October 1975

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Recommended Citation
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ANTITRUST LAW

PAUL J. GALANTI*

During the past term, the Seventh Circuit decided several cases involving interesting aspects of antitrust law. However, none of these cases can be considered earth-shattering, and perhaps the introductory statement should be qualified since later discussion will show the court did not have to decide all of the issues it raised and discussed.¹

* Professor of Law, Indiana University School of Law—Indianapolis; J.D., University of Chicago.

1. The court, of course, cannot be faulted for exercising judicial self-restraint and not deciding issues not essential to a particular case. However, this writer is sure judges enjoy the opportunity to engage in legal discourses without having to make an ultimate determination.

Although this article will discuss three Seventh Circuit decisions, there are other cases decided by the court that warrant at least a passing reference. One such case is Corning Glass Works v. FTC, 509 F.2d 293 (7th Cir. 1975), aff'g and enforcing Corning Glass Works, 3 TRADE REG. REP. § 20,352 (F.T.C. 1973) noted in 43 FOR. L. REV. 1026 (1975). The court upheld the Commission's decision invalidating a clause in Corning's form wholesaler contract requiring wholesalers in states without fair trade laws to refuse to sell to retailers in fair trade states who had not agreed to maintain Corning's fair trade prices. The court agreed that the antitrust exemption provided by section 2 of the McGuire Act, 66 Stat. 632 (1952), amending section 5 of the FTC Act, 15 U.S.C. § 45(a)(2) (1970), did not encompass this type of vertically imposed resale price maintenance. Consequently the clause was unlawful as an unfair method of competition under section 5. The exemption is available only where a state, territory, or the District of Columbia has a statute, law or public policy authorizing resale price agreements for commodities under certain circumstances. See generally 1 R. CALLMANN, UNFAIR COMPETITION TRADEMARKS AND MONOPOLIES §§ 22.2, 24, 25.1 (3d ed. 1967).

The primary issue in the case was whether the law of the state of the wholesaler who is the immediate vendee of the fair trading manufacturer or that of the state of a subsequent purchaser from the wholesaler determined the legality of a price maintenance program. The court held it was the former and hence in the so called "free trade" states no restrictions could be imposed on wholesalers even where the subsequent purchaser was in a fair trade state. A retailer in a so called "non-signer" fair trade jurisdiction, a jurisdiction that enforces fair trade against all sellers whether or not they have contract-ed with the manufacturer, would still have to sell at the fixed price. However, retailers in "signer only" jurisdictions, those that enforce fair trade only against sellers contracting with the manufacturers, could purchase the merchandise at competitive prices out of state and undercut competitors bound by fair trade agreements. Needless to say a restriction prohibiting wholesalers from selling to fair trade state retailers was critical to Corning's price maintenance program, and when it was invalidated Corning's response was to abandon fair trade. N.Y. Times, April 8, 1975, at 46, col. 6.
The result in Corning hinged on the meaning of the word "resale" as used in both the McGuire Act and the earlier Miller-Tydings Act, 50 Stat. 693 (1937), amending section 1 of the Sherman Act, 15 U.S.C. § 1 (1970). The court concluded that the clause in the McGuire Act permitting agreements requiring vendees to limit resales to persons agreeing to maintain fair trade prices did not change the meaning of "resale" in the clause determining the lawfulness of such programs, and that the "when lawful" clause still referred to the state of the first resale by the immediate vendee of the fair trading manufacturer.

Corning involved an interesting exercise in statutory construction that might possibly have done some violence to the congressional intent behind the fair trade exemption, see Note, 43 FOn. L. REV., supra, at 1034-36, but as Professor Milton Handler observed in one of his excellent antitrust lectures the courts have demonstrated hostility to the underlying premises of fair trade and have pointedly ignored the proposition that it is for the legislatures and not the courts to pass on the wisdom, merit and utility of fair trade. 1 M. HANDLER, TWENTY-FIVE YEARS OF ANTI TRUST 516-22 (1973) [hereinafter cited as HANDLER].

The Corning decision was significant enough, in this writer's judgment, to warrant an extensive discussion in the earlier stages of this article. However, the issue was for all intents and purposes mooted when the Consumer Goods Pricing Act of 1975, H.R. 6971, was signed into law on December 12, 1975. The Act repeals the exemptions provided by both the McGuire and the Miller-Tydings Acts and when it becomes effective on March 11, 1976, fair trade agreements will be subject to the long established proscription against resale price maintenance that obtained before the fair trade exemptions were passed and still applies to programs that do not satisfy the requirements of the exemption. See Schwegmann Bros. v. Calvert Distillers Corp., 341 U.S. 384 (1951); Dr. Miles Medical Co. v. John D. Park & Sons, 220 U.S. 373 (1911). Of course even without the Pricing Act the days of fair trade probably were numbered as more and more jurisdictions repealed their fair trade acts, fifteen alone in 1975, 2 CCH TRADE REG. REP. § 6041, or had non-signer statutes turned into signer-only statutes by judicial decree invalidating such statutes on state constitutional grounds, see, e.g., Corning Glass Works v. Ann & Hope, Inc., 294 N.E.2d 354, 361-63 (Mass. 1973), reducing the jurisdictions that permit fair trade in either form to twenty-one. This is from a high of forty-six. See ABA ANTI TRUST LAW DEVELOPMENTS 9 (1975) [hereinafter cited as 1975 DEVELOPMENTS].

Another decision of the Seventh Circuit worth noting is Bob Layne Contractor, Inc. v. Bartel, 504 F.2d 1293 (7th Cir. 1974), affirming a summary judgment against plaintiff real estate developer. In 1960 Layne platted a subdivision in Muncie, Indiana, and recorded certain restrictions, conditions and limitations limiting the lots to single family residences. However, a later taking of land for highway construction made 49 lots more suitable for commercial than for residential development. Layne was able to have the plat vacated in part but his efforts to have the property rezoned were frustrated by legal action of a neighborhood Citizens Association. Layne's suit alleged that a contributor to that group had commercial interests giving the efforts an anticompetitive cast. In affirming the court concluded the evidence showed the contributions were not motivated by an anticompetitive purpose and that in any event the attempt by citizens to influence zoning matters was protected under Eastern R.R. President's Conference v. Noerr Motor Freight, Inc., 365 U.S. 127 (1961). The Noerr-Pennington-Trucking Unlimited doctrine is the basis of Metro Cable Co. v. CATV of Rockford, Inc. 516 F.2d 220 (7th Cir. 1975) discussed at note 5 infra and accompanying text.

Efforts to apply the Robinson-Patman Act, 15 U.S.C. §§ 13(a)-(f) (1970), to matters outside the jurisdictional grant failed in Freeman v. Chicago Title & Trust Co., 505 F.2d 527 (7th Cir. 1974). Plaintiffs urged that the brokerage provision, section 2(c), 15 U.S.C. § 13(c) (1970), applied to rebates title insurance companies paid to savings and loan associations and other agents authorized to purchase title insurance for property owners. The district court dismissed the complaint holding that section 2(c) applies only to "goods, wares or merchandise" and not to the sale of intangibles such as title insurance. Although there is countless authority that the Act is limited to transactions involving tangibles, Baum v. Investors Diversified Servs., Inc., 409 F.2d 872
The Noerr-Pennington-Trucking Unlimited Doctrine

An interesting decision in the Noerr-Pennington-Trucking Unlimited (7th Cir. 1969), plaintiffs argued that section 2(c) applied because it provides “except for services rendered in connection with the sale or purchase of goods ...” (emphasis added). This legalistic legerdemain with punctuation was rejected by the court which noted that judicial repunctuation will be permitted if necessary to effect legislative intent. This of course is particularly appropriate when dealing with the Robinson-Patman Act. See Galanti, Buyer Liability for Inducing or Receiving Discriminatory Prices, Terms, and Promotional Allowances: Caveat Emptor in the 1970's, 7 Ind. L. Rev. 962 (1974).

A second tack of the Freeman plaintiffs, as untenable as the first, was that section 2(c) applied because the title report was a tangible, physical document. The court rightly pointed out that the transfer of any intangible rarely can be accomplished without the incidental involvement of documents or other tangibles and that premising jurisdiction on a mere piece of paper would clearly extend the Act to transactions not contemplated by Congress. See, e.g., Tri-State Broadcasting Co. v. United Press Int'l, Inc., 369 F.2d 268 (5th Cir. 1966). A third argument was that the language of the McCarran-Ferguson Act, 15 U.S.C. §§ 1012-13 (1970), applying the Clayton Antitrust Act to the insurance industry to the extent it is not regulated by state law in effect applied the Robinson-Patman Act to the industry whether or not that statute applied according to its terms. The court rejected this argument recognizing that the McCarran-Ferguson Act was intended to restore the “status quo ante,” United States v. South-Eastern Underwriters Ass'n., 322 U.S. 533 (1944) and not to expand the Robinson-Patman Act. A final contention that a decision in a government merger action against Chicago Title resulted in collateral estoppel as far as section 2(c) also was to no avail. The court noted that the Real Estate Settlement Procedures Act, 12 U.S.C. §§ 2601-16 (1975) might solve the problem, although it was not yet law at the time and it might not be law when this is published as it has engendered considerable dissatisfaction. See Bus. Week, Oct. 13, 1975, at 40; 33 Cong. Q. Tly. 2233 (Oct. 18, 1975); 33 Cong. Q. Tly. 2524 (Nov. 22, 1975).

A fourth case of passing antitrust interest is Arenson v. Chicago Merchantile Exchange, 520 F.2d 722 (7th Cir. 1975). Arenson involved plaintiffs' motion to hold the Board of Trade and other defendants in contempt for violating a settlement order entered in several consolidated antitrust actions brought against commodity exchanges and their members challenging the exchanges' minimum commission rates members charge non-members for commodity transactions. The settlement order contemplated competitively set rates after a transition period where the exchanges could prescribe and enforce minimum rates. During that period the exchanges could increase minimum rates in effect on November 1, 1972, only with court approval.

The particular dispute was over an “exchange service fee” the Board of Trade imposed on transactions for non-members with the fees to be used for purposes benefiting the non-members. The district court judge who had approved the settlement agreement denied plaintiffs' motion, holding that the exchange service fee was just that, and not an increase in the minimum commission rates that would have violated the settlement order. He noted that the fees were imposed in order to defray operating expenses of the Board of Trade and non-members fees were collected by members simply as a matter of convenience. The Seventh Circuit was reluctant to disturb the district court's rejection of the argument that the agreement was intended to prohibit any increase in rates whether “commission rates or rates by any other name” and the acceptance of defendants' argument that the original order was limited by its express terms. The court concluded that the interpretation of the settlement order was reasonable and that the denial of the motion was not an abuse of discretion.

area is *Metro Cable Co. v. CATV of Rockford, Inc.* Metro operated a cable television transmission system in the rural areas around Rockford, Illinois. It picked up television signals from commercial stations in Rockford and elsewhere and transmitted them to subscribers. The genesis of the suit was Metro's inability to obtain a franchise from Rockford to construct and operate a cable system beyond its existing service area. The suit was against the company that obtained the franchise (CATV), an affiliate that operated a commercial TV channel in Rockford whose signals were picked up by Metro, certain individuals who were principals of the two corporations, and the Mayor and an alderman of Rockford. The district court granted defendants' motion to dismiss, basing its action on *Noerr* - *Pennington*, and the Seventh Circuit affirmed.

The complaint apparently was not a model of clarity but its gist was that the defendant corporations and corporate personnel conspired among themselves and with the two city officials to prevent Metro from obtaining the requisite municipal authority to operate a cable system within Rockford. Their goal was to preserve a CATV monopoly in the area for the corporate defendants and apparently to foreclose Metro from entering the Rockford television market in any way. The two city officials purportedly used their best efforts to frustrate Metro's successive attempts to obtain a franchise, or even to obtain a hearing on the merits of its several proposals, and to award the franchise to CATV. The quid pro quo was the promise of substantial campaign contributions.

5. 516 F.2d 220 (7th Cir. 1975).
6. There is no question but that Cable TV plays a significant role in furnishing competition to existing television operations. Pearson, a staff attorney with the antitrust section of the Justice Department, in his article *Cable: The Thread By Which Television Competition Hangs*, 27 RUTGERS L. REV. 800 (1974), posits that television broadcasting and programming is too heavily concentrated in a few sources both on the national and local level and that if existing restrictions were removed cable television could significantly increase competition in the industry.
8. 516 F.2d at 222-23 nn.2,3. The complaint was summarized by the district court, 375 F. Supp. at 352-56.
9. Illinois statutes authorize municipal authorities to "license" or "franchise" cable systems. ILL. REV. STAT. ch. 24, § 11-42-11 (1973). The *Metro Cable* court noted that although the terms are used interchangeably, franchise more appropriately described the authority. 516 F.2d at 228 n.12.
10. The court ultimately acknowledged that a distant television station that could reach Rockford consumers only through cable television might have a valid antitrust claim if the defendants' conspiracy delayed implementation of such a system. However Metro itself was not injured in its business or property by that conduct. 516 F.2d at 232-33. This demonstrates the court's awareness that *Noerr-Pennington* does not immunize all aspects of a scheme that might in part involve an effort to influence governmental action. See Semke v. Enid Automobile Dealers Ass'n., 456 F.2d 1361, 1370 (10th Cir. 1972), a post-*Trucking Unlimited* decision where the court stated that only "injuries and damages proven to have resulted from conspiracies other than those related to petitioning and obtaining official state action need be tried."
11. The substantial contribution point appears to be pleaders' hyperbole. The
Metro characterized these activities as an unlawful boycott or concerted refusal to deal in violation of section 1 of the Sherman Antitrust Act\(^\text{12}\) and as monopolization and a conspiracy to monopolize in violation of section 2.\(^\text{13}\)

\(^{12}\) 15 U.S.C § 1 (1970). 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 . . . .

Concerted refusals to deal have long been characterized as per se offenses under section 1. See, e.g., Klor's v. Broadway Hale Stores, 359 U.S. 207, 212 (1959); Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958); Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941); Associated Press v. United States, 326 U.S. 1 (1945). See generally 1975 DEVELOPMENTS, supra note 1, at 16-19; 16, 16G, 16J. VON KALINOWSKI, BUSINESS ORGANIZATIONS §§ 6.02[2][c], 60.02, 76.01-04 (1975) [hereinafter cited as VON KALINOWSKI].

The district court, 375 F. Supp. at 359, characterized the complaint as merging a boycott charge with a charge that Metro was foreclosed from the Rockford market. It further opined that there was no "boycott" since the city had not refused to buy from or sell to Metro but had just declined to grant it authority to do business.

\(^{13}\) 15 U.S.C. § 2 (1970). Section 2 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 misdemeanor . . . .

Metro also alleged that the cross-ownership and close affiliation of the two corporate defendants constituted an independent violation of the antitrust laws. This element of the complaint was rejected by the district court because the relationship of the defendants could not by itself constitute an antitrust violation. Rather it is the effect of such relationships that determines the legality.\(^{14}\) In the instant case it was not the affiliation that affected Metro but the inability to obtain the governmental franchise. Therefore, defendants' efforts to influence the City of Rockford to their advantage and Metro's harm were, to both the district court and the Seventh Circuit, immune from antitrust attack under the *Noerr - Pennington - Trucking Unlimited* line of cases.

Both courts appear to be absolutely correct in so characterizing the suit since *Metro Cable* falls squarely within *Noerr*. *Noerr* involved a particularly vicious battle between railroads and longhaul trucking interests that had entered the political sphere when the railroads sought state governmental action, both executive and legislative, that would injure the truckers. The lower courts held that the efforts constituted a Sherman Act violation. The Supreme Court,\(^{15}\) in a unanimous opinion by Justice Black, reversed, holding that concerted action to induce or influence public officials to pass or enforce laws is not forbidden by the antitrust laws notwithstanding any

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anticompetitive purpose, intent or effect and notwithstanding that the efforts could be characterized as politically unethical. The Court started from the premise that restraints of trade resulting from otherwise valid governmental action do not violate the Sherman Act under *Parker v. Brown*. Starting with *Parker* and acknowledging the importance in a representative democracy of the right to petition to induce governmental action *Noerr* concluded that genuine efforts to induce lawful government actions were not intended to be covered by the Sherman Act. This result logically follows *Parker* because it would be somewhat anomalous if California raisin growers had been held liable for inducing the proration orders involved in that case while California officials could adopt regulations affecting competition in the raisin industry with Sherman Act immunity.

The *Noerr* court viewed the Sherman Act as applying to commercial agreements inhibiting “trade freedom” and not to agreements to seek legislation or law enforcement. The distinction could be inferred from the dissimilar nature of the two kinds of agreements, confirmed by the effect a contrary construction of the Sherman Act would have on the operation of a representative democracy. The government would be impaired in its right, or actually its need, to have input from the citizenry including vested interests in making political decisions. The corollary right of the citizenry to petition the government also would be impaired, raising serious constitutional questions. *Noerr* was not decided on constitutional grounds, although Justice Douglas raised it to that status in the later *Trucking Unlimited* decision, but rather the Court was utilizing first amendment considerations as indicia or guides to congressional intent. The Court can be commended for its concern with the right to petition, but it is possible to posit that a contrary decision in *Noerr* would not have been all that detrimental. Simply put, a rule that competitors can not join together to influence governmental action certainly would not proscribe individual efforts by the railroads in *Noerr* or by members of any other competitive group to seek favorable treatment.

17. See 365 U.S. at 132 n.6, 139.
18. 404 U.S. 508 (1972). Justice Douglas at one point in the opinion characterized the two considerations mentioned in *Noerr* as the grounds of the decision, 404 U.S. at 510, and at another point he characterized *Noerr* rights as “First Amendment rights.” 404 U.S. at 514. See generally 2 HANDLER, supra note 1, at 1023-24; Note, 1961 U. ILL. L. REV. 326 (1961). The *Metro Cable* court noted Professor Handler's discussion of this issue. 516 F.2d at 227.
19. 2 HANDLER, supra note 1, at 1023-24.
20. In United States v. Association of American R.R., 4 F.R.D. 510, 527 (D. Neb. 1945) the court held that an individual could solicit government action against competitors with impunity. However, the court was not a good prognosticator since it warned that the constitutional protection did not extend to acts done in concert. *Id.* See also P.
Justice Black was aware of the potential impact of the *Noerr* rule and to prevent the total evisceration of the Sherman Act whenever some state agency happens to be involved, which includes virtually every case today, he expounded the "sham exception" which justifies the application of the Sherman Act where a campaign "ostensibly directed toward influencing governmental actions, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor." Of particular significance to *Metro Cable* was the *Noerr* court's conclusion that neither the sole purpose to destroy truckers as competition nor the nature of the campaign using vicious, unethical techniques and making misrepresentations negated the doctrine.

The *Noerr* doctrine was amplified, refined and, in fact, extended in *United Mine Workers of America v. Pennington* where the Court applied *Noerr* to concerted action to influence public officials as part of a broader scheme that violated the Sherman Act. *Pennington's* significance was even greater than this since the Court extended *Noerr* beyond the legislative and executive areas to independent administrative agencies. However, like *Noerr, Pennington* involved efforts to influence the government acting in a non-adjudicatory capacity, and there was substantial debate whether the doctrine applied to adjudicatory proceedings in courts or before administrative agencies.

This question was resolved in *California Motor Transport Co. v. Trucking Unlimited* which held that *Noerr - Pennington* applied but had to be adapted to fit the adjudicatory context. The issue in *Trucking Unlimited* was the sufficiency of a complaint alleging that certain truckers had conspired to deter competitors from seeking new or expanded operating rights by opposing every application to California authorities for those rights regardless of merit. This resulted in the effective closing of the "machinery

**AREEDA, ANTITRUST ANALYSIS § 393 (2d ed. 1974)** [hereinafter cited as **AREEDA**]. The answer, of course, is that collective activities are pretty much the norm in lobbying efforts and many effective campaigns would be too dear for an individual concern. See generally Oppenheim, *supra* note 15, at 214-15, 233-34.

21. Of course, the federal government makes the states look like pikers in this respect, raising the ire of persons ranging from William F. Buckley to the editors of *Road & Track* magazine. See, e.g., Bond, *Detroit's Dilemma*, 27 ROAD & TRACK no. 3, Nov. 1975, at 68.

22. 365 U.S. at 144.

23. 516 F.2d at 224-25.


27. 404 U.S. 508, 511-12, 516 (1972).
of the agencies and courts" to the plaintiffs. This was perhaps one of the more open conspiracies in antitrust history since the defendants informed their competitors what they were up to and that the plaintiffs could avoid the problem by abandoning pending applications and refraining from filing further applications.

It has been argued that Justice Douglas narrowed the scope of Noerr - Pennington in Trucking Unlimited and there certainly is some language supporting the proposition since this was not one of his more lucid antitrust decisions. However, a more logical explanation is that the Court simply recognized that a rule developed in one context cannot necessarily be applied in toto in another context. Certainly if Justice Douglas had intended to retreat from Noerr - Pennington, which is unlikely considering his first amendment record, he probably would have ruled that the doctrine just did not apply to adjudicatory efforts. This was one of the grounds of the Ninth Circuit in upholding the complaint. Rather, he opted for the Ninth Circuit's second ground that defendants' conduct was within the sham exception of Noerr since it was not genuinely aimed at influencing public officials. Subjecting defendants to antitrust liability where they are acting solely and directly to harm competitors by foreclosing access to courts and agencies really is not trampling "upon important First Amendment values."

Justice Douglas recognized that Congress had exercised extreme caution, perhaps far too much, in regulating political activities and that such caution was a premise for refusing to extend the Sherman Act to such activities.

28. This is not too surprising, considering Justice Stewart's concurring opinion where he stated: "Today the Court retreats from Noerr, and in the process tramples upon important First Amendment values." 404 U.S. at 516. Justice Stewart did not question and in fact agreed with the elevation of Noerr to the constitutional level. Id. at 516-17. Rather, the two concurring Justices felt that the activities of the defendants were not aimed at invoking the government process but at denying plaintiffs access to the governmental process. Id. at 518. See generally 1975 DEVELOPMENTS, supra note 1, at 410. Compare 2 Handler, supra note 1, at 1017-30 with Oppenheim, supra note 15, at 217-24. See also authorities cited supra note 15. The Metro Cable court noted the debate over the implications of Trucking Unlimited. 516 F.2d at 225 n.6.

29. 404 U.S. at 511-12. See 2 Handler, supra note 1, at 1028-29. In Goldfarb v. Virginia State Bar, 421 U.S. 773, 782 n.17 (1975), the Supreme Court again recognized the inappropriateness of automatically applying antitrust concepts originating in one area in another context.


31. 404 U.S. at 516. This was Justice Stewart's observation. See note 28 supra. As Justice Douglas pointed out, the first amendment does not automatically insulate conduct violative of valid legislation. 404 U.S. at 514. See, e.g., Giboney v. Empire Storage Co., 336 U.S. 490 (1949).

However, he then posited that much unethical conduct condoned in the political arena is condemned in the adjudicatory process either before courts or administrative agencies. Perjury was one example, bribery another and a third was a "conspiracy with a licensing authority to eliminate a competitor."  

This aspect of *Trucking Unlimited* was significant in *Metro Cable* and will be discussed shortly.  

Although it is possible to argue, as did Justices Stewart and Brennan who concurred in the judgment, that there is no difference between efforts to influence executive and legislative bodies and efforts directed towards administrative and judicial bodies it seems sounder to recognize that even in this post-Watergate era the political sphere is more resilient to "illegal and reprehensible practices" than the judicial sphere. The cynic who expects the worst from "politicians" might well be dismayed by improper activities among jurists or attempts to tamper with the adjudicatory process. *Trucking Unlimited* is obviously not concerned with a random effort to thwart a competitor in a particular law suit or administrative proceeding but rather a pattern of harassment that constitutes an abuse of process. When these factors are present then it is reasonable to conclude that the efforts are a "sham", but when they are absent then efforts to persuade such agencies or the courts can be characterized as "genuine efforts" to influence the governmental process and enjoy the same antitrust immunity as obtains in the political arena.

The Seventh Circuit enjoyed the opportunity to discourse on the decisions involving governmental action and efforts to influence those actions from *Parker* through *Trucking Unlimited*, but it seemed relieved that it did not have to resolve the impact of *Trucking Unlimited on Noerr* since it took the Court at its word that the latter case was reaffirmed.  

The *Metro Cable* court did acknowledge that *Trucking Unlimited* might impose antitrust immunity...
liability if a governmental official was a co-conspirator in an adjudicatory setting. However, the pertinent discussion was deemed inapplicable since there was no question that the Rockford City Council was a legislative body acting as such in a political setting when considering whether or not to award one or more cable television franchises or licenses. Thus efforts to influence the Council's decision-making process were clearly within Noerr without regard to any gloss imparted by Pennington and without regard to any Trucking Unlimited tarnish. The court recognized that Trucking Unlimited and all its ramifications would apply if the City Council had delegated its franchising function to an administrative tribunal deciding in an adjudicatory setting, but this was not the case in Metro Cable.

As a legislative body the council, and the Mayor as an executive officer with some legislative duties, operated in a political setting. Decisions could be made without formal proceedings, which of course is a further reason for distinguishing adjudicatory proceedings with required formalities, and information could be obtained from all sources. This of course includes the lobbying and ex parte pressures that Noerr recognized as part of the political process and as such immune from antitrust attack even with their inherent faults and potential for abuse. The harm suffered by Metro clearly flowed from the City Council's decision to grant the franchise to CATV. This decision was immune as governmental action under Parker, and, therefore, concerted efforts to induce such action, even with an anticompetitive purpose, were protected under Noerr since they were aimed at obtaining governmental action and not, as in Trucking Unlimited, a pretext for inflicting harm on Metro under the guise of governmental action.

Metro tried several ploys to take the case out of the Noerr doctrine. No doubt the one most seriously pressed was the naming of the city officials as co-conspirators. The effort was premised on the reference in Pennington that the official involved was not claimed to be a co-conspirator, and Justice Douglas' observation in Trucking Unlimited that a conspiracy with a licensing authority might be unlawful in an adjudicatory setting. As noted, the reason the effort failed was the legislative setting, but the Seventh Circuit also questioned the basis of the ploy even in the adjudicatory setting. The problem was that the authority cited by Justice Douglas seemed questionable. He cited Continental Ore Co. v. Union Carbide & Carbon Corp. for the proposition, but as the Metro Cable court pointed out the "agent" appointed by Canada was not truly a governmental agency but

37. 516 F.2d at 228-29.
38. Id. See also Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341, 342 (9th Cir. 1969).
39. 381 U.S. at 671.
40. 404 U.S. at 513.
42. 516 F.2d at 229. See 370 U.S. at 695.
rather was a subsidiary of the principal actor in the conspiracy acting at the
direction and on behalf of its parent. Furthermore, the Pennington court had
distinguished Continental Ore as “dissimilar to both Noerr and the present
case”\textsuperscript{43} and it certainly did not involve the adjudicatory context for which it
was cited.

Another decision cited by Justice Douglas was Harman v. Valley Na-
tional Bank\textsuperscript{44} where the Ninth Circuit held it was error to dismiss a complaint
alleging that defendants had conspired with the Arizona Attorney General to
file an unfounded but successful suit to appoint a receiver for a savings and
loan institution as part of a scheme to monopolize that industry. The
decision was not particularly well reasoned and the court was as much
concerned with not deciding antitrust cases on motions to dismiss as it was in
carving out an exception to Noerr. However it did distinguish Noerr on the
grounds that the effort was part of a larger scheme in restraint of trade and
the official in question was an alleged co-conspirator. The first ground did
not survive the subsequent Pennington decision, and the second ground
apparently was not enough to sustain the case since the Ninth Circuit
decided to follow Harman in Sun Valley Disposal Co. v. Silver State
Disposal Co.\textsuperscript{45} Sun Valley was similar to Metro Cable since it involved one
competitor successfully preventing another from obtaining a trash disposal
franchise. To be sure Sun Valley involved the jurisdictional reach of the
Sherman Act, and the concurring judge gave more emphasis to the passage
in Pennington that the public official was not claimed to be a co-conspirator.
Although it makes arguable sense to limit the Noerr - Pennington defense
where public officials are “conspiring”, to do so would seriously erode the
doctrine since it is likely that any effort to obtain governmental action,
such as the awarding of a franchise, will find at least one proponent on the
governmental body.\textsuperscript{46}

\textsuperscript{43.} 381 U.S. at 671.
\textsuperscript{44.} 449 F.2d 564 (9th Cir. 1964). \textit{See also} Bankers Life & Cas. Co. v. Larson,
held it was improper to dismiss a Sherman Act complaint for failure to state a claim even
though it was unwilling to explicitly hold a triable claim had been alleged. However,
there might have been “something there” and a motion for a more particular statement
would have been more appropriate than the motion to dismiss. \textit{See generally} 16F von
Kalinowski, \textit{supra} note 12, §§ 46.03, .04[3].
\textsuperscript{45.} 420 F.2d 341, 342, 343 (9th Cir. 1969). Summary judgment for the plaintiff
was affirmed even though, as in Metro Cable, government officials participated in the
scheme and misrepresentations were utilized to obtain the franchise. The court was
unwilling to turn what might be a violation of local law into a federal case by a
conspiracy allegation.
\textsuperscript{46.} 516 F.2d at 230. The court acknowledged that distinguishing Noerr because of
a “governmental co-conspirator” would abrogate the doctrine for all intents and purposes
since as a practical matter legislative action cannot be induced unless members are
influenced to take the lead. Furthermore, nothing in Noerr suggested Congress intended
the Sherman Act to apply if a legislator supported the efforts but not if somehow
legislative action could be induced without such support.
Metro Cable also discussed and distinguished Israel v. Baxter Laboratories, Inc.\textsuperscript{47} by emphasizing its quasi-adjudicative nature rather than its legislative setting. The Israel court had viewed the complaint as alleging that the defendants' real purposes were to preclude, not induce, governmental action thus bringing the case within the Trucking Unlimited sham exception.\textsuperscript{48} Metro argued the denial of access issue by emphasizing the City Council's refusal to hold hearings on its applications. Again it was an argument with some basis,\textsuperscript{49} but the court was not persuaded since the defendants were attempting to secure favorable action rather than precluding Metro from seeking governmental action. Thus Metro Cable was not within the sham exception as adapted in Trucking Unlimited even if the process proposed by the City Council could be deemed adjudicatory rather than legislative.\textsuperscript{49}

The court then discussed Trucking Unlimited as if it did not involve the sham exception but stood for the proposition that denial of access to a governmental body is actionable. Even then Metro failed since access to a highly structured adjudicatory process can be shut off easily while this is not true with the more free-wheeling legislative context. Metro was just as free to informally influence members of the City Council as were the defendants. There was no allegation that defendants attempted to keep Metro from communicating with governmental officials, and FCC Regulations adopted long after its first application was denied only required a record to support the granting of a municipal CATV franchise and did not require that applicants be given hearings.

Other arguments were to no avail. The supposed substantial campaign contribution turned out to be minimal, and in any event Noerr itself involved campaign support by both sides of the dispute. Although a specific campaign law might regulate such activities the court was convinced that Congress clearly did not intend the Sherman Act to serve this function.\textsuperscript{50} Misrepresentations made by the defendants were irrelevant since Noerr involved similar activity.\textsuperscript{51} A false certificate allegedly filed with the FCC was also irrelevant since no action of that agency affected Metro and the refusal by

\textsuperscript{47} 466 F.2d 272, 279 (D.C. Cir. 1972). See also Semke v. Enid Automobile Dealers Ass'n., 456 F.2d 1361 (10th Cir. 1972).

\textsuperscript{48} See generally 16F VON KALINOWSKI, supra note 12, §§ 46.04[1], [3].

\textsuperscript{49} 516 F.2d at 231-32. See Franchise Realty Interstate Corp. v. San Francisco Joint Bd. of Culinary Workers, 1973-1 Trade Cas. § 74, 513 (N.D. Cal. 1973).

\textsuperscript{50} Id. at 230-31. See note 11 supra and accompanying text; note 32 supra.

\textsuperscript{51} 516 F.2d at 231. See 365 U.S. at 140-42. See also Sun Valley Disposal Co. v. Silver State Disposal Co., 420 F.2d 341 (9th Cir. 1969). See generally 2 HANDLER, supra note 1, at 1023-24.
the City Council to grant Metro authority to install cables on city utility poles was as much a legislative decision as the franchise issue and hence efforts to influence were immune.\textsuperscript{52}

This decision appears to reach a reasonable and proper result. Accepting the premise of \textit{Noerr} the only result that could obtain is that defendants' actions were immune. The context was clearly political and CATV was clearly and genuinely trying to obtain a favored status even if it was not displeased that Metro was shut out of the Rockford cable market. Even if \textit{Trucking Unlimited} eroded \textit{Noerr} by making actionable a foreclosure of access to a governmental body it is difficult to see how Metro could be benefitted. CATV could not really and truly foreclose Metro since contact with legislative bodies is usually, perhaps too much so, informal and Metro was as free as CATV to bend the will of the Council.

\section*{Interstate Commerce}

The year 1975 can perhaps be called the year of the "jurisdictional inquiry" with Supreme Court decisions such as \textit{Goldfarb v. Virginia State Bar},\textsuperscript{53} \textit{Gulf Oil Corp. v. Copp Paving Co.},\textsuperscript{54} and \textit{United States v. American Bldg. Maintenance Indus.}\textsuperscript{55} raising issues as to whether the constitutionally imposed interstate commerce requirement for violating the antitrust laws was satisfied. The Seventh Circuit was also called upon to resolve this issue in \textit{United States v. Finis P. Ernest, Inc.}\textsuperscript{56} where the court affirmed the jury trial conviction of two contractors indicted under section 1 of the Sherman Act for combining and conspiring to submit collusive, noncompetitive and rigged bids for a sewer project in East St. Louis, Illinois, by rejecting the three issues raised by defendants: (1) Whether there was sufficient evidence to prove the jurisdictional commerce requirement; (2) whether there was sufficient evidence to prove the conspiracy to rig bids; and (3) whether the trial court erred in admitting certain evidence.

The key issue was whether the facts were sufficient to satisfy the "particularized judicial determination" necessary to establish the requisite nexus to interstate commerce.\textsuperscript{57} The key facts were that certain of the supplies used by defendants were manufactured without the state of Illinois even though some were purchased from an Illinois company; and while the cost of these supplies and materials was under $10,000, the total cost of the

\begin{footnotes}
\item[52.] 516 F.2d at 232.
\item[53.] 421 U.S. 773 (1975).
\item[54.] 419 U.S. 186 (1974).
\item[55.] 422 U.S. 271 (1975).
\end{footnotes}
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project, paid with federal funds supplied by the United States Department of Housing and Urban Development (HUD), was approximately $60,000.58

Thus the court was faced with a situation where some interstate commerce was clearly involved but the agreement, if any, was a local arrangement between two competitors relating to a local construction project. The court framed the issue as whether the jurisdictional requirement of the Sherman Act and the elements of an unlawful restraint of trade could be satisfied separately or whether the jurisdiction element requires that the restraint be upon interstate commerce. The former test is satisfied where there is a showing of some connection between interstate commerce and the conduct regardless of whether the conduct restrained that commerce. But the alternative approach requires a showing that the conduct restrained was interstate commerce. The Seventh Circuit acknowledged that there is authority supporting both propositions, but did not have to resolve the issue since it was satisfied the evidence supported a finding of jurisdiction under either approach.59 It seems somewhat anomalous that in 1975 there are still some unresolved questions as to the jurisdictional reach of the Sherman Act but such is the case. Perhaps this is because, as the Ernest court observed, the single cryptic phrase “restraint of trade or commerce among the several states” defines both the jurisdictional scope and the type of conduct prohibited.60

Ernest reflects an inclination towards the position that no actual adverse impact on interstate commerce need be shown and that it suffices if defendants’ conduct demonstrates enough relationship to interstate commerce to be within the regulatory powers of Congress. This is the approach taken by the Ninth Circuit in several recent cases including In re Western Liquid Asphalt Cases61 that ultimately resulted in the Supreme Court’s decision in Gulf Oil Co. v. Copp Paving Co.62 on the jurisdictional scope of the Clayton and Robinson-Patman Acts.63 As far as the Sherman Act was concerned

58. 509 F.2d at 1258.
59. Id. at 1260.
61. 487 F.2d at 202 (9th Cir. 1973).
the Ninth Circuit held that the jurisdictional requirement was met because the production of asphaltic concrete in California for building interstate highways "rendered the producers 'instrumentalities' of interstate commerce and placed them 'in' that commerce as a matter of law." Since the Liquid Asphalt court found the defendants in commerce there was no need to decide if there was any actual restraint on commerce. The Seventh Circuit noted that this approach widened the Sherman Act's reach but that it had support in those Supreme Court decisions emphasizing Congress' intent to exercise the full extent of its constitutional authority in adopting the Sherman Act. The court further posited that this approach is particularly appropriate in cases involving per se violations of the Sherman Act where, as with price fixing and bid rigging, there is no need to show effects to establish the substantive offense. If there is no need for an "elaborate inquiry as to the precise harm [the practices] have caused or the business excuse for their use" there is no need to ascertain actual injury in determining whether the Act had been violated.

As Professor Areeda observes in his Antitrust Analysis, however, some courts require some showing that commerce itself is effected by the challenged actions. Although these courts might not appreciate the rationale of the per se doctrine, Professor Areeda does acknowledge that some Supreme Court language supports the proposition since the "interstate consequences" of a course of conduct are mentioned even in the most expansive of decisions. For example, Justice Jackson's marvelous phrase in United States v. Women's Sportswear Manufacturers Association that, "if it is activities within the flow of interstate commerce the practical, economic continuity in the generation of goods and services for interstate markets and their transport and distribution to the consumer." 419 U.S. at 186. See generally 16C von Kalinowski, supra note 12, §§ 26.01[2], 26.02.

64. 487 F.2d at 204. The Ninth Circuit held that jurisdiction attached to the Robinson-Patman Act and Clayton Act claims because they were intended to supplement the Sherman Act. Justice Douglas in his Copp dissent posited that the majority's finding that the questioned activities were not sufficiently in commerce for Robinson-Patman Act and Clayton Act purposes might adversely effect the Sherman Act ruling. 419 U.S. at 208 n.6.


68. Id. Areeda cites the Cherney case for the proposition that the jurisdictional issue must be determined after trial where the issue was whether the alleged violation had too tenuous a relationship with interstate commerce. See note 76 infra.

69. 336 U.S. 460, 464 (1949). The Ernest court noted that the Supreme Court had never squarely decided whether a business with out of state activities violates the
interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze", makes understandable the requirement of proving the interstate pinch.70 The Ernest court also found "suggestions" that there must be a showing of an adverse effect on commerce to satisfy the jurisdictional inquiry in earlier decisions such as United States v. Employing Plasterers Association71 and Mandeville Island Farms, Inc. v. American Crystal Sugar Co.,72 and even in Copp Paving.73 However none of these decisions were considered definitive statements on the issue.

One lower court opinion taking the approach that the Ernest court discussed was the Ninth Circuit's decision in Page v. Work,74 which seems inconsistent with later cases such as Liquid Asphalt but which continues to be cited. Page involved a conspiracy, or alleged conspiracy, to eliminate competition in legal advertising in Los Angeles county. The court concluded that the jurisdictional element was not satisfied because the restraints were on a purely local level and were directed towards the local intrastate market. The fact that the newspapers bought newsprint from without California, carried some national news and advertising and had non-California subscribers did not suffice. Thus Page took a restrictive view of the jurisdictional element emphasizing the locus of the restraint. Other lower courts have found jurisdiction to be absent where interstate activities were alleged but there was no showing that the restraint operated on commerce.75 Interestingly, one case not cited was the Seventh Circuit's own decision in United States v. Starlite Drive-In, Inc.76 affirming a dismissal of a drive-in movie

Sherman Act by engaging in a local conspiracy without effect on interstate commerce but acknowledged dicta suggesting that an interstate restraint is required for jurisdiction. 509 F.2d at 1260. See generally 16 von Kalinowski, supra note 12, § 5.01[1], [3]-[4].


73. 419 U.S. at 195.
74. 290 F.2d 323 (9th Cir.), cert. denied, 368 U.S. 875 (1961).

76. 204 F.2d 419, 421 (7th Cir. 1953). See also Gordon v. Illinois Bell Tel. Co., 330 F.2d 103 (7th Cir.), cert. denied, 379 U.S. 909 (1964); Evanston Cab Co. v. City of Chicago, 325 F.2d 907 (7th Cir.), cert. denied, 377 U.S. 943 (1964); cases cited in Areeda, supra note 20, at 122 n.431. Professor Areeda characterized these courts as not appreciating the rationale of the per se rules and opined as follows:

If certain conduct be held within the antitrust ban because of its potential for harm, regardless of demonstrated harm in any particular case, is it inconsistent simultaneously to require proof of effects to satisfy the statute's jurisdictional
admission price-fixing suit where the restraint on the interstate flow of movie films was “speculative and conjectural.”

Perhaps cases like Starlite and Page can be reconciled with the more expansive decisions by deemphasizing the lack of noticeable effect on commerce and emphasizing that the restraints might just fall within the ancient doctrine de minimis non curat lex. Penalties for Sherman Act violations are severe, with treble damage relief to persons injured in their business or property by the activities or, as in Ernest, criminal sanctions. It certainly does not seem improper to allow some leeway in enforcing legislation like the Sherman Act and perhaps it is more appropriate to recognize clearly that there might well be activities technically and literally falling within Congress' proscriptions that really do not warrant the full sanctions.

However, as noted, the Seventh Circuit did not have to decide which test to apply since both were satisfied. The purchase of the out of state materials for use on a contract that had been obtained through bid rigging satisfied the broader test, particularly since a per se violation was involved and the amount of commerce is unimportant in such cases. Under the alternative approach, jurisdiction obtained since the evidence supported the inference that defendants' activities had the requisite restraining effect even if the price of the materials purchased in interstate commerce was not affected by the bid rigging. The court concluded the restraint potentially reduced competition in supplies in commerce since without genuine competitive bidding there was no incentive for either defendant to seek competitive prices from material suppliers to get the lowest bid. Perhaps an even more significant restraint was the impact of the bid rigging on the cost of the project paid with HUD funds that were transferred in interstate commerce. A related effect was that HUD’s financial “pie” is large but not unlimited and overcharging on a project in East St. Louis means less money available

test? The Supreme Court has, in effect, so ruled by assuming an interstate impact.

AREEDA, supra note 20, at 122 n.431 (citation omitted). See also note 68 infra.

77. See, e.g., Lieberthal v. North Country Lanes, Inc., 332 F.2d 269 (2d Cir. 1964); Evanston Cab Co. v. City of Chicago, 325 F.2d 907 (7th Cir. 1964); Sandidge v. Rogers, 256 F.2d 269 (7th Cir. 1958); Riggall v. Washington County Med. Soc’y, 249 F.2d 266 (8th Cir. 1957). Von Kalinowski posits that many courts adopting a de minimus test do not indicate whether they are holding that such effect is insufficient to create jurisdiction or that the effect was not substantial enough to be deemed unreasonable and simply cite Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 331 U.S. 219 (1948). See 16 VON KALINOWSKI, supra note 12, § 5.01[2] at 5-38 n.43. See also Hopkins v. United States, 171 U.S. 578 (1898); Anderson v. United States, 171 U.S. 604 (1898).

78. 509 F.2d at 1260-61. In considering the broad jurisdictional approach that looks to the relationship to commerce to satisfy the constitutional requirement the court noted that the quantity of commerce is not important where a per se offense is involved, citing United States v. McKesson & Robbins, Inc., 351 U.S. 305, 309-10 (1956) and United States v. Bensinger Co., 430 F.2d 584, 588 (8th Cir. 1970).
for other projects which in turn reduces the amount of goods shipped in commerce.

There is certainly no infirmity in those propositions subsequent to Goldfarb v. Virginia State Bar79 where the Supreme Court held the Sherman Act commerce requirement satisfied in an attack on lawyers' minimum fee schedules where funds for home purchasers in Virginia came from without the state and HUD and the Veterans Administration guaranteed the mortgages. In Goldfarb the Court noted the restraints were on commerce but this does not indicate a Supreme Court tilt towards the more restrictive view in that the Fourth Circuit's decision in Goldfarb had denied any impact on interstate commerce because of the local nature of bar activities.

The defendants also argued that the evidence was insufficient to sustain the conviction.80 Needless to say the court was not inclined to disturb the jury verdict since the jury had the chance to weigh the evidence and determine the credibility of witnesses and there was substantial evidence to support it. Criminal conspiracies do not have to be proved by direct evidence and circumstantial evidence will suffice. Of course, the evidence must be sufficient to convince the jury of guilt beyond a reasonable doubt but this does not mean every reasonable hypothesis other than guilt need be excluded.81 The court nevertheless reviewed the evidence and concluded that the bid of one defendant, Modern Asphalt, was not serious but was submitted to give the appearance of competitive bidding. Particularly significant was the altering of a price on Modern's bid form to a figure substantially higher than Ernest's bid. Other damning evidence included the preparing of Modern's bid on the morning it was due by an employee working at home who had neither inspected the work site nor contacted suppliers; Modern was so over-committed on construction jobs that it could not have obtained a performance bond; and it was so sure that it would not get the job that its checking account did not have sufficient funds to cover the check submitted with the bid. The opportunity to conspire was satisfied by showing that both defendants had worked together on another project when the bids were submitted.82

Finally, appellants argued that the evidence concerning the insufficient funds was improperly admitted as irrelevant and improper rebuttal testimony and impeachment on a collateral matter. However, the court concluded this

80. 509 F.2d at 1261-62.
81. See Glasser v. United States, 315 U.S. 60, 80 (1942); United States v. Manton, 107 F.2d 834, 839 (2d Cir. 1938) (conspiracy may be inferred from a "development and collocation of circumstances"); Holland v. United States, 348 U.S. 121, 139-40 (1954) (not all hypotheses other than guilt need be excluded provided jury is convinced of guilt beyond a reasonable doubt.) The Ernest court relied on these cases. 509 F.2d at 1261. See also United States v. General Motors Corp., 384 U.S. 127 (1966). See generally 16 von Kalinowski, supra note 12, § 6.01[3].
82. 509 F.2d at 1262.
evidence was admitted not to impeach a witness but rather to contradict Modern's evidence that its bid was serious even though the check submitted was not certified as required by the bid specifications. The evidence was properly introduced on rebuttal to "explain, repel, counteract or disprove" Modern's evidence of a serious bid.

**Market Definition**

A final Seventh Circuit decision of antitrust interest is *Cass Student Advertising, Inc. v. National Educational Advertising Service, Inc.*, involving Sherman Act sections 1 and 2. The primary thrust of the complaint was that NEAS exercised monopoly power in the market "for representing college newspapers throughout the United States in the placement of national advertising" in violation of section 2. Cass also charged an attempt to monopolize in violation of section 2 and that section 1 was violated by NEAS's exclusive agreements with college newspapers and a conspiracy among NEAS and some newspapers to restrain plaintiff's business. The district court held that the relevant line of commerce for testing defendant's market power for section 2 purposes was not the market for representing college newspapers but the broader market encompassing all modes of competition for presenting national advertising to college students and the representatives of those media. Since Cass had not shown NEAS possessed monopoly power in that market the district court concluded there was no Sherman Act violation. The Seventh Circuit reversed, finding that the market determination was erroneous.

Ascertaining an appropriate market to judge the economic power of the defendant is of course the threshold inquiry in any monopoly case. The "market" is not an abstraction but rather a pragmatic determination of an

83. 509 F.2d at 1262-63. The court cited United States v. Mallis, 467 F.2d 567, 569 (3d Cir. 1972) and United States v. Crowe, 188 F.2d 209, 213 (7th Cir. 1951).
84. 516 F.2d 1092 (7th Cir. 1975), cert. denied, 44 U.S.L.W. 3295 (U.S. Nov. 18, 1975).
85. 516 F.2d at 1093. Section 2 of the Sherman Act is set out in pertinent part at note 13 *supra* and section 1 is set out in pertinent part at note 12 *supra*.
area of effective competition involving both a product or service element and a geographic element. The former means finding what products or services vie for the consumer's dollar and the latter means finding the locale where defendant and others effectively compete. This can range from one locality to the nation; and it was concededly national in \textit{Cass}.\textsuperscript{89} Rather the lower court erred in the product market determination by not recognizing that representing college newspapers in placing national advertising could be an appropriate submarket within a broader market category including other advertising media.

The Seventh Circuit's inquiry started, as it should have, with \textit{United States v. E.I. du Pont de Nemours & Co.},\textsuperscript{90} the "cellophane" case, where the Court propounded the "reasonable interchangeability" test defining the market in terms of practical market alternatives or substitutes. In other words, a determination was required as to what other product or service reasonably could be used in lieu of defendant's product or service. The test was refined in such monopoly cases as \textit{United States v. Grinnell Corp.},\textsuperscript{91} and \textit{International Boxing Club, Inc. v. United States},\textsuperscript{92} and such merger cases as \textit{Brown Shoe Co. v. United States}\textsuperscript{93} and \textit{United States v. The Connecticut National Bank}\textsuperscript{94} where the concept of distinct submarkets for antitrust purposes was recognized. The determination of submarkets is also a practical exercise, and in the words of \textit{Brown Shoe} quoted in \textit{Cass}, they "may be determined by examining such practical indicia as industry or


\textsuperscript{90} 351 U.S. 377 (1956). \textit{See generally} 1 \textit{HANDLER, supra note 1, at 228-33}; 16 \textit{VON KALINOWSKI, supra note 12, § 8.02[2][a].}

\textsuperscript{91} 384 U.S. 563 (1966). \textit{See generally} 2 \textit{HANDLER, supra note 1, at 1050-51}; 16 \textit{VON KALINOWSKI, supra note 12, § 8.02[2][a].}

\textsuperscript{92} 358 U.S. 242 (1959). \textit{See generally} 16 \textit{VON KALINOWSKI, supra note 12, § 8.02[2][a].}

\textsuperscript{93} 370 U.S. 294 (1962). Although the operational language of section 7 of the Clayton Act, 15 U.S.C. § 18 (1970) is "line of commerce" and section 2 is phrased in terms of a "part of commerce" the Court in \textit{Grinnell} concluded there was "no reason to differentiate" between the two. 384 U.S. at 573. \textit{See generally} 16; 16B \textit{VON KALINOWSKI, supra note 12, §§ 8.02[3], 18.02-.04.}

\textsuperscript{94} 418 U.S. 656 (1974).
public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors.\(^9\)

Submarket definitions often work to the disadvantage of defendants. If cellophane had been considered a submarket among "flexible wrapping materials", du Pont no doubt would have lost the case with its 75 percent market share. In *Grinnell* the Court rejected defendants' efforts to have protective services, other than the central station variety it controlled, included in the market definition. Although other services existed, for many customers only the central station type would suffice making it an appropriate submarket. *International Boxing* recognized that championship boxing contests were unique because of the public interest even among people who otherwise have no interest, or even a disinterest, in boxing and would not attend non-championship fights. However, on occasion the process works to the defendant's advantage. In *Connecticut National* the Court accepted the proposition that savings banks and commercial banks were fiercely competitive as to certain services, but concluded the businesses were sufficiently distinct to warrant separate treatment and that commercial banks were a distinct line of commerce.\(^8\)

The concept of submarkets in appropriate cases has also been recognized in Seventh Circuit decisions cited in *Cass*. In *L.G. Balfour v. FTC*\(^9\) the court reasoned that college students buying fraternity emblematic jewelry were apart from purchasers of other types of emblematic jewelry and their nature required the market be so defined. Particularly significant to the *Cass* court was the observation in *Balfour*, quoting from *United States v. Bethlehem Steel Corp.*,\(^8\) that the characteristics of buyers as well as sellers is important in the market definition process. Similarly, the Seventh Circuit in *Avnet, Inc. v. FTC*\(^9\) rejected a market including sales of used and rebuilt automotive parts priced substantially below comparable new items because there was no price interaction between the two lines. Sales to certain types of rebuilders also were excluded because their operations differed significantly from the typical buyer in the overall market.

95. 516 F.2d at 1094, quoting 370 U.S. at 325.
96. 418 U.S. at 660-66. The decision on the relevant product market was unanimous, but the Court split 5 to 4 on the issue of the relevant geographic market. *Id.* at 673.
98. 168 F. Supp. 576, 592 (S.D.N.Y. 1958). *Bethlehem* was decided before *Brown Shoe*. The court concluded that there was a broad iron and steel line of commerce with distinct submarkets for ten specific products. *See also* cases cited in 1975 Developments, *supra* note 12, at 65 n.10.
Applying the "teachings" of these cases, the Cass court reversed and remanded for the lower court to determine if the service of representing college newspapers in placing national advertising was a distinct submarket for purposes of section 2 even though college students are clearly exposed to national advertising in various media. Cass and NEAS were the only serious contenders in this business with NEAS being by far the largest, claiming to represent over 1000 college newspapers reaching about 85 percent of the 8,500,000-person college market. Most all of NEAS' agreements with the newspapers made it the exclusive representative which, needless to say, made it difficult for Cass to expand from a local operation representing college and high school papers in the Chicago area to a nationwide operation. Apparently NEAS had enjoyed this "monopolistic" position for a number of years, but this, in and of itself, could not establish that NEAS monopolized commerce in violation of section 2. The offense is not the mere existence of monopoly power in a relevant market but the existence of monopoly power coupled with an element of deliberateness in obtaining or maintaining that status. Monopoly power for section 2 purposes is most commonly defined as the power to raise prices and exclude competitors. Basically the issue on remand would be whether the

100. 516 F.2d at 1096. NEAS had 894 written contracts with college newspapers, making it their exclusive representative, about eight written non-exclusive contracts and about 203 oral non-exclusive understandings. NEAS was both boastful and modest; the Cass court noted it overestimated the total number of college students and hence appeared to reach about 87 percent of them. Id. at 1096 n.5.

101. See United States v. Grinnell Corp., 384 U.S. 563, 570-71 (1966); United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945) [hereinafter referred to as Alcoa], United States v. United Shoe Mach. Corp., 110 F. Supp. 295 (D. Mass. 1953). See generally 1955 Report, supra note 13, at 43, 44-46; 1975 DEVELOPMENTS, supra note 1, at 47-48, 55-56; 16 VON KALINOWSKI, supra note 12, §§ 8.01, .02(1), [4]. Judge Hand in Alcoa suggested that a company charged with monopolization might successfully defend on the ground that the monopoly power was innocently acquired, i.e. that it was "thrust upon" the defendant. 148 F.2d at 429. See 16A VON KALINOWSKI, supra note 12, § 9.03[1]. Although this is true in theory and in fact in many cases, it does not take a confirmed cynic to suspect that the possessor of such power over a long period of time is not completely innocent. In fact, Judge Wyzanski in Grinnell questioned the vitality of the defense and posited that dominance in a market established a rebuttable presumption that the defendant has monopolized. However, the Supreme Court did not consider this point since it was satisfied that Grinnell had violated section 2 on traditional grounds. 236 F. Supp. 244, 248 (D.R.I. 1964), aff'd in part and remanded, 384 U.S. 563, 576 n.7. (1966). See generally 1955 Report, supra note 13, at 56-60; 1975 DEVELOPMENTS, supra note 1, at 56-59; 16 VON KALINOWSKI, supra note 12, § 8.02[4]; 1 HANDLER, supra note 1, 230-31.

102. American Tobacco Co. v. United States, 328 U.S. 781, 811 (1946). See also United States v. E.I. du Pont de Nemours & Co., 351 U.S. 377, 389 (1956); United States v. Aluminum Co. of America, 148 F.2d 416, 427-28 (2d Cir. 1945). The concept was recognized as early as the 1911 decision in Standard Oil Co. v. United States, 221 U.S. 1, 58 (1911). See generally 1955 REPORT, supra note 13, at 49-50; 1975 DEVELOPMENTS, supra note 1, at 53-55; 16 VON KALINOWSKI, supra note 12, § 8.02[3]. The most common determinant of monopoly power is the market share of the defendant in the relevant market. In Alcoa, Judge Hand opined that a 90 percent share sufficed, 60 or 64 percent was questionable and 33 percent was insufficient. 148 F.2d at 424. The Court
exclusive contracts precluding the newspapers from accepting advertising from any other representative, but not from the advertiser or its agency directly, supplied the element of deliberateness. There is little doubt but that NEAS' 85 percent share of the "college student" market would satisfy the monopoly or market power element of the offense as long as the district court concluded on remand, as is almost certain to be the case, that this is an appropriate submarket.

On the relevant market issue the trial court had found the college students constituted one third of the population in the 18 to 24 age bracket comprising a distinct market for goods and services apart from their compatriots who do not attend college. It also recognized that college newspapers constituted a distinct communications medium because a great percentage of college students read them even though local commercial papers may reach as many. However, it was unwilling to take the next logical step and conclude that college newspapers were a distinct submarket for section 2. The problem was that the lower court viewed the case as involving only the "single service" of publicizing a product or service in the college market and the newspapers have considerable competition in this respect. Apparently the court misunderstood the significance of the comment in *Balfour* on "buyers" and overemphasized the attitude of national advertisers who acknowledge that college newspapers have such competition. Since there was no showing that NEAS had significant power in this market there was no basis for action.

The problem with this approach was that it failed to recognize that Cass and NEAS act primarily as middlemen furnishing services to the sellers, the college newspapers, as well as the buyers, the national advertisers. This is true even though the advertisers are the ultimate purchasers in buying advertising space. In fact, without enterprises such as Cass or NEAS it would not be economically feasible for either the newspapers or the advertis-

in *du Pont* assumed that a 75 percent market share would have been sufficient to satisfy this element. 351 U.S. at 391. Judge Wyzanski's *Grinnell* monopolization presumption would come into play at an 85 percent market share. 236 F. Supp. 244, 257 (D.R.I. 1964), *aff'd in part and remanded*, 384 U.S. 563 (1966). A 70 percent market share would appear to be about the minimum as a general rule. Hiland Dairy, Inc. v. Kroger Co., 402 F.2d 968, 974 (8th Cir. 1968), *cert. denied*, 395 U.S. 961 (1969). However, smaller shares will or might be sufficient if other factors, such as the marginal nature of the remaining competitors, are present, see 16 von Kalinoski, *supra* note 12, § 8.02[3][c], or where there had been actual exercise of the power. See American Tobacco Co. v. United States, *supra*; 16 von Kalinoski, *supra* note 12, § 8.02[3][a].


104. 516 F.2d at 1097. *See* 374 F. Supp. at 801-02.


ers to seek out each other on a one-to-one basis, and the newspapers would be in difficult straits without representatives who could approach advertisers with the opportunity to place ads in a significant number of journals. Viewed from the vantage point of the newspapers, a representative could have a "stranglehold" and such appeared to be the case with NEAS. Thus without disturbing the findings on the relevant market as viewed from the position of the advertisers, the Seventh Circuit could conclude that the trial court erred as a matter of law in failing to consider the newspapers viewpoint. If the newspapers were viewed as buyers of NEAS' services, then the Balfour comment would be satisfied. The conclusion that the newspapers bought NEAS' services was buttressed by the fact that the newspapers paid NEAS commissions.

Although du Pont and Brown Shoe require that the products or services reasonably be interchangeable, this did not justify the conclusion that the significant alternatives to college newspapers available to national advertisers justified a broad product market definition. Rather the Seventh Circuit applied the Brown Shoe tests or indicia and concluded, rightly so, that the relevant submarket was the market for representing college newspapers in the placement of national advertising. One indicium is whether the submarket has "specialized vendors" and this was clearly so since representatives of commercial newspapers did not represent college papers and NEAS did not represent commercial papers. Further, the newspapers were distinct customers since only those national advertisers selling goods or services appealing to the 18-24 year old college student would be interested in the services of NEAS or Cass.

Another Brown Shoe indicium that was satisfied was industry or public recognition of a submarket as a distinct entity and here NEAS might have been "hoist by its own petard" since it urged in its business operations that college newspapers are the most reliable and effective medium to reach students. In fact NEAS clearly considered the newspapers as an entity since its exclusive contracts were with them and not the advertisers. This was significant since the views of the dominant entity in a market are always

107. 516 F.2d at 1097-98. See 374 F. Supp. at 797-98. The businesses of Cass and NEAS had two aspects. First, they would seek authority to represent the newspapers to national advertisers and once authorized they would become advertising space sales representatives for the college papers. The representatives then bill the advertisers an amount due the various college newspapers in which advertising has been placed. They deduct their commissions before turning the amount over to the papers. Since advertisers want the most exposure for their advertising dollars the newspaper representative with the most client newspapers would receive the greatest amount of business.

108. 516 F.2d at 1099. The Seventh Circuit referred to the "esteemed district judge" and one might wonder if "esteemed" or "learned" trial judges are ever affirmed.

109. 516 F.2d at 1098. See 374 F. Supp. at 797-98.

110. 516 F.2d at 1098-1100.

important in defining the product market for section 2 purposes. Furthermore the evidence indicated that the advertisers themselves regarded the representation of college newspapers as a distinct business. Another area where NEAS perhaps did itself in was when it raised its commission charges and told the newspapers that they in turn could raise their prices to offset the increase without fear of loss of revenue. This demonstrated an insensitivity to price changes that further supported the conclusion that college newspapers were a distinct market.

Since the Seventh Circuit rejected the district court’s view that the sole buyers of the services were the advertisers, it distinguished *Kansas City Star Co. v. United States* and *Huron Valley Publishing Co. v. Booth Newspapers, Inc.* on the ground that they involved monopolies of advertising media in local markets rather than a monopoly in a service market, such as the service of sales representatives for college newspapers. The court appears to be correct on this point and in fact its entire treatment of *Cass* seems an eminently sensible and correct application of the teaching of *Brown Shoe* and other cases recognizing that it is appropriate to carve out a portion of a large market that has distinct attributes in order to test the degree of market power possessed by a defendant. In this case the college newspaper representative business with only two contenders seems particularly appropriate.

113. 516 F.2d at 1100. See 374 F. Supp. at 802. See generally 16 Von Kalinowski, supra note 12, § 8.02[2].
116. Although the point was raised by Cass, the Seventh Circuit declined to consider whether the exclusive agreements and alleged anticompetitive activities were independent violations of section 1 because the issue would again be before the trial court on remand. 516 F.2d at 1100.