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The 1976 term was not one of spectacular activity in the antitrust field. Eight cases were decided. Four of these raise issues worthy of consideration. The issues raised by the cases go beyond the analytical approach to individual cases. In fact, the analysis and approach to the cases is reflective of a broader problem facing attorneys, litigants and judges in the antitrust field.

This article will examine the most important decisions from two perspectives. First, the reasoning of the court in each case will be presented and discussed. Then the more expansive problems suggested by the decisions will be probed. The critical approach taken here is intended to focus the thinking of those interested in antitrust law on the broader implications and ramifications of many of the current developments in the area, particularly in civil cases brought by private parties.

**PRIVATE ANTITRUST DAMAGE CLAIMS**

*Hollob & Co. v. Produce Terminal Cold Storage Co.*

Two cases illustrate special problems generated by the rising tide of private damage litigation under the antitrust laws. The opinion in *Hollob & Co. v. Produce Terminal Cold Storage Co.* resulted in a justifiable conclusion. The thoughtless analysis of issues, however, created unnecessary and undesirable strains on the legal framework of the private antitrust damage claim.

Hollob, an established distributor of many kinds of food and grocery
products, made de novo entry into the business of distributing frozen foods. Produce Terminal was an established and leading competitor in this business but was not apparently otherwise engaged in food distribution.\(^3\) When Holleb failed to achieve its expected sales and profit results, it sued Produce Terminal, attributing the failure to unfair competitive conduct by Produce Terminal. Central to Holleb's position was the claim that Produce Terminal had engaged in selective price cutting. The price cutting was achieved by selling frozen foods to similar buyers at different prices and changing prices charged to buyers depending on whether Holleb was competing for the business.\(^4\) In addition, Holleb claimed that as a condition of doing business with certain producers, Produce Terminal was requiring them to lease space in Produce Terminal's cold storage warehouse.

Holleb claimed that these facts revealed the violation of several provisions of the Robinson-Patman Act,\(^5\) monopolization or attempted monopolization in violation of the Sherman Act\(^6\) and tying.\(^7\) The trial judge dismissed the tying claim before trial. When the jury was unable to reach a verdict on either the Robinson-Patman or the monopolization charges, the defendant's motion to dismiss was granted.\(^8\) The court of appeals affirmed the trial court on the tying and monopolization issues, but reversed part of the decision on the Robinson-Patman claims and remanded for a new trial. Because the major difficulty with the decision is the reasoning of the court with respect to the tying and monopolization issues, a detailed examination of those aspects of the case is required.\(^9\)

The factual basis of the tying claim under the Sherman Act\(^10\) was that

3. Beatrice Foods owns Produce Terminal and in other corporate guises engages in both production and distribution of a great number of grocery products. There is no suggestion in this case, however, that Produce Terminal operated as anything but a separate and independent entity.

4. Produce Terminal had several price books which set forth different charges for similar quantities of purchases; it also had some price categories that were not set forth in writing. Holleb argued that all these price categories were used without cost justification to undermine and defeat competition. 532 F.2d at 34.


9. One aspect of damages might also be noted. Holleb used an economist to project what its sales would have been but for Produce Terminal's conduct. It also offered evidence of out of pocket losses that it incurred. There is an obvious problem for a new entrant seeking to show what would have happened where it has in fact no prior record to which comparison can be made. Once the fact of injury is established, generally the plaintiff has great latitude in offering proof from which a jury can infer damages. Holleb's imaginative use of projections combined with more traditional accounting data seems a more than reasonable effort to provide that evidence.

10. Holleb had charged that the alleged tie-in was a violation of both section 1 of the Sherman Act, 15 U.S.C. § 1 (1970), and section 3 of the Clayton Act, 15 U.S.C. § 14 (1970). The second contention was properly dismissed since the Clayton Act requires that both tying and tied
Produce Terminal had refused to buy frozen foods from a producer unless the producer also agreed to lease cold storage space from Produce Terminal. Both the trial court and the court of appeals recognized that this was not a traditional tie-in agreement, because Produce Terminal was not conditioning the sale of one good or service on the buyer’s taking a second good or service, but restated the facts so as to fit them into the classical tying mold. The court held that, as structured, the tying was not unlawful because the plaintiff had failed to prove the requisite elements of the offense. Specifically, the court held that there was no evidence of “market power over the tying product.”

In so doing, the court assumed, as apparently the state of the record required, that plaintiff had shown enough to mandate a jury decision on the factual issue of whether the defendant had in fact conditioned its purchases on reciprocal buying agreements. The court was also asserting that even if the jury found consistent, and therefore coercive, insistence on tying or reciprocity, it could not infer the requisite market power to make the use of leverage unlawful.

This holding has a threefold impact. It greatly narrows the scope of the prohibition on tying. It contradicts the present holdings of the United States Supreme Court on this issue. Most significantly, it flies in the face of economic logic which would suggest that absent some other explanation the use of tying or leverage can only make sense if one assumes market power on the part of the party using it. The difficulty with the opinion is further compounded by the fact that the court did not recognize that what plaintiff described was coercive reciprocity, conduct no more favored in antitrust law than tying. Reciprocity, in which a buyer uses its market power to force the elements be commodities and not services. Cf. Times-Picayune Publ. Co. v. United States, 345 U.S. 594 (1953) (newspaper’s requirement that advertisers purchase space only according to their unit plan held not violative of the Sherman Act).

11. The court treated the wholesaler as selling a service of reselling frozen foods so that the purchase of the service could be said to be conditioned on the purchase of another service, viz., the cold storage service. 532 F.2d at 32. This easy transformation of the transaction illustrates forcefully the fact that tying and reciprocity are manifestations of a basically identical economic phenomenon: leverage.

12. Id.
13. Id.

14. Many recent cases have turned on the question of when purchases of multiple products can be said to involve coercion where there is no overt requirement of the joint purchase. Ungar v. Dunkin’ Donuts, 531 F.2d 1211 (3rd Cir. 1976); Belliston v. Texaco, Inc., 455 F.2d 175 (10th Cir. 1972), cert. denied, 408 U.S. 928 (1972). In the Holleb case, plaintiff’s claim was that the purchase of storage space was a uniform condition on which Produce Terminal insisted. Such insistence is the real import of the coercion criterion. As so often happens, colorful language obscured the real issue: was the sale of one product conditioned on the purchase of another. If there was such a conditioning, that is economic coercion.

15. See discussion of coercive reciprocity following note 16 infra.

16. Reciprocity has been condemned in dicta, e.g., FTC v. Consolidated Foods Corp., 380 U.S. 592 (1965), and forbidden by consent decree, e.g., United States v. General Tire, 1970 Trade Cas. ¶ 73,303 (N.D. Ohio 1970) (consent decree); but few litigated cases have dealt with its lawfulness, United States v. General Dynamics Corp., 258 F. Supp. 36 (S.D.N.Y. 1966). The
seller to buy something in return, and tying, in which the seller uses its market power with respect to a product to sell something else, are but different examples of the use of economic leverage and ought to be treated consistently. The three implications of the holding in Holleb will be further analyzed below.

The narrowing effect arises from the requirement implied by the court that plaintiff must prove something more about the nature of the defendant than that it had the kind of market position which allowed it to use leverage involving the requisite amount of commerce. The imposition of such a requirement creates an opportunity for courts to dismiss tying cases under the theory that the plaintiff has not proved the undefined "something extra" about the defendant’s power to get the case to the jury. This extra something is not necessary to the proof of the actual use of leverage. That must be shown in any event. Therefore, no implicitly or explicitly determinable definition of what must be proved has been outlined to guide or limit the courts. For this reason, this added requirement of proof of market power beyond that needed to achieve the tie-in can only introduce a hopelessly random variable into this class of litigation.

If courts wish to reject tying or other types of leverage cases, there are good arguments for so doing. But the reason for the limitation on liability and any restrictive rule openly based on that reason needs to be explicit, so that its implications are both known and understandable. No such principled limitation on liability for use of leverage is indicated in Holleb.

The requirement of proof of additional market power is also contrary to the thrust of Supreme Court decisions culminating in United States v. Fortner Enterprises, Inc. These decisions stripped away unnecessary requirements, reducing the question in tying cases to whether there was sufficient market power to make the observed tie-in an exercise of leverage. As analyzed by Judge Sobeloff, the result is that a plaintiff in a Sherman Act case can rely on proof of a tie-in to create a factual context from which the fact finder may infer leverage. Such leverage consists of sufficient market power to enforce a


17. It might be observed that leverage is involved not only in tying and reciprocity but also in many types of requirements contracts, and in full line forcing, and exclusive dealing contracts. For reasons not necessarily logical, the courts do not treat all uses of leverage similarly. Note, Franchises, Requirements, Contracts and Tie-ins, 74 YALE L.J. 691 (1965).

18. See, e.g., Bowman, Tying Arrangements and the Leverage Problem, 67 YALE L.J. 19 (1957) [hereinafter cited as Bowman].


tie-in and hence sufficient power to interfere with the freedom of choice of customers and distort market conditions in the market of the tied product. It is then a matter of defense to plead and offer proof on the alternative matters which might explain the tie-in as either not a product of market power (and therefore not a use or abuse of leverage) or as otherwise justified under the narrow range of defenses recognized in this class of cases. The Supreme Court has now reconsidered *Fortner* and reversed the outcome because the evidence after a full trial revealed only a price cutting, promotional, tie-in not involving any demonstrable market power. The unanimous opinion reiterated the proposition that the prohibition on tying covers all cases in which leverage is used "to require purchasers to accept burdensome terms that could not be exacted in a completely competitive market."

Finally, and most importantly, the economic logic of any situation in which coercive leverage occurs compels the conclusion that market power sufficient to interfere with the independence of other elements of the economy exists. The only conditions under which it would be possible and desirable for a business to insist that either customers or suppliers buy or sell something besides the primary object of the deal is where that business has sufficient leverage over those with whom it is dealing to make it profitable to behave in this way. Such conditions can exist only if the customer or supplier believes that failure to agree to such a proposal will mean that something undesirable will happen. That in turn implies that the firm employing leverage has market power. Thus, under the *Holleb* situation, if the wholesaling of frozen foods were competitive, there would be no market power. The producer of frozen foods would have by definition equally attractive alternative methods of getting its product to retailers which would not employ leverage. Therefore, the producer would not buy something it did not want or need in order to get Produce Terminal to handle its goods. Thus if the market were competitive, no buyer would have the ability to insist on the seller making reciprocal

21. *Id.* at 68 n.11.


24. *Id.* at 4174. Although the Court held that *Fortner* had not met the burden of proof on the issue of economic power, this result is consistent with the analysis presented in this discussion. This is because in context it is clear that the Court is speaking of the ultimate persuasion burden and not of either the burden of pleading alternative non-leverage explanations for admitted tying or the burden of introducing some evidence to support such pleadings.

purchases. A finding that the defendant was engaged in tying, unless explained in other terms, leads to only one possible inference: that the defendant had market power. In *Holleb* it is not clear that Produce Terminal denied using leverage on its suppliers.\(^{26}\) If there was no such denial, the issue of unlawful use of leverage ought to have been foreclosed to the defendant absent further pleading and proof from Produce Terminal justifying, excusing or rebutting the prima facie inference.

The foregoing conclusion does not mean, however, that the court of appeals' ultimate conclusion that Holleb had no case under its tying theory was wrong. Holleb was competing in the wholesaling of frozen foods, not the sale of cold storage space. It competed with Produce Terminal in the field in which Produce Terminal was said to have power. When Produce Terminal employed that power to capture a position in the cold storage market, that act in and of itself, even if it was unlawful, did not and could not cause harm to Holleb.

The fatal weakness in Holleb's tying case was causation. Because Holleb was not a competitor of Produce Terminal in selling cold storage space, the use of Produce Terminal's power to destroy competition in that market could have no relationship to Holleb's injury. In its brief and reply brief, Holleb tried to show how the use of leverage had resulted in injury to it.\(^{27}\) The gist of the argument was that the tying worked as an indirect form of price-cutting for the benefit of Produce Terminal.\(^{28}\) However, even a direct price-cut to Produce Terminal would not mean that Holleb suffered an injury. Only by purporting to trace the proceeds of the gain to Produce Terminal, showing how they subsidized Produce Terminal's competition with Holleb in the business of wholesaling frozen food, could Holleb make out an injury. But that injury, if any, would come from the defendant's misuse of its position as a wholesaler regardless of how it financed this conduct. Thus, if Produce Terminal had argued that although it did engage in discriminatory pricing to its customers, it was able to do so because of a large gift to it and so it had not violated the law, the argument would be equally irrelevant since it is the discriminatory pricing that is the wrong. Conversely, if Holleb wished to show an injury from this course of conduct, it could not focus on the use of leverage as such since that is only a mechanism. It would have to focus on the totality of the conduct, demonstrating that the conduct involved an indirect

\(^{26}\) Brief for Appellee at 27-29, *Holleb v. Produce Terminal Cold Storage Co.*, 532 F.2d 29 (7th Cir. 1976).


\(^{28}\) Given the Robinson-Patman prohibitions on overt price discrimination among similar buyers, 15 U.S.C. § 13(a) (1970), a seller wishing to recognize the power and position of one buyer might well be induced to employ reciprocity as a means of acknowledging that power and indirectly adjusting its prices accordingly. *Cf.* Bowman, note 18 *supra*. 
but nevertheless discriminatory price-cutting. Because, under this approach Holleb’s concern would be not how Produce Terminal got a price-cut but whether Holleb got an equal one, the tying ceases to be relevant. By focusing on the "per se" violation, rather than on how the alleged conduct might have caused injury to plaintiff, Holleb failed to prove a case in which there was a link between the wrongful act shown and the harmful result.

Although causation is of course a well recognized problem in tort litigation, it is now emerging as an important issue in private antitrust damage cases. A significant reason for the delayed recognition of the issue is the historical dominance of government litigation in this area. Because the government as a public prosecutor need not show any actual effects in order to prevail in most antitrust cases, it need not prove damages. Proof of a causal connection between the wrong and the plaintiff’s injury is essential to the private damage litigant. Only if the wrongful cause is in some sense the source of the injury can it give rise to damages.

Holleb failed to establish a cause-and-effect relationship between the wrongful use of leverage which it sought to prove and the resultant injury. The

29. Holleb did also charge that this conduct violated the Robinson-Patman Act, 15 U.S.C. § 13(a) (1970). On the issue of whether the claimed discrimination was knowingly induced by Produce Terminal and/or unavailable to Holleb, the court held that neither claim was proven. This is slightly troublesome, since it may imply that Holleb, too, should have engaged in coercive reciprocity; but if it is read only to mean that Holleb failed to show that comparable, lawful discounts were unavailable to it, then the result seems reasonable.

30. A rough analogy is found in ordinary negligence cases in which defendant has violated a statute, but the statutory violation is not causally related to the injury to plaintiff. A holding of negligence per se still does not create liability since the causal link is missing. As Judge Cardozo said in a leading case: "We must be on our guard... against confusing the question of negligence with that of the causal connection between the negligence and the injury." Martin v. Herzog, 228 N.Y. 164, 170, 126 N.E. 814, 816 (1920).

31. "It is elementary policy that a defendant should not be held liable for the harm the plaintiff complains of unless the plaintiff can at least show that the defendant in fact caused the harm." C. GREGORY & H. KALVEN, CASES AND MATERIALS ON TORTS 5 (2d ed. 1969).


Seventh Circuit's failure to identify this problem led it into rationalizing its decision in a way that confuses the problem to be dealt with. In the future the circuit will hopefully reinterpret this opinion to limit it to the causation issue which it did indeed suggest.

Plaintiff's theory and proof created a problem with the monopolization claim also. Holleb, without support, asserted that Produce Terminal was the only non-chain store-related wholesaler of frozen foods in Chicago prior to Holleb's entry. Evidence of the use of leverage if proven would have been persuasive evidence that Produce Terminal had some market power. Whether that would have amounted to monopoly power, which is clearly more than just some market power, is not at all certain. To let the evidence of the use of leverage support a conclusion that monopoly power existed would push the jury's right to draw inferences to the extreme.

The real basis of Holleb's monopolization claim was not monopoly in the abstract but abuse of power in reality. Its argument was that Produce Terminal had engaged in predatory pricing in an effort to drive Holleb out of business. The specific pricing practices complained of involved purported violations of the Robinson-Patman Act. Whatever may be said about the merits of predatory pricing, Congress has limited the ways in which it may be used and has specifically forbidden discrimination in prices among similar buyers. This was the heart of Holleb's case and the element on which there

35. The trial judge did rest his decision in part on this ground, 1975-2 Trade Cas. ¶ 60,436 (N.D. Ill. 1975) at 66,921, and defendant advanced it in support of its position. Brief for Appellee at 28-29, Holleb v. Produce Terminal Cold Storage Co., 532 F.2d 29 (7th Cir. 1976). But in neither case was the argument laid out in any but the most cursory and conclusive terms.

36. "The evil of a tying agreement is the restraint of competition in the tied product." 532 F.2d at 32. See also Southern Concrete Co. v. United States Steel Corp., 535 F.2d 313 (5th Cir. 1976), where a situation similar to Holleb was presented in which the court suggested lack of causation as the basis for decision but then put the decision on other less tenable grounds.


38. The definition of unlawful or unreasonable monopoly is one of the most difficult issues in antitrust law. See Turner, Antitrust Policy and the Cellophane Case, 70 Harv. L. Rev. 281 (1956).

39. The topic of predatory pricing has recently received extensive but inconclusive treatment by several scholars. Without resolving the question, the central point of the critics of a broad definition of predatory pricing is that vigorous price cutting by a monopolist which has the effect of eliminating or blunting the competition of new entrants is not necessarily inefficient or anticompetitive in the long run and so ought not always to be forbidden. Whether or not this case would fit the rigorous criteria of the critics is not relevant since the specific pricing practices charged involved alleged violations of the provisions of the Robinson-Patman Act. Areeda & Turner, Predatory Pricing and Related Practices Under Section 2 of the Sherman Act, 88 Harv. L. Rev. 697 (1975) [hereinafter cited as Areeda & Turner]; Areeda & Turner, Scherer on Predatory Pricing: A Reply, 89 Harv. L. Rev. 891 (1976); Scherer; Predatory Pricing and the Sherman Act: A Comment, 89 Harv. L. Rev. 869 (1976); Scherer, Some Last Words On Predatory Pricing, 89 Harv. L. Rev. 901 (1976).


41. See note 39 supra.

42. The Areeda-Turner position on predatory pricing, Areeda & Turner, note 39 supra, is in
was substantial proof. Having won the right to jury consideration on that issue, nothing would be added by permitting consideration of a theory based on monopolization or attempted monopolization by the use of predatory pricing. No damage elements were based on a broader formulation of the alleged wrongful conduct. Indeed, Holleb seems not to have charged that Produce Terminal used below cost pricing or that the lowest prices charged were in any sense unfair if charged across the board.

The court need not have reached the monopolization issue at all. Even had the price discrimination issue failed, the monopolization case would have been weak since the evidence was the same in both instances. It is regrettable that the court did not recognize that the claim was redundant and therefore not worthy of consideration.

State of Illinois v. Ampress Brick Co., Inc.

In contrast to the poorly reasoned Holleb case, the decision in State of Illinois v. Ampress Brick Co., Inc. involved a brief, thoughtful but not extensively elaborate analysis of the problem of separating causation from proximate causation in antitrust matters. Illinois, as a final consumer of concrete blocks used in state-financed buildings, sued a group of blockmakers who had allegedly conspired to fix prices. The district court dismissed the claim on the ground that Illinois was too "remote" from the violation to have standing to sue.

As first-year law students are taught in most torts classes, but many practicing lawyers and judges seem to forget, there is a great difference between causation and proximate causation. Causation is a factual proposition while proximate causation is strictly a policy issue legal in character. To be sure, questions of whether a cause is "proximate" or "remote" do not arise until cause in fact is shown. Moreover, proximate causation itself is but a subcategory within the broader concept of duty and is useful in delimiting residual classes to which an actor does not owe a duty which would otherwise appear to be owed.

In private antitrust damage litigation, the issue of duty is most frequently fact strengthened by this rule which assures maximum consumer access to any price cutting by a monopolist.

44. 67 F.R.D. 461, 468 (N.D. Ill. 1975). It is questionable whether the concept of standing is the proper vehicle for courts to use to restrict the right of plaintiffs to seek damages in antitrust cases because it requires that standing have a special meaning unique to antitrust to encompass the proximate cause issues implicit in this effort to limit the rights of victims of antitrust violations. Malamud v. Sinclair Oil Corp., 521 F.2d 1142 (6th Cir. 1975).
45. Thus, it is only because it was incontestable that the Long Island Railroad in fact caused Mrs. Palsgraf to be injured that Judges Cardozo and Andrews could engage in their great debate about the scope of duty. Palsgraf v. Long Island R.R. Co., 248 N.Y. 339, 162 N.E. 99 (1928).
put in terms of standing, that is, whether this plaintiff has the right (standing) to claim damages. This in turn raises the question of whether the defendant owed a class of victims, actually injured, the duty not to injure the business or property of any person. There is thus no easily discernible statutory limit to the duty. As a result, courts have tried to use the "remoteness" of the victim as a means of denying that any duty was owed, thereby denying standing. In some cases this is explained in terms of a direct and indirect test. It is difficult to understand how courts can appear to forget several hundred years of legal history which ultimately rejected the direct-indirect test as a viable guide to separate classes of victims. There is no reason to think that that test will work any better in antitrust cases than it did in tort cases. In many instances, as in Ampress Brick, it can be argued that the intent of the wrongdoers was to impose costs on the ultimate buyers whose identity they knew or could easily learn. To employ a direct-indirect test is thus to confer on certain kinds of price-fixers a license to exploit.

The target area test, although it does not have the weaknesses of the direct-indirect test, is not entirely consistent with generally expressed ideas of the scope of liability in intentional tort cases. Nor does it provide a truly functional guide to courts wishing to draw the outer boundary of a defendant's liability. In theory, liability for intentional tort is broad, including all actual victims of a wrong. But under the target area test, an unforeseeable victim who was actually injured would be denied recovery. The target area test viewed in a broader context is a method of limiting the scope of liability to those victims who are either intended as such or who are reasonably foreseeable. Once reasonable foreseeability is introduced as a criterion, the

48. Two of the most important cases in this line are Scott v. Shepard, 3 Wils. 403, 95 Eng. Rep. 1124 (Common Pleas 1773), and Brown v. Kendall, 6 Cash. 292 (Mass. 1850). Shepard demonstrated that no logically consistent test existed for determining when the consequences of an act become indirect. Brown sought to relegate the forms of action based on the direct/indirect distinction to their place as captions and nothing more.
49. See, e.g., Jeffrey v. Southwestern Bell, 518 F.2d 1129 (5th Cir. 1975); Tugboat, Inc. v. Mobile Towing Co., 534 F. 2d 1172 (5th Cir. 1976); In re Multidistrict Vehicle Air Pollution M.D.L. No. 31, 481 F.2d 122 (9th Cir. 1973). See also Note, Standing to Sue Under the Clayton Act, note 47 supra.
52. A contrary result would be reached in general in intentional tort law. Id. Explanatory Notes § 32, comment at 50. See also Brown v. Martinez, 68 N.M. 271, 361 P.2d 152 (1961).
53. The use of a reasonable foreseeability test would prevent courts from introducing, via a
test is basically indistinguishable from Judge Cardozo's zone of risk standard in Palsgraf v. Long Island Railroad Co.\textsuperscript{54} This approach has not proven itself useful as a guide to actual decision since the determination of what is reasonably foreseeable\textsuperscript{55} is, like the distinction between direct and indirect, ultimately a matter on which there is no hard and fast answer. Policy considerations are used at least implicitly to resolve the close cases.\textsuperscript{56} The difficulties courts have had with reducing proximate cause to any articulated standard should serve as a warning to antitrust litigants and courts that no simple test will provide a brightly illuminated line of demarcation.\textsuperscript{57}

In Ampress Brick the court of appeals rejected the trial judge's effort to treat this suit as only maintainable if there were "direct" injury. It divided the issue into the problems of causation in fact and proximate cause. As to causation in fact, whether the buyers of buildings had allegedly paid more for their buildings as a result of the alleged conspiracy, the only question was whether those allegations could be supported. The allegations included the claim that the state had specified the materials to be used so that all bidders had to use the price-fixed material and would presumably pass on any increased costs. The court distinguished several cases which had denied standing to certain remote buyers as involving situations in which the buyers' allegations did not establish the necessary causal connection between the price increase of a component and the final price of the goods sold.

Having found that the causal connection was established on the pleadings, the only other question was whether notions of fairness, equity, or other considerations should require that this intentional act, whose foreseeable effect was to inflict economic injury on plaintiff, should be treated as the proximate cause of any injury actually inflicted. The policy of the antitrust laws is to punish severely the corporate and individual defendants who violate


\textsuperscript{55} See Pease v. Sinclair Ref. Co., 104 F.2d 183 (2d Cir. 1939) (foreseeability of risk of injury resulting from replacing kerosene in display bottle with water); Chase v. Washington Water Power Co., 62 Idaho 298, 111 P.2d 872 (1941) (foreseeability of two birds touching wings while also touching a charged wire and grounding wire so that electric charge would be conveyed to fence and start fire).


\textsuperscript{57} It should be noted that the issue in tort cases is often further complicated by the fact that even there the courts frequently confuse cause in fact and proximate cause. There appears to be a similar confusion in antitrust cases between standing and cause in fact. See, e.g., Southern Concrete Co. v. United States Steel Corp., 535 F.2d 313 (5th Cir. 1976), where a firm which was not a competitor in the sale of the tied product was denied "standing" because it was outside the "target" area. In reality this case, like Holleb, discussed at notes 2-42 supra, involved a problem of causation.
their terms. There is no general reason to limit to some very small class of victims liability for economic harm actually done. Such a result would fly in the face of the general purpose of the law. The court of appeals, having noted that this class of victims was easily "foreseeable," had no difficulty finding that there was no proximate cause problem.

The opinions in Holleb and Ampress Brick are strikingly different in the quality of their analysis but quite similar in illustrating the importance of basic tort notions to understanding and evaluating private damage actions under the antitrust laws.

SUBSTANTIVE LAW PROBLEMS

If there are problems with the non-substantive aspects of antitrust law as it becomes increasingly a topic of private litigation, there remain problems with the definition, articulation and application of the substantive rules. Two cases illustrate aspects of this problem.

_Lektro-Vend Corp. v. Vendo Co._

The litigation which culminated in the Seventh Circuit decision of _Lektro-Vend Corp. v. Vendo Co._ provides an illuminating example of several problems which may arise frequently in civil antitrust litigation. The factual context and history of the case are both important to an understanding of the significance of the federal decision and will therefore be set out here.

**Background**

In 1959 Stoner Manufacturing Company was purchased by Vendo. Two

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58. The broad reach of a treble damage action under the Sherman Act was stressed in Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 236, 68 S. Ct. 996, 1006, 92 L. Ed. 1328, where the Supreme Court noted that the Sherman Act, "does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." No subsequent decision of that Court has confined the treble damage remedy to direct consumers. The sweeping language of the statute and the policy encouraging private enforcement of the antitrust laws persuade us that if plaintiffs can prove a violation which resulted in an injury to them, they ought to recover.

536 F.2d at 1165.

59. To the extent that the district court held that these plaintiffs, as opposed to ultimate consumers in general, lack standing, we disagree. The plaintiffs here have alleged an injury in fact and are within the target area of the Sherman and Clayton Acts. They have shown that they were within the area of the economy which [defendants] reasonably could have or did foresee would be endangered by the breakdown of competitive conditions.

536 F.2d at 1167.

A most useful discussion of standing and its role in limiting litigation as well as a coherent rejection of both the target area and direct injury tests as tests of standing may be found in Malamud v. Sinclair Oil Corp., 521 F.2d 1142 (6th Cir. 1975).

60. 545 F.2d 1050 (7th Cir. 1976).
primary purposes were to be served by the acquisition: the expansion of Vendo's product line and the elimination of Stoner and his company as a potential competitor. The terms of the sale agreement included a provision giving Stoner substantial stock interest in the company and making him an officer and director of Vendo. A five-year employment contract was entered into between Vendo and Mr. Stoner. Both the sale agreement and the employment contract contained covenants not to compete on a worldwide scale effectively for ten years. As the employment relationship developed it became clear that Mr. Stoner, who had believed he would have an active role in Vendo's management, was to be treated as a figurehead. As the district court concluded, "Vendo . . . admittedly was thus only paying Mr. Stoner not to compete rather than employing him for performance of actual services."

During 1960 Stoner began to finance the research and development of a new type of vending machine which had been previously undertaken by former Stoner employees. The inventors eventually decided to manufacture and market the machine, Lektro-Vend, on their own and requested Mr. Stoner’s assistance. In late 1962 Vendo refused Mr. Stoner’s request for a release from his employment contract to invest in Lektro-Vend. Vendo, however, requested that Stoner inquire of the inventors whether they had an interest in selling the new machine to Vendo. Vendo, despite Stoner’s opinion that it was a mistake, concluded that the investment in the machine was not worthwhile. Lektro-Vend Corp. continued to receive assistance from Stoner. His activity increased until, in March of 1965, after his employment contract with Vendo had ended, Stoner made public his backing of Lektro-Vend.

At this point in the development of the conflict, Vendo filed suit against

62. Prior to 1959 Vendo had manufactured beverage and ice cream vending machines. Stoner Manufacturing was a nationwide producer of candy vending machines. The acquisition of Stoner provided Vendo with the new product line. Id. The court also noted that Federal Trade Commission approval was required for the purchase. The approval was apparently obtained by misrepresentations to the Commission that the two companies were not actual or potential competitors. Id. at n.3.
63. 403 F. Supp. at 530.
65. 403 F. Supp. at 530. "The . . . contract provided that Stoner '[s]hould regulate his own hours of employment and shall determine the amount of time and effort he shall devote . . . ' to Vendo." 545 F.2d at 1053.
66. The contract terminated on June 1, 1964. Mr. Stoner remained on Vendo's board until the spring of 1965. Id. at 531.
67. This public statement consisted of a letter written by Mr. Stoner to fifty vending machine operators announcing his backing of Lektro-Vend. The letter was written in response to rumors circulated by Vendo salesmen that Lektro-Vend was about to go out of business. Id. Part of the letter is quoted in the opinion of the state appellate court, 105 Ill. App. 2d at 276, 245 N.E. 2d at 271.
Stoner in state court. The action was based on alleged violations of the sale and employment covenants against competition. The trial court granted damages and injunctive relief. On appeal the Illinois appellate court found that the non-competition covenants were valid but remanded the case for a determination of the extent of damages based on the breach of the covenants. On appeal after the remand trial, the appellate court again remanded for determination of damages as to a joint judgment against Stoner and Stoner Investments but affirmed the judgment against Stoner individually. An appeal to the Illinois Supreme Court followed.

The Illinois Supreme Court reinstated the trial court judgment, predicating liability on a corporate opportunity theory, not previously considered by any of the courts. The United States Supreme Court denied certiorari.

Stoner, Stoner Investments and Lektro-Vend then sought an injunction in the federal district court to prevent Vendo from taking further action to execute the state judgment until the federal case was concluded. The injunction was granted and the Seventh Circuit affirmed.

Discussion

In the federal courts, at both levels, a major concern was whether and under what circumstances a federal court in an antitrust proceeding could enjoin state court proceedings. Specifically, the courts considered whether section 2283 of the Judicial Code prevented the district court from issuing a preliminary injunction to stay the collection of the state court judgments. The district court found that two exceptions to the prohibition were applicable, only one of which was considered by the court of appeals. Following

68. A trade secrets theft allegation was also made which was rejected by the appellate court and is unimportant to this discussion. 105 Ill. App. 2d at 277, 245 N.E.2d at 271.
69. Id.
70. Id. at 281-86, 245 N.E.2d at 273-76.
71. Id. at 291, 245 N.E.2d at 278.
74. 420 U.S. 975 (1975).
76. 403 F. Supp. at 529.
77. Lektro-Vend Corp. v. Vendo Co., 545 F.2d 1050 (7th Cir. 1976).
78. 28 U.S.C. § 2283 (1970). That section provides: "A court of the United States may not grant an injunction to stay proceedings in a state court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments."
79. 545 F.2d at 1052.
80. The district court ruled that the "expressly authorized" exception was met (403 F. Supp. at 536) and that the injunction was necessary to protect the jurisdiction of the federal court. (Id. at 537.) The court of appeals, having found that the first test was met, did not consider the second.
the guidelines set forth in *Mitchum v. Foster*, the court of appeals found that the antitrust laws clearly created a federal right, enforceable in federal courts of equity which could be given its intended scope only by a stay of the state court proceeding.

In response to the further argument of Vendo that principles of comity and federalism barred the action of the district court, the Seventh Circuit adopted the observation of the trial court:

Principles of comity and federalism do not prevent the issuance of an injunction considering the peculiar nature of this case. The federal action here is based in part on the very proceeding sought to be enjoined. If federal law is violated by continuation of the state action the paramount national interest requires court intervention.

Having resolved that in a suitable case an injunction could issue, the court of appeals then sustained the injunction in this case based on the district court's finding of a substantial likelihood of Stoner's success on the merits. No other result on the merits was possible under either general common law or federal law. The covenants in issue were restraints of trade and intended to be such.

The common law at one time condemned all such agreements, but by the 1700's had evolved a "rule of reason" which permitted the use of such covenants under certain circumstances. The key to the rule of reason is the recognition that a lawful restraint can only exist when that restraint is ancillary to the achievement of some other lawful goal. This latter, primary goal, also determines what is reasonable by way of restraint since only the least restrictive method of achieving that goal is permissible under a rule of reason. In capsule form, the rule of reason permits the justification of what would otherwise be an unlawful restraint on the competitive freedom of businesses only when the restraint is ancillary to some other objective. The restraint will

81. 407 U.S. 225 (1972). *Mitchum* was a case brought under the civil rights statutes, 42 U.S.C. § 1983 (1970). The Court held that to qualify under the express authorization exception to 28 U.S.C. section 2283 (1970), a federal law need not refer directly to section 2283 or expressly authorize an injunction against state court proceedings. The qualifying conditions do require that the statute create "a specific and uniquely federal right or remedy, enforceable in a federal court of equity, that could be frustrated if the federal court were not empowered to enjoin a state court proceeding." 407 U.S. at 237.

82. 545 F.2d at 1056-58.

83. *Id.* at 1058, (quoting Lektro-Vend Corp. v. Vendo Co., 403 F. Supp. 527, 537 (N.D. Ill. 1975)).

84. 545 F.2d at 1059.


only be upheld if it is shown to be the least restrictive method of achieving the objective to which it is ancillary. ⁸⁷

Ancillarity is a functional concept which requires more than a mere showing that two agreements were made in proximity in time. A restraint entered into at the same time and in the same agreement as a contract of sale may or may not be ancillary to that sale. Only if it is essential to the recognition of legitimate value on the part of the buyer and seller will it be considered ancillary. ⁸⁸ To determine whether a restraint is ancillary, three steps must be taken. First, the economically valuable and legally permissible right which is the primary object of the agreement must be identified. Second, the manner in which the restraint acts to enhance or protect the realization of the full value of the primary object must be described. Finally, the restraint must be tested to determine whether it is the least restrictive device necessary to achieve the protection of the primary object. ⁸⁹

In Lektro-Vend, the only apparent object of the agreements was to eliminate competition. There was no discernible purpose to protect the good will of the business acquired from Stoner’s manufacturing company, which could have been a valid ancillary restraint. What Vendo had sought to do was to make two separate purchases: the productive assets of Stoner and Stoner’s agreement not to compete. The transactions, while simultaneous, were independent. The first did not require or need the second and the second could have occurred without the first. Even had some good will been involved in the acquisition of the productive assets which needed protection, such as the need to establish Vendo with customers in the new lines of machines acquired from Stoner, the covenant was too broad in time and area to be reasonable. It covered all of Vendo’s sales territory instead of Stoner’s (as it should have if it were to be even arguably ancillary) and ran for ten years.

Moreover, the terms of the employment contract make it clear that Stoner was not hired to work for Vendo. The employment covenant was rather part of, and intimately related to, the covenant of the manufacturing

⁸⁷ There are cases, e.g., American Motor Inns, Inc. v. Holiday Inns, Inc., 521 F.2d 1230 (3d Cir. 1975), which reject the least restrictive alternative requirement. In context, this rejection is only a statement that the courts must look at the situation in terms of reasonable expectations and concerns at the time the contract and restraint arose and not in the light of hindsight which now suggests that something less restrictive might also have worked.

⁸⁸ The classic example is that of the sale of a barber shop. The buyer wishes to have a fair and reasonable opportunity to attract the business of the present operator. If the seller can reopen a barbering business across the street the next day, the buyer will obviously be less willing to pay the price which the existing business in the shop might warrant. For a reasonable time and in a reasonable area, the seller may, therefore, agree not to compete with the buyer.

⁸⁹ Even though a restraint is thus reasonable in a common law sense, it may nevertheless be held either per se illegal or unreasonable under the federal antitrust laws. Lektro-Vend Corp. v. Vendo Co., 403 F. Supp. at 532-33; see also Carstensen, Vertical Restraints and the Schwinn Doctrine: Rules for the Creation and Dissipation of Economic Power, 26 CASE W. RES. L. REV. 771 (1976) [hereinafter cited as Carstensen].
company. As such it had the same apparent illegitimate, unlawful purpose—the elimination of competition for its own sake. Even if some good will transfer had been asserted, the covenant was unreasonable in length and breadth for such an acquisition. Indeed, the response to Stoner’s request for a release made it abundantly clear that Vendo believed it had paid Stoner not to compete and that this was a primary, independent benefit of the transaction.90

Since it appears so obvious that the agreements were in restraint of trade, the question of how the state courts missed it is inevitable. In the one reported discussion of this issue, the appellate court applied the most mechanical of approaches.91 Because the covenant was part of the contract of sale, the court, ipso facto, assumed that it was ancillary. The issue of whether inclusion of the entire state of Illinois in the covenant made the restraint overly broad was then addressed. Applying old cases and without performing a functional analysis of the restraint to determine how it created value for the parties, the court rejected this argument.92 By assuming the crucial ancillary relationship, the court omitted the central issue in its analysis.

In refusing to review this issue or the potential abuse of the judicial system by Vendo in seeking to enforce such a clearly unlawful agreement, the Illinois Supreme Court did a grave disservice to the development of state court competence in this area. That court’s analysis of the case in terms of a corporate opportunity theory was a further disservice. It may be possible to read the corporate opportunity doctrine so broadly as to require an officer or director to yield to his employer all opportunities presented to him in his personal and private capacity.93 But the application of such a traditional corporate law view in this case, where Stoner was an officer to ensure non-competition with his employer and his labor for the company was minimal, was incomplete and misleading.94 Absent the contract and its

90. In response to Stoner’s request for a release, Vendo’s president replied:
I have always felt that one of the major advantages of the Stoner acquisition contract, from our standpoint, was the fact that it guaranteed that your design genius and experience would never be coupled with our money to put a new and most formidable competitor into the business against Vendo. I can assure you that nothing has happened in recent years to change our position on this matter in any way. I am sure you will understand.

58 Ill. 2d 289, 298, 321 N.E.2d 1, 6 (1974).

91. 105 Ill. App. 2d at 281-87, 245 N.E.2d 263, 271-76.

92. Id. at 284-86, 245 N.E.2d at 273-75.


94. The contrast is clearly discernible between the facts in Stoner and those in Grace v. E.J. Kozin Co., 538 F.2d 170 (7th Cir. 1976), where the rule of Stoner was relied upon to justify the right of a corporation to collect bribes and commissions paid to one of its executives for efforts made in the course of his employment.
accompanying covenant, it seems clear that Stoner would have left Vendo to pursue the Lektro-Vend investment. The only basis upon which the Illinois Supreme Court could have found a conflict of interest sufficient to trigger the corporate opportunity doctrine was that the employment contract was valid. Implicitly then, the court upheld the lawfulness of such agreements. In addition the request of Vendo that Stoner act for Vendo in an attempt to acquire the Lektro-Vend apparently was sufficient justification for the Illinois Supreme Court to infer, without evidence that the owner would sell to Vendo, that only Stoner’s conflict of interest prevented the sale to Vendo. The ultimate resolution of the case in the supreme court implied that the lower court’s analysis had, in fact, been accepted.

The clear lesson of the *Vendo* litigation is that parties must look to the federal courts for protection of competitive interests. This imposes unnecessary burdens on those courts, and tends to reinforce the belief that state courts are really not suitable forums for major commercial litigation. This is regrettable and unnecessary. It will persist, however, until state court judges can free themselves from mechanical rules and start to employ the kind of functional analysis that antitrust law requires.

More immediately this case raises the problems of accommodation between state and federal courts if state courts are to become primary decision makers. This is an area of the law in which great variation among state courts would be intolerable. The present United States Supreme Court has shown an obvious and understandable desire to shift many classes of cases back to state courts. It has also to be concerned about the continuing need to preserve a viable federalism. But in doing so, the Court ought also to be deeply concerned with the need both to preserve the long established national policy of competition reflected in the antitrust laws and to insure that a fairly uniform set of standards exists with respect to the criteria of decision. The obvious goal is to have state courts which understand and apply the fundamental analysis reflected in the rule of reason as it has been expounded and developed in the federal courts. In essence, there ought to be a single national common law with respect to contractual restraints—*Erie Railroad Co. v. Tompkins* notwithstanding. One way to achieve this result is to continue to allow federal courts to intervene and, when necessary, stay state proceedings to allow review of the antitrust and competitive issues at stake. Knowing that their decisions are reviewable in this forum should induce state courts to adhere to the general policies of the federal law. When there is such adherence, the federal court ought not to allow itself to be a second forum for mere fact

95. *Vendo*, at least, had contacts with a number of other states so that this contract covenant could have been reviewed in any of them. The chaotic potential for conflicting state rules with respect of restrictive covenants on interstate business is hard to understate.

96. 304 U.S. 64 (1938).
finding. In many respects *Lektro-Vend* is a model of what ought to occur. The federal court did not intervene or have any reason to do so until the litigation had run its full course in the state courts and until those courts at trial, intermediate appellate and ultimate appellate levels had failed to deal correctly with the basic competitive issues. If such limited intervention can be constitutionally and statutorily upheld, it will serve as a desirable check on state court actions while at the same time allowing federal courts to shift litigation into the states.

*Lektro-Vend* will also provide an opportunity for the Supreme Court to expound upon and clarify its holding in *Kewanee Oil Co. v. Bicron Corp.* In that case, the court upheld the validity of state law trade secret rights and covenants contained in employment contracts not to reveal those secrets. The posture of that case was such that the only issue the Court addressed was whether trade secrets may be protected under legal claims other than the patent law. It did not address the closely related but not presented issue of what kinds of covenants are reasonable protections of those secrets. It is fairly clear that any covenants would have to be both ancillary and reasonable. Moreover, in order to avoid a chaotic legal situation, those rules would have to be fairly standard so that once a state’s law has defined the extent of the property rights which the secret owner has, all courts will reach roughly similar results as to the kind, scope and duration of restraint which is proper to protect such an interest. *Lektro-Vend* provides the Court with a case which on its merits can be used to emphasize that *Kewanee* only recognized a set of rights to which a restraint might be ancillary. It did not authorize either naked or unreasonable restraints based on state law nor did it emphasize that on these issues greater uniformity of decision is essential.

*Moraine Products v. ICI America, Inc.*

State courts are not alone in lack of clear analysis. The Seventh Circuit itself confronted the problem of the meaning of the substantive standards of antitrust law in *Moraine Products v. ICI America, Inc.* and failed to articulate clearly what a rule-of-reason inquiry meant. At the heart of this case was a patent license agreement under which the assignee of a patent agreed with one licensee that with a single exception, mutually agreed upon, there would be no more licenses. The plaintiff argued that this agreement was per se


98. If in *Kewanee* not only the property right in the secret but the scope of restraint that could be used to protect it were defined by Ohio law alone, then, presumably, Indiana could not only reject creating trade secrets but also deny validity to an Ohio contract protecting an Ohio secret when the party moved to Indiana, but such a Balkanization of the country would seem counter productive in the extreme and would effectively destroy the commercial value of trade secret law.

unlawful while the defendant argued that it was per se lawful. The trial judge had apparently agreed with the latter contention.\textsuperscript{100} That the agreement was a restraint is beyond doubt. For it to be a per se lawful restraint, there would have to be an explicit or implicit sanction for it in the patent law.\textsuperscript{101} For example, if the patent law authorized a patentee to fix prices in agreement with his licensees, a per se legal right to do something otherwise illegal or potentially so would have been created. In \textit{Moraine Products} the court of appeals specifically concluded that nothing in the patent law authorized the licensor and a licensee in general to agree on the number or manner of selection of added licensees.\textsuperscript{102} At that point, while the patent context colors the situation, the basic inquiry must be founded in the antitrust laws, and how they relate to joint venture situations.

Plaintiff’s position apparently was that this situation, an agreement to limit the number of licensees, should be per se illegal. In other words, such restraints should always be presumed illegal regardless of the utility, efficiency or necessity of using restraints on additional licensees in order to get a licensee to make the necessary investment.\textsuperscript{103} Such a position was not supported by the record, the long history of judicial ambivalence toward such restraints,\textsuperscript{104} or logically justified in light of at least one counter-example where such a restraint had received Justice Department approval as reasonably necessary to the development and exploitation of the patent.\textsuperscript{105} If no presumptive lawfulness or unlawfulness existed, the restraint was still subject to a rule-of-reason inquiry. Since the trial judge had declined to make such an inquiry, the case was remanded for that purpose.

The Seventh Circuit’s opinion is troublesome because of the lack of clarity of the instructions to the trial judge in the remand order. The opinion demonstrates that there was evidence from which a jury could infer that Plough and Atlas, the principal conspirators, had agreed to the restraint contained in the contract prior to its execution and that thereafter the parties were resolute in their refusal to license others. The court concluded that “a jury could infer that there was an actual restraint of trade.”\textsuperscript{106} Indeed, the whole purpose of the agreement was to restrain trade, and any denial of that purpose from the parties should be regarded as nonsense. Thus, the inquiry which the court suggests does not bear on the issue of reasonableness. As the matter is set forth, moreover, there is no indication of how the jury is to

\textsuperscript{100} 379 F. Supp. 261 (N.D. Ill. 1974).
\textsuperscript{101} If the patent law could be read to authorize this agreement, then a fortiori it could not be unlawful.
\textsuperscript{102} 538 F.2d at 148.
\textsuperscript{103} See Carstensen, note 89 \textit{supra}.
\textsuperscript{104} See the court’s opinion for a scholarly discussion of past decisions. 538 F.2d at 138-44.
\textsuperscript{105} \textit{Id.} at 140.
\textsuperscript{106} \textit{Id.} at 148.
determine whether the restraint, once found, was reasonable. Any restraint consciously employed will reflect a purpose to limit or retard competition. Thus it is predictable that there would be evidence of competitive effect of the sort plaintiff offered.\textsuperscript{107} The test is not competitive effect, for any effective restraint, whether or not reasonable, will have such effects. The inquiry is whether the \textit{only} purpose of the restraint was to achieve those effects or whether it was to achieve some other purpose and whether these effects are the least restrictive ones consistent with the achievement of that goal. Such a standard is vital. It will guide the judge in deciding whether or not a jury issue exists and then in instructing the jury how to resolve it.

At one point the court noted that such an analysis was unnecessary "if it determines that the trial court erred . . ."\textsuperscript{108} in not asking the jury to do so. But that does not excuse its failure to set forth the structure of the analysis to see whether it would or could yield a result for the plaintiff. At another point the opinion suggests that the rule-of-reason analysis includes consideration of the facts peculiar to the business in which the restraint is applied, the nature of the restraint and its effects, and the history of the restraint and the reasons for its adoption. . . . [O]nly those . . . which unduly obstruct the due course of trade, or which injuriously restrain trade . . . are unlawful.\textsuperscript{109} Imagine telling that to a jury and then expecting them to make sense of it. This is not guidance, it is obfuscation.

As discussed earlier,\textsuperscript{110} the essence of a rule-of-reason analysis in cases of this sort is a determination first of the ancillarity and then of the reasonableness of a restraint. If, and only if, Plough or Atlas can set forth sound commercial grounds for the restraint and show that the restraint was ancillary to the achievement of some other goal, such as necessary product development, should there be an inquiry into the reasonableness of the length of the restraint—seventeen years—or its geographic coverage—the entire United States and its possessions. Such a carefully focused inquiry would start at the pleading stage. The defendant should have the duty to plead its justification for the restraint and allege how it operated in an ancillary way and why its terms were reasonable. Only if the defendant made out by allegation a prima facie case, should the issue go to trial at all. In this instance, nothing in the court's opinion suggests what sound commercial grounds would require or justify a seventeen-year prohibition on licensing of competitors of the original licensee. Someone unfamiliar with the detail of the case may well find it difficult to imagine how such a justification could be found for patented antacid stomach pills.

\textsuperscript{107} Id.
\textsuperscript{108} Id. at 145.
\textsuperscript{109} Id. at 146.
\textsuperscript{110} See text accompanying notes 85-87 supra.
While the duty to plead the defense should rest on the defendant, it is not unreasonable to put both the burden of going forward with evidence and the risk of non-persuasion on the plaintiff.111 If the defendant presents via its answer a prima facie, reasonable, ancillary defense to a charge of restraint of trade, then unless the plaintiff can both offer evidence and in fact persuade the fact finder either that the ancillary relation is not there or that an ancillary restraint is unreasonable even so, it is better not to strike down such restraints. In the close case, deference to the judgment of the parties who formulated the restraint is especially reasonable given the dramatic and harsh sanctions for violation of the law.

In this case, the court of appeals in its examination of the evidence should have decided explicitly whether or not the defendants had asserted an ancillary justification for their restraint. If they had, the court could succinctly formulate for the trial judge the proper jury issues. As it is, the opinion only does this obliquely and by indirection. The real meaning of the court's recitation of evidence of prior understandings is that the evidence suggests that the reason for the restraint was not to facilitate some other activity of one or both parties, but rather solely and exclusively for the purpose of restraining competition.112 Hence, if the jury found that those earlier communications explained the real reason for the restraint, they would have to reject any defense of reasonableness since this restraint would in fact be a naked one and thus illegal. By not placing the evidence it referred to in its proper context and by failing to define the analysis essential to deal with the evidence, the court unnecessarily complicated and obscured an understanding of its otherwise quite reasonable results.

**CONCLUSION**

If there is a unifying theme to these comments, it is that the court has in the past year reached sound results more often than it has achieved sound reasoning. The less satisfactory decisions, undoubtedly augmented by the underlying weak analysis conducted by lower courts and appellate counsel, stem from two sources. In *Holleb* the difficulty arises from the failure to treat antitrust problems as part of a larger whole in which more general propositions from tort law, for example, can inform and guide the reasoning process. In *Moraine* a lack of clear examination and articulation of the underlying meaning of the result the court reached from its review of the record diminished the value of the opinion. Conversely, when as in *Ampress Brick*, the broader definition is in the background, or as in *Vendo* the trial judge has clearly laid out the fundamental antitrust analysis, the reasoning is far more

111. *See* F. JAMES, JR., CIVIL PROCEDURE §§ 7.5-7.9 (1965).
112. *See* 538 F.2d at 146-48.
satisfactory. It is perhaps time that more academic attention was devoted to the problems of doctrine and its articulation as well as the interrelation between various types of doctrines.  