject to per se scrutiny because it is a necessary element in the creation of efficiency creating integration.

VISA exhibits characteristics of a joint venture, even if it is not technically a "joint venture." [16] It is an entity that has partially integrated some functions, such as the ***602** IRF, to develop a product—the VISA card [17]—that none of its members could produce individually. The product, then, "is truly greater than the sum of its parts." *BMI,* 441 U.S. at 21–22, 99 S.Ct. at 1563, 60 L.Ed.2d at 17. For a payment system like VISA to function, rules must govern the interchange of the cardholder's receivable. The IRF represents one such rule establishing a "necessary" term, without which the system would not function. [18]

16 The various VISA members neither share profits and losses nor commingle management functions. Each member also competes actively against other members in a variety of ways. This results in merchant-signing banks competing with card-issuing banks to enroll cardholders. *See NaBanco,* 596 F.Supp. at 1253.

17 NaBanco repeatedly stresses that each VISA member, not VISA, issues the individual plastic cards and receives all proceeds from individual transactions. Thus, VISA "produces" no true "product" according to NaBanco.

> The VISA product, however, is not the plastic card itself, but the rules and regulations among the various VISA members that thereby create a national payment system. This universal system is the true product of VISA; the plastic card merely embodies that product.

18 Significantly, NaBanco does not challenge any of the myriad other ancillary restraints that VISA imposes to create and protect its product. *NaBanco,* 596 F.Supp. at 1253.

The IRF is a mechanism by which VISA ensures the universality of its card, not a price fixing device to squeeze out entrepreneurs like NaBanco. NaBanco, however, argues that each VISA member could issue its own plastic card, thereby proving that the IRF is not "necessary" to create the product. This reasoning misses the mark because even if each member could afford to issue its own card, universality of acceptance—the key element to a national payment system—could not be guaranteed absent prearranged interchange rules. Consequently, the restraint is "a necessary consequence of the integration necessary to achieve these efficiencies." *Id.* at 21, 99 S.Ct. at 1563, 60 L.Ed.2d at 17. As such, it must be weighed under the rule of reason.

The Civil Aeronautics Board (the CAB), faced with a strikingly similar fact pattern, examined and upheld, under the rule of reason, a fixed-percentage cost-sharing interchange arrangement to reimburse one airline that

provided credit card service to passengers flying on a different carrier. See *In Re UATP—1976,* 85–11 CAB 2481 (1980). The 1% charge was determined to be a price agreed to among joint venturers, *id.* at 2504, which "[did] not substantially reduce or eliminate competition." *Id.* at 2503. The CAB found that the interchange fee was a "legitimate method of apportioning expenses among" the joint venturers, and that the uniform interchange fee "may very well be necessary to the continued functioning" of the universal payment system. *Id.* at 2505. Notably, the CAB also required that the plan be modified to provide member carriers with the option of entering into private interchange arrangements, *id.* at 2506, just as VISA permits its members to bypass the Base II interchange system. *See* Baxter, *supra* note 13, at 586.

Another justification for evaluating the IRF under the rule of reason is because it is a potentially efficiency creating agreement among members of a joint enterprise. There are two possible sources of revenue in the VISA system: the cardholders and the merchants. As a practical matter, the card-issuing and merchant-signing members have a mutually dependent relationship. If the revenue produced by the cardholders is insufficient to cover the card-issuers' costs, the service will be cut back or eliminated. The result would be a decline in card use and a concomitant reduction in merchant-signing banks' revenues. In short, the cardholder cannot use his card unless the merchant accepts it and the merchant cannot accept the card unless the cardholder uses one. Hence, the IRF accompanies "the coordination of other productive or distributive efforts of the parties" that is "capable of increasing the integration's efficiency and no broader than required for that purpose." Bork, *The Rule of Reason and the Per Se Concept,* 75 Yale L.J. 373, 474 (1966); *see BMI,* 441 U.S. at 21, 99 S.Ct. at 1563, 60 L.Ed.2d at 17; *In Re UATP–1976,* 85–11 CAB at 2503. The IRF is "reasonably ancillary to [a] procompetitive, efficiency-creating endeavor[ ] and therefore not a naked restraint of trade." *Multi-List,* 629 F.2d at 1365. It is an internal accounting procedure between joint venturers that shifts a ***603** portion of the revenues from the merchant-signing partner to the card-issuing partner. *See* Baxter Deposition, Vol. I, at 59–60. As such, it must be judged under the rule of reason.

We also note that NaBanco asserts that the IRF is invalid because it effects price fixing without procedural safeguards. The basis for this claim is that the VISA board of directors is alleged to act at their whim in setting the IRF without input or challenge from the merchant-signing members. This argument fails because the board is made up of members who both receive *and* pay the fee. The board can be, and actually has been, composed of members that handle more merchant accounts than cardholder business, and who therefore represent the solely merchant-signing members' interests because that interest coincides with their own. Given this relationship, the nature of the business ensures that one side will not unfairly take advantage of the other.

In sum, we agree with the district court that in deciding whether a challenged practice is subject to rule of reason or per se analysis, the court must inquire into whether the practice, on its face, always or almost always tends

to restrict output or instead is likely to assist the creation of economic efficiency. *NaBanco,* 596 F.Supp. at 1253. Rigid line-drawing must be avoided and close attention given to procompetitive, efficiency-creating integration that is accomplished as the result of an anticompetitive, yet ancillary, restraint. We conclude that the district court properly determined that the IRF was not a naked restraint of competition and therefore not per se price fixing proscribed by Section 1 of the Sherman Act.

Applying the rule of reason, the district court upheld the IRF on two separate and independent grounds. First, the court determined that the relevant product market was all payment devices (including cash, checks, and all forms of credit cards) and that VISA did not possess power in that market. *NaBanco,* 596 F.Supp. at 1256–59. Second, the court found that, on balance, the interchange fee is procompetitive in nature, *id.* at 1259–61, and reasonably cost related. *Id.* at 1261–63.

NaBanco takes issue with the district court's findings on four fronts: (1) the IRF is anticompetitive; (2) market power is irrelevant in a price fixing case; (3) VISA has market power as demonstrated by the fact that its fixed fee denies merchant-signing banks the opportunity to compete effectively on equal terms; and (4) the district court drew from too large a relevant market by including all payment devices.

The rule of reason "condemn[s] every contract, combination or conspiracy which in purpose or likely effect will *significantly* restrict competition." L. Sullivan, *Antitrust Law* § 68, at 187 (1977) (emphasis in the original). Applying the rule of reason is a three step process. First, the court must determine the restraint's purpose. Second, the court must identify the likely effects of the restraint. Last, the court must balance the anticompetitive and procompetitive purposes and effects in an effort to ascertain if the restraint would substantially impede competition. *See id.* at 187–88.

Whether the court, in applying the rule of reason, must weigh the market power of the antitrust defendant is a curiously confused and uncertain area of the law. Cases can be cited for both sides of the proposition.[19] *NCAA* presents a particularly difficult and mystifying hybrid approach. "As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output." ***604** *NCAA,* 468 U.S. at ——, 104 S.Ct. at 2965, 82 L.Ed.2d at 89.

19 *Compare Chicago Bd. of Trade v. United States,* 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683 (1918) (no market power analysis) *and* L. Sullivan, *Antitrust Law* § 69 at 190 (1977) ("perhaps in most" cases Supreme Court does not analyze market power) *with United States v. Container Corp. of America,* 393 U.S. 333, 89 S.Ct. 510, 21 L.Ed.2d 526 (1969) (Court analyzed possible market power) *and The Supreme Court, 1983 Term,* 98 Harv.L.Rev. 87, 255 (1984) (the Court "generally requires an inquiry into [the restraint's] nature and their actual effects on the market").

Even though the language in *NCAA* is somewhat cryptic, the Court apparently intended merely to require some competitive justification of certain restraints regardless of market power. *See The Supreme Court, 1983 Term,* 98 Harv.L.Rev. 87, 260–61 (1984). This case does not fall in a sufficiently similar fact pattern to warrant strict application of the *NCAA* language. Therefore, in analyzing the competitive advantages and disadvantages of the IRF, market power was a proper and useful tool for the district court.

Having decided that the relevant market is a valid analytic device in this setting, the issue is whether the district court improperly defined that market. The district court held that the relevant market was "all payment devices," and that VISA's share of that market—5 percent or less—did not constitute market power. *NaBanco,* 596 F.Supp. at 1256–59.

Initially, "[D]efinition of the relevant market is basically a fact question heavily dependent upon the special characteristics of the industry involved." *Sulmeyer v. Coca Cola Co.,* 515 F.2d 835, 849 (5th Cir.1975) (Section 2 monopolization case). The finder of fact normally is presented with voluminous expert testimony and other evidence. In such a situation, its factual findings are accorded great deference. We will not reverse the district court's market findings unless they are clearly erroneous. *See id.; Twin City Sportservice v. Charles O. Finley & Co.,* 676 F.2d 1291, 1299 (9th Cir.1982) (market findings not disturbed unless clearly erroneous).

The trial court heard substantial evidence that VISA competes in a national market that includes all payment devices.[20] It also heard testimony that the other payment devices were reasonably interchangeable with one another, even though not identical to a VISA card. "Congress prescribed a pragmatic, factual approach to the definition of the relevant market and not a formal, legalistic one." *Brown Shoe Co. v. United States,* 370 U.S. 294, 336, 82 S.Ct. 1502, 1530, 8 L.Ed.2d 510, 542 (1962).

20 This market includes VISA, Master Card, so-called "T & E" cards (travel and entertainment cards such as American Express and Carte Blanche), cash, travelers checks, personal checks, merchants' proprietary cards, ATM cards, and check guarantee cards.

NaBanco contends that the market must be defined from the perspective of the injured plaintiff. Appellant's Brief at 49. According to NaBanco the relevant market is credit card processing services. We do not reach this issue since the market in these particular circumstances is the same, whether viewed from the plaintiff's, defendant's, or consumer's perspective.

The district court's findings of fact concerning the relevant market are supported by substantial evidence and therefore not clearly erroneous. *See Anderson v. Bessemer City,* 470 U.S. 564, ——, 105 S.Ct. 1504, 1512, 84 L.Ed.2d 518, 528 (1985) ("If the district court's account of the facts is plausible in light of the record viewed in its entirety, the court of appeals may not reverse it.... Where there are two permissible views of the evidence, the factfinder's choice between them cannot be

clearly erroneous.... This is so even when the district court's findings ... are based on physical or documentary evidence or inferences from other facts."); *Dorsey v. Continental Casualty Co.,* 730 F.2d 675, 679 (11th Cir.1984).

NaBanco challenges the district court's conclusion that the IRF had a net procompetitive effect and therefore is valid under the rule of reason. This claim of error is predicated on NaBanco's assertion that "the district court did not discuss the wealth of evidence establishing the actual anticompetitive effects of VISA's price fixing." Appellant's Brief on Appeal at 44.

In NaBanco's view, the primary anticompetitive effect ignored by the district court is that the IRF restricts competition between proprietary VISA members (those that both issue cards and sign merchants) and purely merchant-signing members. The proprietary members are free to reduce the merchant discount in "on-us" transactions, because they do not have to ***605** pay the IRF, and thus can undercut the purely merchant-signing institution that must keep its merchant discount higher than the IRF. Appellant's Brief on Appeal, at 44–46. NaBanco overlooks the court's findings that the IRF has competitive effects that create efficiencies.

The district court held that VISA introduced sufficient evidence to "establish [] that IRF is necessary to offer the VISA card—a pro-competitive benefit which offsets any anti-competitive effects." *NaBanco,* 596 F.Supp. at 1265. Evidence during the trial revealed that individual price negotiations are impractical, would produce instability and higher fees, and could result in the demise of the product offered. *See* Baxter Deposition, Vols. I & II; Baxter, *supra* note 13, at 586. The court found that viewing the evidence as a whole, VISA's evidence was more compelling on the competitive benefits created by the IRF. *NaBanco,* 596 F.Supp. at 1263. The "fundamental economic interdependence" between the card-issuing and merchant-signing banks, *id.* at 1260–61; Baxter, *supra* note 13, demonstrates that redistribution of revenues or costs is a must for the continued existence of the product.

The district court balanced the procompetitive and anticompetitive purposes and effects and decided that the restraint did not substantially impede competition. An abundance of evidence was submitted from which the district court plausibly and logically could conclude that the IRF on balance is procompetitive because it was necessary to achieve stability and thus ensure the one element vital to the survival of the VISA system—universality of acceptance. Substantial, plausible evidence also disclosed that VISA is a joint venture-type enterprise in which the IRF acts as an internal control mechanism that yields procompetitive efficiencies that its members could not create acting alone, and helps create a product that its members could not produce singly. As such, the district court's finding that the IRF is an ancillary restraint that is more procompetitive than anticompetitive is supported by substantial and persuasive evidence.

We hold that the district court's finding that the relevant market is all payment systems, and that VISA does not possess market power in that market, are not clearly erroneous. We also hold

that the district court's alternative finding that, assuming VISA does have market power, the IRF is procompetitive is not clearly erroneous.

As a final matter, NaBanco objects to the fact that the trial was held in several segments over a period of a year and a half and claims it was prejudiced by this interrupted schedule. These pauses in the trial were necessary to accommodate the overloaded criminal docket in the Southern District of Florida, which cases must be given precedence under the Speedy Trial Act, 18 U.S.C. §§ 3161–74. NaBanco complains that this piecemeal process made presentation of its complex, technical evidence very difficult, thereby raising its burden of proof to an impermissible level.

In cases tried to a jury, delays and interruptions can rise to the level of reversible prejudice. *See Young & Simon, Inc. v. Merritt Savings & Loan, Inc.,* 672 F.2d 401, 402 (4th Cir.1982). This trial, however, was to the court without a jury. The trial judge's comprehensive opinion demonstrates detailed factual findings, well supported conclusions of law and a clear understanding of the case, record and the issues. *See Kenmitz v. United States,* 369 F.2d 389, 391 (7th Cir.1966). NaBanco can point to no errors of any consequence and makes no showing of prejudice resulting from the trial delays. Absent such a showing, there is no error of reversible magnitude.

The judgment of the district court is AFFIRMED.

All Citations

779 F.2d 592, 54 USLW 2402, 1986-1 Trade Cases P 66,912

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104 S.Ct. 2948
Supreme Court of the United States

NATIONAL COLLEGIATE ATHLETIC ASSOCIATION, Petitioner
v.
BOARD OF REGENTS OF the UNIVERSITY OF OKLAHOMA and University of Georgia Athletic Association.

No. 83-271.
|
Argued March 20, 1984.
|
Decided June 27, 1984.

Synopsis
Members of college athletic association brought antitrust challenge to association's plan for televising college football games of member institutions for the 1981–1985 seasons. The United States District Court for the Western District of Oklahoma, J., 546 F.Supp. 1276, found that the plan violated the antitrust laws. The Court of Appeals for the Tenth Circuit affirmed in part and remanded in part, 707 F.2d 1147. A stay was granted, 104 S.Ct. 1. On certiorari, the Supreme Court, Justice Stevens, held that: (1) although plan constituted horizontal price fixing and output limitations, it was inappropriate to apply a per se analysis as restraints on competition were essential if the product was to be available at all; (2) plan on its face constituted a restraint on operation of a free market; (3) relevant market was college football; and (4) restraints were not justified on basis of procompetitive effect, protecting live attendance or maintaining competitive balance among amateur athletic teams.

Court of Appeals affirmed.

Justice White, with whom Justice Rehnquist joined, filed a dissenting opinion.

Opinion on remand, 601 F.Supp. 307.

Syllabus [a1]

[a1] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

In 1981, petitioner National Collegiate Athletic Association (NCAA) adopted a plan for the televising of college football games of its member institutions for the 1982–1985 seasons. The plan recites that it is intended to reduce the adverse effect of live television upon football game attendance. The plan limits the total amount of televised intercollegiate football games and the number of games that any one college may televise, and no member of the NCAA is permitted to make any sale of television rights except in accordance with the plan. The NCAA has separate agreements with the two carrying networks, the American ****2952** Broadcasting Cos. and the Columbia Broadcasting System, granting each network the right to telecast the live "exposures" described in the plan. Each network agreed to pay a specified "minimum aggregate

compensation" to the participating NCAA members, and was authorized to negotiate directly with the members for the right to televise their games. Respondent Universities, in addition to being NCAA members, are members of the College Football Association (CFA), which was originally organized to promote the interests of major football-playing colleges within the NCAA structure, but whose members eventually claimed that they should have a greater voice in the formulation of football television policy than they had in the NCAA. The CFA accordingly negotiated a contract with the National Broadcasting Co. that would have allowed a more liberal number of television appearances for each college and would have increased the revenues realized by CFA members. In response, the NCAA announced that it would take disciplinary action against any CFA member that complied with the CFA–NBC contract. Respondents then commenced an action in Federal District Court, which, after an extended trial, held that the controls exercised by the NCAA over the televising of college football games violated § 1 of the Sherman Act, and accordingly granted injunctive relief. The court found that competition in the relevant market—defined as "live college football television"—had been restrained in three ways: (1) the NCAA fixed the price for particular telecasts; (2) its exclusive network contracts were tantamount to a group boycott of all other potential broadcasters ***86** and its threat of sanctions against its members constituted a threatened boycott of potential competitors; and (3) its plan placed an artificial limit on the production of televised college football. The Court of Appeals agreed that the Sherman Act had been violated, holding that the NCAA's television plan constituted illegal per se price fixing and that even if it were not per se illegal, its anticompetitive limitation on price and output was not offset by any procompetitive justifications sufficient to save the plan even when the totality of the circumstances was examined.

Held: The NCAA's television plan violates § 1 of the Sherman Act. Pp. 2958–2970.

(a) While the plan constitutes horizontal price fixing and output limitation, restraints that ordinarily would be held "illegal per se," it would be inappropriate to apply a per se rule in this case where it involves an industry in which horizontal restraints on competition are essential if the product is to be available at all. The NCAA and its members market competition itself—contests between competing institutions. Thus, despite the fact that restraints on the ability of NCAA members to compete in terms of price and output are involved, a fair evaluation of their competitive character requires consideration, under the Rule of Reason, of the NCAA's justifications for the restraints. But an analysis under the Rule of Reason does not change the ultimate focus of the inquiry, which is whether or not the challenged restraints enhance competition. Pp. 2958–2962.

(b) The NCAA television plan on its face constitutes a restraint upon the operation of a free market, and the District Court's findings establish that the plan has operated to raise price and reduce output, both of which are unresponsive to consumer preference. Under the Rule of Reason, these hallmarks of anticompetitive behavior place upon the

NCAA a heavy burden of establishing an affirmative defense that competitively justifies this apparent deviation from the operations of a free market. The NCAA's argument that its television plan can have no significant anticompetitive effect since it has no market power must be rejected. As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output and, as a factual matter, it is evident from the record that the NCAA does possess market power. Pp. 2962–2966.

****2953** (c) The record does not support the NCAA's proffered justification for its television plan that it constitutes a cooperative "joint venture" which assists in the marketing of broadcast rights and hence is procompetitive. The District Court's contrary findings undermine such a justification. Pp. 2966–2967.

(d) Nor, contrary to the NCAA's assertion, does the television plan protect live attendance, since, under the plan, games are televised during ***87** all hours that college football games are played. Moreover, by seeking to insulate live ticket sales from the full spectrum of competition because of its assumption that the product itself is insufficiently attractive to draw live attendance when faced with competition from televised games, the NCAA forwards a justification that is inconsistent with the Sherman Act's basic policy. "The Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." National Society of Professional Engineers v. United States, 435 U.S. 679, 696, 98 S.Ct. 1355, 1367, 55 L.Ed.2d 637. Pp. 2967–2968.

(e) The interest in maintaining a competitive balance among amateur athletic teams that the NCAA asserts as a further justification for its television plan is not related to any neutral standard or to any readily identifiable group of competitors. The television plan is not even arguably tailored to serve such an interest. It does not regulate the amount of money that any college may spend on its football program or the way the colleges may use their football program revenues, but simply imposes a restriction on one source of revenue that is more important to some colleges than to others. There is no evidence that such restriction produces any greater measure of equality throughout the NCAA than would a restriction on alumni donations, tuition rates, or any other revenue-producing activity. Moreover, the District Court's well-supported finding that many more games would be televised in a free market than under the NCAA plan, is compelling demonstration that the plan's controls do not serve any legitimate procompetitive purpose. Pp. 2968–2970.

707 F.2d 1147 (CA 10), affirmed.

Attorneys and Law Firms

Frank H. Easterbrook argued the cause for petitioner. With him on the briefs were *George H. Gangwere* and *James D. Fellers.*

Andy Coats argued the cause for respondents. With him on the brief were *Clyde A. Muchmore, Erwin N. Griswold, J. Ralph Beaird,* and *James F. Ponsoldt.*

Solicitor General Lee argued the cause for the United States as *amicus curiae* urging affirmance. With him on the brief were *Assistant Attorney General McGrath, Deputy Solicitor General Wallace, Deputy Assistant Attorney General* ***88** *Ginsberg, Jerrold J. Ganzfried, Barry Grossman,* and *Andrea Limmer.**

* *Gerald A. Caplan* and *Alexander Halpern* filed a brief for the National Federation of State High School Associations as *amicus curiae* urging reversal.

Forrest A. Hainline III and *J. Laurent Scharff* filed a brief for the Association of Independent Television Stations, Inc., as *amicus curiae* urging affirmance.

Opinion

Justice STEVENS delivered the opinion of the Court.

The University of Oklahoma and the University of Georgia contend that the National Collegiate Athletic Association has unreasonably restrained trade in the televising of college football games. After an extended trial, the District Court found that the NCAA had violated § 1 of the Sherman Act [1] and granted injunctive relief. 546 F.Supp. 1276 (WD Okla.1982). The Court of Appeals agreed that the statute had been violated but modified the remedy in some respects. 707 F.2d 1147 (CA10 1983). We granted certiorari, 464 U.S. 913, 104 S.Ct. 272, 78 L.Ed.2d 253 (1983), and now affirm.

1 Section 1 provides in pertinent part:

"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal...." 26 Stat. 209, as amended, 15 U.S.C. § 1.

I

The NCAA

Since its inception in 1905, the NCAA has played an important role in the regulation of amateur collegiate sports. It has adopted and promulgated playing rules, standards of amateurism, standards for academic eligibility, regulations concerning recruitment of athletes, and rules governing the size of athletic squads and coaching staffs. In some sports, such as baseball, ****2954** swimming, basketball, wrestling, and track, it has sponsored and conducted national tournaments. It has not done so in the sport of football, however. With the ***89** exception of football, the NCAA has not undertaken any regulation of the televising of athletic events. [2]

2 Presumably, however, it sells the television rights to events that the NCAA itself conducts.

The NCAA has approximately 850 voting members. The regular members are classified into separate divisions to reflect differences in size and scope of their athletic programs. Division I includes 276 colleges with major athletic programs; in this group only 187 play intercollegiate football. Divisions II and III

include approximately 500 colleges with less extensive athletic programs. Division I has been subdivided into Divisions I–A and I–AA for football.

Some years ago, five major conferences together with major football-playing independent institutions organized the College Football Association (CFA). The original purpose of the CFA was to promote the interests of major football-playing schools within the NCAA structure. The Universities of Oklahoma and Georgia, respondents in this Court, are members of the CFA.

History of the NCAA Television Plan

In 1938, the University of Pennsylvania televised one of its home games.[3] From 1940 through the 1950 season all of Pennsylvania's home games were televised. App. 303. That was the beginning of the relationship between television and college football.

3 According to the NCAA football television committee's 1981 briefing book: "As far as is known, there were [then] six television sets in Philadelphia: and all were tuned to the game." App. 244.

On January 11, 1951, a three-person "Television Committee," appointed during the preceding year, delivered a report to the NCAA's annual convention in Dallas. Based on preliminary surveys, the committee had concluded that "television does have an adverse effect on college football attendance and unless brought under some control threatens to seriously harm the nation's overall athletic and physical ***90** system." Id., at 265. The report emphasized that "the television problem is truly a national one and requires collective action by the colleges." Id., at 270. As a result, the NCAA decided to retain the National Opinion Research Center (NORC) to study the impact of television on live attendance, and to declare a moratorium on the televising of football games. A television committee was appointed to implement the decision and to develop an NCAA television plan for 1951. Id., at 277–278.

The committee's 1951 plan provided that only one game a week could be telecast in each area, with a total blackout on 3 of the 10 Saturdays during the season. A team could appear on television only twice during a season. The plan also provided that the NORC would conduct a systematic study of the effects of the program on attendance. Id., at 279. The plan received the virtually unanimous support of the NCAA membership; only the University of Pennsylvania challenged it. Pennsylvania announced that it would televise all its home games. The council of the NCAA thereafter declared Pennsylvania a member in bad standing and the four institutions scheduled to play at Pennsylvania in 1951 refused to do so. Pennsylvania then reconsidered its decision and abided by the NCAA plan. Id., at 280–281.

During each of the succeeding five seasons, studies were made which tended to indicate that television had an adverse effect on attendance at college football games. During those years the NCAA continued to exercise complete control over the number of games that could be televised. Id., at 325–359.

From 1952 through 1977 the NCAA television committee followed essentially the same procedure for developing its television plans. It would first circulate a questionnaire to the membership and then use the responses as a basis for formulating ****2955** a plan for the ensuing season. The plan was then submitted to a vote by means of a mail referendum. Once approved, the plan formed the basis for NCAA's negotiations ***91** with the networks. Throughout this period the plans retained the essential purposes of the original plan. See 546 F.Supp., at 1283.[4] Until 1977 the contracts were all for either 1– or 2–year terms. In 1977 the NCAA adopted "principles of negotiation" for the future and discontinued the practice of submitting each plan for membership approval. Then the NCAA also entered into its first 4–year contract granting exclusive rights to the American Broadcasting Cos. (ABC) for the 1978–1981 seasons. ABC had held the exclusive rights to network telecasts of NCAA football games since 1965. Id., at 1283–1284.

4 The television committee's 1981 briefing book elaborates:
"In 1952, the NCAA Television Committee initiated a plan for controlling the televising of college football games. The plans have remained remarkably similar as to their essential features over the past 30 years. They have had the following primary objectives and purposes:
"1. To reduce, insofar as possible, the adverse effects of live television upon football game attendance and, in turn, upon the athletic and education programs dependent upon that football attendance;
"2. To spread television among as many NCAA member colleges as possible; and
"3. To provide football television to the public to the extent compatible with the other two objectives." Ibid.

The Current Plan

The plan adopted in 1981 for the 1982–1985 seasons is at issue in this case.[5] This plan, like each of its predecessors, recites that it is intended to reduce, insofar as possible, the adverse effects of live television upon football game attendance.[6] It provides that "all forms of television of the football ***92** games of NCAA member institutions during the Plan control periods shall be in accordance with this Plan." App. 35. The plan recites that the television committee has awarded rights to negotiate and contract for the telecasting of college football games of members of the NCAA to two "carrying networks." Id., at 36. In addition to the principal award of rights to the carrying networks, the plan also describes rights for a "supplementary series" that had been awarded for the 1982 and 1983 seasons,[7] as well as a procedure for permitting specific "exception telecasts."[8]

5 Because respondents sought and obtained only injunctive relief against future violations of § 1 in the District Court, we do not consider previous NCAA television plans except to the extent that they shed light on the purpose and effect of the current plan.

6 "The purposes of this Plan shall be to reduce, insofar as possible, the adverse

effects of live television upon football game attendance and, in turn, upon the athletic and related educational programs dependent upon the proceeds therefrom; to spread football television participation among as many colleges as practicable; to reflect properly the image of universities as educational institutions; to promote college football through the use of television, to advance the overall interests of intercollegiate athletics, and to provide college football television to the public to the extent compatible with these other objectives." Id., at 35 (parenthetical omitted).

7 The supplementary series is described in a separate article of the plan. It is to consist of no more than 36 exposures in each of the first two years and no more than 40 exposures in the third and fourth years of the plan. Those exposures are to be scheduled on Saturday evenings or at other times that do not conflict with the principal football series that is scheduled for Saturday afternoons. Id., at 86–92.

8 An "exception" telecast is permitted in the home team's market of games that are sold out, and in the visiting team's market of games played more than 400 miles from the visiting team's campus, but in both cases only if the broadcast would not be shown in an area where another college football game is to be played. Id., at 62–72. Also, Division II and Division III institutions are allowed complete freedom to televise their games, except that the games may not appear on a network of more than five stations without the permission of the NCAA. Id., at 73–74.

In separate agreements with each of the carrying networks, ABC and the Columbia Broadcasting System (CBS), the NCAA granted each the right to telecast the 14 live "exposures" described in the plan, in accordance with the "ground rules" set ****2956** forth therein.[9] Each of the networks agreed to pay a specified "minimum aggregate compensation ***93** to the participating NCAA member institutions" during the 4–year period in an amount that totaled $131,750,000. In essence the agreement authorized each network to negotiate directly with member schools for the right to televise their games. The agreement itself does not describe the method of computing the compensation for each game, but the practice that has developed over the years and that the District Court found would be followed under the current agreement involved the setting of a recommended fee by a representative of the NCAA for different types of telecasts, with national telecasts being the most valuable, regional telecasts being less valuable, and Division II or Division III games commanding a still lower price.[10] The aggregate of all these payments presumably equals the total minimum aggregate compensation set forth in the basic agreement. Except for differences in payment between national and regional telecasts, and with respect to Division II and Division III games, the amount that any team receives does not change with the size of the viewing audience, the number of markets in which the game is telecast, or the particular characteristic of the game or the participating

teams. Instead, the "ground rules" provide that the carrying networks make alternate selections of those games they wish to televise, and thereby obtain the exclusive right to submit a bid at an essentially fixed price to the institutions involved. See 546 F.Supp., at 1289–1293.[11]

9 In addition to its contracts with the carrying networks, the NCAA has contracted with Turner Broadcasting System, Inc. (TBS), for the exclusive right to cablecast NCAA football games. The minimum aggregate fee for the initial 2–year period of the TBS contract is $17,696,000. 546 F.Supp., at 1291–1292.

10 The football television committee's briefing book for 1981 recites that a fee of $600,000 was paid for each of the 12 national games telecast by ABC during the regular fall season and $426,779 was paid for each of the 46 regional telecasts in 1980. App. 250. The report further recites that "Division I members received $27,842,185 from 1980 football television revenue, 89.8 percent of the total. Division II's share was $625,195 (2.0 percent), while Division III received $385,195 (1.3 percent) and the NCAA $2,147,425 (6.9 percent)." Id., at 251.

11 The District Court explained how the agreement eliminates competition for broadcasting rights:

"First, the networks have no intention to engage in bidding. Second, once the network holding first choice for any given date has made its choice and agreed to a rights fee for that game with the two teams involved, the other network is then in a monopsony position. The schools cannot threaten to sell the broadcast rights to any other network. They cannot sell to NBC without committing a violation of NCAA rules. They cannot sell to the network which had first choice over that particular date because, again, they would be in violation of NCAA rules, and the network would be in violation of its agreement with NCAA. Thus, NCAA creates a single eligible buyer for the product of all but the two schools selected by the network having first choice. Free market competition is thus destroyed under the new plan." 546 F.Supp., at 1292–1293.

***94** The plan also contains "appearance requirements" and "appearance limitations" which pertain to each of the 2–year periods that the plan is in effect. The basic requirement imposed on each of the two networks is that it must schedule appearances for at least 82 different member institutions during each 2–year period. Under the appearance limitations no member institution is eligible to appear on television more than a total of six times and more than four times nationally, with the appearances to be divided equally between the two carrying networks. See id., at 1293. The number of exposures specified in the contracts also sets an absolute maximum on the number of games that can be broadcast.

Thus, although the current plan is more elaborate than any of its predecessors, it retains the essential features of each of them. It limits

the total amount of televised intercollegiate football and the number of games that any one team may televise. No member is permitted to make any ****2957** sale of television rights except in accordance with the basic plan.

Background of this Controversy

Beginning in 1979 CFA members began to advocate that colleges with major football programs should have a greater voice in the formulation of football television policy than they had in the NCAA. CFA therefore investigated the possibility of negotiating a television agreement of its own, developed ***95** an independent plan, and obtained a contract offer from the National Broadcasting Co. (NBC). This contract, which it signed in August 1981, would have allowed a more liberal number of appearances for each institution, and would have increased the overall revenues realized by CFA members. See id., at 1286.

In response the NCAA publicly announced that it would take disciplinary action against any CFA member that complied with the CFA–NBC contract. The NCAA made it clear that sanctions would not be limited to the football programs of CFA members, but would apply to other sports as well. On September 8, 1981, respondents commenced this action in the United States District Court for the Western District of Oklahoma and obtained a preliminary injunction preventing the NCAA from initiating disciplinary proceedings or otherwise interfering with CFA's efforts to perform its agreement with NBC. Notwithstanding the entry of the injunction, most CFA members were unwilling to commit themselves to the new contractual arrangement with NBC in the face of the threatened sanctions and therefore the agreement was never consummated. See id., at 1286–1287.

Decision of the District Court

After a full trial, the District Court held that the controls exercised by the NCAA over the televising of college football games violated the Sherman Act. The District Court defined the relevant market as "live college football television" because it found that alternative programming has a significantly different and lesser audience appeal. Id., at 1297–1300. [12] The District Court then concluded that the NCAA ***96** controls over college football are those of a "classic cartel" with an

12 The District Court held that the NCAA had monopolized the relevant market in violation of § 2 of the Sherman Act, 15 U.S.C. § 2. See 546 F.Supp., at 1319–1323. The Court of Appeals found it unnecessary to reach this issue, as do we.

"almost absolute control over the supply of college football which is made available to the networks, to television advertisers, and ultimately to the viewing public. Like all other cartels, NCAA members have sought and achieved a price for their product which is, in most instances, artificially high. The NCAA cartel imposes production limits on its members, and maintains mechanisms for punishing cartel members who seek to stray from these production quotas. The cartel has established a uniform price for the products of each of the member producers, with no regard for the differing quality of these products or the

consumer demand for these various products." Id., at 1300–1301.

The District Court found that competition in the relevant market had been restrained in three ways: (1) NCAA fixed the price for particular telecasts; (2) its exclusive network contracts were tantamount to a group boycott of all other potential broadcasters and its threat of sanctions against its own members constituted a threatened boycott of potential competitors; and (3) its plan placed an artificial limit on the production of televised college football. Id., at 1293–1295.

In the District Court the NCAA offered two principal justifications for its television policies: that they protected the gate attendance of its members and that they tended to preserve a competitive balance among the football programs of the various schools. The District Court rejected the first justification because the evidence did not support the claim that college football television adversely affected gate attendance. Id., at 1295–1296. With respect to ****2958** the "competitive balance" argument, the District Court found that the evidence failed to show that the NCAA regulations on matters such as recruitment and the standards for preserving amateurism were not sufficient to maintain an appropriate balance. Id., at 1296.

***97** *Decision of the Court of Appeals*

The Court of Appeals held that the NCAA television plan constituted illegal per se price fixing, 707 F.2d, at 1152.[13] It rejected each of the three arguments advanced by NCAA to establish the procompetitive character of its plan.[14] First, the court rejected the argument that the television plan promoted live attendance, noting that since the plan involved a concomitant reduction in viewership the plan did not result in a net increase in output and hence was not procompetitive. Id., at 1153–1154. Second, the Court of Appeals rejected as illegitimate the NCAA's purpose of promoting athletically balanced competition. It held that such a consideration amounted to an argument that "competition will destroy the market"—a position inconsistent with the policy of the Sherman Act. Moreover, assuming arguendo that the justification was legitimate, the court agreed with the District Court's finding "that any contribution the plan made to athletic balance could be achieved by less restrictive means." Id., at 1154. Third, the Court of Appeals refused to view the NCAA plan as competitively justified by the need to compete effectively with other types of television programming, since it entirely eliminated competition between producers of football and hence was illegal per se. Id., at 1155–1156.

13 The Court of Appeals rejected the District Court's boycott holding, since all broadcasters were free to negotiate for a contract as carrying networks and the threat of sanctions against members for violating NCAA rules could not be considered a boycott if the rules were otherwise valid. 707 F.2d, at 1160–1161.

14 In the Court of Appeals as well as the District Court, petitioner argued that respondents had suffered no injury of the type the antitrust laws were designed to prevent, relying on Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc., 429 U.S. 477, 97 S.Ct.

690, 50 L.Ed.2d 70 (1977). Both courts rejected its position, 707 F.2d, at 1150–1152; 546 F.Supp., at 1303–1304. Petitioner does not seek review on that question in this Court. Brief for Petitioner 5, n. 1.

Finally, the Court of Appeals concluded that even if the television plan were not per se illegal, its anticompetitive limitation on price and output was not offset by any ***98** procompetitive justification sufficient to save the plan even when the totality of the circumstances was examined. Id., at 1157–1160.[15] The case was remanded to the District Court for an appropriate modification in its injunctive decree. Id., at 1162.[16]

15 The Court of Appeals rejected petitioner's position that it should set aside many of the District Court's findings as clearly erroneous. In accord with our usual practice, we must now accord great weight to a finding of fact which has been made by a district court and approved by a court of appeals. See, e.g., Rogers v. Lodge, 458 U.S. 613, 623, 102 S.Ct. 3272, 3278, 73 L.Ed.2d 1012 (1982). In any event, petitioner does not now ask us to set aside any of the findings of the District Court, but rather argues only that both the District Court and the Court of Appeals erred as a matter of law. Brief for Petitioner 6, n. 2, 18–19.

16 Judge Barrett dissented on the ground that the NCAA television plan's primary purpose was not anticompetitive. "Rather, it is designed to further the purposes and objectives of the NCAA, which are to maintain intercollegiate football as an amateur sport and an adjunct of the academic endeavors of the institutions. One of the key purposes is to insure that the student athlete is fully integrated into academic endeavors." 707 F.2d, at 1163. He regarded the television restraints as fully justified "in that they are necessary to maintain intercollegiate football as amateur competition." Id., at 1165. He added: "The restraints upon Oklahoma and Georgia and other colleges and universities with excellent football programs insure that they confine those programs within the principles of amateurism so that intercollegiate athletics supplement, rather than inhibit, academic achievement." Id., at 1167.

II

There can be no doubt that the challenged practices of the NCAA constitute a "restraint of trade" in the sense that they limit members' freedom to negotiate and ****2959** enter into their own television contracts. In that sense, however, every contract is a restraint of trade, and as we have repeatedly recognized, the Sherman Act was intended to prohibit only unreasonable restraints of trade.[17]

17 See, e.g., Arizona v. Maricopa County Medical Society, 457 U.S. 332, 342–343, 102 S.Ct. 2466, 2472, 73 L.Ed.2d 48 (1982); National Society

of Professional Engineers v. United States, 435 U.S. 679, 687–688, 98 S.Ct. 1355, 1363, 55 L.Ed.2d 637 (1978); Chicago Board of Trade v. United States, 246 U.S. 231, 238, 38 S.Ct. 242, 243, 62 L.Ed. 683 (1918).

***99** It is also undeniable that these practices share characteristics of restraints we have previously held unreasonable. The NCAA is an association of schools which compete against each other to attract television revenues, not to mention fans and athletes. As the District Court found, the policies of the NCAA with respect to television rights are ultimately controlled by the vote of member institutions. By participating in an association which prevents member institutions from competing against each other on the basis of price or kind of television rights that can be offered to broadcasters, the NCAA member institutions have created a horizontal restraint —an agreement among competitors on the way in which they will compete with one another. [18] A restraint of this type has often been held to be unreasonable as a matter of law. Because it places a ceiling on the number of games member institutions may televise, the horizontal agreement places an artificial limit on the quantity of televised football that is available to broadcasters and consumers. By restraining the quantity of television rights available for sale, the challenged practices create a limitation on output; our cases have held that such limitations are unreasonable restraints of trade. [19] Moreover, the District Court found that the minimum aggregate price in fact operates to preclude any price negotiation between broadcasters and institutions, ***100** thereby constituting horizontal price fixing, perhaps the paradigm of an unreasonable restraint of trade. [20]

18 See Arizona v. Maricopa County Medical Society, 457 U.S., at 356–357, 102 S.Ct., at 2479–2480; National Society of Professional Engineers v. United States, 435 U.S., at 694–696, 98 S.Ct., at 1366–1367; United States v. Topco Associates, Inc., 405 U.S. 596, 608–611, 92 S.Ct. 1126, 1133–1135, 31 L.Ed.2d 515 (1972). See also United States v. Sealy, Inc., 388 U.S. 350, 352–354, 87 S.Ct. 1847, 1849–1851, 18 L.Ed.2d 1238 (1967) (marketing association controlled by competing distributors is a horizontal combination). See generally Blecher & Daniels, Professional Sports and the "Single Entity" Defense Under Section One of the Sherman Act, 4 Whittier L.Rev. 217 (1982).

19 See, e.g., United States v. Topco Associates, Inc., 405 U.S., at 608–609, 92 S.Ct., at 1133–1134; United States v. Sealy, Inc., supra; United States v. American Linseed Oil Co., 262 U.S. 371, 388–390, 43 S.Ct. 607, 611, 67 L.Ed. 1035 (1923); American Column & Lumber Co. v. United States, 257 U.S. 377, 410–412, 42 S.Ct. 114, 120–121, 66 L.Ed. 284 (1921).

20 See, e.g., Arizona v. Maricopa County Medical Society, 457 U.S., at 344–348, 102 S.Ct., at 2473–2475; Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643, 646–647, 100 S.Ct. 1925, 1927, 64 L.Ed.2d 580 (1980) (per curiam); Kiefer–

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Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213, 71 S.Ct. 259, 260, 95 L.Ed. 219 (1951); United States v. Socony–Vacuum Oil Co., 310 U.S. 150, 212–214, 60 S.Ct. 811, 839–840, 84 L.Ed. 1129 (1940); United States v. Trenton Potteries Co., 273 U.S. 392, 396–398, 47 S.Ct. 377, 379, 71 L.Ed. 700 (1927).

Horizontal price fixing and output limitation are ordinarily condemned as a matter of law under an "illegal per se" approach because the probability that these practices are anticompetitive is so high; a per se rule is applied when "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 19–20, 99 S.Ct. 1551, 1562, 60 L.Ed.2d 1 (1979). In such circumstances a restraint is presumed unreasonable without inquiry into the particular market context in which it is found. Nevertheless, we have decided that it would be inappropriate to apply a per se rule to this case. This decision is not based ****2960** on a lack of judicial experience with this type of arrangement,[21] on the fact that the NCAA is organized as a nonprofit entity,[22] or on ***101** our respect for the NCAA's historic role in the preservation and encouragement of intercollegiate amateur athletics.[23] Rather, what is critical is that this case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all.

21 While judicial inexperience with a particular arrangement counsels against extending the reach of per se rules, see Broadcast Music, 441 U.S., at 9–10, 99 S.Ct., at 1556–1557; United States v. Topco Associates, Inc., 405 U.S., at 607–608, 92 S.Ct., at 1133; White Motor Co. v. United States, 372 U.S. 253, 263, 83 S.Ct. 696, 702, 9 L.Ed.2d 738 (1963); the likelihood that horizontal price and output restrictions are anticompetitive is generally sufficient to justify application of the per se rule without inquiry into the special characteristics of a particular industry. See Arizona v. Maricopa County Medical Society, 457 U.S., at 349–351, 102 S.Ct., at 2475–2476; National Society of Professional Engineers v. United States, 435 U.S., at 689–690, 98 S.Ct., at 1364.

22 There is no doubt that the sweeping language of § 1 applies to nonprofit entities, Goldfarb v. Virginia State Bar, 421 U.S. 773, 786–787, 95 S.Ct. 2004, 2012–2013, 44 L.Ed.2d 572 (1975), and in the past we have imposed antitrust liability on nonprofit entities which have engaged in anticompetitive conduct, American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 576, 102 S.Ct. 1935, 1947, 72 L.Ed.2d 330 (1982). Moreover, the economic significance of the NCAA's nonprofit character is questionable at best. Since the District Court found that the NCAA and its member institutions are in fact organized to maximize revenues, see 546 F.Supp., at 1288–1289, it is unclear why petitioner is less likely to restrict output in order to raise revenues

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above those that could be realized in a competitive market than would be a for-profit entity. Petitioner does not rely on its nonprofit character as a basis for reversal. Tr. of Oral Arg. 24.

23 While as the guardian of an important American tradition, the NCAA's motives must be accorded a respectful presumption of validity, it is nevertheless well settled that good motives will not validate an otherwise anticompetitive practice. See United States v. Griffith, 334 U.S. 100, 105–106, 68 S.Ct. 941, 944–945, 92 L.Ed.2d 1236 (1948); Associated Press v. United States, 326 U.S. 1, 16, n. 15, 65 S.Ct. 1416, 1423, n. 15, 89 L.Ed. 2013 (1945); Chicago Board of Trade v. United States, 246 U.S., at 238, 38 S.Ct., at 243; Standard Sanitary Manufacturing Co. v. United States, 226 U.S. 20, 49, 83 S.Ct. 9, 15, 57 L.Ed 107 (1912); United States v. Trans–Missouri Freight Assn., 166 U.S. 290, 342, 17 S.Ct. 540, 559, 41 L.Ed. 1007 (1897).

As Judge Bork has noted: "[S]ome activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams." R. Bork, The Antitrust Paradox 278 (1978). What the NCAA and its member institutions market in this case is competition itself—contests between competing institutions. Of course, this would be completely ineffective if there were no rules on which the competitors agreed to create and define the competition to be marketed. A myriad of rules affecting such matters as the size of the field, the number of players on a team, and the extent to which physical violence is to be encouraged or proscribed, all must be agreed upon, and all restrain the manner in which institutions compete. Moreover, the NCAA seeks to market a particular brand of football—college football. The identification of this "product" with an academic tradition differentiates ***102** college football from and makes it more popular than professional sports to which it might otherwise be comparable, such as, for example, minor league baseball. In order to preserve the character and quality of the "product," athletes must not be paid, must be required to attend class, and the like. And the integrity of the "product" cannot be preserved except by mutual agreement; if an institution adopted such restrictions unilaterally, its effectiveness as a competitor on the playing field might soon be destroyed. Thus, the NCAA plays a vital role in enabling college football to preserve its character, and as a result enables a product to be marketed which might otherwise be unavailable. In performing this role, its actions widen consumer choice—not only the choices available to sports fans but also ****2961** those available to athletes—and hence can be viewed as procompetitive. [24]

24 See Justice v. NCAA, 577 F.Supp. 356, 379–383 (Ariz.1983); Jones v. NCAA, 392 F.Supp. 295, 304 (Mass.1975); College Athletic Placement Service, Inc. v. NCAA, 1975–1 Trade Cases ¶ 60,117 (NJ), aff'd mem., 506 F.2d 1050 (CA3 1974). See also Brenner v. World Boxing Council, 675 F.2d

445, 454–455 (CA2 1982); Neeld v. National Hockey League, 594 F.2d 1297, 1299, n. 4 (CA9 1979); Smith v. Pro Football, Inc., 193 U.S.App.D.C. 19, 26–27, 593 F.2d 1173, 1180–1181 (1978); Hatley v. American Quarter Horse Assn., 552 F.2d 646, 652–654 (CA5 1977); Mackey v. National Football League, 543 F.2d 606, 619 (CA8 1976), cert. dism'd, 434 U.S. 801, 98 S.Ct. 28, 54 L.Ed.2d 59 (1977); Bridge Corp. of America v. The American Contract Bridge League, Inc., 428 F.2d 1365, 1370 (CA9 1970), cert. denied, 401 U.S. 940, 91 S.Ct. 940, 28 L.Ed.2d 220 (1971); Gunter Harz Sports Inc. v. United States Tennis Assn., 511 F.Supp. 1103, 1116 (Neb.), aff'd, 665 F.2d 222 (CA8 1981); Cooney v. American Horse Shows Assn., Inc., 495 F.Supp. 424, 430 (SDNY 1980); Los Angeles Memorial Coliseum Comm'n v. National Football League, 468 F.Supp. 154, 165–166 (CD Cal.1979), preliminary injunction entered, 484 F.Supp. 1274 (1980), rev'd on other grounds, 634 F.2d 1197 (CA9 1980); Kupec v. Atlantic Coast Conference, 399 F.Supp. 1377, 1380 (MDNC 1975); Closius, Not at the Behest of Nonlabor Groups: A Revised Prognosis for a Maturing Sports Industry, 24 Boston College L.Rev. 341, 344–345 (1983); Kurlantzick, Thoughts on Professional Sports and the Antitrust Law: Los Angeles Memorial Coliseum v. National Football League, 15 Conn.L.Rev. 183, 189–194 (1983); Note, Antitrust and Nonprofit Entities, 94 Harv.L.Rev. 802, 817–818 (1981). See generally Hennessey v. NCAA, 564 F.2d 1136, 1151–1154 (CA5 1977); Association for Intercollegiate Athletics for Women v. NCAA, 558 F.Supp. 487, 494–495 (DC 1983); Warner Amex Cable Communications, Inc. v. American Broadcasting Cos., 499 F.Supp. 537, 545–546 (SD Ohio 1980); Board of Regents v. NCAA, 561 P.2d 499, 506–507 (Okla.1977); Note, Tackling Intercollegiate Athletics: An Antitrust Analysis, 87 Yale L.J. 655, 665–666, 673–675 (1978).

***103** Broadcast Music squarely holds that a joint selling arrangement may be so efficient that it will increase sellers' aggregate output and thus be procompetitive. See 441 U.S., at 18–23, 99 S.Ct., at 1561–1564. Similarly, as we indicated in Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 51–57, 97 S.Ct. 2549, 2558–2561, 53 L.Ed.2d 568 (1977), a restraint in a limited aspect of a market may actually enhance marketwide competition. Respondents concede that the great majority of the NCAA's regulations enhance competition among member institutions. Thus, despite the fact that this case involves restraints on the ability of member institutions to compete in terms of price and output, a fair evaluation of their competitive character requires consideration of the NCAA's justifications for the restraints.

Our analysis of this case under the Rule of Reason, of course, does not change the ultimate focus of our inquiry. Both per se rules and the Rule of Reason are employed "to form a judgment about the competitive significance of the restraint." National Society of Professional

Engineers v. United States, 435 U.S. 679, 692, 98 S.Ct. 1355, 1365, 55 L.Ed.2d 637 (1978). A conclusion that a restraint of trade is unreasonable may be

"based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference or presumption that they were intended to restrain trade and enhance prices. Under either branch of the test, the inquiry is confined to a consideration of impact on competitive conditions." Id., at 690, 98 S.Ct., at 1364 (footnotes omitted).

Per se rules are invoked when surrounding circumstances make the likelihood of anticompetitive conduct so great as to ***104** render unjustified further examination of the challenged conduct.[25] But whether the ultimate finding is the product of a presumption or actual market analysis, the essential inquiry remains the same—whether or not the challenged restraint enhances competition.[26] Under the Sherman ****2962** Act the criterion to be used in judging the validity of a restraint on trade is its impact on competition.[27]

25 See Jefferson Parish Hosp. Dist. No. 2 v. Hyde, 466 U.S. 2, 15–16, n. 25, 104 S.Ct. 1551, 1560, n. 25, 80 L.Ed.2d 2 (1984); Arizona v. Maricopa County Medical Society, 457 U.S., at 350–351, 102 S.Ct., at 2476; Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50, n. 16, 97 S.Ct. 2549, 2557, n. 16, 53 L.Ed.2d 568 (1977).

26 Indeed, there is often no bright line separating per se from Rule of Reason analysis. Per se rules may require considerable inquiry into market conditions before the evidence justifies a presumption of anticompetitive conduct. For example, while the Court has spoken of a "per se" rule against tying arrangements, it has also recognized that tying may have procompetitive justifications that make it inappropriate to condemn without considerable market analysis. See Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S., at 11–12, 104 S.Ct., at 1558.

27 "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. And to this end it prohibits 'Every contract, combination ... or conspiracy, in restraint of trade or commerce among the Several States.' " Northern Pacific R. Co. v. United States, 356 U.S. 1, 4–5, 78 S.Ct. 514, 517–518, 2 L.Ed.2d 545 (1958).

III

Because it restrains price and output, the NCAA's television plan has a significant potential for anticompetitive effects.[28] The findings of the District Court indicate that this ***105** potential has been realized. The District Court found that if member institutions were free to sell television rights, many more games would be shown on television, and that the NCAA's output restriction has the effect of raising the price the networks pay for television rights.[29] Moreover, the ***106** court found that by fixing a price for television rights to all games, the NCAA creates a price structure that is unresponsive to viewer demand and unrelated to the prices that would prevail in a competitive market.[30] And, of course, ****2963** since as a practical matter all member institutions need NCAA approval, members have no real choice but to adhere to the NCAA's television controls.[31]

28 In this connection, it is not without significance that Congress felt the need to grant professional sports an exemption from the antitrust laws for joint marketing of television rights. See 15 U.S.C. §§ 1291–1295. The legislative history of this exemption demonstrates Congress' recognition that agreements among league members to sell television rights in a cooperative fashion could run afoul of the Sherman Act, and in particular reflects its awareness of the decision in United States v. National Football League, 116 F.Supp. 319 (ED Pa.1953), which held that an agreement among the teams of the National Football League that each team would not permit stations to telecast its games within 75 miles of the home city of another team on a day when that team was not playing at home and was televising its game by use of a station within 75 miles of its home city, violated § 1 of the Sherman Act. See S.Rep. No. 1087, 87th Cong., 1st Sess. (1961); H.R.Rep. No. 1178, 87th Cong., 1st Sess., 2–3 (1961), U.S.Code Cong. & Admin.News 1961, p. 3042; 107 Cong.Rec. 20059–20060 (1961) (remarks of Rep. Celler); id., at 20061–20062 (remarks of Rep. McCulloch); Telecasting of Professional Sports Contests: Hearings on H.R.8757 before the Antitrust Subcommittee of the House Committee on the Judiciary, 87th Cong., 1st Sess., 1–2 (1961) (statement of Chairman Celler); id., at 3 (statement of Rep. McCulloch); id., at 10–28 (statement of Pete Rozelle); id., at 69–70 (letter from Assistant Attorney General Loevinger).

29 “It is clear from the evidence that were it not for the NCAA controls, many more college football games would be televised. This is particularly true at the local level. Because of NCAA controls, local stations are often unable to televise games which they would like to, even when the games are not being televised at the network level. The circumstances which would allow so-called exception telecasts arise infrequently for many schools, and the evidence is clear that local broadcasts of college football

would occur far more frequently were it not for the NCAA controls. This is not a surprising result. Indeed, this horizontal agreement to limit the availability of games to potential broadcasters is the very essence of NCAA's agreements with the networks. The evidence establishes the fact that the networks are actually paying the large fees because the NCAA agrees to limit production. If the NCAA would not agree to limit production, the networks would not pay so large a fee. Because NCAA limits production, the networks need not fear that their broadcasts will have to compete head-to-head with other college football telecasts, either on other the networks or on various local stations. Therefore, the Court concludes that the membership of NCAA has agreed to limit production to a level far below that which would occur in a free market situation." 546 F.Supp., at 1294.

30

"Turning to the price paid for the product, it is clear that the NCAA controls utterly destroy free market competition. NCAA has commandeered the rights of its members and sold those rights for a sum certain. In so doing, it has fixed the minimum, maximum and actual price which will be paid to the schools appearing on ABC, CBS and TBS. NCAA has created the mechanism which produces a uniform price for each national telecast, and a uniform price for each regional telecast. Because of the NCAA controls, the price which is paid for the right to televise any particular game is responsive neither to the relative quality of the teams playing the game nor to viewer preference.

"In a competitive market, each college fielding a football team would be free to sell the right to televise its games for whatever price it could get. The prices would vary for the games, with games between prominent schools drawing a larger price than games between less prominent schools. Games between the more prominent schools would draw a larger audience than other games. Advertisers would pay higher rates for commercial time because of the larger audience. The telecaster would then be willing to pay larger rights fees due to the increased prices paid by the advertisers. Thus, the price which the telecaster would pay for a particular game would be dependent on the expected size of the viewing audience. Clearly, the NCAA controls grossly distort the prices actually paid for an individual game from that to be expected in a free market." Id., at 1318.

31

Since, as the District Court found, NCAA approval is necessary for any institution that wishes to compete in intercollegiate sports, the NCAA has a potent tool at its disposal for restraining institutions which require its approval. See Silver v. New York Stock Exchange, 373 U.S. 341, 347–349, and n. 5, 83 S.Ct. 1246, 1251–1252, and n. 5, 10 L.Ed.2d 389 (1963);

Associated Press v. United States, 326 U.S., at 17–18, 65 S.Ct., at 1423.

The anticompetitive consequences of this arrangement are apparent. Individual competitors lose their freedom to compete. ***107** [32] Price is higher and output lower than they would otherwise be, and both are unresponsive to consumer preference. [33] This latter point is perhaps the most significant, since "Congress designed the Sherman Act as a 'consumer welfare prescription.' " Reiter v. Sonotone Corp., 442 U.S. 330, 343, 99 S.Ct. 2326, 2333, 60 L.Ed.2d 931 (1979). A restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of antitrust law. [34] Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman ***108** Act was intended to prohibit. See Standard Oil Co. v. United States, 221 U.S. 1, 52–60, 31 S.Ct. 502, 512–515, 55 L.Ed. 619 (1911). [35] At the same time, the ****2964** television plan eliminates competitors from the market, since only those broadcasters able to bid on television rights covering the entire NCAA can compete. [36] Thus, as the District Court found, many telecasts that would occur in a competitive market are foreclosed by the NCAA's plan. [37]

32 See Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457, 465, 61 S.Ct. 703, 706, 85 L.Ed. 949 (1941); Standard Sanitary Manufacturing Co. v. United States, 226 U.S., at 47–49, 33 S.Ct., at 14–15; Montague & Co. v. Lowry, 193 U.S. 38, 24 S.Ct. 307, 48 L.Ed. 608 (1904).

33 "In this case the rule is violated by a price restraint that tends to provide the same economic rewards to all practitioners regardless of their skill, their experience, their training, or their willingness to employ innovative and difficult procedures." Arizona v. Maricopa County Medical Society, 457 U.S., at 348, 102 S.Ct., at 2475. The District Court provided a vivid example of this system in practice:

"A clear example of the failure of the rights fees paid to respond to market forces occurred in the fall of 1981. On one weekend of that year, Oklahoma was scheduled to play a football game with the University of Southern California. Both Oklahoma and USC have long had outstanding football programs, and indeed, both teams were ranked among the top five teams in the country by the wire service polls. ABC chose to televise the game along with several others on a regional basis. A game between two schools which are not well-known for their football programs, Citadel and Appalachian State, was carried on four of ABC's local affiliated stations. The USC–Oklahoma contest was carried on over 200 stations. Yet, incredibly, all four of these teams received exactly the same amount of money for the right to televise their games." 546 F.Supp., at 1291.

34 As the District Court observed:

"Perhaps the most pernicious aspect is that under the controls, the market is not responsive to viewer preference. Every witness who testified on the matter confirmed that the consumers, the viewers of college football television, receive absolutely no benefit from the controls. Many games for which there is a large viewer demand are kept from the viewers, and many games for which there is little if any demand are nonetheless televised." Id., at 1319.

35 Even in the context of professional football, where Congress was willing to pass a limited antitrust exemption, see n. 28, supra, it was concerned about ensuring that telecasts not be subject to output limitations:

"Mr. GARY. On yesterday I had the opportunity of watching three different games. There were three different games on three different channels....

"Would this bill prevent them from broadcasting three different games at one time and permit the league to enter into a contract so that only one game would be permitted?

"Mr. CELLER. The bill does not prevent what the gentleman saw yesterday. As a matter of fact the antitrust exemption provided by the bill shall not apply to any package contract which prohibits the person to whom league television rights are sold or transferred from televising any game within any area except the home area of a member club on the day when that club is playing a home game.

.....

"Mr. GARY. I am an avid sports fan. I follow football, baseball, basketball, and track, and I am very much interested in all sports. But I am also interested in the people of the United States being able to see on television the games that are played. I am interested in the television audience. I want to know that they are not going to be prohibited from seeing games that might otherwise be telecast.

"Mr. CELLER. I can assure the gentleman from Virginia that he need have no fears on that score." 107 Cong.Rec. 20060 (1961).

36 The impact on competitors is thus analogous to the effect of block booking in the motion picture industry that we concluded violated the Sherman Act:

"In the first place, they eliminate the possibility of bidding for films theater by theater. In that way they eliminate the opportunity for the small competitor to obtain the choice first runs, and put a premium on the size of the circuit." United States v. Paramount Pictures, Inc., 334 U.S. 131, 154, 68 S.Ct. 915, 927, 92 L.Ed. 1260 (1948).

37 546 F.Supp., at 1294. One of respondents' economists illustrated the point:

"[I]t's my opinion that if a free market operated in the market for intercollegiate television of football, that there would be substantially more regional and even more local games being televised than there are currently.

I can take a specific example from my home state of Indiana.

"I am at Ball State University, which until recently was a division one-A institution, although now is a division one-AA institution in terms of intercollegiate football. When Ball State plays Indiana State, that is a hotly contested game in an intrastate sense. That is a prime example of the type of game that probably would be televised. For example, when Ball State is playing Indiana State at Terre Haute, Indiana, that [would be] a popular game to be televised in the Muncie area, and, vice versa, in Terre Haute when the game happens to be in Muncie." App. 506–507.

See also id., at 607–608.

***109** Petitioner argues, however, that its television plan can have no significant anticompetitive effect since the record indicates that it has no market power—no ability to alter the interaction of supply and demand in the market.[38] We must reject this argument for two reasons, one legal, one factual.

As a matter of law, the absence of proof of market power does not justify a naked restriction on price or output. To the contrary, when there is an agreement not to compete in terms of price or output, "no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." Professional Engineers, 435 U.S., at 692, 98 S.Ct., at 1365.[39] Petitioner does not quarrel with ****2965** the District Court's ***110** finding that price and output are not responsive to demand. Thus the plan is inconsistent with the Sherman Act's command that price and supply be responsive to consumer preference.[40] We have never required proof of market power in such a case.[41] This naked restraint on price and output requires some competitive justification even in the absence of a detailed market analysis.[42]

38 Market power is the ability to raise prices above those that would be charged in a competitive market. Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S., at 27, n. 46, 104 S.Ct., at 1566, n. 46; United States Steel Corp. v. Fortner Enterprises, 429 U.S. 610, 620, 97 S.Ct. 861, 867, 51 L.Ed.2d 80 (1977); United States v. E.I. duPont de Nemours & Co., 351 U.S. 377, 391, 76 S.Ct. 994, 1004, 100 L.Ed. 1264 (1956).

39 "The fact that a practice is not categorically unlawful in all or most of its manifestations certainly does not mean that it is universally lawful. For example, joint buying or selling arrangements are not unlawful per se, but a court would not hesitate in enjoining a domestic selling arrangement by which, say, Ford and General Motors distributed their automobiles nationally through a single selling agent. Even without a trial, the judge will know that these two large firms are major factors in the automobile market, that such joint selling would eliminate important price competition between them, that they are quite substantial enough to distribute their products independently,

and that one can hardly imagine a pro-competitive justification actually probable in fact or strong enough in principle to make this particular joint selling arrangement 'reasonable' under Sherman Act § 1. The essential point is that the rule of reason can sometimes be applied in the twinkling of an eye." P. Areeda, The "Rule of Reason" in Antitrust Analysis: General Issues 37–38 (Federal Judicial Center, June 1981) (parenthetical omitted).

40 Moreover, because under the plan member institutions may not compete in terms of price and output, it is manifest that significant forms of competition are eliminated. See Catalano, Inc. v. Target Sales, Inc., 446 U.S., at 648–649, 100 S.Ct., at 1928 (per curiam); Professional Engineers, 435 U.S., at 692–695, 98 S.Ct., at 1365–1367; Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 43–44, 51 S.Ct. 42, 45, 75 L.Ed. 145 (1930).

41 See United States v. McKesson & Robbins, Inc., 351 U.S. 305, 309–310, 76 S.Ct. 937, 939–940, 100 L.Ed. 1209 (1956); United States v. Socony–Vacuum Oil Co., 310 U.S., at 221, 60 S.Ct., at 843. See also Klor's, Inc. v. Broadway–Hale Stores, Inc., 359 U.S. 207, 213, 79 S.Ct. 705, 710, 3 L.Ed.2d 741 (1959).

42 The Solicitor General correctly observes:
"There was no need for the respondents to establish monopoly power in any precisely defined market for television programming in order to prove the restraint unreasonable. Both lower courts found not only that NCAA has power over the market for intercollegiate sports, but also that in the market for television programming—no matter how broadly or narrowly the market is defined—the NCAA television restrictions have reduced output, subverted viewer choice, and distorted pricing. Consequently, unless the controls have some countervailing procompetitive justification, they should be deemed unlawful regardless of whether petitioner has substantial market power over advertising dollars. While the 'reasonableness' of a particular alleged restraint often depends on the market power of the parties involved, because a judgment about market power is the means by which the effects of the conduct on the market place can be assessed, market power is only one test of 'reasonableness.' And where the anticompetitive effects of conduct can be ascertained through means short of extensive market analysis, and where no countervailing competitive virtues are evident, a lengthy analysis of market power is not necessary." Brief for United States as Amicus Curiae 19–20 (footnote and citation omitted).

***111** As a factual matter, it is evident that petitioner does possess market power. The District Court employed the correct test for determining whether college football broadcasts constitute a separate market—whether there are other products that are

reasonably substitutable for televised NCAA football games.[43] Petitioner's argument that it cannot obtain supracompetitive prices from broadcasters since advertisers, and hence broadcasters, can switch from college football to other types of programming simply ignores the findings of the District Court. It found that intercollegiate football telecasts generate an audience uniquely attractive to advertisers and that competitors are unable to offer programming that can attract a similar audience.[44] These findings amply support its conclusion that the NCAA possesses market power.[45] Indeed, the District Court's subsidiary finding that advertisers will pay a premium price per viewer to reach audiences watching college football because of their demographic characteristics **2966 [46] is vivid evidence of the uniqueness of this product.[47] Moreover, the District Court's market *112 analysis is firmly supported by our decision in International Boxing Club of New York, Inc. v. United States, 358 U.S. 242, 79 S.Ct. 245, 3 L.Ed.2d 270 (1959), that championship boxing events are uniquely attractive to fans[48] and hence constitute a market separate from that for non-championship events. See id., at 249–252, 79 S.Ct., at 249–251.[49] Thus, respondents have demonstrated that there is a separate market for telecasts of college football which "rest [[[[s] on generic qualities differentiating" viewers. Times–Picayune Publishing Co. v. United States, 345 U.S. 594, 613, 73 S.Ct. 872, 883, 97 L.Ed. 1277 (1953). It inexorably follows that if college football broadcasts be defined as a separate market—and we are convinced they are—then the NCAA's complete control over those broadcasts provides a solid basis for the District Court's conclusion that the NCAA possesses market power with respect to those broadcasts. "When a product is controlled by one interest, without substitutes available in the market, there is monopoly power." United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 394, 76 S.Ct. 994, 1006, 100 L.Ed. 1264 (1956).[50]

43 See, e.g., United States v. Grinnell Corp., 384 U.S. 563, 571, 86 S.Ct. 1698, 1704, 16 L.Ed.2d 778 (1966); United States v. E.I. du Pont de Nemours & Co., 351 U.S., at 394–395, 76 S.Ct., at 1006–1007; Times–Picayune Publishing Co. v. United States, 345 U.S. 594, 612, n. 31, 73 S.Ct. 872, 882, n. 31, 97 L.Ed. 1277 (1953).

44 See 546 F.Supp., at 1297–1300. See also Hochberg & Horowitz, Broadcasting and CATV; The Beauty and the Bane of Major College Football, 38 Law & Contemp.Prob. 112, 118–120 (1973).

45 See, e.g., Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S., at 27, n. 46, 104 S.Ct., at 1566, n. 46, 80 L.Ed.2d 2 (1984); id., at 37–38, n. 7, 104 S.Ct., at 1571–1572, n. 7 (O'CONNOR, J., concurring in the judgment); Fortner Enterprises v. United States Steel Corp., 394 U.S. 495, 504–506 and n. 2, 89 S.Ct. 1252, 1259–1260 and n. 2, 22 L.Ed.2d 495 (1969).

46 See 546 F.Supp., at 1298–1300.

47 As the District Court observed, id., at 1297, the most analogous programming in terms of the demographic characteristics of its audience is professional football, and as a condition of its limited exemption from the antitrust laws the professional football leagues are prohibited from telecasting games at times that conflict with intercollegiate football. See 15 U.S.C. § 1293.

48 We approved of the District Court's reliance on the greater revenue-producing potential and higher television ratings of championship events as opposed to other events to support its market definition. See 358 U.S., at 250–251, 79 S.Ct., at 250.

49 For the same reasons, it is also apparent that the unique appeal of NCAA football telecasts for viewers means that "from the standpoint of the consumer—whose interests the statute was especially intended to serve," Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S., at 15, 104 S.Ct., at 1559–1560, there can be no doubt that college football constitutes a separate market for which there is no reasonable substitute. Thus we agree with the District Court that it makes no difference whether the market is defined from the standpoint of broadcasters, advertisers, or viewers.

50 See, e.g., Jefferson Parish Hospital Dist. No. 2 v. Hyde, 466 U.S., at 24–25, 104 S.Ct., at 1564–1565; Northern Pacific R. Co. v. United States, 356 U.S., at 7–8, 78 S.Ct., at 519; Times–Picayune, 345 U.S., at 611–613, 73 S.Ct., at 881–883. Petitioner seems to concede as much. See Brief for Petitioner 36–37; Tr. of Oral Arg. 6.

***113** Thus, the NCAA television plan on its face constitutes a restraint upon the operation of a free market, and the findings of the District Court establish that it has operated to raise prices and reduce output. Under the Rule of Reason, these hallmarks of anticompetitive behavior place upon petitioner a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market. See Professional Engineers, 435 U.S., at 692–696, 97 S.Ct., at 1365–1367. We turn now to the NCAA's proffered justifications.

IV

Relying on Broadcast Music, petitioner argues that its television plan constitutes a cooperative "joint venture" which assists in the marketing of broadcast rights and hence is procompetitive. While joint ventures have no immunity from the antitrust laws,[51] as Broadcast Music indicates, a joint selling arrangement may "mak[e] possible a new product by reaping otherwise unattainable efficiencies." Arizona v. Maricopa County Medical Society, 457 U.S. 332, 365, 102 S.Ct. 2466, 2484, 73 L.Ed.2d 48 (1982) (POWELL, J., dissenting) (footnote omitted). The essential contribution ****2967** made by the NCAA's arrangement is to define the number of games that may be televised, to establish the price for each exposure, and to define the basic terms of each contract

between the network and a home team. The NCAA does not, however, act as a selling agent for any school or for any conference of schools. The selection of individual games, and the negotiation of particular agreements, are matters left to the networks and the individual schools. Thus, the effect of the network plan is not to eliminate individual sales of broadcasts, since these still occur, albeit subject to fixed prices and output limitations. Unlike Broadcast Music's blanket license covering broadcast rights ***114** to a large number of individual compositions, here the same rights are still sold on an individual basis, only in a non-competitive market.

51 See Citizen Publishing Co. v. United States, 394 U.S. 131, 134–136, 89 S.Ct. 927, 928–929, 22 L.Ed.2d 148 (1969); United States v. Sealy, Inc., 388 U.S., at 353, 87 S.Ct., at 1850; Timken Roller Bearing Co. v. United States, 341 U.S. 593, 597–598, 71 S.Ct. 971, 974, 95 L.Ed. 1199 (1951); Associated Press v. United States, 326 U.S., at 15–16, 65 S.Ct., at 1422–1423.

The District Court did not find that the NCAA's television plan produced any procompetitive efficiencies which enhanced the competitiveness of college football television rights; to the contrary it concluded that NCAA football could be marketed just as effectively without the television plan.[52] There is therefore no predicate in the findings for petitioner's efficiency justification. Indeed, petitioner's argument is refuted by the District Court's finding concerning price and output. If the NCAA's television plan produced procompetitive efficiencies, the plan would increase output and reduce the price of televised games. The District Court's contrary findings accordingly undermine petitioner's position. In light of these findings, it cannot be said that "the agreement on price is necessary to market the product at all." Broadcast Music, 441 U.S., at 23, 99 S.Ct., at 1564.[53] In Broadcast Music, the availability of a package product that no individual could offer enhanced the total volume of music that was sold. Unlike this case, there was no limit of any kind placed on the volume that might be sold in the entire market and each individual remained free to sell his own music without restraint. Here production has been limited, not enhanced.[54] ***115** No individual school is free to televise its own games without restraint. The NCAA's efficiency justification is not supported by the record.

52 See 546 F.Supp., at 1306–1308.

53 Compare id., at 1307–1308 ("The colleges are clearly able to negotiate agreements with whatever broadcasters they choose. We are not dealing with tens of thousands of relatively brief musical works, but with three-hour football games played eleven times each year"), with Broadcast Music, 441 U.S., at 22–23, 99 S.Ct., at 1564 (footnotes omitted) ("[T]o the extent the blanket license is a different product, ASCAP is not really a joint sales agency offering the individual goods of many sellers, but is a separate seller offering its blanket license, of which the individual compositions are raw material. ASCAP, in short, made a market in which individual composers

are inherently unable to compete fully effectively").

54 Ensuring that individual members of a joint venture are free to increase output has been viewed as central in evaluating the competitive character of joint ventures. See Brodley, Joint Ventures and Antitrust Policy, 95 Harv.L.Rev. 1523, 1550–1552, 1555–1560 (1982). See also Note, United Charities and the Sherman Act, 91 Yale L.J. 1593 (1982).

Neither is the NCAA's television plan necessary to enable the NCAA to penetrate the market through an attractive package sale. Since broadcasting rights to college football constitute a unique product for which there is no ready substitute, there is no need for collective action in order to enable the product to compete against its nonexistent competitors.[55] This is borne out by the District Court's finding that the NCAA's television plan reduces the volume of television rights sold.

55 If the NCAA faced "interbrand" competition from available substitutes, then certain forms of collective action might be appropriate in order to enhance its ability to compete. See Continental T.V., Inc., 433 U.S., at 54–57, 97 S.Ct., at 2559–2561. Our conclusion concerning the availability of substitutes in Part III, supra, forecloses such a justification in this case, however.

V

Throughout the history of its regulation of intercollegiate football telecasts, the NCAA has indicated its concern with **2968 protecting live attendance. This concern, it should be noted, is not with protecting live attendance at games which are shown on television; that type of interest is not at issue in this case. Rather, the concern is that fan interest in a televised game may adversely affect ticket sales for games that will not appear on television.[56]

56 The NCAA's plan is not even arguably related to a desire to protect live attendance by ensuring that a game is not televised in the area where it is to be played. No cooperative action is necessary for that kind of "blackout." The home team can always refuse to sell the right to telecast its game to stations in the immediate area. The NCAA does not now and never has justified its television plan by an interest in assisting schools in "blacking out" their home games in the areas in which they are played.

Although the NORC studies in the 1950's provided some support for the thesis that live attendance would suffer if *116 unlimited television were permitted,[57] the District Court found that there was no evidence to support that theory in today's market.[58] Moreover, as the District Court found, the television plan has evolved in a manner inconsistent with its original design to protect gate attendance. Under the current plan, games are shown on television during all hours that college football games are played. The plan simply does not protect live attendance by ensuring that games

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will not be shown on television at the same time as live events.[59]

57 During this period, the NCAA also expressed its concern to Congress in urging it to limit the antitrust exemption professional football obtained for telecasting its games to contests not held on Friday or Saturday when such telecasts might interfere with attendance at intercollegiate games. See H.R.Rep. No. 1178, 87th Cong., 1st Sess., 3–4 (1961); 107 Cong.Rec. 20060–20061 (1961) (remarks of Rep. Celler); id., at 20662; Hearings, supra n. 28, at 66–68 (statement of William R. Reed). The provision enacted as a result is now found in 15 U.S.C. § 1293.

58 See 546 F.Supp., at 1295–1296, 1315.

59 “[T]he greatest flaw in the NCAA's argument is that it is manifest that the new plan for football television does not limit televised football in order to protect gate attendance. The evidence shows that under the new plan, many areas of the country will have access to nine hours of college football television on several Saturdays in the coming season. Because the ‘ground rules' eliminate head-to-head programming, a full nine hours of college football will have to be shown on television during a nine-to-twelve hour period on almost every Saturday of the football season in most of the major television markets in the country. It can hardly be said that such a plan is devised in order to protect gate attendance.” Id., at 1296.

There is, however, a more fundamental reason for rejecting this defense. The NCAA's argument that its television plan is necessary to protect live attendance is not based on a desire to maintain the integrity of college football as a distinct and attractive product, but rather on a fear that the product will not prove sufficiently attractive to draw live attendance when faced with competition from televised games. At bottom the NCAA's position is that ticket sales for most college games are unable to compete in a free market.[60] The ***117** television plan protects ticket sales by limiting output —just as any monopolist increases revenues by reducing output. By seeking to insulate live ticket sales from the full spectrum of competition because of its assumption that the product itself is insufficiently attractive to consumers, petitioner forwards a justification that is inconsistent with the basic policy of the Sherman Act. “[T]he Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable.” Professional Engineers, 435 U.S., at 696, 98 S.Ct., at 1368.

60 Ironically, to the extent that the NCAA's position has merit, it rests on the assumption that football telecasts are a unique product. If, as the NCAA argues, see supra, at 2965–2966, all television programming is essentially fungible, it would not be possible to protect attendance without banning all television during the hours at which intercollegiate football games are held.

VI

Petitioner argues that the interest in maintaining a competitive balance among amateur athletic teams is legitimate and important and that it justifies the regulations challenged in this case. We agree ****2969** with the first part of the argument but not the second.

Our decision not to apply a per se rule to this case rests in large part on our recognition that a certain degree of cooperation is necessary if the type of competition that petitioner and its member institutions seek to market is to be preserved.[61] It is reasonable to assume that most of the regulatory controls of the NCAA are justifiable means of fostering competition among amateur athletic teams and therefore procompetitive because they enhance public interest in intercollegiate athletics. The specific restraints on football telecasts that are challenged in this case do not, however, fit into the same mold as do rules defining the conditions of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture.

61 See Part II, supra.

The NCAA does not claim that its television plan has equalized or is intended to equalize competition within any ***118** one league.[62] The plan is nationwide in scope and there is no single league or tournament in which all college football teams complete. There is no evidence of any intent to equalize the strength of teams in Division I–A with those in Division II or Division III, and not even a colorable basis for giving colleges that have no football program at all a voice in the management of the revenues generated by the football programs at other schools.[63] The interest in maintaining a competitive balance that is asserted by the NCAA as a justification for regulating all television of intercollegiate football is not related to any neutral standard or to any readily identifiable group of competitors.

62 It seems unlikely, for example, that there would have been a greater disparity between the football prowess of Ohio State University and that of Northwestern University in recent years without the NCAA's television plan. The District Court found that in fact the NCAA has been strikingly unsuccessful if it has indeed attempted to prevent the emergence of a "power elite" in intercollegiate football. See 546 F.Supp., at 1310–1311. Moreover, the District Court's finding that there would be more local and regional telecasts without the NCAA controls means that Northwestern could well have generated more television income in a free market than was obtained under the NCAA regime.

63 Indeed, the District Court found that the basic reason the television plan has endured is that the NCAA is in effect controlled by schools that are not restrained by the plan:
"The plaintiffs and other CFA members attempted to persuade the majority of NCAA members that NCAA had gone far beyond its legitimate role in football television. Not surprisingly, none of the CFA proposals were adopted. Instead the membership uniformly adopted the proposals of the NCAA administration

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which 'legitimized' NCAA's exercises of power. The result was not surprising in light of the makeup of the voting membership. Of approximately 800 voting members of the NCAA, 500 or so are in Divisions II and III and are not subjected to NCAA television controls. Of the 275 Division I members, only 187 play football, and only 135 were members of Division I–A at the time of the January Convention. Division I–A was made up of the most prominent football-playing schools, and those schools account for most of the football games shown on network television. Therefore, of some 850 voting members, less than 150 suffer any direct restriction on their right to sell football games to television." Id., at 1317.

***119** The television plan is not even arguably tailored to serve such an interest. It does not regulate the amount of money that any college may spend on its football program, nor the way in which the colleges may use the revenues that are generated by their football programs, whether derived from the sale of television rights, the sale of tickets, or the sale of concessions or program advertising. [64] The plan simply imposes a restriction on one source of revenue that is more important to some colleges than to others. There is no evidence that this restriction produces any greater measure of equality throughout the NCAA than would a restriction on alumni donations, tuition rates, or any other revenue-producing activity. At the same time, as ****2970** the District Court found, the NCAA imposes a variety of other restrictions designed to preserve amateurism which are much better tailored to the goal of competitive balance than is the television plan, and which are "clearly sufficient" to preserve competitive balance to the extent it is within the NCAA's power to do so. [65] And much more than speculation supported the District Court's findings on this score. No other NCAA sport employs a similar plan, and in particular the court found that in the most closely analogous sport, college basketball, competitive balance has been maintained without resort to a restrictive television plan. [66]

64 Moreover, the District Court found that those schools which would realize increased revenues in a free market would not funnel those revenues into their football programs. See id., at 1310.

65 See id., at 1296, 1309–1310.

66 See id., at 1284–1285, 1299.

Perhaps the most important reason for rejecting the argument that the interest in competitive balance is served by the television plan is the District Court's unambiguous and well-supported finding that many more games would be televised in a free market than under the NCAA plan. The hypothesis that legitimates the maintenance of competitive balance as a procompetitive justification under the Rule of ***120** Reason is that equal competition will maximize consumer demand for the product. [67] The finding that consumption will materially increase if the controls are removed is a compelling demonstration that they do not in fact serve any such legitimate purpose. [68]

67 See Continental T.V., Inc., 433 U.S., at 54–57, 97 S.Ct., at 2559–2561. See also n. 55, supra.

68 This is true not only for television viewers, but also for athletes. The District Court's finding that the television exposure of all schools would increase in the absence of the NCAA's television plan means that smaller institutions appealing to essentially local or regional markets would get more exposure if the plan is enjoined, enhancing their ability to compete for student athletes.

VII

The NCAA plays a critical role in the maintenance of a revered tradition of amateurism in college sports. There can be no question but that it needs ample latitude to play that role, or that the preservation of the student-athlete in higher education adds richness and diversity to intercollegiate athletics and is entirely consistent with the goals of the Sherman Act. But consistent with the Sherman Act, the role of the NCAA must be to preserve a tradition that might otherwise die; rules that restrict output are hardly consistent with this role. Today we hold only that the record supports the District Court's conclusion that by curtailing output and blunting the ability of member institutions to respond to consumer preference, the NCAA has restricted rather than enhanced the place of intercollegiate athletics in the Nation's life. Accordingly, the judgment of the Court of Appeals is

Affirmed.

Justice WHITE, with whom Justice REHNQUIST joins, dissenting.

The NCAA is an unincorporated, nonprofit, educational association whose membership includes almost 800 nonprofit public and private colleges and universities and more than ***121** 100 nonprofit athletic conferences and other organizations. Formed in 1905 in response to a public outcry concerning abuses in intercollegiate athletics, the NCAA, through its annual convention, establishes policies and rules governing its members' participation in college sports, conducts national championships, exerts control over some of the economic aspects of revenue-producing sports, and engages in some more-or-less commercial activities. See Note, Tackling Intercollegiate Athletics: An Antitrust Analysis, 87 Yale L.J. 655, 656–657 (1978). Although some of the NCAA's activities, viewed in isolation, bear a resemblance to those undertaken by professional sports leagues and associations, the Court errs in treating intercollegiate athletics under the NCAA's control as a purely commercial venture in which colleges and universities participate solely, or ****2971** even primarily, in the pursuit of profits. Accordingly, I dissent.

I

"While it would be fanciful to suggest that colleges are not concerned about the profitability of their ventures, it is clear that other, non-commercial goals play a central role in their sports programs." J. Weistart

& C. Lowell, The Law of Sports § 5.12 (1979). The NCAA's member institutions have designed their competitive athletic programs "to be a vital part of the educational system." Constitution and Interpretations of the NCAA, Art. II, § 2(a) (1982–1983), reprinted in App. 216. Deviations from this goal, produced by a persistent and perhaps inevitable desire to "win at all costs," have in the past led, and continue to lead, to a wide range of competitive excesses that prove harmful to students and institutions alike. See G. Hanford, Report to the American Council on Education, An Inquiry into the Need for and Feasibility of a National Study of Intercollegiate Athletics 74–76 (1974) (Hanford); Marco, The Place of Intercollegiate Athletics in Higher Education: The Responsibility of the Faculty, 31 J. Higher Educ. 422, 426 (1968). The fundamental policy ***122** underlying the NCAA's regulatory program, therefore, is to minimize such deviations and "to maintain intercollegiate athletics as an integral part of the educational program and the athlete as an integral part of the student body and, by so doing, retain a clear line of demarcation between college athletics and professional sports." Constitution and Interpretations of the NCAA, Art. II, § 2(a), reprinted in App. 216. See 546 F.Supp. 1276, 1309 (WD Okla.1982).

The NCAA, in short, "exist[s] primarily to enhance the contribution made by amateur athletic competition to the process of higher education as distinguished from realizing maximum return on it as an entertainment commodity." Association for Intercollegiate Athletics for Women v. NCAA, 558 F.Supp. 487, 494 (DC 1983), aff'd, 236 U.S.App.D.C. 311, 735 F.2d 577 (1984). In pursuing this goal, the organization and its members seek to provide a public good—a viable system of amateur athletics—that most likely could not be provided in a perfectly competitive market. See Hennessey v. NCAA, 564 F.2d 1136, 1153 (CA5 1977). "Without regulation, the desire of member institutions to remain athletically competitive would lead them to engage in activities that deny amateurism to the public. No single institution could confidently enforce its own standards since it could not trust its competitors to do the same." Note, Antitrust and Nonprofit Entities, 94 Harv.L.Rev. 802, 817–818 (1981). The history of intercollegiate athletics prior to the advent of the NCAA provides ample support for this conclusion. By mitigating what appears to be a clear failure of the free market to serve the ends and goals of higher education, the NCAA ensures the continued availability of a unique and valuable product, the very existence of which might well be threatened by unbridled competition in the economic sphere.

In pursuit of its fundamental goal and others related to it, the NCAA imposes numerous controls on intercollegiate athletic competition among its members, many of which "are similar to those which are summarily condemned when ***123** undertaken in a more traditional business setting." Weistart & Lowell, supra, at § 5.12.b. Thus, the NCAA has promulgated and enforced rules limiting both the compensation of student-athletes, see, e.g., Justice v. NCAA, 577 F.Supp. 356 (Ariz.1983), and the number of coaches a school may hire for its football and basketball programs, see, e.g., Hennessey v. NCAA, supra; it also has prohibited athletes who formerly have been compensated for playing from participating in intercollegiate competition, see, e.g., Jones v. NCAA, 392 F.Supp. 295

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(Mass.1975), restricted the number of athletic scholarships its members may award, and established minimum academic standards for recipients of those scholarships; and it has pervasively regulated the recruitment process, student eligibility, practice schedules, squad size, the number of games ****2972** played, and many other aspects of intercollegiate athletics. See 707 F.2d 1147, 1153 (CA10 1983); 546 F.Supp., at 1309. One clear effect of most, if not all, of these regulations is to prevent institutions with competitively and economically successful programs from taking advantage of their success by expanding their programs, improving the quality of the product they offer, and increasing their sports revenues. Yet each of these regulations represents a desirable and legitimate attempt "to keep university athletics from becoming professionalized to the extent that profit making objectives would overshadow educational objectives." Kupec v. Atlantic Coast Conference, 399 F.Supp. 1377, 1380 (MDNC 1975). Significantly, neither the Court of Appeals nor this Court questions the validity of these regulations under the Rule of Reason. See ante, at 2959–2961, 2968; 707 F.2d, at 1153.

Notwithstanding the contrary conclusion of the District Court, 546 F.Supp., at 1316, and the majority, ante, at 2968–2969, I do not believe that the restraint under consideration in this case—the NCAA's television plan—differs fundamentally for antitrust purposes from the other seemingly anti-competitive aspects of the organization's broader program of self- ***124** regulation. The television plan, like many of the NCAA's actions, furthers several complementary ends. Specifically, the plan is designed

"to reduce, insofar as possible, the adverse effects of live television ... upon football game attendance and, in turn, upon the athletic and related educational programs dependent upon the proceeds therefrom; to spread football television participation among as many colleges as practicable; to reflect properly the image of universities as educational institutions; to promote college football through the use of television, to advance the overall interests of intercollegiate athletics, and to provide college football television to the public to the extent compatible with these other objectives." App. 35.

See also id., at 244, 323, 640, 651, 672. More generally, in my view, the television plan reflects the NCAA's fundamental policy of preserving amateurism and integrating athletics and education. Nor does the District Court's finding that the plan is intended to maximize television revenues, 546 F.Supp., at 1288–1289, 1315–1316, warrant any implication that the NCAA and its member institutions pursue this goal without regard to the organization's stated policies.

Before addressing the infirmities in the Court's opinion, I should state my understanding of what the Court holds. To do so, it is necessary first to restate the essentials of the NCAA's television plan and to refer to the course of this case in the lower courts. Under the plan at issue, 4–year contracts were entered into with the American Broadcasting Co. (ABC), Columbia Broadcasting System (CBS), and Turner Broadcasting System (Turner) after competitive bidding. Every fall, ABC and CBS were to present 14 exposures of college football and Turner would show 19 evening

games. The overall price for each network was stated in the contracts. The networks select the games to be telecast and pay directly to the colleges involved what has developed to be ***125** a uniform fee for each game telecast. Unless within one of the exceptions, only the designated number of games may be broadcast, and no NCAA member may arrange for televising its games other than pursuant to the plan. Under this scheme, of course, NCAA members must compete against one another for television appearances, although this competition is limited somewhat by the fact that no college may appear on television more than six times in any 2–year period. In 1983, 242 games were televised, 89 network games and 153 under the exceptions provided in the television plan. In 1983, 173 schools appeared on television, 89 on network games and an additional 84 teams under the exceptions. Report of the 1983 NCAA Football Television Committee to ****2973** the 78th Annual Convention of the NCAA 61–65 (1984). [1]

1 Television plans with similar features have been in place since 1951. The 1951–1953 plans were submitted to the Antitrust Division of the Department of Justice for review. The Department took the matter "under study," App. 284–285, and, until this litigation, has apparently never taken the position that the NCAA's television plans were unlawful.

The District Court held that the plan constituted price fixing and output limitation illegal per se under § 1 of the Sherman Act; it also held that the scheme was an illegal group boycott, was monopolization forbidden by § 2, and was in any event an unreasonable restraint of trade. It then entered an injunction that for all practical purposes excluded the NCAA from interfering with or regulating its members' arrangements for televising their football games. The Court of Appeals, while disagreeing with the boycott and monopolization holdings, otherwise upheld the District Court's judgment that the television plan violated the Sherman Act, focusing almost entirely on the price-fixing and output-limiting aspects of the television plan. The Court of Appeals, however, differed with the District Court with respect to the injunction. After noting that the injunction vested exclusive control of television rights in the individual schools, the court stated that, "[w]hile we hold that the NCAA cannot ***126** lawfully maintain exclusive control of the rights, how far such rights may be commonly regulated involves speculation that should not be made on the record of the instant case." 707 F.2d, at 1162. The court expressly stated, for example, that the NCAA could prevent its members from telecasting games on Friday night in competition with high school games, ibid., emphasized that the disparity in revenue between schools could be reduced by "[a] properly drawn system of pass-over payments to ensure adequate athletic funding for schools that do not earn substantial television revenues," id., at 1159, and indicated that it was not outlawing "membership-wide contract[s] with opt-out and pass-over payment provisions, or blackout rules." Id., at 1162. It nevertheless left the District Court's injunction in full force and remanded the case for further proceedings in light of its opinion. Anticipating that the Court would grant certiorari, I stayed the judgment of the Court of Appeals. 463 U.S. 1311, 104 S.Ct. 1, 77 L.Ed.2d 1294 (1983).

In affirming the Court of Appeals, the Court first holds that the television plan has sufficient redeeming virtues to escape condemnation as a per se violation of the Sherman Act, this because of the inherent characteristics of competitive athletics and the justifiable role of the NCAA in regulating college athletics. It nevertheless affirms the Court of Appeals' judgment that the NCAA plan is an unreasonable restraint of trade because of what it deems to be the plan's price-fixing and output-limiting aspects. As I shall explain, in reaching this result, the Court traps itself in commercial antitrust rhetoric and ideology and ignores the context in which the restraints have been imposed. But it is essential at this point to emphasize that neither the Court of Appeals nor this Court purports to hold that the NCAA may not (1) require its members who televise their games to pool and share the compensation received among themselves, with other schools, and with the NCAA; (2) limit the number of times any member may arrange to have its games shown on ***127** television; or (3) enforce reasonable blackout rules to avoid head-to-head competition for television audiences. As I shall demonstrate, the Court wisely and correctly does not condemn such regulations. What the Court does affirm is the Court of Appeals' judgment that the NCAA may not limit the number of games that are broadcast on television and that it may not contract for an overall price that has the effect of setting the price for individual game broadcast rights.[2] I disagree with the Court in these respects.

2 This litigation was triggered by the NCAA's response to an attempt by the College Football Association (CFA), an organization of the more dominant football-playing schools and conferences, to develop an independent television plan. To the extent that its plan contains features similar to those condemned as anticompetitive by the Court, the CFA may well have antitrust problems of its own. To the extent that they desire continued membership in the NCAA, moreover, participation in a television plan developed by the CFA will not exempt football powers like respondents from the many kinds of NCAA controls over television appearances that the Court does not purport to invalidate.

****2974** II

"In a competitive market," the District Court observed, "each football-playing institution would be an independent seller of the right to telecast its football games. Each seller would be free to sell that right to any entity it chose," and "for whatever price it could get." 546 F.Supp., at 1318. Under the NCAA's television plan, member institutions' competitive freedom is restrained because, for the most part, television rights are brought and sold, not on a per-game basis, but as a package deal. With limited exceptions not particularly relevant to antitrust scrutiny of the plan, broadcasters wishing to televise college football must be willing and able to purchase a package of television rights without knowing in advance the particular games to which those rights apply. The real negotiations over price and terms take place between the broadcasters and the NCAA rather ***128** than between the broadcasters and individual schools. Knowing that some

games will be worth more to them than others, the networks undoubtedly exercise whatever bargaining power they possess to ensure that the minimum aggregate compensation they agree to provide for the package bears some relation to the average value to them of the games they anticipate televising. Because some schools' games contribute disproportionately to the total value of the package, see id., at 1293, the manner in which the minimum aggregate compensation is distributed among schools whose games are televised has given rise to a situation under which less prominent schools receive more in rights fees than they would receive in a competitive market and football powers like respondents receive less. Id., at 1315.

As I have said, the Court does not hold, nor did the Court of Appeals hold, that this redistributive effect alone would be sufficient to subject the television plan to condemnation under § 1 of the Sherman Act. Nor should it, for an agreement to share football revenues to a certain extent is an essential aspect of maintaining some balance of strength among competing colleges and of minimizing the tendency to professionalism in the dominant schools. Sharing with the NCAA itself is also a price legitimately exacted in exchange for the numerous benefits of membership in the NCAA, including its many-faceted efforts to maintain a system of competitive, amateur athletics. For the same reasons, limiting the number of television appearances by any college is an essential attribute of a balanced amateur athletic system. Even with shared television revenues, unlimited appearances by a few schools would inevitably give them an insuperable advantage over all others and in the end defeat any efforts to maintain a system of athletic competition among amateurs who measure up to college scholastic requirements.

The Court relies instead primarily on the District Court's findings that (1) the television plan restricts output; and (2) the plan creates a noncompetitive price structure that is unresponsive to viewer demand. Ante, at 2962. See, ***129** e.g., 546 F.Supp., at 1318–1319. These findings notwithstanding, I am unconvinced that the television plan has a substantial anticompetitive effect.

First, it is not clear to me that the District Court employed the proper measure of output. I am not prepared to say that the District Court's finding that "many more college football games would be televised" in the absence of the NCAA controls, id., at 1294, is clearly erroneous. To the extent that output is measured solely in terms of the number of televised games, I need not ****2975** deny that it is reduced by the NCAA's television plan. But this measure of output is not the proper one. The District Court found that eliminating the plan would reduce the number of games on network television and increase the number of games shown locally and regionally. Id., at 1307. It made no finding concerning the effect of the plan on total viewership, which is the more appropriate measure of output or, at least, of the claimed anticompetitive effects of the NCAA plan. This is the NCAA's position, and it seems likely to me that the television plan, by increasing network coverage at the expense of local broadcasts, actually expands the total television audience for NCAA football. The NCAA would surely be an irrational "profit maximizer" if this were not the case. In the absence of a contrary finding by the District Court, I cannot conclude that respondents

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carried their burden of showing that the television plan has an adverse effect on output and is therefore anticompetitive.

Second, and even more important, I am unconvinced that respondents have proved that any reduction in the number of televised college football games brought about by the NCAA's television plan has resulted in an anticompetitive increase in the price of television rights. The District Court found, of course, that "the networks are actually paying the large fees because the NCAA agrees to limit production. If the NCAA would not agree to limit production, the networks would not pay so large a fee." Id., at 1294. Undoubtedly, this is true. But the market for television rights to college football competitions should not be equated to the markets ***130** for wheat or widgets. Reductions in output by monopolists in most product markets enable producers to exact a higher price for the same product. By restricting the number of games that can be televised, however, the NCAA creates a new product—exclusive television rights—that are more valuable to networks than the products that its individual members could market independently.

The television plan makes a certain number of games available for purchase by television networks and limits the incidence of head-to-head competition between football telecasts for the available viewers. Because competition is limited, the purchasing network can count on a larger share of the audience, which translates into greater advertising revenues and, accordingly, into larger payments per game to the televised teams. There is thus a relationship between the size of the rights payments and the value of the product being purchased by the networks; a network purchasing a series of games under the plan is willing to pay more than would one purchasing the same games in the absence of the plan since the plan enables the network to deliver a larger share of the available audience to advertisers and thus to increase its own revenues. In short, by focusing only on the price paid by the networks for television rights rather than on the nature and quality of the product delivered by the NCAA and its member institutions, the District Court, and this Court as well, may well have deemed anticompetitive a rise in price that more properly should be attributed to an increase in output, measured in terms of viewership.

Third, the District Court's emphasis on the prices paid for particular games seems misdirected and erroneous as a matter of law. The distribution of the minimum aggregate fees among participants in the television plan is, of course, not wholly based on a competitive price structure that is responsive to viewer demand and is only partially related to the value those schools contribute to the total package the networks agree to buy. But as I have already indicated, see ***131** supra, at 2974, this "redistribution" of total television revenues is a wholly justifiable, even necessary, aspect of maintaining a system of truly competitive college teams. As long as the NCAA cannot artificially fix the price of the entire package and demand supercompetitive prices, this aspect of the plan should be of little concern. And I find little, if anything, in the record to support ****2976** the notion that the NCAA has power to extract from the television networks more than the broadcasting rights are worth in the marketplace.

III

Even if I were convinced that the District Court did not err in failing to look to total viewership, as opposed to the number of televised games, when measuring output and anticompetitive effect and in failing fully to consider whether the NCAA possesses power to fix the package price, as opposed to the distribution of that package price among participating teams, I would nevertheless hold that the television plan passes muster under the Rule of Reason. The NCAA argues strenuously that the plan and the network contracts "are part of a joint venture among many of the nation's universities to create a product—high-quality college football—and offer that product in a way attractive to both fans in the stadiums and viewers on [television]. The cooperation in producing the product makes it more competitive against other [[[[television] (and live) attractions." Brief for Petitioner 15. The Court recognizes that, "[i]f the NCAA faced 'interbrand' competition from available substitutes, then certain forms of collective action might be appropriate in order to enhance its ability to compete." Ante, at 2967, n. 55. See Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 54–57, 97 S.Ct. 2549, 2559–2561, 53 L.Ed.2d 568 (1977). It rejects the NCAA's proffered procompetitive justification, however, on the ground that college football is a unique product for which there are no available substitutes and "there is no need for collective action in ***132** order to enable the product to compete against its nonexistent competitors." Ante, at 2967 (footnote omitted). This proposition is singularly unpersuasive.

It is one thing to say that "NCAA football is a unique product," 546 F.Supp., at 1299, that "intercollegiate football telecasts generate an audience uniquely attractive to advertisers and that competitors are unable to offer programming that can attract a similar audience." Ante, at 2965 (footnote omitted). See 707 F.2d, at 1158–1159; 546 F.Supp., at 1298–1300. It is quite another, in my view, to say that maintenance or enhancement of the quality of NCAA football telecasts is unnecessary to enable those telecasts to compete effectively against other forms of entertainment. The NCAA has no monopoly power when competing against other types of entertainment. Should the quality of the NCAA's product "deteriorate to any perceptible degree or should the cost of 'using' its product rise, some fans undoubtedly would turn to another form of entertainment.... Because of the broad possibilities for alternative forms of entertainment," the NCAA "properly belongs in the broader 'entertainment' market rather than in ... [a] narrower marke[t]" like sports or football. Grauer, Recognition of the National Football League as a Single Entity Under Section 1 of the Sherman Act: Implications of the Consumer Welfare Model, 82 Mich.L.Rev. 1, 34, n. 156 (1983). See National Football League v. North American Soccer League, 459 U.S. 1074, 1077, 103 S.Ct. 499, 500, 74 L.Ed.2d 639 (1982) (REHNQUIST, J., dissenting from the denial of certiorari); R. Atwell, B. Grimes, & D. Lopiano, The Money Game 32–33 (1980); Hanford, at 67; J. Michener, Sports in America 208–209 (1976); Note, 87 Yale L.J., at 661, and n. 31.

The NCAA has suggested a number of plausible ways in which its television plan

might enhance the ability of college football telecasts to compete against other forms of entertainment. Brief for Petitioner 22–25. Although the District Court did conclude that the plan is "not necessary for effective marketing of the product," 546 F.Supp., at 1307, its ***133** finding was directed only at the question whether college football telecasts would continue in the absence of the plan. It made no explicit findings concerning the effect of the plan on viewership and thus did not reject the factual premise of the NCAA's argument that the plan might enhance competition by increasing ****2977** the market penetration of NCAA football. See also 707 F.2d, at 1154–1156, 1160. The District Court's finding that network coverage of NCAA football would likely decrease if the plan were struck down, 546 F.Supp., at 1307, in fact, strongly suggests the validity of the NCAA's position. On the record now before the Court, therefore, I am not prepared to conclude that the restraints imposed by the NCAA's television plan are "such as may suppress or even destroy competition" rather than "such as merely regulat[e] and perhaps thereby promot [[[[e] competition." Chicago Board of Trade v. United States, 246 U.S. 231, 238, 38 S.Ct. 242, 244, 62 L.Ed. 683 (1918).

IV

Finally, I return to the point with which I began—the essentially noneconomic nature of the NCAA's program of self-regulation. Like Judge Barrett, who dissented in the Court of Appeals, I believe that the lower courts "erred by subjugating the NCAA's educational goals (and, incidentally, those which Oklahoma and Georgia insist must be maintained in any event) to the purely competitive commercialism of [an] 'every school for itself' approach to television contract bargaining." 707 F.2d, at 1168. Although the NCAA does not enjoy blanket immunity from the antitrust laws, cf. Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), it is important to remember that the Sherman Act "is aimed primarily at combinations having commercial objectives and is applied only to a very limited extent to organizations ... which normally have other objectives." Klor's, Inc. v. Broadway–Hale Stores, Inc., 359 U.S. 207, 213, n. 7, 79 S.Ct. 705, 710, n. 7, 3 L.Ed.2d 741 (1959).

The fact that a restraint operates on nonprofit educational institutions as distinguished from business entities is as "relevant ***134** in determining whether that particular restraint violates the Sherman Act" as is the fact that a restraint affects a profession rather than a business. Goldfarb v. Virginia State Bar, supra, at 788, n. 17, 95 S.Ct., at 2013, n. 17. Cf. Community Communications Co. v. Boulder, 455 U.S. 40, 56, n. 20, 102 S.Ct. 835, 843, n. 20, 70 L.Ed.2d 810 (1982). The legitimate noneconomic goals of colleges and universities should not be ignored in analyzing restraints imposed by associations of such institutions on their members, and these noneconomic goals "may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently." Goldfarb v. Virginia State Bar, supra, at 788, n. 17, 95 S.Ct., at 2013, n. 17. The Court of Appeals, like the District Court, flatly refused to consider what it termed "noneconomic" justifications advanced by the NCAA in support of the television plan. It was of the view that our decision in National Society of Professional Engineers v. United

States, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978), precludes reliance on noneconomic factors in assessing the reasonableness of the television plan. 707 F.2d, at 1154; see Tr. of Oral Arg. 24–25. This view was mistaken, and I note that the Court does not in so many words repeat this error.

Professional Engineers did make clear that antitrust analysis usually turns on "competitive conditions" and "economic conceptions." 435 U.S., at 690, and n. 16, 98 S.Ct., at 1364, and n. 16. Ordinarily, "the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition." Id., at 691, 98 S.Ct., at 1365. The purpose of antitrust analysis, the Court emphasized, "is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry." Id., at 692, 98 S.Ct., at 1365. Broadly read, these statements suggest that noneconomic values like the promotion of amateurism and fundamental educational objectives could not save the television plan from condemnation under the Sherman Act. ***135** But these ****2978** statements were made in response to "public interest" justifications proffered in defense of a ban on competitive bidding imposed by practitioners engaged in standard, profit-motivated commercial activities. The primarily noneconomic values pursued by educational institutions differ fundamentally from the "overriding commercial purpose of [the] day-to-day activities" of engineers, lawyers, doctors, and businessmen, Gulland, Byrne, & Steinbach, Intercollegiate Athletics and Television Contracts: Beyond Economic Justifications in Antitrust Analysis of Agreements Among Colleges, 52 Ford.L.Rev. 717, 728 (1984), and neither Professional Engineers nor any other decision of this Court suggests that associations of nonprofit educational institutions must defend their self-regulatory restraints solely in terms of their competitive impact, without regard for the legitimate noneconomic values they promote.

When these values are factored into the balance, the NCAA's television plan seems eminently reasonable. Most fundamentally, the plan fosters the goal of amateurism by spreading revenues among various schools and reducing the financial incentives toward professionalism. As the Court observes, the NCAA imposes a variety of restrictions perhaps better suited than the television plan for the preservation of amateurism. Ante, at 2970. Although the NCAA does attempt vigorously to enforce these restrictions, the vast potential for abuse suggests that measures, like the television plan, designed to limit the rewards of professionalism are fully consistent with, and essential to the attainment of, the NCAA's objectives. In short, "[t]he restraints upon Oklahoma and Georgia and other colleges and universities with excellent football programs insure that they confine those programs within the principles of amateurism so that intercollegiate athletics supplement, rather than inhibit, educational achievement." 707 F.2d, at 1167 (Barrett, J., dissenting). The collateral consequences of the spreading of ***136** regional and national appearances among a number of schools are many: the television plan, like the ban on compensating student-athletes, may well encourage students to choose their schools, at least in part, on the basis of educational quality by reducing the perceived economic element of the choice,

see Note, 87 Yale L.J., at 676, n. 106; it helps ensure the economic viability of athletic programs at a wide variety of schools with weaker football teams; and it "promot[es] competitive football among many and varied amateur teams nationwide." Gulland, Byrne, & Steinbach, supra, at 722 (footnote omitted). These important contributions, I believe, are sufficient to offset any minimal anticompetitive effects of the television plan.

For all of these reasons, I would reverse the judgment of the Court of Appeals. At the very least, the Court of Appeals should be directed to vacate the injunction of the District Court pending the further proceedings that will be necessary to amend the outstanding injunction to accommodate the substantial remaining authority of the NCAA to regulate the telecasting of its members' football games.

All Citations

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98 S.Ct. 1355
Supreme Court of the United States

NATIONAL SOCIETY
OF PROFESSIONAL
ENGINEERS, Petitioner,
v.
UNITED STATES.

No. 76–1767.
|
Argued Jan. 18, 1978.
|
Decided April 25, 1978.

Synopsis

United States brought civil antitrust action against association of professional engineers, alleging that association's canon of ethics prohibiting competitive bidding by its members violated Sherman Anti-Trust Act. The United States District Court for the District of Columbia, 404 F.Supp. 457, entered judgment in favor of United States, and association appealed. The Court of Appeals, 181 U.S.App.D.C. 41, 555 F.2d 978, affirmed in part and remanded in part, and writ of certiorari was granted. The Supreme Court, Mr. Justice Stevens, held that: (1) canon of ethics prohibiting competitive bidding was not justified under Rule of Reason and violated section of Sherman Anti-Trust Act, and (2) judgment prohibiting association from adopting any official opinion, policy statement or guideline stating or implying that competitive bidding was unethical did not abridge association's First Amendment rights.

Affirmed.

Mr. Justice Blackmun, with whom Mr. Justice Rehnquist joined, concurred in part and concurred in the judgment and filed opinion.

Mr. Chief Justice Burger concurred in part and dissented in part and filed opinion.

Procedural Posture(s): On Appeal.

****1358** *Syllabus* [*]

[*] The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

***679** The United States brought this civil antitrust suit against petitioner, the National Society of Professional Engineers, alleging that petitioner's canon of ethics ****1359** prohibiting its members from submitting competitive bids for engineering services suppressed competition in violation of § 1 of the Sherman Act. Petitioner defended on the ground, *inter alia,* that under the Rule of Reason the canon was justified because it was adopted by members of a learned profession for the purpose of minimizing the risk that competition would produce inferior engineering work endangering the public safety. The District Court, granting an injunction against the canon, rejected this justification, holding that the canon on its face violated § 1 of the Sherman Act, thus making it unnecessary to make findings on the likelihood that competition would produce the dire consequences envisaged by petitioner.

The Court of Appeals affirmed, although modifying the District Court's injunction in certain respects so that, as modified, it prohibits petitioner from adopting any official opinion, policy statement, or guideline stating or implying that competitive bidding is unethical. *Held* :

1. On its face, the canon in question restrains trade within the meaning of § 1 of the Sherman Act, and the Rule of Reason, under which the proper inquiry is whether the challenged agreement is one that promotes, or one that suppresses, competition, does not support a defense based on the assumption that competition itself is unreasonable. Pp. 1362–1368.

(a) The canon amounts to an agreement among competitors to refuse to discuss prices with potential customers until after negotiations have resulted in the initial selection of an engineer, and, while it is not price fixing as such, it operates as an absolute ban on competitive bidding, applying with equal force to both complicated and simple projects and to both inexperienced and sophisticated customers. Pp. 1365–1366.

(b) Petitioner's affirmative defense confirms rather than refutes the anticompetitive purpose and effect of its canon, and its attempt to justify, under the Rule of Reason, the restraint on competition imposed by the canon on the basis of the potential threat that competition poses ***680** to the public safety and the ethics of the engineering profession is nothing less than a frontal assault on the basic policy of the Sherman Act. Pp. 1366–1367.

(c) That engineers are often involved in large-scale projects significantly affecting the public safety does not justify any exception to the Sherman Act. Pp. 1367–1368.

(d) While ethical norms may serve to regulate and promote competition in professional services and thus fall within the Rule of Reason, petitioner's argument here is a far cry from such a position; and, although competition may not be entirely conducive to ethical behavior, that is not a reason, cognizable under the Sherman Act, for doing away with competition. P. 1367.

2. The District Court's injunction, as modified by the Court of Appeals, does not abridge First Amendment rights. Pp. 1368–1369.

(a) The First Amendment does not "make it . . . impossible ever to enforce laws against agreements in restraint of trade," *Giboney v. Empire Storage & Ice Co.,* 336 U.S. 490, 502, 69 S.Ct. 684, 691, 93 L.Ed. 834, and, although the District Court may consider the fact that its injunction may impinge upon rights that would otherwise be constitutionally protected, those protections do not prevent it from remedying the antitrust violations. P. 1368.

(b) The standard against which the injunction must be judged is whether the relief represents a reasonable method of eliminating the consequences of the illegal conduct, and the injunction meets this standard. P. 1368.

(c) If petitioner wishes to adopt some other ethical guideline more closely confined to the legitimate objective of preventing deceptively low bids, it may move the District Court to modify its injunction. Pp. 1368–1369.

181 U.S.App.D.C. 41, 555 F.2d 978, affirmed.

Attorneys and Law Firms

****1360** Lee Loevinger, Washington, D. C., for petitioner.

Howard E. Shapiro, Washington, D. C., for respondent.

Opinion

***681** Mr. Justice STEVENS delivered the opinion of the Court.

This is a civil antitrust case brought by the United States to nullify an association's canon of ethics prohibiting competitive bidding by its members. The question is whether the canon may be justified under the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 1 *et seq.* (1976 ed.), because it was adopted by members of a learned profession for the purpose of minimizing the risk that competition would produce inferior engineering work endangering the public safety. The District Court rejected this justification without making any findings on the likelihood that competition would produce the dire consequences foreseen by the association.[1] The Court of Appeals affirmed.[2] We granted certiorari to decide whether the District Court should have considered the factual basis for the proffered justification before rejecting it. 434 U.S. 815, 98 S.Ct. 51, 54 L.Ed.2d 70. Because we are satisfied that the asserted defense rests on a fundamental misunderstanding of the Rule of Reason frequently applied in antitrust litigation, we affirm.

1 389 F.Supp. 1193 (DC 1974).

2 181 U.S.App.D.C. 41, 555 F.2d 978 (1977). When the District Court's original judgment was entered, petitioner was entitled to appeal directly to this Court. We vacated the District Court's judgment for reconsideration in the light of our then recent decision in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572. 422 U.S. 1031, 95 S.Ct. 2646, 45 L.Ed.2d 686. After reconsideration, the District Court re-entered its original judgment, 404 F.Supp. 457 (DC 1975), and petitioner then appealed to the Court of Appeals.

I

Engineering is an important and learned profession. There are over 750,000 graduate engineers in the United States, of whom about 325,000 are registered as professional engineers. Registration requirements vary from State to State, but usually require the applicant to be a graduate engineer with at least ***682** four years of practical experience and to pass a written examination. About half of those who are registered engage in consulting engineering on a fee basis. They perform services in connection with the study, design, and construction of all types of improvements to real property—bridges, office buildings, airports, and factories are examples. Engineering fees, amounting to well over $2 billion each year, constitute about 5% of total construction costs. In any given facility, approximately 50% to 80% of the

cost of construction is the direct result of work performed by an engineer concerning the systems and equipment to be incorporated in the structure.

The National Society of Professional Engineers (Society) was organized in 1935 to deal with the nontechnical aspects of engineering practice, including the promotion of the professional, social, and economic interests of its members. Its present membership of 69,000 resides throughout the United States and in some foreign countries. Approximately 12,000 members are consulting engineers who offer their services to governmental, industrial, and private clients. Some Society members are principals or chief executive officers of some of the largest engineering firms in the country.

The charges of a consulting engineer may be computed in different ways. He may charge the client a percentage of the cost of the project, may set his fee at his actual cost plus overhead plus a reasonable profit, may charge fixed rates per hour for different types of work, may perform an assignment for a specific sum, or he may combine one or more of these approaches. Suggested fee schedules for particular types of services in certain areas have been promulgated from time to time by various local societies. This case does not, however, involve any claim that the National Society has tried to fix specific fees, or even a ****1361** specific method of calculating fees. It involves a charge that the members of the Society have unlawfully agreed to refuse to negotiate or even to discuss the question of fees until after a prospective client has selected the ***683** engineer for a particular project. Evidence of this agreement is found in § 11(c) of the Society's Code of Ethics, adopted in July 1964. [3]

3 That section, which remained in effect at the time of trial, provided:
"Section 11—The Engineer will not compete unfairly with another engineer by attempting to obtain employment or advancement or professional engagements by competitive bidding . . . .
"c. He shall not solicit or submit engineering proposals on the basis of competitive bidding. Competitive bidding for professional engineering services is defined as the formal or informal submission, or receipt, of verbal or written estimates of cost or proposals in terms of dollars, man days of work required, percentage of construction cost, or any other measure of compensation whereby the prospective client may compare engineering services on a price basis prior to the time that one engineer, or one engineering organization, has been selected for negotiations. The disclosure of recommended fee schedules prepared by various engineering societies is not considered to constitute competitive bidding. An Engineer requested to submit a fee proposal or bid prior to the selection of an engineer or firm subject to the negotiation of a satisfactory contract, shall attempt to have the procedure changed to conform to ethical practices, but if not successful he shall withdraw from consideration for the proposed work. These principles shall be applied by the Engineer in obtaining the services of other professions." App. 9951.

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The District Court found that the Society's Board of Ethical Review has uniformly interpreted the "ethical rules against competitive bidding for engineering services as prohibiting the submission of any form of price information to a prospective customer which would enable that customer to make a price comparison on engineering services."[4] If the client requires that such information be provided, then § 11(c) imposes an ***684** obligation upon the engineering firm to withdraw from consideration for that job. The Society's Code of Ethics thus "prohibits engineers from both soliciting and submitting such price information," 389 F.Supp. 1193, at 1206 (DC 1974),[5] and seeks to preserve the profession's "traditional" method of selecting professional engineers. Under the traditional method, the client initially selects an engineer on the basis of background and reputation, not price.[6]

4 389 F.Supp., at 1206. In addition to § 11(c) of the Society's Code of Ethics, see n. 3, *supra*, the Society's Board of Directors has adopted various "Professional Policy" statements. Policy statement 10–F was issued to "make it clear beyond all doubt" that the Society opposed competitive bidding for all engineering projects. 389 F.Supp., at 1206. This policy statement was replaced in 1972 by Policy 10–G which permits price quotations for certain types of engineering work—in particular, research and development projects.

5 Although the Society argues that it has never "enforced" its ban on competitive bidding, Reply Brief for Petitioner 15–18, the District Court specifically found that the record "support[s] a finding that NSPE and its members actively pursue a course of policing adherence to the competitive bid ban through direct and indirect communication with members and prospective clients." 389 F.Supp., at 1200. This finding has not been challenged as clearly erroneous.

6 Having been selected, the engineer may then, in accordance with the Society's canons of ethics, negotiate a satisfactory fee arrangement with the client. If the negotiations are unsuccessful, then the client may withdraw his selection and approach a new engineer. *Id.*, at 1215.

In 1972 the Government filed its complaint against the Society alleging that members had agreed to abide by canons of ethics prohibiting the submission of competitive bids for engineering services and that, in consequence, price competition among the members had been suppressed and customers had been deprived of the benefits of free and open competition. The complaint prayed for an injunction terminating the unlawful agreement.

In its answer the Society admitted the essential facts alleged by the Government and pleaded a series of affirmative defenses, only one of which remains in issue. In that defense, the Society averred that the standard set out in the Code of Ethics was reasonable because competition among professional ****1362** engineers was contrary to the public interest. It was averred that it would be cheaper and easier for an engineer "to design

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and specify inefficient and unnecessarily expensive structures and ***685** methods of construction."[7] Accordingly, competitive pressure to offer engineering services at the lowest possible price would adversely affect the quality of engineering. Moreover, the practice of awarding engineering contracts to the lowest bidder, regardless of quality, would be dangerous to the public health, safety, and welfare. For these reasons, the Society claimed that its Code of Ethics was not an "unreasonable restraint of interstate trade or commerce."

7 The entire defense pleaded in the answer reads as follows:

"18. (a) The principles and standards contained in the NSPE Code of Ethics, particularly those contained in that part of the NSPE Code of Ethics set out above, are reasonable, necessary to the public health, safety and welfare insofar as they are affected by the work of professional engineers, and serve the public interest.

"(b) Experience has demonstrated that competitive bidding for professional engineering services is inconsistent with securing for the recipients of such services the most economical projects or structures. Testing, calculating and designing the most economical and efficient structures and methods of construction is complex, difficult and expensive. It is cheaper and easier to design and specify inefficient and unnecessarily expensive structures and methods of construction. Consequently, if professional engineers are required by competitive pressures to submit bids in order to obtain employment of their services, the inevitable tendency will be to offer professional engineering services at the lowest possible price. Although this may result in some lowering of the cost of professional engineering services it will inevitably result in increasing the overall cost and decreasing the efficiency of those structures and projects which require professional engineering design and specification work.

"(c) Experience has also demonstrated that competitive bidding in most instances and situations results in an award of the work to be performed to the lowest bidder, regardless of other factors such as ability, experience, expertise, skill, capability, learning and the like, and that such awards in the case of professional engineers endanger the public health, welfare and safety.

"(d) For the aforesaid reasons, the provisions of the NSPE Code of Ethics set out above are not, in any event, in unreasonable restraint of interstate trade or commerce." App. 21–22.

The parties compiled a voluminous discovery and trial record. The District Court made detailed findings about the ***686** engineering profession, the Society, its members' participation in interstate commerce, the history of the ban on competitive bidding, and certain incidents in which the ban appears to have been violated or enforced. The District Court did not, however, make any finding on the question whether, or to what extent, competition had led to inferior engineering

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work which, in turn, had adversely affected the public health, safety, or welfare. That inquiry was considered unnecessary because the court was convinced that the ethical prohibition against competitive bidding was "on its face a tampering with the price structure of engineering fees in violation of § 1 of the Sherman Act." 389 F.Supp., at 1200.

Although it modified the injunction entered by the District Court,[8] the Court of Appeals affirmed its conclusion that the agreement was unlawful on its face and therefore "illegal without regard to claimed or possible benefits." 181 U.S.App.D.C. 41, 47, 555 F.2d 978, 984.

8 The Court of Appeals struck down the portion of the District Court's decree that ordered the Society to state that it did not consider competitive bidding to be unethical. 181 U.S.App.D.C., at 47, 555 F.2d, at 984. The court reasoned that this provision was "more intrusive than necessary to achieve fulfillment of the governmental interest." *Ibid.* The Government has not petitioned for review of that decision.

II

In *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572, the Court held that a bar association's rule prescribing minimum fees for legal services violated § 1 of the Sherman Act. In that opinion the Court noted that certain practices by members of a learned profession might survive scrutiny under the Rule of Reason even though they would be viewed as a violation of the Sherman Act in another context. The Court said:

****1363** "The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the ***687** Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today." 421 U.S., at 788–789, n. 17, 95 S.Ct., at 2013.

Relying heavily on this footnote, and on some of the major cases applying a Rule of Reason —principally *Mitchel v. Reynolds*, 1 P.Wms. 181, 24 Eng.Rep. 347 (1711); *Standard Oil Co. v. United States*, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619; *Chicago Board of Trade v. United States*, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683; and *Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568—petitioner argues that its attempt to preserve the profession's traditional method of setting fees for engineering services is a reasonable method of forestalling the public harm which might be produced by unrestrained competitive bidding. To evaluate this argument it is necessary to identify the contours of the Rule of Reason and to discuss its application to the kind of justification asserted by petitioner.

A. The Rule of Reason.

One problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says. The statute says that "every" contract that restrains trade is unlawful.[9] But, as Mr. Justice Brandeis perceptively noted, restraint is the very ***688** essence of every contract;[10] read literally, § 1 would outlaw the entire body of private contract law. Yet it is that body of law that establishes the enforceability of commercial agreements and enables competitive markets—indeed, a competitive economy—to function effectively.

9 Section 1 of the Sherman Act, as set forth in 15 U.S.C. § 1 (1976 ed.), provides:
"Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal . . . ."

10 "But the legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence." *Chicago Board of Trade v. United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 244, 62 L.Ed. 683. See also *United States v. Topco Associates*, 405 U.S. 596, 606, 92 S.Ct. 1126, 1133, 31 L.Ed.2d 515:
"Were § 1 to be read in the narrowest possible way, any commercial contract could be deemed to violate it."

Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition.[11] The Rule of Reason, with its origins in common-law precedents long antedating the Sherman Act, has served that purpose. It has been used to give the Act both flexibility and definition, and its central principle of antitrust analysis has remained constant. Contrary to its name, the Rule does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions.

11 See 21 Cong.Rec. 2456 (1890) (comments of Sen. Sherman); see generally H. Thorelli, Federal Antitrust Policy 228–229 (1955).

This principle is apparent in even the earliest of cases applying the Rule of Reason, *Mitchel v. Reynolds, supra*. *Mitchel* involved the enforceability of a promise by ****1364** the seller of a bakery that he would not compete with the purchaser of his business. The covenant was for a limited time and applied only to the area in which the bakery had operated. It was therefore upheld as reasonable, even though it deprived the ***689** public of the benefit of potential competition. The long-run benefit of enhancing the marketability of the business itself—and thereby providing incentives to develop such an enterprise—outweighed the temporary and limited loss of competition.[12]

12 "4thly, The fourth reason is in favour of these contracts, and is, that there may happen instances wherein they may be useful and beneficial, as . . . in case of an old man, who finding himself under such circumstances either of body or mind, as that he is likely to be a loser by continuing his trade, in this case it will be better for him to part with it for a consideration, that by selling his custom, he may procure to himself a livelihood, which he might probably have lost, by trading longer." 1 P.Wms., at 191, 24 Eng.Rep., at 350.

The Rule of Reason suggested by *Mitchel v. Reynolds* has been regarded as a standard for testing the enforceability of covenants in restraint of trade which are ancillary to a legitimate transaction, such as an employment contract or the sale of a going business. Judge (later Mr. Chief Justice) Taft so interpreted the Rule in his classic rejection of the argument that competitors may lawfully agree to sell their goods at the same price as long as the agreed-upon price is reasonable. *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282–283 (CA6 1898), aff'd, 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136. That case, and subsequent decisions by this Court, unequivocally foreclose an interpretation of the Rule as permitting an inquiry into the reasonableness of the prices set by private agreement. [13]

13 85 F., at 293. See also *United States v. Trans-Missouri Freight Assn.*, 166 U.S. 290, 340–342, 17 S.Ct. 540, 558–559, 41 L.Ed. 1007.

The early cases also foreclose the argument that because of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition. *United States v. Trans-Missouri Freight Assn.,* 166 U.S. 290, 17 S.Ct. 540, 41 L.Ed. 1007; *United States v. Joint Traffic Assn.*, 171 U.S. 505, 573–577, 19 S.Ct. 25, 33–34, 43 L.Ed. 259. That kind of argument is properly addressed to Congress and may justify an exemption from the statute for ***690** specific industries, [14] but it is not permitted by the Rule of Reason. As the Court observed in *Standard Oil Co. v. United States*, 221 U.S., at 65, 31 S.Ct., at 517, "restraints of trade within the purview of the statute . . . [can]not be taken out of that category by indulging in general reasoning as to the expediency or nonexpediency of having made the contracts, or the wisdom or want of wisdom of the statute which prohibited their being made."

14 Congress has exempted certain industries from the full reach of the Sherman Act. See, *e. g.*, 7 U.S.C. §§ 291–292 (1976 ed.) (Capper-Volstead Act, agricultural cooperatives); 15 U.S.C. §§ 1011–1013 (1976 ed.) (McCarran-Ferguson Act, insurance); 49 U.S.C. § 5b (Reed-Bulwinkle Act, rail and motor carrier rate-fixing bureaus); 15 U.S.C. § 1801 (1976 ed.) (newspaper joint operating agreements).

The test prescribed in *Standard Oil* is whether the challenged contracts or acts "were unreasonably restrictive of competitive conditions." Unreasonableness under that test could be based either (1) on the nature or character of the contracts, or (2) on surrounding circumstances giving rise to the inference

or presumption that they were intended to restrain trade and enhance prices.[15] Under either branch of the ****1365** test, the inquiry is confined to a consideration of impact on competitive conditions.[16]

15 "Without going into detail, and but very briefly surveying the whole field, it may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitation on competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act, or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or performed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but, on the contrary, were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy." 221 U.S., at 58, 31 S.Ct. at 515.

16 Throughout the Court's opinion the emphasis is on economic conceptions. For instance, the Court's description of the common-law treatment of engrossing and forestalling statutes noted that contracts which had been illegal on their face were later recognized as reasonable because they tended to promote competition. *Id.*, at 55, 31 S.Ct., at 513. As was pointed out in the Report of the Attorney General's National Committee To Study the Antitrust Laws 11 (1955):

"While *Standard Oil* gave the courts discretion in interpreting the word 'every' in Section 1, such discretion is confined to consideration of whether in each case the conduct being reviewed under the Act constitutes an undue restraint of competitive conditions, or a monopolization, or an attempt to monopolize. This standard permits the courts to decide whether conduct is significantly and unreasonably anticompetitive in character or effect; it makes obsolete once prevalent arguments, such as, whether monopoly arrangements would be socially preferable to competition in a particular industry, because, for example, of high fixed costs or the risks of 'cut-throat' competition or other similar unusual conditions."

***691** In this respect the Rule of Reason has remained faithful to its origins. From Mr. Justice Brandeis' opinion for the Court in *Chicago Board of Trade*, to the Court opinion written by Mr. Justice Powell in *Continental T. V., Inc.*, the Court has adhered to the position that the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or

one that suppresses competition. "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." 246 U.S., at 238, 38 S.Ct., at 243, quoted in 433 U.S., at 49 n. 15, 97 S.Ct., at 2557. [17]

17 In *Continental T. V., Inc.*, the Court explained the Rule of Reason standard as follows:
"Under this rule the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." 433 U.S., at 49, 97 S.Ct. at 2557.
The Court then analyzed the "market impact" of vertical restraints, noting their complexity because of the potential for a simultaneous reduction of intrabrand competition and stimulation of interbrand competition. *Id.*, at 50–51, 97 S.Ct. at 2558. "Competitive impact" and "economic analysis" were emphasized throughout the opinion.

***692** There are, thus, two complementary categories of antitrust analysis. In the first category are agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality—they are "illegal *per se*." In the second category are agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. In either event, the purpose of the analysis is to form a judgment about the competitive significance of the restraint; it is not to decide whether a policy favoring competition is in the public interest, or in the interest of the members of an industry. Subject to exceptions defined by statute, that policy decision has been made by the Congress. [18]

18 See generally Attorney General's Report, *supra*, n. 16, at 10–11; Bork, The Rule of Reason and the Per Se Concept: Price Fixing and Market Division, 74 Yale L.J. 775 (1965); L. Sullivan, Law of Antitrust 165–197 (1977).

B. The Ban on Competitive Bidding.

Price is the "central nervous system of the economy," *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n. 59, 60 S.Ct. 811, 845, 84 L.Ed. 1129, and an agreement that "interfere[s] with the setting of price by free market forces" is illegal on its face. *United States v. Container Corp.*, 393 U.S. 333, 337, 89 S.Ct. 510, 512, 21 L.Ed.2d 526. In this case we are presented with an agreement among competitors to refuse to discuss prices with potential customers until after negotiations have resulted ****1366** in the initial selection of an engineer. While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement. It operates as an absolute ban on competitive bidding, applying with equal force to both complicated and simple projects and to both inexperienced and sophisticated customers. As the District Court found, the ban "impedes the ordinary give and take of the market place," and substantially deprives the customer of "the ability to utilize ***693** and compare prices in

selecting engineering services." 404 F.Supp. 457, 460. On its face, this agreement restrains trade within the meaning of § 1 of the Sherman Act.

The Society's affirmative defense confirms rather than refutes the anticompetitive purpose and effect of its agreement. The Society argues that the restraint is justified because bidding on engineering services is inherently imprecise, would lead to deceptively low bids, and would thereby tempt individual engineers to do inferior work with consequent risk to public safety and health.[19] The logic of this argument rests on the assumption that the agreement will tend to maintain the price level; if it had no such effect, it would not serve its intended purpose. The Society nonetheless invokes the Rule of Reason, arguing that its restraint on price competition ultimately inures to the public benefit by preventing the ***694** production of inferior work and by insuring ethical behavior. As the preceding discussion of the Rule of Reason reveals, this Court has never accepted such an argument.

19 The Society also points out that competition, in the form of bargaining between the engineer and customer, is allowed under its canon of ethics once an engineer has been initially selected. See n. 6, *supra*. It then contends that its prohibition of competitive bidding regulates only the *timing* of competition, thus making this case analogous to *Chicago Board of Trade*, where the Court upheld an exchange rule which forbade exchange members from making purchases after the close of the day's session at any price other than the closing bid price. Indeed, petitioner has reprinted the Government's brief in that case to demonstrate that the Solicitor General regarded the exchange's rule as a form of price fixing. Reply Brief for Petitioner A1–A28. We find this reliance on *Chicago Board of Trade* misplaced for two reasons. First, petitioner's claim mistakenly treats negotiation between a single seller and a single buyer as the equivalent of competition between two or more potential sellers. Second, even if we were to accept the Society's equation of bargaining with price competition, our concern with *Chicago Board of Trade* is in its formulation of the proper test to be used in judging the legality of an agreement; that formulation unquestionably stresses impact on competition. Whatever one's view of the application of the Rule of Reason in that case, see Sullivan, *supra* n. 18, at 175–182, the Court considered the exchange's regulation of price information as having a positive effect on competition. 246 U.S., at 240–241, 38 S.Ct. at 244–245. The District Court's findings preclude a similar conclusion concerning the effect of the Society's "regulation."

It may be, as petitioner argues, that competition tends to force prices down and that an inexpensive item may be inferior to one that is more costly. There is some risk, therefore, that competition will cause some suppliers to market a defective product. Similarly, competitive bidding for engineering projects

may be inherently imprecise and incapable of taking into account all the variables which will be involved in the actual performance of the project.[20] Based on these considerations, a purchaser might conclude that his interest in quality—which may embrace the safety of the end product—outweighs the advantages of achieving cost savings by pitting one competitor against another. Or an individual vendor might independently refrain from price negotiation until he has satisfied himself that he fully understands the scope of his customers' needs. These decisions might be ****1367** reasonable; indeed, petitioner has provided ample documentation for that thesis. But these are not reasons that satisfy the Rule; nor are such individual decisions subject to antitrust attack.

20 We, of course, express no view on the truth of this assertion, although it might be noted that the Society has allowed competitive bidding for some types of engineering projects in this country, see n. 4, *supra*, and, at one time, allowed competitive bidding for all engineering work in foreign countries "as required by the laws, regulations or practices of the foreign country." App. 6487. This rule, called the "When-in-Rome" clause, was abolished in 1968. *Id.*, at 6344.

The Sherman Act does not require competitive bidding;[21] ***695** it prohibits unreasonable restraints on competition. Petitioner's ban on competitive bidding prevents all customers from making price comparisons in the initial selection of an engineer, and imposes the Society's views of the costs and benefits of competition on the entire marketplace. It is this restraint that must be justified under the Rule of Reason, and petitioner's attempt to do so on the basis of the potential threat that competition poses to the public safety and the ethics of its profession is nothing less than a frontal assault on the basic policy of the Sherman Act.

21 Indeed, Congress has decided not to require competitive bidding for Government purchases of engineering services. The Brooks Act, 40 U.S.C. §§ 541–544 (1970 ed., Supp. V), requires the Government to use a method of selecting engineers similar to the Society's "traditional method." See n. 6, *supra*. The Society relies heavily on the Brooks Act as evidence that its ban on competitive bidding is reasonable. The argument is without merit. The Brooks Act does not even purport to exempt engineering services from the antitrust laws, and the reasonableness of an individual purchaser's decision not to seek lower prices through competition does not authorize the vendors to conspire to impose that same decision on all other purchasers.

The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. "The heart of our national economic policy long has been faith in the value of competition." *Standard Oil Co. v. FTC*, 340 U.S. 231, 248, 71 S.Ct. 240, 249, 95 L.Ed. 239. The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among

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alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.

The fact that engineers are often involved in large-scale projects significantly affecting the public safety does not alter our analysis. Exceptions to the Sherman Act for potentially dangerous goods and services would be tantamount to a repeal of the statute. In our complex economy the number of items that may cause serious harm is almost endless—automobiles, drugs, foods, aircraft components, heavy equipment, and countless others, cause serious harm to individuals or to the public at large if defectively made. The judiciary cannot ***696** indirectly protect the public against this harm by conferring monopoly privileges on the manufacturers.

By the same token, the cautionary footnote in *Goldfarb*, 421 U.S., at 788–789, n. 17, 95 S.Ct. at 2013, quoted *supra*, cannot be read as fashioning a broad exemption under the Rule of Reason for learned professions. We adhere to the view expressed in *Goldfarb* that, by their nature, professional services may differ significantly from other business services, and, accordingly, the nature of the competition in such services may vary. Ethical norms may serve to regulate and promote this competition, and thus fall within the Rule of Reason.[22] But the Society's argument in this case is a far cry from such a position. We are faced with a contention that a total ban on competitive bidding is necessary because otherwise engineers will be tempted to submit deceptively low bids. Certainly, the problem of professional deception is a proper ****1368** subject of an ethical canon. But, once again, the equation of competition with deception, like the similar equation with safety hazards, is simply too broad; we may assume that competition is not entirely conducive to ethical behavior, but that is not a reason, cognizable under the Sherman Act, for doing away with competition.

22 Courts have, for instance, upheld marketing restraints related to the safety of a product, provided that they have no anticompetitive effect and that they are reasonably ancillary to the seller's main purpose of protecting the public from harm or itself from product liability. See, *e. g.*, *Tripoli Co. v. Wella Corp.*, 425 F.2d 932 (CA3 1970) (en banc); cf. *Continental T. V.*, 433 U.S., at 55 n. 23, 97 S.Ct., at 2560.

In sum, the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable. Such a view of the Rule would create the "sea of doubt" on which Judge Taft refused to embark in *Addyston*, 85 F., at 284, and which this Court has firmly avoided ever since.

III

The judgment entered by the District Court, as modified by ***697** the Court of Appeals,[23] prohibits the Society from adopting any official opinion, policy statement, or guideline stating or implying that competitive bidding is unethical.[24] Petitioner argues that this judgment abridges its First Amendment rights.[25] We find no merit in this contention.

23 See n. 8, *supra*.

24 See App. 9974–9980.

25 Petitioner contends the judgment is both an unconstitutional prior restraint on speech and an unconstitutional prohibition against free association.

Having found the Society guilty of a violation of the Sherman Act, the District Court was empowered to fashion appropriate restraints on the Society's future activities both to avoid a recurrence of the violation and to eliminate its consequences. See, *e. g., International Salt Co. v. United States*, 332 U.S. 392, 400–401, 68 S.Ct. 12, 17, 92 L.Ed. 20; *United States v. Glaxo Group, Ltd.*, 410 U.S. 52, 64, 93 S.Ct. 861, 868, 35 L.Ed.2d 104. While the resulting order may curtail the exercise of liberties that the Society might otherwise enjoy, that is a necessary and, in cases such as this, unavoidable consequence of the violation. Just as an injunction against price fixing abridges the freedom of businessmen to talk to one another about prices, so too the injunction in this case must restrict the Society's range of expression on the ethics of competitive bidding.[26] The First Amendment does not "make it . . . impossible ever to enforce laws against agreements in restraint of trade . . . ." *Giboney v. Empire Storage & Ice Co.*, 336 U.S. 490, 502, 69 S.Ct. 684, 691, 93 L.Ed. 834. In fashioning a remedy, the District Court may, of course, consider the fact that its injunction may impinge upon rights that would otherwise be constitutionally ***698** protected, but those protections do not prevent it from remedying the antitrust violations.

26 Thus, in *Goldfarb*, although the bar association believed that its fee schedule accurately reflected ethical price levels, it was nonetheless enjoined "from adopting, publishing, or distributing any future schedules of minimum or suggested fees." *Goldfarb v. Virginia State Bar*, 355 F.Supp. 491, 495–496 (ED Va.1973). See also *United States v. National Assn. of Real Estate Boards*, 339 U.S. 485, 70 S.Ct. 711, 94 L.Ed. 1007.

The standard against which the order must be judged is whether the relief represents a reasonable method of eliminating the consequences of the illegal conduct. We agree with the Court of Appeals that the injunction, as modified, meets this standard. While it goes beyond a simple proscription against the precise conduct previously pursued that is entirely appropriate.

"The District Court is not obliged to assume, contrary to common experience, that a violator of the antitrust laws will relinquish the fruits of his violation more completely than the court requires him to do. And advantages already in hand may be held by methods more subtle and informed, and more difficult to prove, than those which, in the first place, win a market. When the purpose to restrain trade appears from a clear violation of law, it is not necessary that all of the untraveled roads to that end be left open and that only the worn one be closed." ****1369** *International Salt Co., supra*, at 400, 68 S.Ct. at 17.

The Society apparently fears that the District Court's injunction, if broadly read, will block legitimate paths of expression on all ethical

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matters relating to bidding.[27] But the answer to these fears is, as the Court held in *International Salt,* that the burden is upon the proved transgressor "to bring any proper claims for relief to the court's attention." *Ibid.* In ***699** this case, the Court of Appeals specifically stated that "[i]f the Society wishes to adopt some other ethical guideline more closely confined to the legitimate objective of preventing deceptively low bids, it may move the district court for modification of the decree." 181 U.S.App.D.C., at 46, 555 F.2d, at 983. This is, we believe, a proper approach, adequately protecting the Society's interests. We therefore reject petitioner's attack on the District Court's order.

27 For instance, the Society argues that the injunction can be read as prohibiting it from opposing repeal of statutes such as the Brooks Act, see n. 21, *supra*, and that such a prohibition would violate the principles of the *Noerr-Pennington* doctrine. See *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464; *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626. By its terms the injunction contains no such prohibition, and indeed the Government contends that "[n]othing in the judgment prevents NSPE and its members from attempting to influence governmental action . . . ." Brief for United States 60.

The judgment of the Court of Appeals is

Affirmed.

Mr. Justice BRENNAN took no part in the consideration or decision of this case.

Mr. Justice BLACKMUN, with whom Mr. Justice REHNQUIST joins, concurring in part and concurring in the judgment.

I join Parts I and III of the Court's opinion and concur in the judgment. I do not join Part II because I would not, at least for the moment, reach as far as the Court appears to me to do in intimating, *ante*, at 1367, and n. 22, that any ethical rule with an overall anticompetitive effect promulgated by a professional society is forbidden under the Sherman Act. In my view, the decision in *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 788–789, n. 17, 95 S.Ct. 2004, 2013, 44 L.Ed.2d 572 (1975), properly left to the Court some flexibility in considering how to apply traditional Sherman Act concepts to professions long consigned to self-regulation. Certainly, this case does not require us to decide whether the "Rule of Reason" as applied to the professions ever could take account of benefits other than increased competition. For even accepting petitioner's assertion that product quality is one such benefit, and that maintenance of the quality of engineering services requires that an engineer not bid before he has made full acquaintance with the scope of a client's desired project, Brief for Petitioner 49–50, 54, petitioner Society's rule is still grossly overbroad. As petitioner concedes, Tr. of Oral ***700** Arg. 47–48, § 11(c) forbids any simultaneous consultation between a client and several engineers, even where the client provides complete information to each about

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the scope and nature of the desired project before requesting price information. To secure a price estimate on a project, the client must purport to engage a single engineer, and so long as that engagement continues no other member of the Society is permitted to discuss the project with the client in order to provide comparative price information. Though § 11(c) does not fix prices directly, and though the customer retains the option of rejecting a particular engineer's offer and beginning negotiations all over again with another engineer, the forced process of sequential search inevitably increases the cost of gathering price information, and hence will dampen price competition, without any calibrated role to play in preventing uninformed bids. Then, too, the Society's rule is overbroad in the aspect noted by Judge Leventhal, when it prevents any dissemination of competitive price information in regard to real property improvements prior to the engagement of a single engineer regardless ****1370** of "the sophistication of the purchaser, the complexity of the project, or the procedures for evaluating price information." 181 U.S.App.D.C. 41, 45, 555 F.2d 978, 982 (1977).

My skepticism about going further in this case by shaping the Rule of Reason to such a narrow last as does the majority, [*] arises from the fact that there may be ethical rules which have a more than *de minimis* anticompetitive effect and yet are important in a progression's proper ordering. A medical association's prescription of standards of minimum competence for licensing or certification may lessen the number of ***701** entrants. A bar association's regulation of the permissible forms of price advertising for nonroutine legal services or limitation of in-person solicitation, see *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), may also have the effect of reducing price competition. In acknowledging that "professional services may differ significantly from other business services" and that the "nature of the competition in such services may vary," *ante*, at 1367, but then holding that ethical norms can pass muster under the Rule of Reason only if they promote competition, I am not at all certain that the Court leaves enough elbowroom for realistic application of the Sherman Act to professional services.

* This Court has not always applied the Rule of Reason with such rigor even to commercial businesses. See *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 53 S.Ct. 471, 77 L.Ed. 825 (1933); *Chicago Board of Trade v. United States*, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683 (1918); L. Sullivan, Law of Antitrust 175–182 (1977); R. Bork, The Antitrust Paradox 41–47, 56 (1978). I intimate no view as to the correctness of those decisions.

Mr. Chief Justice BURGER, concurring in part and dissenting in part.

I concur in the Court's judgment to the extent it sustains the finding of a violation of the Sherman Act but dissent from that portion of the judgment prohibiting petitioner from stating in its published standards of ethics the view that competitive bidding is unethical. The First Amendment guarantees the right to express such a position and that right cannot be

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impaired under the cloak of remedial judicial action.

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78 S.Ct. 514
Supreme Court of the United States

NORTHERN PACIFIC RAILWAY COMPANY and Northwestern Improvement Company, Appellants,
v.
UNITED STATES of America.

No. 59.
|
Argued Jan. 7 and 8, 1958.
|
Decided March 10, 1958.

Synopsis
Action by government against railroad and subsidiary thereof to have certain contractual provisions contained in deeds and leases executed by railroad's subsidiary declared illegal as contravening Sherman Anti-Trust Act and for injunctive relief to prevent enforcement of such provisions. The United States District Court for the Western District of Washington, 142 F.Supp. 679, entered a summary judgment in government's favor, and the railroad and its subsidiary appealed directly to the Supreme Court. The Supreme Court, Mr. Justice Black, held that where railroad and subsidiary deeded and leased land of railroad by instruments containing clauses requiring grantees and lessees of such land to ship products obtained from use of land by way of such railroad unless rates or services of competing lines were more favorable, the 'preferential routing' clauses were per se unlawful restraints of trade in violation of Sherman Act.

Affirmed.

Mr. Justice Harlan, Mr. Justice Frankfurter and Mr. Justice Whittaker dissented.

Attorneys and Law Firms

****516 *2** Mr. M. L. Countryman, Jr., St. Paul, Minn., for appellants.

Mr. Daniel M. Friedman, Washington, D.C., for appellee.

Opinion

Mr. Justice BLACK delivered the opinion of the Court.

In 1864 and 1870 Congress granted the predecessor of the Northern Pacific Railway Company approximately forty million acres of land in several Northwestern ****517** States and Territories to facilitate its construction of a railroad ***3** line from Lake Superior to Puget Sound. [1] In general terms, this grant consisted of every alternate section of land in a belt 20 miles wide on each side of the track through States and 40 miles wide through Territories. The granted lands were of various kinds; some contained great stands of timber, some iron ore or other valuable mineral deposits, some oil or natural gas, while still other sections were useful for agriculture, grazing or industrial purposes. By 1949 he Railroad had sold about 37,000,000 acres of its holdings, but had reserved mineral rights in 6,500,000 of those acres. Most of the unsold land was leased for one purpose or another. In a large number its sales contracts and most of its lease agreements the Railroad had inserted 'preferential routing' clauses which compelled the grantee or lessee to ship over its lines all commodities produced

or manufactured on the land, provided that its rates (and in some instances its service) were equal to those of competing carriers.[2] Since many of the goods produced on the lands subject to these 'preferential routing' provisions are shipped from one State to another the actual and potential amount of interstate commerce affected is substantial. Alternative means of transportation exist for a large portion of these shipments including the facilities of two other major railroad systems.

1 13 Stat. 365, 16 Stat. 378. The details of these statutory grants are extensively set forth and discussed in United States v. Northern Pacific R. Co., 256 U.S. 51, 41 S.Ct. 439, 65 L.Ed. 825, and United States v. Northern Pacific R. Co., 311 U.S. 317, 61 S.Ct. 264, 85 L.Ed. 210.

2 The volume and nature of these restrictive provisions are set forth in more detail hereafter. See note 6, infra.

In 1949 the Government filed suit under s 4 of the Sherman Act seeking a declaration that the defendant's 'preferential routing' agreements were unlawful as ***4** unreasonable restraints of trade under s 1 of that Act.[3] After various pretrial proceedings the Government moved for summary judgment contending that on the undisputed facts it was entitled, as a matter of law, to the relief demanded. The district judge made numerous findings, as set forth in substance in the preceding paragraph, based on the voluminous pleadings, stipulations, depositions and answers to interrogatories filed in the case, and then granted the Government's motion (with an exception not relevant here). 142 F.Supp. 679. He issued an order enjoining the defendant from enforcing the existing 'preferential routing' clauses or from entering into any future agreements containing them. The defendant took a direct appeal to this Court under s 2 of the Expediting Act of 1903, 32 Stat. 823, as amended, 15 U.S.C. s 29, 15 U.S.C.A. s 29, and we noted probable jurisdiction. 352 U.S. 980, 77 S.Ct. 383, 1 L.Ed.2d 364.

3 26 Stat. 209, as amended, 15 U.S.C. ss 1, 4, 15 U.S.C.A. ss 1, 4. Actually there are two defendants here, the Northern Pacific Railway Company and its wholly owned subsidiary Northwestern Improvement Company which sells, leases and manages the Railroad's lands. , for convenience and since Northwestern is completely controlled by the Railroad we shall speak of the two of them as a single 'defendant' or as the 'Railroad.'

The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conductive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. And to ****518** this end it prohibits 'Every contract, combination * * * or ***5** conspiracy, in restraint of trade or commerce among the several States.' Although this prohibition is literally all-encompassing, the courts have construed it as precluding only those contracts or combinations which

'unreasonably' restrain competition. Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619; Chicago Board of Trade v. United States, 246 U.S. 231, 38 S.Ct. 242, 62 L.Ed. 683.

However, there are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 210, 60 S.Ct. 811, 838, 84 L.Ed. 1129; division of markets, United States v. Addyston Pipe & Steel Co., 6 Cir., 85 F. 271, 46 L.R.A. 122, affirmed 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136; group boycotts, Fashion Originators' Guild of America v. Federal Trade Comm., 312 U.S. 457, 668, 61 S.Ct. 703, 85 L.Ed. 949; and tying arrangements, International Salt Co. v. United States, 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20.

For our purposes a tying arrangement may be defined as an agreement by a party to sell one product but only on the condition that the buyer also purchases a different (or tied) product, or at least agrees that he will not ***6** purchase that product from any other supplier. [4] Where such conditions are successfully exacted competition on the merits with respect to the tied product is inevitably curbed. Indeed 'tying agreements serve hardly any purpose beyond the suppression of competition.' Standard Oil Co. of California and Standard Stations v. United States, 337 U.S. 293, 305—306, 69 S.Ct. 1051, 1058, 93 L.Ed. 1371. [5] They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market. At the same time buyers are forced to forego their free choice between competing products. For these reasons 'tying agreements fare harshly under the laws forbidding restraints of trade.' Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 606, 73 S.Ct. 872, 879, 97 L.Ed. 1277. They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected. ****519** International Salt Co. v. United States, 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20. Cf. United States v. Paramount Pictures, 334 U.S. 131, 156—159, 68 S.Ct. 915, 928—929, 92 L.Ed. 1260; United States v. Griffith, 334 U.S. 100, 68 S.Ct. 941, 92 L.Ed. 1236. Of course where the seller has no control or dominance over the tying product so that it does not represent an effectual weapon to pressure buyers into taking

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the tied item any restraint of trade attributable to such tying arrangements would obviously be insignificant at most. As ***7** a simple example, if one of a dozen food stores in a community were to refuse to sell flour unless the buyer also took sugar it would hardly tend to restrain competition in sugar if its competitors were ready and able to sell flour by itself.

4 Of course where the buyer is free to take either product by itself there is no tying problem even though the seller may also offer the two items as a unit at a single price.

5 As this Court has previously pointed out such nonanticompetitive purposes as these arrangements have been asserted to possess can be adequately accomplished by other means much less inimical to competition. See, e.g., International Business Machines Corp. v. United States, 298 U.S. 131, 56 S.Ct. 701, 80 L.Ed. 1085; International Salt Co. v. United States, 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20.

In this case we believe the district judge was clearly correct in entering summary judgment declaring the defendant's 'preferential routing' clauses unlawful restraints of trade. We wholly agree that the undisputed facts established beyond any genuine question that the defendant possessed substantial economic power by virtue of its extensive landholdings which it used as leverage to induce large numbers of purchasers and lessees to give it preference, to the exclusion of its competitors, in carrying goods or produce from the land transferred to them. Nor can there be any real doubt that a 'not insubstantial' amount of interstate commerce was and is affected by these restrictive provisions.

As pointed out before, the defendant was initially granted large acreages by Congress in the several Northwestern States through which its lines now run. This land was strategically located in checkerboard fashion amid private holdings and within economic distance of transportation facilities. Not only the testimony of various witnesses but common sense makes it evident that this particular land was often prized by those who purchased or leased it and was frequently essential to their business activities. In disposing of its holdings the defendant entered into contracts of sale or lease covering at least several million acres of land which included 'preferential routing' clauses.[6] The very existence of ***8** this host of tying arrangements is itself compelling evidence of the defendant's great power, at least where, as here, no other explanation has been offered for the existence of these restraints. The 'preferential routing' clauses conferred no benefit on the purchasers or lessees. While they got the land they wanted by yielding their freedom to deal with competing carriers, the defendant makes no claim that it came any cheaper than if the restrictive clauses had been omitted. In fact any such price reduction in return for rail shipments would have quite plainly constituted an unlawful rebate to the shipper.[7] So far as the Railroad was concerned its purpose obviously was to fence out competitors, to stifle competition. While this may have been exceedingly ****520** beneficial to its business, it is the very type of thing the Sherman Act condemns. In short, we are convinced that the essential prerequisites for treating the defendant's tying arrangements

as unreasonable 'per se' were conclusively established below and that the defendant has offered to prove nothing there or here which would alter this conclusion.

6 The district judge found (and his findings are not challenged here) that as of 1949 there were (1) over 1,000 grazing leases covering more than 1,000,000 acres of land, (2) at least 72 contracts for the sale of timberland covering 1,244,137 acres, (3) at least 31 timber sale contracts covering 100,585 acres, (4) at least 19 oil and gas leases covering 135,000 acres, (5) at least 16 iron ore leases covering 5,261 acres, (6) 12 coal leases (acreage not specified), and (7) at least 17 other mineral leases covering 6,810 acres which contained 'preferential routing' clauses.
The grazing leases, timber sales contracts, timberland sales contracts and in some instances the mineral land leases obligated the vendee or lessee to ship its products by way of the defendant's lines unless rates of competitors were lower; the oil and gas leases, coal leases and the remainder of the mineral land leases, unless the rates were lower or the service better; the iron ore leases, unless the defendant's rates, service and facilities were equal to those of any competing line.

7 49 U.S.C. ss 2, 6(7), 41(3), 49 U.S.C.A. ss 2, 6(7), 41(3).

In our view International Salt Co. v. United States, 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20, which has been unqualifiedly approved by subsequent decisions, is ample authority for affirming the judgment below. In that case the defendant refused ***9** to lease its salt-dispensing machines unless the lessee also agreed to purchase all the salt it used in the machines from the defendant. It was established that the defendant had made about 900 leases under such conditions and that in the year in question it had sold about $500,000 worth of salt for use in the leased machines. On that basis we affirmed unanimously a summary judgment finding the defendant guilty of violating s 1 of the Sherman Act. The Court ruled that it was 'unreasonable, per se, to foreclose competitors from any substantial market' by tying arrangements. As we later analyzed the decision, 'it was not established that equivalent machines were unobtainable, it was not indicated what proportion of the business of supplying such machines was controlled by defendant, and it was deemed irrelevant that there was no evidence as to the actual effect of the tying clauses upon competition.' Standard Oil Co. of California and Standard Stations v. United States, 337 U.S. 293, 305, 69 S.Ct. 1051, 1058, 93 L.Ed. 1371.

The defendant attempts to evade the force of International Salt on the ground that the tying product there was patented while here it is not. But we do not believe this distinction has, or should have, any significance. In arriving at its decision in International Salt the Court placed no reliance on the fact that a patent was involved nor did it give the slightest intimation that the outcome would have been any different if that had not been the case. If anything, the Court held the challenged tying arrangements unlawful despite the fact that the tying item was patented, not because of it. 'By contracting to

close this market for salt against competition, International has engaged in a restraint of trade for which its patents afford no immunity from the antitrust laws.' 332 U.S. at page 396, 68 S.Ct. at page 15. Nor have subsequent cases confined the rule of per se unreasonableness laid down in International Salt to situations involving patents. Cf. United States v. Griffith, 334 U.S. 100, 68 S.Ct. 941, 92 L.Ed. 1236; ***10** United States v Paramount Pictures, Inc., 334 U.S. 131, 156, 68 S.Ct. 915, 928, 92 L.Ed. 1260; Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 73 S.Ct. 872, 97 L.Ed. 1277.[8]

8 Of course it is common knowledge that a patent does not always confer a monopoly over a particular commodity. Often the patent is limited to a unique form or improvement of the product and the economic power resulting from the patent privileges is slight. As a matter of fact the defendant in International Salt offered to prove that competitive salt machines were readily available which were satisfactory substitutes for its machines (a fact the Government did not controvert), but the Court regarded such proof as irrelevant.

The defendant argues that the holding in International Salt was limited by the decision in Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 73 S.Ct. 872, 97 L.Ed. 1277. There the Court held that a unit system of advertising in two local newspapers did not violate s 1 of the Sherman Act. On the facts before it the majority found there was no tying problem at all since only one product was involved and that, in any event, the defendant did not possess sufficient economic power in the advertising market to bring its unit rule within the principle of per se unreasonableness. But ****521** the Court was extremely careful to confine its decision to the narrow record before it. Id., 345 U.S. at pages 627—628, 73 S.Ct. at page 890. And far from repudiating any of the principles set forth in International Salt it vigorously reasserted them by broadly condemning tying arrangements as wholly inconsistent with the fundamental principles of the antitrust laws. In the Court's forceful terms, 'Tying arrangements * * * flout the Sherman Act's policy that competition rule the marts of trade. * * * By conditioning his sale of one commodity on the purchase of another, a seller coerces the abdication of buyers' independent judgment as to the 'tied' product's merits and insulates it from the competitive stresses of the open market. But any intrinsic superiority of the 'tied' product would convince ***11** freely choosing buyers to select it over others, anyway.' Id., 345 U.S. at page 605, 73 S.Ct. at page 878.

While there is some language in the Times-Picayune opinion which speaks of 'monopoly power' or 'dominance' over the tying product as a necessary precondition for application of the rule of per se unreasonableness to tying arrangements, we do not construe this general language as requiring anything more than sufficient economic power to impose an appreciable restraint on free competition in the tied product (assuming all the time, of course, that a 'not insubstantial' amount of interstate commerce is affected). To give it any other construction would be wholly out of accord with the opinion's cogent analysis of the nature and baneful effects of tying

arrangements and their incompatibility with the policies underlying the Sherman Act. Times-Picayune, of course, must be viewed in context with International Salt and our other decisions concerning tying agreements. There is no warrant for treating it as a departure from those cases. Nor did it purport to be any such thing; rather it simply made an effort to restate the governing considerations in this area as set forth in the prior cases. And in so doing it makes clear, as do those cases, that the vice of tying arrangements lies in the use of economic power in one market to restrict competition on the merits in another, regardless of the source from which the power is derived and whether the power takes the form of a monopoly or not.

The defendant contends that its 'preferential routing' clauses are subject to so many exceptions and have been administered so leniently that they do not significantly restrain competition. It points out that these clauses permit the vendee or lessee to ship by competing carrier if its rates are lower (or in some instances if its service is better) than the defendant's.[9] Of course if these restrictive ***12** provisions are merely harmless sieves with no tendency to restrain competition, as the defendant's argument seems to imply, it is hard to understand why it has expended so much effort in obtaining them in vast numbers and upholding their validity, or how they are of any benefit to anyone, even the defendant. But however that may be, the essential fact remains that these agreements are binding obligations held over the heads of vendees which deny defendant's competitors access to the fenced-off market on the same terms as the defendant. In International Salt the defendants similarly argued that their tying arrangements were inoffensive restraints because they allowed lessees to buy salt from other suppliers when they offered a lower price than International. The Court's answer there is equally apt here.

9 See note 6, supra.

'(This exception) does, of course, afford a measure of protection to the lessee, but it does not avoid the stifling effect of the agreement on competition. The appellant had at ****522** all times a priority on the business at equal prices. A competitor would have to undercut appellant's price to have any hope of capturing the market, while appellant could hold that market by merely meeting competition. We do not think this concession relieves the contract of being a restraint of trade, albeit a less harsh one than would result in the absence of such a provision.' 332 U.S. at page 397, 68 S.Ct. at page 15.

All of this is only aggravated, of course, here in the regulated transportation industry where there is frequently no real rate competition at all and such effective competition as actually thrives takes other forms.

Affirmed.

Mr. Justice CLARK took no part in the consideration or decision of this case.

***13** Mr. Justice HARLAN, whom Mr. Justice FRANKFURTER and Mr. Justice WHITTAKER join, dissenting.

The Court affirms summary judgment for the Government by concluding that 'the essential prerequisites for treating the defendant's tying

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arrangements as unreasonable 'per se' were conclusively established below * * *.' In my view, these prerequisites were not established, and this case should be remanded to the District Court for a trial on the issue whether appellants' landholdings gave them that amount of control over the relevant market for land necessary under this Court's past decisions to make the challenged tying clauses violative per se of the Sherman Act. Further, in light of the Court's disposition of the case and the nature of the findings made below, I think that the Court's discussion of International Salt Co. v. United States, 332 U.S. 392, 68 S.Ct. 12, 92 L.Ed. 20, is apt to produce confusion as to what proof is necessary to show per se illegality of tying clauses in future Sherman Act cases.

Because the Government necessarily based its complaint on s 1 of the Sherman Act, 26 State. 209, as amended, 15 U.S.C. s 1, 15 U.S.C.A. s 1, rather than on s 3 of the Clayton Act,[1] it was required to show that the challenged tying clauses constituted unreasonable restraints of trade, see Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 31 S.Ct. 502, 55 L.Ed. 619. As a result, these tying clauses raise legal issues different from those presented by the legislatively defined tying clauses invalidated under the more pointed prohibitions of the Clayton Act. Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 73 S.Ct. 872, 97 L.Ed. 1277, has made it clear beyond dispute that both proof of dominance in the market for the tying product and a showing that an appreciable volume of business in the tied product is restrained are ***14** essential conditions to judicial condemnation of a tying clause as a per se violation of the Sherman Act.[2] 345 U.S. at pages 608—611, 73 S.Ct. at pages 880—881. These firm requirements derive from an awareness that the vice apt to exist in tying agreements 'is the wielding of monopolistic leverage; a seller exploits his dominant position in one market to expand his empire into the next.' 345 U.S. at page 611, 73 S.Ct. at page 882. It is not, as the Court intimates at one point in its opinion, that under the Sherman Act the tying clause is illegal per se; the per se illegality results from its use by virtue of a vendor's ****523** dominance over the tying interest to foreclose competitors from a substantial market in the tied interest.

1 The tying arrangements proscribed by s 3 of the Clayton Act relate only to 'goods, wares, merchandise, machinery, supplies or other commodities * * *.' 38 Stat. 731, 15 U.S.C. s 14, 15 U.S.C.A. s 14.

2 The Court there stated that the presence of either factor is sufficient for invalidation of a tying clause under the Clayton Act. 345 U.S. at pages 608—609, 73 S.Ct. at page 880.

My primary difficulty with the Court's affirmance of the judgment below is that the District Court made no finding that the appellants had a 'dominant position' or, as this Court now puts it, 'sufficient economic power,' in the relevant land market. Such a finding would indicate that those requiring land of the character owned by the appellants would be driven to them for it, thereby putting appellants in a position to foreclose competing carriers, through the medium of tying clauses, from shipping the produce from the lands sold or leased. The District Court seems to have conceived that no more need be shown on

this score than that the appellants owned the particular tracts of land sold or leased subject to a tying clause. Thus it said (142 F.Supp. 684):
'Defendants argue that the first tying element, i.e., market domination over the tying product, is not established because the record does not show the proportion of N.P. (Northern Pacific) lands of various types to the total of the lands of the same types sold and leased in the area of defendants' operations. ***15** This contention ignores the plain language of the cited decisions ('tying clause' cases in this Court), providing that market dominance of 'the tying commodity' is required. The tying commodity need only be the particular property or product to which forced purchase of the second commodity is tied; certainly it does not necessarily include all of the similar and competing commodities which may be in the market. * * *

'The tying commodity in the present case is the land presently or formerly owned by N.P. Unrestricted fee-simple title to land vests in the owner absolute domination of the market in such land. By the ownership of the lands and resulting dominance in the market therefor defendants were able to impose the traffic clauses in question on the grantees and lessees of the land.' (Italics added.)

In conformity with these views the ultimate findings of the District Court on the issue of 'control' were only these:
'37. Defendants, as sellers and as lessors, by reason of title in fee simple, have dominance in the lands now owned by them and had dominance in the lands formerly owned at the time of sale of such lands. (Italics added.)

'38. Defendants have used their dominance in the lands sold and leased to require purchasers and lessees to purchase and use Northern Pacific's transportation service, under the conditions stated in finding 10.' (Finding 10 relates to the terms of the tying clauses.)

I do not think that these findings as to appellants' ad hoc 'dominance' over the particular land sold or leased suffice to meet the showing of market control which Times-Picayune established as one of the essential prerequisites ***16** to holding tying clauses illegal per se under the Sherman Act. In effect the District Court's view by-passed that requirement and made the validity of these tying clauses depend entirely on the commercial restraint accomplished by them. The District Court should have taken evidence of the relative strength of appellants' landholdings vis-a -vis that of others in the appropriate market for land of the types now or formerly possessed by appellants,[3] of the 'uniqueness' of ****524** appellants' landholdings in terms of quality or use to which they may have been put, and of the extent to which the location of the lands on or near the Northern Pacific's railroad line, or any other circumstances, put the appellants in a strategic position as against other sellers and lessors of land. Short of such an inquiry I do not see how it can be determined whether the appellants occupied such a dominant position in the relevant land market, cf. United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 76 S.Ct. 994, 100 L.Ed. 1264, as to make these tying clauses illegal per se under the Sherman Act.

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3 The findings entered by the District Court make no reference to appellants' percentage ownership of a proper market for land, and indeed the record contains in only one instance statistics bearing on this problem. In the period between 1935 and 1942, it appears that appellants' holdings of merchantable timber in Montana, Idaho, and Washington constituted approximately 5% of the total merchantable timber in those States.

Explanation for the Court's failure to remand with instructions to pursue such an inquiry apparently lies in part in its statement that the 'very existence of this host of tying arrangements is itself compelling evidence of the defendant's great power' over the land market. I do not deny that there may be instances where economic coercion by a vendor may be inferred, without any direct showing of market dominance, from the mere existence of the tying arrangements themselves, as where the vendee ***17** is apt to suffer economic detriment from the tying clause because precluded from purchasing a tied product at better terms or of a better quality elsewhere. But the tying clauses here are not cast in such absolute terms. The record indicates that a large majority of appellants' lands were close to the Northern Pacific lines and thus vendees or lessees of these lands might be expected to utilize Northern Pacific as a matter of course. Further, substantially all the tying clauses, as found by the District Court, contained provisos leaving the vendee or lessee free to ship by other railroads when offered either lower rates or lower rates or superior service. In these circumstances it would appear that the inclusion of the tying clauses in contracts or leases might have been largely a matter of indifference to at least many of the purchasers or lessees of appellants' land, and hence that more is needed than the tying clauses themselves to warrant the inference that acceptance of the tying clauses resulted from coercion exercised by appellants through their position in the land market.

Particularly in view of the Court's affirmance of a judgment based on so inadequate a record, I have further difficulty with the opinion in its treatment of International Salt, the decision on which the Court principally relies. The Court regards that case as making irrelevant proof of market dominance in the tying interest, but it seems to me that Times-Picayune has laid to rest all doubt as to the need for clear proof on this issue. In fact that case considered that in International Salt the required element of proof was supplied by the patents themselves which 'conferred monopolistic, albeit lawful, market control' over the tying product, 345 U.S. at page 608, 73 S.Ct. at page 880, as indeed the Court in International Salt itself suggested by prefacing its holding with the statement that '(defendant's) patents confer a limited monopoly of the invention they ***18** reward.' 332 U.S. at page 395, 68 S.Ct. at page 15. Still the Court today states that the tying clauses were there struck down despite the fact that the tying product was patented. In short, insofar as the Sherman Act is concerned, it appears that International Salt simply treated a patent as the equivalent of proof of market control—a view further supported by what was said about International Salt in Standard Oil Co. of California and Standard Stations v. United States, 337 U.S. 293, at pages 304, 307, 69 S.Ct. 1051, at pages 1057, 1058, 93 L.Ed. 1371.

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The reliance on International Salt with the new scope the Court now gives **525 it is puzzling in light of the Court's express recognition that a finding of sufficient economic power over land to restrict competition in freight servives is an essential element here. The Court heightens this paradox by its effort to satisfy this requirement with the assertion that 'undisputed facts' conclusively established the existence of this power. But in so concluding, it could hardly rely on the market-dominance findings below which, as I have tried to show, rested upon the District Court's evidence misconception of Times-Picayune.

I do not understand the Court to excuse findings as to control by adopting the Government's argument that this case should be brought within International Salt by analogy of the ownership of land to that of a patent, so that the particular tract of land involved in each purchase or lease itself constitutes the relevant market. The record in any event is without support for such a theory. No findings were made below as to the uniqueness of any of appellants' lands either because of their location[4] or *19 because of their peculiar qualities enabling production of superior mineral, timber, or agricultural products. Without such an inquiry, I do not see how appellants' supposed dominance of the land market can be based on the theory that their lands were 'unique.'

4 Affidavits before the District Court did indicate that certain landholdings of appellants, particularly grazing lands, were in a checkerboard pattern among private holdings, thereby giving appellants a strategic position with respect to these lands since the private landholders often found it necessary to acquire appellants' lands to fill gaps in existing ranges. The amount of such land does not appear, and I do not think that these affidavits justify short-circuiting an inquiry into the broad issue of market dominance.

Finally, the Court leaves in unsettling doubt the future effect of its statement that the use of the word 'dominance' in Times-Picayune implies no more of a showing of market dominance than 'sufficient economic power to impose an appreciable restraint on free competition in the tied product.' As an abstraction one can hardly quarrel with this piece of surgery, for I do not claim that a monopoly in the sense of s 2 of the Sherman Act, 15 U.S.C.A. s 2, must be shown over a tying product. As already indicated, I should think that a shoring of 'sufficient economic power' in cases of this kind could be based upon a variety of factors, such as significant percentage control of the relevant market, desirability of the product to the purchaser, use of tying clauses which would be likely to result in economic detriment to vendees or lessees, and such uniqueness of the tying product as to suggest comparison with a monopoly by patent. But I venture to predict that the language of the Court, taken in conjunction with its approval of the summary disposition of this case, will leave courts and lawyers in confusion as to what the proper standards now are for judging tying clauses under the Sherman Act.

The Court's action in affirming the judgment below sanctions what I deem to be a serious abuse of the summary judgment procedures.

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Cf. Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 64 S.Ct. 724, 88 L.Ed. 967. A record barren of facts adequate to support either a finding of economic ***20** power over a relevant land market or a finding that the land involved is so unique as to constitute in itself the relevant market is remedied by this Court's reliance upon 'common sense' and judicial notice of appellants' commanding position. But these are poor substitutes for the proof to which the Government should be put. I would remand to the District Court for a trial and findings on the issue of 'dominance.'

All Citations

356 U.S. 1, 78 S.Ct. 514, 2 L.Ed.2d 545

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2009 WL 10711834
Only the Westlaw citation is currently available.
United States District Court, E.D. Wisconsin.

OLDENBURG GROUP INCORPORATED, Plaintiff,
v.
The SHERWIN WILLIAMS COMPANY, Defendant.

Case No. 07-C-0596
|
Signed 08/31/2009

Attorneys and Law Firms

Allen C. Schlinsog, Jr, David E. Frank, Antonio M. Trillo, Reinhart Boerner Van Deuren SC, Milwaukee, WI, for Plaintiff.

Glenn M. Salvo, Gregory M. Weyandt, Dorsey & Whitney LLP, Minneapolis, MN, for Defendant.

DECISION AND ORDER GRANTING DEFENDANT'S MOTION FOR JUDGMENT ON THE PLEADINGS AS TO COUNT II OF PLAINTIFF'S COMPLAINT (Doc. # 26), AND SETTING STATUS CONFERENCE

C. N. CLEVERT, JR., U. S. DISTRICT JUDGE

***1** Plaintiff, Oldenburg Group Inc. (Oldenburg), a Wisconsin corporation, brought suit in Milwaukee County Circuit Court, against defendant, The Sherwin-Williams Company (Sherwin-Williams), an Ohio corporation, alleging seven causes of action: (1) intentional misrepresentation, (2) fraudulent representation pursuant to Wisconsin Statutes § 100.18, (3) unjust enrichment, (4) breach of contract, (5) breach of express warranty, (6) breach of implied warranty of merchantability, and (7) breach of implied warranty of fitness for a particular purpose. On June 29, 2007, Sherwin-Williams removed the action to this court pursuant to 28 U.S.C. §§ 1332, 1441, and 1446.

Before the court is Sherwin-Williams' motion for judgment on the pleadings as to Oldenburg's claim under Wis. Stats. § 100.18 (Count II of the complaint). Rule 12(c) permits a party to move for judgment after the complaint and answer have been filed. *N. Ind. Gun & Outdoor Shows, Inc. v. City of S. Bend*, 163 F.3d 449, 452 (7th Cir. 1998); *see* Fed.R.Civ.P. 12(c). When reviewing a motion for judgment on the pleadings, the court applies the same standard as a motion to dismiss under Rule 12(b)(6). *Pisciotta v. Old Nat'l Bancorp*, 499 F.3d 629, 633 (7th Cir. 2007). All facts alleged in the complaint are taken as true, with all reasonable inferences drawn in plaintiff's favor. *Id.* However, assertions in the complaint which undermine a claim are not ignored. *N. Ind. Gun & Outdoor Shows, Inc.*, 163 F.3d at 452. The party moving for judgment on the pleadings under Fed. R. Civ. P. 12(c) must establish that there is no material issue of fact presented and he is entitled to judgment as a matter of law. *Flora v. Home Fed. Sav. & Loan Assoc.*, 685 F.2d 209, 211 (7th Cir.1982); *Moss v. Martin*, 473 F.3d 694, 698 (7th Cir. 2007).

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This case arises from an allegedly defective paint system sold by Sherwin-Williams to Oldenburg in connection with an Army contract. According to the complaint, in 2001 Oldenburg was awarded the Army contract, involving the manufacture of a Modular Causeway System (MCS). The MCS project required a specific non-skid surface, the application of which must comply with certain military specifications. After a bidding process, Oldenburg selected a Sherwin-Williams paint system, and utilized that system from October 2001 through October 2002 to coat the MCS units. (*See* Compl. 2-3.) Oldenburg discovered problems with the Sherwin-Williams paint system "almost immediately." (*Id.* at 4.) It confronted Sherwin-Williams about the problems, and despite Sherwin-Williams' subsequent attempts at a remedy, issues persisted. Ultimately, 100 MCS units failed due to Sherwin-Williams paint system. (*Id.* at 5.)

Sherwin-Williams attacks Count II of the complaint, which charges fraudulent representation pursuant to Wis. Stats. § 100.18, on the grounds that it was not brought within the time period prescribed by statute. Section 100.18(11)(b)(3) provides that "[n]o action may be commenced under this section more than 3 years after the occurrence of the unlawful act or practice which is the subject of the action." Wisconsin courts have interpreted this provision as a statute of repose (as opposed to a statute of limitations). *See Kain v. Bluemound East Indus. Park, Inc.*, 2001 WI App 230, ¶¶ 14-18, 248 Wis. 2d 172, ¶¶ 14-18, 635 N.W.2d 640, ¶¶ 14-18 (concluding, after thorough discussion of Wisconsin law, that § 100.18(11)(b)(3) is a statute of repose); *see also Tomczak v. Bailey*, 218 Wis. 2d 245, 258, 578 N.W.2d 166 (1998) (confirming in passing that § 100.18 includes a statute of repose).[1] "Under a statute of repose, 'a cause of action must be commenced within a specified amount of time after the defendant's action which allegedly led to injury, *regardless of whether the plaintiff has discovered the injury or wrongdoing*.' " *Id.* ¶ 14 (quoting *Tomczak*, 218 Wis. 2d at 252). "In a statute of repose, the legislature has already determined when the claim 'accrues'—at the time of the defendant's action." *Id.*; *see also Selzer v. Brunsell Bros. Ltd.*, 2002 WI App 232, ¶¶ 29-30, 257 Wis. 2d 809, ¶¶ 29-30, 652 N.W.2d 806, ¶¶ 29-30; *Blacks Law Dictionary* 1451 (8th Ed. 1999) ("Statute of Repose: A statute barring any suit that is brought after a specified time period since the defendant acted ... even if this period ends before the plaintiff has suffered a resulting injury.")

1 In *Tomczak v. Bailey* (captioned in Westlaw as *Castellani v. Bailey*) the Wisconsin Supreme Court concluded, among other things, that Wis. Stat. § 893.37 (limiting actions against a land surveyor to within six years of the survey) was a statute of repose (not a statue of limitations) and that the discovery rule did not apply. 218 Wis.2d at 259, 578 N.W.2d 173. In its discussion, the court noted several cases that addressed statutes of repose, including *Skrupky v. Elbert*, 189 Wis. 2d 31, 526 N.W.2d 264 (Ct. App. 1994), which addressed time limits for § 100.18 claims. The *Kain* court examined the Supreme Court's decision in *Tomczak* in reaching its conclusion as to § 100.18.

***2** Here, according to the complaint, the fraudulent representations at issue were made by Sherwin-Williams in 2001. (*See* Compl. 3, 6.) However, this action was filed in 2007. Applying the plain words of the statute, any claim that Oldenburg had under § 100.18 expired in 2004.

Oldenburg does not dispute the math. Instead, it argues that Sherwin-Williams "is equitably estopped from asserting the statute of repose applies because it engaged in inequitable, deceptive conduct during the limitations period in an attempt to conceal the fraud that is the heart of the Section § 100.18 claim." (Pl.'s Mem. in Opp. to Def.'s Mot. 6.) On this point, Oldenburg submits that Sherwin-Williams attempted to conceal the its fraud by making promises to remedy any failures. (*Id.* 8-9.) This argument, however, fails for several reasons. First, equitable estoppel is generally considered inconsistent with periods of or repose established by a legislature. *See generally* *Teamsters & Employers Welfare Trust of Ill. v. Gorman Bros. Ready Mix*, 283 F.3d 877, 887 (7th Cir. 2002) (Easterbrook, J., concurring) (noting that "equitable extensions are incompatible with periods of repose" inasmuch as "Courts could not allow for additional equitable extensions without displacing a legislative choice"); *Cada v. Baxter Healthcare Corp.*, 920 F.2d 446, 451 (7th Cir. 1990) (noting that the doctrine of equitable estoppel does not apply to statutes of repose because "their very purpose is to set an outer limit unaffected by what the plaintiff knows"). Second, the complaint states explicitly that the fraudulent representations occurred in 2001 prior to Oldenburg's acceptance of Sherwin-Williams' bid, and that Oldenburg discovered serious problems with the Sherwin-Williams paint system "almost immediately." (Compl. ¶¶ 14, 28-30.) Oldenburg does not explain sufficiently how equitable principles require this court to ignore the statutory time limit under such circumstances. Third, similar arguments have been rejected by Wisconsin courts. For example, in *Selzer v. Brunsell Bros. Ltd.*, 2002 WI App 232, ¶¶ 29-30, the court disapproved the plaintiff's argument that "public policy considerations" require that his § 100.18 claim accrues not at the time of the fraudulent representations (in that case, representations that windows will not rot), but at the time of the resulting injury (when he discovered his windows were rotting). Notably, the court found that a decision to "close the courthouse doors on litigants with stale claims is a pure question of policy that is better left to the legislative branch of government." *Id.* ¶ 30 (quoting *Tomczak*, 218 Wis.2d at 254, 578 N.W.2d 166); *see also* *Neuser v. Carrier Corp.*, No. 06-C-645, 2007 WL 484779, *3 (W.D. Wis. Feb. 9, 2007) (relying on *Selzer* and rejecting plaintiff's claim that equitable estoppel can be used to avoid time period in § 100.18 statute of repose); *Seibel v. A.O. Smith Corp.*, No. 97-C-0874, 1998 WL 315067, *8 (W.D. Wis. April 2, 1998) (stating that equitable estoppel does not apply to § 100.18 claims inasmuch as it is a "statute of repose in which law suits are barred a fixed number of years after the unlawful act occurred regardless of whether the plaintiff has discovered the injury").

Oldenburg points to no authority supporting its equitable estoppel defense to a statute of repose under similar circumstances. Its search

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for support in cases such as *Kuiper v. Am. Cyanamid Co.*, 131 F.3d 656 (7th Cir.1997), *abrogated on other grounds by Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 437 (2005), and *RTE Corp. v. Dow Corning Corp.*, No. 85-C-1603, 1986 WL 15395 (E.D. Wis. Nov. 12, 1986) (Warren, J.) falls short inasmuch as those cases are not necessarily on point and are otherwise unpersuasive. For example, in *RTE Corp*, the court referred to the limited time period as a "statute of limitations," which, as discussed, conflicts with later decisions of the Wisconsin courts, *See Kain*, 2001 WI App 230 (discussing difference between statutes of repose and statutes of limitations), and ultimately concluded that the" paucity of the record" (it was considering a motion to dismiss) precluded a ruling in favor of the movant. In *Kuiper*, the court sidestepped arguments that "equitable principles" may extend the limitations period under § 100.18, finding that in any event the plaintiffs had sufficient information to bring suit within the time limit. 131 F.3d at 660-61; *see generally Staudt v. Artifex Ltd.*, 16 F. Supp. 2d 1023, 1031 (E.D. Wis.1998) (Gordon, J.) (noting that after *Kuiper* was decided, Wisconsin courts "ruled that the discovery rule does not apply to statutes of repose like that in Wis. Stats. § 100.18(11)(b)(3) pursuant to which the limitation period begins to run as of the date of the defendant's conduct). Whatever the merits of Oldenburg's allegations, its remedy, if any, lies outside Wis. Stats. § 100.18.

3** Alternatively, Oldenburg makes the absurd argument this court should "reserve ruling on the motion until plaintiff is able to develop facts through discovery to establish its equitable estoppel defense." (Pl.'s Mem. in Opp. 9.) Not only is the court unwilling to wait until Oldenburg digs up a nugget of evidence to support its defense (assuming it had a valid defense), ***but discovery is closed—the parties agreed to a discovery schedule that ran its course before the pending motion was filed. Moreover, the court even stated expressly that any party may request additional time for discovery if necessary, (*see* Doc. # 23), but no such request was filed. Therefore,

IT IS ORDERED that the defendant's Motion for Judgment on the Pleadings as to Count II of the Complaint (Doc. # 26) is granted.

IT IS FURTHER ORDERED that a status conference will be held on November 12, 2009, at 2:300 p.m.

All Citations

Slip Copy, 2009 WL 10711834

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623 F.3d 832
United States Court of Appeals,
Ninth Circuit.

POLIMASTER LTD.; Na&Se Trading Co., Limited, Plaintiffs–Appellants,
v.
RAE SYSTEMS, INC., Defendant–Appellee.
Polimaster Ltd.; Na&Se Trading Company Ltd., Plaintiffs–Appellants,
v.
RAE Systems, Inc., Defendant–Appellee.

Nos. 08–15708, 09–15369.
|
Argued and Submitted Jan. 15, 2010.
|
Filed Sept. 28, 2010.

Synopsis

Background: Manufacturer filed action against designer of radiation monitoring instruments, and corporation that was engaged in intellectual property licensing, to confirm arbitration award. The United States District Court for the Northern District of California, Jeremy D. Fogel, J., 2009 WL 196169, confirmed arbitration award. Plaintiffs appealed.

Holdings: The Court of Appeals, Wallace, Senior Circuit Judge, held that:

arbitration agreement, which required arbitration of any "dispute" at "defendant's [site]," required arbitration of all requests for affirmative relief at defendant's site, whether styled as claims or counterclaims;

arbitration agreement was not ambiguous as to designation of forum for arbitration of counterclaims that had requested affirmative relief; and

award was not enforceable.

Reversed and remanded.

Clifton, Circuit Judge, filed dissenting opinion.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

***834** Kevin R. Garden, Esq., Alexandria, VA, for appellants Polimaster Ltd., et al.

John P. Flynn, Esq., San Francisco, CA, for appellee RAE Systems, Inc.

Appeal from the United States District Court for the Northern District of California, Jeremy D. Fogel, District Judge, Presiding. D.C. No. 05–CV–01887–JF.

Before: J. CLIFFORD WALLACE, PROCTER HUG, JR. and RICHARD R. CLIFTON, Circuit Judges.

Opinion by Judge WALLACE; Dissent by Judge CLIFTON.

OPINION

WALLACE, Senior Circuit Judge:

Appellants Polimaster Ltd. and Na & Se Trading Company, Ltd. (Na & Se) (collectively, Polimaster) appeal from the district court's confirmation of an arbitration award against them and in favor of appellee RAE Systems, Inc. (RAE). They also appeal from the district court's subsequent order granting pre- and post-judgment interest on the arbitration award. We have jurisdiction pursuant to 28 U.S.C. § 1291 and 9 U.S.C. § 16(a)(1)(D), and we reverse and remand.

I.

Appellant Polimaster Ltd. is a limited liability company based in Belarus, engaged in the design and manufacture of radiation monitoring instruments. Appellant Na & Se is a corporation based in Cyprus, engaged in intellectual property licensing. In January 2003, Polimaster Ltd. and Na & Se entered into a contractual relationship with RAE, a Delaware corporation with its principal place of business in California. The parties signed two agreements, the "Nonexclusive License for Proprietary Information Usage" (License Agreement) and the "Product and Component Buy/Sell Agreement" (Buy/Sell Agreement), which provided for RAE's manufacture and distribution of Polimaster-developed radiation detection devices.

The License Agreement refers to Na & Se as the "Licensor," RAE as the "Licensee," Na & Se and RAE as the "Parties," and Polimaster Ltd. as the "Manufacturer." The License Agreement contains a dispute resolution provision that states:

> 9.1 In case of the dispute between the Licensor and the Licensee on the issues provided for by the present Agreement the Parties shall take every effort for their settlement by negotiations.
>
> 9.2 In case of failure to settle the mentioned disputes by means of negotiations they should be settled by means of arbitration at the defendant's side.

The parties agree that "defendant's side" means "defendant's *site,*" that is, the geographical location of the defendant's principal place of business. The Buy/Sell Agreement also contains an arbitration clause, which states, "7.1 The Parties shall exert the best efforts to settle up any disputes by means of negotiations, and in case of failure to reach an agreement the disputes shall be settled by arbitration at the defendant's site."

Disputes arose in the course of performing the agreements. In May 2005, Polimaster filed an action against RAE in the United States District Court for the Northern District of California. After the district court denied Polimaster's request for a preliminary injunction, the parties negotiated to submit Polimaster's claims to arbitration in California (that is, defendant RAE's "site," as directed in the agreements). In May 2006, Polimaster and RAE commenced arbitration by a joint letter to "JAMS," an arbitration provider ***835** organization (since renamed "JAMS, The Resolution Experts"). Although the parties jointly submitted to arbitration, Polimaster made the following reservation:

> It is Polimaster's position that no counterclaims will be filed in this matter based on the requirement in the agreement that all such claims be filed in the location of the party against whom such claims are brought. Because Polimaster is located in Belarus, Polimaster asserts that all such claims against it shall be brought in that location.

In July 2006, Polimaster submitted its demand for arbitration, setting forth claims against RAE for breach of contract under both the License Agreement and the Buy/Sell Agreement, misappropriation of trade secrets, and unfair competition. In August 2006, RAE submitted its answer to Polimaster's demand for arbitration, in which RAE set forth not only its affirmative defenses and responses to Polimaster's allegations, but also RAE's own claims against Polimaster, which it called "counterclaims." RAE asserted several claims sounding in contract and tort, including interference with prospective economic advantage, fraud and negligent misrepresentation.

Polimaster asked the arbitrator to dismiss RAE's "counterclaims," arguing that any claims by RAE against Polimaster could not be arbitrated at RAE's site in California, because the arbitration agreement required that they be brought at the "defendant's [site]," that is, at Polimaster's site. The arbitrator refused to dismiss RAE's counterclaims, reasoning that the contract did not specify where counterclaims should be brought. To fill the perceived gap, he applied procedural rules regarding compulsory counterclaims, as defined in Federal Rules of Civil Procedure, California Rules of Civil Procedure, and JAMS rules. The arbitrator decided it would be contrary to "notions of fairness, judicial economy and efficiency" to "[p]rosecut[e] a claim with affirmative defenses in one venue while simultaneously prosecuting counterclaims almost identical to the affirmative defenses in another [venue]." Instead, he reasoned, RAE's "counterclaims" should be "heard in the same venue as the properly situated original arbitration claims [by Polimaster against RAE]."

The arbitrator in California ultimately adjudicated both Polimaster's claims and RAE's "counterclaims." The arbitrator issued an Interim Award in July 2007, which rejected all of Polimaster's claims and awarded damages to RAE on its successful counterclaim, in the amount of $2,412,432. By a Final Arbitral Award dated September 20, 2007, the arbitrator confirmed the findings and conclusions of the Interim Award and further awarded costs to RAE, as the prevailing party, in the amount of $46,213.15.

Thereafter, RAE sought confirmation of the arbitration award in the United States District Court for the Northern District of California. Polimaster moved to vacate the award, arguing that the arbitral procedure was not in accordance with the parties' agreement and that

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the arbitrator exceeded his powers by allowing RAE to assert "counterclaims" at RAE's own site in California rather than at the "defendant's [site]" as required by the agreement. The district court confirmed the award to RAE, and this appeal followed.

II.

The parties agree that the arbitration agreement and award are governed by the Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention), June 10, 1958, 21 U.S.T. 2517. We must confirm an arbitration award falling under the New York ***836** Convention unless we determine that "one of the grounds for refusal or deferral of recognition or enforcement of the award specified in the [sic] said Convention." 9 U.S.C. § 207; *see also* *Mgmt. & Technical Consultants S.A. v. Parsons–Jurden Int'l Corp.,* 820 F.2d 1531 (9th Cir.1987) (*Parsons–Jurden*).

The New York Convention enumerates seven defenses to the recognition or enforcement of an arbitral award. These grounds include, among others, that the award "deals with a difference not contemplated by or not falling within the terms of the submission to arbitration," that the parties were under some incapacity or their agreement is not valid under the law of the country where the award is made, or that the party against whom the award is invoked was not able to present its case. 21 U.S.T. 2517, Art. V, §§ 1(a)-(c). In this appeal, Polimaster invokes the defense set forth in Article V, § 1(d), of the New York Convention:

> (d) The composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, was not in accordance with the law of the country where the arbitration took place.

21 U.S.T. 2517, Art. V, § 1(d). Polimaster asserts that the arbitration procedure was contrary to the parties' agreement because the arbitrator allowed RAE to bring its claims, calling them "counterclaims," against Polimaster in an arbitration proceeding in California, thereby permitting RAE to bring a claim at its own site.

We review de novo whether a party established a defense to enforcement of an arbitration award under the New York Convention. *China Nat'l Metal Prods. Import/Export Co. v. Apex Digital, Inc.,* 379 F.3d 796, 799 (9th Cir.2004). As the party seeking to avoid enforcement of the award, Polimaster has the burden of showing the existence of a New York Convention defense. *Ministry of Def. of the Islamic Republic of Iran v. Gould, Inc.,* 969 F.2d 764, 770 (9th Cir.1992). Polimaster's burden is substantial because the public policy in favor of international arbitration is strong, *id.,* and the New York Convention defenses are interpreted narrowly. *See* *China Minmetals Materials Imp. & Exp. Co., Ltd. v. Chi Mei Corp.,* 334 F.3d 274, 282–83 (3d Cir.2003); *Gould,* 969 F.2d at 770 (adopting narrow

interpretation of defense based on arbitrator exceeding authority); *Parsons & Whittemore Overseas Co. v. Societe Generale de L'Industrie du Papier (RAKTA),* 508 F.2d 969, 976 (2d Cir.1974) (adopting narrow interpretation of public policy defense).

The grounds for refusing confirmation of an award under the Federal Arbitration Act (FAA), 9 U.S.C. § 10, generally track those under the New York Convention, although they are not coextensive. *See Parsons–Jurden,* 820 F.2d at 1534. When interpreting the defenses to confirmation of an arbitration award under the New York Convention, we may look to authority under the FAA. *Parsons & Whittemore,* 508 F.2d at 974.

III.

We may decline enforcement of an arbitral award on the basis that "the arbitral procedure was not in accordance with the agreement of the parties." 21 U.S.T. 2517, Art. V, § (1)(d). To determine whether the procedure used was contrary to the parties' agreed arbitral procedures, we must begin with the language of the parties' arbitration agreement. *See Encyclopaedia Universalis S.A. v. Encyclopaedia Britannica, Inc.,* 403 F.3d 85, 91 (2d Cir.2005); ***837** *Coast Trading Co. v. Pac. Molasses Co.,* 681 F.2d 1195, 1198 (9th Cir.1982); *cf. generally Howsam v. Dean Witter Reynolds, Inc.,* 537 U.S. 79, 84, 123 S.Ct. 588, 154 L.Ed.2d 491 (2002) (holding that, in the context of an arbitrability determination, the court reviews the contract de novo); *Simula, Inc. v. Autoliv, Inc.,* 175 F.3d 716, 719 (9th Cir.1999) (also in context of arbitrability determination, the interpretation of the relevant contractual provision was subject to de novo review).

A.

In this case, the arbitration agreement provided that disputes "should be settled by means of arbitration at the defendant's [site]." According to Polimaster, the arbitration agreement required RAE's claims to be arbitrated in Belarus. According to RAE, the arbitration agreement was ambiguous concerning the treatment of counterclaims. Thus, according to RAE, the arbitrator correctly, and within the scope of his authority, resolved the ambiguity so as to allow litigation of RAE's counterclaims at its own site in California.

For the reasons stated hereafter, we conclude that the arbitration agreement required that all requests for affirmative relief, whether styled as claims or counterclaims, be arbitrated at the defendant's site. The arbitration agreement required that any "dispute" be arbitrated at "the defendant's [site]." The term "dispute" encompasses both claims and counterclaims. Moreover, a party is a "defendant" as to any dispute where another party seeks damages or some other form of relief against him. Therefore, Polimaster was clearly the "defendant" as to RAE's "counterclaims." The "dispute" embodied in those claims should not have been arbitrated at RAE's site in California.

1.

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The arbitration agreement was not ambiguous. The agreement contemplated that all claims should be asserted at the defendant's site. This provided a clear designation of the forum for arbitration. *Cf., e.g., Bauhinia Corp. v. China Nat'l Mach. & Equip. Imp. & Exp. Corp.,* 819 F.2d 247, 249 (9th Cir.1987) (ambiguous forum selection provision). The requirement of arbitration at the defendant's site is effectively a forum selection clause, in which the parties agreed to arbitrate at the location of a defendant's principal place of business. This choice of forum is presumptively enforceable. *See Scherk v. Alberto–Culver Co.,* 417 U.S. 506, 519, 94 S.Ct. 2449, 41 L.Ed.2d 270 (1974); *M/S Bremen v. Zapata Off–Shore Co.,* 407 U.S. 1, 13–14, 92 S.Ct. 1907, 32 L.Ed.2d 513 (1972).

The dissent takes a different position: it asserts that the arbitration agreement is ambiguous. According to our dissenting colleague, "To the extent that any answer can be gleaned from the language used in the agreement, I think the language cuts slightly against the majority opinion's interpretation." The dissent points out that the arbitration clause in question provides that, in the event that "the mentioned disputes" cannot be settled by "negotiations [,] they should be settled by means of arbitration at the defendant's [site]." Because the word "disputes" is plural, but the words "defendant" and "side [site]" are singular, the dissent reasons that "[t]he parties anticipated that there could be multiple disagreements, yet the 'defendant's site' refers to only one location."

The dissent's construction of the arbitration clause, however, is simply not reasonable. The term "disputes" as used in section 9.2 of the Agreement refers back to the category of disputes made subject to the arbitration clause, as defined in section 9.1 of the Agreement. Section 9.1 provides that, in the case of "the dispute [sic] ***838** between the Licensee and the Licensor on the issue provided for by the present Agreement" the parties were to make "every effort for their settlement by means of negotiations." Section 9.2 contemplates that, in the event that "the mentioned disputes" cannot be settled by negotiations, they should be "settled by means of arbitration at the defendant's [site]." Thus, the plural term "disputes," as used in section 9.2 of the Agreement, is merely a reference back to the covered disputes set forth in section 9.1, i.e. disputes "on the issues provided for by the present Agreement." When viewed in context, the plural term "disputes," cannot reasonably be said to mean consolidation of multiple claims into a single arbitration because that would be contrary to the more specific forum-selection clause contained in section 9.2 of the Agreement.

2.

The arbitrator opined that the arbitration clause was indeterminate because it failed to provide expressly for the treatment of counterclaims. The dissent likewise concludes that the arbitration clause is faulty for failure to contemplate counterclaims. But that the agreement neither expressly included nor excluded counterclaims does not render it indeterminate. There is no reason why the arbitration agreement *had to* provide for the treatment of counterclaims. To conclude that the arbitration clause is ambiguous on this basis

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sets up a rigged game: criticizing the failure to provide for the treatment of counterclaims *presumes* that such a clause is a necessary, indispensable, or essential component of an agreement to arbitrate. But there is no reason that this must be so.

The dissent argues that, "it is not a novel or obscure practice to resolve all claims, including counterclaims, in a single proceeding that has already commenced." The dissent, like the arbitrator below, also points to rules pertaining to counterclaims in the Federal Rules of Civil Procedure, the California Rules of Civil Procedure, and the rules of the arbitration forum agreed upon by the parties (JAMS). The dissent argues that the arbitration clause in this case is ambiguous because "[t]he prosecution of counterclaims in the same proceeding is broadly recognized in international arbitration." The dissent then points to general procedural rules and guidelines from several international arbitration provider organizations that typically would apply to the extent those rules are consistent with a given agreement to arbitrate. *See, e.g.,* International Chamber of Commerce (ICC) Rules of Arbitration art. 5; London Court of International Arbitration Rules art. 2.1(b); United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules art. 19.

Nevertheless, although the joinder of counterclaims into a pending proceeding is widely contemplated by various rules of procedure, the parties simply did not incorporate these rules into their contract. Instead, once the *assumption* that counterclaims will be joined into a pending proceeding is recognized as what it is—merely an assumption—it is clear that the parties' clause was adequate to express their intent. To put the point differently, the parties' clause was adequate to provide for separate arbitrations at the defendant's site. *See, e.g.* Gary B. Born, *International Commercial Arbitration in the United States* 6 (1994). There is no reason to require the parties to include contractual language specifically defeating or negating the joinder of claims. The dissent's viewpoint is, in effect, based on the dissent's assumption that counterclaims should be joined in a pending proceeding. We believe it would be circular to interpret the ***839** parties' agreement therefore by reference to rules that the parties did not incorporate into their contract and which are inconsistent with the parties' agreement to arbitrate. *See, e.g.,* Emmanuel Gaillard & John Savage, Eds., *Fouchard, Gaillard, Goldman on International Commercial Arbitration* 632–53 (1999) (pointing out that the procedural rules of the forum need not apply to conduct of international arbitration).

Indeed, to the extent that we look to, or incorporate, our domestic rules of procedure in construing the arbitration clause at hand, we believe those rules tend to support our interpretation. Counterclaims are "affirmative claims for relief" and are "offensive in nature." Daniel R. Coquilette, et al., eds., *Moore's Federal Practice* § 13.90[1] (3d Ed. 2010); *see also FDIC v. F.S.S.S.,* 829 F.Supp. 317, 322 n. 11 (D.Alaska 1993) ("Counterclaims are separate claims independent of the plaintiff's underlying claim."); *In re Concept Clubs, Inc.,* 154 B.R. 581, 586 n. 4 (D.Utah 1993). Under Federal Rule of Civil Procedure 13, a party is the "defendant" against a counterclaim.

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See Moore's Federal Practice § 13.90[2][a]; *see also Rainbow Mgmt. Group v. Atlantis Submarines Haw., L.P.,* 158 F.R.D. 656, 659 (D.Haw.1994); *Earle M. Jorgenson Co. v. T.I. U.S., Ltd.,* 133 F.R.D. 472, 475 (E.D.Pa.1991) ("Any party asserting a claim, whether an original claim, counterclaim, cross-claim or third-party claim, becomes an opposing party to the party sued" (internal citations and quotation marks omitted)).

The dissent points out that the term "defendant" could have a different meaning depending on the context. For instance, in litigation, "defendant" is sometimes used as a "shorthand" to "distinguish the original defending party from the party initially on the offensive." *See* Moore's Federal Practice at § 13.90[2]. The term, however, is used in the latter sense only when it is clear from the relevant context that the court, tribunal, arbitrator, or the parties have formally designated one particular side as the "defendant." *See id.* In this case, the context and structure of the arbitration clause clearly indicate that the parties understood the "defendant" as a party against whom the other asserts a "dispute" arising out of the License Agreement or the Buy/Sell Agreement. Absolutely nothing in these agreements suggests that the parties understood the term "defendant" as a formal designation limited to the party *initially* on the defensive. It is well established that a counterclaim results in shifting the parties so that the party counterclaiming becomes the plaintiff on the counterclaim and the original plaintiff becomes the defendant. *See Roberts Min. & Mill. v. Schrader,* 95 F.2d 522, 524 (9th Cir.1938) (explaining that a "counterclaim [is], in effect, a new suit, in which Schrader was plaintiff and Smith was defendant"). Accordingly, there can be no dispute that Polimaster became the "defendant" as to RAE's claims against it for affirmative relief, regardless of how RAE styled those claims. Under the clear language of the arbitration agreement, Polimaster was entitled to have the claims against it arbitrated in its home forum.

We acknowledge that the arbitration agreement in this case is an unusual one. The arbitration clause does not provide for a choice of law or a choice of procedural rules. *See generally* Born at 24 (describing the several choice of law issues present in international arbitrations); Alan Redfern & Martin Hunter, *Law and Practice of International Commercial Arbitration,* 163–168 (2002). The arbitration clause also does not provide for the number of arbitrators or a method for their appointment. ***840** *Cf., e.g.,* ICC Standard Arbitration Clause, *available at www.iccarbitration.org* (last visited July 13, 2010) (recommending clause that states: "[a]ll disputes arising out of or in connection with the present contract shall be finally settled under the Rules of Arbitration of the [ICC] by one or more arbitrators appointed in accordance with the said Rules"); American Arbitration Association, *Drafting Dispute Resolution Clauses: A Practical Guide* at 4–5 (Sept. 1, 2007, *available at www.adr.org,* last visited July 13, 2010) (setting forth checklist of subjects generally appropriate for stipulation in arbitration clause); *id.* at 8–9 (providing several model arbitration clauses). In this case, the clause provides only for a choice of forum: defendants' [Polimaster] site. That choice is entitled to enforcement.

B.

Admittedly, we have interpreted the parties' arbitration clause so as to permit an inefficient result: parallel arbitrations in distant fora regarding similar and/or related topics and disputes. Indeed, the dissent accurately points out that requiring arbitration of a "counterclaim" in a separate proceeding at Polimaster's site in Belarus "would represent an inefficient way to resolve disputes." Over this point there is no dispute. But we do not agree with the implication that the dissent draws from the apparent inefficiency of the parties' agreed procedures. The dissent argues that the arbitration clause should be construed in a manner to avoid inefficiency, because "[p]arties contractually adopting arbitration as the method for resolving disputes commonly do so to achieve efficiency." The dissent further adds that "[i]t is logical to reason that the parties to this agreement did not intend an inefficient result." Similarly, the arbitrator opined that parallel arbitrations in two fora "would appear to be inconsistent with the economic benefits of arbitration on which the parties relied in agreeing to arbitration."

We disagree with the proposition that our interpretation of the arbitration clause should be controlled by efficiency concerns. There are two independent reasons why we cannot impose upon the arbitration clause an interpretation in the interests of confirming it to an imputed notion of efficiency. We now discuss those two reasons.

1.

First, the policy favoring arbitration "is at bottom a policy guaranteeing the enforcement of private contractual arrangements." *Mitsubishi Motors Corp. v. Soler Chrysler–Plymouth, Inc.,* 473 U.S. 614, 625, 105 S.Ct. 3346, 87 L.Ed.2d 444 (1985). We must enforce the parties' agreement according to its terms, even if the result is inefficient. *See Dean Witter Reynolds, Inc. v. Byrd,* 470 U.S. 213, 217–21, 105 S.Ct. 1238, 84 L.Ed.2d 158 (1985) (arbitration required even when it results in inefficient procedures: "The legislative history of the Act establishes that the purpose behind its passage was to ensure judicial enforcement of privately made agreements to arbitrate. We therefore reject the suggestion that the overriding goal of the Arbitration Act was to promote the expeditious resolution of claims"). It is true that it may be inefficient to have multiple arbitrations regarding the parties' dealings in different fora before different arbitrators. *See China Nat'l,* 379 F.3d at 802. But we cannot override the express terms of the parties' agreement, because parties are free to agree to inefficient arbitration procedures. *See Byrd,* 470 U.S. at 221, 105 S.Ct. 1238 ("we rigorously enforce agreements to arbitrate, even if the result is 'piecemeal' litigation"); *Moses H. Cone* ***841** *Mem'l Hosp. v. Mercury Constr. Corp.,* 460 U.S. 1, 20, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983) (compelling arbitration where it would result in bifurcated proceedings). Thus, the "efficiency" position adopted by the arbitrator and the dissent is inconsistent with the true basis of the "federal policy favoring arbitration."

In a similar vein, RAE asserts that we should "construe arbitral authority broadly to comport with the enforcement-facilitating thrust of the Convention and the policy favoring arbitration." *See Parsons–Jurden,* 820 F.2d at 1534. While we recognize that the New York Convention was enacted to promote the enforceability of international arbitration agreements, that Convention, like the federal policy favoring arbitration more generally, favors enforcement of arbitration clauses *according to the intent of the contracting parties.* The New York Convention "recognizes the central role of the parties in fashioning the arbitration procedure, and provides sanctions for failure to adhere to the agreed procedures." Born at 44; *see also Rhone Mediterranee Compagnia Francese di Assicurazioni E Riassicurazoni v. Lauro,* 712 F.2d 50, 54 (3d Cir.1983).

We cannot, therefore, "overlook agreed-upon arbitral procedures" in favor of the *enforcement* of an arbitration award. *Encyclopaedia Universalis,* 403 F.3d at 91. We also cannot utilize the federal policy favoring arbitration to justify the imposition of general procedural rules at the expense of the parties' agreement. *See Cargill Rice, Inc. v. Empresa Nicaraguense Dealimentos Basicos,* 25 F.3d 223, 225–26 (4th Cir.1994); *Szuts v. Dean Witter Reynolds, Inc.,* 931 F.2d 830, 831 (11th Cir.1991). Here, the parties expressly agreed to submit disputes to arbitration at "defendant's[site]." The parties' agreement effectively removed the decision regarding forum from the procedural decisions delegated to the arbitrator. The arbitrator could not override the parties' express agreement in favor of general procedural rules. Indeed, adherence to the parties' agreed-upon procedures is regularly enforced, such as where relevant to the choice of forum of arbitration, *see Bear, Stearns & Co., Inc. v. Bennett,* 938 F.2d 31, 32 (2d Cir.1991); *National Iranian Oil Co. v. Ashland Oil, Inc.,* 817 F.2d 326, 332 (5th Cir.1987), or the appointment of arbitrators, *see Universal Reinsurance Corp. v. Allstate Insurance Co.,* 16 F.3d 125, 128 (7th Cir.1993); *Avis Rent A Car System, Inc. v. Garage Employees Union,* 791 F.2d 22, 24 (2d Cir.1986).

2.

Second, the policy favoring arbitration "applies with special force in the field of international commerce." *Mitsubishi Motors,* 473 U.S. at 631, 105 S.Ct. 3346. The Court has recognized the importance of forum-selection clauses to international trade: "agreeing in advance on a forum acceptable to both parties is an indispensable element in international trade, commerce, and contracting," *M/S Bremen,* 407 U.S. at 13–14, 92 S.Ct. 1907, and that a choice of forum is "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction," *Scherk,* 417 U.S. at 516, 94 S.Ct. 2449.

There is no sound basis for imputing a concern for efficiency to the parties in this case. We cannot assume that the parties' agreement to arbitrate was motivated by a desire for efficiency alone, or even that efficiency was a central motivation for their arbitration agreement. Indeed, there are many reasons why parties might agree to private dispute resolution; many of these reasons

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have nothing to do with efficiency. Non-efficiency justifications for arbitration are especially important in the ***842** realm of international contracting. For example, international arbitration is often preferred as a method to obtain a neutral decision maker, and to "obviate[ ] the danger that a dispute under the agreement might be submitted to a forum hostile to the interests of one of the parties or unfamiliar with the problem area involved." *Scherk,* 417 U.S. at 516, 94 S.Ct. 2449; *see also Mitsubishi Motors,* 473 U.S. at 631, 105 S.Ct. 3346; *M/S Bremen,* 407 U.S. at 13, 92 S.Ct. 1907; Born at 5. That appears to have been a critical concern to the contracting parties here: forum selection restricted to the defendants' site. That language makes sense only by a joint view of the parties that neither will be required to defend itself except in a proceeding at its home forum.

In sum, although we recognize that parties often choose arbitration for sake of efficiency, we cannot impute such a motivation to the parties here, and we cannot and the arbitrator cannot rewrite the forum selection clause to suit a personal view of the virtue of efficiency.

C.

China National is not contrary to our holding in the present case. 379 F.3d 796. There, the arbitration provision at issue submitted disputes to arbitration by the China International Economic and Trade Arbitration Commission (CIETAC), pursuant to CIETAC arbitration rules, to be conducted in Beijing, Shenzhen, or Shanghai, as determined by the claimant. Apex commenced arbitration proceedings against China National in Shanghai. A few days later, China National commenced a separate arbitration in Beijing. Apex objected to China National's arbitration application because it concerned the same purchase orders as its own arbitration application. CIETAC allowed the arbitrations to proceed separately, however. China National obtained a favorable award in the Beijing arbitration, and obtained confirmation of that award. Apex appealed, arguing that the arbitral procedure did not comply with the parties' agreement.

We concluded that the maintenance of multiple arbitrations was not inconsistent with the arbitration agreement. The agreement specified three acceptable venues—Beijing, Shenzhen, or Shanghai—and made the selection the *claimant's option.* "Nothing in the parties' purchase orders either specifically designated Shanghai as the only appropriate arbitral forum or articulated a rule of decision for determining the appropriate forum." *Id.* at 800. Further, the arbitration agreement incorporated CIETAC rules, "[t]hus, CIETAC did not trump specific terms of the parties' purchase orders by turning to its own rules because the arbitral clause did not resolve the parties' dispute itself." *Id.* at 801.

China National thus involved an arbitration agreement dissimilar to what we consider here. In *China National,* the arbitration provision provided three options for forum to be selected by the claimant. This provision did not constitute a mandatory forum selection clause. Here, in contrast, there is no ambiguity in the agreement: it requires arbitration at the defendant's site. Further, the parties in *China National* adopted CIETAC rules in their

arbitration agreement; CIETAC did not trump the specific terms of the parties' agreement. *Cf. Cargill Rice,* 25 F.3d at 225–26. Here, the parties made no similar choice of applicable procedures. Thus, the arbitrator's reference to compulsory counterclaim procedures went outside of the parties' agreement, and violated the specific agreement of the parties.

The dissent argues that our holding is inconsistent with *China National.* The dissent's position is, at base, that "[t]he ***843** parties' disagreement in this case over who is a 'defendant'—a respondent to an initial claim only, or *both* an initial respondent *and* a party who responds to counterclaims—matches the *China National* debate over the meaning of the contractual word 'claimant.' " The dissent reasons that "the arbitration clause here is equally 'indeterminate' with respect to the dispositive interpretive question of the precise meaning of 'defendant.' "

In our view, however, the dissent focuses on an inapposite aspect of *China National.* Apex argued that CIETAC had disregarded the parties' arbitration clause by *permitting* separate, parallel arbitrations to proceed. Apex, therefore, had to establish that the parties' arbitration agreement permitted proceedings in *only* one forum "and not in multiple venues." 379 F.3d at 799. As we have described, the agreement in *China National* gave the claimant the option to select one of three fora: Beijing, Shenzhen, or Shanghai. Because the arbitration agreement provided the choice of three fora at claimant's option, "[n]othing in the parties' purchase orders either specifically designated Shanghai as the only appropriate arbitral forum or articulated a rule of decision for determining the appropriate forum. Apex [was] mistaken in its claim that the arbitration clause was sufficiently specific that CIETAC could determine the arbitral forum without reference to its arbitral rules." *Id.* at 800. Further, we determined that the use of the term "claimant" did not limit arbitration proceedings to the first-chosen forum. Instead, "the clause does not define 'Claimant' but leaves it open as a variable term (*i.e.* either party could be a claimant)." *Id.* at 801. Thus, the term "claimant" did not designate the forum of arbitration in light of the fact that the clause allowed each "claimant" to elect the forum of arbitration. We stated that the arbitration clause —*because it provided three potential fora for each claimant's election*—did not resolve the question of forum.

The dissent focuses on the insufficiency of the term "claimant" to resolve the dispute at issue in *China National;* but that term was insufficient to resolve the dispute *in light of* the context of the arbitration agreement involved. Rather than being contradictory to our holding, we view *China National's* discussion of "claimant" to be consistent with our conclusion. In *China National,* as in this case, two parties purported to be claimants. By extension, in this case, there are two claimants and two defendants. The arbitration clause at issue *required* arbitration at the "defendant's [site]." In light of the mandatory forum selection clause, there is no ambiguity. This case is distinct from *China National.*

D.

We hold that Polimaster has established a defense under the New York Convention. Under the New York Convention, we may refuse enforcement of an award if it is the result of procedures that are contrary to the parties' agreement. Here, the parties agreed to an arbitration clause that requires disputes to be arbitrated where the defendant is located; each party should be held to the contractual language requiring arbitration of disputes in the location of the party against whom relief is sought. The procedures used in the arbitration of "counterclaims" were "not in accordance with the agreement." The district court erred in confirming the arbitration award for RAE.

IV.

On February 25, 2008, the district court issued an order confirming the arbitration award, but did not issue a judgment. Polimaster's ***844** appeal of that order is discussed in Part III. On June 5, 2008, RAE filed a motion in our court, asking that, pursuant to Federal Rules of Civil Procedure 60(a), the district court be allowed to make corrections to the order. We denied that motion, but following a request from the district court for leave to fix "an omission and an error" in the February 25, 2008 Order, and a request from RAE that we reconsider our earlier denial of the Rule 60(a) motion, we granted RAE's motion for reconsideration and "motion for limited remand" to allow RAE to file a Rule 60(a) motion in district court to correct the clerical errors identified by the district court. In the district court, RAE then filed its Rule 60(a) motion; on January 23, 2009, the district court granted the motion and filed an amended order and a judgment, this time including in its relief to RAE pre- and post-judgment interest. Polimaster now appeals from that judgment (case No. 09–15369), arguing that the judgment's inclusion of pre- and post-judgment interest exceeded the scope of our limited mandate.

We need not reach the issue of whether the district court erred in this respect, because we hold that the district court's judgment must be vacated for the reasons set forth in Part III of this opinion. We therefore remand for further proceedings consistent with this opinion.

REVERSED AND REMANDED.

CLIFTON, Circuit Judge, dissenting:
I respectfully dissent. I believe that the majority opinion has gone astray in two ways.

First, it fails to recognize that the relevant language in the parties' arbitration agreement is ambiguous. The arbitrator and the district judge both concluded that the language is ambiguous, and I agree with them. The arbitrator also concluded that the language is better interpreted differently than the majority has read it here, and I tend to agree with the arbitrator's specific interpretation, as well. The two judges making up the majority insist, nonetheless, that the language can have but one reasonable interpretation, an interpretation different from that reached by the arbitrator. In light of the contrary views of the neutral arbitrator, the district court, and me, the majority's conclusion that the language is unambiguous flies in the face of a strong headwind, and the reasoning offered

by the majority to support its conclusion is unpersuasive.

Second, as a result of its refusal to recognize the ambiguity of the contractual language, the majority opinion usurps the arbitrator's authority to interpret an ambiguous contractual term, in conflict with our decision in *China National Metal Products Import/Export Co. v. Apex Digital, Inc.,* 379 F.3d 796 (9th Cir.2004).

1. The ambiguity of the relevant language

The problem posed by this case is how, after an arbitration between the parties has been initiated, to deal with a claim back by the respondent against the original claimant. In federal court, we call this type of claim a "counterclaim." *See* Fed.R.Civ.P. 13. The parties advocate different solutions to the problem based upon different interpretations of the arbitration term in the contract: "In case of failure to settle the mentioned disputes by means of negotiations they should be settled by means of arbitration at the defendant's side [site]."

RAE Systems maintains that the word "defendant" refers to the initial respondent, the party against which the first claim is brought, such that any subsequent counterclaim can be brought in the same arbitration proceeding, even though that ***845** proceeding is not located at the site of the target of the counterclaim. Polimaster, on the other hand, contends that both the initial respondent and the counter-respondent are "defendant[s]" within the meaning of the contractual term, requiring the original respondent to initiate and pursue a separate arbitral proceeding at the site of the counter-respondent in order to pursue a counterclaim.

The majority opinion accepts Polimaster's multiple-defendant, multiple-arbitration interpretation as the right one. It further decides that this interpretation is so clearly correct that the arbitration clause is not ambiguous. The majority does not satisfactorily explain, however, why RAE's alternative interpretation is not also a reasonable reading of the arbitration clause. "[A] contract is ambiguous if reasonable people could find its terms susceptible to more than one interpretation." *Doe 1 v. AOL LLC,* 552 F.3d 1077, 1081 (9th Cir.2009) (internal quotation marks omitted). The arbitration clause is susceptible to more than one reasonable interpretation, as the arbitrator and the district court concluded. The language is ambiguous and should be recognized as such.

The majority argues that its reading is the only reasonable one based on the notion that any party who defends against "any dispute where another party seeks damages or some other form of relief against him" is necessarily a "defendant." Maj. op. at 837. But none of the sources the majority cites, at 838–39, establish as a matter of terminology that the term "defendant" must be used only as the majority supposes.[1] At least two of the cited sources actually support the opposite conclusion: that one might use the term "defendant," especially with the definite article and without a preceding adjective, to distinguish the original defending party from the party initially on the offensive. For example, Moore's Federal Practice, upon which the majority relies, refers to "the defendant" in precisely this way. *See* Daniel

Coquilette et al., eds., Moore's Federal Practice § 13.90[2] (3d ed. 2010) (especially the text following n. 9 and preceding n. 17) (using "the plaintiff" and "the defendant" to designate substantive sides in litigation, in contrast to the term "defending party," which refers to either side whenever it defends against an affirmative claim).[2] The plaintiff, under this terminology, might later become a "counterclaim defendant" or a "crossclaim defendant" as well, but such additional designations, despite including the word "defendant," would not transform that party into "the defendant" in the contemplated sense—a shorthand for a particular side in the litigation.

1 *See, e.g., Rainbow Mgmt. Group, Ltd. v. Atlantis Submarines Haw., L.P.,* 158 F.R.D. 656, 659 (D.Haw.1994) (holding that "[c]o-parties become *opposing parties* [emphasis added] within the meaning of Fed.R.Civ.P. 13(a) after one such party pleads an initial cross-claim against the other," with no discussion of whether an "opposing party" must be deemed a "defendant"); *In re Concept Clubs, Inc.,* 154 B.R. 581, 586 n. 4 (distinguishing between a counterclaim and a setoff or recoupment, with no mention of whether a counterclaim makes the party that opposes it a "defendant"); *Earle M. Jorgenson Co. v. T.I. U.S., Ltd.,* 133 F.R.D. 472, 475 (E.D.Pa.1991) (dealing, like *In re Concept Clubs,* with the "opposing party" issue, without endorsing any theory of how the term "defendant" can or must be used).

2 *See also FDIC v. F.S.S.S.,* 829 F.Supp. 317, 322 n. 11 (D.Alaska 1993) (also cited by the majority) (describing a counterclaim brought by "Defendants[ ]" against "the plaintiff").

To the extent that any answer can be gleaned from the language used in the agreement, I think the language cuts slightly against the majority opinion's interpretation. ***846** Look carefully at the sentence in question: "In case of failure to settle the mentioned disputes by means of negotiations they should be settled by means of arbitration at the defendant's side." The word "disputes" is plural, but the words "defendant" and "side" (or "site") are singular. The parties anticipated that there could be multiple disagreements, yet "the defendant's site" refers to only one location. The arbitration clause does not say "defendants' sites." Of course, I need not be as sure of this interpretation as the majority must be of its own, because I do not contend that only this reading is reasonable. To establish that the language is ambiguous, it is enough to demonstrate that a reasonable interpretation other than the majority's exists, and the language of the arbitration clause is more than adequate for that purpose.

The reasoning provided by the arbitrator to support his conclusion that the existing arbitration should encompass counterclaims as well was logical. The arbitrator rejected the interpretation embraced by the majority —that arbitration of a counterclaim must be conducted in a separate proceeding at the counter-respondent's site—because that would represent an inefficient way to resolve disputes. Parties contractually adopting arbitration as the method for resolving disputes commonly

do so to achieve efficiency. It is logical to reason that such parties do not intend inefficient results. See Restatement (Second) of Contracts § 202(1) (1981) ("Words and other conduct are interpreted in the light of all the circumstances."); *id.* cmt. b ("The circumstances for this purpose include the entire situation, as it appeared to the parties.").

In addition, the arbitrator recognized that it is not a novel or obscure practice to resolve all claims, including counterclaims, in a single proceeding that has already commenced. The arbitrator here specifically referenced the treatment of counterclaims in the Federal Rules of Civil Procedure, the California Rules of Civil Procedure, and the rules of the arbitration forum agreed upon by the parties, JAMS. The prosecution of counterclaims in the same proceeding is broadly recognized in international arbitration. Prominent international arbitration organizations address counterclaims explicitly in their rules. *See, e.g.,* International Chamber of Commerce Rules of Arbitration art. 5; London Court of International Arbitration Rules art. 2.1(b); German Institute of Arbitration Rules § 10; United Nations Commission on International Trade Law Arbitration Rules art. 19.

Considering the context in which the parties made their agreement does not improperly assume any conclusion or wrongly impute any particular motivation to the parties. It merely recognizes one good reason the parties may have intended to agree to something different from the interpretation of the arbitration clause that the majority espouses: because the majority's interpretation ignores both the common desire for efficiency and the widespread procedural practice of litigating counterclaims in the same proceeding.[3] Given this context, it is not so clear to me, let alone unambiguously clear from the words of the arbitration clause, that the parties agreed to require piecemeal litigation. ***847** The majority opinion does not persuasively explain why we should conclude that they did.

3 We need not (indeed, should not, in determining whether a contract is ambiguous) seek to establish whether the parties subjectively took efficiency concerns or the concept of counterclaims into account. The relevant point is that the influence of these considerations as background to the agreement makes an alternate reading of the arbitration clause reasonable.

The majority opinion's arguments are, in reality, circular—the arguments for its preferred reading of the arbitration clause assume the correctness of that reading. For example, the majority opinion asserts, at 16562, that "the parties' clause was adequate to express their intent ... to provide for separate arbitrations at the defendant's site." I agree that if the parties intended separate arbitrations at the sites of each defendant or counterclaim defendant, then that is how the agreement should be interpreted and applied. But the inference that the parties intended the interpretation favored by the majority rests on nothing other than the majority's own interpretation of the contractual language. Nothing else is cited by the majority opinion to support its assertion that the parties intended that result, nor is

any persuasive explanation given to counter the reasoning of the arbitrator that reached a different conclusion.

Similarly, the majority opinion asserts, at 16562, that this dissent rests on an "assumption" that counterclaims will be joined into an existing proceeding, and, at 16562, that the relevant language is clear because there was "no reason to require the parties to include contractual language specifically defeating or negating the joinder of claims." But the parties obviously recognized the possibility of conflicting claims. The possibility of combining those claims into a single proceeding was by no means unknown. As noted above, that is the result suggested by both rules of courts and rules of international arbitration organizations. It is no less an "assumption" to conclude that, in the absence of a contractual agreement, multiple claims should be litigated piecemeal in separate arbitrations.

In the end, the reasoning offered by the majority to demonstrate that the agreement unambiguously provided for piecemeal arbitrations rests on nothing more than the majority's own assumption that its interpretation of the arbitration clause is correct. In the face of contrary conclusions by the arbitrator, the district court, and this dissent, that is much too thin a reed to support the majority's conclusion that the relevant language is unambiguous.

2. The China National decision

Our decision in *China National Metal Products Import/Export Co. v. Apex Digital, Inc.,* 379 F.3d 796 (9th Cir.2004), requires that we respect the arbitrator's interpretation of an ambiguous contractual provision. Indeed, it also provides further support for the conclusion that the arbitration clause here is ambiguous.

The arbitration clause in *China National* provided that all disputes arising from or in connection with the contract would be submitted to a specified forum, the China International Economic and Trade Arbitration Commission ("CIETAC"), for arbitration in Beijing, Shenzhen, or Shanghai, "at the Claimant's option." *China National,* 379 F.3d at 800. Just as the parties here argue over who qualifies as "defendant," the parties in *China National* debated who qualified as "claimant" under their arbitration clause. At stake was the right to determine where arbitration would take place.

Apex first commenced arbitration against China National in Shanghai. Days later, China National brought its own claims against Apex in a separate arbitration in Beijing. *Id.* at 798–99. Apex argued that only it, as the party that first initiated arbitration, was a "claimant," and that its selection of Shanghai as the arbitral forum required China National to bring its claims, which arose largely out of ***848** the same set of facts, as counterclaims in the ongoing Shanghai arbitration. *Id.* at 801. China National countered that "[i]t too was a rightful claimant with respect to its claims against Apex" and that it therefore retained the right, under the arbitration clause, "to pick a forum for its own claims." *Id.* After considering its own rules, CIETAC decided in favor of China National's position and let the claims proceed separately before separate panels.

The Beijing panel entered an award in favor of China National and against Apex. China National brought an action in federal district court to confirm the Beijing panel's award, the court confirmed the award, and Apex appealed, arguing that only one proceeding, the Shanghai arbitration, should have taken place. We rejected the challenge and affirmed the confirmation order. *Id.* at 797–98.

We held that "[b]oth positions are arguable, and in the face of an assertion that there can be two claimants, the text of the arbitration clause alone is indeterminate and does not resolve the matter." *Id.* at 801. The parties' disagreement in this case over who is a "defendant"—a respondent to an initial claim only, or *both* an initial respondent *and* a party who responds to counterclaims—matches the *China National* debate over the meaning of the contractual term "claimant." *See id.* (describing how the parties argued "claimant" should be interpreted). And the arbitration clause here is equally "indeterminate" with respect to the dispositive interpretive question of the precise meaning of "defendant."

Because *China National* dealt with an analogous contractual ambiguity, it controls our decision here and requires us to affirm. *China National* established that an arbitrator does not impermissibly "trump specific terms of the parties' [agreement] by turning to its own rules" when, as here, an "arbitral clause [does] not resolve the parties' dispute itself."[4] *Id.* In our case the arbitrator applied JAMS rules and the Federal and California Rules of Civil Procedure because the parties' agreement left a dispute about counterclaims unresolved. The application of extrinsic procedural rules did not contradict the parties' agreement, but merely supplemented it. The arbitrator thus did not violate Article V, section 1(d) of the New York Convention, and the judgment of the district court confirming the arbitration award should be affirmed.

4 None of the parties' contracts defined "defendant's site" or "defendant's side." The controversial term in *China National,* "claimant," was similarly undefined: the arbitration clause "[did] not define 'Claimant' but [left] it open as a variable term (*i.e.,* either party could be a claimant)." *China National,* 379 F.3d at 801.

The majority opinion tries to distinguish *China National* on several grounds, but none are persuasive. It points out that "the parties in *China National* adopted CIETAC rules in their arbitration agreement," so the gap-filling application of those rules by CIETAC "did not trump the specific terms of the parties' agreement." Maj. op. at 842; *see China National,* 379 F.3d at 801. But it was the arbitration panel, not our court, that interpreted CIETAC rules and made the decision as to where the arbitration could proceed. The majority opinion in this case overrides the arbitrator's decision. While the parties in this case did not specify a choice of forum or a choice of procedural law to address issues their arbitration clause did not resolve, they subsequently did expressly agree on JAMS as a forum.

Moreover, while the election of default procedural rules in *China National* may have strengthened the argument that applying those rules did not violate the parties' ***849**

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agreement, a choice of law was not necessary to *China National's* result. "CIETAC did not trump specific terms of the parties' purchase orders by turning to its own rules *because the arbitral clause did not resolve the parties' dispute itself,*" 379 F.3d at 801 (emphasis added), not because the CIETAC rules used to fill a gap in the arbitration clause were incorporated by reference into the contract. Rules entirely extrinsic to an agreement, such as the JAMS rules and Federal and California Rules of Civil Procedure applied in this case, do not automatically conflict with that agreement. *China National* makes clear that it is the presence of a gap in an arbitration clause, not the specification of default rules for filling such a gap, that makes an arbitrator's reference to extrinsic rules appropriate. A gap—that is, a dispute between the parties that "the text of the arbitration clause alone" does not resolve—exists as much in this case as it did in *China National.* Reference to outside procedural rules was appropriate here, even though the rules employed were not specified in advance by the parties.

The majority opinion also attempts to differentiate this case from *China National* by highlighting the fact that the arbitration clause at issue here, once properly interpreted, mandates a particular forum ("the defendant's side"), while the clause in *China National* gave one party a choice among three Chinese cities. Maj. op. at 842–43. That distinction is beside the point. The parties debated the meaning of "claimant" in *China National* because its definition determined which party got to choose among Beijing, Shenzhen, and Shanghai. The winner of the interpretive debate received the right to select a city instead of, as in this case, a predetermined forum that the victorious party would prefer. But that detail does not disturb the parallel contractual analysis that underlies the two cases. Both cases are fundamentally about how contractual terms, "claimant" and "defendant," respectively, should be interpreted when the contracts themselves do not resolve the parties' disputes.

Because I conclude that the judgment on the merits should be affirmed, I would reach the issue of whether the district court exceeded the scope of our earlier limited remand to correct its failure to enter a judgment. I would affirm the district court's belatedly entered judgment. Because the court's oversight was its failure to enter any judgment at all, it was empowered to correct its mistake by entering a judgment that included any relief, including pre- and post-judgment interest, that could have been included in the judgment in the first instance. A court is allowed, under Federal Rule of Civil Procedure 60(a), to make corrections to effectuate what it "originally intended to do." *Robi v. Five Platters, Inc.,* 918 F.2d 1439, 1445 (9th Cir.1990).

I would affirm.

All Citations

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674 F.3d 469
United States Court of Appeals,
Fifth Circuit.

RAIN CII CARBON,
LLC, Plaintiff–Appellee,
v.
CONOCOPHILLIPS COMPANY,
Defendant–Appellant.

No. 11–30669.
|
March 9, 2012.

Synopsis
Background: Following arbitration involving parties to long-term green anode coke supply agreement, which resulted in arbitrator adopting buyer's price formula, seller moved to vacate arbitration award, and buyer moved to confirm. The United States District Court of the Eastern District of Louisiana, Helen Ginger Berrigan, J., confirmed award. Seller appealed.

Holdings: The Court of Appeals, Carl E. Stewart, Circuit Judge, held that:

arbitrator did not exceed his authority under the agreement by clerical error contained in initial award, and

arbitrator rendered a reasoned award that was valid under Federal Arbitration Act (FAA).

Affirmed.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

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Appeals from the United States District Court of the Eastern District of Louisiana.

***471** Before STEWART, CLEMENT and GRAVES, Circuit Judges.

Opinion

CARL E. STEWART, Circuit Judge:

Defendant–Appellant ConocoPhillips Company ("Conoco" or "COP") appeals the district court's judgment confirming an arbitration award favorable to Plaintiff–Appellee Rain CII Carbon, LLC ("Rain"). We AFFIRM.

I.

Conoco and Rain are parties to a long-term supply agreement, whereby Conoco agreed to sell all green anode coke produced at its Alliance refinery from August 2005 to December 2015 to Rain. The 2005 agreement includes a complex formula for capturing the market price of green coke. The agreement

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further provides that if a party reasonably concludes that the contract formula no longer yields market price, the party may reopen price negotiations. If such negotiations prove unfruitful, the matter would be submitted to a "baseball" arbitration, whereby each party submits a proposal and the arbitrator selects one of the two.

In 2008, Conoco reopened market price negotiations. After being unable to reach an agreement, Conoco submitted the matter to arbitration. The parties requested a "reasoned" award in their joint proposed scheduling order. An evidentiary hearing was held in September 2010, and each party submitted a price formula proposal. In December 2010, the arbitrator requested that the parties submit draft awards, which were submitted on February 3, 2011.

On March 7, 2011, the arbitrator awarded $17,702,585.33 to Rain. In the eight-page award, the arbitrator set forth the contentions of the parties before adopting Rain's price formula, which was the formula contained in the initial agreement. The award stated:

> Based upon the testimony, exhibits, arguments, and submissions presented to me in this matter, I find that the price formula contained in Section 4 of the Green Anode Coke Sales Agreement dated August 23, 2005, as amended January, 2007, and July, 2008, shall remain in effect for the balance of the term as stated in the contract.

The arbitrator used Conoco's draft award as the template for his award. Two brief paragraphs from Conoco's draft award were included in the arbitrator's award:

> Applying the replacement formula from April 1, 2008 until March 31, 2009 results in an increased payment by Rain CII to COP of $6,920,234.07. Offsetting the amount of the true up COP owes Rain CII results in a net payment owed by Rain CII to COP in the amount of $1,357,480.82.

and

> Applying the contractual rate of interest to the outstanding amount for the number from April 1, 2009 to February 3, 2011 results in the sum of $214,984.96.

On March 25, 2011, Rain filed a motion requesting that the arbitrator correct these two inconsistencies. On April 18, 2011, the arbitrator granted Rain's motion, identified the "inadvertently included sentences" as clerical errors, and removed them from the final award.

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In the district court, Conoco moved to vacate the award. On June 27, 2011, the district court denied the motion to vacate the award, and granted Rain's motion to confirm the award. This appeal followed.

II.

"In light of the strong federal policy favoring arbitration, judicial review ***472** of an arbitration award is extraordinarily narrow." *Brook v. Peak Int'l, Ltd.,* 294 F.3d 668, 672 (5th Cir.2002) (internal quotation marks omitted). "We review a district court's confirmation of an award de novo, but the review of the underlying award is exceedingly deferential." *Apache Bohai Corp. LDC v. Texaco China BV,* 480 F.3d 397, 401 (5th Cir.2007) (internal quotation marks omitted). This court's de novo review "is intended to reinforce the strong deference due an arbitrative tribunal." *Brook,* 294 F.3d at 672 (internal quotation marks omitted). "An award may not be set aside for a mere mistake of fact or law." *Apache,* 480 F.3d at 401.

"Section 10 of the Federal Arbitration Act, 9 U.S.C. §§ 1–16 ('FAA'), provides 'the only grounds upon which a reviewing court may vacate an arbitrative award.' " *Brook,* 294 F.3d at 672 (quoting *McIlroy v. PaineWebber, Inc.,* 989 F.2d 817, 820 (5th Cir.1993)). "Section 10 allows vacatur, *inter alia,* '[w]here the arbitrators exceeded their powers ....' " *Id.* (quoting 9 U.S.C. § 10(a)(4)).

"Arbitration is a matter of contract." *Id.* "Where arbitrators act 'contrary to express contractual provisions,' they have exceeded their powers." *Apache,* 480 F.3d at 401 (quoting *Delta Queen Steamboat Co. v. AFL–CIO,* 889 F.2d 599, 604 (5th Cir.1989)). "If the contract creates a plain limitation on the authority of an arbitrator, we will vacate an award that ignores the limitation." *Id.* "[L]imitations on an arbitrator's authority must be plain and unambiguous ...." *Id.* at 404. "A reviewing court examining whether arbitrators exceeded their powers must resolve all doubts in favor of arbitration." *Brook,* 294 F.3d at 672.

III.

In this case, Conoco asserts that the arbitrator exceeded his powers in two ways: failing to select only one proposal, per the parties' baseball arbitration agreement; and failing to render a reasoned award. These matters will be addressed in turn.

A.

The parties' "Green Anode Coke Sales Agreement" provided that if a dispute arose regarding the proper formula to yield market price for green coke, the dispute would be resolved by baseball arbitration:

> [U]pon declaration of an impasse by either party, the matter shall be submitted to arbitration as provided in section 19, provided that each party shall submit to the arbitrator one replacement

> mechanism for determining the price of Green Anode Coke to be supplied under this Agreement and the arbitrator shall be required to select from the two proposed mechanisms that one which, in the judgment of the arbitrator, is more likely to yield a market level price for Green Anode Coke to be supplied under this Agreement for the balance of the term then in effect.

Section 19 of the agreement clarified the arbitration procedure:

> Any controversy or claim arising out of or relating to this Agreement, or the breach thereof, shall be settled by arbitration administered by the American Arbitration Association under its Commercial Arbitration Rules in effect at the time such arbitration is commenced, and judgment on the Award rendered by the arbitration may be entered in any court having jurisdiction thereof.

Conoco asserts that the arbitrator exceeded his powers by using parts of both proposals in his award, rather than selecting only one proposed mechanism as required by the contract. As evidenced ***473** above, the AAA Commercial Rules were incorporated into the 2005 agreement. Commercial Arbitration Rule 46 provides: "Within 20 days after the transmittal of an award, any party, upon notice to the other parties, may request the arbitrator, through the AAA, to correct any clerical, typographical, or computational errors in the award. The arbitrator is not empowered to redetermine the merits of any claim already decided." AAA Commercial Arbitration Rule 46, *available at* http://www.adr.org/sp.asp?id=22440.

In the instant case, the arbitrator, upon motion by Rain, removed the two provisions derived from Conoco's proposed draft award from his final award, identifying the inadvertently included sentences as clerical errors. However, despite the arbitrator's correction and reason given, Conoco insists that the arbitrator did not choose one proposal as required by the contract, and that the inclusion of the paragraphs was not a clerical error. Conoco has cited to no case holding that an arbitrator's correction of an award for clerical errors was not genuine or credible. Given the considerable deference afforded arbitration awards, Conoco's argument that the arbitrator exceeded his powers by failing to select only one proposal, which relies on paragraphs stricken from the final award in accordance with the Commercial Rules, must fail.

B.

Conoco disputes that the award rendered by the arbitrator was a "reasoned" award. The only

description of a reasoned award in this circuit was rendered in a footnote. *See Sarofim v. Trust Co. of the W.,* 440 F.3d 213, 215 n. 1 (5th Cir.2006) (" '[A] reasoned award is something short of findings and conclusions but more than a simple result.' " (quoting *Holden v. Deloitte & Touche LLP,* 390 F.Supp.2d 752, 780 (N.D.Ill.2005))).

In *Cat Charter, LLC v. Schurtenberger,* 646 F.3d 836 (11th Cir.2011), the Eleventh Circuit reversed a district court's vacatur of an arbitration award on the ground that the award was not reasoned. The court acknowledged that courts have generally been reluctant to vacate awards challenged on the grounds that their form was improper. *Cat Charter,* 646 F.3d at 842 n. 12. The court reasoned:

> Generally, an arbitrator need not explain her decision; thus, in a typical arbitration where no specific form of award is requested, arbitrators may provide a "standard award" and simply announce a result .... At the other end of the spectrum, the Arbitration Rules allow parties to request that the arbitrators make "findings of fact and conclusions of law," a relatively exacting standard familiar to the federal courts.
>
> Logically, the varying forms of awards may be considered along a "spectrum of increasingly reasoned awards," with a "standard award" requiring the least explanation and "findings of fact and conclusions of law" requiring the most .... [T]herefore, a "reasoned award is something short of findings and conclusions but more than a simple result." *Sarofim* [,440 F.3d at 215 n. 1] (citations and internal quotation marks omitted).

Id. at 844 (internal citations omitted). The court concluded:

> We decline to narrowly interpret what constitutes a reasoned award to overturn an otherwise apparently seamless proceeding. The parties received precisely what they bargained fora speedy, fair resolution of a discrete controversy by an impartial panel of arbitrators skilled in the relevant areas of the law. To vacate the Award and remand for an entirely new proceeding would insufficiently ***474** respect the value of arbitration and inject the courts further into the arbitration process than Congress has mandated.

Id. at 846.

Likewise, in *Green v. Ameritech Corp.,* 200 F.3d 967 (6th Cir.2000), the Sixth Circuit reversed a district court's vacatur of a six-page arbitration award, which the district court had determined failed to comply with a provision of the arbitration agreement requiring that the arbitrator "explain" his decision. The court reasoned that "although the arbitrator's opinion was minimal, it was nevertheless adequate to satisfy the terms of the agreement." *Green,* 200 F.3d at 970. "If parties to an arbitration agreement wish a more detailed

arbitral opinion, they should clearly state in the agreement the degree of specificity required." *Id.* at 976.

Conoco largely relies on a Ninth Circuit opinion vacating an arbitration award. *See W. Employers Ins. Co. v. Jefferies & Co.,* 958 F.2d 258 (9th Cir.1992). That case, however, is factually distinguishable from the present case. In *Jefferies,* the parties had agreed that a statement of findings of fact and conclusions of law would accompany the arbitration award. The final award included no such findings of fact or conclusions of law. Accordingly, the court concluded that "[b]y failing to provide Western with findings of fact and conclusions of law, the [ ] panel clearly failed to arbitrate the dispute according to the terms of the arbitration agreement." *Id.* at 262.

In contrast, the parties in the present case did not request findings of fact and conclusions of law, an exhaustive standard familiar to the courts; rather, they agreed to a reasoned award, without further elaboration. Additionally, it is clear that, in eight pages, the arbitrator rendered more than a standard award, which would be a mere announcement of his decision. Thus, the remaining question is whether the arbitrator's award is sufficiently more than a standard award so as to be a reasoned award.

Given the deference employed when evaluating arbitral awards, and as all doubts implicated by an award must be resolved in favor of the arbitration, the award in this case is sufficient to withstand Conoco's request for vacatur. Conoco's argument against the award hinges on the summary nature of the arbitrator's statement that, based upon all of the evidence, he found that the initial price formula should remain in effect. Conoco ignores that the preceding paragraph thoroughly delineates Rain's contention that Conoco had failed to show that the initial formula failed to yield market price, a contention that the arbitrator obviously accepted. Conoco would have this court vacate the arbitration award merely because the arbitrator did not reiterate this reason in the following paragraph. Such a narrow approach is inconsistent with the deference owed to arbitral awards and the congressional policy favoring arbitration of commercial disputes, and is also contrary to the interest of finality.

As stated in *Green,* if Conoco wanted a more thorough discussion of why the arbitrator reached the decision he did, it could have contracted for an award to include findings of fact and conclusions of law. Instead, the parties agreed to a reasoned award, which, according to our case law, is more than a simple result. In eight pages, the arbitrator laid out the facts, described the contentions of the parties, and decided which of the two proposals should prevail. It is, at the very least, doubtful that the award is not more than a simple result. Accordingly, vacatur is not appropriate and the award must be enforced.

***475** IV.

For the foregoing reasons, we AFFIRM the district court's judgment.

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674 F.3d 469

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289 Ga. 57
Supreme Court of Georgia.

ROSENBERG
v.
FALLING WATER, INC.

No. S10G0877.
|
March 18, 2011.
|
Reconsideration Denied April 12, 2011.

Synopsis

Background: Homeowner brought personal injury action against builder of home, alleging negligence and fraud in construction of deck on back of home. The Superior Court, Cobb County, C. LaTain Kell, J., granted summary judgment to builder based on statute of repose. Homeowner appealed. The Court of Appeals, 302 Ga.App. 78, 690 S.E.2d 183, affirmed. Homeowner appealed.

The Supreme Court, Melton, J., held that homebuilder could not be equitably estopped from asserting defense based on statute of repose.

Affirmed.

Hunstein, C.J., filed a dissenting opinion, in which Carley, P.J., and Benham, J., joined.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

Attorneys and Law Firms

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Opinion

MELTON, Justice.

***57** In *Rosenberg v. Falling Water, Inc.,* 302 Ga.App. 78, 690 S.E.2d 183 (2009), the Court of Appeals affirmed the trial court's grant of summary judgment to the defendant, Falling Water, Inc., in a personal injury action arising from the collapse of a deck at plaintiff Richard Rosenberg's home. We granted review to determine whether the Court of Appeals erred in holding that Falling Water was not equitably estopped from relying on the statute of repose to defeat Rosenberg's construction defect claim. For the reasons set forth below, we affirm.

As set forth by the Court of Appeals, the record shows the following undisputed facts:

> On May 5, 1994, [Falling Water, Inc.] obtained a permit from the City of Kennesaw to begin construction of a house ***58** at 1423 Shiloh Way. The city issued a certificate of occupancy for the property on July 12, 1994. On July 14, 1994, [Falling Water] transferred title to the property to Susan and William Nowicki. The Nowickis subsequently sold the property to Axel and Charlotte Bayala. On March 28, 2002, almost eight years after the city issued a certificate of occupancy for the property and [Falling Water] transferred

title to the property, the Bayalas sold the house to Rosenberg.

According to Rosenberg, he learned about the house from a real estate agent whose name he could not remember, and he testified that the agent did not make any statements regarding the quality of homes other than to say they were "nice starter homes at a great value." Before buying the house, Rosenberg did not know who had built the house and did not inquire about it, had no contact with [Falling Water], did not know anything about [Falling Water]'s reputation, did not know anything about Shiloh Plantation subdivision, ****229** and did not talk to any other homeowners in the subdivision about their homes.

The house had a deck attached to the back. In August 2005, Rosenberg hired his neighbors, who were not carpenters, builders or renovators, to remove the wood siding from the house so that it could be replaced with vinyl siding. On August 31, 2005, on the second day of the renovation project, the neighbors removed the siding from the back of the house, but left the original siding at the site where the deck was attached to the house. When Rosenberg arrived home from work, he started to walk out onto the deck to check the progress of the project. As soon as he stepped on the deck, it collapsed and he fell, sustaining serious injuries. There is no evidence in the record that Rosenberg or the previous owners experienced any problems with the deck prior to the August 2005 collapse.

On May 25, 2006, Rosenberg sued [Falling Water] for injuries resulting from the deck collapse. In his complaint, Rosenberg alleged that [Falling Water] had negligently constructed the deck by failing to properly affix it to the house and had committed fraud by hiding the defective construction from future owners by using certain bolts that made it appear that the deck was properly attached to the house. In [Falling Water]'s motion for summary judgment, it asserted that Rosenberg's claims were barred by OCGA § 9–3–51(a), which imposes an eight-year statute of repose on actions to recover for personal injuries resulting from a ***59** deficiency in the construction of an improvement to real property. Rosenberg argued, however, that, because [Falling Water] committed fraud, it should be equitably estopped from asserting a defense based upon the statute of repose.

(Footnotes omitted.) Id. at 78–79, 690 S.E.2d 183.

The trial court subsequently granted summary judgment to Falling Water based upon a finding that Rosenberg's claims were barred by the statute of repose, OCGA § 9–3–51. The Court of Appeals thereafter affirmed the trial court, finding that Falling Water was not estopped from asserting a defense based on the statute of repose because Rosenberg's injury occurred after the statute had run. Rosenberg now appeals this ruling, contending in essence that the doctrine of estoppel invalidates the statute of repose, even when a plaintiff receives no injuries prior to the running of the statutory period. For the reasons set forth below, we disagree.

This Court has repeatedly held that a statute of ultimate repose frames the time period in which

a right may accrue, if at all. Therefore, if an injury occurs outside this time period, the injury is not actionable, as there is no longer even an inchoate right which may be brought to fruition by injury. See, e.g., *Wright v. Robinson,* 262 Ga. 844, 845(1), 426 S.E.2d 870 (1993) ("A statute of repose stands as an unyielding barrier to a plaintiff's right of action."); *Simmons v. Sonyika,* 279 Ga. 378, 379, 614 S.E.2d 27 (2005) ("A statute of ultimate repose delineates a time period in which a right may accrue. If the injury occurs outside that time period, it is not actionable") (citations and punctuation omitted). "A statute of ultimate repose sets an ultimate limit on which injuries shall be actionable. Therefore, by definition, a statute of ultimate repose cannot be 'tolled' to permit actions to be brought for injuries which did not occur until after the statutory period had expired." *Hill v. Fordham,* 186 Ga.App. 354, 357–358(2), 367 S.E.2d 128 (1988).

The statute of repose applicable in this case provides that no action to recover damages for "injury to the person ... arising out of ... any deficiency in the ... construction of an improvement to real property ... shall be brought against any person performing ... construction of such an improvement more than eight years after substantial completion of such an improvement." OCGA § 9–3–51(a)(1), (3). Here, the injuries sustained by Rosenberg occurred more than a decade after his home had been substantially completed by Falling Water. As a result, Rosenberg's right to file suit against Falling Water never accrued, and, once eight years passed with no injury, even the possibility of such an accrued right was eliminated.

****230** Based on ***60** *Esener v. Kinsey,* 240 Ga.App. 21, 522 S.E.2d 522 (1999),[1] and *Hill v. Fordham,* supra,[2] Rosenberg argues that he should be allowed to maintain suit against Falling Water because: (1) a question of fact remains whether Rosenberg fraudulently concealed a defect in the deck construction and (2) Falling Water should be equitably estopped from asserting the statute of repose defense if such fraud can be shown. *Hill* and *Esener,* however, do not support this conclusion. In both of these cases, the respective plaintiffs sustained and discovered injuries *within* the statute of repose. Each plaintiff delayed in filing suit until after the statute of repose's expiration due to fraudulent acts by the respective defendants which were designed to prevent or discourage the plaintiffs from filing suit. Thus, in both of these cases, the plaintiff's right accrued within the time period set by the statute of repose, and fraudulent acts committed after the injury by a defendant prevented the plaintiff from pursuing this now viable right within the applicable statute of repose. Because the defendant's fraudulent actions in each case prevented the plaintiff from pursuing a timely-accrued right, it was held that the defendant should be equitably estopped from asserting a defense based on the statute of repose. The Court of Appeals explained in *Esener* the reasoning behind this rule: "the statute of ultimate repose should not be applied to relieve a defendant of liability for injuries which occurred *during the period of liability,* but which were concealed from the patient by the defendant's own fraud." (Emphasis supplied.) *Esener,* supra, 240 Ga.App. at 22, 522 S.E.2d 522. In other words, the defendant would not be allowed to cause the plaintiff to miss the deadline imposed by the statute of repose

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and then use that same statute to defeat the plaintiff's otherwise viable action.

1 In *Esener,* an improper delivery caused brain damage to a child, but the delivering gynecologist concealed any negligence and made the mother believe that the damage was caused by something else.

2 In *Hill,* there was evidence that a dentist knew of the existence of a wisdom tooth and the condition which allegedly caused patient's pain and discomfort, and patient claimed he failed to seek further treatment or diagnosis of his condition in reliance on the dentist's statement that the condition would resolve itself.

Rosenberg's argument that the exception to the statute of repose set forth in these cases should be extended to his situation is logically untenable. In the present case, Rosenberg never held a timely-accrued right to bring suit against Falling Water for his personal injuries. As set forth above, Rosenberg was not personally injured until years after the statute of repose time period expired. Therefore, he has never had a viable cause of action to pursue. In addition, Falling Water has taken no action to prevent Rosenberg from discovering a cause for his injuries or to dissuade Rosenberg from ***61** filing suit with respect to his injuries, even if such a cause of action existed. In *Hill* and *Esener,* the defendant was estopped from relying on a deadline that the defendant purposefully caused the plaintiff to miss. Falling Water simply could not have caused Rosenberg to miss the deadline for filing suit for his personal injuries because those personal injuries did not even occur until the deadline had already passed.

Rosenberg maintains that this result is not equitable; however, it must be remembered that the statute of repose, itself, is a statutory construct based on considerations of fundamental fairness. The statute of repose represents an express determination by the Legislature of a time beyond which it is no longer fair to hold a defendant to be potentially liable for his actions.

> [It is] the legislature's intent, in enacting statutes of ultimate repose, to establish a reasonable outside time limit beyond which architects, engineers, and contractors are insulated from suit based upon their work in constructing improvements to real estate. See generally *Benning Constr. Co. v. Lakeshore Plaza Enterprises,* 240 Ga. 426, 427–428, 241 S.E.2d 184 (1977). Without such protection, such persons would be exposed to liability for many years after losing control over the improvements and their use and maintenance.

(Citation omitted.) ****231** *Gwinnett Place Assoc., L.P. v. Pharr Engineering, Inc.,* 215 Ga.App. 53, 55(1)(a), 449 S.E.2d 889 (1994).

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In light of this legislative mandate and our precedent which requires that the injury must happen *within* the applicable time period of the statute of repose for equitable estoppel to apply, the Court of Appeals properly affirmed the trial court's grant of summary judgment to Falling Water.[3]

3 Rosenberg argues that the Court of Appeals endorsed the holding of *Canton Lutheran Church v. Sovik, Mathre, Sathrum & Quanbeck,* 507 F.Supp. 873 (S.D.1981), in *Hill v. Fordham,* supra. That decision's cursory citation to *Canton Lutheran* was not an endorsement of the proposition that a defendant can be barred through equitable estoppel from asserting the statute of repose as a defense when an injury occurred after the end of the repose period. In citing *Canton Lutheran* in *Hill,* the Court of Appeals noted only that "[o]ther jurisdictions have held that the doctrine of equitable estoppel precludes a defendant from raising the defense of the statute of ultimate repose where there is evidence of fraud or other conduct on which the *plaintiff reasonably relied in forbearing the bringing of a lawsuit.*" (Emphasis supplied.) *Hill,* supra, 186 Ga.App. at 358(2), 367 S.E.2d 128. Here, Rosenberg did not "forbear" the bringing of the lawsuit because the injury had not occurred and no right had accrued during the statute of repose. Furthermore, as the Court of Appeals pointed out in its opinion in *Rosenberg v. Falling Water, Inc.,* the *Canton Lutheran* case is distinguishable in that it addressed a statute of limitation issue in a case where the plaintiff claimed fraudulent concealment. This difference is important since "[t]he statute of repose is absolute; the bar of the statute of limitation is contingent." (Citation omitted.) *Wright v. Robinson,* supra, 262 Ga. at 845, 426 S.E.2d 870.

The dissent's own statements of the law, as opposed to its ***62** statements of pure opinion, actually support the outcome described above and negate the dissent's unfounded conclusion. For example, the dissent states that this majority creates "incongruous results" by treating personal injury claims and defective construction claims differently. The dissent, however, explicitly recognizes that a claim for *property damage* due to defective construction typically arises upon substantial completion of a project, while a claim for *personal injury* does not. This very observation proves that these two causes of action are fundamentally different and that the result here is not at all incongruous. To the contrary, the dissent's discussion is internally inconsistent on this point. Furthermore, the dissent explicitly recognizes that a statute of repose is an "unyielding barrier" to a plaintiff's right of action. Yet, in the next breath, the dissent would eradicate this barrier by its own conclusion of where the law should be, not where it is. In short, the dissent bases its analysis on inaccurate comparisons between admittedly different causes of action and legal conclusions contrary to the very law it cites. As a result, the dissent provides no viable argument for reaching a different result.

Judgment affirmed.

All the Justices concur, except HUNSTEIN, C.J., CARLEY, P.J., and BENHAM, J., who dissent.

HUNSTEIN, Chief Justice, dissenting.
The unworkable rule the majority creates, distinguishing between cases in which injury occurs and the claim accrues during the repose period of the improvement to real property statute of repose, OCGA § 9–3–51, and those in which the injury occurs thereafter yields irrational results. Neither logic nor the general nature or function of statutes of repose compel, much less support, the conclusion that equitable estoppel is unavailable because Rosenberg's deck collapsed and he suffered bodily injury outside of the repose period, and the effect of the majority's opinion is to countenance fraud. Because I cannot agree that the application of equitable estoppel is automatically foreclosed in this case, I respectfully dissent.

1. In concluding that equitable estoppel is unavailable to Rosenberg, the majority establishes a dichotomy between cases in which the injury occurs and the claim accrues during the repose period and those in which the injury sued upon occurs after the repose period has expired, holding that equitable estoppel is available only in the former category of cases. Absent from the majority's analysis is a ***63** discussion of the incongruous results its rule will produce in cases asserting claims governed by OCGA § 9–3–51. Specifically, inconsistent results will occur by virtue of the early accrual date of a property owner's claim for damage to real property based on defects in construction.

****232** A building owner's tort claims based upon defects in construction typically accrue upon substantial completion of the project "because damages usually become immediately ascertainable to the [owner] at that time." *Colormatch Exteriors, Inc. v. Hickey,* 275 Ga. 249(1), 569 S.E.2d 495 (2002).[4] Where, as here, a property owner files an action against a builder based on negligent construction and fraudulent concealment of construction defects, the plaintiff's allegations, assuming their truth, will almost always establish the existence of an actionable injury within the repose period, i.e., damage to the owner's real property. Thus, if Rosenberg's allegations here are true, the initial homeowners, the Nowickis, could have asserted negligence or fraud claims well within the applicable statute of limitation, OCGA § 9–3–30, and the statute of repose in OCGA § 9–3–51. To the extent that Falling Water fraudulently concealed such claims from the Nowickis and their successors-in-interest, the statute of limitation would be tolled. See OCGA § 9–3–96; compare *U–Haul Co. of W. Ga.,* 247 Ga. at 567, 277 S.E.2d 497 (if statute of limitation expired on claims held by original owner for damage to building, claims are not revived when building is sold to subsequent purchaser).

4 See also *U–Haul Co. of W. Ga. v. Abreu & Robeson, Inc.,* 247 Ga. 565, 566, 277 S.E.2d 497 (1981) (legal injury from negligent design occurs at the time of construction because building is damaged at that time); *Heffernan v. Johnson,* 209 Ga.App.

> 139(1), 433 S.E.2d 108 (1993) (fraud claim for damage to home accrued upon substantial completion); *Millard Matthews Builders, Inc. v. Plant Improvement Co., Inc.,* 167 Ga.App. 855, 307 S.E.2d 739 (1983) (negligent design or construction of building "in and of itself constitute[s] a legal injury to the plaintiff") (citation and punctuation omitted). In *Colormatch Exteriors,* we established an exception to this rule, holding that when a builder retains ownership of the residence and contracts to sell it after substantial completion, the purchaser's claim against the builder accrues upon the initial sale of the property. 275 Ga. at 251–252(2), 569 S.E.2d 495.

Facts sufficient to toll the statute of limitation would also permit a homeowner to assert that the builder should be equitably estopped from relying on the statute of repose in OCGA § 9–3–51. The majority does not dispute that, so long as a claim accrues *before* the repose period expires, a plaintiff in a suit alleging defects in construction, like a plaintiff in a medical malpractice case, may invoke the doctrine of equitable estoppel to bar a defendant from asserting a statute of repose defense if the plaintiff shows fraud "by offering evidence of a known failure to reveal negligence." *Craven v. Lowndes County Hosp. Auth.,* 263 Ga. 657(3), 437 S.E.2d 308 (1993). Thus, applying the majority's rule, Rosenberg might be entitled to invoke the ***64** doctrine of equitable estoppel to the extent he was pursuing an action for damages for real property subsequent to the deck's collapse because injury occurred and a claim accrued before the repose period expired. The collapse of the deck did not represent a new claim for damage to real property but rather resulted in accrual of additional damages on an existing claim. But, as the majority would have it, even if Falling Water engaged in fraud, Rosenberg is automatically foreclosed from invoking the doctrine of equitable estoppel when seeking damages for personal injury occurring during the very same incident because the personal injury claim arose only when Rosenberg took the fateful step out onto the deck and it collapsed. See *U–Haul Co. of W. Ga.,* 247 Ga. at 567, 277 S.E.2d 497 (claim for personal injury resulting from defective construction accrues when injury occurs).

2. Despite the irrational results it yields, the majority insists that logic and the very nature of statutes of repose compel it to draw a distinction between cases in which the claim accrues within the repose period and those in which the injury sued upon occurs later. I disagree. In concluding that a claim's accrual date is dispositive, the majority relies on *Hill v. Fordham,* 186 Ga.App. 354, 367 S.E.2d 128 (1988), one of the first Georgia appellate decisions to hold that equitable estoppel may be applied to defeat the statute of repose applicable in medical malpractice cases, OCGA § 9–3–71(b). In *Hill,* the Court of Appeals stated:

> There is a distinction between a statute of limitation and a statute of ultimate repose. A statute of limitation is a procedural rule limiting the time in which a party may bring an action

> for a right which has already **233 accrued. A statute of ultimate repose delineates a time period in which a right may accrue. If the injury occurs outside that period, it is not actionable.

Id. at 357(2), 367 S.E.2d 128. The Court of Appeals then reasoned that since "[a] statute of ultimate repose sets an ultimate limit on which injuries shall be actionable ... by definition, a statute of ultimate repose cannot be 'tolled' to permit actions to be brought for injuries which did not occur until after the statutory period had expired." Id. The Court of Appeals concluded, however, that a different result obtains when the injury sued upon occurs within the repose period:

> [T]he statute of ultimate repose should not be applied to relieve a defendant of liability for injuries which occurred during the period of liability, but which were concealed from the patient by the defendant's own fraud. The statute of ultimate repose should not provide an incentive for a doctor *65 or other medical professional to conceal his or her negligence with the assurance that after five years such fraudulent conduct will insulate him or her from liability. The sun never sets on fraud.

Id. *Hill* did not involve a medical malpractice case in which the plaintiff suffered no injuries until after the repose period expired, and its discussion of the availability of equitable estoppel under those circumstances is dicta. [5]

5 The dicta in *Hill* have been repeated in several Court of Appeals opinions, but, as in *Hill,* the underlying cases have not involved an injury first occurring after the expiration of the statute of repose. See, e.g., *Osburn v. Goldman,* 269 Ga.App. 303(1)(a), 603 S.E.2d 695 (2004); *Esener v. Kinsey,* 240 Ga.App. 21, 22–23, 522 S.E.2d 522 (1999); *Bynum v. Gregory,* 215 Ga.App. 431(2), 450 S.E.2d 840 (1994).

Contrary to the dicta in *Hill* and the majority's conclusion here, nothing about the definition or function of a statute of repose such as OCGA § 9–3–51 leads logically or inexorably to the conclusion that equitable estoppel cannot apply when the injury underlying a plaintiff's claim occurs outside of the repose period. As the majority points out, Maj. Op., p. 229, we have stated previously that "[a] statute of repose stands as an unyielding barrier to a plaintiff's right of action." *Wright v. Robinson,* 262 Ga. 844(1), 426 S.E.2d 870 (1993). But this is equally true whether or not the plaintiff's injury occurs before or after the repose period expires. Thus, if the injury necessary to complete a tort claim occurs after the repose period ends, the injury is not actionable. See *Craven,* supra,

263 Ga. at 660(2), 437 S.E.2d 308. The statute of repose, in that situation, acts to "abolish a claim before its accrual." Id.; see also *Mullis v. Southern Co. Svcs.,* 250 Ga. 90(1), 296 S.E.2d 579 (1982). In addition, when a claim accrues during the repose period, the expiration of the period before a lawsuit is commenced "destroys ... previously existing rights so that ... [any existing] cause of action no longer exists." *Wright,* supra, 262 Ga. at 845(1), 426 S.E.2d 870; *Simmons v. Sonyika,* 279 Ga. 378, 379, 614 S.E.2d 27 (2005).

Our pronouncements about the absolute nature of statutes of repose, however, do not foreclose an equitable estoppel from arising when the requisite elements are established under OCGA § 24–4–27.[6] I would conclude that this is true regardless of when an injury occurs. When an estoppel results from the estopped party's fraudulent conduct, that party may be foreclosed from invoking the protection of an otherwise applicable legal rule or statute. As our ***66** Court of Appeals has explained: "The principle of equitable estoppel is based on the ground of promoting the equity and justice of the individual case by preventing a party from asserting his rights under a general technical rule of law, when he has so conducted himself that it would be contrary to equity and good conscience for him to allege and prove the truth." (Citation and punctuation omitted.) *Hewett v. Carter,* 215 Ga.App. 429, 430(1), 450 S.E.2d 843 (1994); see also *Eiberger v. West,* 247 Ga. 767(1)(a), 281 S.E.2d 148 (1981) (obligor under promissory note estopped by conduct from asserting defense under usury statute). When it applies to preclude reliance on a ****234** statute of repose, equitable estoppel does not purport to toll, modify, or otherwise alter the repose period. Rather, "[e]quitable estoppel is a way of saying that ... the statute of repose [is] valid and would be [an] absolute defense[ ] to this action but because of your conduct ..., you ... will not be permitted to raise [the defense]." *Robinson v. Shah,* 23 Kan.App.2d 812, 936 P.2d 784, 796 (1997).[7]

6 OCGA § 24–4–27 states: "In order for an equitable estoppel to arise, there must generally be some intended deception in the conduct or declarations of the party to be estopped, or such gross negligence as to amount to constructive fraud, by which another has been misled to his injury."

7 See also *Sovereign Camp, W.O.W. v. Heflin,* 59 Ga.App. 299, 305, 200 S.E. 489 (1938) ("Estoppel means 'that a party is precluded by his own acts from asserting a right to the detriment of another who, entitled to rely on such conduct, has acted thereon.' ") (citation omitted); *Bomba v. W. L. Belvidere, Inc.,* 579 F.2d 1067, 1070 (7th Cir.1978) ("[B]ecause equitable estoppel operates directly on the defendant without abrogating the running of the limitations period as provided by statute, it might apply no matter how unequivocally the applicable limitations period is expressed."); Black's Law Dictionary at 570 (7th ed. 1999) (" 'Estoppe,' says Lord Coke, 'cometh of the French word *estoupe,* from whence the English word stopped; and it is called an estoppel or conclusion, because a man's own act or acceptance stoppeth or closeth up his

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mouth to allege or plead the truth.' ") (citation omitted).

In *Craven,* supra, we concluded without hesitation that equitable estoppel applies with full force when a plaintiff in a medical malpractice case has been injured but fails to file suit within the repose period because the defendant knowingly conceals his or her negligence. 263 Ga. at 660(3), 437 S.E.2d 308. As the Court of Appeals recognized in *Hill,* supra, to hold otherwise would subvert the purpose of the equitable estoppel doctrine by incentivizing fraud. 186 Ga.App. at 357, 367 S.E.2d 128.

"Equity mandates that wrongdoers should be estopped from enjoying the fruits of their fraud." *Windham v. Latco of Miss., Inc.,* 972 So.2d 608, 612 (Miss.2008) (equitable estoppel available to bar reliance on improvement to real property statute of repose); *Canton Lutheran Church v. Sovik, Mathre, Sathrum & Quanbeck,* 507 F.Supp. 873, 879–880 (D.S.D.1981) (same).[8] Yet, by arbitrarily limiting the availability of equitable estoppel based on the date of the ***67** plaintiff's injury, the majority sanctions the very result that the doctrine of equitable estoppel is intended to prevent. One who fraudulently conceals his or her negligence and thereby deters another from preventing or avoiding an injury in the first place is, if anything, more culpable than one who fraudulently conceals the cause of an injury after the injury occurs. Likewise, the rationale for equitable estoppel applies with equal if not greater force when both the delayed but preventable injury *and* the resultant late filing of an action are attributable to the defendant's alleged misconduct.

8 The majority's attempt to distinguish *Canton Lutheran* on the ground that it did not involve an improvement to real property statute of repose is unavailing, as the operation of the statute at issue there was not distinguishable from OCGA § 9–3–51 in any meaningful way. *Canton Lutheran* is different from this case in that it involved a claim for damage to real property, which arguably accrued as soon as the education building addition to the church was completed even though the obviously more substantial damages accrued when cracks in the structure occurred almost 14 years later. 507 F.Supp. at 874–875; see also Mark W. Peacock, An Equitable Approach to Products Liability Statutes of Repose, 14 N. Ill. U.L.Rev. 223, 236, n. 63 (1993) (citing *Canton Lutheran* as an example of a case acknowledging that equitable principles apply when injury has occurred within the repose period). As discussed at length in this dissent, I do not believe such a distinction is controlling here.

3. For the reasons set forth above, I would hold that the trial court and Court of Appeals erred in concluding that, based on the date of his personal injury, Rosenberg is automatically foreclosed from arguing that equitable estoppel bars Falling Water's reliance on the statute of repose. I would remand the case to the Court of Appeals to consider whether Rosenberg offered evidence sufficient to raise an issue of fact as to whether Falling Water should be equitably estopped because it fraudulently concealed its negligent conduct.

I am authorized to state that Presiding Justice CARLEY and Justice BENHAM join in this dissent.

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RUBY GLEN, LLC
v.
INTERNET CORP. FOR
ASSIGNED NAMES & NUMBERS

CV 16-5505 PA (ASx)
|
Filed 07/26/2016

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Proceedings: IN CHAMBERS —COURT ORDER

PERCY ANDERSON, UNITED STATES DISTRICT JUDGE

***1** Before the Court is an Ex Parte Application for Temporary Restraining Order ("Application for TRO") filed by plaintiff Ruby Glen, LLC ("Plaintiff"). Plaintiff seeks to temporarily enjoin defendant Internet Corporation for Assigned Names and Numbers ("ICANN") from conducting an auction for the rights to operate the registry for the generic top level domain ("gTLD") for .web. Currently, that auction is set for 6:00 a.m. on July 27, 2016. Pursuant to Rule 78 of the Federal Rules of Civil Procedure and Local Rule 7-15, the Court finds that this matter is appropriate for decision without oral argument.

Plaintiff applied to ICANN in 2012 to operate the registry for the .web gTLD. Because other entities also applied to operate the .web gTLD, ICANN's procedures require all of the applicants, what are referred to as "contention sets," to first attempt to resolve their competing claims, but if they cannot do so, ICANN will conduct an auction and award the rights to operate the registry to the winning bidder. According to Plaintiff, one of the competing entities, Nu Dotco, LLC ("NDC") is unwilling to informally resolve the competing claims and has instead insisted on proceeding to an auction. Plaintiff asserts that it learned on June 7, 2016, that NDC has experienced recent changes in its management and ownership since it initially submitted its application to ICANN but that NDC has not provided ICANN with updated information as required by ICANN's application requirements. Specifically, the email from NDC's Jose Ignacio Rasco stated:

> The three of us are still technically the managers of the LLC, but the decision goes beyond just us. Nicolai [Bezsonoff] [1] is at [Neustar, Inc.] full time and no longer involved with our TLD applications. I'm still running our program and Juan [Diego

> Calle] sits on the board with me and several others. Based on your request, I went back to check with all the powers that be and there was no change in the response and [we] will not be seeking an extension.

(Docket No. 8, Decl. of Jonathon Nevett, Ex. A.)

1 According to Plaintiff, Bezsonoff was identified on NDC's ICANN application as NDC's "secondary contact."

Plaintiff alleges that it requested that ICANN conduct an investigation regarding the discrepancies in NDC's application beginning on June 22, 2016 and requested a postponement of the auction. At least one other applicant seeking to operate the .web registry has also requested that ICANN postpone the auction and investigate NDC's current management and ownership structure. ICANN denied the requests on July 13, 2016, and stated that "in regards to potential changes of control of Nu DOT CO LLC, we have investigated the matter and to date we have found no basis to initiate the application change request process or postpone the auction." Plaintiff and another of the applicants then submitted a request for reconsideration to ICANN on July 17, 2016. ICANN denied the request for reconsideration on July 21, 2016.

Plaintiff, relying on the Court's diversity jurisdiction, filed this action in this Court on July 22, 2016. According to the Complaint, Plaintiff "is a limited liability company, duly organized and existing under the laws of the State of Delaware and operated by an affiliate located in Bellevue, Washington." (Compl. ¶ 4.) The Complaint alleges that ICANN "is a nonprofit corporation, organized and existing under the laws of the State of California, with its principal place of business in Los Angeles, California." (Id. ¶ 5.) Plaintiff asserts claims for: (1) breach of contract; (2) breach of the implied covenant of good faith and fair dealing; (3) negligence; (4) unfair competition pursuant to California Business and Professions Code section 17200; and (5) declaratory relief. Plaintiff filed its Application for TRO at the same time it filed its Complaint.

***2** As an initial matter, the Court notes that the Application for TRO fails to satisfy the requirements for a valid Ex Parte Application. Specifically, under Local Rule 7-19.1, an attorney making an ex parte application has a duty to give notice by making reasonable good faith efforts to orally advise counsel for the other parties, if known, of the proposed ex parte application, and "to advise the Court in writing of efforts to contact other counsel and whether any other counsel, after such advice, opposes the application or has requested to be present when the application is presented to the Court." Here, Plaintiff did not notify the Court in writing of its efforts to notify opposing counsel of the Application for TRO or if ICANN intended to file an Opposition. These violations of the Local Rules are themselves sufficient to deny Plaintiff's Application for TRO. See Standing Order 6:5-7 ("Applications which fail to conform with Local Rules 7-19 and 7-19.1, including a statement of opposing counsel's position, will

not be considered."). Additionally, Plaintiff did not submit a proposed order with the Application for TRO as required by Local Rule 7-20. See Local Rule 7-20 ("A separate proposed order shall be lodged with any motion or application requiring an order of the Court, pursuant to L.R. 52-4.1."). Finally, the Application for TRO was not accompanied by a proof of service as required by Local Rule 5-3.1. Indeed, according to ICANN, as of July 25, 2016, Plaintiff had not served ICANN with the Complaint or Application for TRO. Had ICANN not filed its Notice of Intent to File Opposition, the Court would have denied the Application for TRO as a result of these procedural deficiencies and violations of the Local Rules. See, e.g., Reno Air Racing Ass'n, Inc. v. McCord, 452 F.3d 1126, 1131 (9th Cir. 2006) ("[C]ourts have recognized very few circumstances justifying the issuance of an ex parte TRO [without notice]."). Despite these violations of the Local Rules, the Court will address the merits of Plaintiff's Application for TRO because ICANN filed an Opposition. Future violations of the Local Rules, this Court's Orders, or the Federal Rules of Civil Procedure may result in the striking of the offending documents or the imposition of sanctions.

The standard for issuing a temporary restraining order is identical to the standard for issuing a preliminary injunction. See Lockheed Missile & Space Co., Inc. v. Hughes Aircraft Co., 887 F. Supp. 1320, 1323 (N.D. Cal. 1995). "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." Winter v. Natural Resources Defense Council, 555 U.S. 7, 20, 129 S. Ct. 365, 374, 172 L.Ed. 2d 249 (2008). "A preliminary injunction is an extraordinary remedy never awarded as of right." Id. The Ninth Circuit employs a "sliding scale" approach to preliminary injunctions as part of this four-element test. Alliance for the Wild Rockies v. Cottrell, 632 F.3d 1127, 1135 (9th Cir. 2011). Under this "sliding scale," a preliminary injunction may issue "when a plaintiff demonstrates ... that serious questions going to the merits were raised and the balance of hardships tips sharply in the plaintiff's favor," as long as the other two Winter factors have also been met. Id. (internal citations omitted). "[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." Mazurek v. Armstrong, 520 U.S. 968, 972, 117 S. Ct. 1865, 1867, 138 L.Ed. 2d 162 (1997).

Plaintiff's breach of contract, breach of the implied covenant of good faith and fair dealing, and negligence claims are all based on provisions in ICANN's bylaws and the ICANN Applicant Guidebook stating, for instance, that ICANN will make "decisions by applying documented policies neutrally and objectively, with integrity and fairness," that ICANN will remain "accountable to the Internet community through mechanisms that enhance ICANN's effectiveness," and that no contention set will proceed to auction unless there is "no pending ICANN accountability mechanism." Plaintiff's unlawful business practices act and declaratory relief claims allege that a covenant not to sue contained in the ICANN Application

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Guidebook is invalid and unlawful under California law. That release states:

> Applicant hereby releases ICANN and the ICANN Affiliated Parties from any and all claims by applicant that arise out of, are based upon, or are in any way related to, any action, or failure to act, by ICANN or any ICANN Affiliated Party in connection with ICANN's or an ICANN Affiliated Party's review of this application, investigation or verification, any characterization or description of applicant or the information in this application, any withdrawal of this application or the decision by ICANN to recommend, or not to recommend, the approval of applicant's gTLD application. APPLICANT AGREES NOT TO CHALLENGE, IN COURT OR IN ANY OTHER JUDICIAL FORA, ANY FINAL DECISION MADE BY ICANN WITH RESPECT TO THE APPLICATION, AND IRREVOCABLY WAIVES ANY RIGHT TO SUE OR PROCEED IN COURT OR ANY OTHER JUDICIAL FORA ON THE BASIS OF ANY OTHER LEGAL CLAIM AGAINST ICANN AND ICANN AFFILIATED PARTIES WITH RESPECT TO THE APPLICATION....

***3** Even if, as Plaintiff contends, this release is not valid, and Plaintiff could therefore be considered likely to prevail on its unlawful business practices and declaratory relief claims, the potential invalidity of the release—an issue the Court does not reach—is a separate issue that is not related to the propriety of proceeding with the auction for the .web registry. As a result, those claims, and Plaintiff's likelihood of success on them, are not relevant to Plaintiff's Application for TRO and do not provide a basis for enjoining the .web auction.

In its Opposition to the Application for TRO, ICANN contends that Plaintiff has not established the requisite likelihood of success on the merits or irreparable harm to justify the issuance of the preliminary injunctive relief it seeks. Specifically, ICANN has provided evidence that it has conducted investigations into Plaintiff's allegations concerning potential changes in NDC's management and ownership structure at each level of Plaintiff's appeals to ICANN for an investigation and postponement of the auction. During those investigations, NDC provided evidence to ICANN that it had made no material changes to its management and ownership structure. Additionally, ICANN's Opposition is supported by the Declarations of Nicolai Bezsonoff and Jose Ignacio Rasco, who declare under penalty of perjury that there

have been no changes to NDC's management, membership, or ownership since NDC first filed its application with ICANN.

Based on the strength of ICANN's evidence submitted in opposition to the Application for TRO, and the weakness of Plaintiff's efforts to enforce vague terms contained in the ICANN bylaws and Applicant Guidebook, the Court concludes that Plaintiff has failed to establish that it is likely to succeed on the merits, raise serious issues, or show that the balance of hardships tips sharply in its favor on its breach of contract, breach of the implied covenant of good faith and fair dealing, and negligence claims. Moreover, because the results of the auction could be unwound, Plaintiff has not met its burden to establish that it will suffer irreparable harm in the absence of the preliminary injunctive relief it seeks. The Court additionally concludes that the public interest does not favor the postponement of the auction.

Finally, the Court notes that Plaintiff's Complaint has not adequately alleged a basis for this Court's jurisdiction. Jurisdiction may be based on complete diversity of citizenship, requiring all plaintiffs to have a different citizenship from all defendants and for the amount in controversy to exceed $75,000.00. See 28 U.S.C. § 1332; Owen Equip. & Erection Co. v. Kroger, 437 U.S. 365, 373, 98 S. Ct. 2396, 2402, 57 L.Ed. 2d 274 (1978). To establish citizenship for diversity purposes, a natural person must be a citizen of the United States and be domiciled in a particular state. Kantor v. Wellesley Galleries, Ltd., 704 F.2d 1088, 1090 (9th Cir. 1983). Persons are domiciled in the places they reside with the intent to remain or to which they intend to return. See Kanter v. Warner-Lambert Co., 265 F.3d 853, 857 (9th Cir. 2001). "A person residing in a given state is not necessarily domiciled there, and thus is not necessarily a citizen of that state." Id. A corporation is a citizen of both its state of incorporation and the state in which it has its principal place of business. 28 U.S.C. § 1332(c)(1); see also New Alaska Dev. Corp. v. Guetschow, 869 F.2d 1298, 1300-01 (9th Cir. 1989). Finally, the citizenship of a partnership or other unincorporated entity is the citizenship of its members. See Johnson v. Columbia Props. Anchorage, LP, 437 F.3d 894, 899 (9th Cir. 2006) ("[L]ike a partnership, an LLC is a citizen of every state of which its owners/members are citizens."); Marseilles Hydro Power, LLC v. Marseilles Land & Water Co., 299 F.3d 643, 652 (7th Cir. 2002) ("the relevant citizenship [of an LLC] for diversity purposes is that of the members, not of the company"); Handelsman v. Bedford Village Assocs., Ltd. P'ship, 213 F.3d 48, 51-52 (2d Cir. 2000) ("a limited liability company has the citizenship of its membership"); Cosgrove v. Bartolotta, 150 F.3d 729, 731 (7th Cir. 1998); TPS Utilicom Servs., Inc. v. AT & T Corp., 223 F. Supp. 2d 1089, 1101 (C.D. Cal. 2002) ("A limited liability company ... is treated like a partnership for the purpose of establishing citizenship under diversity jurisdiction.").

***4** The Complaint fails to establish that the parties are completely diverse. Specifically, by failing to identify and allege the citizenship of its own members, Plaintiff, a limited liability company, has not properly alleged its own citizenship. Accordingly, the Court is unable to ascertain whether it may exercise subject

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matter jurisdiction over this action. Without Plaintiff having adequately alleged a proper jurisdictional basis, the Court would not grant Plaintiff's Application for TRO even if Plaintiff had otherwise satisfied the requirements for injunctive relief.

Despite Plaintiff's failure to properly allege the Court's subject matter jurisdiction, a district court may, and should, grant leave to amend when it appears that subject matter jurisdiction may exist, even though the complaint inadequately alleges jurisdiction. See 28 U.S.C. § 1653; Trentacosta v. Frontier Pacific Aircraft Industries, Inc., 813 F.2d 1553, 1555 (9th Cir. 1987). Therefore, the Court grants Plaintiff leave to amend the Complaint to attempt to establish federal subject matter jurisdiction. Plaintiff's First Amended Complaint, if any, is to be filed by August 8, 2016. The failure to file a First Amended Complaint by that date or to adequately allege the Court's jurisdiction may result in the dismissal of this action without prejudice.

For all of the foregoing reasons, the Court concludes that Plaintiff is not entitled to the injunctive relief it seeks. The Court therefore denies the Application for TRO.

IT IS SO ORDERED.

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36 F.3d 958
United States Court of Appeals,
Tenth Circuit.

SCFC ILC, INC., doing business as MountainWest Financial, Inc., Plaintiff–Counter–Defendant–Appellee,
v.
VISA USA, INC., Defendant–Counter–Claimant–Appellant,
v.
SEARS, ROEBUCK AND COMPANY, an Illinois corporation; Sears Consumer Financial Corporation an Illinois corporation, Counterclaim–Defendants–Appellees.
American Bankers Association; Independent Bankers Association of America; Colorado Bankers Association; Community Bankers Association of Kansas; Community Bankers Association of Oklahoma; Independent Bankers of Colorado; Independent Community Bankers of New Mexico; New Mexico Bankers Association; Kansas Bankers Association; Utah Bankers Association; Wyoming Bankers Association; American Automobile Manufacturers Association; Boulder Technology Incubator; Chevron Corporation; Corning Incorporated; Pacific Telesis Group; Plasticom Industries, Inc.; Rmes Communications Inc.; American Financial Services Association; Bankcard Holders of America, Amici Curiae.

No. 93–4105.
|
Sept. 23, 1994.

Synopsis
Issuer of credit card brought action under Sherman Act against association of credit card issuers which had denied application for membership, and association counterclaimed under Clayton Act for injunction to bar issuer from membership. The United States District Court for the District of Utah, Dee V. Benson, J., 819 F.Supp. 956 entered judgment for issuer, and association appealed. The Court of Appeals, John P. Moore, Circuit Judge, held that: (1) association did not violate Sherman Act, and (2) injunction under Clayton Act was unnecessary.

Affirmed in part; reversed in part.

Procedural Posture(s): On Appeal.

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Before MOORE and SETH, Circuit Judges, and DAUGHERTY, District Judge.[*]

[*] Honorable Frederick A. Daugherty, Senior District Judge for the United States District Court for the Western District of Oklahoma, sitting by designation.

Opinion

JOHN P. MOORE, Circuit Judge.

Visa USA provides payment services to its 6,000 members which individually issue credit cards to consumers. Sears, Roebuck and Company, a competitor offering its own credit card, the Discover Card, wanted to become a Visa USA member and also issue Visa cards. The question presented by this case is whether Visa USA's refusal to admit Sears to its joint venture restrains trade in violation of section 1 of the Sherman Act, 15 U.S.C. § 1. Rejecting Visa USA's legal and factual challenges to the jury's adverse verdict, the district court found the evidence of exclusion constituted antitrust injury and harm to competition. *SCFC ILC, Inc. v. Visa U.S.A., Inc.,* 819 F.Supp. 956, 990 (D.Utah 1993). We conclude, however, the exclusion does not trigger section 1 liability and reverse.

I. Background

As set forth more extensively in the district court's order, the factual background of this dispute encompasses the history of the general purpose credit card industry. What is known today "everywhere you want to be" as *Visa* has evolved over the last forty years from direct extensions of credit for a single purpose; for example, oil company or department store credit cards, to a "charge card which could be used for general purposes at a wide variety of retail establishments." *Id.* at 963 n. 2. The resulting card was offered without geographic restrictions under the neutral trademark, Visa.

Now, to its approximately 6,000 associates, Visa USA,[1] the umbrella organization, provides technology to process credit card transactions and regulates and coordinates the individual programs through rules and bylaws proposed by management and adopted by a board of directors (the Board).[2] The bylaws cover a range of issues: members' liability, termination, and confidentiality, to name a few. However, since its inception, each Visa USA

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member independently decides the terms and conditions of credit extensions, the number of cards issued, and the interest rates charged. That is, individual banks establish, operate, and promote their own credit card programs under the Visa aegis, while Visa USA serves as a clearinghouse for the ultimate transaction between issuer, consumer, and merchant. The fees ***961** members pay to Visa USA for its services vary according to a formula established by the association.

1 In this opinion, Visa USA designates the joint venture named as the defendant. We refer to its credit cards simply as Visa.

2 The Visa USA Board draws its members from twelve designated regions, each electing a representative, generally a bank's chief executive officer or chief operating officer. Based on a formula, larger regions may have a second board seat. Seven directors are elected nationally, and a separate seat is reserved for a director who represents small banks. Citicorp has its own seat on the board based on the rule of automatic appointment to any member with more than ten percent of the total volume of outstanding cards. MasterCard board members are not permitted to sit on the Visa USA board.

Any financial institution which is eligible for federal deposit insurance may become a Visa USA member. Among its current membership are Citicorp, Ford Motor Company, General Electric, and ITT. Although the membership was originally restricted to exclusively issuing Visa cards, a challenge to the bylaw prohibiting members from issuing MasterCard forced Visa USA to withdraw the rule. *See Worthen Bank & Trust Co. v. National BankAmericard, Inc.,* 345 F.Supp. 1309 (E.D.Ark.1972), *rev'd,* 485 F.2d 119 (8th Cir.1973), *cert. denied,* 415 U.S. 918, 94 S.Ct. 1417, 39 L.Ed.2d 473 (1974). Consequently, Visa USA members now generally offer both Visa and MasterCard, a practice referred to in the industry as *duality.*

Prior to its entry into the general credit card arena, Sears [3] mustered a bankcard steering committee to investigate the alternatives of developing its own general purpose charge card or joining the Visa USA/MasterCard association. In 1985, Sears introduced the Discover Card, its own proprietary card, one "owned and distributed solely by a single business entity," 819 F.Supp. at 963 n. 3., to be marketed and issued nationally. This entry was intended to compete with Visa, MasterCard, American Express, and Citibank's Diners' Club/Carte Blanche, the only other national proprietary cards. Despite Visa USA's aggressive efforts to thwart its new rival, *id.* at 963, Discover succeeded with such innovations as preapproved, no fee cards offering cash back bonuses to cardholders and deeper discounts to merchants. In fact, at the time of this litigation, Sears was the largest individual issuer of credit cards in terms of the number of cards distributed and the second largest, following Citicorp, in credit card receivables volume. [4] To compete with the Visa Gold Card and American Express Optima Card, Sears also introduced an upscale Discover Card called Prime Issue. Another Sears' entity, Sears Payment Services (SPS), assists other companies in operating their credit card programs.

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3 Sears, Roebuck and Company is the parent corporation of Sears Consumer Financial Corporation and Dean Witter Financial Services Group, its wholly owned subsidiaries. Sears' counsel informed the court during oral argument that Dean Witter then owned plaintiff MountainWest. However, the designation Sears in this opinion collectivizes plaintiff bank and the Sears entities involved in the litigation.

4 In 1991, approximately 24 million Discover cards had been issued, while Citicorp had approximately 21 million cards in the market.

In 1988, Greenwood Trust Company, a Sears-owned Delaware bank which issues Discover Card, applied for membership in Visa USA, prompting the Board to adopt the bylaw which is the genesis of this antitrust litigation. The amendment to the Board rule, Bylaw 2.06, stated:

> Notwithstanding (a) above, if permitted by applicable law, the corporation shall not accept for membership any applicant which is issuing, directly or indirectly, Discover cards or American Express cards, or any other cards deemed competitive by the Board of Directors; an applicant shall be deemed to be issuing such cards if its parent, subsidiary or affiliate issues such cards.

Subsequently, the Board denied Greenwood Trust's application to Visa USA.

In 1990, the Resolution Trust Corporation sold Sears the assets, including the Visa USA membership, of MountainWest Savings and Loan Association, a bankrupt savings and loan in Sandy, Utah. Sears then created a new entity, SCFC ILC, Inc., doing business as MountainWest Financial, by merging the Sandy bank with Basin Loans, a Utah Industrial Loan Company.

Through this vehicle, Sears was poised to inaugurate a national Visa program it dubbed the Prime Option card, a charge card featuring a two-tiered interest rate, 9.9% for the first two months and 15.9% thereafter. To this end, Sears moved Discover's top executives to Prime Option and ordered an initial printing of 1.5 million Prime Option Visa cards. However, upon inadvertently discovering the plan, Visa USA cancelled the printing and invoked Bylaw 2.06 to exclude Sears from the association. Sears then instituted this antitrust litigation.

*962 II. Fed.R.Civ.P. 50(b) Review

In this appeal, Visa USA contends Sears has failed to carry its burden of showing Visa USA's conduct was harmful to competition in violation of section 1. Indeed, Visa USA underscores, the district court conceded had it tried the facts, it "would have concluded that the harm to competition from letting Sears

into the Visa system is greater than any harm from keeping Sears out." 819 F.Supp. at 983. Sears, however, urges this fact-intensive case persuaded the jury that preventing consumers access to the Prime Option card and destroying rivals' incentives to develop new proprietary cards harmed competition.

Nonetheless, we focus only on those relevant antitrust facts, which, when viewed most favorably to Sears, underpin our plenary review under Fed.R.Civ.P. 50(b). In the context of this case, if there is evidence upon which a jury could properly find Visa USA restrained trade, we must affirm. 5A J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 50.07[2], at 50–76 (2d ed. 1994). Naturally, we do not weigh the credibility of the evidence when reviewing the record. However, if the evidence is insufficient "under the controlling law," Fed.R.Civ.P. 50(a), we must enter judgment as a matter of law for the moving party.

Having stated its contrary view, but reluctant to substitute its judgment for that of the jury, the district court articulated those facts which it opined could become the basis for judgment:

1. Testimony of Sears' expert, Professor James Kearl, on the appropriateness of calculating Visa USA's market power by aggregating the individual market shares of Visa USA and MasterCard; and his conclusion that Visa USA exercised market power through its collective power to make rules; and testimony about the "presence of high profits."

2. Dean Witter's president, Phillip Purcell's testimony had Sears known that developing the Discover Card would disqualify it from Visa USA entry, it would not have placed a new proprietary card in the market.

3. Testimony that no new proprietary cards had been introduced in the relevant market since Bylaw 2.06 was enacted although memberships in Visa USA and MasterCard increased.

4. Testimony that Prime Option "would be a low-cost card which would be supported by powerful marketing and advertising strategies on a national level." 819 F.Supp. at 986–87.

5. Testimony by Sears' executives that Discover Card, in the face of Prime Option's entry, would remain an aggressive competitor.

6. Testimony that intersystem competition will not be harmed "because Prime Option Visa was designed to reach that part of the market that Discover does not reach." *Id.* at 987.

7. Testimony that "Sears would benefit significantly from issuing Prime Option Visa as opposed to Prime Option Discover or another separate proprietary card." *Id.*

This evidence, which the district court found sufficient to impose section 1 liability, however, must be placed in the specialized province of antitrust law and section 1. We do so fully recognizing both the evolving legal precedent and the objectives of antitrust regulation: "to improve people's lives ... [through] economic efficiency ... more efficient production methods ... [and] through increased

innovation." Stephen Breyer, *The Cutting Edge of Antitrust: Lessons from Deregulation,* 57 Antitrust L.J. 771 (1989). That antitrust objectives often collide with these goals simply reminds us "[a]ntitrust is an imperfect tool for the regulation of competition." Frank H. Easterbrook, *The Limits of Antitrust,* 63 Tex.L.Rev. 1, 39 (1984).

III. Joint Ventures and Section I

Section 1 forbids agreements in restraint of trade.[5] Read costively, section 1 ***963** might prohibit "every conceivable contract or combination ... anywhere in the whole field of human activity." *Standard Oil Co. of N.J. v. United States,* 221 U.S. 1, 60, 31 S.Ct. 502, 516, 55 L.Ed. 619 (1911). However, "the 'rule of reason' limits the Act's literal words by forbidding only those arrangements the anticompetitive consequences of which outweigh their legitimate business justifications." *Clamp–All Corp. v. Cast Iron Soil Pipe Inst.,* 851 F.2d 478, 486 (1st Cir.1988) (citing 7 P. Areeda & D. Turner *Antitrust Law* ¶ 1500, at 362–63 (1978)), *cert. denied,* 488 U.S. 1007 (1989). Hence, when we ask if a particular practice is "reasonable" or "unreasonable," or if the practice is "anticompetitive," we use these terms with special antitrust meaning reflecting the "Act's basic objectives, the protection of a competitive process that brings to consumers the benefits of lower prices, better products, and more efficient production methods." *Id.* at 486. In this lexicon, a practice ultimately judged anticompetitive is one which harms competition, not a particular competitor. *Brunswick Corp. v. Pueblo Bowl–O–Mat, Inc.,* 429 U.S. 477, 488, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 *cert. denied,* 429 U.S. 1090, 97 S.Ct. 1099, 51 L.Ed.2d 535 (1977); *Brown Shoe Co. v. United States,* 370 U.S. 294, 319–20, 82 S.Ct. 1502, 1521–21, 8 L.Ed.2d 510 (1962).

5 In part, section 1 states, "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

Of course, reasonability is of no consequence when certain practices, for example, price fixing, are entirely void of redeeming competitive rationales. These we deem *per se* illegal under section 1, no offsetting economic or efficiency justifications salvaging them. "This *per se* approach permits categorical judgments with respect to certain business practices that have proved to be predominantly anticompetitive." *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.,* 472 U.S. 284, 289, 105 S.Ct. 2613, 2617, 86 L.Ed.2d 202 (1985).

The sharp line between *per se* and rule of reason analysis, however, especially blurs under section 1 when the actors change. In the case of a joint venture, present here in the Visa USA association, competitive incentives between independent firms are intentionally restrained and their functions and operations integrated to achieve efficiencies and increase output. *See* Joseph F. Brodley, *Joint Ventures and Antitrust Policy,* 95 Harv.L.Rev. 1523, 1524 (1982). Although virtually any collaborative activity among business firms may be called a joint venture, joint ventures differ from mergers and cartels

by the extent to which they integrate the resources of their partners. A cartel constitutes a naked agreement among competitors unaccompanied by any integration of resources. In a joint venture, partners contribute assets, such as, capital, technology, or production facilities to a common endeavor. This integration of resources creates economic efficiencies that cannot be achieved by naked agreements among competitors. Indeed, the efficiencies created by joint ventures are similar to those resulting from mergers—risk-sharing, economies of scale, access to complementary resources and the elimination of duplication and waste. Joint ventures, however, differ from mergers in a critical way: because they are less integrated than mergers, *they allow their partners to continue to compete with each other in the relevant market.*

Thomas A. Piraino, Jr., *Beyond Per Se, Rule of Reason or Merger Analysis: A New Antitrust Standard for Joint Ventures,* 76 Minn.L.Rev. 1, 7 (1991) (italics added). The whole becomes greater than the sum of its parts. However, at its center remains an agreement among competitors to eliminate competition in some way.

The Supreme Court has recognized this tension in its evolving treatment of allegedly anticompetitive agreements by joint ventures. In *Broadcast Music, Inc. v. Columbia Broadcasting, Inc.,* 441 U.S. 1, 99 S.Ct. 1551, 60 L.Ed.2d 1 (1979) (BMI), the Court refused to condemn under a *per se* analysis blanket licenses which amounted to price fixing among the participants. The joint venture, the American Society of Composers, Authors and Publishers (ASCAP), was created as a clearinghouse through which individual music copyright owners licensed their compositions, and ASCAP then monitored ***964** the use of their work. Virtually all participants in the copyright music market participated in ASCAP. However, eschewing *per se* treatment, the Court acknowledged, "Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all." *Id.* at 23, 99 S.Ct. at 1564. Viewed in this light, the efficiency justification of increasing the aggregate output in the market rendered the agreement procompetitive.

Similarly, in *NCAA v. Board of Regents of Univ. of Okla.,* 468 U.S. 85, 104 S.Ct. 2948, 82 L.Ed.2d 70 (1984), the Court held inappropriate the application of *per se* treatment to the NCAA's horizontal price fixing and output limitation of the number of games college

football teams could negotiate to televise. Again the Court recognized the horizontal restraint on competition was essential to make the product available at all. *Id.* at 101, 104 S.Ct. at 2960. Under a rule of reason analysis, however, the rule decreased output and had the effect of increasing prices. While cooperation may be necessary and justified, the Court suggested it fit a different mold, such as, "rules defining the condition of the contest, the eligibility of participants, or the manner in which members of a joint enterprise shall share the responsibilities and the benefits of the total venture." *Id.* at 117, 104 S.Ct. at 2969.

Finally, in *Northwest Wholesale Stationers,* 472 U.S. at 284, 105 S.Ct. at 2613, the Court looked at the economic efficiency justifications of a joint purchasing cooperative to determine the anticompetitive effect of its expelling a member who did not comply with one of the cooperative's rules. Rejecting *per se* condemnation, the Court suggested the disclosure rule which excluded plaintiff from membership might be necessary to monitor the creditworthiness of the cooperative's members. "Wholesale purchasing cooperatives must establish and enforce reasonable rules in order to function effectively.... Unless the cooperative possesses market power or exclusive access to an element essential to effective competition, the conclusion that expulsion is virtually always likely to have an anticompetitive effect is not warranted." *Id.* at 296, 105 S.Ct. at 2620–21 (citations omitted).

In rejecting automatic *per se* treatment in these joint venture cases, [6] the Court directs us instead to look at the challenged agreement to judge whether it represents the essential reason for the competitors' cooperation or reflects a matter merely ancillary to the venture's operation; whether it has the effect of decreasing output; and whether it affects price. Underlying these cases is an effort to appreciate the economic reality of the particular business behavior to assure that the procompetitive goals, in fact, are neither undervalued nor mask a reduction in competition. Key to the analysis of "the competitive significance of the restraint," *NCAA,* 468 U.S. at 103, 104 S.Ct. at 2961 (quoting *National Soc'y of Professional Eng'r v. United States,* 435 U.S. 679, 692, 98 S.Ct. 1355, 1365, 55 L.Ed.2d 637 (1978)), is the Court's appreciation that the horizontal restraint may be essential to create the product in the first instance. That understanding properly values the proprietary rights and incentives for innovation embodied by the joint venture as well as concerns about free-riding, "the diversion of value from a business rival's efforts without payment." *Chicago Professional Sports Ltd. Partnership v. NBA,* 961 F.2d 667, 675 (7th Cir.), *cert. denied,* 506 U.S. 954, 113 S.Ct. 409, 121 L.Ed.2d 334 (1992).

6 *BMI, NCAA,* and *Northwest Wholesale Stationers* are emblematic and not intended to be all inclusive or exhaustive of the extant Supreme Court precedent on joint ventures under section 1.

We do not read the Court's precedent involving joint ventures to imply any special treatment or differing antitrust analysis. [7] Indeed, aside from clarifying the inappropriateness of automatically invoking *per se* scrutiny ***965** of a joint venture's alleged antitrust violation,

the Court has not articulated a different rule of reason approach. Thus, under the Court's precedent, cooperative business activity in one setting may permit its participants to achieve market efficiencies or economies of scale, while in another, a similar activity might run afoul under rule of reason review.

7 We would note, however, some of the commentary on the antitrust treatment of joint ventures suggests a different approach. *See, e.g.,* Thomas A. Piraino, Jr., *Beyond Per Se, Rule of Reason or Analysis: A New Antitrust Standard for Joint Ventures,* 76 Minn.L.Rev. 1 (1992); Joseph F. Brodley, *Joint Ventures and Antitrust Policy,* 95 Harv.L.Rev. 1523 (1982).

Again, in the context of section 1, the focus of the procompetitive justifications for the business practice remains the ultimate consumer. To be judged anticompetitive, the agreement must actually or potentially harm consumers. *Stamatakis Indus., Inc. v. King,* 965 F.2d 469 (7th Cir.1992). That concept cannot be overemphasized and is especially essential when a successful competitor alleges antitrust injury at the hands of a rival. Indeed, "[w]henever producers invoke the antitrust laws and consumers are silent, this inquiry becomes especially pressing." *Chicago Professional Sports,* 961 F.2d at 670.

IV. Market Power

Rule of reason analysis first asks whether the offending competitor, here Visa USA, possesses market power in the relevant market where the alleged anticompetitive activity occurs. The answer to that question may end the suit or permit an abbreviated rule of reason inquiry.

Broadly, market power is the ability to raise price by restricting output. [8] "[I]n economic terms [it] is the ability to raise price without a total loss of sales." 2 P. Areeda & D. Turner, *Antitrust Law* ¶ 501, at 322 (1978). Without market power, consumers shop around to find a rival offering a better deal. Indeed,

8 The 1984 Department of Justice Merger Guidelines define market power as "[t]he ability of one or more firms profitably to maintain prices above a competitive level for a significant period of time." *U.S. Dept. of Justice Merger Guidelines* (1984), *reprinted in 4 Trade Reg. Rep.* (CCH) ¶ 13,103 at 20,556.

> if we accept the notion that the point of antitrust is promoting consumer welfare, then it is clear why the concept of market power plays such a prominent role in antitrust analysis. If the structure of the market is such that there is little potential for consumers to be harmed, we need not be especially concerned with how firms behave because the presence of effective competition will provide a powerful antidote to any effort to exploit consumers.
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> George A. Hay, *Market Power in Antitrust,* 60 Antitrust L.J. 807, 808 (1992) [hereinafter *Market Power*].

Consequently, whether a firm possesses market power may facilitate the determination that the practice harms competition and not simply

a single competitor. Proof of market power, then, for many courts is a critical first step, or "screen," or "filter,"[9] which is often dispositive of the case. *Valley Liquors, Inc. v. Renfield Importers, Ltd.,* 822 F.2d 656, 666–67 (7th Cir.), *cert. denied,* 484 U.S. 977, 108 S.Ct. 488, 98 L.Ed.2d 486 (1987). If market power is found, the court may then proceed under rule of reason analysis to assess the procompetitive justifications of the alleged anticompetitive conduct. *National Bancard Corp. (NaBanco) v. VISA, U.S.A.,* 779 F.2d 592, 603 (11th Cir.), *cert. denied,* 479 U.S. 923, 107 S.Ct. 329, 93 L.Ed.2d 301 (1986).

9 These screens or filters are presumptions in antitrust analysis. They "help to screen out cases in which the risk of loss to consumers and the economy is sufficiently small that there is no need of extended inquiry and significant risk that inquiry would lead to wrongful condemnation or to the deterrence of competitive activity as firms try to steer clear of the danger zone." Frank H. Easterbrook, *The Limits of Antitrust,* 63 Tex.L.Rev. 1, 17 (1984). These "simple rules [ ] will filter the category of probably-beneficial practices out of the legal system, leaving to assessment under the Rule of Reason only those with significant risks of competitive injury." *Id.*

While this approach is "the norm under Section 2 of the Sherman Act, where a firm cannot be found liable unless it has achieved monopoly power or there is a dangerous probability of its doing so," *Market Power,* at 808, this two-step analysis has become equally helpful under section 1.[10] *See, e.g., Rothery* ***966** *Storage & Van Co. v. Atlas Van Lines, Inc.,* 792 F.2d 210 (D.C.Cir.1986), *cert. denied,* 479 U.S. 1033, 107 S.Ct. 880, 93 L.Ed.2d 834 (1987); *Ball Memorial Hosp., Inc. v. Mutual Hosp. Ins., Inc.,* 784 F.2d 1325 (7th Cir.1986).

10 Again, we recognize the overlaps in analysis between section 1 and section 2 cases as did the district court. Nevertheless, the differences must be underscored, the former involving conduct that doesn't alter market structure; the latter, "a pernicious market structure in which the concentration of power saps the salubrious influence of competition." *Berkey Photo, Inc. v. Eastman Kodak Co.,* 603 F.2d 263, 272 (2d Cir.1979), *cert. denied,* 444 U.S. 1093, 100 S.Ct. 1061, 62 L.Ed.2d 783 (1980).

The market power query begins with the determination of the relevant market, "that is, a market relevant to the legal issue before the court." P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 518.1c, at 535 (Supp.1993) [hereinafter *1993 Supplement*]. "The 'market' which one must study to determine when a producer has monopoly power will vary with the part of commerce under consideration. The tests are constant. That market is composed of products that have reasonable interchangeability for the purposes for which they are produced—price, use and qualities considered." *United States v. E.I. du Pont de Nemours & Co.,* 351 U.S. 377, 404, 76 S.Ct. 994, 1012, 100 L.Ed. 1264 (1956). We also look to the geographic reach of the group of sales or sellers to determine

the relevant market. *Brown Shoe Co. v. United States,* 370 U.S. 294, 324, 82 S.Ct. 1502, 1523, 8 L.Ed.2d 510 (1962). Further, "[b]ecause the ability of consumers to turn to other suppliers restrains a firm from raising prices above the competitive level, the definition of the 'relevant market' rests on a determination of available substitutes." *Rothery Storage,* 792 F.2d at 218.

> To define a market in product and geographic terms is to say that if prices were appreciably raised or volume appreciably curtailed for the product within a given area, while demand held constant, supply from other sources could not be expected to enter promptly enough and in large enough amounts to restore the old price and volume.

Id. (quoting L. Sullivan, *Antitrust* § 12, at 41 (1977)).

Although these concepts provide a shorthand for rule of reason analysis, we would be amiss to imply their application is necessarily facile. Each may be problematic:

> There is no subject in antitrust law more confusing than market definition. One reason is that the concept, even in the pristine formulation of economists, is deliberately an attempt to oversimplify—for working purposes—the very complex economic interactions between a number of differently situated buyers and sellers, each of whom in reality has different costs, needs, and substitutes. Further, when lawyers and judges take hold of the concept, they impose on it nuances and formulas that reflect administrative and antitrust policy goals. This adaption is legitimate (economists have no patent on the concept), but it means that normative and descriptive ideas become intertwined in the process of market definition.

United States Healthcare, Inc. v. Healthsource, Inc., 986 F.2d 589, 598 (1st Cir.1993). By defining the relevant market, however, we identify the firms that compete with each other. Plugged into the market power inquiry, we may then determine whether the alleged anticompetitive activity restrained trade, that is, raised price or reduced output.

V. Issuer Market

This case illustrates both the utility and difficulties of the market power tool. In this lawsuit, Sears and Visa USA stipulated "the relevant market is the general purpose

charge card market in the United States." 819 F.Supp. at 966. Presently, the only participants in this market are Visa USA, MasterCard, American Express, Citibank (Diners Club and Carte Blanche), and Sears (Discover Card). Competition among these five firms to place their individual credit cards into a consumer's pocket is called *intersystem.* "Interbrand competition is the competition among the manufacturers of the same generic product ... and is the primary concern of antitrust law." *Continental T.V., Inc. v. GTE Sylvania Inc.,* 433 U.S. 36, 52 n. 19, 97 S.Ct. 2549, 2558 n. 19, 53 L.Ed.2d 568 (1977).

In its complaint, Sears alleged the amendment to Bylaw 2.06 represented a concerted refusal to deal which unreasonably ***967** restrained trade in the general purpose charge card market. The parties agreed, and the testimony clearly established that in this relevant market competition occurs only at the issuer level. That is, to the extent that Visa USA is in the market, it operates in the *systems* market, not the *issuer* market. Its *members* issue cards, competing with each other to offer better terms or more attractive features for their individual credit card programs. This is *intrasystem* competition.

The issuer market, thus, remains atomistic, each issuer financial institution, bank, or other entity being independent from another.[11] Although Sears does not dispute this characterization of the market, it contends it attempted to launch its Prime Option program under the Visa aegis to "compete more effectively" at the issuer level. By offering multiple credit cards, Discover and Prime Option Visa, Sears contended it would then "strengthen competition."

11 Although approximately 6,000 financial institutions separately are issuers in the association, setting fees, interest rates, and other conditions, approximately 19,000 "participating members" offer cards under their own names and utilize the services of their issuing bank. Robert E. Litan, *Consumers, Competition, and Choice, The Impact of Price Controls on the Credit Card Industry,* March 1992.

If the general credit card issuer market is the relevant market, however, the evidence the district court relied upon to deny the Rule 50(b) motion belies Sears' contention and calls into question the definition of relevant market the court apparently adopted. First, the district court recounted the market shares of each intersystem competitor: "Visa was estimated to possess 45.6% of the nationwide general purpose charge card market; MasterCard, 26.4%; American Express, 20.5%; Discover Card, 5.5%; and Diners Club, 2.0%." 819 F.Supp. at 966 (footnote omitted). Within Visa USA's intersystem share, aggregated to include MasterCard issuers as well, the district court noted the evidence showed "in 1991 the ten largest issuers of Visa and MasterCard accounted for approximately 48% of the total Visa/MasterCard charge volume. The top-ten issuers were Citicorp, First Chicago, AT & T, Chase Manhattan, MBNA America, Bank of America, Nationsbank, Chemical Bank, Banc One, and Wells Fargo Bank. The largest issuer, Citicorp, accounted for approximately $42.5 billion in charge volume in 1991—representing approximately 15.8% of the Visa/MasterCard market and 11.4% of the entire general purpose charge card market." *Id.* at 966 n. 8.

While these raw figures may suggest Visa USA possesses market power in the intersystem market, the parties have established a different paradigm. By their agreement, the context of this case was intended to focus on the issuance of credit cards as the relevant market. Indeed, that is the market the district court defined for the jury. To determine, therefore, whether Visa USA possesses market power, we must compare *issuers,* the point where both Sears and Visa USA agreed they compete. At that level, testimony from both Sears and Visa experts established Discover Card is the second largest issuer preceded only by Citicorp in terms of charge volume, that is, what consumers owe on their credit cards.

Based on the district court's figures, Citicorp's charge volume represented about 15.8% of the Visa/MasterCard market share, aggregated at 72% of the general purpose credit card market. If we compare issuers' charge volume, our calculations demonstrate Citicorp's is 21.9% in the relevant market, while that of Sears Discover Card is 5%. Neither figure reflects *at the issuer* level that Visa USA through its members possesses market power.

Nevertheless, Sears' expert, Dr. James Kearl, upon whom the district court relied to conclude the evidence was sufficient to establish Visa USA's market power, explained he looked at the collective, aggregated shares of Visa and MasterCard, because "we have a collective rule, bylaw 2.06 ... I found that the collective share was very large, and as a consequence my conclusion was that the collective rule was *an exercise of market power.*" (italics added). Dr. Kearl opined the association members

> have both incentive and the ability to exercise that market power. They have the incentive because this market share was ***968** large and they want to protect that market share. And they also had the incentive because since this is large, *if they can keep prices up or from falling they can make a lot of money.*

(italics added).

Second, despite the stipulation on the relevant market, "the market relevant to the legal issue before the court," *1993 Supplement,* at 535, the testimony reflects that Sears, in fact, sought to expand its competition not specifically in the general purpose credit card market but in a segment of that market represented by financial institutions or banks. For example, Sears' executive, William O'Hara, stated, "We were trying to compete *in that segment* of the general purpose credit card market called the bank association segment." (emphasis added.) Visa USA's witness, Richard Rosenberg, explained he voted for Bylaw 2.06, believing that because a non-bank like Dean Witter did not have to comply with certain requirements imposed on banks like the Community Reinvestment Act, Sears would have a competitive advantage over its bank rivals.

Indeed, albeit the stipulation, as the trial progressed, the "relevant market" devolved into *Visa USA*'s *share* of the defined market.

Thus, the legal issue was transformed, equating exclusion from Visa USA to exclusion from the market.[12] The evidence, however, does not support this mutation. The district court recognized five active rivals presently compete at the intersystem level. Of that market, for example, Citicorp represents 21.9%, American Express 20.5%, and Sears 5%. At the issuer level, where intrasystem competition occurs, the court found, and the parties' experts agreed, the market is remarkably unconcentrated.[13] Given the wide range of interest rates and terms offered by various issuers and Sears' recognized intersystem strength, we are at a loss to find the evidence to support the district court's contrary conclusion.

12 This revision of the market distinguishes this case from *Reazin v. Blue Cross & Blue Shield of Kan.,* 899 F.2d 951 (10th Cir.), *cert. denied,* 497 U.S. 1005, 110 S.Ct. 3241, 111 L.Ed.2d 752 (1990), upon which Sears relies.

13 Ironically, the district court rejected Visa USA's argument that the present market is highly concentrated, such that admitting Sears would constitute a violation of section 7 of the Clayton Act. After discussing the Herfindahl–Hirschman Index (HHI), which is used to determine market concentration, the district court rejected Visa USA's aggregation of market shares, stating "the court agrees with Visa's expert Professor Schmalensee that *each* individual issuer of Visa and MasterCard cards should be included in the HHI analysis, resulting in a system HHI of below 500." *SCFC ILC, Inc. v. Visa U.S.A., Inc.,* 819 F.Supp. 956, 994 (D.Utah 1993). This figure represents an unconcentrated market.

From this standpoint, even if Visa USA possesses market power, Dr. Kearl's testimony that Visa USA exercised that market power in *its ability* to make collective rules misses the point in the context of joint ventures. "A joint venture made more efficient by ancillary restraints, is a fusion of the productive capacities of the members of the venture." *Rothery Storage,* 792 F.2d at 230. The very existence of a joint venture in the first instance is premised on a pooling of resources to affect competition in some manner and is made functional through some form of cooperative behavior or rule-making. However, the Court has made clear, as previously discussed, cooperative conduct alone is not prohibited.

Hence, it is not the rule-making *per se* that should be the focus of the market power analysis, but the effect of those rules—whether they increase price, decrease output, or otherwise capitalize on barriers to entry that potential rivals cannot overcome. Although Dr. Kearl testified "if they can keep prices up or from falling they can make a lot of money" to support his conclusion Visa USA possesses market power, there was no evidence that price had been increased, output had decreased, or other indicia of anticompetitive activity had occurred.

Thus, without any eye on effect, the very exercise of rule-making became the factual basis for rule of reason condemnation of Bylaw 2.06. Consequently, rule-making was not only divorced from its functional analysis but also from the facts of the case. "When an expert

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opinion is not supported by sufficient facts to validate it in the eyes of the law, or when indisputable record facts contradict or ***969** otherwise render the opinion unreasonable, it cannot support a jury's verdict." *Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp.,* 509 U.S. 209, ——, 113 S.Ct. 2578, 2598, 125 L.Ed.2d 168 (1993). In this complex area, the Court cautioned, "Expert testimony is useful as a guide to interpreting market facts, but it is not a substitute for them." *Id.*

We believe the evidence cited by the district court to conclude Visa USA possessed market power is insufficient as a matter of law. Although the district court did not end its rule of reason inquiry upon that finding, the conclusion set the path for its uncharted journey upon a landscape of speculation, conjecture, and theoretical harm. The consequence is the finding of liability based on tendentious and conclusory statements, none of which amounts to evidence of restraint of trade. [14]

14 In particular, Sears' disincentive argument provides the widest array of speculation and raises concerns about its standing to represent the supposed injury of others hoping to start up proprietary charge cards. Nevertheless, the parties each shared in charting the court's terrain.

VI. Efficiency Justifications

We therefore return to the two-step analysis previously discussed to assess the procompetitive justifications of Bylaw 2.06 to counteract Sears' allegation the restraint is unreasonable. Visa USA maintained it instituted Bylaw 2.06 to protect its property from intersystem competitors who otherwise would enjoy a free ride at this time of entry. Its general counsel, Bennett Katz, described technological advancements Visa USA achieved and incentives for innovation to system-wide competition generated. In a letter informing Sears of the Board's action, he stated, "As I indicated to you by phone, we believe that intersystem competition should be preserved and enhanced; membership by Greenwood Trust Co. would have the opposite effect." Describing the industry as small, "we only have three basic competitors ... Visa and MasterCard ... American Express and Discover," Katz expressed concern about government regulation if the existing competition diminished or Visa USA became too large. [15] In addition, there was testimony that after duality was permitted, MasterCard and Visa competed less aggressively, consumers regarding the two cards often as interchangeable. Other witnesses expressed concern, for example, about Sears' threat to their own profits; the effect a big player like Sears would have on the many small banks that compete in the Visa USA association; and Sears' likely ability to become a Board member and privy to confidential information.

15 In testimony, Katz explained, not only was Justice Department scrutiny a concern, but also "attorneys general around the country who had been looking at Visa and deciding whether it is too large."

Against these justifications, Sears offered testimony about a two-stage strategy in which

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it had always planned to enter the market first with its Discover Card and then with a low-cost Visa card; that marketing the Prime Option card as a Discover Card program would not meet the objectives of "Sears' branding strategy," and that consumers would be harmed by being denied the opportunity to select a Prime Option Visa card from the possible choices in the general charge card market. Broadly, Sears promised a low-cost, competitive alternative to the existing market's cards and elicited, through expert testimony, the prospect of other similarly situated potential intersystem competitors being excluded and discouraged from offering new rival cards because of Bylaw 2.06.

Most of this evidence relied upon by the district court is irrelevant to the central antitrust question posed, however. First, intent to harm a rival, protect and maximize profits, or "do all the business if they can," *Ball Memorial Hosp.,* 784 F.2d at 1325, is neither actionable nor sanctioned by the antitrust laws. "Competition, which is always deliberate, has never been a tort, intentional or otherwise." *Olympia Equip. Leasing Co. v. Western Union Tel. Co.,* 797 F.2d 370, 379 (7th Cir.1986), *cert. denied,* 480 U.S. 934, 107 S.Ct. 1574, 94 L.Ed.2d 765 (1987). "Most businessmen don't like their competitors or for that matter competition. They want to ***970** make as much money as possible and getting a monopoly is one way of making a lot of money." *Id.* Thus, evidence that a Board member voted for Bylaw 2.06 to discourage price competition within Visa USA may reveal a mental state but is not an objective basis upon which section 1 liability may be found. If Bylaw 2.06 is not "objectively anticompetitive the fact that it was motivated by hostility to competitors ... is irrelevant." *Id.* (citation omitted).

What we ask under section 1 is whether the alleged restraint is reasonably related to Visa USA's operation and no broader than necessary to effectuate the association's business. *NaBanco,* 779 F.2d at 592, 601. That is, is Bylaw 2.06 ancillary, "subordinate and collateral ... [making] the main transaction more effective in accomplishing its purpose," which is to provide credit card services to its members? *Rothery Storage,* 792 F.2d at 224. If it is not ancillary, does it restrain trade in a manner which alters the structure of the general purpose credit card market and, thus, harms consumers?

We think the analysis in *Rothery Storage* helps us resolve this question. There, Atlas Van Lines adopted a new policy to prohibit any affiliated company from handling interstate hauling both under its own name as well as under the Atlas name. The policy was intended to prevent its affiliates from using Atlas equipment, facilities, and services for interstate hauling while independently negotiating contracts for their own accounts.[16] Atlas announced the rule was necessary to prevent its agents from benefiting from a free ride, increasing Atlas' liability for interstate shipments while using Atlas' resources without any attendant return of revenue.

16 The new policy responded as well to deregulation of the moving industry. Although regulatory constraints figured in the analysis, the

> resolution of the central issue was not dependent on that context.

> Atlas has required that any moving company doing business as its agent must not conduct independent interstate carrier operations. Thus, a carrier agent, in order to continue as an Atlas agent, must either abandon its independent interstate authority and operate only under Atlas' authority or create a new corporation (a 'carrier affiliate') to conduct interstate carriage separate from its operation as an Atlas agent. Atlas' agents may deal only with Atlas or other Atlas agents.
>
> *Id.* at 217.[17] Several Atlas carrier agents claimed the policy constituted a group boycott and filed a complaint under section 1.

17 That is, its interstate rivals can no longer compete in interstate hauling both as Atlas agents and as independent agents. The policy, then, is analogous to the rule at issue here.

After a thorough and well-reasoned analysis, the D.C. Circuit rejected plaintiffs' claim, based not simply on the evidence Atlas did not possess market power in the market for the interstate carriage of used household goods, but also on the conclusion the new rule was ancillary to Atlas' main enterprise, enhancing consumer welfare by creating efficiency. *Id.* at 223. What improved the company's efficiency, the court found, was the elimination of the free ride:

> The restraints preserve the efficiencies of the nationwide van line by eliminating the problem of the free ride. There is, on the other hand, no possibility that the restraints can suppress market competition and so decrease output.

Id. at 229. This conclusion was built on the foundation of *BMI, NCAA,* and *Northwest Wholesale Stationers.*

Similarly, Visa USA urges its concern about protecting the property it has created over the years and preventing Sears and American Express,[18] successful rivals, from profiting by a free ride does not represent a refusal to deal or group boycott but is reasonably necessary to ensure the effective operation of its credit card services. It urges Bylaw 2.06 avoids "free-riding, an unlevel playing field, and the added costs that Sears would impose on VISA members by taking advantage of a brand and operating systems that it not only had done nothing to create but had chosen to compete against." Visa USA contends Sears does not need Visa USA ***971** to compete in the relevant market and cannot demonstrate it can only issue a low-cost card with Visa USA's help.

18 We note that American Express has never participated in this lawsuit.

Sears urges the justification is pretext. "In this case, the issue is whether the selective exclusion imposed by Visa's Bylaw 2.06 is ancillary to Visa's legitimate purposes as an open industry association." Sears contends Visa USA is a network joint venture, one whose

integrative efficiencies actually grow as its membership increases. To accept Visa USA's analogy to a research venture, one expending individual talent and resources in a small laboratory only to be forced to include rival researchers, Sears argues, is naive. It protests everyone gets into Visa USA except Sears itself. In support, Sears relies on the bulwarks of exclusionary conduct cases.

We do not believe either precedent or policy compels Sears' position, however. For example, *United States v. Terminal R.R. Ass'n of St. Louis,* 224 U.S. 383, 32 S.Ct. 507, 56 L.Ed. 810 (1912) (joint venture railroad companies that acquired Terminal Company, which controlled bridge across Mississippi River, approaches, and terminal at St. Louis, must admit rivals to permit use of facilities on nondiscriminatory terms), involved a "most extraordinary" situation in St. Louis, "and we base our conclusion in this case, in a large measure, upon that fact." *Id.* at 405, 32 S.Ct. at 513–14. In that setting, mandating the combined railroad companies admit their competitors merely permitted joint ownership of common facilities. "The defendants had not built or created anything except a combination to take over existing facilities." *1993 Supplement* ¶ 736.1, at 841.

Similarly, *Associated Press v. United States,* 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945) (joint venture news gathering agency must provide reasonable access to excluded firms), never stated a joint venture cannot exclude anyone. The Court's prohibition of the membership restriction was focussed particularly on the operation of the rule itself, where an individual Associated Press member could singly veto a rival's access to its local market. More importantly, the joint venture, "the largest news agency," was factually unique: its news gathering and dissemination capacity could not be duplicated and represented in and of itself a limitation on nonmembers. *Id.* at 13, 65 S.Ct. at 1421.[19]

19 *Terminal Railroad* and *Associated Press* are the roots of the essential facility analysis in antitrust. *See* Phillip E. Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles,* 58 Antitrust L.J. 841 (1990).

We would also distinguish the much-quoted language in *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.,* 472 U.S. 585, 105 S.Ct. 2847, 86 L.Ed.2d 467 (1985) (ski company's decision not to participate in an all-mountain lift ticket violated section 2). In that case, defendant ski company justified its refusal to continue offering an all-mountain lift ticket by asserting it had no duty to engage in joint marketing with a competitor. The Court responded by observing:

> The absence of a duty to transact business with another firm is, in some respects, merely the counterpart of the independent businessman's cherished right to select his customers and his associates. The high value that we have placed on the right to refuse to deal with other firms does

not mean that the right is unqualified.

Id. at 601, 105 S.Ct. at 2856 (footnote omitted). In qualifying that right, the Court noted in the context of section 2 the refusal to deal had the effect of making "an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years ... Ski Co.'s decision to terminate the all-Aspen ticket was thus a decision by a monopolist to make an important change in the character of the market." *Id.* at 603–04, 105 S.Ct. at 2858.

None of these conditions is present in this case. Bylaw 2.06 did not alter the character of the general purpose credit card market or change any present pattern of distribution. *Id.* Nor did it bar Sears from access to this market. There was no evidence Sears could only introduce a Prime Option card with Visa USA's help or that Visa USA's exclusion from its joint venture disabled Sears from developing its new card under the Discover mantle. More importantly, there was no evidence the bylaw harms consumers, the focus ***972** of the alleged violation. Indeed, the evidence established the current market in general purpose credit cards is structurally competitive, issuers targeting different consumer groups and consumer needs. In this market, Sears already competes vigorously. Surely, if its goal is to compete *more effectively* in that market, we do not believe this objective constitutes the proverbial sparrow the Sherman Act protects. "[A] producer's loss is no concern of the antitrust laws, which protect consumers from suppliers rather than suppliers from each other." *Stamatakis Indus.,* 965 F.2d at 471.[20]

20 Indeed, when the question becomes whether the restraint is reasonably necessary to achieve the joint venture's goals, "[e]xclusivity of venture membership will not generally be regarded as suspect." *1993 Supplement* ¶ 1506, at 1115. The Department of Justice has stated:

> [S]electivity in the membership of a joint venture often enhances a joint venture's procompetitive potential. Forcing joint ventures to open membership to all competitors (or to license the product of an R & D joint venture to all who seek licenses) would decrease the incentives to form joint ventures ... For example, the inability to exclude those who would bring little or nothing to the joint venture, or those who would fail to share fully in the risks, would decrease the efficiency of the joint venture and reduce the expected reward from successfully accomplishing the joint venture's mission. An enforcement policy that denied a joint venture the ability to select its members might also encourage firms to forego risky endeavors in the hope of being able to gain access through antitrust litigation to the fruits of the successful endeavors of others. Thus, the Department [of Justice] generally will be concerned about a joint venture's policy of excluding others only if (i) an excluded

> firm cannot compete in a related market or markets ... in which the joint venture members are currently exercising market power without having access to the joint venture and (ii) there is no reasonable basis related to the efficient operation of the joint venture for excluding other firms.
>
> Justice Department, International Operations Antitrust Enforcement Policy 42 (Nov. 10, 1988) (CCH Supp.) (quoted in *1993 Supplement* ¶ 1506, at 1115).

Given Visa USA's justification the bylaw is necessary to prevent free-riding in a market in which there was no evidence price was raised or output decreased or Sears needed Visa USA to develop the new card, we are left with a vast sea of commercial policy into which Sears would have us wade. To impose liability on Visa USA for refusing to admit Sears or revise the bylaw to open its membership to intersystem rivals, we think, sucks the judiciary into an economic riptide of contrived market forces. Whatever currents Sears imagines Visa USA has wrongly created, we believe can be better corrected by the marketplace itself. The Sherman Act ultimately must protect competition, not a competitor, and were we tempted to collapse the distinction, we would distort its continuing viability to safeguard consumer welfare.

VII. Conclusion

Reversal of the district court's order denying Visa USA's Rule 50(b) motion further dissipates the preemptive strike Visa USA attempted by requesting injunctive relief under section 7 of the Clayton Act. The reasoning which underpins our reversal of the district court's order and leaves the present entities in the market unchanged obviates scrutiny under section 7 of the Clayton Act. The district court properly denied relief.

We therefore **REVERSE** the district court's order holding Visa USA liable under section 1 of the Sherman Act. However, we **AFFIRM** its denial of an injunction to Visa USA under section 7 of the Clayton Act for reasons consistent with this opinion.

All Citations

36 F.3d 958, 63 USLW 2258, 1994-2 Trade Cases P 70,725

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675 F.3d 215
United States Court of Appeals,
Third Circuit.

John Ivan SUTTER, M.D.
v.
OXFORD HEALTH
PLANS LLC, Appellant.

No. 11–1773.
|
Argued Nov. 17, 2011.
|
Opinion Filed: April 3, 2012.
|
As Amended April 4, 2012.

Synopsis

Background: Health plan moved to vacate arbitrator's award authorizing class arbitration of dispute regarding plan's alleged failure to make prompt and accurate reimbursement payments to physicians participating in primary care physician agreement. The United States District Court for the District of New Jersey, Garrett E. Brown, J., 2011 WL 734933, authorized class arbitration, and plan appealed.

The Court of Appeals, Fuentes, Circuit Judge, held that arbitrator did not exceed his powers by construing the parties' arbitration agreement to authorize class arbitration.

Affirmed.

Procedural Posture(s): On Appeal.

Attorneys and Law Firms

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***217** Eric D. Katz, Esq. [ARGUED], Mazie, Slater, Katz & Freeman, Roseland, NJ, for Appellee.

Before: FUENTES, CHAGARES, Circuit Judges, and POGUE, Judge. *

* Hon. Donald C. Pogue, Chief Judge, United States Court of International Trade, sitting by designation.

OPINION OF THE COURT

FUENTES, Circuit Judge:

Oxford Health Plans, LLC, and Dr. John Ivan Sutter are parties to a Primary Care Physician Agreement, drafted by Oxford, which contains a broad arbitration clause. Neither the arbitration clause nor any other provision of the agreement makes express reference to class arbitration. Nevertheless, when a dispute arose regarding Oxford's alleged failure to make prompt and accurate reimbursement payments to participating physicians, an arbitrator construed the broad text of the clause to authorize class arbitration. Oxford contends that the Supreme Court's decision in *Stolt–Nielsen S.A. v. AnimalFeeds International Corp.,* ––– U.S. ––––, 130 S.Ct.

1758, 176 L.Ed.2d 605 (2010), requires vacatur of the award authorizing class arbitration. We disagree, and we will affirm the Order of the District Court denying Oxford's motion to vacate the award.

I

By their 1998 Primary Care Physician Agreement (the "Agreement"), the parties agreed that Sutter would provide primary care health services to members of Oxford's managed care network in exchange for compensation at predetermined reimbursement rates. They also agreed to arbitrate their disputes under the Agreement by a clause that states:

> No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the Rules of the American Arbitration Association with one arbitrator.

(App. 55).

A dispute arose in April 2002, when Sutter accused Oxford of engaging in a practice of improperly denying, underpaying, and delaying reimbursement of physicians' claims for the provision of medical services. Sutter filed a complaint on behalf of himself and a class of health care providers against Oxford and other health insurers in New Jersey Superior Court, alleging breach of contract and other violations of New Jersey law. Oxford moved to compel arbitration of Sutter's claims against it under the Agreement. Sutter opposed the motion, arguing that referral of the class claims to individual arbitration would violate New Jersey public policy. He urged the Superior Court either to refuse to enforce the clause or to certify the class before sending the claims to arbitration. In October 2002, the Superior Court granted Oxford's motion to compel arbitration and ordered that all procedural issues, including those of class certification, be resolved by the arbitrator.

The parties commenced arbitration before William L.D. Barrett and submitted to him the question of whether the arbitration clause in their Agreement allows for class arbitration. By memorandum and order dated September 23, 2003, he determined that it does. Framing the question as one of contract construction, the arbitrator turned first to the text of the arbitration clause. He described the clause as "much broader even than the usual broad ***218** arbitration clause;" it was "unique in [his] experience and seem[ed] to be drafted to be as broad as can be." (App. 47). The arbitrator thus determined that the clause's first phrase, "No civil action concerning any dispute arising under this Agreement shall be instituted before any court," embraces all conceivable court actions, including class actions. Because the clause's second phrase sends "all such disputes" to arbitration, he reasoned that class disputes must also be arbitrated. Thus, the arbitrator concluded that the clause expressed the parties' intent to authorize class arbitration

"on its face." (App. 48). He observed that an express carve-out for class arbitration would be required to negate this reading of the clause. He mused, however, that it would be bizarre for the parties to have intended to make class action impossible in any forum. Since he found the clause unambiguous, the arbitrator did not reach Sutter's argument that any ambiguity in the clause should be construed against its drafter, Oxford. The arbitrator subsequently incorporated this clause construction into his Partial Final Class Determination Award, dated March 24, 2005.

In April 2005, Oxford filed a motion to vacate the award in the District Court, arguing that the arbitrator had exceeded his powers and manifestly disregarded the law by ordering class arbitration. The District Court denied Oxford's motion in October 2005, and a panel of this Court affirmed in February 2007. *Sutter v. Oxford Health Plans, LLC,* No. 05–CV–2198, 2005 U.S. Dist. LEXIS 25792 (D.N.J. Oct. 31, 2005), *aff'd* 227 Fed.Appx. 135 (3d Cir.2007). The arbitration thereafter proceeded on a classwide basis.

This action represents Oxford's second foray into federal court to vacate the award authorizing class arbitration as in excess of the arbitrator's powers. Since Oxford's first unsuccessful attempt at vacatur, the Supreme Court decided *Stolt–Nielsen S.A. v. AnimalFeeds International Corp.,* ––U.S. ––, 130 S.Ct. 1758, 176 L.Ed.2d 605 (2010), in which it held that an arbitral panel had exceeded its authority by allowing class arbitration when the parties had reached no agreement on the issue. *See id.* at 1775. Oxford contends that *Stolt–Nielsen* controls this case and compels the conclusion that the arbitrator's construction of the clause was in excess of his powers. Oxford first moved the arbitrator for reconsideration of his clause construction award, but the arbitrator distinguished *Stolt–Nielsen* and reaffirmed his construction of the parties' clause. Oxford then moved the District Court to vacate the arbitrator's most recent award or, in the alternative, to reconsider its own 2005 decision denying vacatur. The District Court denied Oxford's motion and granted Sutter's cross-motion to confirm the award. *Sutter v. Oxford Health Plans, LLC,* Nos. 05–CV–2198, 10–CV–4903, 2011 WL 734933, 2011 U.S. Dist. LEXIS 17123 (D.N.J. Feb. 22, 2011). Oxford appeals.

II

The District Court exercised diversity jurisdiction over this matter pursuant to 28 U.S.C. § 1332. We have jurisdiction over Oxford's appeal under the Federal Arbitration Act, 9 U.S.C. § 16(a)(1)(D) ("An appeal may be taken from ... an order ... confirming or denying confirmation of an award or partial award."). [1]

1 Anomalously, the Federal Arbitration Act creates a body of federal substantive law without creating any independent federal-question jurisdiction. *Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.,* 460 U.S. 1, 25 n. 32, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). It does, however, confer appellate jurisdiction, including over interlocutory judicial orders. *See* 9 U.S.C. § 16(a). In a court

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of competent jurisdiction, assuming ripeness, interlocutory arbitral awards on the availability of class arbitration are reviewable under the Act. *See Stolt–Nielsen,* 130 S.Ct. at 1766–67 & n. 2.

***219** On appeal from a district court's ruling on a motion to confirm or vacate an arbitration award, we review its legal conclusions de novo and its factual findings for clear error. *First Options of Chicago, Inc. v. Kaplan,* 514 U.S. 938, 947–48, 115 S.Ct. 1920, 131 L.Ed.2d 985 (1995), *aff'g* 19 F.3d 1503, 1509 (3d Cir.1994); *China Minmetals Materials Imp. & Exp. Co. v. Chi Mei Corp.,* 334 F.3d 274, 278–79 (3d Cir.2003).

A more deferential standard of review applies to the arbitration award itself. We do not entertain claims that an arbitrator has made factual or legal errors. Rather, mindful of the strong federal policy in favor of commercial arbitration, we begin with the presumption that the award is enforceable. *See Moses H. Cone Memorial Hosp. v. Mercury Const. Corp.,* 460 U.S. 1, 24–25, 103 S.Ct. 927, 74 L.Ed.2d 765 (1983). An award may be vacated only upon one of the four narrow grounds enumerated in the Federal Arbitration Act:

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

9 U.S.C. § 10(a). These grounds are exclusive and may not be supplemented by contract. *Hall St. Assocs., L.L.C. v. Mattel, Inc.,* 552 U.S. 576, 584, 128 S.Ct. 1396, 170 L.Ed.2d 254 (2008), *overruling Roadway Package Sys., Inc. v. Kayser,* 257 F.3d 287, 288 (3d Cir.2001). In sum, when parties agree to resolve their disputes before an arbitrator without involving the courts, the courts will enforce the bargains implicit in such agreements by enforcing arbitration awards absent a reason to doubt the authority or integrity of the arbitral forum. *See id.* at 586, 128 S.Ct. 1396 (characterizing the exclusive statutory bases for vacatur as "egregious departures from the parties' agreed-upon arbitration").

The basis for vacatur asserted in this case, § 10(a)(4) of the Federal Arbitration Act, permits district courts to vacate awards when arbitrators exceed their powers. "Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit." *Volt Info. Scis., Inc. v. Bd. of Trustees of Leland Stanford Junior Univ.,* 489 U.S. 468, 479, 109 S.Ct. 1248, 103 L.Ed.2d 488 (1989). By contractually restricting the issues they will arbitrate, the individuals with whom they will arbitrate, and the arbitration procedures that will govern, parties to an arbitration agreement may place limits upon the arbitrator's powers that are enforceable by the courts. *See Puleo*

v. Chase Bank USA, N.A., 605 F.3d 172, 181 (3d Cir.2010) (en banc). An arbitrator oversteps these limits, and subjects his award to judicial vacatur under § 10(a)(4), when he decides an issue not submitted to him, grants relief in a form that cannot be rationally derived from the ***220** parties' agreement and submissions, or issues an award that is so completely irrational that it lacks support altogether. *Ario v. Underwriting Members of Syndicate 53 at Lloyds for the 1998 Year of Account,* 618 F.3d 277, 295–96 (3d Cir.2010) (citing *Mut. Fire, Marine & Inland Ins. Co. v. Norad Reins. Co.,* 868 F.2d 52, 56 (3d Cir.1989)). In other words, the task of an arbitrator is to interpret and enforce a contract. When he makes a good faith attempt to do so, even serious errors of law or fact will not subject his award to vacatur. *See Brentwood Med. Assocs. v. United Mine Workers of Am.,* 396 F.3d 237, 243 (3d Cir.2005) (upholding an arbitration award despite the arbitrator's inexplicable reliance on language not found in the relevant agreement). But when the arbitrator "strays from interpretation and application of the agreement and effectively 'dispenses his own brand of industrial justice,' " he exceeds his powers and his award will be unenforceable. *Stolt–Nielsen,* 130 S.Ct. at 1767 (quoting *Major League Baseball Players Ass'n. v. Garvey,* 532 U.S. 504, 509, 121 S.Ct. 1724, 149 L.Ed.2d 740 (2001) (per curiam) (quoting *Steelworkers v. Enterprise Wheel & Car Corp.,* 363 U.S. 593, 597, 80 S.Ct. 1358, 4 L.Ed.2d 1424 (1960))).[2]

2 Like the Supreme Court, this Court will refer to the federal common law developed under *Textile Workers Union of Am. v. Lincoln Mills of Ala.,* 353 U.S. 448, 456–57, 77 S.Ct. 912, 1 L.Ed.2d 972 (1957), for judicial review of labor arbitration awards under the Labor Management Relations Act, 29 U.S.C. § 185, to elaborate the meaning of the Federal Arbitration Act's statutory grounds for vacatur. *See Swift Indus., Inc. v. Botany Indus., Inc.,* 466 F.2d 1125, 1130 & n. 11 (3d Cir.1972); *cf. Hall St.,* 552 U.S. at 585, 128 S.Ct. 1396 (suggesting without deciding that the judicially created manifest disregard of law ground for vacatur may be properly considered only as a judicial gloss on the statutory grounds); *Stolt–Nielsen,* 130 S.Ct. at 1768 n. 3 (same).

An arbitrator may exceed his powers by ordering class arbitration without authorization. In *Stolt–Nielsen,* the Supreme Court held that arbitrators may not infer parties' consent to class arbitration procedures solely from the fact of their agreement to arbitrate. 130 S.Ct. at 1775. Therefore, an arbitrator lacks the power to order class arbitration unless there is a contractual basis for concluding that the parties agreed to that procedure. *Id.*

III

Stolt–Nielsen arose out of a Department of Justice investigation which revealed that Stolt–Nielsen and other shipping companies were engaged in an illegal price fixing conspiracy. *Id.* at 1765. AnimalFeeds and other customers of the shipping companies brought class action antitrust lawsuits, which were consolidated by the Judicial Panel on Multidistrict Litigation. *Id.* AnimalFeeds' suit was subsequently referred to arbitration on the

basis of an arbitration clause in the "Vegoilvoy" charter party, a standard form shipping contract that AnimalFeeds had selected. *Id.* at 1764–65. When AnimalFeeds then sought to proceed in arbitration on a classwide basis, the parties agreed to submit the issue of class arbitration to a panel of three arbitrators. *Id.* at 1765. After hearing argument and testimony, the arbitrators concluded that class arbitration was permitted. *Id.* at 1766.

Before the arbitrators, the parties stipulated that the arbitration clause in the Vegoilvoy charter party was "silent" with respect to class arbitration, in the sense that they had not reached any agreement on that issue. *Id.* at 1766. "Counsel for AnimalFeeds explained to the arbitration panel that the term 'silent' did not simply mean that the clause made no express reference to class arbitration. Rather, he ***221** said, 'all parties agree that when a contract is silent on an issue there's been no agreement that has been reached on that issue.' " *Id.* Thus, the arbitration clause was silent but "not ambiguous so as to call for parol evidence" because "the parties were in complete agreement regarding their intent." *Id.* at 1770 (internal quotation marks omitted). The arbitrators were bound to conclude that the parties intended neither to authorize nor to preclude class arbitration. *See id.*

The parties' stipulation left the arbitrators unable to apply traditional principles of contract interpretation. It obviously "left no room for an inquiry regarding the parties' intent, and any inquiry into that settled question would have been outside the panel's assigned task." *Id.* Nor could the panel construe the text of the arbitration clause because, in light of the parties' stipulation, "the particular wording of the charter party was quite beside the point." *Id.*

"Because the parties agreed their agreement was 'silent' in the sense that they had not reached any agreement on the issue of class arbitration, the arbitrators' proper task was to identify the rule of law that governs in that situation." *Id.* at 1768 (identifying the Federal Arbitration Act, federal maritime law, and New York law as possible sources of a governing rule). Instead, the panel based its decision that class arbitration was permitted on the parties' failure to contractually preclude the procedure and on other arbitral decisions construing other clauses to allow class arbitration. *Id.* In so doing, the Supreme Court held, the arbitrators impermissibly assumed the power of a common law court to fashion a rule of decision. *Id.* at 1769. By doing so, rather than interpreting the contract under the governing law, the arbitrators exceeded their powers within the meaning of § 10(a)(4) of the Federal Arbitration Act. *Id.* at 1770.

The Supreme Court held that "a party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 1775 (emphasis in original). The Court therefore faulted the arbitrators for imposing class arbitration in the absence of any agreement on the issue and on the basis that the parties had not intended to *preclude* class arbitration. *Id.* Although parties may implicitly authorize arbitrators to adopt necessary procedures, the Court held that "[a]n implicit agreement to authorize class-action arbitration ... is not a term that the arbitrator may infer solely from the fact of the parties'

agreement to arbitrate." *Id.* "[T]he differences between bilateral and class-action arbitration are too great for arbitrators to presume ... that the parties' mere silence on the issue of class-action arbitration constitutes consent to resolve their disputes in class proceedings." *Id.* at 1776; *see also AT & T Mobility LLC v. Concepcion,* ––– U.S. ––––, 131 S.Ct. 1740, 1752, 179 L.Ed.2d 742 (2011) (further articulating the "fundamental" differences between bilateral arbitration and class arbitration). [3]

3 In *AT & T Mobility LLC v. Concepcion,* the Supreme Court held that the Federal Arbitration Act preempts a California common law rule invalidating class waivers in arbitration clauses as unconscionable. *See* ––– U.S. ––––, 131 S.Ct. 1740, 1753, 179 L.Ed.2d 742 (2011). The Court found its decision in *Stolt–Nielsen* to be "instructive." *Id.* at 1750. Because class arbitration necessarily sacrifices the informality, speed, and cost savings of arbitration and increases the stakes without increasing the level of judicial scrutiny available under the Federal Arbitration Act, the Court found "it hard to believe that defendants would bet the company with no effective means of review, and even harder to believe that Congress would have intended to allow state courts to force such a decision." *Id.* at 1752. Recognizing that parties *could* agree to class arbitration if they so chose, the Court held that this procedure may not be *required* by state law. *Id.* at 1752–53.

***222** *Stolt–Nielsen* did not establish a bright line rule that class arbitration is allowed only under an arbitration agreement that incants "class arbitration" or otherwise expressly provides for aggregate procedures. *Stolt–Nielsen,* 130 S.Ct. at 1776 n. 10; *Jock v. Sterling Jewelers Inc.,* 646 F.3d 113, 124 (2d Cir.2011) (holding that an arbitrator did not exceed her powers by ruling that class arbitration was allowed under an agreement lacking an express class provision). The Court underscored this point, writing, "We have no occasion to decide what contractual basis may support a finding that the parties agreed to authorize class-action arbitration. Here, as noted, the parties stipulated that there was 'no agreement' on the issue of class-action arbitration." 130 S.Ct. at 1776 n. 10; *see also id.* at 1783 (Ginsburg, J., dissenting) ("[T]he Court does not insist on express consent to class arbitration.").

Instead, *Stolt–Nielsen* established a default rule under the Federal Arbitration Act: "[A] party may not be compelled under the FAA to submit to class arbitration unless there is a contractual basis for concluding that the party *agreed* to do so." *Id.* at 1775 (emphasis in original). Absent a contractual basis for finding that the parties agreed to class arbitration, an arbitration award ordering that procedure exceeds the arbitrator's powers and will be subject to vacatur under § 10(a)(4). [4]

4 Thus, the District Court misstated the law when it wrote that the arbitrator must decide whether the arbitration clause "forbids" class arbitration. *See Sutter v. Oxford Health Plans, LLC,* 2011 WL 734933, at *4, 2011 U.S. Dist. LEXIS 17123, at *12 (quoting

> *Vilches v. The Travelers Cos.,* 413 Fed.Appx. 487, 492 (3d Cir.2011)). It is evident from the District Court's discussion, however, that it properly understood that *Stolt–Nielsen* allows class arbitration only where the parties intend to authorize it, as the arbitrator found they did in this case. In any event, upon de novo review under the appropriate standard, we conclude that the arbitration award stands.

IV

Oxford argues that the clause construction award at issue in this case should be vacated because the arbitrator exceeded his powers under *Stolt–Nielsen.* According to Oxford, "the arbitrator found that the arbitration clause between Sutter and Oxford is silent on the issue of class arbitration, but he went on to conclude that the clause permits class arbitration in light of its breadth and the absence of a class arbitration exclusion." (Appellant's Br. at 14). Oxford charges that the arbitrator imposed his own default rule, in derogation of *Stolt–Nielsen* and New Jersey law, based on his own conceptions of public policy.

As an initial matter, we reject Oxford's attempt to cast this case in the mold of *Stolt–Nielsen.* The arbitration clause in its Agreement does not refer to class arbitration. Yet it is not "silent" in the way that the Vegoilvoy charter party was "silent" in *Stolt–Nielsen,* and Oxford equivocates when it suggests otherwise.[5] No ***223** stipulation between Oxford and Sutter is conclusive of the parties' intent and, indeed, the parties dispute whether or not they intended to authorize class arbitration. Therefore, the arbitrator in this case was not constrained to conclude that the parties did not intend to authorize class arbitration or, on the other hand, to identify a contrary default rule of New Jersey law. *Cf. Stolt–Nielsen,* 130 S.Ct. at 1769–70. His decision to order class arbitration is within his authority so long as it stands on a contractual basis. *See id.* at 1775.

5 Oxford seems to suggest that an arbitration provision is "silent" whenever the words "class arbitration" are not written into the text of the arbitration clause. This rule finds no support in *Stolt–Nielsen.* It would effectively impose on all contracting parties an obligation to use the words "class arbitration" to signal their intention to authorize class arbitration. But *Stolt–Nielsen* did not purport to restrict the freedom of contracting parties in this way. Rather, it repeatedly emphasized that the fundamental duty of the arbitrator and the courts to effectuate parties' intentions. *Stolt–Nielsen,* 130 S.Ct. at 1773–74. Oxford's approach would cabin the freedom of contracting parties, safeguarded by the Federal Arbitration Act, to structure their arbitration provisions as they see fit. *See id.* at 1774 ("Underscoring the consensual nature of private dispute resolution, we have held that parties are generally free to structure their arbitration agreements as they see fit.") (internal quotation marks and citation omitted).

As Oxford concedes, the arbitrator did articulate a contractual basis for his decision

to order class arbitration. Appropriately, the arbitrator made first resort to the text of the arbitration clause:

> No civil action concerning any dispute arising under this Agreement shall be instituted before any court, and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the Rules of the American Arbitration Association with one arbitrator.

(App. 55). He reasoned that the clause's first phrase, "No civil action concerning any dispute arising under this Agreement shall be instituted before any court," is broad enough to include class actions. Thus, its second phrase, "and all such disputes shall be submitted to final and binding arbitration in New Jersey, pursuant to the Rules of the American Arbitration Association with one arbitrator," sends all conceivable civil actions —including class actions—to arbitration. In other words, the phrase "no civil action ... shall be instituted in any court" meant that a class action may not be instituted in a court of law. "All such disputes" must go to arbitration.

Oxford attacks the contractual basis for the arbitrator's decision by asserting that the arbitrator's purported examination of the parties' intent was pretext for the imposition of his policy preferences. *See Stolt–Nielsen,* 130 S.Ct. at 1769–70 (concluding that the arbitral panel had impermissibly imposed its preferred policy notwithstanding its references to the parties' intent, where the parties stipulated that they had formed no intent). According to Oxford, if the arbitrator were actually desirous of determining the parties' intent, he would have sought it not in the text of their agreement to arbitrate but instead in their briefing before the New Jersey Superior Court. In that forum, Sutter opposed enforcement of the arbitration agreement on the ground that it would send the dispute to individual arbitration, which, he argued, would be contrary to New Jersey public policy. Oxford argues that Sutter's submissions to the Superior Court, together with Oxford's own representations that its Agreement did not contemplate arbitration on a classwide basis, were tantamount to a stipulation that the parties did not intend to authorize class arbitration. *Cf. id.* at 1766.

Oxford's argument lacks force because Sutter's litigation position in the Superior Court is not conclusive, or even particularly probative, of the meaning of a clause drafted solely by Oxford. *Cf. id.* at 1775 (relying on the stipulation of the sophisticated business entity that had selected the charter party). We observe, further, that Sutter's litigation position was not uniform: Sutter alternatively urged the Superior Court to certify the class before sending the claims to arbitration, and he argued before the arbitrator that the ***224** clause could be construed to affirmatively authorize class arbitration. Without a conclusive statement of the parties' intent or clear evidence of arbitral overreaching, we must conclude that the arbitrator performed his duty appropriately and endeavored to give effect to the parties' intent. In this light, Oxford's allegations of pretext are

simply dressed-up arguments that the arbitrator interpreted its agreement erroneously.

The remainder of Oxford's arguments are similarly uncognizable claims of factual and legal error. In particular, Oxford argues that the arbitrator improperly inferred the parties' intent to authorize class arbitration from the breadth of the parties' arbitration agreement and from its failure to preclude class arbitration. In his clause construction award, the arbitrator remarked that the parties' arbitration clause was unique in its breadth. Construing the broad text and structure of the clause, he concluded that the parties affirmatively intended to authorize arbitration on a classwide basis. Then, given his construction of the clause, the arbitrator noted that an express exception for class arbitration would be required to carve out and prohibit class arbitration. Oxford submits that the arbitrator thereby relied on two grounds that *Stolt–Nielsen* had expressly proscribed.

The arbitrator unquestionably relied on the breadth of the arbitration agreement, but *Stolt–Nielsen* does not proscribe such reliance. Rather, it acknowledges the relevance of an arbitration agreement's breadth to the determination of whether it authorizes class arbitration. In *Stolt–Nielsen,* the Supreme Court concluded that the arbitration panel "imposed its own conception of sound policy" in derogation of its duty to interpret the arbitration agreement and apply the law. 130 S.Ct. at 1769. The Court acknowledged indications that were arguably contrary to its conclusion: The panel had referred to the parties' intent and had commented on the breadth of the arbitration agreement. *Id.* at 1770. But the Court nonetheless held that these references and comments could not overcome the parties' stipulation that they had reached no agreement on the issue of class arbitration. In light of the parties' stipulation, "the panel had no occasion to ascertain the parties' intention" and "the particular wording of the charter party was quite beside the point." *Id.* (internal quotation marks omitted). The lesson from this discussion is that where, as here, the parties' intent with respect to class arbitration is in question, the breadth of their arbitration agreement is relevant to the resolution of that question.

Stolt–Nielsen does prohibit an arbitrator from inferring parties' consent to class arbitration solely from their failure to preclude that procedure, but the arbitrator did not draw the proscribed inference in this case. Rather, the arbitrator construed the text of the arbitration agreement to authorize and require class arbitration. Then he observed that an express carve-out for class arbitration would have made it unavailable even under the clause's otherwise broad language. As the arbitrator later articulated when he revisited his construction of the clause in light of *Stolt–Nielsen,* the lack of an express exclusion was merely corroborative of his primary holding that the parties' clause authorized class arbitration; it was not the basis of that holding. Thus, the arbitrator did not impermissibly infer the parties' intent to authorize class arbitration from their failure to preclude it.

We are satisfied that the arbitrator endeavored to interpret the parties' agreement within the bounds of the law, and we cannot say that his interpretation was totally irrational. Nothing

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more is required ***225** under § 10(a)(4) of the Federal Arbitration Act.

V

Because the arbitrator did not exceed his powers by construing the parties' arbitration agreement to authorize class arbitration, we will affirm the Order of the District Court.

All Citations

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32 Cal.App.5th 478
Court of Appeal, Second District, Division 8, California.

UNITED FARMERS AGENTS ASSOCIATION, INC., Plaintiff and Appellant,
v.
FARMERS GROUP, INC. et al., Defendants and Respondents.

B282541
|
Filed 2/22/2019

Synopsis

Background: Trade association for insurance agents brought action against insurers, seeking declaratory judgment as to provisions in agent appointment agreements between agents and insurers. Following a bench trial, the Superior Court, Los Angeles County, No. BC497447, Gregory W. Alarcon, J., entered judgment for insurers, and association appealed.

Holdings: The Court of Appeal, Bigelow, P.J., held that:

association had standing to pursue claims related to office locations and performance standards as stated in individual agent agreements;

association lacked standing to bring unconscionability claim;

association lacked standing to pursue claim that agreements precluded insurers from sharing with competitors customer information acquired by agents; and

agreements did not preclude insurers from terminating an agency based on dissatisfaction with agent's office location or failure to meet performance standards.

Affirmed.

Procedural Posture(s): On Appeal; Judgment.

****31** APPEAL from a judgment of the Superior Court of Los Angeles County. Gregory W. Alarcon, Judge. Affirmed. (Los Angeles County Super. Ct. No. BC497447)

Attorneys and Law Firms

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Opinion

BIGELOW, P. J.

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***482** Plaintiff United Farmers Agents Association, Inc. (UFAA) is a trade association whose members are insurance agents. It brought this declaratory relief action against Farmers Insurance Exchange, Truck Insurance Exchange, Fire Insurance Exchange, Mid-Century Insurance Company, and Farmers New World Life Insurance Company (the Companies) as well as Farmers Group, Inc. (FGI). After a bench trial, the court found UFAA lacked standing to pursue its claims and failed to demonstrate it was entitled to declaratory relief. The court entered judgment in favor of the defendants, and UFAA appealed. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

The Parties

The Companies are a group of insurers that mutually contract to sell insurance products through independent-contractor insurance agents.[1] FGI provides the Companies non-claim related administrative and management services. It is the attorney-in-fact of Farmers Insurance Exchange, and the parent company of the attorneys-in-fact of Fire Insurance Exchange and Truck Insurance Exchange.

[1] We use the terms "agent" and "agency" in their colloquial senses.

UFAA is a nonprofit professional trade association whose members are insurance agents that sell the Companies' insurance products. It has approximately 1,900 members, ****32** 600 of whom are located in California.

Agent Appointment Agreements

In order to sell the Companies' insurance products, an agent must enter into a form "Agent Appointment Agreement," which defines the terms and conditions of the agent's relationship to the Companies. This case concerns several contractual terms common to Agent Appointment Agreements signed prior to 2009 (the Agreements), some of which date back to the 1970s.

Under the Agreements, agents must extend the right of first refusal to the Companies to bind insurance coverage on behalf of applicants solicited and procured by the agents. In exchange, the Companies pay commissions and ***483** provide agents advertising assistance, educational and training programs, and necessary manuals, forms, and policyholder records.

The Agreements require agents "provide the facilities necessary to furnish insurance services to all policyholders of the Companies including ... servicing all policyholders of the Companies in such a manner as to advance the interests of the policyholders, the Agent, and the Companies." The Agreements further state that an agent "shall, as an independent contractor, exercise sole right to determine the time, place and manner in which the objectives of this Agreement are carried out, provided only that the Agent conform to normal good business practice, and to all State and Federal laws governing the conduct of the Companies and their Agents."

The Agreements allow any party to terminate the contract by giving three months' written notice (the no-cause termination provision).

However, if a party breaches the Agreement, the other party may terminate the Agreement on 30 days' written notice. The Companies may also terminate the Agreement immediately if the agent embezzles funds, switches insurance to another carrier, abandons the agency, is convicted of a felony, or makes willful misrepresentations material to the operation of the agency.

If the Agreement is terminated by any party, the agent generally is entitled to "contract value," which amounts to approximately one year's worth of commissions. In exchange, the agent must agree not to solicit, accept, or service his or her customers for a period of one year.

Complaint

On December 17, 2012, UFAA filed a complaint alleging the Companies and FGI (collectively, Farmers)[2] engage in numerous practices that violate the terms of the Agreements.[3] In relief, UFAA sought four declarations from the court: (1) the Agreements' no-cause termination provisions are unconscionable; (2) the Agreements preclude Farmers's use of performance programs and imposition of discipline based on an agent's failure to meet performance standards; (3) the Agreements preclude Farmers from taking adverse action against agents based on the "location, nature, hours, and types of offices maintained" by the agents; and (4) the Agreements preclude Farmers from sharing customer information acquired by agents with competitors, such as 21st Century Insurance (21st Century).

2 We refer to the defendants collectively only for the sake of simplicity. We do not mean to imply they are a single entity or enterprise.

3 We discuss the nature of the alleged practices in more detail below.

484** ***Trial

The court conducted a bench trial over the course of three weeks. We summarize ****33** the relevant evidence related to each claim.

Unconscionability of the No-Cause Termination Provisions

On the unconscionability issue, the court heard testimony from numerous Farmers representatives[4] that it was Farmers's policy to read an Agreement to an agent line-by-line before the agent signed the Agreement. The Agreements were presented on a take-it-or-leave-it basis, meaning the agents were not allowed to change any language.

4 For the sake of simplicity, we use the term "Farmers representative" to refer to individuals affiliated with Farmers who are not UFAA members.

Several agents testified that, before signing the Agreements, Farmers representatives made additional representations about the termination provisions. Multiple agents, for example, said they were told Farmers would only terminate an agency if the agent engaged in one of the behaviors expressly prohibited by the Agreements. Another agent said she was told Farmers would never terminate an Agreement under the no-

cause termination provision because it would constitute discrimination. Others said they were simply told Farmers does not enforce the no-cause termination provision.

In response, Farmers presented testimony from representatives who were present while hundreds of agents signed their Agreements. The representatives said they had never witnessed an agent being told an agency would be terminated only for reasons specifically listed in the Agreements. Farmers also introduced testimony from three agents who said they did not discuss the no-cause termination provisions with a Farmers representative prior to signing their Agreements.

Performance Standards

Numerous agents testified that they had meetings with Farmers representatives to discuss their poor sales of new policies and retention of existing policies. After the meetings, each agent received a letter with the following language: "[Y]ou have been experiencing a loss of policies in force, insufficient new business production and/or low policy retention are significant factors contributing to this loss of policies. ... [¶] ... Based on the overall business results generated by your agency, please be advised that continuation of your Agent Appointment Agreement depends on your ability to immediately achieve a significant improvement in your agency's business results." Some of the agents' Agreements were eventually terminated.

***485** Farmers did not dispute that it considers an agent's performance when deciding whether to terminate an Agreement. Numerous Farmers representatives testified that, in determining whether to terminate an Agreement, they consider whether the agent has achieved an "acceptable business result." In making that determination, they look at the agent's "overall business results," including sales of new policies, retention of existing policies, and profitability. They do not, however, impose any specific production requirements or sales quotas.

Office Locations

UFAA presented testimony from two agents whose Agreements were terminated, at least in part, because they were operating their agencies out of personal residences. A Farmers district manager also testified that an agent in his district had been terminated for operating an agency out of her home, and another had been terminated for using a shipping store ****34** as an office address. He explained that Farmers prefers agents work out of commercial office buildings, in part because it does not want clients "to be walking through somebody's living room to meet with their agent."

The director of FGI's home office agencies testified that Farmers does not have a policy regarding the type of office space an agent must use, but it does require that the space be professional and adequate for servicing policyholders. The director explained that, because an agent must accept premium payments from any Farmers policyholder, it is important that the agent's office is identifiable as a location where Farmers business is conducted.

The head of commercial sales for FGI testified that Farmers does not condone agents working out of personal residences, but it may be acceptable depending on the circumstances and whether the agent is meeting the needs of customers. He explained that he has seen situations where agents have built additions onto their homes to use as private offices, which allowed the agents to conduct business with their customers in a professional environment.

Farmers's expert testified that it is normal for exclusive agency insurance carriers, like Farmers, to require their agents conform to good business practices. In the expert's opinion, it is not a good business practice, and it is not in the best interests of the customers or the insurance companies, for a customer to have to go into a personal residence to do business with the agent.

Sharing of Customer Information

The court heard testimony that 21st Century is owned by some of the Companies and managed by FGI. Unlike the Companies, 21st Century is a ***486** direct writer of insurance, meaning it markets directly to consumers for the acquisition of new business. As a result, it is able to offer lower premiums than insurance companies that sell through agents. Customers can contact 21st Century and purchase insurance from it over the phone and the internet.

The court heard testimony that agents are required to enter their customers' information into Farmers's electronic database. Several Farmers representatives testified that Farmers does not share such information with 21st Century.

Farmers agent Thana Robinson, however, suspected Farmers shared her customers' information with 21st Century. According to Robinson, she wrote an insurance policy for two customers, which was in effect for a year. Robinson expected the customers would renew the policy, but they did not. Instead, the customers were issued a new policy, which had a "J-code" in Farmers's database. Robinson was not certain precisely what the J-code signified, but she believed it meant the customers obtained the new policy through 21st Century. Robinson admitted she did not know if 21st Century obtained the customers' information through the database.

Farmers agent Jose Soberanes also suspected Farmers was sharing customer information with 21st Century. According to Soberanes, he would frequently provide quotes to prospective customers and enter their information into Farmers's database. A few months later, he would call the customers, only to be told they had obtained insurance from 21st Century.

Statement of Decision and Judgment

After trial, the court issued a detailed statement of decision, in which it found in Farmers's favor on each claim. At the outset—and as discussed more fully below—the ****35** court determined that UFAA lacked standing to pursue its claims. Although this finding was sufficient to warrant dismissal, the court nonetheless proceeded to consider the merits of UFAA's claims.

The court first determined that UFAA failed to demonstrate the no-cause termination provision is unconscionable. The court explained: "UFAA's members reported having

varying experiences as to what, if anything, was said about the three-month written termination provision, and what was said to them about the contract in general. UFAA's procedural unconscionability theory rests on the premise all of its California member agents were orally told the same thing at the time of signing the [Agreements]. ... The evidence did not support this."

The court next determined that, because UFAA failed to show the no-cause termination provisions are unconscionable, its claims related to Farmers's ***487** performance and office standards necessarily fail as well. The court explained: "If, as the [Agreement] permits, [Farmers] can terminate the [Agreement] on three-months' notice, for no reason at all, the fact that they have or even let others know, some criteria (e.g., performance results, business practices) that they consider in the exercise of their unbridled discretion does not make those factors improper. To the contrary, it protects [the] use of such factors as wholly within their unconstrained discretion."

Even without the no-cause termination provisions, the court found Farmers's alleged use of performance and office standards does not violate the Agreements. It explained that, as the principal, Farmers has "the right to set expectations about how much insurance is to be sold for the relationship to continue, even if the contract allows the agent to determine the time, place and manner in meeting those expectations. [Farmers has] the right to expect positive business results and to determine what constitutes adequate results." The court further explained that the Agreements require agents to comply with "normal good business practices, and to all State and Federal laws governing the conduct of [Farmers] and their Agents." The court found the evidence on what constitutes a "normal good business practice" demonstrated that it encompasses an appropriate business location and normal business hours. Accordingly, "[a]sking the agent to maintain an office outside the home and to maintain normal business hours is not at variance with the agreement."

With respect to the claim that Farmers improperly shared customer information with 21st Century, the court found UFAA presented "no admissible or credible evidence of any instance where customer information was disseminated to 21st Century" by Farmers.

Finally, the court declined UFAA's invitation to find that FGI and the Companies are a single enterprise.

Judgment, Motion for New Trial, and Appeal

On February 14, 2017, the court entered judgment in favor of Farmers and against UFAA. UFAA moved for a new trial, which the court denied on April 19, 2017. UFAA timely appealed.

DISCUSSION

I. UFAA Had Standing to Pursue Some of Its Claims

Before considering the merits of UFAA's claims, we must first determine whether it had standing to assert them. We find UFAA had associational ***488** standing to pursue its

claims related to performance ****36** and office standards, but did not have standing to pursue its other claims.

A. Standard of Review

Standing is a question of law that we review independently. (*San Luis Rey Racing, Inc. v. California Horse Racing Bd.* (2017) 15 Cal.App.5th 67, 73, 222 Cal.Rptr.3d 453.) "However, where the superior court makes underlying factual findings relevant to the question of standing, we defer to the superior court and review the findings for substantial evidence." (*Ibid.*)

B. Associational Standing

"A litigant's standing to sue is a threshold issue to be resolved before the matter can be reached on its merits. [Citation.] Standing goes to the existence of a cause of action [citation], and the lack of standing may be raised at any time in the proceedings." (*Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles* (2006) 136 Cal.App.4th 119, 128, 38 Cal.Rptr.3d 575, italics omitted.)

" '[A] plaintiff generally must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.' " (*Independent Roofing Contractors v. California Apprenticeship Council* (2003) 114 Cal.App.4th 1330, 1341, 9 Cal.Rptr.3d 477.) The doctrine of associational standing is an exception to this general rule. It provides that, even in the absence of injury to itself, "an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." (*Hunt v. Washington Apple Advertising Comm'n* (1977) 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (*Hunt*).) These are often referred to as the *Hunt* requirements.

The doctrine of associational standing "was developed in the federal courts under the 'case or controversy' requirement of article III of the United States Constitution." (*Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court* (2009) 46 Cal.4th 993, 1003, 95 Cal.Rptr.3d 605, 209 P.3d 937.) Nonetheless, California courts have applied the doctrine, including the three *Hunt* requirements. (See, e.g., *Airline Pilots Assn. Internat. v. United Airlines, Inc.* (2014) 223 Cal.App.4th 706, 726, 167 Cal.Rptr.3d 467; *Apartment Assn. of Los Angeles County, Inc. v. City of Los Angeles, supra*, 136 Cal.App.4th at p. 129, 38 Cal.Rptr.3d 575; *Brotherhood of Teamsters & Auto Truck Drivers v. Unemployment Ins. Appeals Bd.* (1987) 190 Cal.App.3d 1515, 1521, 236 Cal.Rptr. 78; see also ***489** *Amalgamated Transit Union, Local 1756, AFL-CIO v. Superior Court, supra,* 46 Cal.4th at p. 1003, 95 Cal.Rptr.3d 605, 209 P.3d 937.) We consider federal case law concerning associational standing persuasive, although not binding. (See *Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1234, 94 Cal.Rptr.2d 740, disapproved on other grounds in *Save the Plastic Bag Coalition v. City of Manhattan Beach* (2011) 52 Cal.4th 155, 169–170, 127 Cal.Rptr.3d 710, 254 P.3d 1005.)

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C. Analysis

The trial court determined that UFAA lacked standing because it failed to satisfy the third *Hunt* requirement, that "neither the claim asserted nor the relief requested requires the participation of individual members of the lawsuit." Although the court gave multiple reasons for its decision, it seemed to be motivated in large part by a belief that associational standing is lacking if the participation of ****37** any association member is necessary to adjudication of the claim. This interpretation of the third *Hunt* requirement was too restrictive.

The United States Supreme Court has explained that the third *Hunt* requirement "is best seen as focusing on ... matters of administrative convenience and efficiency." (*Food and Commercial Workers v. Brown Group, Inc.* (1996) 517 U.S. 544, 557, 116 S.Ct. 1529, 134 L.Ed.2d 758.) Although it could be read as foreclosing associational standing if *any* individual member participates in the lawsuit, federal courts have found associational standing despite the need for participation of *some* individual members. (See, e.g., *Hospital Council v. City of Pittsburgh* (3d Cir. 1991) 949 F.2d 83 (*Hospital Council*); *Pennsylvania Psychiatric v. Green Spring Health* (3d Cir. 2002) 280 F.3d 278 (*Pennsylvania Psychiatric*); *Retired Chicago Police Ass'n v. City of Chicago* (7th Cir. 1993) 7 F.3d 584 (*Retired Chicago Police Ass'n*); *Association of Amer. Physicians v. Texas Medical* (5th Cir. 2010) 627 F.3d 547 (*Amer. Physicians*).)

In *Hospital Council, supra*, 949 F.2d 83, for example, the Third Circuit held that an association of hospitals had standing to pursue claims that governmental entities were forcing its members to make payments in lieu of taxes, despite the fact that adjudication of the claims would likely require trial testimony from the member hospitals' officers and employees. The court explained that the third *Hunt* requirement is a paraphrase of a prior statement by the Supreme Court that associational standing is appropriate unless "the individual participation of each injured party [is] *indispensable* to proper resolution of the cause." (*Warth v. Seldin* (1975) 422 U.S. 490, 511, 95 S.Ct. 2197, 45 L.Ed.2d 343, italics added.) Therefore, the court reasoned, the participation of *some* members is not fatal to associational ***490** standing, so long as the participation of *each* member is not required. (*Hospital Council, supra*, 949 F.2d at pp. 89–90.) In a subsequent decision, the Third Circuit further clarified that associational standing may be appropriate where the plaintiff alleges "systemic policy violations that will make extensive individual participation unnecessary." (*Pennsylvania Psychiatric, supra*, 280 F.3d at p. 286.)

The Seventh Circuit adopted the Third Circuit's interpretation of the third *Hunt* requirement in *Retired Chicago Police Ass'n, supra*, 7 F.3d 584. In that case, the court found an association had standing to pursue its claim that a city breached certain binding representations made to its members, despite the fact that it might need to rely on evidentiary submissions of some of its members to establish the breach. (*Id.* at p. 603.) The court explained: "We can discern no indication ... that the Supreme Court intended to limit representational standing to cases in which it would not be necessary to take any evidence

from individual members of an association. Such a stringent limitation on representational standing cannot be squared with the Court's assessment in *Brock* [5] of the efficiencies for both the litigant and the judicial system from the use of representational standing. Rather, the third prong of *Hunt* is more plausibly read as dealing with situations in which it is necessary to establish 'individualized proof,' [citation], for litigants not before the court in order to support the cause of action." (*Retired Chicago Police Ass'n, supra*, 7 F.3d at pp. 601–602, fn. omitted.)

5 *Automobile Workers v. Brock* (1986) 477 U.S. 274, 106 S.Ct. 2523, 91 L.Ed.2d 228.

The Fifth Circuit considered the issue more recently in *Amer. Physicians, supra*, 627 F.3d 547. In that case, an association of physicians sought declaratory and injunctive relief related to a medical board's ****38** alleged improper use of anonymous complaints and retaliatory actions against its member physicians. After looking to *Hospital Council* and *Retired Chicago Police Association*, the court concluded the association had standing. The court explained: "If practiced systemically, such abuses may have violated or chilled [the association's] members' constitutional rights. Proof of these misdeeds could establish a pattern with evidence from the Board's witnesses and files and from a small but significant sample of physicians. Because [the association] also seeks only equitable relief from these alleged violations, both the claims and relief appear to support judicially efficient management if associational standing is granted." (*Amer. Physicians, supra*, 627 F.3d at p. 553.)

We find the federal courts' reasoning in these cases persuasive and adopt their interpretation of the third *Hunt* requirement. Accordingly, the fact that UFAA relied on testimony from some of its members to support its claims is not dispositive. Instead, we must determine whether UFAA's claims and ***491** requested relief required extensive participation from, or individualized proof related to, its agent members, keeping in mind the focus of the requirement is administrative convenience and efficiency.

1. UFAA Had Standing to Pursue its Claims Related to Office Locations and Performance Standards

UFAA argues it had standing to pursue its claims related to office locations and performance standards because it was possible to establish the claims without individualized factual inquiries related to each agent.[6] We agree.

6 Farmers does not address this issue in its respondent's brief.

With respect to these claims, UFAA essentially sought declarations that the Agreements categorically forbid Farmers from terminating an agency based, in whole or in part, on its dissatisfaction with the agent's office location or failure to meet performance standards. Farmers did not dispute that it considers such factors when deciding whether to terminate an Agreement, and has, in fact, terminated Agreements for such reasons. The only issue before the court, therefore, was whether

the Agreements permit Farmers to terminate agencies for such reasons. To decide that issue, the court needed only interpret and construe the terms of the Agreements; it did not need to consider evidence related to individual agents or the specific circumstances under which their agencies were terminated. The claims, therefore, satisfied the third *Hunt* requirement, and UFAA had standing to pursue them. [7]

7 The parties do not dispute that these claims satisfied the other *Hunt* requirements.

2. UFAA Lacked Standing to Pursue its Unconscionability Claim

UFAA lacked associational standing to pursue its claim seeking a declaration that the no-cause termination provisions are unconscionable. [8]

8 Although UFAA generally argues that the court erred in finding it lacked associational standing, it does not specifically address why it had standing to pursue its unconscionability claim. Even though standing is an issue we review independently, we are not required to develop UFAA's arguments for it, and its failure to provide reasoned argument and citations to authority has forfeited the point. (*Reyes v. Kosha* (1998) 65 Cal.App.4th 451, 466, fn. 6, 76 Cal.Rptr.2d 457 ["[a]lthough our review of a summary judgment is de novo, it is limited to issues which have been adequately raised and supported in plaintiffs' brief"]; *Niko v. Foreman* (2006) 144 Cal.App.4th 344, 368, 50 Cal.Rptr.3d 398 [" 'This court is not inclined to act as counsel for ... any appellant and furnish a legal argument as to how the trial court's rulings in this regard constituted an abuse of discretion' [citation], or a mistake of law."].) Nonetheless, we will exercise our discretion to consider the issue, as its resolution impacts UFAA's other claims.

A court may refuse to enforce contracts or clauses in contracts that are ****39** unconscionable. (Civ. Code, § 1670.5, subd. (a).) " '[U]nconscionability ***492** has both a "procedural" and a "substantive" element,' the former focusing on ' "oppression" ' or ' "surprise" ' due to unequal bargaining power, the latter on ' "overly harsh" ' or ' "one-sided" ' results. [Citation.] 'The prevailing view is that [procedural and substantive unconscionability] must *both* be present in order for a court to exercise its discretion to refuse to enforce a contract or clause under the doctrine of unconscionability.' [Citation.] But they need not be present in the same degree. 'Essentially a sliding scale is invoked which disregards the regularity of the procedural process of the contract formation, that creates the terms, in proportion to the greater harshness or unreasonableness of the substantive terms themselves.' [Citations.] In other words, the more substantively oppressive the contract term, the less evidence of procedural unconscionability is required to come to the conclusion that the term is unenforceable, and vice versa." (*Armendariz v. Foundation Health Psychcare Services, Inc.* (2000) 24 Cal.4th 83, 114, 99 Cal.Rptr.2d 745, 6 P.3d 669, abrogated on other grounds by *AT&T Mobility LLC v. Concepcion* (2011) 563 U.S. 333, 131 S.Ct. 1740, 179 L.Ed.2d 742.)

An unconscionability claim typically cannot be resolved simply by examining the face of the contract. (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1147, 163 Cal.Rptr.3d 269, 311 P.3d 184.) This is because "[u]nconscionability is a flexible standard in which the court looks not only at the complained-of term but also at the process by which the contractual parties arrived at the agreement and the larger context surrounding the contract, including its 'commercial setting, purpose, and effect.' [Citations.]" (*De La Torre v. CashCall, Inc.* (2018) 5 Cal.5th 966, 976, 236 Cal.Rptr.3d 353, 422 P.3d 1004.) An unconscionability determination is "highly dependent on context," (*Sanchez v. Valencia Holding Co., LLC* (2015) 61 Cal.4th 899, 911, 190 Cal.Rptr.3d 812, 353 P.3d 741) and "requires a court to examine the totality of the agreement's substantive terms as well as the circumstances of its formation to determine whether the overall bargain was unreasonably one-sided." (*Sonic-Calabasas A, Inc. v. Moreno, supra*, 57 Cal.4th at p. 1146, 163 Cal.Rptr.3d 269, 311 P.3d 184.)

Given the nature of an unconscionability determination—particularly the focus on the circumstances of the contract's formation and sliding scale approach—in most cases it will be difficult, if not impossible, for an association to establish its members' contracts are unconscionable without individualized proof and the participation of each member. While there may be limited circumstances under which it is possible, this is plainly not one of those cases.

***493** Although UFAA provided multiple reasons why the no-cause termination provisions are unconscionable—among them, that agents lacked bargaining power, the provisions are contained in contracts of adhesion, and the provisions are "extremely one-sided"—the focus of its claim was an allegation that Farmers had a uniform practice of informing its agents, prior to signing the Agreements, that it terminates contracts only for cause. In its closing argument, UFAA stressed the centrality of this alleged practice to its claim: "We are asking the court to declare that the three-month ****40** termination clause is unconscionable because agents are being told don't worry, Farmers never enforces it."[9] According to UFAA, this practice rendered every no-cause termination provision unconscionable because Farmers's representations constituted "substantive procedural deception," "negate[d] the reasonable expectations of the agent," and caused "unfair surprise."

9 On appeal, UFAA continues to maintain this alleged practice is the crux of its unconscionability claim.

To prove its claim at trial, UFAA presented representational testimony from several agents who said they were told something to the effect that Farmers terminates agencies only for cause. Farmers, however, maintained it did not have a practice of making such representations, and presented testimony from numerous representatives to support that assertion. After weighing this conflicting evidence, the trial court concluded UFAA failed to establish that Farmers had a uniform practice of informing agents that it terminates

Agreements only for cause, a finding UFAA does not challenge on appeal.

This factual finding was fatal to UFAA's associational standing. Absent a showing of a uniform practice, it was impossible for UFAA to establish its claim—that *every* no-cause termination provision is unconscionable—without presenting evidence regarding the specific representations made to each agent before he or she signed an Agreement.[10] Given the need for individualized proof and participation of each agent, UFAA failed to satisfy the third *Hunt* requirement and lacked standing to pursue its claim.[11]

10 We acknowledge it may have been possible for UFAA to establish its unconscionability claim without evidence of Farmers's representations to agents. UFAA, however, does not argue that point, and we consider it forfeited.

11 Even if UFAA had standing, its unconscionability claim failed on the merits for a similar reason. As discussed above, UFFA sought a declaration that *every* no-cause termination provision is unconscionable, which was premised on an allegation that Farmers informed each agent that it terminates contracts only for cause. UFAA, however, does not dispute that it failed to present sufficient evidence that Farmers made such representations to each agent. Without such evidence, UFAA could not establish that *every* no-cause termination provision is unconscionable. Accordingly, it was not entitled to its requested relief.

*494 3. UFAA Lacked Standing to Pursue its Claim Related to Sharing of Customer Information

UFAA also lacked associational standing to pursue its claim that the Agreements preclude Farmers from sharing with competitors customer information acquired by agents.[12] UFAA's claim was premised on an allegation that Farmers "systematically" shares such information with 21st Century, thereby interfering with the agents' business expectancies and violating the covenants of good faith and fair dealing contained in each Agreement. UFAA sought to establish its claim primarily through representative testimony from two agents, Robinson and Soberanes.

12 UFAA again failed to specifically address this issue in its appellate briefing, which has forfeited the point. Nonetheless, we will exercise our discretion to consider the merits of the issue.

The trial court, however, found the agents' testimony showed, at most, "isolated incidents" of Farmers sharing information with 21st Century. Given this finding, which UFAA does not contest, UFAA could establish its claim—that Farmers is interfering with and violating each agent's business expectancies and contractual agreements—only by presenting, ****41** for each individual agent, evidence that Farmers improperly shares customer information procured by that agent. Because of the need for individualized proof and extensive participation from each agent, the

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court properly determined that UFAA lacked associational standing to pursue this claim. [13]

13 Even if UFAA had standing, it has not shown the trial court erred in denying its claim on the merits. The trial court rejected UFAA's claim after finding it presented "no admissible or credible evidence of any instance where customer information was disseminated to 21st Century" by Farmers. UFAA suggests this was error because Robinson's testimony established that Farmers shared her customers' information with 21st Century. According to UFAA, there is no possible way the customers could have failed to renew their policy with Robinson, and then obtained a new policy through 21st Century, unless Farmers shared their information. We disagree. The court could have reasonably inferred from the evidence that 21st Century independently solicited Robinson's customers, or the customers independently reached out to 21st Century. Accordingly, Robinson's testimony did not compel a finding in UFAA's favor. (See *Sonic Manufacturing Technologies, Inc. v. AAE Systems, Inc.* (2011) 196 Cal.App.4th 456, 466, 126 Cal.Rptr.3d 301 [where an issue on appeal turns on failure of proof, appellant's evidence must be of such a character and weight as to leave no room for a judicial determination that it was insufficient to support a finding].)

II. UFAA Was Not Entitled to Declaratory Relief On Its Claims Related to Office Locations and Performance Standards

UFAA contends the trial court erred in refusing to declare that the Agreements preclude Farmers from terminating an agency based on its dissatisfaction with the agent's office location or failure to meet performance ***495** standards. As best we can tell, UFAA's primary argument is that consideration of such factors is improper because the Agreements do not expressly prohibit specific office locations or mandate performance standards. We are not persuaded.

" 'The fundamental goal of contractual interpretation is to give effect to the mutual intention of the parties.' [Citations.] 'Such intent is to be inferred, if possible, solely from the written provisions of the contract.' [Citations.] 'If contractual language is clear and explicit, it governs.' [Citation.]" (*State of California v. Continental Ins. Co.* (2012) 55 Cal.4th 186, 195, 145 Cal.Rptr.3d 1, 281 P.3d 1000.) We strive to "give effect to all of a contract's terms, and to avoid interpretations that render any portion superfluous, void or inexplicable." (*Brandwein v. Butler* (2013) 218 Cal.App.4th 1485, 1507, 161 Cal.Rptr.3d 728.)

UFAA is correct that that Agreements do not expressly prohibit specific office locations or require agents meet performance standards. Nonetheless, Farmers may terminate agencies for such reasons pursuant to the no-cause termination provision. Unlike the 30-day termination provision (which may be invoked only after a breach of the Agreement) and the no-notice termination provision (which

may be invoked only if the agent engages in enumerated conduct), the no-cause termination provision does not require any conditions precedent. The parties may invoke the provision and terminate the Agreement at any time, and for any or no reason, so long as they provide sufficient notice. It follows that Farmers may terminate an agency under the no-cause termination provision for reasons not specifically listed in the Agreement, including dissatisfaction with the agent's office location or failure to meet performance standards.

****42** UFAA's interpretation—that Farmers may terminate agencies only for reasons specifically listed in the Agreements—is unreasonable, as it renders the no-cause termination provision superfluous. The 30-day termination provision already allows the parties to terminate an Agreement for a breach. UFAA fails to explain how, under its interpretation, the no-cause termination provision would operate any differently, or why a party would ever invoke it rather than the 30-day termination provision.

UFAA suggests that allowing Farmers to terminate an agency for reasons other than those specifically listed in an Agreement would constitute a unilateral amendment to the Agreement. In support, it relies on the Nevada Supreme Court's decision in *MacKenzie Ins. v. National Ins*. (Nev. 1994) 110 Nev. 503, 874 P.2d 758. In that case, an insurance agency sued an insurer after the insurer unilaterally reduced the commission the agency would be paid from fifteen percent (pursuant to the terms of the agency agreement) to five percent. The ***496** trial court granted the insurer's motion for summary judgment, reasoning that, "since the relationship between [the agency] and [the insurer] was terminable by either party, with or without cause, the right of termination by written notice included the lesser right of imposing prospectively, changes in the conditions of the contract, including the terms of compensation." (*Id.* at p. 505, 874 P.2d 758.) The Nevada Supreme Court reversed, holding: "The trial court incorrectly ruled that either party to the written contract had the 'privilege of imposing prospectively, changes in the conditions of the contract.' [I]f this were true, and either party had actually had the 'privilege' of imposing unwanted changes in the contract on the other, then there would be no point in having a written contract which set the commission percentage agreed to be paid. The contract gives the parties an option to terminate by giving written notice; it does not give either party the 'privilege of imposing' unilateral changes 'in the conditions of the contract.' [The agency] had the right to receive the fifteen percent commission rate agreed-upon by the parties until the contract was terminated in accordance with its terms, unless, of course, [the agency] waived the required written notice or agreed expressly or impliedly to accept less than was provided for in the written contract." (*Id.* at p. 506, 874 P.2d 758.)

MacKenzie is readily distinguishable. Unlike the insurance company's attempt to reduce the agency's commission in *MacKenzie*—which was contrary to the express terms of the parties' contract—Farmers has an explicit right under the Agreements to terminate an agency without cause. Further, there is nothing in the Agreements that precludes Farmers from exercising that authority in the event it is dissatisfied with an agent's office location

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or failure to meet performance standards. It is absurd to argue that Farmers's exercise of a specifically enumerated contractual right amounts to an attempt to unilaterally rewrite the contract.

UFAA also suggests, in perfunctory fashion, that an agent's office location may never be a basis for termination because the Agreements designate agents independent contractors and give them the right to determine the time, place, and manner in which the objectives of the Agreements are to be carried out. UFAA does not specifically address, in any meaningful way, how these provisions constrain Farmers's authority under the no-cause termination provisions. [14] Consequently, we ****43** consider the point forfeited. (See *Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784–785, 79 Cal.Rptr.2d 273; *People v. DeSantis* (1992) 2 Cal.4th 1198, 1240, fn. 18, 9 Cal.Rptr.2d 628, 831 P.2d 1210.)

14 UFAA suggested in its complaint that Farmer's termination authority is limited by the implied covenant of good faith and fair dealing. UFAA, however, makes only passing reference to the implied covenant in its reply brief, and provides no meaningful analysis or authority on the issue.

***497** Even if we overlook the forfeiture, we do not agree that these provisions preclude Farmers from ever terminating an Agreement because of the agent's office location. An agent's authority to determine the time, place, and manner in which the objectives of the Agreement are to be carried out is expressly qualified by the requirement that the agent "conform to normal good business practice, and to all State and Federal laws governing the conduct of the Companies and their Agents." Therefore, even setting aside the no-cause termination provisions, Farmers may terminate an Agreement if the agent's office location violates state or federal law or does not conform to "normal good business practice."

UFAA maintains that the phrase "normal good business practice" is ambiguous, and therefore should be interpreted against Farmers, which drafted the contract. UFAA, however, does not provide even a hint as to what we should interpret the phrase to mean. Instead, it merely points to evidence that operating an agency out of a personal residence may constitute a "normal good business practice" under certain circumstances. While that may be true, it does not help UFAA, as it implies there are circumstances under which operating an agency out of a personal residence is not a "normal good business practice." If so, the Agreements cannot be said to categorically forbid Farmers from terminating an agency based on an agent's office location, as UFAA contends.

Nor are we persuaded that Farmers's authority to terminate an agency if dissatisfied with the agent's office location is necessarily inconsistent with the agents' designation as independent contractors. As UFAA correctly points out, an employer generally may exercise control over an independent contractor's results, but not the means by which the results are accomplished. (*S.A. Gerrard Co. v. Industrial Acc. Com.* (1941) 17 Cal.2d 411, 413, 110 P.2d 377; accord *Varisco v. Gateway Science & Engineering, Inc.* (2008) 166

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Cal.App.4th 1099, 1103, 83 Cal.Rptr.3d 393.) Nonetheless, an employer of an independent contractor may "retain some interest in the manner in which the work is done" without altering the relationship. (*Millsap v. Federal Express Corp.* (1991) 227 Cal.App.3d 425, 432, 277 Cal.Rptr. 807; see *Bates v. Industrial Acc. Com.* (1958) 156 Cal.App.2d 713, 718, 320 P.2d 167 ["Complete abnegation of control is not essential to the establishment of the status of independent contractor."].) Accordingly, the fact that Farmers may have some limited control over the agents' office locations does not necessarily render the agents something other than independent contractors. [15]

15 To determine whether our interpretation of the Agreements actually alters the agents' purported status as independent contractors would require consideration of numerous additional factors. (See *S. G. Borello & Sons, Inc. v. Department of Industrial Relations* (1989) 48 Cal.3d 341, 351, 256 Cal.Rptr. 543, 769 P.2d 399.) Because UFAA failed to discuss, or even acknowledge, any of those factors, we decline to consider the issue any further.

*498 III. UFAA's Single Enterprise Arguments Are Moot

UFAA contends the trial court erred in finding it failed to establish that FGI and the Companies are a single enterprise. It ****44** also contends the court erroneously excluded expert testimony on the issue. Because we conclude UFAA failed to establish its entitlement to relief on any of its claims, these arguments are moot and we need not consider them.

IV. UFAA's Arguments Related to the Motion for New Trial Are Meritless

UFAA contends the trial court erred in denying its motion for new trial. In support, it simply rehashes its arguments related to standing and the merits of its claims. We reject the arguments for the reasons discussed above.

DISPOSITION

The judgment is affirmed. Respondents are awarded costs on appeal.

We concur:

GRIMES, J.

WILEY, J.

All Citations

32 Cal.App.5th 478, 244 Cal.Rptr.3d 27, 19 Cal. Daily Op. Serv. 1690, 2019 Daily Journal D.A.R. 1424

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166 N.C.App. 216
Court of Appeals of North Carolina.

James WOOD and wife,
Pat Wood, Plaintiffs,
v.
BD & A CONSTRUCTION, L.L.C.,
and BD & A Realty & Construction,
Inc., and Bob DeGabrielle &
Associates, Inc., Defendants.

No. COA03–1296.
|
Sept. 7, 2004.

Synopsis
Background: Home owners brought breach of warranties, breach of implied warranty, negligence, negligent misrepresentation, breach of contract, and unfair and deceptive trade practices action against construction companies that designed and constructed their house. The Superior Court, Dare County, Dwight L. Cranford, J., granted construction companies' motion to dismiss. Homeowners appealed.

Holdings: The Court of Appeals, Thornburg, J., held that:

the fraud or willful and wanton negligence exception to the six year statute of repose based upon or arising out of the defective or unsafe condition of an improvement to real property did not apply to bar construction companies from asserting a statute of repose defense, and

construction companies were not equitably estopped from asserting a statute of repose defense to homeowners breach of warranty and negligence claims.

Affirmed.

Procedural Posture(s): On Appeal; Motion to Dismiss; Motion to Dismiss for Failure to State a Claim.

****312** Appeal by plaintiffs from order entered 1 August 2003 by Judge Dwight L. Cranford in Dare County Superior Court. Heard in the Court of Appeals 27 May 2004.

Attorneys and Law Firms

C. Everett Thompson, II, Elizabeth City, for plaintiff-appellants.

Poyner & Spruill, LLP, by J. Nicholas Ellis and Gregory S. Camp, Rocky Mount, for defendant-appellees.

Opinion

THORNBURG, Judge.

***217** Plaintiffs are the owners of a house and lot in Manteo, North Carolina. In 1995, plaintiffs contracted with defendants for the design and construction of the house. The house was substantially completed and certificates for occupancy were issued in April 1996.

Shortly after plaintiffs occupied the home, water intrusion leaks began to appear at various locations on the walls and around the ****313** windows and doors of the house. One of the

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major leaks involved water getting around the deck flashing and running down the inside and outside of the sheathing in one corner of the house. Defendants repaired this defect. Plaintiffs also experienced leaks around the windows of the master bedroom and the great room and two sliding doors. Defendants notified plaintiffs that there were problems with the Andersen windows in the house, which defendants felt might be the source of the continued leaks. The Andersen windows were replaced in early 1997.

In August 2002, plaintiffs undertook some maintenance to the house and discovered construction defects and damage to the house as a result of water intrusion. On 11 February 2003, plaintiffs filed the instant action alleging that the defects in the house resulted from latent defects in the design and construction of the house by defendants. Plaintiffs brought claims for breach of warranties, breach of implied warranty, negligence, negligent misrepresentation, breach of contract and unfair and deceptive trade practices. On 6 March 2003, defendants moved to dismiss the plaintiffs' complaint pursuant to N.C. Gen.Stat. § 1A–1, Rule 12(b)(6), asserting that plaintiffs' claims were barred by the applicable statutes of limitations and statutes of repose. The trial court granted defendants' motion to dismiss due to the expiration of the statute of repose found in N.C. Gen.Stat. § 1–50. Plaintiffs appeal.

Plaintiffs argue on appeal: (1) that the statute of limitations has not expired as the claim was not discovered until less than a year before the action was commenced; (2) that the defendants are equitably estopped from raising either the statutes of limitations or the statute of repose; and (3) that the statute of repose in ***218** N.C. Gen.Stat. § 1–50 does not apply as defendants' actions constituted fraud or willful or wanton negligence.

"In our review of the trial court's dismissal of this action pursuant to N.C. Gen.Stat. § 1A–1, Rule 12(b)(6), we must consider the allegations of the plaintiffs' complaint as true." *Arroyo v. Scottie's Professional Window Cleaning,* 120 N.C.App. 154, 155, 461 S.E.2d 13, 14 (1995), *disc. review improvidently allowed,* 343 N.C. 118, 468 S.E.2d 58 (1996). "A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of a complaint by presenting 'the question of whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some [recognized] legal theory.' " *Cage v. Colonial Building Co.,* 337 N.C. 682, 683, 448 S.E.2d 115, 116 (1994) (quoting *Lynn v. Overlook Dev.,* 328 N.C. 689, 692, 403 S.E.2d 469, 471 (1991)) (alteration in original). A motion should be granted if it appears to a certainty that a plaintiff is entitled to no relief under any set of facts which could be proved in support of the claim. *Cage,* 337 N.C. at 683, 448 S.E.2d at 116.

The applicable statute of repose is found in N.C. Gen.Stat. § 1–50(a)(5), which provides in part:

> No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than

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> six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.

N.C. Gen.Stat. § 1–50(a)(5)(a) (2003). This statute "is designed to limit the potential liability of architects, contractors, and perhaps others in the construction industry for improvements made to real property." *Lamb v. Wedgewood South Corp.,* 308 N.C. 419, 427–28, 302 S.E.2d 868, 873 (1983). Plaintiffs have the burden of proving that their cause of action was brought within the period of the applicable statute of repose. *Tipton & Young Construction Co. v. Blue Ridge Structure Co.,* 116 N.C.App. 115, 118, 446 S.E.2d 603, 605 (1994).

Plaintiffs' complaint alleges that the house was substantially complete in April 1996. This action was not filed until 11 February 2003, more than six years since the substantial completion of the house. The statute of repose would clearly apply in this case, though plaintiffs argue that defendants are precluded from relying on the ***219** statute of repose by virtue of N.C. Gen.Stat. § 1–50(a)(5)(e). N.C. Gen.Stat. § 1–50(a)(5)(e) provides:

> ****314** The limitation prescribed by this subdivision shall not be asserted as a defense by any person who shall have been guilty of fraud, or willful or wanton negligence in furnishing materials, in developing real property, in performing or furnishing the design, plans, specifications, surveying, supervision, testing or observation of construction, or construction of an improvement to real property, or a repair to an improvement to real property, or to a surety or guarantor of any of the foregoing persons, or to any person who shall wrongfully conceal any such fraud, or willful or wanton negligence.

N.C. Gen.Stat. § 1–50(a)(5)(e) (2003). Plaintiffs argue that their complaint alleges that defendants engaged in fraud or willful or wanton negligence, and thus that defendants cannot rely on the protection of the statute of repose. However, plaintiffs' complaint, in fact, failed to allege fraud, which must be plead with particularity. Thus, we find no error by the trial court in declining to apply N.C. Gen.Stat. § 1–50(a)(5)(e) to the instant case based on fraud.

We further hold that plaintiffs' complaint failed to allege willful or wanton negligence to support the application of N.C. Gen.Stat. § 1–50(a)(5)(e).

> "Negligence ... connotes inadvertence. Wantonness, on the other hand, connotes intentional wrongdoing.... Conduct is wanton when in conscious and intentional disregard of and indifference to the rights and safety of others." Stated otherwise, "

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> '[a]n act is wanton when it is done of wicked purpose ...,' " and wilful negligence is the "deliberate purpose not to discharge some duty necessary to the safety of the person or property of another."

Cacha v. Montaco, Inc., 147 N.C.App. 21, 31, 554 S.E.2d 388, 394 (2001), *cert. denied,* 355 N.C. 284, 560 S.E.2d 797 (2002) (internal citations omitted). In their complaint, plaintiffs never allege wanton negligence, only negligence and negligent misrepresentation, and make no assertions of intentional wrongdoing. Plaintiffs' assignment of error as to the trial court's failure to apply N.C. Gen.Stat. § 1–50(a)(5)(e) on the basis of willful and wanton negligence by the defendants fails as well.

Plaintiffs further argue that defendants should be equitably estopped from asserting the statute of repose as a defense. A party ***220** may be estopped from pleading and relying on a statute of limitations defense when delay has been induced by acts, representations, or conduct which would amount to a breach of good faith. *Nowell v. Great Atlantic & Pacific Tea Co.,* 250 N.C. 575, 108 S.E.2d 889 (1959). Equitable estoppel may also defeat a defendant's statute of repose defense. *One North McDowell Assn. v. McDowell Development Co.,* 98 N.C.App. 125, 389 S.E.2d 834, *disc. review denied,* 327 N.C. 432, 395 S.E.2d 686 (1990).

In their brief, plaintiffs argue that defendants' act of blaming the leaks on the Andersen windows amounted to a breach of good faith and thus equitably estops the defendants from relying on the statute of repose as a defense. Plaintiffs made the following allegations in their complaint regarding the Andersen windows:

> 13. Defendants, through Eric Avery, notified the Plaintiffs that they had discovered a serious problem with the Andersen windows in their new home at 38 Hammock Drive, Manteo, Dare County, North Carolina which, they felt, might be the source of the continued leaks. Defendants arranged with Andersen windows to have all the double hung windows repaired.
>
> 14. Defendants, by and through their president E. Andrew Keeney, notified Plaintiffs by letter dated May 15, 1997, a copy of which letter is attached hereto as "Exhibit A," explaining that the difficulties and problems Plaintiffs were experiencing were caused by and as a result of defects in the Andersen windows installed in Plaintiffs' home.
>
> ....
>
> 39. The Defendants' misrepresentations include, on information and belief, that the home constructed by them would be of the highest quality, moisture resistant, low maintenance and cost efficient; that the Defendants had mechanisms in place to monitor Plaintiffs home for construction defects, including prospective leaks, so as ****315** to always protect the owners' investment in the property; that the leaks had been repaired and remedied; and that the manufacturers' and third parties and not Defendants were to blame for leaks at Plaintiffs' home.

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40. Defendants made these representations knowing them to be false or without regard to whether they were true or negligent, to induce Plaintiffs to rely and act thereon and Plaintiffs did rely and act upon the misrepresentations to their damage.

***221** We note that the letter referred to in paragraph 14 as "Exhibit A" is not included in the record on appeal, and thus is not included in our evaluation of whether plaintiffs effectively pled equitable estoppel.

> Actual fraud, bad faith, or an intent to mislead or deceive is not essential to invoke the equitable doctrine of estoppel. It is not necessary that there be misrepresentations of existing facts, as in fraud. If the debtor makes representations which mislead the creditor, who acts upon them in good faith, to the extent that he fails to commence his action in time, estoppel may arise. The tolling of the statute may arise from the honest but entirely erroneous expression of opinion as to some significant legal fact. Equity will deny the right to assert the defense of the statute of limitations when delay has been induced by acts, representations, or conduct, the repudiation of which would amount to a breach of good faith.

Duke University v. Stainback, 320 N.C. 337, 341, 357 S.E.2d 690, 692–93 (1987) (internal citations omitted). In order for equitable estoppel to bar application of the statute of repose, a plaintiff must have been induced to delay filing of the action by the conduct of the defendant that amounted to the breach of good faith.

In *Nowell,* plaintiffs hired defendant contractor to construct a building that plaintiffs then leased to a third party, Great Atlantic & Pacific Tea Co. *Nowell,* 250 N.C. at 576, 108 S.E.2d at 889. After plaintiffs experienced problems with the building, defendant assured plaintiffs that he would perform any necessary correction to the building in the future due to re-occurring problems in his construction work. *Id.* at 578, 108 S.E.2d at 891. The plaintiffs entered possession of the building, and after the statute of limitations had run, defendant refused to assume further responsibility or correct plaintiffs' continuing problems with the building. *Id.* The North Carolina Supreme Court concluded that plaintiffs had effectively pled equitable estoppel and that plaintiffs "relied upon the promise and did not sue while efforts to correct the structural errors were under way. The appellant [defendant], by its promises, invited the delay and should not complain that the invitation was accepted." *Id.* at 579, 108 S.E.2d at 891.

In the instant case, plaintiffs alleged that they told defendants that they "continued to experience water leakage evidenced below the

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edges of the windows in the master bedroom on the north side and the windows of the great room also on the north side." The plaintiffs ***222** then alleged that the defendants told them that the Andersen windows were the cause of the leaks and defendants then replaced the windows. Plaintiffs make no allegations as to the condition of the house between the replacement of the windows in 1997 until the plaintiffs discovered other problems in 2002. On the face of plaintiffs' complaint, it appears that defendants remedied the problem with leaking below the windows that plaintiffs complained of in 1996 and 1997. The cause of delay in filing in the instant action was not the defendants' representations that it had addressed the window problem, but rather the plaintiffs' delay in discovering the other defects in the home. As there are no allegations as to how plaintiffs' reliance on the particular representations regarding the Andersen windows prevented them from filing suit within the applicable statute of repose, we find that plaintiffs have not sufficiently alleged equitable estoppel. See *Jordan v. Crew,* 125 N.C.App. 712, 720, 482 S.E.2d 735, 739, *disc. review denied,* 346 N.C. 279, 487 S.E.2d 548 (1997). Plaintiffs' assignment of error fails.

Due to our conclusion that plaintiffs have not alleged fraud, willful or wanton negligence or equitable estoppel, and consequently that the statute of repose bars plaintiffs' ****316** claims in this action, we do not address plaintiffs' argument regarding the statute of limitations. The trial court correctly granted the defendants' motion to dismiss.

Affirmed.

Judges HUDSON and GEER concur.

All Citations

166 N.C.App. 216, 601 S.E.2d 311

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RLA-71

West's Annotated California Codes
Code of Civil Procedure (Refs & Annos)
Part 1. Of Courts of Justice
Title 1. Organization and Jurisdiction
Chapter 6. General Provisions Respecting Courts of Justice (Refs & Annos)
Article 2. Incidental Powers and Duties of Courts

West's Ann.Cal.C.C.P. § 128.5

§ 128.5. Frivolous actions or delaying tactics; order for payment of expenses; punitive damages; sanctions

Effective: August 7, 2017
Currentness

(a) A trial court may order a party, the party's attorney, or both, to pay the reasonable expenses, including attorney's fees, incurred by another party as a result of actions or tactics, made in bad faith, that are frivolous or solely intended to cause unnecessary delay. This section also applies to judicial arbitration proceedings under Chapter 2.5 (commencing with Section 1141.10) of Title 3 of Part 3.

(b) For purposes of this section:

(1) "Actions or tactics" include, but are not limited to, the making or opposing of motions or the filing and service of a complaint, cross-complaint, answer, or other responsive pleading. The mere filing of a complaint without service thereof on an opposing party does not constitute "actions or tactics" for purposes of this section.

(2) "Frivolous" means totally and completely without merit or for the sole purpose of harassing an opposing party.

(c) Expenses pursuant to this section shall not be imposed except on notice contained in a party's moving or responding papers or, on the court's own motion, after notice and opportunity to be heard. An order imposing expenses shall be in writing and shall recite in detail the action or tactic or circumstances justifying the order.

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(d) In addition to any award pursuant to this section for an action or tactic described in subdivision (a), the court may assess punitive damages against the plaintiff on a determination by the court that the plaintiff's action was an action maintained by a person convicted of a felony against the person's victim, or the victim's heirs, relatives, estate, or personal representative, for injuries arising from the acts for which the person was convicted of a felony, and that the plaintiff is guilty of fraud, oppression, or malice in maintaining the action.

(e) This section shall not apply to disclosures and discovery requests, responses, objections, and motions.

(f) Sanctions ordered pursuant to this section shall be ordered pursuant to the following conditions and procedures:

(1) If, after notice and a reasonable opportunity to respond, the court issues an order pursuant to subdivision (a), the court may, subject to the conditions stated below, impose an appropriate sanction upon the party, the party's attorneys, or both, for an action or tactic described in subdivision (a). In determining what sanctions, if any, should be ordered, the court shall consider whether a party seeking sanctions has exercised due diligence.

(A) A motion for sanctions under this section shall be made separately from other motions or requests and shall describe the specific alleged action or tactic, made in bad faith, that is frivolous or solely intended to cause unnecessary delay.

(B) If the alleged action or tactic is the making or opposing of a written motion or the filing and service of a complaint, cross-complaint, answer, or other responsive pleading that can be withdrawn or appropriately corrected, a notice of motion shall be served as provided in Section 1010, but shall not be filed with or presented to the court, unless 21 days after service of the motion or any other period as the court may prescribe, the challenged action or tactic is not withdrawn or appropriately corrected.

(C) If warranted, the court may award to the party prevailing on the motion the reasonable expenses and attorney's fees incurred in presenting or opposing the motion. Absent exceptional circumstances, a law firm shall be held jointly responsible for violations committed by its partners, associates, and employees.

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(D) If the alleged action or tactic is the making or opposing of a written motion or the filing and service of a complaint, cross-complaint, answer, or other responsive pleading that can be withdrawn or appropriately corrected, the court on its own motion may enter an order describing the specific action or tactic, made in bad faith, that is frivolous or solely intended to cause unnecessary delay, and direct an attorney, law firm, or party to show cause why it has made an action or tactic as defined in subdivision (b), unless, within 21 days of service of the order to show cause, the challenged action or tactic is withdrawn or appropriately corrected.

(2) An order for sanctions pursuant to this section shall be limited to what is sufficient to deter repetition of the action or tactic or comparable action or tactic by others similarly situated. Subject to the limitations in subparagraphs (A) and (B), the sanction may consist of, or include, directives of a nonmonetary nature, an order to pay a penalty into court, or, if imposed on motion and warranted for effective deterrence, an order directing payment to the movant of some or all of the reasonable attorney's fees and other expenses incurred as a direct result of the action or tactic described in subdivision (a).

(A) Monetary sanctions may not be awarded against a represented party for a violation of presenting a claim, defense, and other legal contentions that are warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law.

(B) Monetary sanctions may not be awarded on the court's motion unless the court issues its order to show cause before a voluntary dismissal or settlement of the claims made by or against the party that is, or whose attorneys are, to be sanctioned.

(g) A motion for sanctions brought by a party or a party's attorney primarily for an improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation, shall itself be subject to a motion for sanctions. It is the intent of the Legislature that courts shall vigorously use its sanction authority to deter the improper actions or tactics or comparable actions or tactics of others similarly situated.

(h) The liability imposed by this section is in addition to any other liability imposed by law for acts or omissions within the purview of this section.

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(i) This section applies to actions or tactics that were part of a civil case filed on or after January 1, 2015.

Credits

(Added by Stats.1981, c. 762, § 1. Amended by Stats.1984, c. 355, § 1; Stats.1985, c. 296, § 1; Stats.1990, c. 887 (S.B.2766), § 1; Stats.1994, c. 1062 (A.B.3594), § 1; Stats.2014, c. 425 (A.B.2494), § 1, eff. Jan. 1, 2015; Stats.2017, c. 169 (A.B.984), § 1, eff. Aug. 7, 2017.)

West's Ann. Cal. C.C.P. § 128.5, CA CIV PRO § 128.5
Current with urgency legislation through Ch. 372 of 2020 Reg.Sess. Some statute sections may be more current, see credits for details.

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West's Annotated California Codes
Corporations Code (Refs & Annos)
Title 1. Corporations
Division 1. General Corporation Law (Refs & Annos)
Chapter 2. Organization and Bylaws (Refs & Annos)

West's Ann.Cal.Corp.Code § 208

§ 208. Limitations on business, purposes or powers; enforcement; contracts or conveyances; enforcement

Currentness

(a) No limitation upon the business, purposes or powers of the corporation or upon the powers of the shareholders, officers or directors, or the manner of exercise of such powers, contained in or implied by the articles or by Chapters 18 [1], 19 [2] and 20 [3] or by any shareholders' agreement shall be asserted as between the corporation or any shareholder and any third person, except in a proceeding (1) by a shareholder or the state to enjoin the doing or continuation of unauthorized business by the corporation or its officers, or both, in cases where third parties have not acquired rights thereby, or (2) to dissolve the corporation or (3) by the corporation or by a shareholder suing in a representative suit against the officers or directors of the corporation for violation of their authority.

(b) Any contract or conveyance made in the name of a corporation which is authorized or ratified by the board, or is done within the scope of the authority, actual or apparent, conferred by the board or within the agency power of the officer executing it, except as the board's authority is limited by law other than this division, binds the corporation, and the corporation acquires rights thereunder, whether the contract is executed or wholly or in part executory.

(c) This section applies to contracts and conveyances made by foreign corporations in this state and to all conveyances by foreign corporations of real property situated in this state.

Credits
(Added by Stats.1975, c. 682, § 7, eff. Jan. 1, 1977.)

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Footnotes

1 Corporations Code § 1800 et seq.
2 Corporations Code § 1900 et seq.
3 Corporations Code § 2000 et seq.

West's Ann. Cal. Corp. Code § 208, CA CORP § 208

Current with urgency legislation through Ch. 147 of 2020 Reg.Sess. Some statute sections may be more current, see credits for details.

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RLA-73

Restatement (Second) of Torts § 899 (1979)

Restatement of the Law - Torts | June 2020 Update

Restatement (Second) of Torts

Division Twelve. Defenses Applicable to all Tort Claims

Chapter 46. Discharge

§ 899 Statutes of Limitations

Comment:
Case Citations - by Jurisdiction

A cause of action for a tort may be barred through lapse of time because of the provisions of a statute of limitations.

Comment:

a. The statutes commonly known as statutes of limitations are ordinarily applicable to actions at law and to equitable proceedings in which there is a concurrent legal remedy. As frequently interpreted, they do not apply to equitable proceedings based upon purely equitable rights. In many states, however, statutes are specifically applicable to equitable proceedings and in other states equitable proceedings may be barred by analogy to the statutes of limitations. For specific statements with reference to statutes limiting the time in which actions for the recovery of land and for harm to land may be brought, see Restatement of Property, §§ 220-227.

b. An act and its consequences may be both a tort and a breach of contract and may also give rise to a restitutionary right. When this is so, the injured person, although barred by a statute from maintaining an action of tort may not be barred from enforcing his contractual or restitutionary right or vice versa, since the statutes commonly provide for a different period of limitation for tort actions and for those based upon a breach of contract or the right of restitution. A statute of

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limitations frequently provides for a longer period for one type of wrong, such as a conversion, than for another type, such as an injury to reputation.

A person injured by a tort that would be indivisible if he were to bring action at once may be able to maintain an action for the damage not barred by the statute, although his remedy for the other harm has been barred. Thus when a car and its owners are injured in a collision, the cause of action for harm to the person may terminate before that for harm to the chattel. When there are joint tortfeasors, the cause of action may be barred against one tortfeasor and not against another, either because there is a statute applicable to only one of the tortfeasors or because one of them leaves the jurisdiction. On nuisance, see Comment *d*.

c. *Time when statute begins to run.* Statutes of limitations ordinarily provide that an action may be commenced only within a specified period after the cause of action arises. Although the courts have not been consistent in applying this limitation strictly, the interpretation of the statute as applied to torts has been such that the statute does not usually begin to run until the tort is complete, and may not begin to run even then if there has been a series of continuous acts.

A tort is ordinarily not complete until there has been an invasion of a legally protected interest of the plaintiff. Thus when one makes a fraudulent misrepresentation to another, the tort is not complete until the other acts upon it to his detriment.

A battery is complete upon physical contact, even though there is no observable damage at the point of contact. An assault is complete when anticipation of harm occurs. A cause of action for negligently harming a person or a thing is complete when the harm occurs. A cause of action for mental shock or mental distress is complete when the shock or distress occurs, if the shock or distress itself is sufficient for the tort (see § 46); but if some resulting bodily harm is necessary to the cause of action, it is not complete until the bodily harm occurs. For false imprisonment, the statute begins to run only when the imprisonment ends, since the period of imprisonment is treated as a unit.

A cause of action for death is complete when death occurs. Under most wrongful death statutes, the cause of action is a new and independent one, accruing to the representative or to surviving relatives of the decedent only upon his death; and since the cause of action does not come into existence until the death, it is not barred by prior lapse of time, even though the decedent's own cause of action for the injuries resulting in death would be barred. In some jurisdictions, however, the wrongful death acts take the form of statutes providing for the survival of the decedent's own cause of action, in which case the statute of limitations necessarily runs from the time of his original injury.

A cause of action for the loss of the services of another arises at the time when the right to the services accrues or when there is a deprivation of existing services. When there has been a loss of services over a considerable period of time by a continuous series of acts, as when a child is

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withheld from the custody of his parents, the injured party recovers only for that to which he was entitled within the statutory period before suit.

A cause of action for malicious prosecution is complete when the prosecution is terminated in favor of the plaintiff. A cause of action for defamation is complete at the time of publication, except when the statement is not actionable until harm has been caused, in which case the cause of action matures when harm is first caused.

A cause of action for misrepresentation in a business transaction is complete when the injured person has been deprived of his property or otherwise has suffered pecuniary loss or has incurred liability as the result of the misrepresentation.

A cause of action for the conversion of chattels is complete when the chattel is first tortiously taken or retained by the defendant; the person deprived cannot delay the operation of the statute by making repeated demands. In some cases the statute of limitations begins to run before the defendant took possession, as when a previous taker converted the chattel and later transferred possession to the defendant. When the possession was acquired rightfully and continued wrongfully, the statute ordinarily runs from the time of the first wrongful detention. If, however, the owner transferred the property by mistake without tortious conduct on the part of the recipient and the owner subsequently makes demand for it, the statutory period runs in favor of the recipient from the time of the original transfer even though before demand he was not guilty of tortious conduct.

In the area of products liability there has sometimes been a certain amount of confusion. If the action is based on contract, the cause of action is usually held to accrue at the time of the sale. If the action is in tort, the usual rule is that the cause accrues as of the time of the injury; but some courts have held that it still accrues as of the time of the sale. There is also some disagreement on the proper classification of an action for breach of warranty involving a personal injury.

d. Continuing harm—Nuisance. When there is a continuing trespass, such as that caused by the erection of a structure upon the land of another or when there is a series of harms caused by the existence of a structure or by the operation of a business outside the land, the time when the statute of limitations begins to run depends upon the rules stated in § 161 (continuing trespass) and those stated in § 930. In cases in which a public utility or governmental agency erects a harmful structure such as a bridge or conducts a harmful activity such as opening a sewer that pollutes a stream and the interference with the plaintiff's interests is not abatable by a proceeding in equity, the statutory period normally begins when the structure is completed or the activity is begun. In some cases, however, in which the defendant has done an act that may have a permanent injurious effect, but when the effect is problematical and no harm is observable, the statute does not begin to run until some portion of the harm becomes observable. This is true, for example, when a railroad company builds a bridge that may or may not cause water to flow on the plaintiff's land in times of flood, in which case the statute begins to run from the time of the first flooding, if there is likelihood of recurrent floods.

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In other cases when there is a series of continuing harms the plaintiff, under the rules stated in § 161 and § 930, has an election to recover or is permitted to recover damages only for harm to the use of the land up to the time of trial. In cases of this type, the statute does not run from the time of the first harm except for the harm then caused. Thus, for example, when there has been the tortious emission of fumes from a factory, the plaintiff is not required to treat the harm as a unit and is entitled to recover for damages for harm that has accrued within the period provided by statute for that type of tort. In some of these cases, however, the defendant may have acquired a right by prescription to continue the tortious act, as when a prescriptive easement to flood another's land is gained by flooding under a claim of right. In these cases the injured person is barred not by the statute of limitations but by the creation of an easement in the land in favor of the person who was originally a tortfeasor.

e. When no knowledge of the tort. Under the early interpretation of the English statutes of limitations, knowledge by the injured person of the existence of the tort was immaterial, and it is still true in many of the states that, in the absence of fraud or concealment of the cause of action, the statutory period runs from the time the tort was committed although the injured person has no knowledge or reason to know of it. Statutes have been enacted in some states providing that the period does not begin until the injured person has knowledge or reason to know of the facts, if the tortfeasor has concealed the existence of the tort. In a number of states that have no such special statutes, the courts have reached the same result by construction of the general statute.

One group of cases in which there has been extensive departure from the earlier rule that the statute of limitations runs although the plaintiff has no knowledge of the injury has involved actions for medical malpractice. Two reasons can be suggested as to why there has been a change in the rule in many jurisdictions in this area. One is the fact that in most instances the statutory period within which the action must be initiated is short—one year, or at most two, being the common time limit. This is for the purpose of protecting physicians against unjustified claims; but since many of the consequences of medical malpractice often do not become known or apparent for a period longer than that of the statute, the injured plaintiff is left without a remedy. The second reason is that the nature of the tort itself and the character of the injury will frequently prevent knowledge of what is wrong, so that the plaintiff is forced to rely upon what he is told by the physician or surgeon.

There are still courts that proceed to apply the rule that the action is barred by the statute even though there has been no knowledge that it could be brought. Many of them, however, have resorted to various devices to extend the time of the statute. Thus the negligent treatment or the defendant's duty to disclose the injury is held to continue until the relation of doctor and patient is ended, or the court finds fraudulent concealment or nondisclosure of the injury, tolling the running of the statute; or failure to discover and remove a foreign object left in the plaintiff's body is held to be continuing negligence, not yet terminated.

In a wave of recent decisions these various devices have been replaced by decisions meeting the issue directly and holding that the statute must be construed as not intended to start to run until the

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plaintiff has in fact discovered the fact that he has suffered injury or by the exercise of reasonable diligence should have discovered it. There have also been a number of instances in which a similar rule has been applied to other professional malpractice, such as that of attorneys or accountants and the rule may thus become a general one.

f. Capacity or location of parties as affecting running of statutes. Although the provisions of the statutes differ to some extent, ordinarily special provision is made for torts committed against persons whose lack of capacity requires them to bring proceedings through others, such as infants and insane persons. A special period beginning at the end of the disability is ordinarily provided for. Some statutes provide that, if because of the situation of the tortfeasor, such as his absence from the state after the tort, the injured person is unable for a period to sue in the state in which the tort occurred, the period in which suit cannot be brought is to be deducted from the length of time otherwise allowed.

g. Statutes of repose. In recent years special "statutes of repose" have been adopted in some states covering particular kinds of activity, such as professional negligence for doctors, lawyers or architects, or products liability, or liability of building contractors. These statutes set a designated event for the statutory period to start running and then provide that at the expiration of the period any cause of action is barred regardless of usual reasons for "tolling" the statute. The statutory period in these acts is usually longer than that for the regular statute of limitations, but, depending upon the designated event starting the running of the statute, it may have run before a cause of action came fully into existence. This may well raise constitutional problems.

h. Equity. The rules for laches and the effect of a statute of limitations upon proceedings in equity are dealt with in § 939.

Case Citations - by Jurisdiction

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C.A.11,
C.A.D.C.
M.D.Ala.
D.D.C.
S.D.Fla.
N.D.Ga.
N.D.Ill.
W.D.La.
D.Mass.
D.Minn.
D.Nev.
D.N.M.
E.D.N.Y.
S.D.N.Y.
E.D.Pa.
M.D.Pa.
W.D.Pa.
D.P.R.
D.S.D.
D.V.I.
E.D.Wash.
Alaska
Ariz.App.
Ark.
Conn.App.
D.C.App.
Fla.App.
Ga.
Ga.App.
Hawaii
Idaho
Ill.App.
Iowa
Ky.
Md.
Mass.
Miss.
Mo.App.
Nev.
N.J.

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N.M.
N.Y.Sup.Ct.App.Div.
N.Y.Ct.Cl.
N.C.
N.C.App.
Pa.
Pa.Super.
Tex.
Tex.App.
Utah
Utah App.
Va.
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Wash.App.
Wis.
Wis.App.

U.S.

U.S.2014. Com. (g) cit. and quot. in sup. Buyers of an electronics-manufacturing plant, along with owners of adjacent properties, brought a state-law nuisance action against former owner of the plant, seeking “reclamation” of toxic contaminants allegedly belonging to defendant, remediation of environmental harm caused by the contaminants, and monetary damages. The district court granted defendant's motion to dismiss based on North Carolina's 10-year statute of repose, because defendant sold the plant more than 24 years before plaintiffs commenced their action. The court of appeals reversed, ruling that the state's statute of repose was preempted by the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA)'s discovery rule, under which statutes of limitations in covered actions began to run when a plaintiff discovered, or reasonably should have discovered, that the harm in question was caused by the contaminant. Reversing and remanding, this court held that, while CERCLA expressly preempted statutes of limitations, it did not expressly or impliedly preempt statutes of repose. Citing Restatement Second of Torts § 899, the court noted that statutes of repose differed from statutes of limitations in that the time period for statutes of repose was usually longer than the time period for statutes of limitations, and that they were not subject to equitable tolling. CTS Corp. v. Waldburger, 134 S.Ct. 2175, 2183, 2185-2186.

U.S.2007. Com. (c) cit. in syllabus and in sup. After plaintiff's murder conviction was remanded for a new trial on grounds that his arrest was without probable cause and the charges against him were later dropped, plaintiff brought a § 1983 action against city and police officers, seeking damages for false arrest in violation of the Fourth Amendment. The district court granted summary judgment for defendants on grounds that plaintiff's action was barred by the statute of limitations, and the court of appeals affirmed. Affirming, this court held, inter alia, that plaintiff's claim accrued when

plaintiff became detained pursuant to legal process, rather than when his conviction was set aside. Noting that, under the common law, the statute of limitations for false imprisonment, a cause of action closely analogous to plaintiff's claim, began to run when the alleged false imprisonment ended, the court reasoned that plaintiff's false imprisonment ended when legal process was initiated against him. Wallace v. Kato, _ U.S. _, _, _, 127 S.Ct. 1091, 1092, 1096, 166 L.Ed.2d 973, rehearing denied _ U.S. _, 127 S.Ct. 2090, 167 L.Ed.2d 807 (2007).

U.S.1979. Com. (e) quot. in ftn. in sup. and com. (e) quot. in part in ftn. in diss. op. The plaintiff, a veteran, had surgery on his ear at a veterans hospital, and following surgery, the infected area of the ear had been irrigated with an antibiotic until the infection was gone. Approximately six weeks later the plaintiff noticed a ringing sensation in his ears and some loss of hearing. One ear specialist diagnosed the condition as bilateral nerve deafness and another specialist told the plaintiff that the hearing loss had probably resulted from the application of the antibiotic. The plaintiff applied for an increase in the disability benefits he was already receiving, alleging that the antibiotic treatment had caused his deafness. An administrative board recognized that the hearing loss may have been caused by the treatment but rejected the claim on the ground that the treatment was within accepted medical practice at that time and that the government was therefore not at fault. Subsequently, another private physician told the plaintiff that the antibiotic had caused his injury and should not have been administered. The plaintiff filed a medical malpractice suit in federal court under the Federal Tort Claims Act. That court held that the claim was not barred by the statute of limitations because the claim accrued when the plaintiff had reason to suspect negligence and the plaintiff filed suit within two years thereafter. This court held that the plaintiff's claim was barred by the statute of limitations because the cause of action accrued when the plaintiff became aware of his injury and its probable cause, which was three years before he filed suit, and not at a later time when he learned that the acts inflicting the injury may have constituted malpractice. The dissent argued that, generally, in medical malpractice cases, the cause of action accrued when a diligent plaintiff had knowledge of sufficient facts to put him on notice of his legal rights. The dissent noted that the lower court had found that the plaintiff's belief that there was no medical malpractice was reasonable because of the technical complexity of whether his treatment involved excessive risks, because of the failure of any of the doctors he saw first to suggest the possibility of negligence, and because of the repeated, unequivocal assertions by the administrative agency that the government had not been negligent. United States v. Kubrick, 444 U.S. 111, 100 S.Ct. 352, 358, 362, 62 L.Ed.2d 259.

C.A.1,

C.A.1, 2018. Com. (e) quot. in case quot. in disc. Relatives of patient who died of septic shock after receiving treatment from a federally-supported health center and other medical facilities brought a medical-malpractice action under the Federal Tort Claims Act against, inter alia, the U.S. Department of Health and Human Services. The district court granted summary judgment for defendant. This court affirmed, holding that the malpractice claims were barred by the applicable two-year statute of limitations, because plaintiffs' knowledge of the vital facts surrounding patient's condition and treatment triggered plaintiffs' duty to investigate whether there was a

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causal connection between patient's death and defendant's treatment of patient. The court quoted Restatement Second of Torts § 899, Comment *e*, in discussing the importance of the "discovery rule" exception to the statute of limitations in medical-malpractice cases, and determined that, here, plaintiffs' claims accrued no later than the day plaintiffs received the death certificate listing the direct cause of patient's death. Morales-Melecio v. United States (Department of Health and Human Services), 890 F.3d 361, 368.

C.A.1

C.A.1, 2003. Com. (c) quot. in disc., com. (e) quot. in case quot. in sup. and cit. in conc. op. World War II veteran died three days after admission to veterans' hospital for treatment of alcoholism. Five years later, federal jury convicted hospital nurse of murdering veteran and three other patients. Veteran's family and other victims' families sued United States under Federal Tort Claims Act, seeking compensation. District court dismissed five of the six cases. This court affirmed, holding that veteran's family's claim was time-barred due to failure to file administrative claim within two years of accrual of cause of action on day following veteran's autopsy. It rejected defendant's argument that strict time-of-injury rule should apply outside medical-malpractice and latent-disease contexts. Concurring opinion agreed with applying discovery rule, since definitive proof of wrongful conduct and government liability was not required to start period for filing claim. Skwira v. U.S., 344 F.3d 64, 73, 74, 84.

C.A.1, 1984. Com. (e) quot. in ftn. (Erron. cit. as Judgments 2d.) Police officers investigating a murder in 1975 forced the plaintiff to undergo a chemical test designed to detect the presence of blood on the skin. The chemical caused a rash and a burning sensation. Five years later, the plaintiff learned that the chemical the police had used was a carcinogen, and he sued under state law and 42 U.S.C. § 1983. The defendant argued that the claim was barred by a three-year statute of limitations. The trial court found for the plaintiff and denied the defendant's motion for judgment n.o.v. Reversing, this court concluded that the plaintiff knew in 1975 that his rights had been violated and that the police had committed a tort. The plaintiff was placed on notice that he had a cause of action and, if he had pursued the action when it accrued, would have discovered the chemical's carcinogenic nature. Marrapese v. State of R.I., 749 F.2d 934, 942, certiorari denied 474 U.S. 921, 106 S.Ct. 252, 88 L.Ed.2d 259 (1985).

C.A.1, 1981. Com. (c) cit. and quot. in ftn. and com. (e) cit. in ftn. An action was brought against insured by insurer's assignee, seeking to recover on promissory notes executed by the insured to pay premiums on insurance policies. The insured filed a third-party complaint against the insurer, the insurance agent, and the agent's employer, alleging fraud, negligent representation, and breach of contract. The lower court granted the motions of the third-party defendants for summary judgment on the ground that the third-party complaint was time-barred. On appeal, this court stated that where the third-party complaint was filed in an action brought on the basis of diversity jurisdiction in the federal court for New Hampshire, federal courts had to apply the New Hampshire rules as to choice of law. The court found that New Hampshire would apply its own

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substantive law to determine the parties' rights and liabilities inasmuch as it was in New Hampshire where the insurance agent made his allegedly false representations and where the insured received and acted upon such representations. The court found that the insured, who claimed that he was the victim of fraud on the part of the insurance agent who allegedly misrepresented to him that, by switching policies, he could obtain premium loans on a more favorable basis, should have become aware of any falsity in that statement within a few days of the date he applied for his first premium loan. Accordingly, the court held that the insured's claim against the insurer, its agent, and the agent's employer was barred by the New Hampshire six-year statute of limitations because the insured's third-party suit was not filed until nine years later. The judgment of the lower court was affirmed. Premium Management, Inc. v. Walker, 648 F.2d 778, 781, 783.

C.A.2

C.A.2, 2007. Cit. in case quot. in sup. Co-owner of copyrights in two songs brought a copyright-infringement action against singer, record company, and composers of allegedly similar songs. The district court granted summary judgment for defendants, concluding that a retroactive written agreement between plaintiff's alleged co-author and one of the defendants, purporting to assign co-author's rights to the songs as of the time of their creation, was valid. Vacating and remanding, this court held, as a matter of first impression in the courts of appeals, that an action for infringement by one co-author of a song could not be defeated by a retroactive transfer of copyright ownership from another co-author to an alleged infringer. The court noted that such a retroactive license or assignment destroyed a co-owner's valuable and vested right to enforce an accrued infringement claim. Davis v. Blige, 505 F.3d 90, 103.

C.A.2, 1980. Cit. in disc. and com. (c) cit. and quot. in disc. The plaintiff and his wife were divorced. The court awarded custody of their three minor children to the wife and visitation rights to the plaintiff. The wife remarried and shortly thereafter her second husband was imprisoned in state prison. While imprisoned, the second husband agreed to testify in court against certain members of organized crime. After he had testified, the state parole board granted him parole and the Justice Department, as part of its agreement to protect the family against any retaliatory action, relocated and provided new identities for the entire family, including the plaintiff's three children. For approximately eight years the plaintiff did not know where his children were until 1975 when the wife allowed them to meet. Approximately two years after this reunion the plaintiff brought an action on his own behalf and on behalf of his children against, inter alia, the Justice Department and various federal agencies. The plaintiff claimed, inter alia, that these defendants had violated his and his children's constitutional rights by removing and concealing the children from the plaintiff. All of the plaintiffs' claims were dismissed by the trial court for various reasons. The trial court dismissed the father's constitutional claim against the federal defendants on the ground, inter alia, that it was time-barred by the applicable statute of limitations because the plaintiff had not commenced the action until ten years after the removal of the children. The plaintiff appealed, contending that his constitutional claim against the federal defendants was not time-barred because each time he wished to see his children, and was unable to do so, he was deprived of his constitutional rights and a new cause of action accrued and continued to accrue until he

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was finally reunited with the children. The court of appeals held that the father's cause of action accrued at the time that the defendants had first concealed the children and that all subsequent acts were merely in furtherance of the concealment and did not give rise to new causes of action. There was no need for the court to decide which of the two possible statutes of limitations applied to this case because this action would have been barred under either statute. The court commented that the complaint also included a common law tort claim by the children alleging abduction or false imprisonment. The court summarily dismissed this claim based upon the mother's affidavit, which clearly indicated that the children's removal and concealment were entirely voluntary. Leonard v. United States, 633 F.2d 599, 613, certiorari denied 451 U.S. 908, 101 S.Ct. 1975, 68 L.Ed.2d 295 (1981).

C.A.4

C.A.4, 1980. Com. (c) cit. in diss. op. A barge discharged oil into a harbor, and the United States filed an action to recover costs expended in removing the subsequent oil slick. The spill occurred on August 10, 1975, and the action was filed on September 6, 1978, more than three years after the spill occurred. The trial court granted the defendant's motion for summary judgment, stating that the plaintiff failed to bring the action within the three-year statute of limitations period. On appeal, the court reversed and remanded the case stating that under 28 U.S.C. §§ 2415 and 2416, the computation of time for filing an action for the purpose of satisfying the three-year statute of limitations period began on September 12, 1975, when the government completed the oil removal. The dissent argued that the accrual date was the date on which the harm occurred, stating that the government should find itself in no different position than any plaintiff who, with a claim for injury to his person, must file suit within a statutory time from the day his injury happened. United States v. Barge Shamrock, 635 F.2d 1108, 1115, certiorari denied 454 U.S. 830, 102 S.Ct. 125, 70 L.Ed.2d 107 (1981).

C.A.5,

C.A.5, 2015. Com. (g) quot. in case quot. in sup. Federal Deposit Insurance Corporation brought federal and state securities-fraud claims against financial institutions, alleging that defendants made false and misleading statements in selling and underwriting residential-mortgage-backed securities. The district court granted judgment on the pleadings in favor of defendants, finding that, while the governing federal statute preempted state statutes of limitations, it did not preempt the statute of repose set forth in the Texas Securities Act. Reversing and remanding, this court held that federal law preempted all limitations periods, whether characterized as statutes of limitations or statutes of repose. The court cited Restatement Second of Torts § 899 in reasoning that the general usage of the terms "statute of repose" and "statute of limitations" had not always been precise, and the fact that the federal statute at issue used the term "statute of limitations" was not dispositive. F.D.I.C. v. RBS Securities Inc., 798 F.3d 244, 252.

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C.A.5

C.A.5, 2009. Coms. (c) and (e) cit. in case quot. in disc. Worker on offshore drilling rigs who was diagnosed with hypersensitivity pneumonitis and fibrosis of the lungs sued employer/owner of the rigs, alleging claims under the Jones Act and general maritime law. The district court granted partial summary judgment for defendant on the ground that the suit was time-barred under the applicable three-year statute of limitations, and dismissed the claims. Reversing and remanding, this court held that, because genuine issues of material fact existed as to the existence of a traumatic event and initial symptoms, the severity of plaintiff's symptoms prior to 2004, and his reasonable reliance on the opinions of medical experts, a jury question was presented as to when plaintiff reasonably should have discovered that he was suffering from a serious medical condition. Pretus v. Diamond Offshore Drilling, Inc., 571 F.3d 478, 482.

C.A.5, 1988. Com. (c) cit. in ftn. and quot. in sup. In 1983 a consumer notified a credit bureau of an erroneous credit report, but the consumer did not take the action necessary for correction. In 1987 the consumer sued the bureau for negligence and intentional violation of the Fair Credit Reporting Act (FCRA) after the same report was issued in 1986. The trial court held that the claims were time-barred since the original injury and violation occurred in 1983. Reversing and remanding, this court held that the FCRA statute of limitations was triggered when the consumer was injured or discovered the injury, whichever was later, and each communication of an erroneous credit report was a separate injury. The court explained that, because the consumer had no cause of action until he was injured by a report, other triggering points would frustrate the purpose of the Act. Moreover, the court said that, because of the confidential nature of the information, each communication was distinct. Hyde v. Hibernia Nat. Bank in Jefferson Parish, 861 F.2d 446, 448, cert. denied 491 U.S. 910, 109 S.Ct. 3199, 105 L.Ed.2d 706 (1989).

C.A.5, 1984. Coms. (c) and (e) cit. in disc. In an action brought under the Jones Act and for unseaworthiness the plaintiff sought damages for his exposure to trichloroethylene while on board an oceangoing freighter. The district court granted summary judgment to the defendant, and this court affirmed. The court noted the general rule that a tort action accrues for the purpose of the statute of limitations when the plaintiff's legally protected interests have been invaded. Finding that the plaintiff was aware of his injuries at the time of his exposure to the chemical, the court ruled that the action was barred because the plaintiff had not brought the action within the period of the statute. The court noted that a plaintiff is required to assert in one action all the elements of his past, present, and future harm attributable to the defendant's tortious conduct and to establish those elements by nonspeculative proof. Albertson v. T.J. Stevenson & Co., Inc., 749 F.2d 223, 228.

C.A.5, 1984. Coms. (c) and (e) cit. in disc. A widow filed a wrongful death action against her husband's employer after her husband died of lung cancer. The lower court found for the widow, and this court affirmed. The employer argued that the claim was barred by the statute of limitations because the lung diseases that preceded the cancer were manifest more than three years prior to the suit. This court recognized that the statute of limitations normally began to run at the time of

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a tortious act. However, the court applied the "discovery rule" for latent injuries, holding that this cause of action was not barred because the injury and its cause were first known less than three years prior to commencement of the suit. DuBose v. Kansas City Southern Ry. Co., 729 F.2d 1026, 1029, certiorari denied 469 U.S. 854, 105 S.Ct. 179, 83 L.Ed.2d 113 (1984).

C.A.5, 1983. Com. (d) cit. in case cit. in ftn. in disc. A female university professor who was assigned twice the workload of her male counterparts filed a charge with the EEOC one year after being informed that her employment contract would not be renewed. The district court dismissed the claim because it was not filed within 180 days of the alleged unlawful employment practice. The 180-day period began, the court said, when the professor received notice she would not be rehired. This court reversed and remanded. The claim would not be time-barred if the professor could prove the continuing discriminatory policy of a series of related acts, one of which occurred within the 180-day period. This court analogized a continuing discriminatory policy to a continuing trespass. Berry v. Board of Sup'rs of L.S.U., 715 F.2d 971, 979, appeal after remand 783 F.2d 1270 (5th Cir.1986).

C.A.5, 1980. Com. (e) cit. in ftn. The United States government destroyed the plaintiff's cattle after the cattle had been allegedly negligently misdiagnosed as tubercular by the Department of Agriculture. The plaintiff brought an action against the United States under the Federal Tort Claims Act and under the Tucker Act, which allows suits against the United States in cases not sounding in tort. The plaintiff's case was dismissed, and the plaintiff appealed. The appellate court stated that the misrepresentation exception to the Federal Tort Claims Act did not bar the plaintiff's tort claim because the tort of negligent misrepresentation demands some act by the plaintiff that is the result of justifiably relying on the misrepresentation. The court also concluded that federal law determines when a claim accrues within the meaning of the Federal Tort Claims Act, and it held that the action was not barred by the statute of limitations. The dismissal of the Tucker Act claim was affirmed, and the dismissal of the Federal Tort Claims Act claim was reversed. Ware v. United States, 626 F.2d 1278, 1284.

C.A.5, 1979. Com. (e) quot. in part in ftn. in sup. A brain surgery patient brought a medical malpractice action against a hospital based on an allegation that the hospital staff had been negligent and that this negligence caused her serious injury. The lower court granted summary judgment to the hospital on the ground that the prescriptive period had passed. The appellate court held that a material issue of fact existed concerning when the plaintiff sustained the injury, precluding summary judgment. The court stated that, under Louisiana law, prescription did not begin until the day when the patient knew or should have known that she had sustained some damage. The decision was therefore reversed and the case was remanded. Higgenbotham v. Ochsner Foundation Hospital, 607 F.2d 653, 658.

C.A.6

C.A.6, 1997. Cit. in disc., cit. generally in ftn., com. (d) quot. in disc. A landowner who alleged that a massive leak of uranium from a nuclear processing facility had damaged and continued to damage his property sued the former operator of the facility for continuing trespass. The district court dismissed on limitations grounds. Affirming in part and reversing in part, this court held, inter alia, that plaintiff stated a claim for continuing trespass, since, under Ohio law, a claim for continuing trespass could be supported by proof of continuing damages and need not be based on allegations of continuing wrongful conduct. Nieman v. NLO, Inc., 108 F.3d 1546, 1557.

C.A.6, 1987. Coms. (c) and (e) cit. in disc. A former barge company employee sued several employers under the Jones Act, alleging that continued exposure to chemicals caused his subsequent bladder cancer. The trial court granted summary judgment to the defendants, holding that a suit based on the bladder cancer claim was barred by the statute of limitations. Affirming, this court held that the combination of the plaintiff's knowledge of his eye doctor's statements and his later blindness should have put him on notice more than three years prior to the time at which he filed suit that he had been exposed to injurious chemicals and suffered damage therefrom. Hicks v. Hines Inc., 826 F.2d 1543, 1544.

C.A.7

C.A.7, 2007. Com. (e) cit. in sup. Insurer that covered company against losses from employee embezzlement brought, in part, a subrogation action against stock brokerage firm for negligence and breach of fiduciary duty for allowing company's CFO to deposit in his own personal account a check issued by company to brokerage firm. The district court dismissed the claim as barred under California law by the three-year statute of limitations. Affirming, this court held that application of the discovery rule, as plaintiff urged, did not help plaintiff's case, since, pursuant to the rule, company should have discovered the embezzlement long before it actually did; elementary controls over employees who had check-writing authority would have quickly revealed the defalcation. Travelers Cas. & Sur. Co. of America, Inc. v. Northwestern Mut. Life Ins. Co., 480 F.3d 499, 504.

C.A.7, 1980. Com. (c) cit. in disc. In 1967, the plaintiff worked for the government, handling and processing munitions and rocket propellants containing nitroglycerin. By the end of 1967, she began to experience pains and was hospitalized for a period of time because of the pains. She returned to work in May 1968 but continued to suffer the pains. She had suspected that the exposure to the nitroglycerin was the cause of her medical problems but was unable to obtain medical confirmation of that fact. The government physician at work assured her that there was no connection and, in fact, stated that the nitroglycerin was beneficial. Four years later a doctor for the first time documented the connection between the nitroglycerin and her pain. A year and a half later the plaintiff filed a claim under the Federal Tort Claims Act seeking damages from the government. The trial court dismissed the suit, stating that the two-year statute of limitations had run because she had known of her disease in 1967 but had not sued until 1972. On appeal, the court disagreed with the trial court's application of the statute of limitations. This court stated that usually

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an injury will provide notice to the victim that his legal rights have been invaded. However, this theory was not usually applied to medical malpractice cases because the injured party frequently has no reason to suspect that her rights have been invaded simply because she was sick. This court held that the plaintiff's claim did not accrue until after she had discovered and confirmed the cause of her ailment, and did not accrue merely when the illness itself was discovered. The court stated that until a possible cause had been established, the plaintiff did not have a claim. Therefore, the involuntary dismissal was reversed and the case was remanded for a trial on the merits. Stoleson v. United States, 629 F.2d 1265, 1268, appeal after remand 708 F.2d 1217 (1983).

C.A.7, 1979. Com. (c) cit. and quot. in ftn. in sup. and com. (e) cit. and dist. Plaintiff worker brought suit against the United States pursuant to the Federal Tort Claims Act to recover for injuries sustained while installing runway lights and signs on an inactive runway at an international airport. Plaintiff alleged that his injury resulted from the negligence of the Federal Aviation Administration. The lower court dismissed the complaint on the ground that the claim accrued on the date of the injury, which was more than two years before the filing of the claim with the FAA, and plaintiff appealed. This court held that in an action brought under the Federal Tort Claims Act, the question of when a claim accrues is determined by federal law. After discussing the necessity and special circumstances of a discovery rule for medical malpractice cases, the court further held that the general rule under which the statute of limitations begins to run when there has been an invasion of a legally protected interest of the plaintiff would govern where, as here, the injury was immediate and manifest and was close in time with the allegedly negligent conduct. Thus, the court ruled that in this instance the claim accrued immediately and was untimely as a result of plaintiff's failure to file within two years; it was, therefore, properly dismissed by the lower court. Steele v. United States, 599 F.2d 823, 826-828.

C.A.8

C.A.8, 1987. Com. (d) quot. in disc. Homeowners sued a neighboring manufacturer for nuisance after they discovered sawdust particles and encountered strong and unpleasant odors on their property from the manufacturing plant. The trial court found for the plaintiffs, holding that the dust and lacquer offenses continued unabated up to the time of trial, and that the plaintiffs could recover damages up to that time. Reversing and remanding, this court held, inter alia, that damages for a temporary nuisance are deemed to continue only up to the time the suit is filed, and are recoverable during the continuance of the nuisance or injury unless an injunction is sought. The court rejected the plaintiffs' argument that a series of continuing harms existed, which would allow recovery for harm to the use of the land up to the time of trial. Greger v. International Jensen, Inc., 820 F.2d 937, 940.

C.A.8, 1980. Subsec. (c) cit. in disc. The plaintiff was employed as a section hand for the defendant railroad. In 1962 the plaintiff injured his back. The injury was actually diagnosed by a physician in 1966. A physician recommended to the railroad that, until 1975, the plaintiff should be reassigned to work that did not require heavy bending and lifting. The railroad, however, continued to assign

the plaintiff to his regular job as a section hand. In 1977 the plaintiff brought a personal injury claim against the railroad under the Federal Employers Liability Act. The lower court dismissed the case holding that the claim was barred by the Act's three-year statute of limitations. On appeal, this court held that the plaintiff's claim for back injury was time-barred because the cause of action accrued in 1962 when the injury occurred. The court found, however, that the lower court had erred by not ruling on the plaintiff's allegation that the railroad had negligently assigned him work that was not within his physical capacity to perform with reasonable safety. The court held that the statute of limitations was tolled when the railroad continued tortious conduct that affected the plaintiff's present condition. The railroad knew of the back injury but continued to assign the plaintiff his regular job up until 1975; therefore the plaintiff's 1977 suit was valid. The lower court's decision was reversed in part and remanded for trial on the theory of negligent assignment. Fletcher v. Union Pac. R. Co., 621 F.2d 902, 908, certiorari denied 449 U.S. 1110, 101 S.Ct. 918, 66 L.Ed.2d 839 (1981).

C.A.9

C.A.9, 1985. Com. (e) cit. in disc. After his wife died allegedly due to her receiving the swine flu vaccine, her husband sued the United States for wrongful death and survival under the Federal Tort Claims Act as the administrator and the manufacturer of the vaccine. The trial court dismissed both claims as time-barred. The court of appeals reversed, holding that the husband's Federal Tort Claims Act wrongful death cause of action accrued when he discovered, or in the exercise of reasonable diligence should have discovered, both the injury and the cause of his wife's death. This court also held that whether the husband knew or reasonably should have discovered the cause of his wife's death within the statute of limitations period was an issue of material fact for the jury. In re Swine Flu Products Liability Litigation, 764 F.2d 637, 639, judgment reversed 852 F.2d 1290 (9th Cir.1988).

C.A.9, 1981. Com. (e) cit. in sup. The plaintiff took a polio vaccine at a mass immunization center established in cooperation with state and local medical authorities. Within 30 days after the vaccination, the plaintiff became partially paralyzed and exhibited other symptoms of polio. The plaintiff sued the manufacturer of the drug in another action. The plaintiff then sued the government under the Federal Tort Claims Act. The lower court granted summary judgment to the defendant, holding that the plaintiff's suit was barred by a two-year statute of limitations that applied to all actions brought under the Act. The plaintiff appealed. On appeal, this court stated that the two-year statute of limitations began to run when the plaintiff knew of the injury and of its cause. The court held that the plaintiff's cause of action, being outside of the applicable statute of limitations period, was barred by the statute of limitations. The court also held that any failure on the part of the defendant to ascertain and publish the fact of its negligence was not sufficient to constitute fraudulent concealment. Davis v. United States, 642 F.2d 328, 330, certiorari denied 455 U.S. 919, 102 S.Ct. 1273, 71 L.Ed.2d 459 (1982).

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C.A.10,

C.A.10, 2014. Com. (c) quot. in sup. and cit. in case quot. in sup. Former student sued coach, school district, and school superintendent under § 1983, Title IX, and the New Mexico Tort Claims Act, alleging that coach had sexually abused her while she was a student. The district court granted summary judgment for defendants on the federal claims as untimely. Affirming, this court held that plaintiff's federal claims were barred by New Mexico's three-year statute of limitations. The court concluded that the accrual date of those claims was the accrual date for the common-law tort of battery, which was the tort most analogous to her § 1983 claim, and was complete, under Restatement Second of Torts § 899, Comment *c*, for limitations purposes upon physical contact, even though there was no observable damage at the point of contact. Consequently, plaintiffs' federal claims accrued no later than the last act of sexual abuse by coach, not when plaintiff allegedly learned the full extent of the resultant emotional injury. Varnell v. Dora Consol. School Dist., 756 F.3d 1208, 1215, 1216.

C.A.11,

C.A.11, 2018. Subsec. (e) cit. in sup. Relator filed a qui tam action alleging that two defense contractors violated the False Claims Act by submitting false or fraudulent claims for payment to the United States. The district court concluded that relator's claim was time-barred. Reversing and remanding for further proceedings, this court held that relator's claim appeared to be timely, because his allegations showed that he filed suit within three years of the date when he disclosed facts material to the right of action to United States officials and within ten years of when the fraud occurred. The court rejected contractors' argument that it would be absurd for the limitations period to be triggered by the knowledge of a government official, rather than the relator's knowledge, when, as here, the United States declined to intervene, noting that, under Restatement Second of Torts § 899, a statute of limitations began to run when an injured person had knowledge or reason to know of the facts. United States ex rel. Hunt v. Cochise Consultancy, Inc., 887 F.3d 1081, 1091.

C.A.D.C.

C.A.D.C.1988. Com. (d) cit. in case quot. in disc. A homeowner who noticed vibrations and cracks in her home after the completion of a nearby section of a subway line sued the transit authority for damages, alleging, inter alia, that the vibrations constituted a continuing and abatable nuisance. The district court granted the defendant's motion for summary judgment, finding that the nuisance was permanent and that the three-year statute of limitations barred the action. Reversing and remanding, this court held that genuine issues of material fact existed as to whether the nuisance was permanent and thus the action was barred by the statute of limitations, or whether it was continuing and abatable in nature and thus a new cause of action arose with each new injury. Beatty v. Washington Metro. Area Transit Authority, 860 F.2d 1117, 1123.

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C.A.D.C.1982. Subsec. (d) cit. in disc. Women bindery workers brought an action against the Government Printing Office (GPO) alleging violation of the Equal Pay Act of 1963 and Title VII of the Civil Rights Act of 1964. Under authority granted to him by Title VII, the President had promulgated a succession of Executive Orders mandating equal opportunity in the GPO. The first of these Executive Orders was issued in 1969. Suits against the federal government under Title VII were first authorized by Congress in 1972. The district court held for the plaintiffs and awarded, inter alia, back pay extending to the time of the promulgation of the first Executive Order directed at the GPO under Title VII. In affirming this part of the judgment, the court noted that such an award merely measured the recovery by including all the effects of a continuing process of illegal discrimination reaching back to 1969 just as victims of a series of tortious harms could recover damages accrued from the series within the limitations period, even though the statute of limitations may have run on the earliest harms in the series. Therefore, it was proper to allow acts of illegal discrimination lying beyond the two-year period of Title VII back pay accrual to affect the measurement of the back pay award. The trial court's judgment was affirmed in part and remanded in part for calculating the amount of front pay and reforming the interim quota imposed by the trial judge. Thompson v. Sawyer, 678 F.2d 257, 290.

C.A.D.C.1982. Com. (e) cit. in ftn. in sup. The widow of an asbestos insulation worker brought a wrongful death action against the manufacturers and distributors of asbestos products to which her husband was allegedly exposed. The deceased at one time was diagnosed as having mild asbestosis and consequently was assigned to non-asbestos-related work. Five years after this diagnosis, the plaintiff's spouse was found to have developed mesothelioma, attributable to the prior asbestos exposure, which caused his death three months later. The trial court granted summary judgment in favor of the defendant, dismissing the plaintiff's complaint as barred by the statute of limitations. On appeal, this court reversed and remanded. The court stated that the discovery rule governed statutes of limitations in latent disease cases, and declared that the earlier diagnosis of mild asbestosis did not start the clock on a right to sue for a separate and distinct disease attributable to the same exposure, but not manifest until later. To rule otherwise, the court noted, would make it very difficult for plaintiffs to recover in such cases, since a plaintiff, in order to recover damages for future consequences, would have to prove such consequences were “reasonably certain” to occur. Wilson v. Johns-Manville Sales Corp., 684 F.2d 111, 116.

C.A.D.C.1980. Cit. in disc. The defendant had brought an action against the plaintiff charging medical malpractice and seeking both compensatory and punitive damages. The claim for punitive damages was dismissed. The plaintiff then brought an action against the defendant for malicious prosecution, contending that the claim for punitive damages had been brought maliciously and without probable cause. The suit was dismissed on the ground that the one-year statute of limitations for malicious prosecution actions had run, and the plaintiff appealed. The appellate court stated that the malicious prosecution period of limitations is properly computed from the date of the disposition of the underlying action. The court held that the statute of limitations for a malicious prosecution action runs from the date when the prior, allegedly malicious, suit was terminated in favor of the defendant, not from the date on which the prior suit was commenced. The

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judgment was reversed, and the case was remanded with instructions to reinstate the complaint. Shulman v. Miskell, 626 F.2d 173, 176.

M.D.Ala.

M.D.Ala.2007. Com. (c) quot. in sup. Death-row inmate who was scheduled to be executed by lethal injection in Alabama brought federal civil-rights action under § 1983 against prison warden and others, seeking a stay of execution on grounds that there was an unreasonably high risk that Alabama's execution protocol would be carried out improperly and thereby cause him extreme pain at the moment of execution. This court denied plaintiff's motion for a stay on equitable grounds, but rejected defendants' argument that the action was barred by the statute of limitations, holding, inter alia, that, in a case where a plaintiff sought an injunction to prevent an unconstitutionally tortious act from occurring in the future, such a claim could not be barred by the statute of limitations because the tortious act had not yet occurred and the tort was not yet complete. Jones v. Allen, 483 F.Supp.2d 1142, 1148, affirmed 485 F.3d 635 (11th Cir.2007).

D.D.C.

D.D.C.1993. Com. (c) cit. in sup. Son, as personal representative of the estate of a deceased recipient of HIV-contaminated blood, sued the hospital where the transfusion took place and the supplier of the blood for personal injury and wrongful death. This court, denying in part the defendants' motions to dismiss or for summary judgment, held, inter alia, that, under District of Columbia law, even though the patient's right to sue for personal injuries had expired before his death, the wrongful death portion of the action was not time-barred, as the wrongful death claim did not accrue until the patient died, and the action was brought within a year of his death. Nelson v. American Nat. Red Cross, 815 F.Supp. 501, 505, affirmed in part, reversed in part, 26 F.3d 193 (C.A.D.C.1994).

S.D.Fla.

S.D.Fla.1984. Com. (c) cit. but not fol. Plaintiffs were arrested by DEA agents in 1975, convicted of assaulting federal officers, and imprisoned. A new trial ended in a second conviction, but when that was reversed on appeal, the government dismissed the indictments, and plaintiffs were released in 1980. Plaintiffs then sued under the Federal Tort Claims Act for false arrest and false imprisonment. Defendants moved for dismissal, asserting plaintiffs had failed to bring suit within two years from the time the cause of action had accrued. The court dismissed the suit, rejecting plaintiffs' argument that their claims did not accrue until the indictments were dismissed. The court held that under Florida and federal law a cause of action for false imprisonment or false arrest accrued on the day of arrest. Hitchmon v. United States, 585 F.Supp. 256, 261.

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N.D.Ga.

N.D.Ga.1995. Com. (d) cit. and quot. in sup., quot. in ftn., adopted in case cit. in disc., and cit. generally in case cit. in disc. Owner of a commercial office complex that was in the direct flight path of aircraft using a city's airport sued the city for nuisance, inter alia, claiming that high levels of noise, dust, exhaust, and vibrations from the planes had injured its use and enjoyment of its property. Granting defendant's renewed motion for summary judgment, the court held, inter alia, that plaintiff's nuisance claim for continuing harm was barred by the statute of limitations. The cause of action accrued on plaintiff's receipt of its injuries, which were immediately apparent upon the initiation of a particular runway's operation prior to the limitations period, and the extent of the nuisance had not increased within the limitations period. Provident Mut. Life Ins. of Philadelphia v. Atlanta, 938 F.Supp. 829, 830, 833, 834.

N.D.Ga.1994. Com. (d) cit. in case cit. in sup. The owner of commercial property located near an airport sued the airport for, among other claims, taking of property and continuing nuisance, alleging that planes flew over his property frequently and at close proximity, subjecting the property to high levels of noise, dust, exhaust, and vibrations. This court granted in part and denied in part defendant's motion for judgment on the pleadings, holding, inter alia, that plaintiff had alleged a viable cause of action for continuing nuisance because, given that no clear rule existed for distinguishing in specific cases between continuing and permanent nuisances, plaintiff was allowed to choose how it wished to construe defendant's alleged nuisance. Provident Mut. Life Ins. Co. v. City of Atlanta, 864 F.Supp. 1274, 1287.

N.D.Ill.

N.D.Ill.2012. Com. (c) cit. in disc. In patent-infringement litigation between smart-phone manufacturers, a hearing was held on the question of whether the case had to be dismissed without a determination of liability, after all damages and injunctive claims were dropped from the suit for failure of adequate proof. In dismissing the action with prejudice, this court rejected one party's argument that any act of infringement, even if it gave rise to no measurable damages, was an injury entitling it to a judgment. While the court recognized that a suit to establish the validity or scope of a patent by means of a suit against an alleged infringer could be analogized to a "harmless trespass" suit, and could therefore justify an award of nominal damages even if no injury were proved, it doubted that a patentee could sue for nominal damages, since, without an actual or prospective tangible injury, a federal court had no subject-matter jurisdiction. Apple, Inc. v. Motorola, Inc., 869 F.Supp.2d 901, 908.

W.D.La.

W.D.La.2007. Subsec. (d) cit. in case quot. in ftn. Citizens brought suit for declaratory and injunctive relief under the Endangered Species Act, alleging that the Secretary of the Interior

failed to perform his nondiscretionary duty to designate the critical habitat of the Louisiana black bear after more than 12 years of colloquy between the parties. Granting summary judgment for plaintiffs, this court held that plaintiffs' claims were not barred by the six-year statute of limitations, because plaintiffs gave notice to sue and then filed suit as soon as they came to believe that further dealings with defendant, which made misrepresentations to plaintiffs, were futile. The court concluded in the alternative that, under the continuing-violations doctrine, Secretary's continuing failure to comply with his nondiscretionary duty under the law constituted a continuing violation with every day's nonfeasance, and the statute of limitations ran from the last day of the continuing offense. Schoeffler v. Kempthorne, 493 F.Supp.2d 805, 817.

D.Mass.

D.Mass.2019. Com. (e) quot. in case quot. in ftn. Patient at a federally qualified health center brought an action under the Federal Tort Claims Act against center and its physician, alleging that physician negligently prescribed him amphetamines even though he was a former addict, causing him to relapse into addiction. This court denied the government's motion to dismiss, in which it argued that patient's claim was barred by the statute of limitations because he failed to timely file an administrative claim under the Act. The court rejected the government's argument that patient's claim accrued when he relapsed into amphetamine dependency, noting that patient plausibly alleged that his relapse caused severe mental impairments and that a person similarly situated would not have been able to appreciate the factual basis for his injury or causally link it to physician's negligence. The court noted that, under Restatement Second of Torts § 899, the discovery rule was motivated in particular by medical-malpractice claims, since many of the consequences of medical malpractice often did not become apparent for a period longer than that of the statute of limitations. Duke v. Community Health Connections, Inc., 355 F.Supp.3d 49, 55.

D.Mass.1988. Com. (e) cit. in disc. and cit. generally in disc. On January 28, 1984, a patient had surgery to replace his knee at a Veterans Hospital. Over the next six months he experienced pain, swelling, and a decreased range of motion in his knee and received treatment at the hospital for those conditions. In July 1984, the patient consulted with two doctors, who ordered tests and X-rays of the knee. An infection was diagnosed and the patient required several surgical procedures and remained disabled. On June 16, 1986, the patient filed an administrative claim against the Veterans Administration pursuant to the Federal Tort Claims Act; however, his claim was denied and he subsequently filed this action. The district court denied the government's motion to dismiss, holding in part that the applicable two-year statute of limitations did not bar the patient's claim. It determined that a six-month toll of the statute was appropriate because the patient diligently sought treatment during that period and did not discover the alleged malpractice until the two doctors examined him. Young v. United States, 698 F.Supp. 393, 395.

D.Minn.

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D.Minn.1986. Com. (e) cit. in sup. After being treated at a veterans hospital by a succession of physicians over a period of 22 years during which his condition continued to worsen, a patient sued the government for medical malpractice. This court granted the defendant's motion for summary judgment on the ground that the plaintiff's claim was barred by the two-year statute of limitations. Given the plaintiff's awareness of the declining nature of his condition, his possession of his medical records, and his involvement in other medical malpractice litigation, the court was unable to find that the plaintiff had exercised reasonable diligence in investigating the cause and existence of his injury. Wehrman v. United States, 648 F.Supp. 386, 389, judgment vacated 830 F.2d 1480 (8th Cir.1987).

D.Nev.

D.Nev.1987. Coms. (c) and (e) cit. in case cit. in disc. A former railroad employee sued the railroad under the Federal Employers' Liability Act (FELA), alleging that he suffered a compensable work-related injury during the course of his employment. This court granted the defendant's motion for partial summary judgment, holding, inter alia, that the plaintiff's claim was time-barred by the three-year statute of limitations contained in FELA. The court reasoned that the "time of event" rule determined the cause of action's accrual because the traumatic event coincided with a discernable injury. Gregory v. Union Pacific R. Co., 673 F.Supp. 1544, 1546.

D.N.M.

D.N.M.2014. Com. (c) quot. in case quot. in disc. In arrestee's action against county and director of a detention center following his arrest and incarceration based on a bench warrant that had been cancelled, this court noted that New Mexico courts had not stated when a plaintiff's causes of action for false arrest and for false imprisonment accrued; however, the Restatement Second of Torts § 899, Comment *c*, provided that the statute of limitations for false imprisonment and false arrest began to run only when the imprisonment ended, and New Mexico courts often looked to the law as stated in the Restatement Second of Torts. Chavez v. County of Bernalillo, 3 F.Supp.3d 936, 986.

D.N.M.2010. Cit. in sup. (general cite); com. (c) cit. and quot. in sup. Arrestee brought false-arrest and false-imprisonment claims under, inter alia, the New Mexico Tort Claims Act against county board of commissioners, alleging that she was rearrested because of the failure of county law-enforcement officers and/or corrections officers to clear a bench warrant for her arrest. Denying defendant's motion to dismiss, this court predicted that the Supreme Court of New Mexico would hold that the two-year statute of limitations for claims of false arrest and false imprisonment began to run when the imprisonment ended, not at the time of arrest; thus, because plaintiff filed her complaint within two years of the end of her imprisonment, her claims were timely. Gose v. Board of County Com'rs of County of McKinley, 727 F.Supp.2d 1256, 1261, 1263, 1264.

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E.D.N.Y.

E.D.N.Y.1983. Com. (e) cit. in disc. A former serviceman brought a malpractice action against the defendant Veterans Administration Hospital under the Federal Tort Claims Act. The issue in the case was whether the plaintiff's claim was time-barred. According to the Supreme Court of the United States, a claim accrued in FTCA cases when the plaintiff became so aware of his injury and its cause that he had the information to at least contemplate a malpractice action. This court held that although the plaintiff knew he had a problem, plaintiff's claim did not accrue more than two years before he filed this suit, because he relied on continued assurances by the doctors that all would heal. Plaintiff's claim was therefore timely, and the defendant's motion to dismiss was denied. Rispoli v. United States, 576 F.Supp. 1398, 1401, judgment affirmed 779 F.2d 35 (2nd Cir.1985), certiorari denied 474 U.S. 1069, 106 S.Ct. 829, 88 L.Ed.2d 800 (1986), rehearing denied 475 U.S. 1062, 106 S.Ct. 1291, 89 L.Ed.2d 597 (1986).

S.D.N.Y.

S.D.N.Y.1990. Quot. in sup. A bank approved a loan to a printing company, to be secured by the printing company's accounts receivables, inventory, and fixed assets, and disbursed some funds with the remainder to be made available only after an evaluation of the assets' value and quality was completed. The bank released the remainder of the loan funds based on an appraisal company's evaluation, and the printing company went bankrupt shortly thereafter without making any loan payments. The bank sued the appraisal company and its president for negligence, but voluntarily discontinued the suit with prejudice. More than two years later, the appraisal company's president sued the bank and its attorneys, inter alia, for intentional infliction of emotional distress. This court dismissed the complaint, holding that since the president alleged that his emotional distress was caused by the bank filing its suit, his claim accrued when the suit was filed and so was time-barred by a one-year statute of limitations. Diamond v. Strassberg, 751 F.Supp. 1152, 1154.

S.D.N.Y.1990. Com. (c) cit. in disc. Plaintiff, the legal guardian of her minor grandson, brought a medical malpractice suit against the federal government under the Federal Tort Claims Act alleging that the minor suffered and would continue to suffer mental and physical damage as a result of malpractice at the time of his delivery at a U.S. Army medical center. The court dismissed the action as time-barred under the statute of limitations, holding that the plaintiff with reasonably diligent inquiry should have known the cause of the minor's injury within the statutory period. The court stated that a reasonably diligent person in the plaintiff's position, equipped with little background knowledge regarding the medical history of her grandson for whom she was the caretaker, would have asked one of the many physicians or medical staff to explain the information contained in the medical records, which were in her possession for four years. Mendez v. U.S., 732 F.Supp. 414, 422.

S.D.N.Y.1986. Com. (c) cit. in disc. A divorced man absconded out of state with his daughters during a scheduled visitation in 1974 and failed to return them to their mother, who had legal

custody. In 1976 the mother discovered the children's address and phone number, but made only cursory attempts to obtain legal help to effect their return. In 1984 she filed suit against her ex-husband for damages for custodial interference and intentional infliction of emotional distress. This court granted the defendant's motion for summary judgment and dismissed the action with prejudice, holding that the action was time-barred under the three-year statute of limitations. The court found that custodial interference was more analogous to a conversion than to a trespass, and held that the father's action was not a continuing wrong, but a wrong that accrued a cause of action at the time the plaintiff learned of her daughters' whereabouts. Tinker v. Abrams, 640 F.Supp. 229, 231.

S.D.N.Y.1981. Com. (c) cit. in disc. The plaintiff brought this action under the Federal Tort Claims Act for a patient's wrongful death due to the federal government's undisclosed experimentation with toxic drugs. At the time of the settlement, 25 years earlier, the government's involvement was concealed from the plaintiff. She later contended that the concealment of this fact deprived the estate of property without due process of law. The government asserted that the action was time-barred and made a motion to dismiss. The court reluctantly granted the motion to dismiss, reasoning that the cause of action accrued no later than the time of the settlement, when the estate had the opportunity to engage in discovery but did not fully utilize the proceedings and impose sanctions. Because the Federal Tort Claims Act is a waiver of sovereign immunity, its two-year statute of limitations must be strictly applied. Because the cause of action accrued 25 years earlier, that court had no choice but to hold that the action was time-barred. Barrett v. Hoffman, 521 F.Supp. 307, 316, decision reversed 689 F.2d 324 (2d Cir. 1982). Certiorari denied 462 U.S. 1131, 103 S.Ct. 3111, 77 L.Ed.2d 1366 (1983).

E.D.Pa.

E.D.Pa.1980. Cit. in disc. and com. (e) quot. in part in disc. The plaintiff brought a strict liability action for damages arising out of an aircraft crash that killed her husband. The defendant moved for summary judgment claiming, inter alia, that the one-year statute of limitations barred the plaintiff's wrongful death claim. The court noted that many jurisdictions have a special rule concerning the running of the statute of limitations in malpractice cases, and concluded that the rule that the limitations period begins to run from the time the plaintiff knows or reasonably should know the cause of his injury would apply to cases involving an airplane crash. The court held that the defendant was entitled to summary judgment on the wrongful death claim because the action was filed more than one year after the date of the crash and the plaintiff had not put forth any evidence to indicate that the limitations period should begin on any date other than that of the crash. Wetzel v. McDonnell Douglas Corp., 491 F.Supp. 1288, 1291.

M.D.Pa.

M.D.Pa.1994. Com. (d) cit. in case cit. in sup. Property owners sued owners of an adjacent recycling center, alleging, among other claims, CERCLA and RICO violations, nuisance, and

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trespass. This court granted in part and denied in part defendants' motion to dismiss plaintiffs' claims as time-barred, holding, inter alia, that reasonable minds would agree that plaintiffs had all of the necessary information to trigger the statute of limitations on their claims of negligence, negligent and intentional infliction of emotional distress, and strict liability. The court stated that this case was analogous to a prior case in which the owners of wells contaminated by toxic substances sued the company that allegedly caused the contamination. In this case, however, the court was without information to reach a conclusion as to the trespass and nuisance claims in that no time frame was provided as to the levels of selenium and arsenic. Rohrbach v. AT & T Nassau Metals Corp., 888 F.Supp. 627, 634, vacated 902 F.Supp. 523 (M.D.Pa.1996).

M.D.Pa.1988. Com. (d) cit. in disc. Landowners sued a corporation for continuously discharging contaminants into their wells. The defendant moved for partial summary judgment on the ground that the plaintiffs' negligence and strict liability claims were barred by the statute of limitations because it had ceased the practices that caused the contamination more than two years before the suit was filed. The court denied the motion, holding that issues of fact existed regarding the nature of the toxic substances, the time that the plaintiffs discovered the contamination, and whether the situation involved a continuing trespass or a trespass that resulted in a continuing harm of a permanent nature. Merry v. Westinghouse Elec. Corp., 684 F.Supp. 852, 855.

M.D.Pa.1988. Com. (b) cit. in disc. The owners of property located near a landfill that was used for the illegal disposal of toxic waste sued the owners and operators of the landfill and the haulers and the generators of the waste under federal law with pendent state claims for negligence, nuisance, trespass, and strict liability. The court denied the defendants' motions to dismiss, holding that the plaintiffs had sufficiently alleged claims of negligence and nuisance, even as against the generators, because the defendants had reason to recognize that the nuisance would result. The court stated that questions of fact needed to be resolved before proper decisions could be made whether the actions of the defendants constituted continuing torts, which would allow the plaintiffs to escape the barring effects of the statute of limitations, and whether the plaintiffs had sufficiently alleged that the defendants' actions constituted abnormally dangerous activity. Piccolini v. Simon's Wrecking, 686 F.Supp. 1063, 1075.

W.D.Pa.

W.D.Pa.1981. Com. (e) cit. in disc. In a diversity action by a parent in his own right and as parent and natural guardian of an infant, the plaintiff asserted claims for damages from the alleged malpractice by physician and hospital in connection with the birth of the infant, who was born with cerebral palsy. This court stated that, under the law of Pennsylvania, the limitations period begins to run when the plaintiff discovers his injury, operative cause, and causative relationship, and when the plaintiff reasonably should know that he has a cause of action. The court held that within a year of the birth of the child the parent knew that the child had cerebral palsy, that the condition resulted from oxygen deprivation during the first four minutes following delivery, and that several occurrences could have caused such oxygen deprivation. However, because the parent

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did not institute suit until six years and seven months after the birth, the claims were time-barred. The defendants' motions for summary judgment were granted. Bosworth v. Plummer, 510 F.Supp. 1027, 1030.

D.P.R.

D.P.R.2016. Com. (c) quot. in case quot. in sup. Family of deceased patient brought a medical-malpractice claim under the Federal Tort Claims Act against the United States in connection with the treatment patient received shortly prior to his death at a federally funded hospital. This court granted summary judgment for defendant, holding that plaintiffs' claim was barred by the Act's two-year statute of limitations, which began running on the date of injury, specifically, the date of patient's death. The court reasoned that, under Restatement Second of Torts § 899, a cause of action for death was complete when death occurred, and that the circumstances at issue here did not warrant the application of the discovery rule, because patient's symptoms did not improve after he was discharged from the hospital, and he died within two days of the date he first sought treatment at the hospital. Morales-Melecio v. United States, 190 F.Supp.3d 249, 257.

D.P.R.1983. Com. (e) quot. in case quot. in disc. In this medical malpractice action, summary judgment was granted in favor of defendant. The court of appeals vacated and remanded. On remand, the district court held an evidentiary hearing at which plaintiff's regular attending physician testified. According to the testimony, the physician referred plaintiff to defendant for consultation in connection with plaintiff's chronic drainage of a cyst in the perianal area. Defendant performed surgery, after which plaintiff returned to her regular physician complaining of incontinence. Plaintiff's physician advised her that the surgery performed by defendant had weakened plaintiff's sphincter muscle, thus causing the incontinence. The court once again ruled in favor of defendant, holding that the limitations period began running when plaintiff first learned of her injury. Plaintiff's action was thus barred. Complaint dismissed. Galarza v. Zagury, 574 F.Supp. 875, 879, decision vacated and remanded 739 F.2d 20 (1st Cir.1984).

D.S.D.

D.S.D.1997. Com. (c) cit. in disc. The owner of a grain storage building that suddenly collapsed brought causes of action in contract and in tort against the manufacturer of the building's components. Denying in part defendant's motion for summary judgment, the court held, inter alia, that, as to plaintiff's tort theories, the Uniform Commercial Code's statute of limitations did not bar plaintiff's claims, because the cause of action did not accrue until plaintiff was harmed by defendant. Corsica Co-op. Ass'n v. Behlen Manufacturing Co., 967 F.Supp. 382, 385.

D.V.I.

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D.V.I.1995. Com. (d) cit. in disc. and headnote and cit. generally in disc. A lawsuit was brought against, among others, a corporation in connection with the contamination of an aquifer. This court denied the corporation's motion for summary judgment, holding, inter alia, that fact issues existed as to whether the two-year statute of limitations applicable to plaintiffs' claims had expired. The court was unable to determine on the record whether the injuries resulting from the alleged continuing tortious conduct of the corporation were temporary, indefinitely recurring, or permanent in nature. It stated that so long as the injuries resulting from a recurring tort are temporary, the statute of limitations will not begin to run regardless of the measure of damages sought by the plaintiff. In re Tutu Wells Contamination Litigation, 909 F.Supp. 980, 981, 989, 990.

E.D.Wash.

E.D.Wash.2010. Com. (d) cit. in case cit. in disc. (erron. cit. as § 899(d)). Environmental organization sued Department of the Interior, United States Fish and Wildlife Service (FWS), their directors, and others, alleging, among other things, that defendants were in violation of the Washington State Water Code in regard to the operation of a national fish hatchery, and that these alleged state-law violations constituted violations of federal reclamation law. This court dismissed for lack of jurisdiction, holding that plaintiffs' claims were barred by the six-year statute of limitations applicable to suits against the United States, as plaintiffs failed to file their claims within six years of the time from which they had notice regarding defendant FWS's water rights for the hatchery and the existence of certain structures that they alleged unlawfully blocked fish passage. The court rejected plaintiffs' theory that defendants' alleged failure to comply with state law represented an "on-going" violation that exempted them from any limitations period. Wild Fish Conservancy v. Salazar, 688 F.Supp.2d 1225, 1234.

Alaska

Alaska, 1998. Com. (c) cit. in case quot. in disc. General contractor on a city's power line construction project brought a legal malpractice action against its former law firm and several attorneys, alleging negligence in defendants' handling of plaintiff's lawsuit against the project engineer and project designer. The trial court entered judgment on a jury verdict awarding plaintiff damages less favorable than defendants' pretrial offer of judgment. Affirming and remanding for recalculation of prejudgment interest, this court held, inter alia, that, in plaintiff's underlying lawsuit against the project engineer, the trial court did not err in awarding plaintiff prejudgment interest on its damages from the date that plaintiff submitted its cost-overrun claim to the city, rather than on the date that plaintiff claimed that it first incurred damages from the engineer's misrepresentations. The court said that construction occurred over many months, and the record provided no clear indication of the date when plaintiff first suffered pecuniary loss resulting from the engineer's negligence and misrepresentations. Power Constructors, Inc. v. Taylor & Hintze, 960 P.2d 20, 36.

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Alaska, 1984. Cit. in disc., com. (c) quot. in ftn. Plaintiff, hired as a replacement pilot during a strike against defendant, was told that he was a permanent employee. Upon settlement of the strike, defendant furloughed plaintiff and rehired the striking pilots. Plaintiff sued, alleging breach of an employment contract and negligent and fraudulent misrepresentation. The trial court granted defendant's motion for a directed verdict. This court set aside the directed verdict on the breach of contract claim and affirmed on the misrepresentation claims. To be actionable, a representation must be false when made, and the evidence did not show that defendant's representations of plaintiff's status were false when made. The court declined to rule that misrepresentations of law were not actionable, but held that defendant did not misrepresent its hiring authority. Bubbel v. Wien Air Alaska, Inc., 682 P.2d 374, 381.

Alaska, 1982. Com. (c) cit. in ftn. Having suffered losses because of the failure of its attorney to register its stock, a corporation sued the attorney for legal malpractice. The trial court granted summary judgment to the attorney, finding that the statute of limitations barred the action. This court reversed and remanded. The court indicated that the crucial question was when the statute began to run, and noted that in this particular situation, it was a question of first impression. Deciding that the discovery rule was most appropriate for fixing the accrual of a legal malpractice action, the court held that the statute began to run when a party discovered, or reasonably should have discovered, the existence of all the elements of his cause of action. The court also ruled that where a client discovered his attorney's negligence prior to actually suffering any injury as a result of that negligence, the statute would not begin to run until such injury occurred. Finding that the corporation knew of its attorney's failure to register the stock more than two years prior to filing its complaint, but that the corporation was unsure that it had been damaged by the failure until a point in time within the two-year period, the court ruled that the action was not barred. Greater Area, Inc. v. Bookman, 657 P.2d 828, 829.

Alaska, 1981. Com. (c) cit. in diss. op. Former client brought a malpractice action against its former attorneys. The lower court granted summary judgment in favor of the attorneys and the plaintiff appealed. The court held that where the duty that the defendants breached was a duty of reasonable care imposed by law, where the claim that the former attorneys breached an implied term of their contract of employment, to render competent and diligent services, was only a claim that they failed to exercise due care, and where there was no evidence of an agreement to obtain a particular result or to do a particular thing, the essence of the plaintiff's complaint was negligence, and the gravamen thereof lay in tort. Accordingly, the court held that the applicable statute of limitations was one for torts and not for contracts and the action was barred by the two-year statute of limitations. The judgment of the lower court was affirmed. The dissent stated that there were material questions of fact as to whether or not the defendants had breached the duty of representation owed to the plaintiff and as to the time at which the applicable tort statute of limitations commenced to run on the claims. Accordingly, the dissent would not have affirmed the lower court's grant of summary judgment. Van Horn Lodge, Inc. v. White, 627 P.2d 641, 646.

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Ariz.App.

Ariz.App.2001. Com. (c) cit. but dist. Tort victim, as assignee of insured tortfeasor's rights under their policies, brought a bad-faith action against insurer after insurer filed a declaratory-relief action contesting coverage. The trial court dismissed the complaint as time-barred. Affirming, this court held, inter alia, that plaintiff's bad-faith claim against insurer accrued, for statute-of-limitations purposes, when the stipulated judgment in the underlying personal-injury action against insured became final, and not when a final determination of coverage was later made in the declaratory-relief action. Manterola v. Farmers Ins. Exchange, 200 Ariz. 572, 30 P.3d 639, 648.

Ark.

Ark.1986. Com. (c) cit. and quot. in part in sup. A former wife brought action for battery against her former husband. The wife did not discover the extent of her injuries until the limitations period had expired. The trial court dismissed the action, holding that the statute of limitations ran from the time that the battery was committed and had thus lapsed. Affirming, this court held that the limitations period began to run upon physical contact even though there was no observable damage at that point in time. McEntire v. Malloy, 288 Ark. 582, 707 S.W.2d 773, 776.

Conn.App.

Conn.App.2013. Com. (d) cit. in case quot. in sup. Property owner brought claims for nuisance, trespass, and negligence against neighbors who planted invasive bamboo on their property without putting up any barrier to contain it, alleging that the bamboo repeatedly encroached upon her property and continued to do so. The trial court granted summary judgment for defendants, finding that the claims were time barred. Reversing and remanding, this court held that that there were genuine issues of material fact as to whether the alleged nuisance and trespass caused by the bamboo were continuing or permanent. The court explained that a nuisance that was not abatable was considered permanent, and the statute of limitations began to run against such a claim upon the creation of the nuisance once some portion of the harm became observable; however, a nuisance that could and should be abated was not considered permanent, and every continuance of the nuisance was a fresh nuisance for which a fresh action would lie. Rickel v. Komaromi, 73 A.3d 851, 860.

D.C.App.

D.C.App.1985. Com. (g) cit. in disc. A fire at a commercial building originated in a ten-year-old heating system that an employee of the defendant company had repaired. The heating system included an automatic safety switch that failed to function and was a contributing cause of the fire. The tenants and their insurers sought damages for their destroyed property, and the trial court

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found that the defendant's employee had negligently repaired the system fan. The court dismissed the defendant's third-party claim against the manufacturer of the safety switch pursuant to a statute barring actions for damages caused by defective improvements to real property occurring more than ten years after the date on which the improvement was substantially completed. The court of appeals affirmed, holding that the system constituted an "improvement to real property" and that the ten-year time period began to run when the system was installed. The court held that the safety switch manufacturer was within the class of persons the statute protected because manufacturers, like architects and engineers, have no control over maintenance of an improvement that may result in a dangerous or unreasonably unsafe condition. J.H. Westerman Co. v. Fireman's Fund Ins., 499 A.2d 116, 119.

Fla.App.

Fla.App.1998. Com. (c) cit. in disc. An adult woman sued her stepfather for injuries that resulted from sexual abuses he allegedly committed upon her during her childhood. Trial court dismissed based on the four-year statute of limitations. This court affirmed and certified a question regarding tolling of the statute of limitations. The court determined that a prior case precluded a judicial recognition of either an exception to or a tolling of the statute of limitations based upon the application of the doctrine of delayed discovery to actions to recover damages for child abuse where the victim suffers from traumatic amnesia resulting from the abuse. Hearndon v. Graham, 710 So.2d 87, 88, quashed 767 So.2d 1179 (Fla.2000).

Ga.

Ga.2011. Adopted in cases cit. in sup., com. (d) cit. and quot. in sup. Neighboring property owners sued companies that owned and operated power plant, alleging that noise and vibrations from the power plant constituted a nuisance. The trial court denied defendants' motion for summary judgment, holding that defendants had not established that the nuisance was permanent, rather than abatable, and thus the statute of limitations had not run on plaintiffs' claim; the court of appeals affirmed. Affirming in part, reversing in part, and remanding, this court held that, while the noise and vibrations were a permanent nuisance, and thus plaintiffs were limited to filing one cause of action for the recovery of past and future damages, a genuine issue of material fact existed as to whether there was an adverse change in the nature of the noises and vibrations coming from the plant after the start of the 2004 operating season; defendants were entitled to summary judgment, however, to the extent that plaintiffs sought damages for harm that had changed only by degree, i.e., extent and amount, since the power plant began operation. Oglethorpe Power Corp. v. Forrister, 289 Ga. 331, 711 S.E.2d 641, 643, 645.

Ga.App.

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Ga.App.2013. Com. (d) quot. in case quot. in ftn. Landowners brought various claims against county, alleging that county's installation of a drainpipe and drainage tie-in on nearby property resulted in repeated flooding on their property. The trial court granted summary judgment for defendant on each of plaintiff's claims, with the exception of their nuisance claim. Reversing, this court held that the trial court erred by failing to grant defendant's motion for summary judgment in its entirety. The court concluded that plaintiffs' nuisance claim was barred by the four-year statute of limitations, because that claim accrued when they first observed flooding on their property following the completion of county's installation work, and not when they later discovered waterlogged trees falling on their property. Floyd County v. Scott, 740 S.E.2d 277, 280.

Hawaii

Hawaii, 2007. Com. (c) quot. in disc. Motorist and his wife sued university more than three years after motorist was struck and injured by professor who was driving a vehicle owned by university. The trial court denied defendant's motion to dismiss based on the two-year statute of limitations. Affirming, this court held, as a matter of first impression, that, while a cause of action for negligently harming a person was generally complete when the harm occurred, plaintiffs' personal-injury claim did not accrue until motorist actually received the requisite amount of "reasonably necessary" medical-rehabilitative treatment, as manifested through bills received or paid, to meet Hawaii's monetary threshold for tort liability, beneath which motor vehicle accidents were generally characterized as no-fault. Savini v. University of Hawaii, 153 P.3d 1144, 1150.

Idaho

Idaho, 2010. Com. (c) quot. in sup. Heirs and personal estate representatives of decedents sued manufacturers, alleging that decedents contracted asbestos-related illnesses that led to their eventual deaths due to their exposure to defendants' asbestos-containing products or machinery. The trial court granted summary judgment for defendants on grounds that plaintiffs' wrongful-death claims were barred because the statute of limitations for defendants' actions had run prior to their deaths. Reversing and remanding, this court held that, while the state's wrongful-death statute contained an implied condition precedent that such an action could only be brought where the injury to the decedent was such that the decedent himself or herself could have brought a cause of action against the injuring party had the decedent lived, the condition precedent did not apply to the statute of limitations; as the actionable wrong for a wrongful-death action was not complete until the death of the decedent, the statute of limitations did not begin running until that time. Castorena v. General Elec., 149 Idaho 609, 238 P.3d 209, 219.

Ill.App.

Ill.App.1994. Com. (e) at 444 cit. but dist. Woman who sought counseling from priest sued priest and diocese for emotional distress after she allegedly became sexually involved with him but was

later ignored, claiming that priest was responsible for her depression and failed suicide attempt. This court affirmed the trial court's determination that plaintiff's cause of action was barred by the two-year statute of limitations. The court noted that plaintiff cited no Illinois authority that held that the continuing tort rule should apply beyond nuisance or trespass cases, and said that plaintiff could not take advantage of the discovery rule because she did not sufficiently allege facts showing the existence of a legal disability. Hertel v. Sullivan, 261 Ill.App.3d 156, 198 Ill.Dec. 574, 633 N.E.2d 36, 39.

Iowa

Iowa, 2005. Com. (e) cit. in diss. op. A group of adults brought several causes of action against the state based on their speech problems caused by state university experiments on stuttering that they had been unknowingly subjected to as orphaned children. The trial court denied the state's motion to dismiss. This court affirmed and remanded, holding that the state had waived its sovereign immunity under the Iowa Tort Claims Act, and that the statute's two-year statute of limitations began when the plaintiffs discovered that they had been subjects of the experiments, even though the Act had not been enacted when the experiments were performed. The dissent argued that the majority inappropriately applied legal principles developed after the Act's enactment and that the case should have been resolved according to the legislature's intent, which the dissent felt did not include claims based on conduct that occurred decades before the statute's enactment. Nixon v. State, 704 N.W.2d 643, 659, 660.

Ky.

Ky.2007. Com. (c) cit. in case quot. in sup. Arrestee who was acquitted on criminal charges of harassment, menacing, and resisting arrest sued police officers for, among other things, false imprisonment. The trial court granted defendants' motion to dismiss that claim on the basis that the statute of limitations had run. The court of appeals affirmed. Affirming, this court held, inter alia, that, as a matter of first impression, the statute of limitations on a false imprisonment claim stemming from an arrest, where the arrest was followed by criminal proceedings, began to run when the alleged false imprisonment ended, i.e., at the time the plaintiff became detained pursuant to legal process, rather than on the date of dismissal of the criminal charges. Dunn v. Felty, 226 S.W.3d 68, 72.

Md.

Md.2013. Com. (c) quot. in sup. Surviving spouse and adult children of deceased patient brought a wrongful-death action against physician, alleging that defendant was negligent in failing to timely diagnose decedent's colorectal cancer. The trial court granted defendant's motion to dismiss, holding that plaintiffs' wrongful-death claims were barred because decedent could not have brought a timely personal-injury suit against defendant at the time of her death, as it would have

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been time-barred by the statute of limitations applicable to medical-negligence claims. Reversing and remanding, this court held that, under Maryland's wrongful-death statute, a wrongful-death claimant's right to sue was not contingent on the decedent's ability to file a timely claim before death. The court reasoned that the statute created a new and independent cause of action that provided recovery for damages sustained by the survivors upon the death of the party injured. Mummert v. Alizadeh, 435 Md. 207, 77 A.3d 1049, 1059-1060.

Md.2011. Com. (c) quot. in sup. and cit. in case quot. in ftn. to conc. and diss. op. Husband sued county and police officers, after he was wrongfully imprisoned for over eight months on charges that he raped and murdered his wife. The trial court entered judgment on a jury verdict for plaintiff. The court of appeals affirmed. Affirming, this court held, among other things, that the Local Government Tort Claims Act's 180-day notice requirement did not begin to run until plaintiff's release from prison, noting that the general rule for false imprisonment cases in which a person was arrested and released prior to trial was that the statute began to run only when the imprisonment ended. The concurring and dissenting opinion argued that plaintiff's notice was untimely, but that his neglect in timely filing was excusable because he acted with the due diligence of a reasonable person isolated in a detention center for eight months. Prince George's County v. Longtin, 419 Md. 450, 19 A.3d 859, 874-875, 892.

Mass.

Mass.1991. Com. (g) cit. in case cit. in ftn. The purchaser of a house sued the seller, among others, nine years after purchasing the house, alleging that the seller knowingly constructed the house on improper foundation material and failed to disclose this to the purchaser. The trial court allowed the defendants' joint motion for summary judgment based on the statute of repose. Affirming in part and vacating in part, this court held, inter alia, that those claims based on the deficient or negligent design or construction of the house were barred by the statute of repose. The court found that neither the fraudulent concealment provisions of the statute nor common law estoppel prevented the statute of repose from applying. There was no claim of fraudulent concealment or estoppel based on conduct apart from the wrongdoing that was the basis of the plaintiff's claim. Sullivan v. Iantosca, 409 Mass. 796, 569 N.E.2d 822, 824.

Miss.

Miss.1983. Com. (c) cit. in case quot. in sup. The plaintiff alleged that he collapsed on the job in November 1977 because of job stress. This complaint was filed in March 1980. There was a three-year limitations period. The defendant argued that the complaint was time-barred because the plaintiff had experienced stomach problems attributable to work stress as early as 1970. The trial court ruled that matters prior to March 1977 were time-barred. At trial, the plaintiff prevailed; the defendant appealed. This court reversed, holding that when an injury was caused by continuous and repeated acts, the limitations period did not begin until the tortious conduct ceased. Here, the stressful working conditions were viewed as continuing up to the time of collapse. This tolled the

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running of the limitations period until November 1977. The trial court thus erroneously barred the admission of plaintiff's evidence occurring before March 1977. Illinois Central Gulf R. Co. v. Boardman, 431 So.2d 1126, 1128.

Mo.App.

Mo.App.1992. Com. (c) cit. in sup. (Cit. as § 899(c).) Landowner acquired a fuel tank expressly conveyed to her at the time she purchased the land. The lessor of the fuel tank demanded it returned, the landowner refused, and the lessor sued the landowner one year later to acquire possession of the tank. The trial court dismissed plaintiff's claim as barred by a five-year statute of limitations, since the original lessee obtained the tank fourteen years before the proceedings and conveyed the land along with the tank soon after. This court reversed and remanded holding that the controversy was not barred because it did not arise until the current landowner refused to surrender possession of the tank, a year before plaintiff brought suit. Empiregas, Inc. of Palmyra v. Zinn, 833 S.W.2d 449, 451.

Nev.

Nev.1988. Com. (e) cit. in disc. A son and daughter sued their mother's doctors for wrongful death allegedly resulting from medical malpractice. The trial court held that the action was time-barred by the applicable statute of limitations. This court held that the two-year statutory period for wrongful death medical malpractice actions did not begin to run until the plaintiff discovered or reasonably should have discovered the legal injury, or, in other words, both the death and the negligent cause thereof. The court noted that its ruling was in accord with its own past decisions and with the rule in many other jurisdictions. Pope v. Gray, 104 Nev. 358, 760 P.2d 763, 765.

N.J.

N.J.1980. Quot. in disc. The plaintiff, a famous artist, claimed that in 1946 three of her paintings were stolen from a New York art gallery that was operated by her husband. Neither the plaintiff nor her husband reported the paintings missing to any law enforcement agency. Finally, in 1972, the plaintiff reported the loss to the Art Dealers Association. In 1975, she learned that the paintings were on display in a gallery, and that the defendant had recently purchased the paintings from a seller who had received them as a gift from his father. The seller traced his father's possession of the paintings back to 1941, a period that preceded the actual theft. Consequently, the seller's factual contentions were inconsistent with the plaintiff's allegations of theft. The plaintiff brought this action for replevin of the paintings. The defendant asserted that he was a purchaser for value, that he had title to the paintings by adverse possession, and that the plaintiff's action was barred by the statute of limitations. The trial court granted summary judgment for the defendant. The appellate court reversed and entered judgment for the plaintiff. On further appeal, the state supreme court reversed and remanded for a plenary hearing. It held that the appellate court erred in granting

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summary judgment for the plaintiff because there was an issue of material fact—whether the paintings were stolen—that required remand for trial. On the limited record before it, the court could not determine who had title to the paintings. It nonetheless suggested several guidelines to aid the trial court in resolving questions of law. The critical legal question in this case was when the plaintiff's cause of action accrued. In New Jersey, an action for replevin must be commenced within six years after the accrual of the cause of action. Courts have developed the discovery rule to avoid harsh application of the statute. Applying the discovery rule to the instant action of replevin, the plaintiff's cause of action accrued when she first knew, or reasonably should have known through due diligence, of the cause of action, including the identity of the possessor of the paintings. O'Keefe v. Snyder, 83 N.J. 478, 416 A.2d 862, 875.

N.M.

N.M.2017. Com. (g) quot. in sup. and in diss. op. Patient sued physician, alleging that physician committed medical malpractice by failing to inform her that an ultrasound report indicated that there was a complex mass on her left ovary. The trial court denied physician's motion for summary judgment, in which physician argued that patient's malpractice claim was barred by the state Medical Malpractice Act's three-year statute of repose. The court of appeals reversed and remanded. Affirming, this court held that plaintiff could not invoke the Act's due-process exception to the statute of repose for claims accruing within the last year of the three-year repose period, because she did not file her late-accruing claim within twelve months. The dissent cited Restatement Second of Torts § 899 in arguing that the majority's twelve-month rule could potentially give rise to constitutional problems when the statute of repose ran before a cause of action came fully into existence. Cahn v. Berryman, 408 P.3d 1012, 1015, 1031.

N.Y.Sup.Ct.App.Div.

N.Y.Sup.Ct.App.Div.1996. Cit. in diss. op. A man who was suffering the physical and emotional effects of cancer and major surgery was threatened by his neighbor during an ongoing dispute concerning a murky condition in a lake that abutted their adjoining properties. The man and his family sued the neighbor and his family for intentional infliction of emotional distress. Trial court entered judgment on a jury verdict awarding compensatory and punitive damages. This court affirmed as modified, holding, inter alia, that the jury could rationally conclude that defendant's conduct was extreme and outrageous and that he had engaged in a deliberate and malicious campaign of harassment and intimidation directed at plaintiffs. Dissent argued that a new trial should be had, at which plaintiffs would have to prove that defendants' conduct within the statute of limitations period was performed with the requisite culpability, rose to the level necessary to justify the imposition of liability, and caused plaintiffs serious emotional distress. Plaintiffs would have to show their susceptibility to injury and defendants' awareness of plaintiffs' vulnerability. Stram v. Farrell, 223 A.D.2d 260, 646 N.Y.S.2d 193, 198.

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N.Y.Ct.Cl.

N.Y.Ct.Cl.2019. Com. (c) cit. in sup. Inmate who was allegedly confined to his cell and to "keeplock" for six days as a result of two separate disciplinary proceedings filed claims for wrongful confinement against state, claiming that the misbehavior reports charging him with facility rule violations did not provide adequate notice of the offenses charged and that the hearings were conducted by a biased hearing officer. This court denied defendant's motion to dismiss for lack of jurisdiction, in which defendant argued that plaintiff failed to allege an "accrual date" for his claims, holding that plaintiff satisfied the relevant pleading requirements by stating when the wrongful-confinement claims arose, and that his claims were sufficiently definite to allow defendant to promptly and specifically investigate its potential liability. The court cited Restatement Second of Torts § 899 in explaining that the limitations period on a claim for false imprisonment began to run when the claimant was released, rather than when the claimant was first confined, in recognition of the legal difficulty a confined claimant faced in interposing a claim. Green v. State, 109 N.Y.S.3d 839, 843.

N.C.

N.C.1982. Com. (g) cit. in disc. The plaintiff was injured in 1977 when his hand was caught in the gears of a yarn-crimping machine owned by his employer. The machine had been purchased from the defendant in 1971. The complaint was filed in 1979. The defendant made motions to dismiss and for summary judgment. The trial court granted the motions on the basis of a state statute providing that no products liability action could be brought more than six years after the date of initial purchase for use or consumption. The court of appeals reversed, holding that the statute was unconstitutional on its face. On appeal, this court held that the statute did not apply to the plaintiff's case. The court noted that the statute here, a statute of repose, was similar to many others enacted throughout the nation to set an outside limit for bringing products liability actions for personal injury. However, the court concluded that the legislature did not intend that the statute be applied retrospectively to causes of action that had accrued before its effective date of October 1, 1979. Here, the plaintiff's cause of action accrued at the time he was injured. Thus, although he had not filed his claim by the effective date of the statute, his claim was still viable. The decision of the court of appeals was modified and affirmed. Bolick v. American Barmag Corp., 306 N.C. 364, 293 S.E.2d 415, 417.

N.C.App.

N.C.App.1999. Com. (g) cit. in case cit. in sup. Homeowner sued contractor, alleging defective construction. Contractor brought third-party complaint against two of its subcontractors. Second subcontractor moved to dismiss on the ground that contractor's claim against it was time-barred. The trial court granted the motion. Affirming, this court held that the complaint was untimely under the applicable statute of repose, North Carolina's real-property-improvement statute, since

the last act giving rise to the alleged injury occurred more than six years before contractor filed its third-party complaint. Furthermore, while statutes of limitations could be tolled under certain circumstances, statutes of repose could not. Monson v. Paramount Homes, Inc., 515 S.E.2d 445, 449.

N.C.App.1998. Cit. in headnote, cit. in case cit. in disc. The State, acting as liquidator of an insurance company, sued the insurer's attorneys for negligence and constructive fraud in connection with loans by the insurer. The trial court granted defendants' motion to dismiss. This court affirmed, holding, inter alia, that plaintiff's negligence claim was time-barred on the face of its complaint. The court determined that plaintiff's reliance on the doctrine of adverse domination was unavailable, because equitable doctrines did not toll statutes of repose. Even if the doctrine applied, the statute of repose barred plaintiff's malpractice action. The last negligent acts of defendants were those regarding the loans and defendants' representation of the insurer regarding those loans in 1991. Plaintiff's complaint was filed in 1996, and thus was not initiated within four years of defendants' last act giving rise to the cause of action. State ex rel. Long v. Petree Stockton, 129 N.C.App. 432, 499 S.E.2d 790, 791, 798, cert. dismissed 1999 WL 49852 (N.C.1999).

Pa.

Pa.2017. Com. (g) cit. in sup. Administrator of patient's estate brought wrongful-death and survival claims against nursing home and others, alleging that patient died from sepsis and pressure sores that she developed while in defendants' care. After a jury returned a verdict in favor of plaintiff, the trial court denied defendants' motion for judgment notwithstanding the verdict, in which defendants argued that plaintiff's survival claim was time-barred under the Medical Care Availability and Reduction of Error Act. The court of appeals affirmed. Affirming, this court held that plaintiff's survival claim was timely filed under the Act, which permitted plaintiffs to bring survival actions within two years of death, rather than from the date of the patient's injury. The court noted that the applicable provision of the Act was a statute of limitations that could be tolled on equitable grounds, rather than a statute of repose that could not be delayed by estoppel or tolling under Restatement Second of Torts § 899. Dubose v. Quinlan, 173 A.3d 634, 645.

Pa.Super.

Pa.Super.1980. Com. (e) cit. in disc. The plaintiffs, administratrices of the estates of their deceased husbands, brought survival actions and wrongful death actions against the defendants claiming that emissions from coke ovens built by them had caused the decedents to contract cancer of the lungs, which caused their deaths. The defendants filed motions for summary judgment, arguing that the one-year statute of limitations applicable to survival actions barred the suits. The lower court denied the motions. The defendants argued that the last day on which the statutory periods could have started to run was the day of the decedents' deaths, which had occurred more than two years before the suits were brought. The plaintiffs argued that the statutory period did not start to run until they, as the decedents' representatives, knew or should have known of the causal connection

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between the emissions from the coke ovens and the decedents' deaths and that, as to that date, there was a genuine issue of fact sufficient to prevent a grant of summary judgment in favor of the defendants. This court stated that a judicially created standard known as the "discovery rule" has been applied in cases involving malpractice by various professionals and injuries resulting from complications incident to medical procedures and drugs, all cases where not even a diligent party may reasonably be expected to discovery his injury. The discovery rule holds that the limitations period runs from the time of actual discovery of the injury, the operative cause of the injury, and of the causal relation between the injury and the operative cause, or the time when discovery of these factors was reasonably possible. By applying this rule to this case, the court found that a genuine issue of fact existed as to when the plaintiffs should have discovered the causal connection between the coke oven emissions and the decedents' cancer. The lower court's denial of the defendants' motion for summary judgment was therefore affirmed. Anthony v. Koppers Co., Inc., 284 Pa.Super. 81, 425 A.2d 428, 431, 434, reversed 496 Pa. 119, 436 A.2d 181 (1981).

Tex.

Tex.1992. Cit. but not fol.; com. (c) quot. in ftn., quot. in conc. and diss. op., and quot. in ftn. to conc. and diss. op. Family of worker whose death was caused by silicosis brought wrongful death and survival suit against manufacturers and distributors of silica products decedent had used in his work. Decedent had sued for his injuries but died before his case came to trial. The trial court granted summary judgment to those defendants whom decedent had not timely sued; the intermediate appellate court affirmed. This court also affirmed, holding that plaintiffs' wrongful death action was time-barred, since it was derivative of decedent's claims, which were time-barred. Two concurring and dissenting opinions concurred in dismissal of plaintiffs' survival action as time-barred but argued that the wrongful death action was not derivative of decedent's rights and should be permitted within two years of decedent's death, whether or not decedent's action for his injuries would have been time-barred on the date of his death. Russell v. Ingersoll-Rand Co., 841 S.W.2d 343, 350, 356, 360.

Tex.App.

Tex.App.2008. Cit. in disc. Laborer who allegedly contracted mesothelioma as a result of exposure to asbestos-containing insulating products brought products-liability and negligence claims against successor of manufacturer of the products. The trial court granted summary judgment for defendant based on a Texas statute that was enacted and made effective during the proceedings, which created an affirmative defense to successor liability for asbestos claims and altered the choice-of-law analysis to require application of Texas law to the fullest extent permissible. Reversing and remanding, this court held that the statute violated the Texas constitution by retroactively destroying plaintiff's vested rights in accrued common-law tort claims. The court noted that, under general principles of tort law, a personal-injury cause of action like plaintiff's accrued when the conduct that invaded plaintiff's rights caused injury. Satterfield v. Crown Cork & Seal Co., Inc., 268 S.W.3d 190, 207.

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Tex.App.2001. Cit. in conc. op. Boat owner sued contractor's liability insurer for negligent misrepresentation after insurer denied owner coverage as an additional insured under contractor's liability policy for injury to contractor's employee. The trial court entered a take-nothing judgment in favor of insurer, holding that owner's suit was time-barred. Affirming, this court held that the statute of limitations commenced on the date that owner first received the certificate of insurance. The concurring opinion stated that it was unfair to begin running the statute of limitations until the plaintiff's injury was known or apparent, and that to do otherwise would cause a trend toward statutes of repose, unfairly barring actions regardless of the reasons for tolling the statute. Sabine Towing & Transp. Co., Inc. v. Holliday Ins. Agency, Inc., 54 S.W.3d 57, 63.

Utah

Utah, 1995. Com. (b) quot. in ftn. in sup. Crop owner sued farmers' association to recover for damage to his crops, after defendant applied the wrong chemicals to plaintiff's safflower field. Reversing the trial court's grant of summary judgment for defendant and remanding, this court held, inter alia, that, although the facts alleged in plaintiff's complaint could give rise to a tort claim, plaintiff's action was based on breach of specific terms of the parties' contract and thus was timely filed under both Utah and Idaho limitations statutes for oral contract actions. Ward v. Intermountain Farmers Ass'n, 907 P.2d 264, 267.

Utah, 1984. Com. (g) cit. in sup. Subcontractor, sued for breach of contract by general contractor for installation of defective doors, brought third-party indemnity action against manufacturer and supplier of doors. Trial court granted summary judgment for defendants because action was not brought within four years of delivery of doors. This court affirmed, holding that U.C.C. statute of repose required all actions based on breach of contract for sale of goods, including indemnity actions, to be brought within four years of tender of delivery. Perry v. Pioneer Wholesale Supply Co., 681 P.2d 214, 219.

Utah App.

Utah App.2006. Com. (g) quot. in case quot. in disc. Former wife, who remained in a conjugal relationship with ex-husband following their divorce and husband's marriage to another woman, filed a verified petition after his death for judicial declaration of an unsolemnized marriage with decedent. The trial court granted summary-judgment motions brought by decedent's legal wife and another woman with whom he had lived. Affirming, this court held that the petition was time-barred under the one-year statutory limit for establishing the validity of an unsolemnized marriage, because petitioner did not bring the petition within a year after decedent's licensed remarriage, which marked the termination of any purported unsolemnized marriage between decedent and petitioner; because the controlling statute was one of repose, rather than limitation, it could not be tolled by decedent's concealment from petitioner of his remarriage. In re Marriage of Kunz, 2006 UT App 151,136 P.3d 1278, 1283.

Va.

Va.1987. Com. (g) cit. in sup. A city and its school board sued manufacturers of asbestos products, seeking damages for the removal and replacement of asbestos products in school buildings. The trial court certified a question to this court as to whether a statute reviving all causes of action against asbestos manufacturers until July 1, 1990 violated the due process clause of the state constitution. Answering affirmatively, this court held that a statute of repose had bestowed substantive rights, which the legislature could not impair, on the manufacturers when the period expired. The statute of repose, unlike a statute of limitations, defined substantive rights by stating that after a certain time a defendant could not be subject to any liability, whether it accrued before or after the period elapsed. School Bd. of Norfolk v. U.S. Gypsum Co., 234 Va. 32, 360 S.E.2d 325, 328, rejected by Independent School Dist. No. 197 v. W. R. Grace & Co., 752 F.Supp. 286 (D.Minn.1990).

Wash.

Wash.2016. Com. (c) quot. in diss. op. Personal representative for the estate of worker who died of asbestos-related disease filed a wrongful-death action against defendants who allegedly had a part in exposing worker to asbestos, including one defendant against which worker had obtained a judgment in a personal-injury suit approximately nine years prior to his death. The trial court granted defendants' motions to dismiss, finding that plaintiff's wrongful-death action was barred by the three-year statute of limitations on personal-injury suits, because worker would not have had a cause of action against defendants at the time of his death. The court of appeals and this court both affirmed. The dissent argued that plaintiff's statutory wrongful-death action was timely under Restatement Second of Torts § 899 because it was filed within three years of worker's death; the dissent reasoned that only a personal representative had the right to bring a wrongful-death claim, and thus a wrongful-death claim could not accrue before the decedent's death. Deggs v. Asbestos Corporation Limited, 381 P.3d 32, 44.

Wash.App.

Wash.App.2015. Subsec. (c) quot. in ftn. to diss. op. Following the death of worker who had successfully sued several entities for injuries related to asbestos exposure on the job, personal representative of worker's estate filed a second action asserting survival and wrongful-death claims against one defendant from the prior action and several new defendants. This court affirmed the trial court's grant of summary judgment for defendants, reasoning that plaintiff's claims against defendants were barred because worker had allowed the statute of limitations to run out on his remaining claims against defendants during his lifetime, and thus there was no valid subsisting cause of action in worker at the time of his death from which plaintiff's wrongful-death claim could derive. The dissent argued that plaintiff's wrongful-death action could not accrue before worker's

death, and that, under Restatement Second of Torts § 899, statutes of limitations could not be applied so as to bar claims that had not yet accrued. Deggs v. Asbestos Corp. Ltd., 354 P.3d 1, 10.

Wis.

Wis.1980. Com. (e) cit. in disc. Twenty-one years prior to the commencement of this action, the defendant operated upon the plaintiff, then a child, to repair a congenital hernia. Although it was not discovered until one year prior to commencement of this action, the plaintiff was rendered sterile by that surgery. The defendant's motion for summary judgment based on the statute of limitations was denied by the lower court but the intermediate appellate court reversed this decision. This court stated that the statute of limitations provides that such actions must be commenced within three years "after the cause of action has accrued." While the trend in many jurisdictions has been to adopt the "discovery rule," which holds that the cause of action does not accrue until it is or should have been discovered, this court held that the statute of limitations in medical malpractice cases begins to run from the time the negligent act occurs and the accompanying injury results, not from the date of the discovery of the injury. Therefore, the decision of the intermediate appellate court was affirmed. Rod v. Farrell, 96 Wis.2d 349, 291 N.W.2d 568, 570.

Wis.App.

Wis.App.1990. Com. (d) cit. in ftn. to diss. op. Two dairy farmers sued an electrical company for damage to their dairy herd caused by stray electrical voltage, alleging negligence, strict tort liability, and nuisance. The trial court entered judgment on a jury verdict for the plaintiff. While the jury had also determined that the plaintiffs should have discovered their cause of action more than six years before commencing suit, the court concluded that the defendant's negligence was continuing and ruled that the action was not barred, upholding the jury's favorable verdict on the plaintiffs' three theories of liability. Reversing, this court held, inter alia, that strict liability, which applied to the sale of defective products, not services, was inapplicable to stray electrical voltage, which was a normal and natural condition common to all power distribution systems. The court further held that the continuous negligence rule of medical malpractice cases did not apply to stray electrical voltage. The dissent responded that the farmers should have been allowed to recover their continuing damages, from the time they knew or should have known that the defendant's electrical system was a cause of those damages to the date of trial. Kolpin v. Pioneer Power & Light Co., 154 Wis.2d 487, 453 N.W.2d 214, 222, review granted _ Wis.2d _, 457 N.W.2d 323 (1990).

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Article V(1)(c) gives rise to a number of issues, many of which parallel issues arising in the P 3541 annulment context. (765) It is sometimes said that Article V(1)(c) is rarely invoked, (766) but P 3542 there are in fact a substantial number of cases in which the provision has arisen.

[a] Article V(1)(c) Distinguished From Article V(1)(a)

Article V(1)(c) addresses one element of the basic requirement that international commercial arbitration under the Convention be based on the parties' consent. (767) Just as parties must consent to arbitrate at all, so they must consent to arbitrate, and submit to arbitration, the particular disputes that the tribunal decides.

An arbitral tribunal has no authority to decide disputes that the parties have not agreed to arbitrate, and submitted to it, and its awards on such matters are subject to non-recognition. According to one authority's evocative characterization, "[a]n arbitral tribunal is one of large and exclusive powers within its prescribed limits, but it is as impotent as a morning mist when it is outside these limits." (768)

Preliminarily, Article V(1)(c) does *not* apply where there is a dispute as to the existence of a valid arbitration agreement (which is the subject of Article V(1)(a)). (769) Instead, Article V(1)(c) applies where it is alleged that a tribunal improperly decided matters that were not submitted to it by the parties (or, less clearly, where the tribunal failed to decide matters that were properly submitted to it). (770) Article V(1)(c) concerns only the excess of jurisdiction, or authority, rather than the absence of any jurisdiction at all.

Of course, Article V(1)(c) also does not apply where there is a challenge to the substantive decision of the arbitral tribunal on the merits of the parties' dispute; as discussed elsewhere, the Convention does not provide for, or permit, such substantive review. (771) Article V(1)(c) only authorizes non-recognition where the arbitrators exceeded their jurisdiction, not where they made errors, including serious errors, in the exercise of that jurisdiction.

[b] Burden and Standard of Proof Under Article V(1)(c)

P 3542 It is clear that the award-debtor bears the burden of proof of an excess of authority under

PROCEDURAL ORDER No. 2 (Revised)
May 31, 2005

Glamis Gold, Ltd., Claimant
v.
The United States of America, Respondent

An Arbitration Under Chapter 11 of the North American Free Trade Agreement (NAFTA), in accordance with the United Nations Commission on International Trade Law (UNCITRAL) Arbitration Rules, and administered by the International Centre for Settlement of Investment Disputes (ICSID)

Michael K. Young, President
David D. Caron, Arbitrator
Donald L. Morgan, Arbitrator

I. Summary

1. Based on its reading and application of Article 21(4) of the UNCITRAL Arbitration Rules to Respondent's request for bifurcation of the proceedings, the Tribunal does not find sufficient grounds to justify the separation of the identified jurisdictional issues from the merits of the case. Respondent's request for bifurcation therefore is denied.

II. Procedural History and Contentions of the Parties

2. This Arbitration was commenced by Claimant in a Notice of Arbitration dated December 9, 2003.

3. On March 3, 2005, the Tribunal issued its Procedural Order No. 1 ("Order No. 1") outlining a schedule of proceedings which incorporated Respondent's stated intent to make preliminary objections to the jurisdiction of the tribunal and to request bifurcation of the proceedings.

4. Under Order No. 1, Respondent was directed to file any request for bifurcation of the proceedings based upon pleas as to the jurisdiction or preliminary objections along with its Statement of Defense on April l8, 2005. The Claimant was directed to file its response to a request for bifurcation by April 21, 2005. The Respondent was given the opportunity to reply by April 29, 2005. The Claimant was permitted to file a rejoinder by May 5, 2005.

5. Respondent's request for bifurcation of the proceedings and the subsequent filings identified in the preceding paragraph were all submitted in a timely fashion.

6. The Tribunal indicated in Order No. 1 that it would expeditiously issue a decision regarding bifurcation and inform the Parties as appropriate of changes to the schedule of proceedings.

III. Applicable Law

7. The applicable procedural rules are the UNCITRAL Arbitration Rules.

8. Article 21(4) of the UNCITRAL Arbitration rules provides:

> "In general, the arbitral tribunal should rule on a plea concerning its jurisdiction as a preliminary question. However, the arbitral tribunal may proceed with the arbitration and rule on such a plea in their final award."

9. Article 21(4) establishes a presumption in favor of the tribunal preliminarily considering objections to jurisdiction. Simultaneously, however, Article 21(4) does not require that pleas as to jurisdiction must be ruled on as preliminary questions. The choice not to do so is left to the tribunal's discretion.[1]

10. Parties direct the Tribunal's attention to a significant number of arbitral awards and commentary on the subject of jurisdiction, bifurcation, and justiciability. The majority of these sources do not involve UNCITRAL Rule 21(4). Most importantly, these sources often do not involve rules with a presumption in favor of the preliminary consideration of pleas as to jurisdiction and are not directly relevant to the tribunal's considerations.

11. In examining the drafting history of Article 21(4) of the UNICTRAL Rules, the Tribunal finds that the primary motive for the creation of a presumption in favor of the preliminary consideration of a jurisdictional objection was to ensure efficiency in the proceedings. Importantly, the Tribunal reads the presumption in favor of preliminarily considering an objection to jurisdiction as an instruction to the Tribunal and clearly not as an absolute right of the requesting party.

12. This Tribunal in examining the various sources finds that Article 21(4) contains a three fold test.

    a. First, in considering a request for the preliminary consideration of an objection to jurisdiction, the tribunal should take the claim as it is alleged by Claimant.
    b. Second, the "plea" must be one that goes to the "jurisdiction" of the tribunal over the claim. For example, the presumption in Article 21(4)

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[1] The exercise of this discretion is implicit in a number of decisions in proceedings governed by the UNCITRAL Arbitration Rules. See e.g. *Canfor Corporation v. United States of America*, Decision on the Place of Arbitration, Filing of a Statement of Defense and Bifurcation of the Proceedings, (January 23, 2004), ¶ 46 (Rule "allows an arbitral tribunal to rule on its jurisdiction as a preliminary question,")

would not apply to a request to bifurcate the proceedings between a liability phase and a damages phase. Likewise, Article 21(4) would not apply to a request that the Tribunal first consider whether the actions complained of were the cause of the loss, even though such a determination might be efficient overall for the proceedings. The Tribunal does not mean to suggest that such a request can not be made to the Tribunal under, for example, Article 15(1), but rather seeks to emphasize that the presumption in favor of bifurcation contained in Article 21(4) extends only to pleas as to the jurisdiction of the tribunal.

c. Third, if an objection is raised to the jurisdiction of the tribunal and a request is made by either party that the objection be considered as a preliminary matter, the tribunal should do so. The tribunal may decline to do so when doing so is unlikely to bring about increased efficiency in the proceedings. Considerations relevant to this analysis include, *inter alia*, (1) whether the objection is substantial inasmuch as the preliminary consideration of a frivolous objection to jurisdiction is very unlikely to reduce the costs of, or time required for, the proceeding; (2) whether the objection to jurisdiction if granted results in a material reduction of the proceedings at the next phase (in other words, the tribunal should consider whether the costs and time required of a preliminary proceedings, even if the objecting party is successful, will be justified in terms of the reduction in costs at the subsequent phase of proceedings); and (3) whether bifurcation is impractical in that the jurisdictional issue identified is so intertwined with the merits that it is very unlikely that there will be any savings in time or cost[2]

IV. The Contentions of the Parties

13. In its Request for Bifurcation, the Respondent advances two preliminary objections to the jurisdiction of the Tribunal: (1) that Claimant's claims under NAFTA Article 1105(1) based upon three federal actions taking place in October 1999, December 1999, and November 2000 are time-barred under the limitation period set forth in NAFTA Article 1117(2); and (2) that Claimant's claims under NAFTA Article 1110 are not ripe because the Claimant cannot assert that it "has incurred" a loss as a result of California state measures as required by NAFTA Article 1117(1).

14. The Claimant argues that it has properly pleaded its claims with respect to NAFTA Article 1105 and Article 1110. Claimant argues that bifurcation would

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[2] *See e.g., Methanex Corporation* and *United States of America*, Partial Award on Jurisdiction (NAFTA Chapter Eleven, 7 Aug. 2002), at 37 ¶ 110, 160 (footnote omitted), *reprinted in* 14 *World Trade & Arbitration Materials* 109, 146, 186, 188-89 (No. 6, 2002); *Methanex Corp.* and *United States of America*, Letter from the Tribunal President to the Parties' counsel (NAFTA Chapter Eleven, 2 Jun. 2003), at 1-3, *available at* http://naftalaw.org; and Bank *Markazi Iran and The Federal Reserve Bank of New York*, Award No. 595-823-3 (16 Nov. 1999), Dissenting Opinion of Mohsen Aghahosseini (13 Jun. 2000), at 26.

result in unwarranted delay since its claims arise from a common set of facts that will eventually need to be addressed at a merits phase. In Claimant's view, the Tribunal will have to perform "the same comprehensive review of the federal and state mining approval process that will decide the merits of this dispute."[3]

15. Respondent disagrees arguing that Claimant in its Article 1105 claim is impermissibly attempting to "bundle" actions taken at different time by separate governmental entities into a single measure as a basis for its claim.

V. Decision of the Tribunal

16. The Tribunal is not persuaded that the proceedings should be bifurcated at this time. To do so would not ultimately avoid expense for the Parties, contribute to Tribunal efficiency, or be practical.

Respondent's Objection that Various Aspects of Claimant's Article 1105 Claim are Time Barred.

17. Respondent objects to Claimant's Article 1105 claim on the ground that three federal actions from October 1999, December 1999, and November 2000, but not all federal actions, mentioned by Claimant are time barred from being considered as "offending measures."

18. The Tribunal finds that an objection based on a limitation period for the raising of a claim is a plea as to jurisdiction for the purposes of Article 21(4).

19. The Parties dispute whether the several federal actions mentioned in Claimant's Article 1105 claim are each independent bases for an Article 1105 claim or whether they can be "bundled" for the purpose of an Article 1105 claim. In Respondent's view, "[w]hile Glamis, of course, may refer to facts that predate December 9, 2000, as background for its claims, events that predate that time may not form the basis for a finding that the U.S. breached a provision of the NAFTA."[4] It is unclear from the pleadings of Claimant whether the three federal actions to which Respondent directs its objection are asserted as NAFTA claims in and of themselves or as supporting evidence of a later NAFTA claim.

20. The Tribunal need not decide which of the references to government actions in Claimant's Notice of Arbitration are asserted as the direct basis of a NAFTA claim and which are asserted as supporting factual evidence of a NAFTA claim. Without prejudice to that question, it is clear that Claimant relies on the January

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[3] Claimant's Response at p. 4.
[4] Claimant's Response at p. 4.

17, 2001, Department of Interior Record of Decision and subsequent state and federal acts as a basis for its Chapter 11 claims.[5]

21. The Tribunal notes that even if it were to find the three mentioned federal actions to be time barred, such a finding does not eliminate the Article 1105 claim inasmuch as other federal actions are alleged by Claimant to be a basis for its claim. The potential exclusion of certain events at the merits stage to serve as independent bases of the claim will not in the circumstances of this proceeding exclude the claim in its entirety. Inasmuch as there is no jurisdictional objection to the NAFTA Article 1105 claim as based on the Record of Decision and subsequent acts, the Tribunal does not find the request for preliminary consideration of the objection to the Article 1005 to be justified in that even if the Tribunal were to grant respondent's objection, the cost and time of that proceeding would not be justified in terms of the reduction in costs at the subsequent phase of these proceedings.

Respondent's Objection that Claimant's Article 1110 Claim is not Ripe because Claimant has not Incurred a Loss.

22. Respondent objects to Claimant's Article 1110 as not ripe because Claimant cannot assert that it "has incurred" a loss as a result of California state measures as required by NAFTA Article 1117(1).

23. The Tribunal finds that an objection asserting that claimant has not suffered a loss in accordance with Article 1117(1) is not a plea as to jurisdiction for the purposes of Article 21(4). The requirement that the Claimant establish through evidence the existence of a loss is typically a part of the merits of a case and is not transformed into a jurisdictional limitation by its articulation in a provision of Chapter 11 of NAFTA.

24. Respondent alternatively presents its request for bifurcation under the Tribunal general authority over the proceedings under Article 15(1) of the UNCITRAL Rules.[6]

25. Considering Respondent's request for bifurcation and preliminary consideration of the 1117(1) under Article 15(1), the Tribunal does not find the request justified and therefore denies Respondent's request. In particular, the Tribunal finds that if it were to bifurcate its consideration of the issue identified, the Tribunal would be immediately confronted with the issue of whether California's laws and policies resulted in an expropriation under Chapter 11 of NAFTA. Since the facts presented to answer the Article 1117(1) issue are likely to be the same facts presented on the expropriation issue, the Tribunal finds the proposed bifurcation

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[5] Claimant's Response at p. 2 (referring to the January 17, 2001 Record of Decision as "the definitive adverse action.").

[6] Respondent's Reply at p. 10.

to be impractical in that the Article 1117(1) issue identified is so intertwined with the merits that it is very unlikely that there will be any savings in time or cost. The question, therefore, of identifying "the point when the damage was sufficiently concrete and permanent to result in breaches" is to be considered as a part of the merits.[7]

VI. Schedule of Proceedings and the May 18, 2005 Joint Request of the Parties.

26. The Parties in a letter dated May 18, 2005 jointly requested the Tribunal to extend to June 7, 2005 the deadline for submitting objections to the document requests exchanged on May 10, 2005. This request is granted.

27. The schedule otherwise set forth in Order No. 1 of March 3, 2005 is confirmed.

Michael K. Young

[7] Claimant's Rejoinder at p. 5.

Consolidated Electronic Version
for Publication to PCA Website

PCA Case No. 2016-13

IN THE MATTER OF AN ARBITRATION UNDER CHAPTER ELEVEN OF THE NORTH AMERICAN FREE TRADE AGREEMENT ('NAFTA') AND THE 1976 UNCITRAL ARBITRATION RULES

between

RESOLUTE FOREST PRODUCTS INC.

(Claimant)

and

GOVERNMENT OF CANADA

(Respondent)

DECISION ON JURISDICTION AND ADMISSIBILITY

January 30, 2018

Arbitral Tribunal:
Judge James R Crawford, AC (Presiding Arbitrator)
Dean Ronald A Cass
Dean Céline Lévesque

Registry:
Permanent Court of Arbitration
Ms Judith Levine, Tribunal Secretary

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LIST OF DEFINED TERMS

Article 1128 Submissions	Submissions filed by the United States and Mexico pursuant to Article 1128 of NAFTA on June 14, 2017
C$	Canadian Dollars
Canada	The Government of Canada
CCAA	*Companies' Creditor Arrangement Act*, R.S.C. 1985, ch. c-36 (Exhibit R-025)
Claimant	Resolute Forest Products, Inc. (or 'Resolute'), a company incorporated in the State of Delaware, United States of America
Counter-Memorial	Counter-Memorial on Jurisdiction filed by the Claimant on February 22, 2017
Disputing Parties	The Claimant and the Respondent
Draft NOI	Draft Notice of Intent to submit a claim to arbitration under NAFTA Chapter Eleven (Exhibit R-081)
Expropriation Objection	Respondent's Objection to Jurisdiction based on the argument that the questioned measures are not tantamount to expropriation of the Laurentide mill
Federal Measures	Measures taken by Canada in respect to the investigation by the United States Department of Commerce in relation to the Canadian supercalendered paper industry
Hausman Statement	Expert Witness Statement of Jerry Hausman, Ph.D., filed by the Claimant with its Counter-Memorial on Jurisdiction on February 22, 2017
Laurentide mill	The Laurentide supercalendered paper mill owned by the Claimant located at Shawinigan, Québec
Memorial	Memorial on Jurisdiction filed by the Respondent on December 22, 2016
Mexico	The United Mexican States
Monitor	Ernst & Young, as appointed by the Supreme Court of Nova Scotia to monitor the business and financial affairs of NPPH during the CCAA proceedings and monitor the sales process of NPPH
NAFTA	North American Free Trade Agreement
Non-Disputing NAFTA Parties	The United States of America and the United Mexican States
Notice of Arbitration and Statement of Claim	Notice of Arbitration and Statement of Claim filed by the Claimant on December 30, 2015
Nova Scotia	The Government of Nova Scotia (or 'the Province')
Nova Scotia Measures	The measures implemented by Nova Scotia in 2012 of which the Claimant complains

NPC	NewPage Corporation
NPPH	NewPage Port Hawkesbury Corp.
NSPI	Nova Scotia Power Inc.
Opposition to Bifurcation	Opposition to Respondent's Request for Bifurcation filed by the Claimant on October 13, 2016
PCA	The Permanent Court of Arbitration
PHP	Port Hawkesbury Paper Inc.
Plan	The Plan Sponsorship Agreement entered into by PWCC and NPPH on July 6, 2012
Port Hawkesbury mill	A supercalendered paper mill located in Port Hawkesbury, Nova Scotia
Province	The Government of Nova Scotia (or 'Nova Scotia')
Provincial Treatment Objection	Respondent's objection to jurisdiction based on Article 1102(3) of NAFTA
PWCC	Pacific West Commercial Corporation
Rejoinder Memorial	Rejoinder Memorial on Jurisdiction filed by the Claimant on May 3, 2017
Reply Memorial	Reply Memorial on Jurisdiction filed by the Respondent on March 29, 2017
Request for Bifurcation	Request for Bifurcation filed by the Respondent on September 29, 2016
Resolute	Resolute Forest Products, Inc. (or the 'Claimant')
Respondent	The Government of Canada (or 'Canada')
Scope Objection	Respondent's objection to jurisdiction based on Article 1101(1) of NAFTA
Statement of Defence	Reply Statement filed by the Respondent on September 1, 2016
Taxation Measures Objection	Respondent's objection to jurisdiction in relation to taxation measures implemented by Nova Scotia based on Article 2103 of NAFTA
Time-Bar Objection	Respondent's objection to jurisdiction based on Articles 1116(2) and 1117(2) of NAFTA
UARB	Nova Scotia Utility and Review Board
UNCITRAL Rules	United Nations Commission on International Trade Law Arbitration Rules (1976)
US ITC	The United States International Trade Commission
USTR	United States Trade Representative

I. INTRODUCTION

A. The Disputing Parties

1. The Claimant in this arbitration is Resolute Forest Products Inc., a corporation incorporated in the State of Delaware, United States of America (the '**Claimant**'). The Claimant's address is 1209 Orange Street, Wilmington, Delaware 19801, United States of America. The Claimant brings this arbitration as an investor on its own behalf and on behalf of Resolute FP Canada Inc, a corporation incorporated in Canada that is directly owned and controlled by the Claimant. The address of Resolute FP Canada Inc is 111 Duke Street, Suite 5000, Montréal, Québec H3C 2M1, Canada. The Claimant is represented in these proceedings by Dr Elliot J Feldman, Mr Michael Snarr and Mr Paul M Levine of Baker Hostetler LLP, 1050 Connecticut Avenue, NW, Washington, DC 20036, United States of America; and Mr Martin J Valasek, Ms Jenna Anne de Jong and Mr Jean-Christophe Martel of Norton Rose Fulbright Canada LLP, 1 Place Ville Marie, Suite 2500, Montréal, Québec H3B 1R1, Canada.

2. The Respondent in this arbitration is the Government of Canada ('**Canada**' or the '**Respondent**'). The Respondent is represented in these proceedings by Mr Mark Luz, Mr Rodney Neufeld, Ms Jenna Wates and Ms Michelle Hoffmann of the Trade Law Bureau (JLT), Global Affairs Canada, 125 Sussex Drive, Ottawa, Ontario K1A 0G2, Canada.

B. Overview of the Dispute

3. A dispute has arisen between the Claimant and Canada in respect of which the Claimant commenced arbitration pursuant to Chapter Eleven of the North American Free Trade Agreement ('**NAFTA**').

4. The dispute concerns the Claimant's investment in the Laurentide supercalendered paper mill ('**Laurentide mill**') in Québec, Canada, as well as the Dolbeau and Kénogami mills, also located in Québec, Canada.[1] According to the Claimant, it was forced to close the Laurentide mill because it was unable to compete with another supercalendered paper mill located in Port Hawkesbury, Nova Scotia (the '**Port Hawkesbury mill**'). The Claimant alleges that the Nova Scotia Government implemented a series of measures in 2012 (the '**Nova Scotia Measures**') to 'ensure that the Port Hawkesbury mill would have competitive advantages above any other

[1] Supercalendered paper is a glossy paper used for such things as newspaper supplements and advertising brochures.

[supercalendered] paper producer, including Resolute.'[2] Specifically, it is alleged that Nova Scotia preserved the Port Hawkesbury mill so that it could be sold as a going concern, provided electricity to the Port Hawkesbury mill at a discounted rate and provided the Port Hawkesbury mill with more than C$124 million in assistance to ensure its competitiveness. The Claimant alleges that these measures are tantamount to the expropriation of the Laurentide mill, in violation of Article 1110 of NAFTA, and also constitute a violation of the minimum standard of treatment and national treatment standards of NAFTA (Articles 1105 and 1102, respectively).

5. The Claimant further alleges that officials of the Government of Canada discriminated against the Claimant by excluding it from a joint defence group in respect of an investigation by the United States Department of Commerce in relation to the Canadian supercalendered paper industry (the '**Federal Measures**').

6. The Claimant claims compensation for: (a) the direct losses caused by the measures of Canada and Nova Scotia that amount to a violation of NAFTA; (b) consequential damages arising as a result of the offensive measures; (c) the costs of the proceedings, including the costs of the arbitration; and (d) interest.

7. The Respondent argues that the Claimant's allegations in respect of the measures taken by Nova Scotia are time-barred under Articles 1116(2) and 1117(2) of NAFTA (the '**Time-Bar Objection**'). Alternatively, the Respondent also argues that the Nova Scotia related claims fall outside the scope of application of NAFTA under Article 1101(1) of NAFTA (the '**Scope Objection**'), that the Claimant's national treatment claims are inadmissible under Article 1102(3) of NAFTA (the '**Provincial Treatment Objection**'), and that the questioned measures are not tantamount to expropriation of the Laurentide mill (the '**Expropriation Objection**'). Finally, the Respondent also considers the Tribunal to lack jurisdiction in respect of the Nova Scotia claims insofar as they relate to taxation measures implemented by Nova Scotia (the '**Taxation Measures Objection**').

8. In addition to its arguments on jurisdiction and admissibility, the Respondent rejects the Claimant's claims on the merits and requests the Tribunal to dismiss the claims in their entirety and order the Claimant to bear all the costs of the arbitration.

9. This Decision deals with the Time-Bar Objection (in Part V.B), the Scope Objection (in Part V.C), the Provincial Treatment Objection (in Part V.D), the Expropriation Objection (in Part V.E), and

[2] Notice of Arbitration and Statement of Claim, para 4.

the Taxation Measures Objection (in Part V.F). Either the Time-Bar Objection or the Scope Objection, if upheld by the Tribunal, would entirely dispose of Claimant's claims in relation to the Nova Scotia Measures, whereas the other Objections would dispose of the claims in part.

10. These Objections relate only to the Nova Scotia Measures. The Disputing Parties agree that the Objections relating to the Federal Measures fall to be dealt with in a subsequent phase of this arbitration.

II. PROCEDURAL HISTORY

11. On September 30, 2015, the Claimant served on Canada its Notice of Intent to Submit a Claim to Arbitration pursuant to Article 1119 of NAFTA.

12. On December 30, 2015, the Claimant served its Notice of Arbitration and Statement of Claim ('**Notice of Arbitration and Statement of Claim**') under Chapter Eleven of NAFTA on Canada. Pursuant to Article 1120(1)(c) of NAFTA, the Claimant also indicated its election to proceed with the arbitration pursuant to Article 3 of the United Nations Commission on international Trade Law Arbitration Rules of 1976 ('**UNCITRAL Rules**').

13. On February 9, 2016, pursuant to Article 7(1) of the UNCITRAL Rules and Article 1123 of NAFTA, the Claimant notified the Respondent of its appointment of Dean Ronald A Cass as arbitrator. Dean Cass is Dean Emeritus of Boston University School of Law and a national of the United States of America.

14. On March 18, 2016, pursuant to Article 7(1) of the UNCITRAL Rules and Article 1123 of NAFTA, the Respondent notified the Claimant of its appointment of Dean Céline Lévesque as arbitrator. Dean Lévesque is Dean of the Faculty of Law, Civil Law Section at the University of Ottawa and a national of Canada.

15. On May 25, 2016, pursuant to Article 7(1) of the UNCITRAL Rules and Article 1123 of NAFTA, the Disputing Parties appointed H.E. Judge James R Crawford, AC as the presiding arbitrator by mutual agreement. Judge Crawford is a judge of the International Court of Justice and a national of Australia.

16. Each arbitrator duly provided the Disputing Parties with a Statement of Independence.[3] The Disputing Parties have both confirmed that 'the Tribunal has been duly constituted in accordance

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[3] Procedural Order No 1, June 29, 2016, para 3.2.

with Article 1123 of the NAFTA. The Disputing Parties have no objections whatsoever to the constitution of the Tribunal or to the appointment of any Member of the Tribunal in respect of matters known to them' as at June 2016.[4]

17. On June 28, 2016, the Tribunal convened a preliminary procedural teleconference with the Disputing Parties.

18. Following the teleconference, the Tribunal issued Procedural Order No. 1 on June 29, 2016. Among other things, Procedural Order No. 1 recorded the Disputing Parties' confirmation that the Tribunal had been duly constituted in accordance with Article 1123 of NAFTA, and their agreement that the 1976 version of the UNCITRAL Arbitration Rules would apply to this arbitration, that the place of arbitration would be Toronto, Ontario, that the languages of the arbitration would be English and French, and that the Permanent Court of Arbitration ('**PCA**') would act as registry in relation to this arbitration. Procedural Order No. 1 also set out procedural rules and a date for Canada to file its Statement of Defence ('**Statement of Defence**').

19. By letters of July 27, 2016 and August 8, 2016, the Claimant and Respondent respectively presented an agreed procedural calendar for the Tribunal to decide on bifurcating any jurisdictional and admissibility objections in a preliminary phase. The Disputing Parties noted their agreement that the Claimant would indicate whether it consented to bifurcation by September 15, 2016. By the same correspondence, the Disputing Parties also outlined their respective positions in relation to the timing of submissions under Article 1128 of NAFTA by Non-Disputing NAFTA Parties and Amici Curiae. The Claimant provided further comments on the timing of the Article 1128 Submissions in a letter of August 11, 2016.

20. In accordance with Articles 7.1 and 8.1 of PO1, on September 1, 2016 the Respondent filed its Statement of Defence and accompanying documents.

21. By letter of September 14, 2016, the Claimant explained that it was unable to consent to bifurcation on the basis of the proposal set out in the Respondent's Statement of Defence.

22. By letter of September 22, 2016, the Respondent informed the Tribunal that the Disputing Parties had reached agreement on a Procedural Order regarding procedures to be followed during document production. The Respondent also informed the Tribunal that the Disputing Parties had largely agreed to the text of a confidentiality order, however, there were a number of outstanding issues to be decided by the Tribunal. The Respondent's letter also enunciated the Respondent's

[4] Procedural Order No. 1, June 29, 2016, para 3.3.

position on the areas of disagreement regarding the confidentiality order.

23. The Claimant provided its comments on the outstanding issues regarding the draft confidentiality order on September 22, 2016.

24. On September 29, 2016, the Respondent filed its Request for Bifurcation ('**Request for Bifurcation**') and accompanying documents.

25. On October 13, 2016, the Claimant filed its Opposition to Respondent's Request for Bifurcation ('**Opposition to Bifurcation**').

26. On October 14, 2016, the Tribunal issued Procedural Order No. 2 dealing with document production. On the same date, the Tribunal issued a Confidentiality Order, which the Disputing Parties signed on October 27, 2016.

27. On November 3, 2016, the Tribunal issued Procedural Order No. 3, setting out two alternative schedules, one in the event that the Tribunal decided to bifurcate the proceedings and one in the event that bifurcation was refused.

28. On November 7, 2016, the Tribunal held an oral hearing on bifurcation via teleconference.

29. On November 18, 2016, the Tribunal issued Procedural Order No. 4 by which the Tribunal decided to bifurcate these proceedings for the purpose of hearing the Respondent's objections to jurisdiction and admissibility under Articles 1116(2), 1117(2), 1101(1), 1102(3) and 2103(6) of NAFTA as preliminary questions. Having decided to bifurcate the proceedings, the Tribunal also adopted Schedule A of Procedural Order No. 3.

30. On December 12, 2016, having considered the Disputing Parties' correspondence, the Tribunal issued Procedural Order No. 5 setting out a revised schedule for the jurisdictional phase of the proceedings. The Tribunal reserved any decision in respect of the scheduling for the merits phase of these proceedings.

31. On December 22, 2016, the Respondent filed its Memorial on Jurisdiction ('**Memorial**') and accompanying documents.

32. By email of January 25, 2017, the Claimant informed the Tribunal on behalf of the Disputing Parties that they had agreed to hold the Hearing on Jurisdiction and Admissibility at Arbitration Place in Toronto, Canada.

33. On February 22, 2017, the Claimant filed its Counter-Memorial on Jurisdiction ('**Counter-Memorial**') and accompanying documents including an Expert Witness Statement of Jerry Hausman, Ph.D. on the issue of whether the management of the Claimant could have known of the damage to its supercalendered paper business prior to Q1 2013 (the '**Hausman Statement**').

34. By email of March 2, 2017, the Claimant designated: (a) the entire Hausman Statement; and (b) Exhibits C-026 and C-038 as confidential information.

35. By letter of March 3, 2017, the Respondent consented to the confidentiality designations in respect of Exhibits C-026 and C-038, but objected to the Claimant's designation of the entire Hausman Statement as confidential. Pursuant to Section 12.1 of PO1, the Respondent also sought the data and information relied upon by Dr. Hausman in the preparation of his report.

36. On March 8, 2017, the Claimant provided the source information for the Hausman Report sought by the Respondent and proposed more specific confidentiality designations.

37. On March 29, 2017, the Respondent filed its Reply Memorial on Jurisdiction ('**Reply Memorial**') and accompanying documents.

38. On May 3, 2017, the Claimant filed its Rejoinder Memorial on Jurisdiction ('**Rejoinder Memorial**') and accompanying documents.

39. On May 8, 2017, the PCA published on its website a Press Release in both English and French inviting submissions from the Non-Disputing NAFTA Parties and potential *amici curiae* by May 31, 2017.

40. On May 31, 2017, an application to participate as *amici curiae* was submitted jointly by Professor Robert Howse and Mr Barry Appleton.

41. On June 14, 2017, following an extension of time granted by the Tribunal, the United States of America ('**United States**') and the United Mexican States ('**Mexico**') submitted Non-Disputing Party submissions pursuant to Article 1128 (the '**Article 1128 Submissions**').

42. On June 21, 2017, Canada submitted its objection to the participation of Professor Howse and Mr Appleton as *amici curiae*. On June 23, 2017, Resolute confirmed that it 'has no comments regarding the amicus application.'

43. On June 29, 2017, the Tribunal issued its Procedural Order No. 6 on the Participation of Professor Robert Howse and Mr Barry Appleton as *amici curiae*, rejecting their joint application.

44. On July 12, 2017, the Disputing Parties filed their comments on the Article 1128 Submissions of the Non-Disputing NAFTA Parties.

45. A pre-hearing conference was held amongst the Disputing Parties and the Presiding Arbitrator on July 19, 2017.

46. Pursuant to paragraph 22.2 of Procedural Order No. 1, on July 21, 2017, the Tribunal provided a number of questions in writing for the Disputing Parties to address in their oral submissions during the Hearing on Jurisdiction and Admissibility.

47. At the instruction of the Tribunal and having consulted with the Disputing Parties, the PCA issued a Press Release on August 1, 2017 with information for the public live-streaming of the forthcoming Hearing on Jurisdiction and Admissibility.

48. The Hearing on Jurisdiction and Admissibility was held at the Arbitration Place in Toronto, Canada on August 15 and 16, 2017. The following individuals were present:

Tribunal
Judge James R Crawford, AC (Presiding Arbitrator)
Dean Ronald A Cass
Dean Céline Lévesque

The Claimant's Representatives
Mr Elliot J Feldman (Baker Hostetler LLP)
Mr Michael S Snarr (Baker Hostetler LLP)
Mr Paul M Levine (Baker Hostetler LLP)
Mr Martin J Valasek (Norton Rose Fulbright Canada LLP)
Mr Jean-Christophe Martel (Norton Rose Fulbright Canada LLP)
Ms Jenna Anne de Jong (Norton Rose Fulbright Canada LLP)
Mr Jacques Vachon (Resolute Forest Products Inc)
Prof Jerry Hausman, PhD (Expert Witness)

The Respondent's Representatives
Mr Mark A Luz (Trade Law Bureau, Global Affairs Canada)
Mr Rodney Neufeld (Trade Law Bureau, Global Affairs Canada)
Ms Jenna Wates (Trade Law Bureau, Global Affairs Canada)
Ms Michelle Hoffmann (Trade Law Bureau, Global Affairs Canada)
Ms Shawna Lesaux (Trade Law Bureau, Global Affairs Canada)
Ms Shamali Gupta (Investment Trade Policy Division, Global Affairs Canada)
Mr Daniel Hill (Canadian Forest Service of Natural Resources Canada)
Mr Andrew Weatherbee (Nova Scotia Department of Justice)

The Non-Disputing NAFTA Parties' Representatives
Mr Matthew Olmsted (United States of America)

PCA
Ms Judith Levine (Tribunal Secretary)

49. Oral submissions were made on behalf of the Claimant by Mr Elliot J Feldman and Mr Martin J

Valasek and on behalf of the Respondent by Mr Mark A Luz, Mr Rodney Neufeld and Ms Jenna Wates. With the agreement of the Disputing Parties, the Tribunal decided that no post-hearing briefs were necessary.

III. THE UNCONTESTED FACTUAL BACKGROUND

50. The Claimant is a company incorporated under the laws of Delaware, United States of America. It was created in 2007 following the merger of two forest product companies, Abitibi-Consolidated Inc and Bowater Inc.[5] The Claimant describes itself as 'an integrated forest products company that manufactures and markets a diverse range of wood and paper products, including a product known as supercalendered paper, or 'SC paper'.'[6]

51. The Claimant's Canadian subsidiary, Resolute FP Canada, owns three SC paper mills located in Canada: the Dolbeau and Kénogami mills located in Québec and the 'now-defunct' Laurentide mill, also located in Québec.[7]

52. The Port Hawkesbury mill, located in Nova Scotia, also produces SC paper and competes with Resolute in the North American SC paper market. In 2007, a US company, NewPage Corporation ('**NPC**') acquired the Port Hawkesbury mill which was then operated by its wholly-owned Canadian subsidiary NewPage Port Hawkesbury ('**NPPH**').[8] However, following losses of C$4 million per month, NPPH announced that it was shutting down the mill in August 2011.[9]

53. On September 6, 2011, NPPH sought creditor protection under the *Companies' Creditor Arrangement Act* ('**CCAA**'), pursuant to which the Port Hawkesbury mill would be sold as part of a court supervised sale process.[10] The Supreme Court of Nova Scotia appointed Ernst & Young (the '**Monitor**') to 'monitor the business and financial affairs of NPPH during the CCAA proceedings' and the sales process of NPPH.[11]

54. During the time that NPPH was seeking creditor protection, Nova Scotia implemented measures so as 'to support the sale of the Port Hawkesbury mill in a way that would improve the chances it would be purchased as a going concern, which would result in continued employment for workers

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[5] Claimant's Notice of Arbitration and Statement of Claim, para 21; Respondent's Statement of Defence, para 20.
[6] Claimant's Notice of Arbitration and Statement of Claim, para 22.
[7] Claimant's Notice of Arbitration and Statement of Claim, para 23.
[8] Respondent's Memorial, para 12; Claimant's Notice of Arbitration and Statement of Claim, para 27.
[9] Claimant's Notice of Arbitration and Statement of Claim, para 25. Respondent's Memorial, para 13.
[10] Claimant's Notice of Arbitration and Statement of Claim, para 27; Respondent's Memorial, paras 12-14.
[11] Claimant's Notice of Arbitration and Statement of Claim, para 27; Respondent's Memorial, para 14.

in the Cape Breton region, rather than the mill be dismantled for scrap.'[12] Two measures are relevant to this period.

55. First, Nova Scotia agreed with NPPH to create a '$14-million Forestry Infrastructure Fund' pursuant to which 'NPPH would serve as an intermediary between [Nova Scotia] and the approximately 350 independent contractors who would provide forestry services' as part of Nova Scotia's forest management activities and forestry strategy.[13] Nova Scotia provided an 'additional $12 million in funding to the FIF' on March 16, 2012.[14]

56. Second, Nova Scotia provided up to C$5 million in funding for the Port Hawkesbury mill to remain in 'hot idle' so that it could be sold as a going concern once NPPH's cash ran out and it was no longer able to maintain the Port Hawkesbury mill in 'hot idle' on its own.[15] At the same time that Nova Scotia announced the additional funding to the FIF, Nova Scotia also announced a further C$5.8 million in hot idle funding for the Port Hawkesbury mill.[16]

57. The Monitor published public notices of the sales process and directly contacted 110 parties who might be interested in acquiring the Port Hawkesbury mill, including the Claimant.[17] Four bidders submitted final offers in December 2011, two intended to acquire the Port Hawkesbury mill as a going concern with the other two proposing liquidation.[18] Ultimately, the Monitor recommended, and NPPH accepted, a bid from Pacific West Commercial Corporation ('**PWCC**') for the acquisition of the Port Hawkesbury mill.[19]

58. On July 6, 2012, PWCC and NPPH entered into the Plan Sponsorship Agreement (the '**Plan**') pursuant to which 'PWCC would act as the sponsor of a plan of compromise and arrangement for NPPH under the CCAA' and acquire Port Hawkesbury for C$33 million.[20] An amended and restated version of the Plan was sanctioned by the Court following creditor approval on September 25, 2012.[21]

59. The sale to PWCC was conditional on 'certain support [being] provided by Nova Scotia.'[22] The

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12 Respondent's Statement of Defence, para 39; Claimant's Notice of Arbitration and Statement of Claim, para 29.
13 Respondent's Statement of Defence, para 41; Claimant's Notice of Arbitration and Statement of Claim, para 37.
14 Respondent's Statement of Defence, para 42; Claimant's Notice of Arbitration and Statement of Claim, para 37.
15 Respondent's Statement of Defence, paras 44-46; Claimant's Notice of Arbitration and Statement of Claim, paras 33, 37.
16 Respondent's Statement of Defence, para 47; Claimant's Notice of Arbitration and Statement of Claim, para 37.
17 Claimant's Notice of Arbitration and Statement of Claim, para 30; Respondent's Memorial, para 15.
18 Claimant's Notice of Arbitration and Statement of Claim, para 30; Respondent's Memorial, para 15.
19 Claimant's Notice of Arbitration and Statement of Claim, para 31; Respondent's Memorial, paras 15-16.
20 Respondent's Memorial, para 17; Claimant's Notice of Arbitration and Statement of Claim, para 43.
21 Respondent's Memorial, para 17; Claimant's Notice of Arbitration and Statement of Claim, para 43.
22 Respondent's Memorial, para 18; Claimant's Notice of Arbitration and Statement of Claim, para 32.

Respondent observes that these conditions 'are a matter of public record' and notes the following:

> Among these conditions was the requirement for PWCC to have entered into certain agreements with Nova Scotia, including a Sustainable Forest Management and Outreach Program Agreement in respect of achieving sustainable harvest and forest land practices in woodlands in Nova Scotia, a Forest Utilization License Agreement in respect of access to fibre on Crown Lands, a Letter of Offer Agreement in connection with the provision of certain financial assistance by Nova Scotia to PWCC and a Real Property Agreement with respect to the purchase and sale of certain real property owned by NPPH.
>
> PWCC also conditioned the implementation of the restructuring and sale transaction on the Nova Scotia Utility and Review Board (the "UARB" or "Board") approving a Load Retention Tariff ("LRT") Pricing Mechanism governing the mill's electricity rates, which was the subject of a private agreement between PWCC and the mill's privately-owned electricity supplier, Nova Scotia Power Inc ("NSPI").[23]

60. Once the conditions were met, the sale between NPPH and PWCC was completed on September 28, 2012.[24]

61. Following the Court's approval for the sale of the Port Hawkesbury mill to PWCC, the United States Trade Representative ('**USTR**') investigated the support provided by Nova Scotia to the Port Hawkesbury mill.[25] In late 2012, the Government of Canada responded to questions regarding Nova Scotia's support for the Port Hawkesbury mill from the USTR and the United States raised during a meeting of the WTO Committee on Subsidies and Countervailing Measures on October 23, 2012.[26]

62. At the beginning of 2015, two US SC paper producers 'submitted a CVD petition to the US [Department of Commerce] and the United States International Trade Commission [('**US ITC**')] requesting the initiation of an investigation into SC paper imports from Canada.'[27] The US Department of Commerce formally initiated an investigation into these allegations in March 2015.[28]

IV. RELIEF SOUGHT

63. In its Notice of Arbitration and Statement of Claim, the Claimant has sought the following relief:

> i. Damages exceeding US$70 million or such other amount to be proven in these proceedings in compensation for the direct losses caused by the measures of Canada

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[23] Respondent's Memorial, paras 19-20; Claimant's Notice of Arbitration and Statement of Claim, paras 31-42.
[24] Respondent's Memorial, para 17; Claimant's Notice of Arbitration and Statement of Claim, para 43.
[25] Respondent's Statement of Defence, paras 56-57; Claimant's Notice of Arbitration and Statement of Claim, paras 57 ff.
[26] Respondent's Statement of Defence, para 57; Claimant's Counter-Memorial on Jurisdiction, para 37.
[27] Respondent's Statement of Defence, para 60; Claimant's Notice of Arbitration and Statement of Claim, paras 57 and 68.
[28] Respondent's Statement of Defence, paras 61-63; Claimant's Notice of Arbitration and Statement of Claim, para 68.

and Nova Scotia that are inconsistent with Canada's obligations under Section A of NAFTA Chapter Eleven;

ii. Additional consequential damages arising as a result of the illegal measures, in an amount to be proven in these proceedings;

iii. the full costs associated with these proceedings, including all professional fees and disbursements, as well as the fees of the arbitral tribunal and any administering institution;

iv. pre- and post-award interest at a rate to be fixed by the Tribunal; and

v. such further relief as counsel may advise and the Tribunal may deem just and appropriate.[29]

64. Within the jurisdictional phase, the Claimant has requested the Tribunal to 'issue a Partial Award commencing the Merits and Quantum Phases of this arbitration' and order Canada 'to pay Resolute's costs and legal fees for this phase.'[30] It submits that the 'Tribunal should confirm that it does have jurisdiction over Resolute's claims and that the claims are admissible' and therefore the Tribunal 'should convene the Parties and move on to the next phase of this arbitration to determine liability and damages.'[31]

65. In its Statement of Defence, the Respondent has requested the Tribunal to (a) dismiss the Claimant's claims in their entirety; (b) require the Claimant to bear all costs of the arbitration, including legal costs and Tribunal costs; and (c) grant any other relief it deems appropriate.[32]

66. Within the jurisdictional phase, the Respondent requests this Tribunal to issue an award:

i. dismissing the Claimant's Nova Scotia Claims under Articles 1102, 1105 and 1110 in their entirety and with prejudice on grounds of lack of jurisdiction;

ii. dismissing the Claimant's Nova Scotia Claims under Article 1102 in their entirety and with prejudice on grounds of admissibility;

iii. ordering the Claimant to bear the costs of this preliminary phase of the arbitration in full and to indemnify Canada for its legal fees and costs in the preliminary phase of this arbitration; and

iv. granting any further relief it deems just and appropriate under the circumstances.[33]

V. THE ARGUMENTS OF THE DISPUTING PARTIES

A. BURDEN OF PROOF

1. Introduction

67. The Disputing Parties have competing views as to who bears the burden of proof, in particular in

[29] Claimant's Notice of Arbitration and Statement of Claim, para 121.
[30] Claimant's Counter-Memorial on Jurisdiction, para 217.
[31] Claimant's Rejoinder on Jurisdiction, para 147.
[32] Respondent's Statement of Defence, para 106.
[33] Respondent's Memorial on Jurisdiction, para 141. See also Reply on Jurisdiction, para 171.

respect of the Time-Bar Objection. Some of their arguments touch upon the proof of jurisdictional and admissibility requirements more broadly. The Respondent considers time-bar to go to this Tribunal's jurisdiction and that the burden of proof falls on the Claimant. However, the Claimant considers time-bar to be an issue of admissibility, not jurisdiction, and thus, it argues, the burden of proof falls on the Respondent. The Non-Disputing NAFTA Parties both support the Respondent's position that the question of time-bar goes to the jurisdiction of this Tribunal and is for the Claimant to prove.

2. The Respondent's Arguments

68. The Respondent submits that the Claimant 'bears the burden of proving that the respondent has consented to arbitration and that the tribunal has jurisdiction over the dispute' since it is the one bringing the claim under NAFTA.[34] The Respondent argues that a NAFTA Party's consent to arbitrate under Article 1122 is only engaged when certain requirements are met 'by a claimant.'[35] The Respondent refers to numerous NAFTA cases, such as *Bayview, Grand River* and *Gallo* as authority for the proposition that 'it is for the claimant to establish that its claims fall within NAFTA Chapter Eleven and the tribunal's jurisdiction.'[36] By reference to the decisions in *Methanex* and *Feldman*, the Respondent submits that Article 1122(1) establishes the time bar provisions of Article 1116 and 1117 of NAFTA as jurisdictional hurdles, not matters affecting the admissibility of the claim, since the time bar concerns the NAFTA Parties' advance consent to arbitrate.[37]

69. The Respondent also considers the Claimant to have 'overstat[ed] the extent to which its allegations are to be accepted as true *pro tem* for the purposes of this jurisdictional phase' and submits that the Claimant is nonetheless required to prove the existence of facts on which it relies in the jurisdictional phase.[38] The Respondent refers this Tribunal to a number of NAFTA and other investor-state cases where, it says, 'the principle that a claimant bears the burden of proving all facts necessary to establish a tribunal's jurisdiction is […] well established.'[39] In particular, it cites the following paragraph from the Interim Award in *Spence International Investments v Costa Rica*:

> It is for a party advancing a proposition to adduce evidence in support of its case. This applies to questions of jurisdiction as it applies to the merits of a claim, notably insofar as it applies to the factual basis of an assertion of jurisdiction that must be proved as part-and-parcel of a

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34 Respondent's Reply Memorial, para 10.

35 Respondent's Reply Memorial, para 11, referring to *Methanex Corporation v United States of America*, UNCITRAL, Partial Award (Preliminary Award on Jurisdiction and Liability), August 7, 2002, para 120 (**CL-001**) and (**RL-018**) ('***Methanex*, Partial Award**').

36 Respondent's Reply Memorial, para 13.

37 Hearing on Jurisdiction and Admissibility, August 15, 2017, 155:11-157:20; see also 162:12-165:11.

38 Respondent's Reply Memorial, para 12.

39 Respondent's Reply Memorial, para 14.

> claimant's case. The burden is therefore on the Claimants to prove the facts necessary to establish the Tribunal's jurisdiction.[40]

70. The *Spence* tribunal went on to explain that only once a claimant proffers that proof does the burden shift to a respondent to show why the tribunal lacks jurisdiction.[41] The Respondent notes that this rule 'makes perfect sense' in the context of this case where it would be unfair, for example, to put the burden on the Respondent to disprove the Claimant's state of knowledge, a matter on which the Claimant would have more extensive evidence.[42]

71. The Respondent also submits that the Claimant 'misinterprets' Article 24(1) of the 1976 UNCITRAL Arbitration Rules in order to attempt to shift the burden of proof onto the Respondent.[43] Article 24(1) of the UNCITRAL Rules provides:

> Each party shall have the burden of proving the facts relied on to support his claim or defence.

72. The Respondent submits that this provision should be understood as referring only to the burden applicable to 'affirmative defences' raised by the Respondent and does not absolve the Claimant of its obligation to establish the Tribunal's jurisdiction.[44] The Respondent submits that the *Pope & Talbot* decision incorrectly determined that jurisdictional objections constitute an 'affirmative defence' and has since been 'overtaken by the more recent decisions in *Methanex*, *Apotex*, *Bayview*, *Grand River* and *Gallo*.'[45]

3. The Claimant's Arguments

73. The Claimant accepts that it bears the burden of proof in respect of establishing this Tribunal's jurisdiction.[46] The Claimant considers itself to have satisfied this burden in respect of the relevant jurisdictional elements, i.e., that Resolute is an American company doing business in Canada and had an investment in Canada at the relevant time that the impugned measures were adopted.[47] However, the Claimant submits that the Respondent's time-bar objection does not affect the jurisdiction of the Tribunal, only the admissibility of the claim; consequently, the Claimant maintains that it is the Respondent which bears the burden of proof in respect of the time-bar.[48]

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[40] Respondent's Reply Memorial, para 14, citing *Spence International Investments, LLC, Berkowitz, et al. v Republic of Costa Rica*, UNCITRAL, Interim Award, October 25, 2016, para 239 (**RL-028**) ('***Spence*, Interim Award**').
[41] Respondent's Reply Memorial, para 15, referring to *Spence*, Interim Award, para 239.
[42] Respondent's Reply Memorial, para 17.
[43] Respondent's Reply Memorial, para 18.
[44] Respondent's Reply Memorial, para 19, referring to D Caron & L Caplan, *The UNCITRAL Arbitration Rules: A Commentary* (2nd ed, OUP 2012), 558 (**RL-078**).
[45] Respondent's Reply Memorial, para 20.
[46] Claimant's Rejoinder Memorial, para 12.
[47] Claimant's Rejoinder Memorial, para 13.
[48] Claimant's Rejoinder Memorial, para 15.

74. The Claimant notes that there have been 'complementary theories' as to whether the time-bar objection is 'a defence against asserted claims' or 'pertain[s] to the admissibility of claims', but either theory is unrelated to the Respondent's consent to arbitration or the Tribunal's authority and so the burden falls on the moving party, in this case, the Respondent.[49] The Claimant cites the *Pope & Talbot* decision which considered Canada's timeliness objection in that case to be 'in the nature of an affirmative defence'; therefore the burden fell on Canada.[50]

75. The Claimant refers to the decision in *Feldman* as well as scholarly writings and domestic court decisions from the United States and Canada in support of the proposition that a time-bar objection does not relate to the tribunal's jurisdiction.[51] The Claimant submits that the only NAFTA case on point is *Pope & Talbot* where 'that tribunal recognized the time bar as an affirmative defence, and as an affirmative defence, it carries with it a different consequence.'[52] By comparison, the Claimant considers the Respondent's reliance on *Methanex*, *Apotex*, *Bayview*, and *Grand River* to be misconceived since none of those cases considered the question of whether a timeliness objection goes to jurisdiction or admissibility.[53] The Claimant also cautions this Tribunal from relying on the decision in *Spence v Costa Rica* since that case was under the DR-CAFTA 'whose terms are notoriously different from NAFTA's' and whose tribunal itself 'caution[ed] any reading of this Award that would give it wider "precedential" effects.'[54] In fact, other non-NAFTA decisions, including *Tecmed* have similarly determined that time limitation objections are not related to the tribunal's jurisdiction but should be considered as admissibility objections.[55]

76. In any event, the Claimant considers sufficient proof to have been provided that it has brought its claims within time. Specifically, the Claimant points to the fact that the Respondent's case, at its highest, 'speculates that Resolute should have anticipated losses that Canada claims were incurred

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[49] Claimant's Rejoinder Memorial, para 17.

[50] Claimant's Rejoinder Memorial, paras 18-19 referring to *Pope & Talbot Inc v Government of Canada*, UNCITRAL, Award by Arbitral Tribunal in relation to Preliminary Motion by Government of Canada to Strike Paragraphs 34 and 103 of the Statement of Claim from the Record, February 24, 2000, paras 11-12 (**CL-002**); see also Claimant's Rejoinder Memorial, para 24, referring to Respondent's Reply Memorial, para 20.

[51] Claimant's Rejoinder Memorial, paras 20-23; Hearing on Jurisdiction and Admissibility, August 15, 2017, 293:10-297:6.

[52] Hearing on Jurisdiction and Admissibility, August 15, 2017, 297:7-15

[53] Claimant's Rejoinder Memorial, paras 25-28; Hearing on Jurisdiction and Admissibility, August 15, 2017, 297:16-300:8.

[54] Claimant's Rejoinder Memorial, para 29, citing *Spence*, Interim Award, para 166 (**RL-028**); Hearing on Jurisdiction and Admissibility, August 15, 2017, 303:5-23.

[55] Claimant's Rejoinder Memorial, para 31, referring to *Técnicas Medioambientales Tecmed, S.A. v The United Mexican States*, ICSID Case No. ARB(AF)/00/2, Award, May 29, 2003 (**CL-038**) ('***Tecmed*, Award**').

in a price drop in January 2013.'[56]

4. The Non-Disputing NAFTA Parties' Comments

77. The United States submits that a NAFTA Party's consent to arbitrate is 'limited by the procedural conditions set out in Chapter Eleven' including, *inter alia*, the requirements of Articles 1116(2) and 1117(2).[57] The time-bar imposed by these Articles, it says, 'impose a *ratione temporis* jurisdictional limitation on the authority of a tribunal to act on the merits of the dispute.'[58] It submits that 'NAFTA Parties consistently raise, and tribunals generally address, the time bar defence as a jurisdictional objection' and cites *Glamis Gold*, *Apotex I & II* and *Spence International Investments v Costa Rica* as examples of such a consistent approach.[59]

78. Mexico expresses its agreement with the Respondent that the Claimant 'bears the burden of proving that the respondent has consented to arbitration and that the tribunal has jurisdiction over the dispute.'[60] Mexico also recalls the decisions in *Methanex*, *Apotex*, *Spence International Investments v Costa Rica* and *Emmis International Holding v Hungary* as cases where the respective tribunals each found that the claimant bears the burden of proof in respect of the tribunal's jurisdiction, with the *Methanex* and *Spence* tribunals specifically noting that time-bar provisions (under NAFTA and DR-CAFTA, respectively) go to the jurisdiction of the tribunal.[61]

79. The Respondent submits that the Article 1128 submissions of Mexico and the United States should be given 'considerable weight' when the NAFTA Parties 'express concordant, common and consistent views on how to interpret NAFTA, they create subsequent agreement and practice within the meaning of Article 31(3) of the Vienna Convention'.[62] The Respondent points out that both the United States and Mexico support its position that the time bar is in the nature of a jurisdictional objection for which the Claimant bears the burden of proof.[63]

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[56] Claimant's Rejoinder Memorial, para 33.

[57] Submission of the United States, para 2.

[58] Submission of the United States, para 3.

[59] Submission of the United States, para 4, citing *Glamis Gold, Ltd. v United States of America*, UNCITRAL, Procedural Order No. 2 (Revised), May 31, 2005 ('***Glamis Gold*, PO2**'); *Apotex Inc. v United States of America*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, June 14, 2013 (**RL-023**) ('***Apotex*, Award on Jurisdiction and Admissibility**'); and *Spence*, Interim Award.

[60] Submission of Mexico, para 2, citing Respondent's Reply Memorial, para 10.

[61] Submission of Mexico, paras 3-5, citing *Methanex*, Partial Award; *Apotex*, Award on Jurisdiction and Admissibility, para 150; *Spence*, Interim Award; *Emmis International Holding, B.V., Emmis Radio Operating, B.V., and MEM Magyar Electronic Media kereskedelmi ésSzolgáltató Kft. v Hungary*, ICSID Case No. ARB/12/2, Award, April 16, 2014 ('***Emmis*, Award**').

[62] Reply of the Government of Canada to the NAFTA Article 1128 Submissions of the Governments of the United States and the United Mexican States, July 12, 2017 ('**Canada's Reply to Art. 1128 Submissions**'), paras 6-8; Hearing on Jurisdiction and Admissibility, August 15, 2017, 165:12-167:9.

[63] Canada's Reply to Art. 1128 Submissions, paras 15-25.

80. The Claimant prefaces its comments on the Article 1128 submissions by observing that all the NAFTA Parties 'can be expected to express similar interpretations of NAFTA because all are cast as respondents in Chapter Eleven proceedings, and all would prefer to limit the occasions when they have to defend their respective governments against foreign investor claims.'[64] The Claimant acknowledged during the Hearing on Jurisdiction and Admissibility that the interpretation of NAFTA by the NAFTA Parties through their Article 1128 submissions 'must be valued by the tribunal for its persuasive authority.'[65] The Claimant did, however, note that just as the Tribunal has been asked to take into account the agreement of the NAFTA Parties as to the interpretation of the treaty, the Tribunal should also pay serious attention to areas where the NAFTA Parties disagree with one another.[66]

81. With respect to the burden of proof, the Claimant reiterates its view that the time bar goes to admissibility and that Canada bears the burden. The Claimant argues that the United States' submission in this respect fails to distinguish between admissibility and jurisdiction, and that the United States incorrectly characterizes *Pope & Talbot* as wrongly decided.[67]

5. The Tribunal's Analysis

82. Section B of Chapter Eleven of NAFTA deals with settlement of disputes between investors and States Parties. Its central provision, jurisdictionally speaking, is section 1122 ('Consent to Arbitration'), paragraph 1 of which reads:

> Each Party consents to the submission of a claim to arbitration in accordance with the procedures set out in this Agreement.

83. The clear inference is that arbitration of a claim not submitted in accordance with those procedures is not consented to and that the tribunal lacks jurisdiction. Although the time limit specified in Articles 1116(2) and 1117(2) is not itself a procedure, compliance with it is required for the bringing of a claim, which is certainly a procedure. This is enough to justify the conclusion that compliance with the time limit goes to jurisdiction.

84. Even if it did not, and was to be classified (as time limits in other contexts are often classified) as a matter of admissibility, it would not necessarily follow that the onus of proof in that regard was on the respondent party. Article 24(1) of the UNCITRAL Rules, which are applicable here by virtue of Article 1120(1) of NAFTA, imposes on the relevant party 'the burden of proving the

[64] Comments on the Article 1128 Submissions of Mexico and the United States, July 12, 2017 ('**Claimant's Reply to Article 1128 Submissions**'), para 1.
[65] Hearing on Jurisdiction and Admissibility, August 15, 2017, 306:4-12.
[66] Hearing on Jurisdiction and Admissibility, August 15, 2017, 306:16-307:1.
[67] Claimant's Reply to Article 1128 Submissions, paras 6-15.

facts relied on to support [its] claim or defence'. The Tribunal does not see any reason to limit Article 24(1) to matters of substance, and the facts necessary to establish that a claim has been brought in accordance with Section B of Chapter Eleven are, in its view, facts relied on in support of the claim.

85. The Tribunal does not agree with the *Pope & Talbot* dictum that time bar objections under NAFTA Articles 1116(2) and 1117(2) constitute an 'affirmative defence'. The language of NAFTA treats the 3-year time limit as one among a number of requirements that a claimant under Chapter Eleven has to meet to attract jurisdiction over a claim. The Tribunal agrees with later tribunals, and with the United States and Mexico in their Article 1128 submissions, that the claimant has to establish its case on this and other points.

86. The Tribunal would however add that too much importance should not be attached to the onus of proof in international arbitration. In the end, the question is whether one or the other party has done enough to persuade the tribunal of its case. It is relevant that the fact in question is one which is peculiarly within the knowledge of one or the other party.

B. THE TIME-BAR OBJECTION

1. Introduction

87. Turning to the substance of the time-bar objection, the Respondent argues that the Claimant's claims relating to the Nova Scotia Measures are time-barred under NAFTA Articles 1116(2) and 1117(2). NAFTA Article 1116(2) provides:

> An investor may not make a claim if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.

88. NAFTA Article 1117(2) is couched in similar terms:

> An investor may not make a claim on behalf of an enterprise described in paragraph 1 if more than three years have elapsed from the date on which the enterprise first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the enterprise has incurred loss or damage.

89. It is common ground between the Disputing Parties that the present dispute was submitted to arbitration on December 30, 2015, making December 30, 2012 the critical date for present purposes. The Respondent contends that the Claimant knew or could not have been unaware of the enactment of the Nova Scotia Measures which constitute the alleged NAFTA breach in this case, and that the Claimant had incurred loss or damage prior to that critical date of December 30, 2012. As such, the Claimant's case relating to the Nova Scotia Measures is, in the Respondent's

submission, time-barred.

90. The Claimant, on the other hand, argues that it did not and could not know of its loss or damage as a result of the Nova Scotia Measures before the first quarter of 2013. Therefore, the Claimant submits that it referred this dispute to arbitration in a timely manner.

91. As the Tribunal noted in its Decision on Bifurcation, 'if successful, the time bar objection could dispose of all claims relating to the Nova Scotia Measures.'[68]

2. The Respondent's Arguments

92. The Respondent submits that the Claimant's claims related to the Nova Scotia Measures are time-barred in their entirety on the basis that the Claimant knew or ought to have known of its damage or loss more than three years before the submission of its claim to arbitration, i.e., before December 30, 2012. The Respondent raises five arguments in relation to this submission. First, the Claimant alleges that Articles 1116(2) and 1117(2) impose a strict time limit on the initiation of arbitration under NAFTA. Second, the time limits are triggered once the Claimant has either actual or constructive knowledge of loss or damage. Third, the Claimant does not need to know the full extent of its loss or damage to trigger the time-bar period. Fourth, the Claimant in this case did in fact have knowledge of the alleged NAFTA breaches and its loss or damage prior to December 30, 2012. Fifth, the Claimant's reliance on a 'continuing' breach so as to renew the limitation period is misconceived in law and fact.

(a) Rigidity of the time limit established by Articles 1116(2) and 1117(2) of NAFTA

93. The Respondent submits that NAFTA Articles 1116(2) and 1117(2) 'impose a strict three-year time limit for a claimant to submit a claim to arbitration in its own behalf or on behalf of an enterprise that it owns or controls.'[69]

94. In the Respondent's submission, the rigidity of the time limit established by the text of Articles 1116(2) and 1117(2) is 'not subject to any suspension [...], prolongation or other qualification.'[70]

95. The Respondent submits that compliance with the time limits set out in these provisions is a pre-condition to a NAFTA Party's consent to arbitration. In this respect, the Respondent relies on

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68 Procedural Order No. 4, Decision on Bifurcation, November 18, 2016, para 4.10.

69 Respondent's Memorial, para 25.

70 Respondent's Memorial, para 26 citing *Marvin Roy Feldman Karpa v United Mexican States*, ICSID Case No. ARB(AF)/99/1, Award, December 16, 2002, para 63 (**RL-021**) ('***Feldman*, Award**').

NAFTA Article 1122(1) which provides that each NAFTA Party 'consents to the submission of a claim to arbitration in accordance with the procedures set out in [NAFTA].'[71]

96. Accordingly, the Respondent submits that initiation of this arbitration after the three-year time limit specified by Articles 1116(2) and 1117(2) means that this Tribunal lacks jurisdiction *ratione temporis.*[72] The Respondent points to the awards in *Grand River*,[73] *Apotex*[74] and *Bilcon*[75] as instances where tribunals have dismissed claims following a strict application of the three year time limit.[76]

(b) Conditions for triggering the time limits under Articles 1116(2) and 1117(2)

97. The Respondent submits that the plain words of Articles 1116(2) and 1117(2) establish two possible points in time from which the time limit may commence running: (1) the moment when an investor or enterprise 'first acquired' knowledge of the alleged breach and loss, or (2) the moment when an investor or enterprise 'should have first acquired' knowledge of the alleged breach and loss.[77] Thus either actual or constructive knowledge of the alleged breach and loss would be sufficient to trigger the time limit.[78]

98. By reference to the decision in *Grand River*, the Respondent argues that Articles 1116(2) and 1117(2) require investors to exercise a measure of 'reasonable care' and 'diligence', thereby preventing a claimant from 'feign[ing] ignorance of facts it should reasonably have been aware of had it conducted appropriate due diligence' so as to circumvent the time limitation established under the NAFTA.[79]

99. The Respondent refers this Tribunal to a series of NAFTA decisions in *Grand River*, *Mondev*, and *Bilcon*, as well as the Canada-Venezuela BIT decision in *Rusoro Mining v Venezuela*, in support of the proposition that Articles 1116(2) and 1117(2) do not require a claimant to know

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71 Respondent's Memorial, para 23 citing *Methanex*, Partial Award, para 120.

72 Respondent's Memorial, para 28.

73 *Grand River Enterprises Six Nations, Ltd v United States, of America*, UNCITRAL, Decision on Objections to Jurisdiction, July 20, 2006 (**RL-022**) ('***Grand River*, Decision on Objections to Jurisdiction**').

74 *Apotex*, Award on Jurisdiction and Admissibility.

75 *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc v Canada*, UNCITRAL, Award on Jurisdiction and Liability, March 17, 2015 (**RL-025**) ('***Bilcon*, Award on Jurisdiction and Liability'**).

76 Respondent's Memorial, paras 29-31; Hearing on Jurisdiction and Admissibility, August 15, 2017, 153:24-154:3.

77 Respondent's Memorial, para 32; Hearing on Jurisdiction and Admissibility, August 15, 2017, 153:4-11.

78 Respondent's Memorial, para 32; Hearing on Jurisdiction and Admissibility, August 15, 2017, 153:12-23.

79 Respondent's Memorial, paras 34, 36 citing *Grand River*, Decision on Objections to Jurisdiction, paras 44-73.

the full extent of the damage or loss. Rather, the time limit begins to run from the time the claimant knew or ought to have known that some loss or damage to it has been caused.[80]

100. The Respondent considers the *Mondev* tribunal to have been unequivocal when it stated that 'a claimant may know that it has suffered loss or damage even if the extent of quantification of the loss or damage is still unclear.'[81] Such a position is necessary because, as the *Bilcon* tribunal explained, requiring knowledge of the full extent of damage or loss 'might prolong greatly the inception of the three-year period and add a whole new dimension of uncertainty to the time-limit issue.'[82]

101. The Respondent considers the Claimant's interpretation of Articles 1116(2) and 1117(2), which would require the loss or damage to be sufficiently precise before the claimant could know of it, to be incorrect since it would 'allow claimants to ignore the fact that they have already incurred a loss or damage simply because the amount of that loss or damage will not be measured and reported to the claimants' investors and the public until the end of the relevant financial reporting period.'[83] This, the Respondent submits, is 'directly contrary to the ordinary meaning of "incurred"' which was considered in *Grand River* and where that tribunal found:

> A party is said to incur losses, debts, expenses or obligations, all of which may significantly damage the party's interests, even if there is no immediate outlay of funds or if the obligations are to be met through future conduct. Moreover, damage or injury may be incurred even though the amount or extent may not become known until some future time.[84]

102. The Respondent submits that non-NAFTA tribunals arrived at a similar interpretation of time-bar provisions in Rusoro Mining v Venezuela, Corona Materials v Dominican Republic, Spence International Investments v Costa Rica, and Ansung Housing v China.[85] The Respondent contends that the only case cited against it on this point, Pope & Talbot, was incorrectly decided and inconsistent with the NAFTA and non-NAFTA cases to which it has referred.[86]

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[80] Respondent's Memorial, para 42 citing *Rusoro Mining Limited v Bolivarian Republic of Venezuela*, ICSID Case No. ARB(AF)/12/5, Award, August 22, 2016 (**RL-030**).

[81] Respondent's Memorial, para 38 citing *Mondev International Ltd v United States, of America* (ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, para 87 (**RL-029**) ('***Mondev*, Award**'); Hearing on Jurisdiction and Admissibility, August 15, 2017, 173:4-14.

[82] Respondent's Memorial, para 39 citing *Bilcon*, Award on Jurisdiction and Liability, para 275.

[83] Respondent's Reply Memorial, para 97.

[84] Respondent's Reply Memorial, para 97, citing *Grand River*, Decision on Objections to Jurisdiction, para 77.

[85] Respondent's Reply Memorial, paras 98-101.

[86] Respondent's Reply Memorial, para 103.

(c) When did the Claimant first acquire (or should have first acquired) knowledge of its loss or damage?

103. The Respondent explains that since this arbitration was submitted on December 30, 2015, the 'critical date' is December 30, 2012.[87] If the Claimant had actual or constructive knowledge of its loss or damage prior to December 30, 2012, then the Respondent submits that the Tribunal lacks jurisdiction *ratione temporis*.

104. The Respondent considers it uncontested that the Nova Scotia Measures were all adopted between September 2011 and September 2012, that is, before the 'critical date' of December 30, 2012.[88] The Claimant has not denied that it knew of the implementation of the Nova Scotia Measures at the time and, in any event, could not have been unaware of them given that they were a 'matter of public record' and 'the subject of numerous news releases issued by Nova Scotia, […] court filings in the CCAA' and legislative debate in Nova Scotia.'[89] Additionally, the Respondent alleges that 'the Claimant publicly acknowledged the adoption of the Nova Scotia Measures in November 2012,' during an Earnings Conference Call.[90]

105. The Respondent submits that the Claimant, with the knowledge of the Nova Scotia Measures by November 2012 at the latest, must have known or could not have been unaware of its loss or damage on the basis of 'an abundance of market data and analysis available prior to December 30, 2012, which confirmed the impact on Resolute's market share and SC paper prices.'[91] Since the 'damage to the Claimant's competitive position is [...] the only loss or damage that the Claimant attributes directly to the Nova Scotia measures', it 'should have known about this alleged competitive disadvantage on September 28, 2012, when the last of the measures were adopted and the sale of the Port Hawkesbury mill to Pacific West closed.'[92]

106. Specifically, the Respondent refers to press reports and industry analysis in October 2012 regarding the capacity of the newly re-opened Port Hawkesbury mill and the effect it would have on market share and prices.[93] For example, one report in November 2012 assessed that 'Resolute's market share would fall from 20.1 per cent at the end of 2011 to 13.5 per cent at the end of 2012.'[94]

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87 Respondent's Memorial, para 43.
88 Respondent's Memorial, para 45.
89 Respondent's Memorial, para 49.
90 Respondent's Memorial, para 49, referring to CQ Transcriptions, transcript, 'Q3 2012 Resolute Forest Products Inc. Earnings Conference Call – Final' (November 2, 2012), 9 (**R-096**).
91 Respondent's Memorial, para 52.
92 Hearing on Jurisdiction and Admissibility, August 15, 2017, 220:21-221:10.
93 Respondent's Memorial, paras 63-64.
94 Respondent's Memorial, para 64, referring to Verle Sutton, *Reel Time*, Special Edition (November 8, 2012), 7 (**R-102**).

Similarly, market data and reports were noting a fall in SC paper prices as a result of the increased capacity due to the reopening of the Port Hawkesbury mill.[95]

107. The Respondent additionally submits that it is 'not credible' for the Claimant to argue that it was unaware of its loss or damage until the First Quarter of 2013 since 'prices for shipments of SC paper are contracted at least a month in advance.'[96] The Respondent points out that the Claimant's expert, Professor Hausman, accepts that it is industry practice to contract at least a month in advance[97] and considers it conclusive that the Claimant has not led any evidence to contradict either the Respondent's submission or Professor Hausman's testimony on this point.[98] The Respondent refers to the findings of the US ITC that 'lead times between order and delivery dates range from 35 to 45 days for US producers and 28 to 45 days for US importers,' which took into account Resolute's firm-specific lead times that have not been put into evidence by the Claimant before this Tribunal.[99] The Respondent, therefore, concludes that the Claimant must have known 'in November or December 2012 what its January 2013 prices were going to be.'[100] The Respondent submits that this was widely reported in industry publications and data at the time and acknowledged simultaneously by Resolute's competitors.[101] The Respondent notes that even though the Claimant criticizes these market data and forecasts as 'speculation and prognostication,' the Respondent considers that 'they were accurate' and 'the Claimant has not cited a single divergent opinion from the industry publications at that time.'[102]

108. The Respondent also points to five instances where, it alleges, the Claimant acknowledged that it had incurred loss or damage starting in 2012. The Respondent submits that any one of these five facts alone would 'be sufficient to establish Resolute's knowledge of the alleged loss or damage before the critical date.'[103] First, the Respondent refers to a draft notice of intent to submit a claim to arbitration under NAFTA Chapter Eleven presented to it on February 24, 2015 (the '**Draft NOI**') which alleged that 'Resolute's market share for all SC Paper has declined from 2012 to

[95] Respondent's Memorial, paras 65-67.
[96] Respondent's Memorial, paras 66, 68; Respondent's Reply Memorial, paras 69-70.
[97] Respondent's Reply Memorial, para 71, referring to Hausman Statement, para 7 and fn. 29.
[98] Respondent's Reply Memorial, para 72.
[99] Respondent's Reply Memorial, paras 70, 72; Hearing on Jurisdiction and Admissibility, August 15, 2017, 229:16-230:14.
[100] Respondent's Reply Memorial, para 72.
[101] Respondent's Reply Memorial, paras 74-91; Hearing on Jurisdiction and Admissibility, August 15, 2017, 197:13-18.
[102] Hearing on Jurisdiction and Admissibility, August 15, 2017, 233:5-11.
[103] Hearing on Jurisdiction and Admissibility, August 15, 2017, 198:20-23.

2014' as a result of the Nova Scotia Measures.[104] The Respondent asks this Tribunal to disregard the Claimant's description of this document as a 'non-paper' and 'rough internal draft' and instead characterises the Notice as 'a carefully crafted document which the Claimant's President and CEO, Mr Richard Garneau, presented to Canada's Minister of International Trade during an in-person meeting in order to threaten legal action against Canada.'[105]

109. The Respondent also considers the Claimant's allegation that it has 'misread' the Draft NOI as 'hollow'.[106] Contrary to the Claimant's allegation, the meaning of the word 'from' used in the Draft NOI can only be understood as 'starting in', therefore revealing a decline in market share 'starting in' 2012, not merely noting a drop in market share in 2014 vis-à-vis market share held in 2012.[107] The Respondent also considers the Draft NOI to have 'significant probative value' given the time at which it was prepared and submitted to the Canadian government.[108]

110. Second, the Respondent alleges that the Claimant did not have to wait until the reopening of the Port Hawkesbury mill in September 2012 to know of its loss or damage. The Respondent refers to a transcript of a conference call relating to Resolute's 2012 second quarter results and Mr Garneau's comment that the restart of the Port Hawkesbury mill would 'certainly have an impact on the market' and it would be 'impossible not to have an impact on the market.'[109]

111. Third, the Respondent points to the Claimant's decision to shut down a paper machine at its Laurentide mill in November 2012 based on both a drop in demand and increase in market capacity elsewhere as evidence that the Claimant knew of the impact of the Port Hawkesbury mill's restart.[110] The Respondent alleges that references by senior management of the Claimant to 'increased market capacity' could only refer to the re-opening of the Port Hawkesbury mill since: (a) the only other increase in capacity at the relevant time was from another Resolute mill in August 2012; and (b) a public statement by Mr Pierre Choquette (a spokesman for the

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[104] Respondent's Memorial, para 54, referring to Notice of Intent to Submit a Claim to Arbitration Under Chapter Eleven of the North American Free Trade Agreement (February 24, 2015), para 19 (**R-081**); Respondent's Reply Memorial, paras 26, 30.

[105] Respondent's Memorial, para 55; Hearing on Jurisdiction and Admissibility, August 15, 2017, 223:15-224:16.

[106] Respondent's Reply Memorial, para 31.

[107] Respondent's Reply Memorial, para 31; Hearing on Jurisdiction and Admissibility, August 15, 2017, 196:8-197:12.

[108] Respondent's Reply Memorial, paras 32-33.

[109] Respondent's Memorial, para 56, referring to Resolute Forest Products Inc., Form 8-K (August 1, 2012), Exhibit 99.2: Transcript of Earnings Conference Call Held on August 1, 2012, p. 10 (**R-097**); Respondent's Reply Memorial, para 26.

[110] Respondent's Memorial, paras 58-61.

Claimant) directly referred to the restart of a competitor mill in Nova Scotia.[111]

112. The Respondent submits that the Claimant's allegation that Line #10 at the Laurentide mill closed down due to the reopening of the Dolbeau mill 'contradicts its earlier contemporaneous public statements'[112] as well as the public record.[113] In the Respondent's view, this contradiction and the lack of corroborating evidence 'destroys the credibility of a claimant's assertions'.[114]

113. The Respondent submits that it would be irrelevant if the Claimant could establish other reasons for the closure of Line #10 since it has already cited 'the reopening of Port Hawkesbury as one of its main reasons.'[115] The Respondent considers irrelevant the Claimant's suggestion that there was uncertainty about the reopening of Port Hawkesbury since Line #10 was not closed until November 6, 2012, over a month after Port Hawkesbury was reopened in September 2012.[116] The Respondent points to a number of public statements throughout 2011 and 2012 where the Claimant expressed uncertainty about the reopening of Dolbeau and the effect that might have on its other operations; it submits that as late as August 2012, when the Dolbeau mill was finally reopened, Mr Garneau made public statements in reassurance that the reopening of Dolbeau would not affect the Laurentide mill.[117]

114. Fourth, the Respondent also points to public statements surrounding the temporary shutdown of Line #11 at the Laurentide mill on December 19, 2012, one month after the permanent shutdown of Line #10, which 'explicitly cited the reopening of the Port Hawkesbury mill as one of the reasons for this decision.'[118]

115. By contrast to the publicly available evidence relied on above, the Respondent considers the Claimant to have 'failed to provide any direct or credible response in its Counter-Memorial to refute its past admissions' and finds it 'remarkabl[e]' that the Claimant has not presented a witness

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111 Respondent's Memorial, para 60, referring to Radio-Canada, 'Shawinigan: 111 emplois perdus à l'usine Laurentide' (November 6, 2012) (**R-101**); Respondent's Reply Memorial, paras 26, 36, referring to 'Résolu va mettre à pied 111 travailleurs', *Le Journal de Montréal*, November 6, 2012 (**R-115**), and 'Résolu va mettre à pied 110 travailleurs' *TVA,* November 6, 2012 (**R-116**) ; Hearing on Jurisdiction and Admissibility, August 15, 2017, 197:19-198:8, 236:25-238:25.

112 Respondent's Reply Memorial, para 34.

113 Respondent's Reply Memorial, para 43.

114 Respondent's Reply Memorial, para 44.

115 Respondent's Reply Memorial, para 45.

116 Respondent's Reply Memorial, para 46.

117 Respondent's Reply Memorial, paras 48-60.

118 Respondent's Reply Memorial, para 41, referring to Guy Veillette, 'Un marché difficile, répète Produits forestiers Résolu', *Le Nouvelliste*, December 19, 2012 (**R-120**); Hearing on Jurisdiction and Admissibility, August 15, 2017, 239:1-15.

of fact 'who is willing and able to attest to what it actually knew during the relevant period.'[119] The Respondent submits that these uncontested contemporaneous statements from Resolute 'demonstrat[e] that Resolute actually knew that the reopening of Port Hawkesbury had caused it the loss or damage that it claims in this arbitration' and the statements therefore have great probative value.[120]

116. By comparison, the Respondent submits that Professor Hausman's report has 'no probative value' since: (a) he conceded during cross-examination 'that he has no experience working in sales or marketing of supercalendered paper' and so 'can't offer an opinion on what a reasonable producer should have known and when based on specialized industry knowledge or expertise'; (b) the report is not based on interviews with Resolute's employees or managers about their actual knowledge; (c) the report 'relies on a limited amount of data which was curated by Resolute'; (d) his regression analysis used a market price index instead of prices from Resolute or, more specifically, Laurentide; and (e) he considered the weighted average price of three Resolute mills combined, rather than the Laurentide mill in isolation.[121]

117. Fifth, the Respondent considers the Claimant to have selectively cited statements of PHP during an Antidumping and Countervailing Duty Investigation pursued by the US International Trade Commission and says the Claimant has taken those statements out of context.[122] For example, the Claimant is alleged to have omitted the fact that the US ITC did not accept PHP's submission that it was 'impossible for PHP to cause any injury in 2012.'[123] Similarly, the Claimant is said to have omitted PHP's testimony that it had customers 'willing and able to start business with us shortly after we restarted' leading to a production in 2012 of 72,000 metric tonnes.[124] This amounted to '20 per cent of the Port Hawkesbury mill's total annual production capacity [...] and [...] as much as the average quarterly production capacity and actual sales tonnage of Resolute's Laurentide and Dolbeau mills combined.'[125]

118. The Respondent concludes on the basis of the above that the Claimant was not, and could not have been, unaware that 'a loss or damage in the form of decreased market share, lower prices and a competitive disadvantage' would be incurred as soon as the Port Hawkesbury mill reopened

[119] Respondent's Reply Memorial, paras 27-28; Hearing on Jurisdiction and Admissibility, August 15, 2017, 20:22-22:13.
[120] Hearing on Jurisdiction and Admissibility, August 15, 2017, 199:1-6, August 16, 2017, 422:18-423:17.
[121] Hearing on Jurisdiction and Admissibility, August 15, 2017, 204:21-207:14.
[122] Respondent's Reply Memorial, para 61.
[123] Respondent's Reply Memorial, para 62, referring to *In Re Supercalendered Paper from Canada*, Inv. No. 701-TA-530, Final Determination Commission Opinion, p. 25 (**C-054**).
[124] Respondent's Reply Memorial, para 64, citing October US ITC Transcript p. 240:14-24 (**C-052**).
[125] Respondent's Reply Memorial, paras 64-66.

on October 3, 2012 with the support of the Nova Scotia Measures.[126] Accordingly, the time-bar clock started to run from October 3, 2012 and as such, the Claimant's submission of this arbitration on December 30, 2015 is out of time insofar as it concerns the Nova Scotia Measures.[127]

119. The Respondent submits that if the Tribunal nonetheless determines that it has insufficient evidence to make a determination on this matter, the Tribunal should dismiss the claim on the basis that the Claimant has failed to meet its burden to establish the Tribunal's jurisdiction.[128] Alternatively, the Respondent submits that the Tribunal should join the time bar issue to the merits so as to avoid a decision at this stage that would be *res judicata*.[129] Finally, the Respondent suggested that the Tribunal should order a targeted production of documents on the part of the Claimant directed at disclosing the internal state of knowledge of its senior executives.[130]

120. In any event, the Respondent observes that if the Claimant succeeds on the time bar issue, that establishes a 'jurisdictional dilemma that [...] prevents the expropriation claim from proceeding' to the merits phase since:

> If the substantial deprivation was unknown and unknowable until the intervening actions of Port Hawkesbury [...] then the Nova Scotia measures did not relate to the Claimant, and the expropriation was not a measure adopted or maintained by Canada. But if the substantial deprivation was known or should have been known by Nova Scotia, then Resolute also knew and so did everyone else in the market.[131]

(d) Whether the Nova Scotia Measures constitute a continuing breach

121. The Respondent asks the Tribunal to reject the Claimant's contention that the Nova Scotia Measures are 'ongoing measures' that constitute 'continuing violations' of NAFTA and so are not time-barred.[132] The Respondent raises two arguments in this respect.

122. First, the Respondent submits that the notion of 'continuing breach' would disregard the plain wording of Articles 1116(2) and 1117(2) which provide that the time-bar starts to run once the Claimant '*first* acquired, or should have *first* acquired knowledge of the alleged breach and loss.'[133] To interpret Articles 1116(2) and 1117(2) otherwise would go against the consistent

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126 Respondent's Memorial, para 69; Respondent's Reply Memorial, para 93-94.
127 Respondent's Memorial, paras 70-71.
128 Hearing on Jurisdiction and Admissibility, August 15, 2017, 189:12-190:5; August 16, 2017, 421:12-422:3.
129 Hearing on Jurisdiction and Admissibility, August 16, 2017, 422:4-11.
130 Hearing on Jurisdiction and Admissibility, August 15, 2017, 190:5-191:15; August 16, 2017, 422:1-3.
131 Hearing on Jurisdiction and Admissibility, August 15, 2017, 219:5-18.
132 Respondent's Memorial, para 72.
133 Respondent's Memorial, para 73 (emphasis in original).

findings of NAFTA tribunals and the practice of the NAFTA Parties themselves.[134]

123. Second, the Respondent submits that a continuing breach argument is not sustainable as a matter of fact since the Nova Scotia Measures were all concluded prior to the 'critical date' of December 30, 2012.[135] The Respondent draws a distinction between 'continuing acts and completed acts that continue to cause loss or damage', with the Nova Scotia Measures possibly falling into the latter category, but certainly not the former.[136]

(e) The alleged breaches that took place after December 30, 2012

124. The Respondent submits that the Claimant's reliance on a January 2013 electricity regulation allegedly granting a C$6-8 million yearly benefit to Port Hawkesbury did not appear in its Notice of Arbitration and Statement of Claim and was introduced in its Counter Memorial.[137] The Respondent submits that the Claimant's submissions only on this topic are 'outside of the scope of claims that Resolute submitted to arbitration' and, unless the Claimant is permitted to amend its claim under Article 20 of the UNCITRAL Rules, should be ignored.[138]

125. In any event, the Respondent submits that any claim based on the January 2013 Renewable Energy Regulations is also time-barred since any arbitration based thereon would have had to have been submitted by January 2016.[139] Since this claim was omitted from the Claimant's Notice of Arbitration and Statement of Claim, it would be out of time even if the Tribunal allowed the Claimant to amend its claim.[140]

126. The Respondent also considers it 'specious' for the Claimant to contend that its expropriation claim under Article 1110 is brought within time because the expropriation did not occur until October 2014, i.e., the date the Claimant shut down the Laurentide mill.[141] It is uncontested that the Nova Scotia Measures were all adopted in 2012, therefore they could not give rise to a case of 'creeping expropriation' here since the Claimant cannot point to any conduct in 2013 or 2014 that forms the basis of an expropriation claim.[142] Rather, the Claimant's current formulation of its case demonstrates that no legally significant connection exists between the Nova Scotia Measures

134 Respondent's Memorial, para 73.
135 Respondent's Memorial, para 74.
136 Respondent's Memorial, para 75.
137 Respondent's Reply Memorial, para 105.
138 Respondent's Reply Memorial, paras 104, 109; Hearing on Jurisdiction and Admissibility, August 15, 2017, 194:15-18, 208:11-210:12.
139 Respondent's Reply Memorial, para 109.
140 Respondent's Reply Memorial, paras 109-110.
141 Respondent's Reply Memorial, paras 111-112.
142 Respondent's Reply Memorial, para 112.

and its investment.[143]

127. The Respondent also notes that part of the Claimant's allegedly expropriated property included its sales and market share. While the Respondent denies these are assets capable of expropriation, it submits that if the Claimant were right on this point, it must have first acquired knowledge of the alleged breach as well as its loss and damage prior to December 30, 2012 and so would also be time-barred under Articles 1116(2) and 1117(2).[144]

128. Finally, the Respondent argues that acceptance of the Claimant's argument regarding the date of expropriation and the consequent effect on time-bar would lead to an absurd result in NAFTA arbitration. For example, the Respondent recalls that the Claimant reserved the right to claim expropriation in the event its Dolbeau and Kénogami mills closed as a result of the Nova Scotia Measures. The Respondent argues that permitting a claimant to rely on the date it decided to close its mill up to six or more years after the impugned measures were adopted would render the time limitation under Articles 1116(2) and 1117(2) irrelevant.[145]

3. The Claimant's Arguments

(a) Conditions for triggering the time limits under Articles 1116(2) and 1117(2)

129. The Claimant submits that the three-year time limits established under Articles 1116(2) and 1117(2) are triggered upon the Claimant having actual or constructive knowledge of both (a) a breach of NAFTA and (b) loss or damage that has been incurred as a result of such a breach.[146] Contrary to the Respondent's submission, the Claimant argues that its knowledge must relate to losses or damages that have been 'incurred'; knowledge of the probability or likelihood of damages being insufficient to trigger the time limit.[147] In this respect, the Claimant relies on the decision in *Pope & Talbot* where the tribunal held 'the critical requirement is that the loss has occurred and was known or should have been known by the Investor, not that it was or should have been known that loss could or would occur.'[148]

130. The Claimant characterises the Respondent's argument that the time period runs even if a claimant does not know the 'full extent' of its loss or damage as an obfuscation and seeks to distinguish

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143 Respondent's Reply Memorial, para 111.
144 Respondent's Reply Memorial, para 115.
145 Respondent's Reply Memorial, para 113.
146 Claimant's Counter Memorial, para 56; Hearing on Jurisdiction and Admissibility, August 15, 2017, 258:19-24.
147 Claimant's Counter Memorial, para 57.
148 Claimant's Counter Memorial, para 57.

the *Mondev*, *Grand River* and *Bilcon* decisions relied upon by the Respondent.[149] The Claimant points out that in *Mondev*, the tribunal found that the claimant knew of its damage in 1992 when it brought proceedings in US courts, this was seven years before it filed its NAFTA claim and the claimant was therefore clearly out of time.[150] In *Grand River*, the statutory obligation to make payment into a 25 year escrow was sufficient to constitute 'loss or damage' under Articles 1116 and 1117 despite the fact that the payments were not yet due.[151] Finally, in *Bilcon*, the tribunal determined that damages arising from the Claimant's loss of quarry operations as of May 2004 were sufficiently certain although not precisely quantified and therefore out of time since the arbitration was only commenced in June 2008. This finding was in spite of the fact that the relevant Canadian federal minister did not accept the results of the Joint Review Panel until December 2007.[152] The additional non-NAFTA decisions referred to by the Respondent in its Reply Memorial are, according to the Claimant, also distinguishable since 'in each case, there was no serious dispute that the incurred damage was caused by the breaches.'[153]

131. By contrast, the Claimant submits that *Pope & Talbot* is 'factually similar to the instant dispute' and therefore the more persuasive authority.[154] In that case, the Canadian government unsuccessfully argued that the investor knew or should have known of its loss or damage at the time the relevant regulation was enacted, four years prior to the investor submitting the dispute to arbitration.[155] A similar outcome should be reached in this case since Canada here, like in *Pope & Talbot*, 'relies upon uncertain market responses' to 'retrospective[ly] speculate' without affirmative evidence that the Claimant knew or ought to have known of its loss or damage in 2012.[156]

(b) When did the Claimant first acquire (or should first have acquired) knowledge of its loss or damage?

132. Contrary to the Respondent's contention that Resolute knew or could not have been unaware of the effect of the re-entry of the Port Hawkesbury mill on the market following the implementation of the Nova Scotia Measures, the Claimant submits that 'there was great uncertainty as to the immediate likely effects of Port Hawkesbury's re-entry into the market, and the statute of

149 Claimant's Counter Memorial, para 58; Claimant's Rejoinder Memorial, para 89.
150 Claimant's Counter Memorial, paras 60-61.
151 Claimant's Counter Memorial, para 62; Claimant's Rejoinder Memorial, para 57.
152 Claimant's Counter Memorial, para 63.
153 Claimant's Rejoinder Memorial, para 90.
154 Claimant's Counter Memorial, para 64.
155 Claimant's Counter Memorial, para 64.
156 Claimant's Counter Memorial, paras 65-66; Claimant's Rejoinder Memorial, para 91.

limitations is not triggered by probability, anticipation, fear or speculation.'[157] The Claimant maintains that it did not know of any loss or damage until the first quarter of 2013 and makes six submissions in support of this contention.[158]

133. First, the uncertainty surrounding the Port Hawkesbury mill reopening, longevity and the effect of its entry into the market is critical, in the Claimant's view, in demonstrating that it could not have known of its loss or damage prior to December 30, 2012. The Claimant submits that the US ITC proceedings regarding Port Hawkesbury confirm the uncertainty surrounding the re-opening of the mill and that losses could not have been incurred before 2013. Counsel for PHP stated that: 'PHP didn't really get into the market until 2013. As such, it's impossible for PHP to cause any injury in 2012.'[159] Additionally, PHP's counsel noted that upon its re-entry in the market, PHP deliberately sought to avoid disrupting the US market by exporting its product.[160] Similarly, the American petitioners noted the uncertainty surrounding the re-entry of PHP in the market, the volume of sales it might make and the effect it would have on the market.[161] All of this demonstrates that PHP was not 'in the market' in any significant way before 2013.'[162] These statements, the Claimant says, 'are consistent with Prof. Hausman's findings that PHP did not affect the market (or cause Resolute to incur damages) in 2012.'[163]

134. The Claimant acknowledges that 'after September 28, 2012 […] PHP had reopened and would have some effect on the market, but no thoughtful or responsible observer was certain what the effect might be.'[164] Accordingly, the Claimant regards as implausible the Respondent's argument that the Claimant knew or should have known of its loss or damage immediately upon the reopening of Port Hawkesbury mill.[165]

135. Second, the Claimant relies on the expert report of Professor Jerry Hausman asserting that 'Resolute could not have concluded that the firm's SCP operation had been financially harmed by the reopening of the PHP mill prior to the first quarter of 2013.'[166] Professor Hausman concludes that given Resolute's 2012 results 'showed no harm caused by Port Hawkesbury',

[157] Claimant's Counter Memorial, para 67.
[158] Claimant's Counter Memorial, para 68.
[159] Claimant's Counter Memorial, para 71, referring to March 18, 2015 US ITC Transcript at 14:7-9 (**R-083**); Claimant's Rejoinder Memorial, para 60.
[160] Claimant's Rejoinder Memorial, para 61, referring to March 19, 2015 US ITC Transcript at 14:22-15:2 (**R-083**).
[161] Claimant's Counter Memorial, para 73.
[162] Claimant's Counter Memorial, para 73.
[163] Claimant's Rejoinder Memorial, para 62.
[164] Claimant's Rejoinder Memorial, para 58.
[165] Claimant's Rejoinder Memorial, para 59.
[166] Claimant's Counter Memorial, para 74, citing Hausman Statement, para 14.

'Resolute would not have been able to determine the negative effects of PHP's reopening until at least Q2 2013.'[167] The Claimant relies on its own data and Professor Hausman's analysis to show that prices and sales quantities in the fourth quarter of 2012 were not affected by Port Hawkesbury's reopening.[168] However, a price decrease was observed from the first quarter of 2013 and diminution in Resolute's sales quantities after Q1 2013, although these sales volumes were 'consistent with sales in [Q1 2012].'[169]

136. Third, the Claimant submits that the Respondent has failed to meet its evidential burden regarding the potential market effects of the reopening of the Port Hawkesbury mill and accuses the Respondent of selectively and misleadingly quoting certain statements of the Claimant's CEO.[170] For example, in relation to an August 2012 conference call quoted by the Respondent, the Claimant points to other extracts in which its CEO 'pushed back against the notion that it was going to incur loss or damages' and expressed a desire to compete with Port Hawkesbury, even foreseeing 'some improvement' in Q4 2012.[171] Similar confidence in Resolute's ability to compete was expressed in a November 2012 Earnings Conference Call, this portion having been omitted by the Respondent.[172]

137. Fourth, the Respondent's selective reliance on various market forecasts is misplaced given that these forecasts are necessarily speculative and the forecasters in this case have acknowledged that their forecasts were incorrect.[173] For example, predictions regarding a surge in imports and price fall were ultimately proved to be incorrect with PHP 'mov[ing] "seamlessly into the market"' instead.[174] The Claimant considers these forecasts to be 'legally irrelevant' for determining when the Claimant knew or ought to have known of its loss or damage.[175]

138. Fifth, the Claimant submits that the Respondent erroneously relies on its February 2015 Draft Notice of Intent to submit a claim to arbitration.[176] For one thing, the Claimant notes that this document was merely a 'Draft Only' and 'Strictly Confidential' paper that was intended to

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167 Claimant's Counter Memorial, para 74, citing Hausman Statement, para 27; Hearing on Jurisdiction and Admissibility, August 15, 2017, 48:9-22.
168 Claimant's Counter Memorial, paras 75-77; Hearing on Jurisdiction and Admissibility, August 15, 2017, 259:19-260:7.
169 Claimant's Counter Memorial, paras 78-79.
170 Claimant's Counter Memorial, paras 82-83.
171 Claimant's Counter Memorial, para 84.
172 Claimant's Counter Memorial, para 85.
173 Claimant's Counter Memorial, paras 87-88.
174 Claimant's Counter Memorial, para 88, referring to PHP Post. Conf. Br. At Attachment D (**C-044**); March 2013 *Reel Time Report,* pp. 4-5 (**C-026**).
175 Claimant's Counter Memorial, para 89.
176 Claimant's Counter Memorial, paras 94-97.

'initiate a conversation that might lead to compensation for Resolute.'[177] Additionally, this document does not, as the Respondent believes, reveal that the Claimant knew of its loss or damage in 2012, but only specifies that 'Resolute's market share for all SC Paper has declined from 2012 to 2014.'[178] That is to say, 'Resolute's market share for SC paper was less in 2014 than it was in 2012.'[179] The Claimant rebuffs the Respondent's assertion that the word 'from' in the draft NOI must be understood as a 'starting point' for the loss of market share.[180] The Claimant points to the Respondent's own Reply Memorial as conflating 'from December 2012' with 'in January 2013' as a demonstration that the phrase 'from 2012' in the draft NOI does not have the meaning ascribed to it by the Respondent.[181]

139. The Claimant considers the Respondent's focus on the supercalendered paper price forecasts between 2012 and 2014 to be defective for five key reasons:

i. despite the Respondent's assertions, the Claimant's volumes and profits did not decline between December 2012 and January 2013, which are insufficient in any event to constitute a broader trend;[182]

ii. the Respondent has not presented evidence that prices decreased in December 2012, rather it accepts they held firm, so the Claimant had not incurred loss in December 2012;[183]

iii. the seasonality of prices means that 'it is not uncommon for prices to go down in January' and no causal link has been demonstrated between the reopening of Port Hawkesbury and any price decrease in January 2013. In fact, the prices recovered in February 2013;[184]

iv. the Respondent's assertion that the Claimant must have known of the price decrease in January 2013 because of its 28-45 day contract conclusion lead time disregards the fact that the Claimant's prices actually rose in February 2013 and this upcoming increase would have been known at a similar time;[185] and

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177 Claimant's Counter Memorial, para 96, referring to Letter from Richard Garneau to Minister Ed Fast (March 2, 2015) (**R-082**).

178 Claimant's Counter Memorial, para 95, citing Resolute Draft Notice of Arbitration, para 19 (**R-081**).

179 Claimant's Counter Memorial, para 95.

180 Claimant's Rejoinder Memorial, paras 38-40.

181 Claimant's Rejoinder Memorial, para 41, referring to Respondent's Reply Memorial, para 86.

182 Claimant's Rejoinder Memorial, para 43.

183 Claimant's Rejoinder Memorial, para 44; Hearing on Jurisdiction and Admissibility, August 15, 2017, 66:20-67:1.

184 Claimant's Rejoinder Memorial, paras 45, 51-52; Hearing on Jurisdiction and Admissibility, August 15, 2017, 260:8-261:3.

185 Claimant's Rejoinder Memorial, para 46; Hearing on Jurisdiction and Admissibility, August 15, 2017, 73:13-77:15.

v. there continued to be uncertainty surrounding the long term viability of Port Hawkesbury and the later increase in market prices in 2013 demonstrates that Port Hawkesbury's reentry in the market did not have such a dramatic effect.[186] In this regard, the Claimant argues 'a lot of people at the time said – and a customer said at the ITC in the hearing, "This place failed before. It lost its customers. Will the customers come back and trust it again?" Nobody knew for sure. And that was the underestimate, as I tried to suggest, of just how committed the Nova Scotia government was to make it succeed.'[187]

140. Sixth, the Respondent's assertion that the Claimant closed Line #10 at its Laurentide mill because of the reopening of Port Hawkesbury is factually incorrect. The Claimant points out that it attributed the closure of Line #10 to the reopening of the 'more modern and efficient Dolbeau plant' throughout 2011 and 2012, with the reopening of Port Hawkesbury not being certain until September 2012.[188] The Claimant does acknowledge that the closure of Line #11 was attributable to Port Hawkesbury.[189] However, the Claimant disagrees with the Respondent that the temporary shutdown of Line #11 in 2012 was to be attributed to PHP, but was rather scheduled to coincide with the seasonal downturn in demand.[190]

141. The Claimant considers the Respondent's reliance on a particular statement by Resolute's spokesman, Pierre Choquette, regarding the closure of Line #10 to be misconceived.[191] In fact, M. Choquette referenced the opening of Port Hawkesbury as potentially just one of 'several factors' leading to the closure of Line #10, and M. Garneau had elsewhere unambiguously referred to the fact that the reopening of Dolbeau would lead to the closure of another Resolute mill or machine.[192] Elsewhere, M. Choquette repeated the CEO's message that the closure of Line #10 related to the decision to reopen Dolbeau and was unrelated to Port Hawkesbury.[193] At the Hearing on Jurisdiction and Admissibility, the Claimant also explained that 'the decision [to close Line #10] had been taken a full year earlier [...] but a company doesn't show fully its hand when it has workers who are going to be very distressed in a town that depends completely on that mill.'[194]

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186 Claimant's Rejoinder Memorial, para 47; Hearing on Jurisdiction and Admissibility, August 15, 2017, 95:7-98:20, 274:14-275:2.
187 Hearing on Jurisdiction and Admissibility, August 15, 2017, 279:12-22.
188 Claimant's Counter Memorial, paras 98-107; Claimant's Rejoinder Memorial, paras 64, 66-83.
189 Claimant's Rejoinder Memorial, paras 64, 68.
190 Claimant's Rejoinder Memorial, para 79.
191 Claimant's Rejoinder Memorial, para 71.
192 Claimant's Rejoinder Memorial, paras 71-73.
193 Claimant's Rejoinder Memorial, para 76, referring to Guy Veillette, '111 emplois perdus chez Laurentide', *Le Nouvelliste*, November 7, 2012 (**R-117**).
194 Hearing on Jurisdiction and Admissibility, August 15, 2017, 283:24-284:5.

(c) Certain NAFTA breaches were only known to the Claimant after December 30, 2012

142. While the Claimant acknowledges that certain breaches (but not loss or damage) were known by it by September 28, 2012, it submits that other breaches were not known to it until after December 30, 2012.[195] The Claimant refers to two breaches that arose after December 30, 2012: the expropriation of the Laurentide mill which only occurred after the mill closed in October 2014, and a January 2013 Nova Scotia Measure relating to a biomass facility providing Port Hawkesbury with a C$6 to 8 million benefit.[196] These two claims remain timely notwithstanding the outcome of the Respondent's jurisdictional objection in relation to the other claims.[197]

143. First, in relation to the Claimant's expropriation claim, the Claimant submits that it could not have known of the Respondent's breach of NAFTA Article 1110 until it had been substantially deprived of its investment in the Laurentide mill.[198] This, the Claimant says, did not occur until the Laurentide mill closed in October 2014, after the critical date of December 30, 2012 and therefore within time for the purposes of Articles 1116(2) and 1117(2).[199] The Claimant explained during the Hearing on Jurisdiction and Admissibility that the Laurentide mill had been sold in January 2016, and that 'it's no longer owned at all by Resolute. It's in other hands, and, therefore, the mill could not possibly be restored or reopened.'[200]

144. The Claimant submits that the closure of Line #10 – which, in any event, was not attributable to the reopening of Port Hawkesbury – would not constitute a 'substantial deprivation' of its investment so as to amount to a breach of Article 1110.[201] The Claimant considers the Respondent's policy arguments regarding the operation of the time bar in relation to expropriation claims to be more prejudicial to investors than the NAFTA Parties if accepted since a 'claimant could be forced to bring an unripe NAFTA expropriation claim' that would necessarily be dismissed.[202] The Claimant also disavows the Respondent's allegation that the expropriation claim considers sales and market share to have been expropriated, explaining instead that these are cognizable damages even if they are not capable of expropriation. Its claim instead relies on

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195 Claimant's Counter Memorial, para108.
196 Claimant's Counter Memorial, para 109.
197 Claimant's Counter Memorial, para 109.
198 Claimant's Counter Memorial, para 110; Claimant's Rejoinder Memorial, para 94; Hearing on Jurisdiction and Admissibility, August 25, 2017, 36:20-23.
199 Claimant's Counter Memorial, paras 111-113; Hearing on Jurisdiction and Admissibility, August 15, 2017, 290:23-291:2.
200 Hearing on Jurisdiction and Admissibility, August 15, 2017, 37:23-38:9, 285:11-24.
201 Claimant's Counter Memorial, para 114.
202 Claimant's Rejoinder Memorial, para 97.

the closure of the Laurentide mill in 2014.[203]

145. Second, the Claimant refers to the fact that Port Hawkesbury 'used steam provided by a Nova Scotia Power biomass facility to make its paper.'[204] The Claimant alleges that the biomass facility needed to run full time to power Port Hawkesbury, but Port Hawkesbury was only required to pay for the amount of energy it used, i.e., 24 per cent, with the remaining 76 per cent being passed on to ratepayers.[205] The passing down of costs was approved by the Nova Scotia Government by a regulation it passed in January 2013.[206] This regulation constituted a C$6-8 million benefit to Port Hawkesbury and occurred after the critical date of December 30, 2012 so is nonetheless admissible.[207] Contrary to the Respondent's contention that this argument was raised for the first time in the Claimant's Counter Memorial and is therefore out of time, the Claimant submits that these measures formed part of the 'electricity benefits received by PHP and identified by Resolute in its Statement of Claim.'[208] In the event that the Claimant is required to amend its claim (which it does not believe it ought), the Claimant submits that the Tribunal should permit such an amendment as no prejudice would accrue to the Respondent; the arbitrators would only need to address this claim in the merits phase of this arbitration, there being no identified jurisdictional objection to this claim.[209]

4. The Non-Disputing NAFTA Parties' Comments

146. The United States supports the Respondent's contention that the limitation period established by Articles 1116(2) and 1117(2) are 'clear and rigid' and 'not subject to any "suspension", "prolongation", or "other qualification".'[210]

147. Further, the United States agrees with the Respondent's interpretation of the plain text of Articles 1116(2) and 1117(2) regarding the start of the time limitation under those Articles. The United States recalls that the Articles require a 'claimant to submit a claim to arbitration within three years of the 'date on which the' investor or enterprise 'first acquired, or should have first acquired, knowledge' of the alleged breach and its loss or damage.[211] Contrary to the Claimant's theory regarding continuing breach, 'an investor or enterprise *first* acquires knowledge [...] at a particular moment in time [...] such knowledge cannot *first* be acquired at multiple points in time or on a

[203] Claimant's Rejoinder Memorial, para 98.
[204] Claimant's Counter Memorial, para 115.
[205] Claimant's Counter Memorial, paras 115-116.
[206] Claimant's Counter Memorial, para 116.
[207] Claimant's Counter Memorial, para 117.
[208] Claimant's Rejoinder Memorial, paras 99-102.
[209] Claimant's Rejoinder Memorial, para 102.
[210] United States Submission, para 6.
[211] United States Submission, para 7.

recurring basis.'[212]

148. The United States further submits that knowledge of 'incurred loss or damage' pursuant to Article 1116(2) and 1117(2) does not require 'the financial impact of the loss [to be] realized' but instead, the word 'incur' should be understood to refer to when the investor 'become[s] liable or subject to' such loss, even if 'that loss or damage is not immediate.'[213]

149. In respect of the time a claimant acquires knowledge of an alleged breach of the expropriation standard under NAFTA Article 1110, the United States submits that 'a claimant has actual or constructive knowledge of the 'alleged breach' once it has (or should have had) knowledge of all elements required to make a claim under Article 1110 – including that the destruction of, or interference with, the economic value of the investment is sufficient to constitute a taking.'[214] In cases where a series of measures are impugned as being expropriatory, knowledge of the expropriation can exist prior to the enactment of the last government measure.[215] Additionally, the United States submits that 'a claimant may have actual or constructive knowledge that the interference with the economic value of its investment is sufficient to constitute a taking before that investment has lost all of its value.'[216]

150. In a similar vein, Mexico agrees with the Respondent's submission that 'the plain language of Articles 1116(2) and 1117(2) does not require a claimant to acquire knowledge of the full extent of the loss or damage resulting from the alleged breaches in order to start the time limitation to submit a claim to arbitration.'[217] In this regard, Mexico refers to the finding in *Mondev* where the tribunal determined that 'a claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear.'[218]

151. The Respondent points out these areas of agreement amongst the NAFTA Parties, and the authorities that they cite in common, including the statement of the *Mondev* tribunal that a 'claimant may know that it has suffered loss or damage even if the extent of the quantification of the loss or damage is still unclear.'[219] The Respondent agrees with the United States that the holdings in *Pope & Talbot* and *Grand River* are not necessarily incompatible 'as a loss occurs

212 United States Submission, para 7.
213 United States Submission, paras 8-9.
214 United States Submission, paras 10-11.
215 United States Submission, para 11.
216 United States Submission, para 11.
217 Mexico Submission, para 6.
218 Mexico Submission, para 6, citing *Mondev*, Award, para 87.
219 Canada's Reply to Article 1128 Submissions, paras 10-14.

when it is incurred, rather than when the financial impact of the loss is realized.'[220]

152. The Claimant considers that the distinction drawn by the United States between when a loss may be incurred and when the financial impact of the loss may be experienced, is irrelevant to the facts of the present case. That is because Resolute did not know and had no persuasive reason to know that it had either incurred or experienced injury prior to December 30, 2012.[221]

5. The Tribunal's Analysis

(a) General considerations

153. The relevant language of Articles 1116(2) and 1117(2) is identical: 'if more than three years have elapsed from the date on which the investor first acquired, or should have first acquired, knowledge of the alleged breach and knowledge that the investor has incurred loss or damage.' The triggering event is the knowledge, actual or constructive, that an alleged breach has occurred and that loss or damage has been incurred as a result. The Tribunal agrees with the Respondent, and with the other NAFTA Parties in their Article 1128 submissions, that this time limit is strict, not flexible. There is no provision for the Tribunal to extend the limitation period, and there is no question here of any waiver on the part of the Respondent. On the other hand, the specified conditions must be fulfilled: the alleged breach must actually have occurred, the resulting damage must actually have been incurred, and the claimant must know, or be in a position such that it should have known, of these facts.

154. As to the requirement of breach, one cannot know of a breach until the facts alleged to constitute the breach have actually occurred. It is not enough that a breach is likely to occur: paragraph (2) deals with allegations, no doubt, but not with contingencies.[222] There may thus be a difference between the date of different breaches arising from a given course of governmental conduct. The Claimant alleges breaches of Articles 1102(3) (national treatment), 1105(1) (unfair and inequitable treatment), and 1110(1) (expropriation). Breaches of Articles 1102(3) and 1105(1) occur when the governmental conduct complained of occurs. By contrast a breach of Article 1110(1) occurs when the expropriation (as there defined) occurs and not before. The gist of an expropriation is the loss of the property in question, as a result of a governmental taking (direct

220 Canada's Reply to Article 1128 Submissions, para 14.
221 Claimant's Reply to Article 1128 Submissions, paras 16-18.
222 In certain cases, tribunals have been prepared to overlook technically premature claims, provided the relevant requirements have subsequently been satisfied: e.g. *Ethyl Corporation v Canada*, Award on Jurisdiction, June 14, 1998, paras 85-88 (where the legislation complained of had not been passed or come into force). The question here is a different one: it is whether a strict 3-year limit for bringing a claim has been exceeded. The 3-year limit is counted from the date of actual (putative) breach and knowledge of harm.

or indirect). Only when the investor is substantially or completely deprived of the attributes of property in an investment can there be an expropriation under Article 1110(1).[223]

(b) Knowledge (actual or constructive) of the alleged breaches

155. In the present case, the essential acts alleged to constitute breaches of Articles 1102(3) and 1105(1) were completed by September 2012, three months before the critical date. It was in September 2012 that the sale of the Port Hawkesbury mill was finalised, along with the associated promises of support. Moreover, the Claimant was well aware of this at the time. It had previously declined to bid for the mill, and the proposed sale was covered in the trade press. Indeed, the Claimant, subject to an argument as to continuing breach, did not really argue otherwise. Its principal argument was that it did not suffer loss or was, reasonably, not aware of having done so until, at the earliest, January 2013, after the critical date.

156. In its written pleadings, at least, the Claimant also sought to argue that the Nova Scotia Measures were continuing breaches of Articles 1102(3) and 1105(1), breaches which continued after the critical date and which consequently were not caught by the 3-year time limit. In oral argument, this argument was not pressed, and in the Tribunal's view rightly not.

157. The core point is that in the present case, the Nova Scotia measures were taken within a short space of time and were effectively complete when taken. It is true that they eventually had a continuing effect on the Claimant (from what date is disputed), but that does not suffice to qualify them as continuing wrongful acts. There is a distinction between a continuing breach of an obligation and a perfected breach which continues to have injurious effects. Decisions to provide support to the Port Hawkesbury mill were taken and implemented in September 2012, and with one possible exception (as to which see paragraph 160 below) they did not call for further measures to be taken.

158. Articles 1116(2) and 1117(2) of NAFTA refer to the time when the breach 'first' occurred. According to the ordinary meaning of the terms used and the object and purpose of the provision (under Article 31 of the Vienna Convention on the Law of Treaties), whether a breach definitively occurring and known to the claimant prior to the critical date continued in force thereafter is irrelevant. In terms of Article 14(2) of the Articles on State Responsibility, '[t]he breach of an international obligation by an act of a State having a continuing character extends over the entire

[223] 'The essence of the matter is the deprivation by state organs of the right of property either as such, or by permanent transfer of the power of management and control': *Brownlie's Principles* (8th edn, ed Crawford, 2012) 621.

period during which the act continues and remains not in conformity with the international obligation.'[224] But the breach nonetheless occurs when the State act is first perfected and can be definitively characterized as a breach of the relevant obligation. Here the reopening of the Port Hawkesbury mill on favourable terms – alleged by the Claimant to constitute a breach of Articles 1102(3) and/or 1105(1) – first occurred not later than September 2012.

159. In these circumstances the Tribunal does not need to attempt to reconcile the apparent discrepancies between various NAFTA tribunals concerning continuing wrongful acts.[225]

160. A possible exception to this conclusion concerns the January 2013 electricity regulation granting a further benefit to Port Hawkesbury (see paragraph 124, 145 above). At the oral phase the Parties spent very little time on this argument. It was not (and in the Tribunal's view, could not have been) pleaded as giving rise to a new claim under Chapter Eleven; it was, if anything, a continuation of conduct already in operation. If necessary, the Tribunal would have permitted an amendment to the Notice of Arbitration and Statement of Claim, but in essence the 2013 electricity regulation was not more than an ancillary factor, linked to the original Measures. As such, it does not affect the operation of the time-bar.

161. The position is different, in the Tribunal's view, in respect of the alleged breach of Article 1110(1). The gist of an expropriation claim is the actual loss of property or (in the case of conduct tantamount to an expropriation) of control over it. In the words of the tribunal in *Glamis Gold*:

> Claims only arise under NAFTA Article 1110 when actual confiscation follows, and thus mere threats of expropriation or nationalization are not sufficient to make such a claim ripe; for an Article 1110 claim to be ripe, the governmental act must have directly or indirectly taken a property interest resulting in actual present harm to an investor.[226]

162. The Claimant summarized its case on expropriation in closing as follows:

> an expropriation is a measure that causes the substantial deprivation of my property. And if you, as a government, take measures, knowing that you will be supporting an entity in a way that will harm a limited number of other competitors in a shrinking market, I think that there is a very good basis to claim that that measure may cause the expropriation, indirect, constructive expropriation, of one of the other market players. It results in the substantial

224 International Law Commission, *Draft Articles on Responsibility of States for Internationally Wrongful Acts* 2001, Report of the International Law Commission on the Work of Its Fifty-third Session, UN GAOR, 56th Sess, Supp No 10, 43, UN Doc. A/56/10 (2001).

225 Cf, on the one hand, *United Parcel Service of America Inc (UPS) v Government of Canada*, ICSID Case No. UNCT/02/1, Award, May 24, 2007, para 28 and, on the other, *Apotex Inc v Government of the United States*, ICSID Case No. UNCT/10/2, Award on Jurisdiction and Admissibility, June 14, 2013, paras 325-7; *Glamis Gold, Ltd v United States of America*, UNCITRAL Award, June 8, 2009, para 348; *Grand River Enterprises Six Nations Ltd v United States*, Award, ICSID Case No ARB/10/5, IIC 481 (2011), January 12, 2011, para 74.

226 *Glamis Gold, Ltd. v United States of America*, UNCITRAL, Award, June 8, 2009, para 328.

> deprivation of my asset... [227]

163. In accordance with this submission, the expropriation did not occur until 2014, when the Claimant's Canadian subsidiary decided to close down the Laurentide mill and the Claimant was thereby deprived of the benefit of its investment.[228] As will appear, there are difficulties with this claim for breach of Article 1110(1), but in the Tribunal's view, the timing requirements of Articles 1116(2) and 1117(2) have not been infringed in respect of the expropriation claim.

(c) Knowledge (actual or constructive) of losses incurred

164. This conclusion concerning expropriation makes it unnecessary for present purposes to decide when the Claimant became aware that it had suffered loss as a result of the alleged breach of Article 1110(1), or should have done so. But that question does arise with respect to the losses incurred by the Claimant as a result of the alleged breaches of Articles 1102(3) and 1105(1).

165. On this issue the Disputing Parties agreed that it is not necessary for this purpose that the full extent of losses incurred be known. As the tribunal said in *Mondev*, 'a claimant may know that it has suffered loss or damage even if the extent or quantification of the loss or damage is still unclear.'[229]

166. Beyond this point the Disputing Parties' positions diverged. The Claimant did not call its spokesman at the time, or its senior management, to testify as to their knowledge of present losses. Rather it called expert evidence in the person of Professor Hausman, who asserted that any adverse impact of the breaches did not occur until, at the earliest, the first quarter of 2013. The Respondent for its part contested Professor Hausman's evidence, although it did not call any

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[227] Hearing on Jurisdiction and Admissibility, August 16, 2017, 458:19-459:4.

[228] There is an extensive case-law on the question when an expropriation occurs, much of it concerned with 'creeping' expropriation (which is not this case) and with issues of valuation rather than (as here) with jurisdiction. A typical finding is that of the Iran-US Claims Tribunal that:

> When the alleged expropriation is carried out by way of a series of interferences in the enjoyment of property, the breach forming the cause of action is deemed to take place on the day when the interference has ripened into a more or less irreversible deprivation of the property rather than on the beginning date of the events

International Technical Products Corporation v Government of the Islamic Republic of Iran, Award No. 196-302-3, October 28, 1985, para 49, Iran-USCTR 206, 240-1 (1985). See further *Biloune and Marine Drive Complex Ltd v Ghana Investments Centre and the Government of Ghana*, UNCTIRAL, Award, October 27, 1989, 95 ILR 184, 210, para 30. See also e.g. *First National City Bank, Memorandum of determinations*, IIC 1023 (1973), April 9, 1973, *Chile (Overseas Private Investment Corporation)*; *Compañia del Desarrollo de Santa Elena SA v Republic of Costa Rica*, ICSID Case No. ARB/96/1, Award, February 17, 2000, paras 77-8; *Nykomb Synergetics Technology Holding AB v Latvia*, Award, December 16, 2003, para 4.3.1.

[229] *Mondev International Ltd. v United States of America*, ICSID Case No. ARB(AF)/99/2, Award, October 11, 2002, para 87.

expert in rebuttal. Instead, the focus of its case was on a series of statements, made by the Claimant in 2012 and subsequently, that, in the Respondent's view, indicated awareness that losses had already been incurred.

167. There is an almost metaphysical question whether a claimant which actually asserts that it has already suffered loss or damage can subsequently, in effect, argue that it was mistaken and that the loss or damage were only incurred at a later date. Is it possible to have actual knowledge of something that is not the case? But as not infrequently happens in the law, the metaphysical question does not really arise. Articles 1116(2) and 1117(2) are concerned to set time limits on NAFTA claims once the claimant has notice of what it considers breach and consequential loss. A claimant which unequivocally asserts both elements, then waits more than 3 years to commence proceedings, can hardly be heard to say that its original assertion was premature.

168. It is thus necessary to review the statements relied on by the Respondent to see whether they constituted unequivocal assertions of loss already incurred. The various statements were itemized in paragraphs 108-117 above.

169. The draft notice of intent presented to the Minister on February 24, 2015 referred to market share having declined 'from 2012 to 2014'.[230] The Tribunal does not accept Claimant's argument that this was merely a draft for the purposes of negotiation. It was a document transmitted to the Respondent with a view to the settlement of the dispute, and was correspondingly significant. However, the statement as to market share was not unequivocal. To say that market share declined from one year to another does not say anything specific about whether there was a decline in the first year, especially since only a few months in that year were implicated. The first year may be simply a comparator. The Tribunal does not read this isolated statement as an admission that Claimant suffered actual loss or damage in 2012.

170. As to the 2012 conference call and Claimant's statement that it was 'impossible [for the reopening of Port Hawkesbury] not to have an impact on the market',[231] this certainly shows that the Claimant expected to lose market share. But made at a time when Port Hawkesbury had yet to reopen, this was a mere prediction, not an acknowledgement of loss already incurred.

171. More significant in this regard is the Claimant's closure of Line #10 at Laurentide in November 2012, and the contemporaneous explanations for this given by the Claimant. The Claimant argues

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[230] Resolute Forest Products, 'Draft Notice of Intent', February 24, 2015, para 19 (**R-081**). No further specification was offered.

[231] See para 110.

that the major reason for the closure of Line #10 was its own decision, made a year before, to reopen its Dolbeau plant. This seems to have been the major reason, but the explanation reveals the interaction of economic factors in a saturated market. Claimant's spokesperson, Pierre Choquette, said at the time that the reopening of Port Hawkesbury was 'just one of several factors' in the decision to close Line #10 and the Tribunal is inclined to think that this statement was accurate. Moreover, the temporary closure of Line #11 at Laurentide was according to the Claimant itself, at least partly attributable to the reopening of Port Hawkesbury. But it is one thing, in a climate of uncertainty as to markets, to take precautionary measures, and another to acknowledge present loss or injury. The Claimant does not suggest that the temporary closure was a compensable loss, and in the Tribunal's view neither was it an acknowledgement of damage.

172. The Respondent quotes press articles from late 2012, which state that the Claimant will lose market share: (i) a 'Reel Time' report published on November 8, 2012 predicted that Resolute's market share would fall from 20.1% at the end of 2011 to 13.5% at the end of 2012;[232] (ii) the 'ERA Forest Products Monthly' November 2012 issue said that the Port Hawkesbury restart was already having an impact on contract negotiations for the first half of 2013;[233] and (iii) 'Industry Intelligence' reports about drops in prices.[234] The Claimant points out that previous reports by 'Reel Time' were erroneous, and asserts that speculation about markets is inherently uncertain.[235]

173. In the Tribunal's view, it was clear when Port Hawkesbury restarted in September 2012 that paper prices would be affected at some point. But that fact is not equivalent to a finding that damage was already being incurred, and that is what Articles 1116(2) and 1117(2) require. Press speculation and market predictions are no substitute for evidence of sales volumes and prices, or a clear acknowledgement of present loss.

174. Dr Jerry Hausman, a Professor of Economics at MIT, gave evidence on the former point. In his Expert Witness Statement he concluded that:

> The management of Resolute could not have concluded that the firm's SCP operation had been financially harmed by the reopening of the PHP mill prior to the first quarter of 2013. Several factors underlie my conclusion. First, the price and financial effects of the reopening were not evident until January 2013 or later. Second, PHP did not have a material impact on

232 Canada's Memorial on Jurisdiction, para 64, citing Verle Sutton, *Reel Time*, Special Edition (Nov. 8, 2012), p. 7, available at: http://suttonpaperstrategies.com/PDFs/Nov%2012%20Forecast%20Issue.pdf. (**R-102**)

233 Canada's Memorial on Jurisdiction, para 65, citing ERA Forest Products Research, *ERA Forest Products Monthly* (November 30, 2012), p. 25 (**R-105**).

234 Canada's Memorial on Jurisdiction, paras 66-7, citing, Industry Intelligence, report, 'Industry Intelligence i2dashboard - 35 lb SC-A' (**R-108**) and Industry Intelligence, report, 'Industry Intelligence i2dashboard - 33 lb SC-B' (**R-109**).

235 Claimant's Counter-Memorial on Jurisdiction, paras 88, 91.

> the North American SCP market until 2013. Third, there was nothing in the financial results of Resolute's SCP operations during the fourth quarter of 2012 to suggest that Resolute had been materially harmed by the reopening, especially when viewed in the context of declining consumption of SCP during 2012. Fourth, even if Resolute's management had suspected adverse effects might arise from the reopening, it would not have known the extent of any effects, or their materiality, prior to the first quarter of 2013.[236]

175. He added:

> Based on the evidence presented [...] Resolute could not have contemporaneously known the damaging effects of PHP's reopening in 2012, due to the limited price, quantity, and profit effects apparent in Q4 2012.[237]

176. Dr Hausman was ably cross-examined on his Statement, but without resiling from its principal conclusions. He accepted that there had been a slight decline in SC paper prices in January 2013, and an even slighter increase in February 2013 (both of which would have been known in December), but said that someone in the Claimant's position should not have attached significance to that, given the relatively modest price changes and typical market fluctuations after the end of the holiday season. He also emphasized the uncertainties regarding Port Hawkesbury's reopening, which could not have been resolved in the short time scale in question. In his view the major impact on prices was not felt until later in 2013 or even 2014.[238] In the absence of rebuttal evidence and in light of the indications of prices for supercalendered paper in the period November 2012 to February 2013, the Tribunal accepts his evidence cited above.

177. As noted (paragraph 119 above), the Respondent submitted at the hearing that the Tribunal should join (or rather rejoin) the time bar issue to the merits, or at least order a targeted production of documents directed at disclosing the internal state of knowledge of Claimant's senior executives. The Tribunal is disinclined to accept either procedural proposal. The Respondent sought bifurcation *inter alia* on this issue, yet at the jurisdictional phase issues will typically be decided on the basis of written party submissions.[239] In fact, a quantity of documentary evidence was produced, including items taken from the trade literature and statements by informed company personnel, and the matter was fully argued. The resulting picture suggested that there was an expectation of increased competition and pressure on prices, but, consistent with the factual analysis presented above, there was no admission by the Claimant of immediate losses in the period after Port Hawkesbury restarted, and the economic evidence produced by the Claimant supported this conclusion. In the circumstances, no case for joinder or a special discovery process has been made out.

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[236] Hausman, Expert Witness Statement, February 22, 2017, para 14.
[237] Ibid, para 40.
[238] The oral evidence is at Hearing on Jurisdiction and Admissibility, August 15, 2017, 50-99.
[239] Cf *Grand River*, Decision on Objections to Jurisdiction, para 54.

178. In the Tribunal's view, the Claimant did not know, and could not reasonably have known, by December 2012, that it had already incurred loss or damage by reason of the alleged breach. Indeed, it has not been established that it did actually suffer loss in this short period. Market participants and observers expected increased price competition in the longer term, but that is a different matter. The Respondent argued that at least the reopening of Port Hawkesbury precluded the Claimant from raising its prices, but as Claimant pointed out, there is no evidence that it planned a price increase,[240] and anyway press speculation as to possible price increases is not the same thing as an admission of loss or injury. *A fortiori* it is not enough to trigger the time limit.

179. For these reasons, in the Tribunal's view the time-bar in Article 1116(2) and 1117(2) does not prevent the Tribunal exercising jurisdiction over the claims.

C. THE SCOPE OBJECTION

1. Introduction

180. NAFTA Article 1101(1) deals with the 'Scope and Coverage' of NAFTA Chapter Eleven and relevantly provides:

> This Chapter applies to measures adopted or maintained by a Party relating to:
> (a) investors of another party;
> (b) investments of investors of another Party in the territory of the Party; and
> (c) with respect to Articles 1106 and 1114, all investments in the territory of the Party.

181. The Respondent submits that the words 'relating to' in Article 1101(1) require a 'legally significant connection' between the impugned measures and the investor or its investment. The Respondent contends that such a connection does not exist in this case between the Nova Scotia Measures and the Claimant or the Laurentide mill and so the Nova Scotia Measures do not fall within the scope of application of NAFTA.

182. The Claimant, on the other hand, contends that the words 'relating to' only requires a 'causal connection' between the impugned measures and the investor or its investment. In this case, the Claimant submits that such a 'causal connection' exists here since the Nova Scotia Measures directly affected the Claimant and the Laurentide mill.

183. As noted by the Tribunal in its Decision on Bifurcation, if the Respondent's Article 1101(2) objection is successful, it would dispose of the entirety of the claims relating to the Nova Scotia

[240] Claimant's Rejoinder Memorial, para 54.

Measures.[241]

2. The Respondent's Arguments

(a) Interpretation of the words 'relating to' under Article 1101(1)

184. The Respondent's jurisdictional objection revolves around whether the words 'relating to' are sufficiently broad to include cases where the impugned measures merely have an effect on the investor and its investment, or whether something more is required.[242] The Respondent submits that the words 'relating to' impose a higher threshold than the 'causal nexus' test proposed by the Claimant and require a 'legally significant connection' between the impugned measures and the investor or its investment so as to be covered by NAFTA Chapter Eleven.[243]

185. The Respondent compares the words chosen in Article 1101(1) with other provisions of NAFTA that are formulated more broadly in order to cover measures that have a mere direct or indirect effect on trade.[244] The Respondent reinforces this point by reference to previous drafts of NAFTA which broadened the scope of application of Chapter Eleven to 'measures affecting investments [...] and investors'.[245] However, this earlier drafting was rejected by the NAFTA Parties and reformulated in its narrower current form. The Respondent notes that the Disputing Parties agree that 'a measure that has a mere effect on an investment [...] is not sufficient to satisfy the Article 1101(1) threshold' and a measure 'must directly affect the investor or its investment for it to meet the "relating to" threshold.'[246] The Respondent submits that it is also the agreed view amongst all three NAFTA Parties that the words 'relating to' ought to be understood as requiring a 'legally significant connection' between the measure, the investor and its investment so as to fall within Chapter Eleven's scope of application and, consequently, the jurisdiction of a NAFTA tribunal.[247] This view, which has been expressed in cases such as *Methanex* and *Apotex*, was adopted by those tribunals in their reasoning. For example, the tribunal in *Methanex* found:

> If the threshold provided by Article 1101(1) were merely one of 'affecting', as Methanex contends, it would be satisfied wherever any economic impact was felt by an investor or an investment...

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241 Procedural Order No. 4, Decision on Bifurcation, November 18, 2016, para 4.15.

242 Respondent's Memorial, para 81.

243 Respondent's Memorial, paras 79, 81; Hearing on Jurisdiction and Admissibility, August 15, 2017, 111:1-7.

244 Respondent's Memorial, para 81 referring to NAFTA Articles 709 ('this Section applies to any such [sanitary and phytosanitary] measure of a Party that may, directly or indirectly, affect trade between the Parties') and 901 ('this Chapter applies to standard-related measures […] that may directly or indirectly, affect trade in goods or services').

245 Respondent's Memorial, para 82.

246 Respondent's Reply Memorial, para 118.

247 Respondent's Memorial, para 83; Hearing on Jurisdiction and Admissibility, August 15, 2017, 111:8-114:19.

> We decide that the phrase 'relating to' in Article 1101(1) NAFTA signifies something more than the mere effect of a measure on an investor or an investment and that it requires a legally significant connection between them.[248]

186. The Respondent submits that this approach has been endorsed and adopted by subsequent tribunals in *Bayview*[249] and *Cargill*.[250] In respect of the *Cargill* decision, the Respondent disagrees with the Claimant's assertion that 'the *Cargill* tribunal considered that the 'legally significant connection' test set out in *Methanex* 'sets the bar too high, or requires refinement.'[251] Rather, the *Cargill* tribunal found that there was a 'causal nexus' between the investor, its investment and the Mexican permit regime imposed on the import of high fructose corn syrup.[252] Although phrased differently, the Respondent submits that the 'causal nexus' test is essentially the same as the 'legally significant connection' test.[253] In fact, the *Cargill* tribunal refused to comment on the stringency of the *Methanex* test, instead determining that: 'regardless of whether or not the test espoused in *Methanex* is too restrictive, it is satisfied.'[254]

187. The Respondent further contends that the very same argument was considered and rejected in the *Apotex* and *Apotex II* cases, especially where the tribunal in *Apotex II* determined:

> The Tribunal does not consider that the *Cargill* tribunal was seeking to apply a different legal interpretation of NAFTA Article 1101(1) from the two tribunals in *Methanex* and *Bayview.*[255]

188. The Respondent maintains that the 'legally significant connection' test is the proper approach since it was the standard applied in *Bayview* and described by the *Bilcon* tribunal as 'a sound basis for deliberation.'[256] The Respondent submits that the 'legally significant connection' test requires more than the measure 'merely affect' the claimant or its investment, but does not necessarily require that the measures be 'intended to deliberately harm' the investor nor 'create a legal impediment', even though measures such as these would 'undoubtedly meet the threshold' set by

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248 Respondent's Memorial, para 84

249 *Bayview Irrigation District v United Mexican States* (ICSID Case No. ARB(AF)/05/1) Award, June 19, 2007 (**RL-005**) ('***Bayview*, Award**'); Hearing on Jurisdiction and Admissibility, August 15, 2017, 115:11-22.

250 *Cargill, Incorporated v United Mexican States* (ICSID Case No. ARB(AF)/05/2) Award, September 18, 2009 (**RL-050**) ('***Cargill, Award***').

251 Respondent's Memorial, para 88, referring to Claimant's Opposition to Respondent's Request for Bifurcation, para 10.

252 Respondent's Memorial, para 88, citing *Cargill*, Award, para 174.

253 Respondent's Memorial, para 88; Respondent's Reply Memorial, para 125.

254 Respondent's Reply Memorial, para 123, citing *Cargill*, Award, para 175.

255 Respondent's Memorial, para 89, citing *Apotex Holdings Inc. and Apotex Inc v United States of America*, ICSID Case No. ARB(AF)/12/1, Award, August 25, 2014, para 6.13 (**RL-051**) ('***Apotex*, Award**'); Respondent's Reply Memorial, para 122; Hearing on Jurisdiction and Admissibility, August 15, 2017, 136:16-21.

256 Respondent's Reply Memorial, para 124 referring to *Bayview*, Award, para 101; *Bilcon*, Award on Jurisdiction and Liability, para 240.

the 'legally significant connection' test.[257]

189. The Respondent urges this Tribunal to follow the line of authority established by the tribunals mentioned above and also followed by the tribunal in *Bilcon* and ignore the Claimant's reference to the *BG Group v Argentina* case which is based on the UK-Argentina BIT, inconsistent with NAFTA practice, and has never been endorsed by a NAFTA tribunal.[258] To find otherwise, the Respondent says, 'would create a limitless class of affected investors' and 'do exactly what the *Methanex* tribunal cautioned against'.[259]

(b) Whether a 'legally significant connection' exists between the Nova Scotia Measures, Resolute and Resolute's investments

190. The Respondent submits that while Resolute may have felt the economic impact of the Nova Scotia Measures and the re-opening of the Port Hawkesbury mill, this is insufficient to satisfy the 'legally significant connection' test required by Article 1101(1). This is, quite simply, because the Claimant's operations are headquartered in Québec and the Claimant has no investment in Nova Scotia and, conversely, the Nova Scotia government exercises no legal authority over the Claimant's investments outside of Nova Scotia.[260]

191. The Respondent considers the Claimant to have inappropriately added a new claim via its Counter Memorial by alleging that the Nova Scotia measures were intended to harm a foreign investor.[261] This allegation was not capable of being accepted *pro tem*, as alleged by the Claimant, since it only appeared for the first time in the Claimant's Counter-Memorial.[262] Without permission to amend its claim under Article 20 of the UNCITRAL Rules, the Respondent submits that this allegation should be ignored.[263]

192. In any event, the Respondent contends that this 'bare accusation of malign intent without so much as a hint of evidence' still does not satisfy Article 1101(1).[264] The Respondent draws comparisons between this case and *Methanex*, where the claimant had permission to amend its claim so as to allege a conspiracy to harm in order to bolster its jurisdictional arguments.[265] However, just as

257 Hearing on Jurisdiction and Admissibility, August 15, 2017, 116:18-117:16.
258 Respondent's Memorial, para 93.
259 Respondent's Reply Memorial, para 126; Hearing on Jurisdiction and Admissibility, August 15, 2017, 126:5-22.
260 Respondent's Memorial, para 95; Respondent's Reply Memorial, para 130.
261 Respondent's Reply Memorial, paras 128, 131, referring to Claimant's Counter Memorial, para 154.
262 Respondent's Reply Memorial, para 132.
263 Respondent's Reply Memorial, para 132.
264 Respondent's Reply Memorial, para 132.
265 Respondent's Reply Memorial, paras 133-135.

that tactic did not succeed in *Methanex*, so should the Claimant's attempt in this case fail.[266] The Respondent submits that the Claimant's allegation of intention to harm is 'totally unsupported by evidence' and contradicts Resolute's evidence before the US ITC that 'PHP and Resolute were not in direct competition because they make a lesser quality paper.'[267]

193. In addition to the above, the Respondent considers each category of the Nova Scotia Measures in turn to demonstrate 'that only a tangential, indirect connection exists between the measure and the Claimant's investment.'[268]

194. The funding provided by the Forestry Infrastructure Fund was used to train and sustain workers in the forestry industry and to help keep the Port Hawkesbury mill in 'hot idle', thereby preventing the mechanical deterioration of the mill so that it could be sold as a going concern to prospective buyers.[269] These measures contributed to the value of the Port Hawkesbury mill when being sold to prospective buyers, of whom Resolute could have been one, but could equally have been futile had no purchaser been found.[270] Additionally, these measures do not 'relate to' the Claimant nor its investments in a different province, they solely relate to the Port Hawkesbury mill and its resale value.[271] Canada asks that these measures be severed from the claim as not having a 'legally significant connection' to the investor or its investment since they were only 'temporary stopgap measures with neutral intent and limited scope.'[272]

195. The C$124.5 million in government support for PWCC's acquisition of the Port Hawkesbury mill similarly lacks a significant legal connection to the Claimant and its investments. This funding was not provided to PWCC to give it a competitive advantage, as suggested by the Claimant, but was provided to assist the new owners implement 'improved land management practices, preservation and expansion of Crown land, sustainable harvesting, and support for the local work force, the forestry sector and the Mi'kmaq people.'[273]

196. PWCC's Property Tax Agreement and preferential electricity rate negotiated with NSPI similarly have no connection to the Claimant or its investments since the Claimant does not pay property

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266 Respondent's Reply Memorial, para 135.
267 Respondent's Reply Memorial, para 136, referring to March US ITC Transcript, p. 130:12-15 (**R-083**).
268 Respondent's Reply Memorial, para 137.
269 Respondent's Memorial, para 97; Respondent's Reply Memorial, paras 138, 139; Hearing on Jurisdiction and Admissibility, August 15, 2017, 13:13-14:3.
270 Respondent's Memorial, para 98.
271 Respondent's Memorial, para 99.
272 Hearing on Jurisdiction and Admissibility, August 15, 2017, 14:7-15, 138:3-141:2; August 16, 2017, 408:15-409:3.
273 Respondent's Memorial, para 101; Respondent's Reply Memorial, para 140; Hearing on Jurisdiction and Admissibility, August 15, 2107, 141:3-145:2.

taxes in Nova Scotia nor is it subject to electricity rates in Nova Scotia.[274] In respect of the Property Tax Agreement, the Respondent submits that this agreement, between Richmond County and NewPage and Port Hawkesbury, does not relate to Resolute's investment in 'another province entirely where a different tax regime applies'.[275] The Respondent argues that it is insufficient for the Claimant to contend that the Property Tax Agreement 'benefitted PHP, and that's good enough for it to be related to Resolute.'[276] In respect of the preferential electricity rate, this was negotiated and given because it was in NSPI's interest, as a 'privately-owned, commercially-run corporation', to preserve PHP as a customer and was in the public interest since PHP's continued existence 'benefitted all of the customers on the grid' by avoiding a 'hike in electricity rates for all other customers on account of the loss of this extra-large customer.'[277]

197. The Respondent also submits that the Claimant's case relating to the biomass facility, in addition to being made belatedly, must fail 'for the same reasons as the Property Tax Agreement [...] because it doesn't draw the necessary legal connection.'[278]

198. The Respondent submits that the Claimant's complaints themselves illustrate how no 'legally significant connection' exists between the Claimant, its investments and the Nova Scotia Measures. For example, the Claimant's complaint that it was not afforded similar treatment as the Port Hawkesbury mill demonstrates how there is no 'legally significant connection' since such treatment was not afforded to it for the simple fact that it is not located in Nova Scotia.[279] Similarly, the fact that (on its own case) the Claimant did not know the economic impact of the Nova Scotia Measures until the first quarter of 2013 demonstrates that the Nova Scotia Measures did not relate to the Claimant's investment in a 'legally significant' way.[280]

199. The Respondent draws a parallel between this case and the *Methanex* case, where the impugned measures did not directly affect the claimant but only had an effect on the market that was felt by the claimant.[281] The Respondent contends that 'such market effects are too far removed to meet the threshold of Article 1101(1)' and therefore submits that the Claimant's claims relating to the Nova Scotia Measures fall outside the scope of application of Chapter Eleven of NAFTA.[282]

274 Respondent's Memorial, para 102; Respondent's Reply Memorial, paras 141-142.
275 Hearing on Jurisdiction and Admissibility, August 15, 2017, 147:6-14.
276 Hearing on Jurisdiction and Admissibility, August 15, 2017, 147:14-18.
277 Hearing on Jurisdiction and Admissibility, August 15, 2017, 145:3-21.
278 Hearing on Jurisdiction and Admissibility, August 15, 2017, 147:19-149:5.
279 Respondent's Memorial, para 103.
280 Respondent's Memorial, para 104; Hearing on Jurisdiction and Admissibility, August 15, 2017, 16:14-24.
281 Respondent's Memorial, paras 107-109.
282 Respondent's Memorial, para 109.

200. In this respect, the Respondent distinguishes this case from *Cargill* where the impugned measures were intended to harm the High Fructose Corn Syrup industry.[283] By comparison, in this case the Nova Scotia Measures are of 'general application to the entire industry and are not intended to drive Resolute out of the market, are not intended to have the same types of effect that the very measure, the very tax that was at issue in *Cargill* did.'[284] The Respondent argues that the Nova Scotia Measures were intended to 'bring back 330 jobs and to help stabilize logging in Cape Breton', not to 'make sure that we have one market player here and that there isn't another one to compete with.'[285] In this respect, the present case is different to that in *Cargill* in terms of the 'directness' of the measure.[286] The Respondent clarified its position in this way during the Hearing on Jurisdiction and Admissibility:

> If you have a measure that applies directly to a company, whether you want to harm them or not, and it has a relationship to them, it doesn't have to intend to harm them. If you have an indirect measure that is helping somebody else, one of the ways of showing the relationship to the claimant in a situation like that would be to show an intention. Might there be other evidence to show a relationship? Sure. But my simple point is that you have to show a relationship. You have to show a legally significant connection to the rest of the industry or the ripple effects that that might cause.[287]

201. At the hearing, the Respondent observed that the Claimant simultaneously argues that Nova Scotia 'wanted to create a national champion at the expense of Resolute' but, at the same time, that the impact of the reopening of the Port Hawkesbury mill was 'unknown and unknowable' until 2014.[288] This inconsistency, the Respondent contends, demonstrates that no legally significant connection exists between the Nova Scotia Measures and the Claimant or its investment. The Respondent accordingly invites the Tribunal to follow the approach of the *Methanex* tribunal and dismiss the claim since it does not fall within the scope of NAFTA required by Article 1101(1).[289]

202. The Respondent further observes that the Claimant's argument, that 'predatory pricing' by PHP in 2014 caused the shutdown of the Laurentide mill itself, demonstrates a lack of a 'legally significant connection' as required by Article 1101(1).[290] The Respondent submits that it was PHP, not the Government of Nova Scotia that would have engaged in any alleged predatory pricing and, since PHP's actions are not attributable to the Respondent, the Claimant's claim lacks

283 Hearing on Jurisdiction and Admissibility, August 15, 2017, 119:17-124:7, August 16, 2017, 412:16-415:14.
284 Hearing on Jurisdiction and Admissibility, August 15, 2017, 124:8-15.
285 Hearing on Jurisdiction and Admissibility, August 15, 2017, 125:10-20.
286 Hearing on Jurisdiction and Admissibility, August 15, 2017, 125:10-20; August 16, 2017, 415:15-417:6.
287 Hearing on Jurisdiction and Admissibility, August 15, 2017, 135:13-24.
288 Hearing on Jurisdiction and Admissibility, August 15, 2017, 16:2-17:7-11.
289 Hearing on Jurisdiction and Admissibility, August 15, 2017, 17:7-23, 108:2-11.
290 Hearing on Jurisdiction and Admissibility, August 15, 2017, 18:6-11.

'a fundamental jurisdictional prerequisite.'[291]

203. The Respondent summarized its case in this way during the Hearing on Jurisdiction and Admissibility:

> [B]enefit to PHP that allows it to eventually, if successful, and if market conditions permit, cause harm to the Claimant's investment can't constitute a measure relating to the Claimant's investment. It's indirect, and it doesn't establish a legally significant connection...
>
> As Professor Hausman said, government support is not sufficient to make a company successful. There, we're talking again about the preconditions. If that's the case, if the government support isn't sufficient to make the company successful in the first place, how is it that that same government support has a clear relationship to the investor or its investment? Clearly it doesn't.[292]

3. The Claimant's Arguments

(a) Interpretation of the words 'relating to' in Article 1101(1)

204. The Claimant alleges that the stated purpose of the Nova Scotia Measures was to 'make the Port Hawkesbury mill the national champion in SC paper' by making it the 'lowest cost' producer in North America and putting it in direct competition with Resolute, 'a leading SC paper producer, in the Canadian and North American markets.'[293] This, the Claimant says, is sufficient to clear the 'low threshold' imposed by Article 1101(1) which only requires, in the words of the Ontario Superior Court, 'some connection' between the measures and the investor/investment and not requiring 'that the measure[s] be adopted with the express purpose of causing loss.'[294]

205. The Claimant submits that the Ontario Superior Court formulation in *Cargill* of 'some connection' is the appropriate standard, not the 'legally significant connection' test espoused in *Methanex* and relied upon by the Respondent.[295] The Claimant observes that the *Cargill* tribunal thought the *Methanex* standard 'might be "too restrictive"', noting that 'Article 1101 has a causal connection requirement as well: the measures adopted or maintained by the Respondent must be those 'relating to' investors of another Party or investments of investors of another Party.'[296] While the *Cargill* tribunal found that the Mexican regulations requiring the Claimant to obtain a permit to import High Fructose Corn Syrup passed the *Methanex* test because it imposed a 'legal

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291 Hearing on Jurisdiction and Admissibility, August 15, 2017, 18:6-21; 19:23-20:1.
292 Hearing on Jurisdiction and Admissibility, August 15, 2017, 149:17-150:19.
293 Claimant's Counter Memorial, paras 118-119.
294 Claimant's Counter Memorial, paras 123, citing *United Mexican States v Cargill, Inc.,* 2010 ONSC 4656, para 57, affirmed by 2011 ONCA 622, application for leave to appeal dismissed, 2012 CanLII 25159 (SCC) (**CL-004**); Claimant's Rejoinder Memorial, para 108.
295 Claimant's Counter Memorial, para 124; Hearing on Jurisdiction and Admissibility, August 15, 2017, 333:19-334:14.
296 Claimant's Counter Memorial, para 128, citing *Cargill*, Award, paras 174-175 (**CL-003**); Hearing on Jurisdiction and Admissibility, August 15, 2017, 332:24-333:9.

impediment' on Cargill's business, it also found that a tax imposed on products sweetened with High Fructose Corn Syrup was a measure 'relating to' Cargill.[297]

206. Similar to the facts in this case, the tax measure impugned in *Cargill* was not imposed on the Claimant directly, but Cargill was nonetheless 'directly affected by a measure that was intended to protect a local industry and hurt its competitors outside the relevant jurisdiction.'[298] The Claimant argues that this view was recently endorsed by the tribunal in *Mesa Power.* [299] That case dealt with Ontario legislation imposing new regulations on the power industry but where the claimant did not receive a contract under the newly created 'feed-in tariff program'. The *Mesa Power* tribunal specified that the requirement imposed by Article 1101(1) that the measures 'relate to' the investor or its investments would be satisfied so long as the measures 'have a causal nexus with the Claimant or its investment.'[300] Even though the measures in question in that case did not create a legal impediment or intend to harm the Claimant, the tribunal nonetheless considered the 'causal connection' between the legislation and the Claimant's injury to be sufficient.[301]

207. The Claimant considers the Respondent's reliance on and characterization of the *Methanex* 'legally significant connection' test to be 'exaggerated'[302] The Claimant notes that the *Methanex* tribunal itself conceded that 'a "legally significant connection" need not mean that a measure must be primarily directed at the investment or investor in order to qualify as "relating to" it' and 'that it is no easier "to define the exact dividing line" between related and unrelated measures than it is "'in twilight to see the divide between night and day."'[303] The Claimant also points to the fact that the *Methanex* tribunal analyzed the merits of the claims before concluding that there was no 'legally significant connection' and that the tribunal had no jurisdiction as evidence that the tribunal was 'uncomfortable with its own legal test.'[304]

208. The Claimant submits, further, that the present case is distinguishable from *Methanex* on the basis that the measures impugned in *Methanex* affected a potentially indeterminate class of investors, whereas here 'we have a finite number of affected market participants.'[305] In addition, the

297 Claimant's Counter Memorial, paras 128-129.
298 Claimant's Counter Memorial, para 130; Claimant's Rejoinder Memorial, para 111; Hearing on Jurisdiction and Admissibility, August 15, 2017, 335:6-336:1.
299 Claimant's Counter Memorial, para 132, citing *Mesa Power Group LLC v Government of Canada*, PCA Case No. 2012-17, Award, March 24, 2016 (**CL-005**) ('***Mesa Power*, Award**').
300 Claimant's Counter Memorial, para 132, citing *Mesa Power*, Award, para 259; Claimant's Rejoinder Memorial, para 116; Hearing on Jurisdiction and Admissibility, August 15, 2017, 337:4-21.
301 Claimant's Counter Memorial, para 134.
302 Claimant's Counter Memorial, para 135.
303 Claimant's Counter Memorial, para 135, citing *Methanex,* Partial Award, paras 139, 142, 147.
304 Claimant's Counter Memorial, paras 136-137.
305 Hearing on Jurisdiction and Admissibility, August 15, 2017, 326:5-21.

Claimant argues that *Methanex* is 'not particularly helpful because it decided only what did not satisfy Article 1101, that is, the mere effect in connection with a measure of general applicability, not what does satisfy the 'relating to' test beyond the phrase 'legally significant connection.'[306]

209. The Claimant also notes the subsequent criticism of the *Methanex*'s 'legally significant connection' test, paying particular attention to the decision in *BG Group Plc. v Republic of Argentina.*[307] In that case, the tribunal disagreed with the *Methanex* tribunal's interpretation of the words 'relating to' as requiring a 'legally significant connection' since such an interpretation would render other NAFTA articles unnecessary or redundant.[308] Rather, a simpler 'effects' test would be sufficient to 'establish that a measure is one "relating to" an investment or investor.'[309]

210. The Claimant also points to a number of NAFTA decisions which 'have expanded the "legally-significant-connection" spectrum to include measures that have a causal connection or causal nexus to a claimant.'[310] The Claimant submits that these cases, while not explicitly rejecting *Methanex*, provide a more nuanced and persuasive analysis which considers the existence of a causal nexus and possibility of liability to a determinate class or set of investors as sufficient to establish jurisdiction under Article 1101(1).[311]

211. The tribunal in *Apotex II* took such an approach and, when reviewing the decision in *Cargill*, determined that 'something more than a mere "effect" from the measure is required to overcome the jurisdictional threshold in NAFTA Article 1101(1)', but went on to explain that it would be inappropriate to read into Article 1101(1) the requirement of a causal connection.[312] Additionally, the *Apotex II* tribunal did not consider indeterminate liability to be a danger in that case, an approach, the Claimant submits, this Tribunal should follow since 'the universe of possibly impacted companies here is very small, five for the entire continent.'[313] Finally, the Claimant considers the Respondent's reliance on cases such as *Bayview* as erroneous since those cases, it argues, do not in fact endorse the 'legally significant connection' test espoused in *Methanex* since it was not required to resolve the question of whether the measures 'related to' the claimants in

306 Hearing on Jurisdiction and Admissibility, August 15, 2017, 326:22-327:3.
307 *BG Group Plc. v Republic of Argentina*, UNCITRAL, Award, December 24, 2007 (**CL-006**) ('***BG Group*, Award**').
308 Claimant's Counter Memorial, paras 138-140; Claimant's Rejoinder Memorial, para 109; Hearing on Jurisdiction and Admissibility, August 15, 2017, 342:13-21.
309 Claimant's Counter Memorial, paras 138-139.
310 Claimant's Counter Memorial, para 141; Hearing on Jurisdiction and Admissibility, August 15, 2017, 40:14-18.
311 Claimant's Counter Memorial, para 141.
312 Claimant's Counter Memorial, para 144, citing *Apotex*, Award, para 6.13.
313 Claimant's Counter Memorial, para 145; Claimant's Rejoinder Memorial, para 113.

that case.[314]

212. The Claimant submits that, in the present case, the 'relating to' threshold will be met so long as a measure 'is adopted with the understanding or purpose that a significant impact on the investor will result.'[315] This standard would be appropriate, in the Claimant's submission, because it would satisfy the causal nexus requirement while not prejudging the merits of the case during this bifurcated proceeding.[316]

(b) Whether the Nova Scotia Measures 'relate to' Resolute and Resolute's investments

213. The Claimant points to the following excerpts from its Notice of Arbitration and Statement of Claim that establish a 'causal connection' between the Nova Scotia Measures and its investments:

i. Nova Scotia undertook a series of measures late in 2012 to ensure that the Port Hawkesbury paper mill would have competitive advantages above any other SC paper producer, including Resolute.

ii. Nova Scotia understood that the SC paper market was in 'secular decline'.

iii. The unforeseen and unforeseeable introduction into the Canadian market of an SC paper mill bankrolled by public funds to become 'the lowest cost operation in North America' has had a devastating impact on the viability and competitiveness of Resolute's three SC Paper mills in Canada.

iv. Nova Scotia's measures openly threatened Resolute and other SC paper producers because Port Hawkesbury Paper would take their customers, create a downward pressure on prices, and 'push higher-cost operators out of business'.

v. Port Hawkesbury Paper began to take market share from Resolute in 2013.

vi. Resolute was forced to close its Laurentide mill permanently in October 2014 due principally to the added production capacity of Port Hawkesbury, which has driven prices down while producing at lower costs because of the measures taken by Nova Scotia.

vii. Nova Scotia selected the Port Hawkesbury Paper mill as a national champion, chosen by a

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314 Claimant's Counter Memorial, para 150; Claimant's Rejoinder Memorial, para 115; Hearing on Jurisdiction and Admissibility, August 15, 2017, 340:1-6.
315 Hearing on Jurisdiction and Admissibility, August 15, 2017, 345:22-346:5.
316 Hearing on Jurisdiction and Admissibility, August 15, 2017, 346:6-14.

government, to establish it as the 'lowest cost and most competitive producer' in the SC paper market, displacing all other producers, including Resolute.

viii. With tens of millions of dollars of assistance from the government and ongoing preferential operation arrangements, Port Hawkesbury Paper was empowered to drive Resolute's SC paper mills in Québec out of business.

ix. Nova Scotia propped its own provincial mill up with benefits and operational advantages to ensure that its costs are lower than those of Resolute and other competitors in the Canadian, US and other markets, thereby creating grossly unfair conditions in an SC paper market in Canada that has very few producers.[317]

214. A causal connection exists between Resolute, its investments in Canada and the Nova Scotia Measures given that these measures 'eventually harmed Resolute directly' even though they 'were not aimed specifically at Resolute' nor were they 'adopted with the express purpose of causing [Resolute] loss.'[318] The Claimant refutes the contention that it has alleged 'a grand, far-fetched conspiracy'. It simply states its case that the Nova Scotia Measures sought to make Port Hawkesbury the 'national champion'; even though the measures were not directly aimed at the Claimant, it nonetheless felt a direct impact from them.[319] As was the case in *Cargill*, the Nova Scotia Measures were intended to harm an identifiable class of competitors, of whom 'Resolute was the lone foreign investor in Canada.'[320] This, the Claimant submits, is sufficient to establish the necessary 'causal nexus' required by Article 1101(1).[321]

215. At the Hearing on Jurisdiction and Admissibility, the Claimant relied on the following documentary evidence to 'show the inextricable connection between [the Nova Scotia Measures] and the sale to Pacific West and making Pacific West the lowest cost producer in North America,'[322] and to substantiate its submission that the Nova Scotia Measures 'relate to' the Claimant and the Laurentide mill:

i. a CBC news report from September 2011 in which various individuals expressed the intention to sell the Port Hawkesbury mill as a going concern, despite the fact it was

[317] Claimant's Counter Memorial, para 152, referring to Claimant's Notice of Arbitration and Statement of Claim, paras 4, 47, 48, 50, 53, 89, 95, 107; Hearing on Jurisdiction and Admissibility, August 15, 2017, 347:2-349-18.
[318] Claimant's Rejoinder Memorial, para 118.
[319] Claimant's Rejoinder Memorial, paras 120-121.
[320] Claimant's Rejoinder Memorial, para 122; Hearing on Jurisdiction and Admissibility, August 15, 2017, 349:19-350:9.
[321] Claimant's Rejoinder Memorial, para 122.
[322] Hearing on Jurisdiction and Admissibility, August 16, 2017, 444:1-6.

suffering 'significant operating losses' of around $50 million in operating losses per year. This report, the Claimant says, demonstrates the lengths to which Nova Scotia would support the Port Hawkesbury mill in order to ensure its ongoing viability. In this regard, reference in this report to the Forestry Infrastructure Fund shows that it was a measure required for the sale of the Port Hawkesbury mill and is not unrelated to the Claimant and the Laurentide mill.[323]

ii. a press release from Nova Scotia in which the Premier explains that 'the province had a role to play to make [the sale of Port Hawkesbury] a success. That the province took every reasonable step to keep this mill resale ready and facilitate the reopening', particularly through the hot idle funding.[324]

iii. various statements including: (a) of the Premier to the effect that the Forestry Infrastructure Fund was intended to keep the Port Hawkesbury mill 'resale ready';[325] (b) of the Court appointed Monitor that the hot idle funding 'permit[s] a smooth resumption of production when circumstances permit';[326] and (c) a press release from the Premier 'when they announced the actual financial package, this is mentioned simply as part of the support for making [Port Hawkesbury] the national champion.'[327]

216. Notwithstanding the Claimant's submission in relation to the inappropriateness of the *Methanex* 'legally significant connection' test, the Claimant submits that it would nevertheless meet the requirements of such a test if this Tribunal were to apply it.[328] This is because the intent or purpose of the Nova Scotia Measures was 'not only to make PHP the lowest cost SC paper producer, but also to push higher-cost producers out of business.'[329] The desire to give PHP such a competitive advantage necessarily implies an intention to harm foreign investors, such intention being

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323 Hearing on Jurisdiction and Admissibility, August 16, 2017, 444:15-450:10, referring to *NewPage Port Hawkesbury mill to be sold, CBC News*, September 7, 2011 (**C-005**).

324 Hearing on Jurisdiction and Admissibility, August 16, 2017, 450:15-451:25, referring to Nova Scotia Press Release, Province Standing with Strait after Announcement Mill Will Not Reopen, September 21, 2012 (**C-035**).

325 Hearing on Jurisdiction and Admissibility, August 16, 2017, 452:11-453:11, referring to Nova Scotia Department of Natural Resources, News Release, 'Province Presents Forestry Infrastructure Plan', September 20, 2011 (**R-039**).

326 Hearing on Jurisdiction and Admissibility, August 16, 2017, 453:12-454:1, referring to Re NewPage Port Hawkesbury Corp., Report of the Proposed Monitor (S.C.N.S.), September 7, 2011 (**R-046**); see also 454:2-455:5 referring to Nova Scotia Department of Natural Resources, News Release, 'Province Will Keep NewPage Mill in Point Tupper Re-Sale Ready', January 4, 2012 (**R-048**).

327 Hearing on Jurisdiction and Admissibility, August 16, 2017, 455:6-458:3 referring to Nova Scotia Press Release, Province Invests in Jobs, Training, and Renewing the Forestry Sector, August 20, 2012 (**C-009**).

328 Claimant's Counter Memorial, para 153; Claimant's Rejoinder Memorial, paras 123-124.

329 Claimant's Counter Memorial, para 155.

sufficient to satisfy the 'legally significant connection' test espoused in *Methanex*.[330]

217. The Claimant submits that the public spending measures implemented by Nova Scotia were 'designed to intervene in a competitive market and alter it to the advantage of the government's chosen champion.'[331] Contrary to the Respondent's contention that 'a flood of claims by innumerable investors' could materialize 'if NAFTA Chapter Eleven applied every time government spending had an impact on market conditions', the Claimant submits that NAFTA Parties are permitted to 'spend public funds in a way that incidentally impacts market conditions' but 'may not spend public monies deliberately, or with the unavoidable expectation, of undermining foreign investors or their investments.'[332]

4. The Non-Disputing NAFTA Parties' Comments

218. The United States and Mexico both endorse the finding of the *Methanex* tribunal that the words 'relating to' in Article 1101(1) require a 'legally significant connection' between the impugned measures and the claimant or its investment.[333] Both Non-Disputing NAFTA Parties further submit that if the 'relating to' requirement were satisfied by a 'mere, or incidental, effect that a challenged measure had on a claimant', an indeterminate number of investors may be entitled to bring claims under NAFTA and so the words 'relating to' would impose no threshold at all.[334]

219. The United States submits further that the question of whether a 'challenged measure bears a "legally significant connection" to a foreign investor or investment depends on the facts of a given case' but does require a 'direct connection between the challenged measure and the foreign investor or investment', not a mere 'negative impact' on the investor or investment.[335] The United States notes that such a connection was found in *SD Myers* since the relevant measure 'was raised to address specifically the operations of SDMI and its investment'. In *Bilcon* there was clearly a 'legally significant connection' between the measure that rejected the claimant's investment. In *Cargill*, the import permit requirement 'directly affected' the claimant by imposing a 'legal impediment' on the conduct of its business.[336] The United States notes that while a 'legally significant connection' was not found in *Methanex*, the tribunal speculated that such a connection would have existed had the claimant been able to prove that the 'Governor of California *intended*

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330 Claimant's Counter Memorial, paras 152-156.
331 Claimant's Counter Memorial, para 159.
332 Claimant's Counter Memorial, para 162.
333 United States Submission, para 12; Mexico Submission, paras 8, 11.
334 United States Submission, para 12; Mexico Submission, para 9.
335 United States Submission, para 13.
336 United States Submission, para 14, citing *S.D. Myers, Inc. v Government of Canada*, UNCITRAL, Partial Award, November 13, 2000, para 234 ('***SD Myers*, Partial Award**'); *Bilcon*, Award on Jurisdiction and Liability, paras 5, 12, 237, 239 and 241; and *Cargill*, Award, paras 173, 175.

to penalize foreign producers of methanol (such as the claimant).'[337]

220. The Respondent points out that the NAFTA Parties all agree that to satisfy the 'relating to' requirement in Article 1101, a claimant must demonstrate that 'legally significant connection' exists between the challenged measures and the investor or its investment, and that something more than a 'negative impact' on the investor is required.[338] The Respondent further agrees with the United States that Article 1101 was not meant to allow 'untold numbers of domestic measures that simply have an economic impact on a foreign investor or its investment' to meet the threshold.[339]

221. The Claimant points out that the United States highlights that whether a measure is one 'relating to' an investment or investor 'depends on the facts of a given case'.[340] The Claimant then recalls that the alleged purpose of the Nova Scotia Measures was to make Port Hawkesbury the national champion of the SC paper industry, necessarily to Resolute's detriment and that these facts, accepted *pro tem* by Canada for purposes of bifurcation, are 'sufficient to satisfy the Article 1101 standard'. Any findings on the facts for the Tribunal to make on this issue go to the merits of Resolute's claims.[341] The Claimant also addresses concerns expressed by the United States that recognition of a claim would result in 'unlimited liability', by pointing out that the class of affected investors in the present case is narrowly confined.[342]

5. The Tribunal's Analysis

(a) The 'relating to' requirement: general considerations

222. The term 'relating to' in Article 1101 of NAFTA would appear to require that the measure complained of have some specific impact on the claimant: Chapter Eleven was not intended as a vehicle for public interest litigation. Beyond that, however, Article 1101's limits are not very clear, and it is not a substitute for the specific requirements of other provisions of Chapter Eleven.

223. Under Article 32 of the Vienna Convention on the Law of Treaties, when the ordinary meaning of a treaty text leaves the meaning ambiguous or obscure, the interpreter may have recourse to the preparatory work.[343] In the earliest versions of Article 1101, dated December 1991, the

337 United States Submission, para 14, referring to *Methanex*, Partial Award, paras 151-159.
338 Canada's Reply to Art. 1128 Submissions, paras 26-27.
339 Canada's Reply to Art. 1128 Submissions, para 28.
340 Claimant's Reply to Art. 1128 Submissions, paras 20-23.
341 Claimant's Reply to Art. 1128 Submissions, para 22.
342 Claimant's Reply to Art. 1128 Submissions, paras 22-23.
343 Arbitrator Cass, without diverging from the Tribunal's analysis, would use great caution in according weight to sources other than the text accepted by the signatory Parties.

investment chapter's scope referred to measures 'affecting' either investments of another party in the host state's territory or 'affecting' investors.[344] By August 1992 the text was changed to 'relating to'. The drafts do not provide any explanation as to the modification.[345]

224. Canada's Statement of Implementation states that Chapter Eleven applies to:

> measures by a Party (i.e. any level of government in Canada) that affect: investors of another Party [...]; investments of investors of another Party [...]; and for purposes of the provisions on performance requirements and environmental measures, all investments.[346]

225. The United States' Statement of Administrative Action uses different language, paraphrasing this element of Article 1101(1), stating simply that, subject to exceptions 'the chapter applies to all governmental measures relating to investment...'[347]

226. A number of tribunals have had the opportunity to analyze the 'relating to' requirement.

227. In *Ethyl Corporation*, Canada argued that the prohibition to import and trade a gasoline additive was not a measure relating to investment but one relating to the movement of goods. In rejecting the argument, the tribunal observed that Canada did not cite any authority, and did not elaborate any argument for a restrictive interpretation of the 'relating to' requirement.[348]

228. In *Pope & Talbot*, Canada contended that the implementation of the Canada-US Softwood Lumber Agreement did not relate to investments or investors but to trade in goods. The tribunal dismissed this argument. Among other things, it denied that a measure could be characterized as 'relating to' one subject matter to the exclusion of all others.[349]

229. In *SD Myers*, the applicant complained of a Canadian order prohibiting the export of PCB waste to the United States. The tribunal found that the 'relating to' requirement in Chapter Eleven was satisfied because the import ban was passed to address specifically the prospect that SDMI would carry through with its plans to expand its Canadian operations.[350]

230. In *Methanex*, the claimant was a producer and marketer of methanol, a key raw material in the manufacture of the gasoline additive MTBE. The challenged measure was California's ban on

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344 INVEST, December 1991, 1, Article 2101, 401.
345 INVEST.826, Lawyers' Revision (August 26, 1992) 1, Article 2101 (**RL-045**).
346 Department of External Affairs, Canadian Statement on Implementation, Canada Gazette Part I, January 1, 1994, 148.
347 US Statement of Administrative Action, 450.
348 *Ethyl Corporation v Government of Canada*, UNCITRAL, Award on Jurisdiction, June 24, 1998, para 63.
349 *Pope & Talbot Inc. v Canada*, UNCITRAL, Award in relation to Preliminary Motion by Canada, January 26, 2000, para 33 (**CL-002**).
350 *S.D. Myers, Inc. v Government of Canada*, Partial Award, November 13, 2000, para 234.

the use of MTBE. In partially rejecting jurisdiction, the tribunal decided that there must be a legally significant connection between the questioned measure and the investor or its investment. Specifically, it said:

> ... The possible consequences of human conduct are infinite, especially when comprising acts of governmental agencies; but common sense does not require that line to run unbroken towards an endless horizon. In a traditional legal context, somewhere the line is broken; and whether as a matter of logic, social policy or other value judgment, a limit is necessarily imposed restricting the consequences for which that conduct is to be held accountable. For example, in the law of tort, there must be a reasonable connection between the defendant, the complainant, the defendant's conduct and the harm suffered by the complainant; and limits are imposed by legal rules on duty, causation and remoteness of damage well-known in the laws of both the United States and Canada. Likewise, in the law of contract, the contract-breaker is not generally liable for all the consequences of its breach even towards the innocent party, still less to persons not privy to that contract. It is of course possible, by contract or statute, to enlarge towards infinity the legal consequences of human conduct; but against this traditional legal background, it would require clear and explicit language to achieve this result.
>
> ... there must be a legally significant connection between the measure and the investor or the investment. With such an interpretation, it is perhaps not easy to define the exact dividing line, just as it is not easy in twilight to see the divide between night and day. Nonetheless, whilst the exact line may remain undrawn, it should still be possible to determine on which side of the divide a particular claim must lie.[351]

231. Based on that reasoning, the tribunal determined that the meaning of the phrase 'relating to' in Article 1101(1) went beyond the simple effect of a measure on an investor or an investment and required a legally significant connection between them.[352]

232. Thus, the tribunal ruled it lacked jurisdiction to hear a claim based upon California's ban on the use of MTBE.[353] However, the tribunal stated it could hear a claim based on intent on the part of California's governor to favour domestic ethanol producers over foreign producers of MTBE and methanol.[354]

351 *Methanex*, Partial Award, paras 138-9.
352 Ibid, para 147.
353 Ibid, para 150.
354 *Methanex Corporation v United States of America*, UNCITRAL, Tribunal's Letter re Request for Interpretation of Award, September 25, 2002, para 17.

(b) Application and critique of *Methanex* in subsequent cases

233. The *Methanex* test was adopted by the tribunals in *Bayview*,[355] *Cargill*,[356]*Apotex II*,[357] *Bilcon*[358]and *Mesa*.[359] While *Bayview* and *Bilcon* did not clarify the meaning of 'legally significant connection', the tribunals in *Cargill*, *Apotex II* and *Mesa* did contribute to a better, though not necessarily consistent, understanding of the test.

234. In *Cargill*, the claimant questioned Mexico's imposition of a tax on soft drinks containing HFCS and its failure to issue import permits. Mexico argued that the import permit requirement was a trade measure, not an investment measure.[360] The tribunal considered that *Methanex* imposed two requirements: (a) that the questioned measure produce an effect on the investor or its investment; and (b) a 'causal connection requirement': there must be a legally significant connection between the measure and the investors of another party or investments of investors of another party.[361] In that regard, the tribunal said that although the import permit requirement notionally prevented the claimant's goods from crossing the border from the United States into Mexico, the permit directly 'affected' the business of Cargill de Mexico.[362] The tribunal also understood that the import permit requirement constituted a legal impediment to carrying on the business of Cargill de Mexico in sourcing HFCS in the United States and re-selling it in Mexico.[363]

235. When reviewing (and upholding) the *Cargill* award, the Ontario Superior Court held that the term 'related' in Article 1101 requires only some connection but not that the measure be adopted with the express purpose of causing loss. The Court said:

> With reference to the threshold issues in Article 1101, Mexico acknowledges that Cargill was an investor, and that CdM was an investment. Clearly the measures adopted by Mexico

[355] *Bayview Irrigation District v United Mexican States*, ICSID Case No. ARB(AF)/05/1, Award, June 19, 2007, para 101. The tribunal decided it lacked jurisdiction because the investors were domestic investors in Texas, not foreign investors in Mexico (para 104).

[356] *Cargill, Incorporated v United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, para 174. The tribunal held that there was a legally significant connection between an import permit requirement and Cargill's business in Mexico (para 175).

[357] *Apotex Holdings Inc. and Apotex Inc v United States of America*, ICSID Case No. ARB(AF)/12/1, Award, August 25, 2014, para 6.13.

[358] *William Ralph Clayton, William Richard Clayton, Douglas Clayton, Daniel Clayton and Bilcon of Delaware, Inc. v Canada*, UNCITRAL, Award on Jurisdiction and Liability, March 17, 2015, para 240.

[359] *Mesa Power Group, LLC v Government of Canada*, UNCITRAL, Award, March 24, 2016, para 259.

[360] *Cargill, Incorporated v United Mexican States*, ICSID Case No. ARB(AF)/05/2, Award, September 18, 2009, para 170.

[361] Ibid, para 174.

[362] Ibid, para 173.

[363] Ibid, para 175.

> related to the investor and the investment. The term 'related' requires only some connection and does not require that the measure be adopted with the express purpose of causing loss.[364]

236. The Respondent argues that the *Cargill* tribunal did not interpret or apply the 'relating to' threshold in any way differently from *Methanex*:[365] while the *Cargill* tribunal used the phrases 'causal connection' and 'causal nexus' requirements, not 'legally significant connection', they share the idea that the measure must have a direct relationship constituting more than a mere effect on an investor or its investment.[366] On the other hand, the Claimant considers that Cargill did not have to be the specific target of the measures in order for the tribunal to exercise jurisdiction over its claims; it needed only to be directly affected, for example, by a measure that was intended to protect a local industry and to hurt its competitors elsewhere.[367]

237. In *Apotex II*, the claimant complained that the United States had imposed an import alert and detention of certain drugs produced in Canada.[368] The tribunal considered that the *Cargill* tribunal applied the same interpretation of Article 1101(1) as in *Methanex* and *Bayview*.[369] The tribunal considered that the circumstances of *Apotex II* were similar to those of *Cargill* but not to *Methanex.*[370] The facts were similar to *Cargill* in that the immediate effect of the import alert made it impossible for the claimant's company in the host state to receive contracted products from its factories in Canada; as a direct result, the claimant's investment was prevented from carrying on a major part of its business.[371] The facts were different from *Methanex,* because there the potential class of investors indirectly affected by the disputed measure was indeterminate and unknown, whereas in *Apotex II* the questioned measure affected the claimant immediately and directly.[372]

238. Importantly, contrary to the *Cargill* tribunal's causal connection requirement, the *Apotex II* tribunal thought it 'inappropriate to introduce within NAFTA Article 1101(1) a legal test of causation applicable under Chapter Eleven's substantive provisions for the merits of the Claimants' claims'. The tribunal stated that...

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364 *United Mexican States v Cargill Inc*, 2010 ONSC 4656, para 57.
365 Respondent's Memorial on Jurisdiction, December 22, 2016, para 88; Respondent's Reply Memorial on Jurisdiction, 29 March 2017, para 122.
366 Respondent's Reply Memorial on Jurisdiction, para 125.
367 Claimants Counter-Memorial on Jurisdiction, para 130.
368 *Apotex Holdings Inc. and Apotex Inc v United States of America*, ICSID Case No. ARB(AF)/12/1, Award, August 25, 2014.
369 Ibid, para 6.13.
370 Ibid, para 6.23.
371 Ibid.
372 Ibid, para 6.24.

> For jurisdictional purposes, the threshold is necessarily different under NAFTA Article 1101(1), given the ordinary meaning of the connecting phrase 'relating to.'[373]
>
> ... Equally, in the Tribunal's view, it is no answer for the Respondent to invoke different theories as to the legal cause of loss to Apotex-US, other than the Import Alert. That issue may likewise affect issues of liability and quantum; but, again, there is no reason for requiring NAFTA Article 1101(1) to be so narrowly interpreted as to require only a claimant with a successful case on causation to pass through its threshold gateway; or to establish that the disputed measure is the only relevant possible measure.[374]
>
> … there is a practical problem in seeking to interpret and apply the phrase 'relating to' as a narrow threshold jurisdictional issue without any regard to the substantive NAFTA provisions invoked by a claimant investor in the particular case …[375]

239. In *Mesa*, the claimant questioned certain measures taken in Ontario to promote the generation and consumption of renewable energy in the province.[376] In finding the government actions met the Article 1101(1) requirement, the tribunal followed *Cargill*, saying that all of the measures must have a causal nexus with the Claimant or its investment.[377]

240. The *Methanex* test has been subject to criticism. The *Methanex* tribunal built its argument by resorting to analogy with the law of state responsibility, contract law and tort law—that is, substantive law. Nevertheless, the tribunal used the test to exclude jurisdiction.[378]

241. The *BG* tribunal expressly rejected the *Methanex* test on additional grounds. The tribunal noted that several NAFTA chapters have exceptions to obligations that would not be necessary if measures which did not 'relate to' other NAFTA investors or their investments were already outside its scope.[379] However, the *BG* tribunal seems to have understood that the *Methanex* test requires that a questioned measure, on its face, targets an investor.[380] Additionally, BG's claim was brought under the Argentina-United Kingdom BIT, not under NAFTA.

(c) The Tribunal's conclusion on the applicable test

242. Article 1101(1) requires that the questioned measure 'relate to' an investor or an investment. Having regard to the preponderant case-law and the convergent views of the three NAFTA Parties (see paragraphs 218-220 above), the Tribunal concludes that there must exist a 'legally significant connection' between the measure and the claimant or its investment. It agrees with the *Apotex II*

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373 Ibid, para 6.20.
374 Ibid, para 6.26.
375 Ibid, para 6.27.
376 *Mesa Power Group, LLC v Government of Canada*, UNCITRAL, PCA Case No. 2012-17, Award, March 24, 2016, para 254.
377 Ibid, para 259.
378 Z Douglas, *The International Law of Investment Claims* (CUP, 2009) 244, para 464.
379 *BG Group Plc. v Republic of Argentina*, UNCITRAL, Final Award, December 24, 2007, para 230.
380 Ibid, para 231.

tribunal in rejecting the application of a legal test of causation. Chapter Eleven's substantive requirements of causation should be analyzed when deciding on the merits of the claim. Rather, the Tribunal should ask whether there was a relationship of apparent proximity between the challenged measure and the claimant or its investment. In doing so, the tribunal should ordinarily accept *pro tem* the facts as alleged. It is not necessary that the measure should have targeted the claimant or its investment—although if it did so, the necessary legal relationship will be established. Nor is it necessary that the measure imposed legal penalties or prohibitions on the investor or the investment itself. However, a measure which adversely affected the claimant in a tangential or merely consequential way will not suffice for this purpose.

(d) Application to the present claim

243. In the present case, the Claimant complains about Nova Scotia's measures taken for the benefit of PHP.[381] Canada argued that 'measures which merely affect an investor and its investment economically do not automatically allow an investor to invoke the protections of NAFTA Chapter Eleven.'[382] In principle this is correct, but it is necessary for this purpose to draw a distinction between those measures aimed at maintaining the Port Hawkesbury mill in a condition where it could be offered for sale as a going concern and those involved in the actual transaction of sale and reopening on favourable terms.

244. As to the former, the financial support offered by Nova Scotia to maintain the plant in 'hot idle' condition is key. It did not directly address, target, implicate, or affect the Claimant. Had the financial support not resulted in a sale of the plant as a going concern, it would have had no impact at all on Claimant or other producers of supercalendered paper. The cost to Nova Scotia of keeping the plant in 'hot idle' condition may or may not have been justified from a fiscal point of view but it maintained the plant's value and preserved the possibility of reopening, with consequent preservation of local employment opportunities. It was in no way a measure relating to the Claimant's investment in different plants, in a different province. Similar considerations apply to the other Nova Scotia measures taken during the period of administration of the company, including the FIF. Applying the principle as articulated in paragraph 242, these pre-sale measures fall outside the scope of Article 1101(1) of NAFTA and cannot form part of the present claim.

245. The position as concerns the actual terms of sale is arguably different. PWCC's winning bid of C$33 million had attached to it a number of conditions, notably concerning financial benefits offered or approved by Nova Scotia, including (a) C$124.5 million in loans (not under market

381 Claimant's Counter-Memorial on Jurisdiction, para 12-21.
382 Respondent's Memorial on jurisdiction, para 82.

conditions) and other payments; (b) tax savings in Nova Scotia for assets in other provinces; (c) municipal tax breaks; and (d) an electricity discount.[383]

246. At the time of the measures there were only five companies in the business of producing supercalendered paper in the whole of North America. The measures allowed Port Hawkesbury to produce at a lower cost than it could have otherwise done. The Claimant argues that the total production capacity of the market increased, competition increased and market prices were, after a brief interval, driven down.

247. To determine whether these measures 'related to' the investor or its investment, the questions which need to be answered are: (a) is it possible that the benefits afforded to Port Hawkesbury might have allowed it to produce at a lower cost than its competitors?; (b) if so, is it possible that prices were reduced as a consequence?; (c) if so, is it possible that in a five-company market competitors might have incurred significant losses as a consequence?; and (d) if so, in a five-company market, is a significant business loss in Québec proximate to benefits provided for a company in Nova Scotia? Positive answers to these four questions would in the Tribunal's view justify a finding that the questioned measures 'related to' the Claimant and its investment.

248. The Respondent stressed that the Measures did not target or discriminate against the Claimant or apply to it at all. But they were intended to put the purchaser in a favourable position, and in a small and saturated market it was to be expected that competitors would be affected. The Tribunal finds it unnecessary and inappropriate to parse the facts further at this preliminary stage: to do so risks intruding on issues of substance. The Tribunal regards the case as close to the line, but on balance it would answer each of the four questions identified above in the affirmative. It holds that the sale measures were sufficiently proximate to the Claimant and its investment to satisfy the 'relating to' requirement of Article 1101.

D. THE PROVINCIAL TREATMENT OBJECTION: NAFTA ARTICLE 1102(3)

1. Introduction

249. The Respondent submits that the Nova Scotia Measures are incapable of founding a national treatment claim under Article 1102(3). NAFTA Article 1102(3) provides:

> The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like

[383] Claimant's Counter-Memorial on Jurisdiction, para 21. [This footnote, along with the name of the mill in para. 330 below, were corrected by the Tribunal on 5 March 2018 pursuant to Art. 36 of the UNCITRAL Rules. The corrections have been incorporated into this consolidated electronic version of the Decision].

> circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.

250. The Respondent submits that Article 1102(3) confines the scope of the national treatment obligation, insofar as concerns a component state or province, to treatment afforded to investors within the jurisdiction of that state or province. It does not extend to extraterritorial or extra-provincial treatment. Since the Claimant had no investment in Nova Scotia, there could have been no breach of the national treatment obligation by Nova Scotia in relation to it. The Claimant, for its part, submits that the Respondent's interpretation of Article 1102(3) is too narrow and would diminish the national treatment protection provided by NAFTA since it would exclude measures taken by one state or province that affect foreign investors in other states or provinces.

251. If the Respondent's objection is successful, it would dispose of the Claimant's national treatment claim in its entirety.[384]

2. The Respondent's Arguments

252. The Respondent refers to *Merrill & Ring* as the 'only NAFTA dispute [to date] in which the issue of cross-jurisdictional comparison has arisen.'[385] In that case, the tribunal rejected a comparison between treatment provided by the federal Government of Canada and the provincial government of British Columbia, holding:

> Treatment accorded to foreign investors by the national government needs to be compared to that accorded by the same government to domestic investors [...] just as the treatment accorded by a province ought to be compared to the treatment of that province in respect of like investments.[386]

253. The Respondent considers it unreasoned that the Claimant characterises *Merrill & Ring* as distinguishable on the basis that it is a 'regulatory case'.[387] The Respondent also considers the Claimant's reliance on *Bilcon* as erroneous since the tribunal in that case also determined that 'the claimant had the burden of proving that "a government accorded Bilcon or its investment 'treatment' during the environmental assessment and 'that the *same* government accorded treatment to other domestic [...] investors or investments."'[388] The Respondent submits that, in fact, 'every single one of the NAFTA national treatment cases relied upon by the Claimant undermines its own argument and proves Canada's point that this Article 1102 claim is

384 Procedural Order No. 4, Decision on Bifurcation, November 18, 2016, para 4.19.
385 Respondent's Memorial, para 120.
386 Respondent's Memorial, para 120, citing *Merrill & Ring Forestry L.P. v The Government of Canada* (UNCITRAL) Award, March 31, 2010, para 82 (**RL-060**) ('***Merrill & Ring*, Award**').
387 Respondent's Memorial, para 121; Respondent's Reply Memorial, para 157.
388 Respondent's Memorial, para 122, citing *Bilcon*, Award on Jurisdiction and Liability, para 717.

inadmissible.'[389]

254. Accordingly, the Respondent submits that the Claimant's complaint that 'it should have been accorded the same treatment in Québec that Nova Scotia accorded to PWCC' is precluded by virtue of Article 1102(3).[390] The Respondent points out that the Claimant 'has not identified any treatment it received directly as an investor in Canada [...] [nor] any treatment that it received within the jurisdiction of the province of Nova Scotia' and, therefore, the claim must fail.[391]

255. The Respondent considers the Claimant's case as enunciated in its Counter-Memorial to demonstrate the 'fundamental illogic of its position'.[392] The Respondent submits that plainly the Claimant's complaint that it was not afforded like treatment by Nova Scotia 'falls apart' since 'Nova Scotia cannot accord treatment to an investor over which it has no jurisdiction.'[393] The Respondent submits that there is no 'treatment' by Nova Scotia of Resolute or the Laurentide mill, only treatment of third parties, forestry workers and First Nations industries and, as such, the claim under Article 1102 must necessarily fail.[394] The Respondent points out that the Nova Scotia Measures covering 'the subject matters of property tax, hydro-electricity, and the management and disposition of provincial Crown land' are matters within the competence of the provincial government and are 'limited by its territorial jurisdiction, as defined by its geographic boundaries.'[395] Accordingly, Nova Scotia simply has no competence to enact measures relating to Resolute's investment in Québec.[396]

256. The Respondent argues that acceptance of the Claimant's reading of Article 1102 would lead to the radical result that treatment by one state or province would permit a foreign investor in any other state or province to bring a national treatment claim against the federal government, meaning that 'the measure of a single state would automatically become the standard of treatment by which the remaining [...] states are held.'[397]

257. The Respondent submits that the Claimant is attempting to 'get around what 1102(3) would not

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389 Respondent's Reply Memorial, para 159.
390 Respondent's Memorial, para 124.
391 Respondent's Memorial, para 125.
392 Respondent's Reply Memorial, para 146.
393 Respondent's Reply Memorial, para 146; Hearing on Jurisdiction and Admissibility, August 15, 2017, 26:20-23.
394 Respondent's Reply Memorial, para 148; Hearing on Jurisdiction and Admissibility, August 15, 2017, 244:23-245:14.
395 Respondent's Reply Memorial, para 151.
396 Respondent's Reply Memorial, para 151; Hearing on Jurisdiction and Admissibility, August 15, 2017, 245:15-21.
397 Respondent's Reply Memorial, para 160.

allow them to do [...] by saying that there was treatment accorded to them even though Nova Scotia could never have offered them the same treatment.'[398] By reference to Judge Higgins' opinion in *Oil Platforms*, the Respondent alleges that the impugned conduct is not capable of constituting a breach of the NAFTA since a factual predicate is missing, and therefore the Respondent invites the Tribunal to determine that the claim is inadmissible.[399]

258. Finally, the Respondent considers the Claimant's arguments regarding the meaning of 'in like circumstances' to be premature since this question ought not be answered in the jurisdiction and admissibility phase and can only be considered once the Tribunal determines whether the Claimant's Article 1102 claim is permissible.[400]

3. The Claimant's Arguments

259. The Claimant alleges that the Respondent has shifted its interpretation of Article 1102(3) from being a 'geographic limitation precluding Resolute from making any national treatment claims with respect to Canadian investments located outside of Nova Scotia' to one referring to a 'metaphysical "jurisdiction"' which 'renders inadmissible claims that seek to compare treatment accorded by one government to the treatment accorded by a different government.'[401] However, the Claimant submits that the Respondent's reformulated argument is 'irrelevant here' because the Claimant 'is not asking this Tribunal to compare treatment accorded by one province to treatment accorded by another province' or some other level of government.[402]

260. Rather, the Claimant submits that its national treatment claim under Article 1102 deals with 'whether the treatment Nova Scotia accorded to Resolute is no less favourable than the treatment Nova Scotia accorded to PHP, when the purpose of the Nova Scotia Measures was to help PHP compete with Resolute in the SC paper business sector and in markets that they share in common.'[403] The Claimant alleges that the Respondent's supposition 'that a province cannot accord treatment to foreign investors outside of the province's geographical or jurisdictional

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398 Hearing on Jurisdiction and Admissibility, August 16, 2017, 427:5-22.

399 Hearing on Jurisdiction and Admissibility, August 16, 2017, 428:2-429:2. See *Oil Platforms* (Islamic Republic of Iran v United States of America), ICJ Reports 1996, Separate Opinion of Judge Higgins, addressing the methodology for determining whether a particular claim falls within the compromissory clause of a treaty.

400 Respondent's Reply Memorial, para 162.

401 Claimant's Counter Memorial, paras 163-165; Hearing on Jurisdiction and Admissibility, August 15, 2017, 368:14-372:2.

402 Claimant's Counter Memorial, para 166; Hearing on Jurisdiction and Admissibility, August 15, 2017, 41:23-42:2.

403 Claimant's Counter Memorial, para 168; Hearing on Jurisdiction and Admissibility, August 15, 2017, 42:21-43:10.

confines' is both legally and factually untrue.[404]

261. The Claimant submits that accepting the Respondent's 'narrow interpretation' of Article 1102(3) would permit provincial governments to favour local companies over competitors who are not physically located in the same province.[405] Such an interpretation would require this Tribunal to read in additional words to the plain words of Article 1102(3) chosen by the NAFTA Parties and would run contrary to the objectives of NAFTA as they are promoted by the national treatment standard.[406] The Claimant submits that measures undertaken to the benefit of a local investor and the detriment of a foreign investor operating elsewhere in Canada should properly be considered as 'treatment' under Article 1102.[407]

262. In fact, Nova Scotia did not see itself as limited to granting PWCC benefits within the jurisdiction, but also 'extended tax benefits to PWCC for assets outside Nova Scotia, thus reaching deliberately beyond its own borders, although still within Canada, to discriminate.'[408] The Claimant alleges that 'Canada knew that it was responsible for the conduct of Nova Scotia and that Nova Scotia's conduct would have continent-wide consequences' and was 'put on notice of the extra-territorial impact of the Nova Scotia Measures' by the Claimant itself and the United States through the WTO.[409] The Claimant alleges that despite this knowledge, Canada chose to defend and protect Nova Scotia's discriminatory measures that are 'contrary to the object and purpose of NAFTA.'[410]

263. The size of Port Hawkesbury in the market made it obvious that the Nova Scotia Measures would necessarily have an impact and 'were intended to confer a comparative advantage on a domestic competitor, to the detriment of the foreign investor in the same business sector, which was not limited to the territory of Nova Scotia.'[411] Accordingly, the Claimant submits that 'by distorting market competition, the Nova Scotia measures had extra provincial effects that constituted "treatment" for Resolute.'[412]

264. The Claimant refers to the *travaux préparatoires* of NAFTA Chapter Eleven to the effect that the NAFTA Parties 'reject[ed] wording that would have restricted national treatment obligations of states and provinces to treatment of foreign investors physically within the province or state' but

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404 Claimant's Counter Memorial, para 169; Claimant's Rejoinder Memorial, para 129.
405 Claimant's Counter Memorial, paras 173-174.
406 Claimant's Counter Memorial, paras 177-179; Claimant's Rejoinder Memorial, para 140; Hearing on Jurisdiction and Admissibility, August 15, 2017, 390:18-391:20.
407 Claimant's Rejoinder Memorial, para 131.
408 Claimant's Counter Memorial, para 182.
409 Claimant's Counter Memorial, para 184.
410 Claimant's Counter Memorial, paras 185-186.
411 Hearing on Jurisdiction and Admissibility, August 15, 2017, 379:9-380:22.
412 Hearing on Jurisdiction and Admissibility, August 15, 2017, 381:4-8.

instead 'deliberately chose wording that did not allow a state or province to deny most favourable treatment to a foreign investor in like circumstances as the provincial investor solely because it was located in another state or province of the same country.'[413]

265. The Claimant submits that the issue for this Tribunal to resolve is whether Resolute has been accorded 'national treatment' by Nova Scotia and Canada.[414] This requires the Tribunal to assess whether the Claimant has been treated no less favourably than its Canadian competitors 'in like circumstances'.[415] The Claimant submits that 'like circumstances' must be 'determined on a case-by-case basis' and, in past NAFTA cases, have been assessed according to the relevant 'economic and business sector, not geography or subnational jurisdiction.'[416]

266. The Claimant finds support for this submission in the *SD Myers*, *Pope & Talbot*, *Archer Daniels Midland*, and *Cargill* decisions. The Claimant submits that these cases represent a consistent line of authority where each NAFTA tribunal has determined that the relevant comparison required by the words 'like circumstances' in Article 1102 relates to whether both comparators operate in the same business or economic sector.[417]

267. In this case, the Claimant says that it is in 'like circumstances' to PHP because it is a competitor in the same North American SC paper market, not because of physical location in the same province.[418] The Claimant submits that 'NAFTA jurisprudence has never gone as far' as to assert that the national treatment obligation relating to provincial measures requires comparison only with the treatment of other investors within that province.[419] The Claimant seeks to distinguish this case from the decision in *Merrill & Ring* relied upon by the Respondent on the basis that the measures in the present case were not 'regulatory' but 'were intended to confer an advantage on a domestic competitor to the detriment of the foreign investor in the same business sector', such business sector not being limited to the province of Nova Scotia.[420] In this case, the Claimant does not ask the Tribunal to compare the conduct of two different levels of government, as was the case in *Merrill & Ring*, but rather to compare the treatment of the Claimant and PHP by the Nova

413 Claimant's Counter Memorial, paras 187-188; Claimant's Rejoinder Memorial, para 141; Hearing on Jurisdiction and Admissibility, August 15, 2017, 391:21-395:21.
414 Claimant's Counter Memorial, para 189.
415 Claimant's Counter Memorial, para 189.
416 Claimant's Counter Memorial, para 190.
417 Claimant's Counter Memorial, paras 191-200.
418 Claimant's Counter Memorial, paras 180-181.
419 Claimant's Counter Memorial, para 201.
420 Claimant's Counter Memorial, para 204; Hearing on Jurisdiction and Admissibility, August 15, 2017, 398:14-20.

Scotia Government.[421]

268. Additionally, the Claimant recalls the following comments of the *Cargill* tribunal:

> The Claimant's mills [in *GAMI*] were certainly treated differently, but they were not the target of a measure to drive them out of business. But, here, the measure and the effect are different from *GAMI*. If the *GAMI* principle could be used to justify a measure that destroys an economically viable foreign investment in order to benefit a domestic competitor, the national treatment protection in Article 1102 would be meaningless.[422]

269. The Claimant submits that similarly, reliance by this Tribunal on the *Merrill & Ring* principle would render Article 1102 meaningless since Nova Scotia's stated intention to make PHP the lowest cost SC paper producer 'could be achieved only through the introduction of discriminatory measures.'[423]

4. The Non-Disputing NAFTA Parties' Comments

270. The United States submits that the Article 1102 obligation 'prohibits nationality-based discrimination between domestic and foreign investors (or investments of foreign and domestic investors) that are "in like circumstances"', but does not impose an obligation to 'provide nationally uniform treatment.'[424] Specifically, 'Article 1102(3) pertains to state and provincial measures only' and ensures that investors from NAFTA Parties are afforded the better of: (1) treatment accorded by a state or province to in-state (or in-province) investors or their investment; and (2) treatment accorded to domestic out-of-state (or out-of-province) investors or their investments.[425]

271. The United States submits that Article 1102(3) does not prevent a state or province from implementing measures that apply only to investors or investments in that state or province.[426] The United States contends that 'an investor cannot rest its claim under Article 1102(3) on the fact that a domestic enterprise operating in another state or province receives a different or greater benefit or is subject to a different or lesser burden unless it is "in like circumstances" with that enterprise.'[427] Whether the measures discriminate against a foreign investor 'in like circumstances' on the basis of their nationality will be a 'fact-specific inquiry at the merits phase.'[428]

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421 Claimant's Counter Memorial, para 205; Hearing on Jurisdiction and Admissibility, August 15, 2017, 395:23-396:20.
422 Claimant's Counter Memorial, para 208, citing *Cargill*, Award, para 210.
423 Claimant's Counter Memorial, para 209.
424 United States Submission, para 15.
425 United States Submission, para 16.
426 United States Submission, para 17.
427 United States Submission, para 17.
428 United States Submission, para 17.

272. Mexico agrees with Canada's submission that the NAFTA Parties did not intend by Article 1102(3) that 'the treatment by one state or province would become the national standard for the entire country.'[429]

273. The Respondent does not disagree with the United States that an analysis of whether a foreign and domestic investor are 'in like circumstances' is a question for the merits. It points out, however, that such an analysis presumes there has been actual treatment accorded to the investor or its investment by the state or province in question in order for the claim to be admissible. In this respect, the Respondent states that 'absent any evidence of a link between Nova Scotia and the investor, the claim cannot even meet the *prima facie* basis of admissibility and can therefore be dismissed at this preliminary stage.'[430]

274. The Claimant notes that the United States recognizes that proof of national treatment under Article 1102(3) requires a 'fact-specific inquiry at the merits phase' and states that such an inquiry 'by definition' cannot be made at this stage of the arbitration.[431] Thus, the Claimant concludes that the US position is consistent with its own position, and, based on an examination of like circumstances, is contrary to Canada's categorical argument that a claim under Article 1102(3) in respect of a provincial measure is unavailable to an investor without an investment in that province.[432]

5. The Tribunal's Analysis

(a) The legal framework

275. Article 1102 of NAFTA, the national treatment clause, provides that each party must accord to investors of another party and to investments of investors of another party treatment no less favourable than it accords, in like circumstances, to its own investors or their investments with respect to the establishment, acquisition, expansion, management, conduct, operation, and sale or other disposition of investments.[433]

276. In the present phase of this arbitration, the relevant measures were taken by Nova Scotia and not by the federal government. For those situations, Article 1102(3) of NAFTA provides that:

> The treatment accorded by a Party under paragraphs 1 and 2 means, with respect to a state or province, treatment no less favorable than the most favorable treatment accorded, in like

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429 Mexico Submission, para 13, citing Respondent's Reply Memorial, para 161.
430 Canada's Reply to Art. 1128 Submissions, para 33.
431 Claimant's Reply to Art. 1128 Submissions, paras 25-26.
432 Ibid, paras 26-27.
433 Article 1102 paras 1 & 2, NAFTA.

circumstances, by that state or province to investors, and to investments of investors, of the Party of which it forms a part.

277. The interpretation of Article 1102(3) is not without its difficulties. The underlying question is whether, in order to apply the national treatment standard, the NAFTA investor or its investment must already be present or intend to be present in the province. Or is it enough that the NAFTA investor or its investment is located within any part of the host state as long as it is accorded 'treatment' by the province?

278. NAFTA's preamble and articles give limited help. The preamble expresses the NAFTA Parties' resolve to 'reduce the distortions to trade'. Provincial measures that give preference to in-province or domestic investors could be understood as distortions to trade. In light of the preamble, Article 1102(3) could be understood as prohibiting that a state or province accords treatment less favourable than the most favourable treatment it accords, in like circumstances, to investors, and to investments of investors. As long as there is treatment of the investor/investment by the state or province, it should not matter whether those distortions produce effects inside or outside the state or province which applied the questioned measure.

279. The initial proposal for what became Article 1102(3) was included in the December 1991 negotiating text. Specifically regarding Article 1102(3), the parties' proposals were as follows:

i. The Mexican version read: 'shall mean, with respect to a province or state, treatment no less favorable than that granted by such province or state to any investor of that province or state.'[434]

ii. The US proposal was similar: 'The treatment accorded by a Party [under XX01 with respect to nationals and companies, and under XX02 with respect to investments] shall, in any state or political subdivision, be no less favorable than the treatment accorded by such state or political subdivision to its residents, or companies legally constituted under its laws, or their investments in its territory.'[435]

iii. Canada's proposal said: 'treatment by a province or state shall be: no less favourable than the most favourable treatment accorded by such province or state to any like goods, services and service providers, investors and suppliers, as the case maybe [*sic*], of the Party of which it forms a part.'[436]

[434] INVEST, December 1991, 2–3, Article 2103.
[435] INVEST, December 1991, 3.
[436] INVEST, December 1991, 3, Article 105.

280. By April 1992 Mexico also joined the pertinent part of the United States' proposal[437] with respect to political subdivisions.[438] At that point the United States and Mexico supported one formulation while Canada supported another. On July 10, 1992, the three Parties agreed on a text. The text adopted a formulation close to the United States-Mexico proposal:[439]

> The treatment accorded by a Party under this paragraph with respect to investors of another Party and their investments shall be, with respect to a state or province, no less favorable than the treatment accorded, in like circumstances, by such state or province to its residents, or entities legally constituted under its laws, or their investments in its territory.[440]

281. On July 22, 1992 a new text of the political subdivisions section was agreed:

> The treatment accorded by a Party under paragraphs 1 and 2 shall mean, with respect to a state or province, treatment no less favourable than the treatment accorded, in like circumstances, by such state or province to its residents, or enterprises legally constituted under its laws, or their investments in its territory.[441]

That is to say, the 22 July version set forth that the baseline treatment owed to a NAFTA investor was that accorded by the host state's province to its in-province investors. On August 4, 1992 the parties agreed on a further version, almost identical to the final text.[442] That text replaced the reference to 'by such state or province to its residents, or enterprises legally constituted under its laws, or their investments in its territory' by 'treatment no less favorable than the most favorable treatment accorded by such state or province in like circumstances to investors of the Party of which it forms a part.' That is to say, the baseline treatment owed to a NAFTA investor was not only to be that accorded by the host State's province to its in-province investors, but could include out-of-province domestic investors and their investments. This conclusion, however, does not provide an answer to the Respondent's argument to the effect that Nova Scotia provided no treatment to the Claimant because it does not operate or is not located in that province.

282. As regards the NAFTA Parties' views of the final text, Canada's Statement on Implementation reads:[443]

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437 Mexico first did not endorse the US language that extended the obligation to any 'state or political subdivision' (March 1992). Later, Mexico agreed to extend obligations to 'states' but not to other 'political subdivisions' (6 April draft). See M Kinnear, A Bjorklund & J Hannaford, *Investment Disputes under NAFTA: An Annotated Guide to NAFTA Chapter 11* (Kluwer, 2006), 1102-6.

438 INVEST.403, Washington Composite (Apr. 3, 1992) 10.

439 INVEST.710, All-Star Composite (July 10, 1992) 4.

440 Ibid.

441 INVEST.722 July 22, 1992, 4.

442 INVEST.805, Watergate Daily Update, August 4, 1992, 3.

443 Department of External Affairs, Canadian Statement on Implementation, Canada Gazette Part I, June 1, 1994, 148-149.

> National treatment means that Canada will treat US and Mexican investors and their investments as favourably as it treats Canadian investors and their investments, in like circumstances [...] National treatment by state, provincial, and local governments is defined as the best treatment provided by that government to any investor or investment...

Canada's Statement does not distinguish between in-province, out-of-province and foreign investors.

283. The United States' Statement of Administrative Action reads:[444]

> ... the treatment provided by state and provincial governments to investors from other NAFTA countries and their investments must be no less favourable than the most favourable treatment they provide to domestic investors and their investments.

Under the United States' Statement, the standard of treatment is what state and provincial governments provide to any domestic investor. Neither statement, however, provides an answer to Canada's arguments on the absence of treatment.

(b) NAFTA jurisprudence

284. Three cases have dealt with issues close to but not exactly the same as the present one.

285. In *SD Myers*, the questioned measure was Canada's order prohibiting the export of polychlorinated biphenyl ('**PCB**') waste to the United States. The measure had been taken by the federal government.[445] The tribunal, explaining Article 1102(3), said: 'in that context the relevant comparison is between the treatment accorded to an investment or an investor and the best treatment accorded to investments or investors within the jurisdiction of the sub-national authority.'[446] This would require that a province provide a foreign investor the best treatment accorded to investors within the jurisdiction of that province. However, this comment was by way of *obiter dicta*.

286. In *Pope & Talbot*, the dispute arose out of Canada's implementation of the Softwood Lumber Agreement between Canada and the United States. The Agreement established a limit on the free export of softwood lumber into the United States and required Canada to collect a fee for export of softwood lumber in excess of a set quantity.[447] Canada argued that (a) the plural form of the language of Article 1102(2) placed a single investment outside its scope or required a claimant to demonstrate that there were other similarly-situated foreign investments; and (b) the plural form

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444 US Statement of Administrative Action, 141.
445 *SD Myers, Inc v Government of Canada*, Partial Award, November 13, 2000, para 123.
446 Ibid, para 240.
447 *Pope & Talbot Inc v Canada*, UNCITRAL, Memorial of the Investor (Initial Phase), January 28, 2000, paras 16-39.

required a comparison of the treatment provided to the foreign investor with that accorded to more than one domestically owned investment. The tribunal rejected both arguments,[448] on the ground that 'use of the plural form does not, without more, prevent application of statutory or treaty language to an individual case.'[449]

287. Canada also argued that NAFTA treats the two levels of government differently, imposing more rigorous restraints on provinces.[450] Once again, the tribunal rejected this view. Specifically, the tribunal understood that 'the obligation of a state or province was to provide investments of foreign investors with the best treatment it accords *any* investment of its country, not just the best treatment it accords to investments of *its* investors.'[451] Under *Pope & Talbot* neither Canada nor its provinces can comply with NAFTA by according foreign investments less than the most favourable treatment they accord any investment in Canada. But once again, the questioned measures there had been taken at federal level. Article 1102(3) was only discussed in order to compare it with Article 1102(2). The tribunal's reading of Article 1102(3) has no direct application here.

288. In *Merrill & Ring*, the claimant questioned Canada's timber export regime, which was implemented through both federal and provincial legislation. Both included a log surplus test prior to authorization of log removal or export from the province.[452] The claimant complained that the federal regulations were disadvantageous compared to the provincial ones.[453] Canada argued that Article 1102(3) specifically distinguished treatment accorded by a state or province from that of the national government and, thus, the two could not be compared.[454] The tribunal understood that the 'treatment accorded to foreign investors by the national government needs to be compared to that accorded by the same government to domestic investors [...] just as the treatment accorded by a province ought to be compared to the treatment of that province in respect of like investments.'[455] Thus for the tribunal 'the proper comparison is between investors which are subject to the same regulatory measures under the same jurisdictional authority.'[456] The tribunal added that to establish a breach of national treatment, the key is to determine which investors are in like circumstances.[457] The tribunal rejected using the better treatment offered by a province as

448 *Pope & Talbot Inc v Canada*, UNCITRAL, Award on the Merits of Phase 2, April 10, 2001, para 36.
449 Ibid, para 37.
450 Ibid, para 40.
451 Ibid, para 41.
452 *Merrill & Ring Forestry L.P. v Government of Canada*, UNCITRAL, Award, March 31, 2010, paras 26-8.
453 Ibid, paras 61-2.
454 Ibid, para 81.
455 Ibid, para 82.
456 Ibid, para 89.
457 Ibid, para 83.

a point of reference to compare the less beneficial federal regime, and thus declined to find a breach of the national treatment standard.[458]

289. Canada reads these awards, particularly *Merrill & Ring*, as saying that Article 1102(3) does not allow comparison of Nova Scotia's treatment of investors within its jurisdiction to the treatment received by the claimant from other governments, whether provincial or federal.[459] The Claimant argues that the *Merrill & Ring* rationale does not apply to the present case because the facts are different. The Claimant says that the measures taken by Nova Scotia were not restrictions of an industry within its territory and were not regulatory. The measures were intended to confer an advantage on a domestic competitor to the detriment of the foreign investor in the same business sector which was not limited to the province's territory.[460]

(c) The Tribunal's conclusions

290. The Tribunal agrees with the NAFTA parties that Article 1102(3) should not be read so as to impose, vis-à-vis foreign investments, a requirement of uniformity of treatment by the different component units of the three federal States which are Parties to NAFTA. It agrees with the tribunal in *Merrill & Ring* that Article 1102(3) only applies to 'the same regulatory measures under the same jurisdictional authority'. But it does not follow that Canada's argument limiting the effective scope of the national treatment obligation to investments located within the particular province should be accepted. Examples can be imagined of protective measures taken for the benefit of local investors while effectively keeping NAFTA investors or their investments out. Whether this would involve a breach of Article 1102 would depend on the circumstances, including the application of the 'like circumstances' requirement. But there seems no doubt that there *could* be a breach of the national treatment obligation in such case. The same would be true in a *Methanex*-type scenario if the out-of-province investor had been the specific target of a provincial campaign to cause it loss. The situation is not limited necessarily to a scenario where there has been a single specific target. While the Claimant does not suggest that it was specifically targeted by the Nova Scotia measures, it is open to it to establish on the merits a breach of Article 1102 on some other basis.

291. The Tribunal also stresses that it is not called on in this phase of the proceedings to discuss the application of the 'like circumstances' test to the present case. Nor is it necessary to discuss in further detail here the meaning of 'treatment' in Article 1102.

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[458] Ibid, para 94.
[459] Canada's Memorial on Jurisdiction, para 125.
[460] Claimant's Counter-memorial on Jurisdiction, para 204.

292. For these reasons and on this basis, the Tribunal rejects Canada's preliminary objection based on Article 1102(3).

E. JURISDICTION OVER THE EXPROPRIATION CLAIM UNDER THE *OIL PLATFORMS* TEST

1. Introduction

293. The Tribunal has held that the Claimant's expropriation claim is not time-barred, on the ground that the expropriation, if there was one, could not have occurred until October 2014. But that claim requires more careful scrutiny, given that the last Nova Scotia measure of which the Claimant complains occurred in September 2012 and that the Claimant retained complete control of the Laurentide mill until it was closed and sold more than two years later.[461]

294. The Claimant argues that the Respondent constructively expropriated the Laurentide mill by destroying the value of the investment.[462] The Claimant goes on to say that: (a) there was no valid public purpose for the expropriation, since provincial protectionism is not a legitimate public purpose;[463] (b) the expropriation was discriminatory because Nova Scotia favoured a domestically-owned, in-province mill over foreign-owned out-of-province mills, without any regard to principles of fair market competition; [464] (c) the expropriation was taken in disregard of international standards of due process;[465] and (d) the Claimant received no compensation.[466]

295. The Respondent replies that the questioned measures cannot be construed as an indirect expropriation: (a) sales and market share cannot be expropriated;[467] (b) the questioned measures are not the proximate cause of alleged damages;[468] (c) neither Canada nor Nova Scotia substantially deprived the Claimant of its investment; and (d) the Claimant remained in control of the mill at all times.[469]

296. At the hearing, following a question from the Presiding Arbitrator, counsel for Canada referred to Judge Higgins' separate opinion in *Oil Platforms* as having addressed whether or not, on the facts as pled, the alleged conduct is capable of constituting a breach.[470] He continued:

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461 Claimant's Counter-Memorial on Jurisdiction, para 113.
462 Notice of Arbitration and Statement of Claim, paras 88, 90.
463 Notice of Arbitration and Statement of Claim, para 94.
464 Notice of Arbitration and Statement of Claim, para 95.
465 Notice of Arbitration and Statement of Claim, para 96.
466 Notice of Arbitration and Statement of Claim, para 97.
467 Canada's Statement of Defence, para 82.
468 Canada's Statement of Defence, para 83.
469 Canada's Statement of Defence, para 83.
470 Hearing on Jurisdiction and Admissibility, August 16, 2017, 428:2-429:2. See also Hearing on Jurisdiction and Admissibility, August 15, 2017, 132:20-132:24.

> with respect to the expropriation claim, our view is that it's not capable of doing it because the alleged expropriation was not done by the state. It was done by a private actor. Similarly, here, it's not capable of constituting a breach because the language of 1102(3), the factual predicate that a province accord treatment to the investor is not here, and it couldn't be here because they're in a different province.[471]

297. By contrast, counsel for the Claimant did not consider *Oil Platforms* to provide a basis for arguing inadmissibility for the purpose of Article 1101:

> [Article] 1101 is not a claim-related procedure. 1101 is very clear. It just requires Claimant to establish that the measures are related to their investment. It doesn't say that you can use that to short-circuit an analysis of the claims.[472]

2. The *Oil Platforms* Test and its Application to NAFTA Chapter Eleven Proceedings

298. In *Oil Platforms (Preliminary Objections)*, the Court determined the scope of various articles of the 1955 Treaty of Amity, Economic Relations, and Consular Rights between Iran and the United States on which Iran relied, deciding it had jurisdiction to entertain the Iranian claims only on the basis of one provision of the Treaty, Article X. The Court said:

> ... the Parties differ on the question whether the dispute between the two States with respect to the lawfulness of the actions carried out by the United States against the Iranian oil platforms is a dispute 'as to the interpretation or application' of the Treaty of 1955. In order to answer that question, the Court cannot limit itself to noting that one of the Parties maintains that such a dispute exists, and the other denies it. It must ascertain whether the violations of the Treaty of 1955 pleaded by Iran do or do not fall within the provisions of the Treaty and whether, as a consequence, the dispute is one which the Court has jurisdiction *ratione materiae* to entertain...[473]

299. Judge Higgins explained the reasoning behind the Court's approach in the following terms:

> The only way in which, in the present case, it can be determined whether the claims of Iran are sufficiently plausibly based upon the 1955 Treaty is to accept *pro tem* the facts as alleged by Iran to be true and in that light to interpret Articles I, IV and X for jurisdictional purposes, that is to say, to see if on the basis of Iran's claims of fact there could occur a violation of one or more of them.[474]

300. It should be stressed that both the Court and Judge Higgins treated this as a jurisdictional matter rather than one going to admissibility.

301. The *Oil Platforms* test has been applied by investment tribunals, although the arbitral practice is not entirely consistent. In particular, in *Methanex*, the tribunal, while paying lip service to *Oil*

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[471] Hearing on Jurisdiction and Admissibility, August 16, 2017, 428:2-429:2. See also Hearing on Jurisdiction and Admissibility, August 15, 2017, 132:20-133:7.

[472] Hearing on Jurisdiction and Admissibility, August 16, 2017, 466:22-467:2.

[473] *Oil Platforms* (*Islamic Republic of Iran v United States of America)*, Judgment of December 12, 1996 (Preliminary Objections), ICJ Reports 1996 p. 810 (para 16).

[474] *Oil Platforms (Islamic Republic of Iran v United States of America)*, Judgment of December 12, 1996 (Preliminary Objections), Separate Opinion of Judge Higgins, ICJ Reports 1996 p. 810 (para 32).

Platforms, held that since the UNCITRAL Rules refer only to preliminary objections on jurisdictional grounds, there was no scope for the application of that test to claims of inadmissibility. The tribunal said:

> In order to establish the necessary consent to arbitration, it is sufficient to show (i) that Chapter 11 applies in the first place, i.e. that the requirements of Article 1101 are met, and (ii) that a claim has been brought by a claimant investor in accordance with Articles 1116 or 1117 (and that all pre-conditions and formalities required under Articles 1118-1121 are satisfied). Where these requirements are met by a claimant, Article 1122 is satisfied; and the NAFTA Party's consent to arbitration is established.
>
> Accordingly, there is no necessity at the jurisdictional stage for a definitive interpretation of the substantive provisions relied on by a claimant: the jurisdiction of the arbitration tribunal is established without the need for such interpretation [...] On the other hand, in order to establish its jurisdiction, a tribunal must be satisfied that Chapter 11 does indeed apply and that a claim has been brought within its procedural provisions. This means that it must interpret, definitively, Article 1101(1) and decide whether, on the facts alleged by the claimant, Chapter 11 applies. Similarly, insofar as the point is in issue, the tribunal must establish that the requirements of Articles 1116-1121 have been met by a claimant, which will similarly require a definitive interpretation of those provisions...[475]

302. In practice the *Methanex* tribunal assumed that the facts alleged by the claimant, albeit disputed by the USA, were correct only for the purpose of the award on jurisdiction. The tribunal went on to hold that it had no power to consider, under the rubric of admissibility, whether the claims were capable of giving rise to responsibility under the substantive provisions of Chapter Eleven.[476]

303. But other tribunals have not taken this view. For example, in *UPS*, a NAFTA arbitration under the UNCITRAL Rules, the tribunal decided that for the purpose of the respondent's challenge to jurisdiction 'the facts alleged [...] are to be accepted as correct.'[477] After quoting *Oil Platforms* and noting the differences between the various formulations of the test offered by the Court and in separate opinions, it said that:

> ... the Tribunal's task is to discover the meaning and particularly the scope of the provisions which UPS invokes as conferring jurisdiction. Do the facts alleged by UPS fall within those provisions; are the facts capable, once proved, of constituting breaches of the obligations they state? It may be that those formulations would differ in their effect in some circumstances but in the present case that appears not to be so.[478]

304. In *Impregilo v Pakistan*, the tribunal quoted *Oil Platforms* and inquired whether the facts as alleged by the claimant, if established, were capable of coming within the provisions of the BIT invoked. It considered aspects of the claims were not capable of constituting 'unfair or inequitable treatment' or discriminatory measures for the purposes of the applicable BIT because they

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475 *Methanex,* Partial Award, paras 120-121.
476 Ibid, paras 122-126.
477 *United Parcel Service of America Inc. (UPS) v Government of Canada*, ICSID Case No. UNCT/02/1, Award on Jurisdiction, November 22, 2002, para 32.
478 Ibid, para 37.

concerned merely the implementation of contracts.[479]

305. In *Bayindir v Pakistan*, the tribunal cited *Impregilo*[480] and defined the task as requiring it...

> to determine the meaning and scope of the provisions which Bayindir invokes as conferring jurisdiction and to assess whether the facts alleged by Bayindir fall within those provisions or are capable, if proved, of constituting breaches of the obligations they refer to. In performing this task, the Tribunal will apply a *prima facie* standard, both to the determination of the meaning and scope of the BIT provisions and to the assessment whether the facts alleged may constitute breaches. If the result is affirmative, jurisdiction will be established, but the existence of breaches will remain to be litigated on the merits.[481]

306. The tribunal found that it had jurisdiction, emphasizing that this decision was 'not equivalent to joining the question of jurisdiction to the merits' but rather that the claims were 'capable of constituting a violation of the BIT'. The tribunal added that '[t]he threshold at the jurisdictional level, which implies a *prima facie* standard, is different from the standards which the Claimant will have to discharge on the merits to show an actual treaty breach.'[482]

307. In *Canfor*, a NAFTA arbitration under the UNCITRAL rules, the respondent relied on Article 1901(3) by way of a jurisdictional objection. The Respondent proposed that the tribunal apply the test enunciated by Judge Koroma in the *Fisheries Jurisdiction* case.[483] In contrast, the claimants understood that article 1901(3) was an interpretative provision that did not concern jurisdiction, and that the *Oil Platforms* test need not be applied.[484]

308. The *Canfor* tribunal quoted *Oil Platforms*, *Methanex* and *UPS*, and said that:

> The above decisions make clear four points that a Chapter Eleven tribunal needs to address if and to the extent that a respondent State Party raises an objection to jurisdiction under the NAFTA:
>
> > —First, a mere assertion by a claimant that a tribunal has jurisdiction does not in and of itself establish jurisdiction. It is the tribunal that must decide whether the requirements for jurisdiction are met.
> >
> > —Second, in making that determination, the tribunal is required to interpret and apply the jurisdictional provisions, including procedural provisions of the NAFTA relating thereto, i.e., whether the requirements of Article 1101 are met; whether a claim has been brought by a claimant investor in accordance with Article 1116 or 1117; and whether all pre–conditions and formalities under Articles 1118–1121 are satisfied.

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479 *Impregilo S.p.A. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/3, Decision on Jurisdiction, April 22, 2005, para 268.

480 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, November 14, 2005, para 193-194.

481 Ibid, para 197.

482 *Bayindir Insaat Turizm Ticaret Ve Sanayi A.S. v Islamic Republic of Pakistan*, ICSID Case No. ARB/03/29, Decision on Jurisdiction, November 14, 2005, para 263.

483 *Canfor Corporation and Terminal Forest Products Ltd. v United States of America*, Decision on Preliminary Question, June 6, 2006, para 174 (**RL-007**) ('***Canfor and Tembec*, Decision**').

484 Ibid.

> —Third, the facts as alleged by a claimant must be accepted as true *pro tempore* for purposes of determining jurisdiction.
>
> —Fourth, the tribunal must determine whether the facts as alleged by the claimant, if eventually proven, are *prima facie* capable of constituting a violation of the relevant substantive obligations of the respondent State Party under the NAFTA.
>
> It is also clear that, in determining jurisdiction by applying the above test, a NAFTA tribunal is not in any way prejudging the merits of the case.[485]

309. The tribunal found that under Article 1901(3) the only possible interpretation was that the entire Chapter Eleven did not apply with respect to the antidumping law and countervailing duty law of a NAFTA's party.[486] Hence, it concluded that the respondent did not consent to arbitrate most of the claims, except those which did not form part of the respondent's antidumping law or countervailing duty law.[487]

310. In *Desert Line Projects v Yemen*, the tribunal cited *Oil Platforms* and several of the precedents that applied it.[488] In deciding whether it had jurisdiction *ratione materiae*, the tribunal said that since 'issues of jurisdiction and admissibility are examined on the hypothesis that the relevant claims are factually founded in principle, the claim may still be defeated at the merits stage if they are not proven.'[489] The respondent had argued that the tribunal did not have jurisdiction because the dispute had been heard by a Yemeni arbitration tribunal. The *Desert Line Projects* tribunal disagreed, on the basis that the claims formulated by the claimant were capable of constituting violations of the BIT, and that the claims asserted in the prior arbitration were fundamentally distinct from those related to the violation of the BIT.[490]

311. This Tribunal agrees with these and other decisions on the point. A NAFTA tribunal (whether sitting under the UNCITRAL Rules or some other set of arbitral rules) is entitled to inquire not merely whether procedural prerequisites and time limits for commencing arbitration have been satisfied, but whether the claims, assuming *pro tem* that the claimant's allegations of fact are true, fall within the scope of Chapter Eleven of NAFTA, that is to say, are capable of giving rise to a finding of breach. It should be stressed that since, under *Oil Platforms*, this is a matter going to jurisdiction, not admissibility, it is not necessary for this purpose to consider whether Article 21 of the UNCITRAL Rules, which refers only to jurisdictional objections, excludes the power to rule as a preliminary matter on questions of admissibility of claims.

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485 Ibid, paras 171-172.
486 Ibid, para 273.
487 Ibid, para 348.
488 *Desert Line Projects LLC v The Republic of Yemen*, ICSID Case No. ARB/05/17, Award, February 6, 2008, paras 129-134.
489 Ibid, para 134.
490 Ibid, paras 137-8.

3. The Tribunal's Analysis

312. In the Tribunal's view, the Article 1110 claim for expropriation of the Laurentide mill faces considerable difficulties, even assuming the facts as pleaded. These include the following:

    i. The Claimant retained full control over the mill until its closure in October 2014, and subsequently negotiated its sale. It was the Claimant's choice to close Laurentide rather than one of its other two mills in Quebec.

    ii. The closure decision was allegedly made because of the low paper prices offered by PHP, and did not involve state action of any kind. The Claimant has not alleged that PHP: (a) was a state agency; (b) exercised governmental powers delegated to it; or (c) was controlled by government officials in taking its pricing decisions.

    iii. There was a significant delay between the Nova Scotia measures taken in September 2012 and the alleged expropriation in October 2014. The Claimant argues that it had decided to take a risk by running the mill after the measures, and that the mill was no longer profitable after two years. The question is how the negative consequences of its investment decision to take that risk can be construed as an expropriation.

313. Moreover, if the Claimant's argument were to prevail, claims under Chapter Eleven could be pursued, many years after the event, as 'new' expropriations, with all the problems of causality that might raise. This would drive a coach and horses through the time-limits for action under NAFTA.

314. On the other hand, the *Oil Platforms* argument was not raised by the Respondent in its written pleadings, and only at the oral stage in reply to questioning from the Tribunal. On balance, the Tribunal considers that the Article 1110 claim, despite the questions it raises, should not be dismissed at this preliminary stage but should be left to the merits.

F. THE TAXATION MEASURES OBJECTION

1. Introduction

315. The Respondent submits that the Tribunal lacks jurisdiction insofar as the Claimant's expropriation claim encompasses 'taxation measures'. This results from the restriction imposed by NAFTA Article 2103. Relevantly, Article 2103(6) provides:

> Article 1110 (Expropriation and Compensation) shall apply to taxation measures except that no investor may invoke that Article as the basis for a claim under Article 1116 (Claim by an Investor of a Party on its Own Behalf) or 1117 (Claim by an Investor of a Party on Behalf of an Enterprise), where it has been determined pursuant to this paragraph that the measure is

> not an expropriation. The investor shall refer the issue of whether the measure is not an expropriation for a determination to the appropriate competent authorities set out in Annex 2103.6 at the time that it gives notice under Article 1119 (Notice of Intent to Submit a Claim to Arbitration). If the competent authorities do not agree to consider the issue or, having agreed to consider it, fail to agree that the measure is not an expropriation within a period of six months of such referral, the investor may submit its claim to arbitration under Article 1120 (Submission of a Claim to Arbitration).

316. The Respondent argues that under Article 2103(6) the Claimant was required to refer the claim relating to 'taxation measures' to the appropriate tax authorities before being able to submit such a claim to NAFTA arbitration. The Claimant, however, submits that the taxation measures to which it refers do not independently amount to an expropriation, but are part of a series of measures that amount to the alleged expropriation, and so do not need to be referred to the authorities under Article 2103(6).

2. The Respondent's Arguments

317. The Respondent submits that any claims relating to the Property Tax Agreement between PWCC, Richmond County and NPPH are precluded by Article 2103. In the Respondent's view, Article 2103(1) provides a broad carve-out in respect of taxation measures: 'except as set out in this Article, nothing in this Agreement shall apply to taxation measures.'[491] The Respondent relies on the decision in *Canfor* and *Tembec*[492] as well as the claimant's withdrawal of its claim in *UPS* to support its submission that this broad carve-out excludes the Claimant's minimum standard of treatment claim under Article 1105 insofar as it relates to the property tax measures.

318. In respect of the Claimant's expropriation claim under Article 1110, the Respondent acknowledges that Article 2103(6) permits such a claim relating to taxation measures so long as the Claimant follows the procedure set out therein.

319. The Respondent refers this Tribunal to *Gottlieb Investments Group v Canada* where the claimant followed the Article 2103(6) procedure, obtained a determination from the competent US and Canadian authorities that the measure was not an expropriation, and accordingly abandoned its expropriation claims.[493]

320. The Respondent asks this Tribunal to reject the Claimant's assertion that the current approach to Article 2103 'distort[s] the exception's intent' and that its real purpose is 'to deny claims that taxes might have been used as a tool to expropriate', not instances where tax relief, as part of a

491 Respondent's Memorial, para 130.
492 *Canfor and Tembec*, Decision, para 259.
493 Respondent's Memorial, para 135.

suite of measures, gives a third party a competitive advantage over the claimant.[494] The Respondent submits that such approach has no textual basis in NAFTA and would permit claimants to circumvent the exception in Article 2103(6) by grouping taxation measures with other measures.[495] The Respondent refers to *EnCana v Ecuador* which concerned Article VII of the Canada-Ecuador BIT, almost identically worded to Article 2103 of NAFTA. In that case, the claimant followed the procedure set out in Article VII notwithstanding the fact that the taxation measures were one part of the government conduct that allegedly constituted expropriation.[496] The Respondent submits that such an approach should have been followed by the Claimant in this case. The Respondent recalls the statement of the *Feldman* tribunal that 'Chapter 11 jurisdiction over tax matters is carefully circumscribed by Article 2103' and that 'this Tribunal would be derelict in its duties if it either expanded or reduced that jurisdiction.'[497]

3. The Claimant's Arguments

321. The Claimant submits that its reference to the property tax discount provided by Nova Scotia is admissible since it does not claim that this taxation measure amounts in itself to an expropriation covered by Article 2103(6).[498] Rather, this measure is merely one of many that 'contributed to the constructive expropriation of Resolute's Laurentide mill.'[499]

4. The Non-Disputing NAFTA Parties' Comments

322. The United States submits that Article 2103 'generally excludes taxation measures from the NAFTA's provisions' and so are 'not subject to any Chapter Eleven obligations' unless 'expressly identified as exceptions' to that general exclusion.[500] Article 2103 applies equally to all 'taxation measures', whether they are imposed on the investment or the investor or apply to a domestic investment or investor as a means of expropriating the foreign claimant's investment.[501] The United States further submits that Article 2103(6) 'imposes a jurisdictional requirement' that the investor must refer its complaint to the competent tax authorities before it can raise an Article 1110 claim before a NAFTA arbitration.[502]

323. The Respondent observes that all three NAFTA Parties agree that, pursuant to Article 2103,

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[494] Respondent's Memorial, para 136.
[495] Respondent's Memorial, para 137; Respondent's Reply Memorial, paras 163-165; Hearing on Jurisdiction and Admissibility, August 15, 2017, 249:3-22.
[496] Respondent's Memorial, para 138.
[497] Respondent's Memorial, para 139, citing *Feldman*, Award, para 188.
[498] Claimant's Counter Memorial, para 213; Hearing on Jurisdiction and Admissibility, August 15, 2017, 35:3-10.
[499] Claimant's Counter Memorial, para 213.
[500] United States Submission, para 18.
[501] United States Submission, para 19.
[502] United States Submission, para 20; see also Mexico Submission, para 14.

taxation measures may not be contested as a breach of Article 1105 and accordingly, the Claimant's argument about the Property Tax Agreement between Pacific West Commercial Corporation and Richmond County as a breach of Article 1105 must fail.[503] The Respondent also notes that the NAFTA Parties agree that a taxation measure may only be contested as a breach of Article 1110 if a claimant has first sought a determination from the NAFTA Parties that the measure is an expropriation, a procedural step which Resolute has not followed here.[504]

324. The Claimant considers that the United States calls for the adoption of an overly expansive interpretation of 'taxation measures' such that it would include a taxation 'practice' for the enforcement or failure to enforce a tax. By contrast, the Claimant submits that the referral obligation in Article 2103(6) consists of affirmative taxation measures burdening an investor to the point of expropriation. Tax breaks favouring a competitor without affirmatively burdening an investor are not, according to the Claimant, 'taxation measures' requiring referral.[505]

5. The Tribunal's Analysis

325. Article 2103(1) of NAFTA provides that 'except as set out in this Article, nothing in this Agreement shall apply to taxation measures.' Article 2103(6) provides a limited exception for claims that a tax measure constitutes an expropriation contrary to Article 1110: this requires prior submission of the claim to 'the appropriate competent authorities set out in Annex 2103.6', a procedure not followed by the Claimant in this case. This raises two issues: first, are the two measures invoked by the Claimant 'taxation measures' as referred to in Article 2103(1); and second, if so, can the Claimant invoke them here as an aspect of its Article 1110 claim, given that it does not rely on the measures as *per se* amounting to an expropriation but only as contributory to it.

326. The term 'taxation measure' was considered by the tribunal in *EnCana v Ecuador*. That was a claim for expropriation under the Ecuador-United States BIT, but the relevant provisions were not materially different from NAFTA's. The *EnCana* tribunal adopted a broad interpretation of the term, observing that...

> All those aspects of the tax regime which go to determine how much tax is payable or refundable are part of the notion of 'taxation measures'. Thus tax deductions, allowances or rebates are caught by the term [...] [A] measure is a taxation measure if it is part of the regime for the imposition of a tax. A measure providing relief from taxation is a taxation measure just as much as a measure imposing the tax in the first place.[506]

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503 Canada's Reply to Art. 1128 Submissions, para 29.

504 Canada's Reply to Art. 1128 Submissions, para 30-31.

505 Claimant's Reply to Art. 1128 Submissions, paras 30-31, also citing *Hulley Enterprises Limited (Cyprus) v Russian Federation,* PCA Case No. AA226, Final Award, July 18, 2014, para 1407, as an example of a similar finding in the context of claims under the Energy Charter Treaty.

506 *EnCana Corporation v Republic of Ecuador*, Award, February 6, 2006, para 142(3)-(4) (**RL-066**).

327. The tribunal did not need to consider a taxation measure dealing with taxation of a third party; indeed, an expropriation effected by conferring a tax benefit on a competitor of the claimant was probably not contemplated by the drafters. But the exception for taxation measures under Article 2103(1) is a general exception, and there is no reason to limit it to taxation measures imposed on the claimant or its investment. To do so would be to add words not in the text. Moreover, it would be anomalous if a tribunal could evaluate a third-party taxation measure under Chapter Eleven but not a measure imposing a tax directly on the claimant.

328. For similar reasons, the fact that the expropriation claim only relies on Nova Scotia's property tax discount as one among several circumstances leading to a claim for expropriation does not bring the claim under the Tribunal's jurisdiction. Taxation measures are simply not covered by NAFTA except as provided in Article 2103, and there is no relevant exception here.[507]

329. For these reasons, even if the present claim fell within the jurisdiction of the Tribunal and was otherwise admissible, it could not include any aspect of Nova Scotia's conduct covered by the taxation measures exemption in Article 2103.

DECISION

330. For the foregoing reasons, the Tribunal holds that it has jurisdiction to decide the Claimant's claims concerning the Nova Scotia Measures, with the exception of the interim measures taken to keep the Port Hawkesbury mill in operation prior to its sale in September 2012 and the claims concerning taxation measures, and that the claims are admissible.

331. Questions of costs and expenses are reserved to the final decision on the merits.

[507] Arbitrator Cass takes a narrower view of what qualifies as a 'taxation measure' under Article 2103. Because he does not read that provision as covering exemptions from taxation for reasons unrelated to framing and application of tax laws and regulations, he would not find measures complained of in this proceeding excluded under Article 2103.

Place of Arbitration: Toronto, Ontario

Date: January 30, 2018

Dean Ronald A. Cass

Dean Céline Lévesque

Judge James R. Crawford, AC

RLA-77

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Article V (1)*(c)*

1. Recognition and enforcement of the award may be refused, at the request of the party against whom it is invoked, only if that party furnishes to the competent authority where the recognition and enforcement is sought, proof that:

[…]

(c) The award deals with a difference not contemplated by or not falling within the terms of the submission to arbitration, or it contains decisions on matters beyond the scope of the submission to arbitration, provided that, if the decisions on matters submitted to arbitration can be separated from those not so submitted, that part of the award which contains decisions on matters submitted to arbitration may be recognized and enforced;

Travaux préparatoires

The *travaux préparatoires* on article V (1)*(c)* as adopted in 1958 are contained in the following documents:

Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards and comments by Governments and Organizations:

- Report of the Committee on the Enforcement of International Arbitral Awards: E/2704 and Annex.
- Comments by Governments and Organizations on the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards: E/2822, Annexes I-II; E/2822/Add.4; E/2822/Add.5; E/2822/Corr.1; E/CONF.26/3; E/CONF.26/3/Add.1.
- Comments on the Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards: Note by the Secretary General: E/CONF.26/2.