Antitrust - Decisions Concerning Supplier-Dealer Relations and the Rule of Reason

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ANTITRUST
DECISIONS CONCERNING
SUPPLIER-DEALER RELATIONS AND
THE RULE OF REASON

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The most significant decisions of the Court of Appeals for the Seventh Circuit in the 1980-81 term reflect the development of legal theory in two areas of antitrust law: supplier-dealer relations and the rule of reason.

SUPPLIER-DEALER RELATIONS
Dealer Terminations

Dealer terminations might well be the largest single source of antitrust litigation in the universe of business conduct. However, the popularity of such litigation ought not to be taken as indicating that plaintiffs are successful litigants, since courts generally do not look kindly upon terminated dealer antitrust plaintiffs.

Judicial review begins with the premise established in *United States v. Colgate & Co.* that a supplier may choose with whom he will deal, even if the supplier has agreed with a competitor of the dealer to replace him, and even if losing his source of supply injures or destroys the dealer. The supplier's right of refusal is not, however, unlimited. If a dealer is cut off pursuant to an anticompetitive conspiracy involving the supplier or for purposes of gaining monopoly or market control for the supplier, the termination may violate section 1 of the Sherman Act.


1. 250 U.S. 300 (1919).
2. Ark Dental Supply Co. v. Cavitron Corp., 461 F.2d 1093, 1094 (3d Cir. 1972) (per curiam). The Third Circuit stated:

   "[I]t is indisputable that a single manufacturer or seller can ordinarily stop doing business with A and transfer his business to B and that such a transfer is valid even though B may have solicited the transfer and even though the seller and B may have agreed prior to the seller's termination of A."

4. 15 U.S.C. § 1 (1976). Section 1 of the Act now provides:

   "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is de-
There are two criteria for violation of the statute in a dealer termination case. First, the termination must be the product of an agreement, as opposed to a unilateral decision by the supplier acting on its own, not to do business with the dealer. Secondly, the termination must adversely affect competition. If the termination is part and parcel of a per se violation, such as price fixing, the termination itself may be considered unlawful. If, however, the supplier's action does not fall within the per se categories, the adverse impact on competition must be proved under the rule of reason. Generally, courts have declined to find the requisite adverse impact where a supplier merely substitutes one dealer for another.

In its recent term, the Seventh Circuit had before it two dealer termination cases. The opinions in these cases broke no new ground because the evidence did not require any major expansion of the case law. In one decision, the dealer plaintiff's claims were sustained because it was terminated as part of a price fixing agreement with plaintiff's competitors, a per se violation of section 1. In the other decision, the court affirmed the dismissal of a dealer plaintiff who could show no adverse impact on competition nor any elements of a conspiracy in a non per se case.

*Trabert & Hoeffer, Inc. v. Piaget Watch Corp.* represented the Seventh Circuit's first opportunity to consider a dealer termination in the context of a resale price maintenance case. The court reaffirmed the rule that vertical price fixing conspiracies are indeed per se unlawful. Although the court's ruling did not make new law, it is important in the current climate which finds the Assistant Attorney General in charge of the Antitrust Division declaring a "new" antitrust philosophy, which apparently sees no evil in vertical price fixing.

The fact situation in *Trabert & Hoeffer* was an antitrust classic. A

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6. 633 F.2d 477 (7th Cir. 1980) (per curiam).

discounting retailer refused to change his ways. Competing retailers then complained to the manufacturer, who agreed to and did cut off the discounting dealer. The evidence showed that Schilling, Piaget's sales representative, not only urged plaintiff's president to restrict his discounting to twenty percent, but he also “explained that his warning was a response to complaints from other retailers.” Thereafter, when the plaintiff repudiated a brief pricing agreement with Piaget, Schilling answered competing retailers' pleas for protection “with a commitment to 'firm up the market.'” Schilling also expressly agreed with another competing retailer that the retailer would limit its discounting if Piaget enforced a similar limited discount policy. Piaget began to curtail the plaintiff's supply of watches without explanation, but Schilling finally told the plaintiff's president that the plaintiff had been terminated “because of pressure from plaintiff's competitors and [his] refusal to adhere to the 20% maximum discount.”

The Seventh Circuit affirmed the district court's finding of a Sherman Act violation, stating:

'[This] case involves a history of explicit threats and agreements by the defendants to restrain price competition coupled with an unsatisfactorily explained refusal to deal. While the law recognizes that a manufacturer has a right to sell to whom it pleases, this court has held this right to be neither absolute nor exempt from regulation. "If it is accompanied by unlawful conduct or agreement, or conceived in monopolistic purpose or market control, the right is deemed to have transgressed the [Sherman] Act."'

The clarity of the evidence in Trabert & Hoeffer, and the almost incredible lack of subtlety on the part of Piaget's sales representative in explaining to the plaintiff exactly why it was being terminated, may have been a mixed blessing. Direct evidence of conspiracy in a dealer termination case is a rarity. However, in distinguishing opinions cited by defendants, the court of appeals appears to suggest that evidence less clear cut than a defendant's unequivocal admissions and promises that he would rid plaintiff's competitors of the price cutter would be insufficient to sustain a violation of section 1. For example, the defendants cited Borger v. Yamaha International Corp., in which the Second Circuit held that a manufacturer's consultation with a plaintiff's prospective competitors before declining to offer the plaintiff a franchise

8. 633 F.2d at 480.
9. Id.
10. Id.
11. 633 F.2d at 481 (citing Fontana Aviation, Inc. v. Beech Aircraft Corp., 432 F.2d 1080, 1085 (7th Cir. 1970), cert. denied, 401 U.S. 923 (1971)).
12. 625 F.2d 390 (2d Cir. 1980).
did not establish a boycott. Distinguishing *Borger*, the Seventh Circuit noted:

The district court here, acting consistently with the *Borger* caveat, based its liability finding on evidence of explicit agreements, *beyond mere consultation and complaint-hearing*, between defendants and plaintiff's competitors to effect the proven restraint, *i.e.*, price-fixing.13

Similarly, in distinguishing *Klein v. American Luggage Works, Inc.*,14 the court noted that the evidence in that case did not show complaints were directed at the plaintiff in particular, whereas the record before the court showed that the complaints of competing retailers were specifically directed at Trabert & Hoeffer's practices and were the basis of the defendant's decision.

While the court acknowledged that direct evidence of agreement need not be shown, the court's choice of grounds on which to distinguish *Borger* and *Klein* reflect at least an ambivalence in the opinion. Courts have long recognized that although antitrust conspiracies are often not susceptible to proof by direct evidence, their existence may be inferred from the actions of the parties.15 If competitors of a price-cutting dealer complain to the supplier, about either the discounter specifically or price-cutting in general, and if the supplier, after "complaint hearing" and "consultation," terminates the price-cutter, a jury should be permitted to infer a conspiracy to end the discounting retailer's career.16

Courts should not expect that a supplier, like Piaget in *Trabert & Hoeffer*, will provide the terminated dealer with direct evidence of an explicit agreement between the supplier and the plaintiff's competitors which is specifically aimed at the plaintiff. For example, if the supplier is reasonably sophisticated, it will establish contemporaneously with the price-cutter's termination a new "marketing plan" which never mentions price, but nonetheless gives the supplier a business reason for eliminating the offender. Direct evidence of the type found in *Trabert & Hoeffer* should not be required to prove that a supplier's termination of a price-cutter was not unilateral. Courts have consistently found unlawful those dealer terminations which have been motivated by price

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13. 633 F.2d at 481 n.1 (emphasis added).
16. The Seventh Circuit distinguished *Borger* on grounds that there was no evidence of "anything like price-fixing" and that the "complaint hearing" and "consultation" occurred in the context of a supplier's decision whether to add plaintiff as a dealer, not in cutting off an existing distributor. 633 F.2d at 481 n.1. See *Borger v. Yamaha Int'l Corp.*, 625 F.2d 390, 395, 397 (2d Cir. 1980).
maintenance purposes. This position will be substantially weakened if the Seventh Circuit follows through on its apparent inclination to limit the practical inferences which can be reasonably drawn from the conduct of the parties in such cases.

The dealer's termination in Contractor Utility Sales Co. v. Certain-Teed Products Corp. lacked the price fixing elements of Trabert & Hoeffer and thus fell outside the per se rule applied in that case. Plaintiff CUSCO was a distributor of PVC plastic pipe manufactured by Certain-Teed. In 1976, Certain-Teed cancelled its "agency" agreements with distributors and offered them less lucrative distribution agreements which the plaintiff refused to accept. At various times, Certain-Teed offered other distributors better pricing in bidding on jobs. The parties' rocky relations came to an end in 1977 when Certain-Teed terminated the plaintiff as a distributor.

At the outset, the Seventh Circuit drew the line of demarcation between refusals to deal resulting from conduct which is per se illegal and those refusals to deal which may be completely proper under the rule of reason. CUSCO alleged that Certain-Teed had conspired with the former's competitors to eliminate it from the market. The court found, however, that CUSCO had not established a prima facie case of conspiracy between the manufacturer and other distributors to eliminate it as a competitor. Rather, the evidence was that of a unilateral action by Certain-Teed, which regardless of its anticompetitive effects, is not prohibited by section 1.

Thus, lacking the factual basis for a per se violation, CUSCO was required under the rule of reason to prove competitive injury in the market. The court noted that the plaintiff had presented some evidence concerning price, but held that the facts simply did not fit the price-fixing mold. While Certain-Teed had engaged in some discriminatory pricing on bid jobs and had granted a competitor terms not offered to CUSCO, this did not in itself show either price discrimination or an anticompetitive effect in the PVC pipe market.

Again, no new trails were blazed, but then the facts of the case did not require or even suggest drastic departures from established precedent. Trabert & Hoeffer and Contractor Utility are, if nothing else, object lessons for any terminated dealer contemplating antitrust litigation.

17. See Alloy Int'l Co. v. Hoover-NSK Bearing Co., 635 F.2d 1222, 1225-26 (7th Cir. 1980) (citing Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164, 170 (3d Cir. 1979)).
18. 638 F.2d 1061 (7th Cir. 1981).
19. Id. at 1075.
20. Id. at 1075-76.
against his former supplier. They set out the guidelines and borders which previously had not been so clearly marked by the courts.

_Coercion In Supplier-Dealer Relationships_

The disparity in the economic power between suppliers and their dealers has long been the subject of both decisions and commentary. Over the years, courts have become increasingly aware that in certain industries a manufacturer can coerce its dealers to do its will without overt actions or threats of action.\textsuperscript{21}

In 1964, the Seventh Circuit first considered this issue in _Goodyear Tire & Rubber Co. v. Federal Trade Commission_.\textsuperscript{22} In _Tire Sales Corp. v. Cities Service Oil Co._,\textsuperscript{23} the Seventh Circuit again examined evidence of dealer coercion and, with a pragmatic view of business realities in the oil industry, concluded that the evidence was sufficient to warrant submission of the case to the jury. The plaintiff, a tire wholesaler, was terminated by an oil company whose dealers bought tires from the plaintiff. The circumstances of the plaintiff's termination itself were not at issue in the case. However, the plaintiff alleged that, after cancelling its agreement with the plaintiff, the defendant coerced its dealers into purchasing tires solely from another wholesaler to the exclusion of the plaintiff.

The Seventh Circuit took note of the plaintiff's direct evidence of demands and threats to the dealers by the defendant's sales representatives. However, the court also noted that overt acts of coercion were not the only means of enforcing a tying arrangement. It stated that circumstantial evidence, such as the course of dealing between the oil company and its dealers and the speed with which the company's wishes were translated into dealer acquiescence, would be sufficient to establish such coercion. The court recognized that the economic power inherent in the dealers' dependence on the oil company for their livelihood could make a "recommendation... tantamount to command."\textsuperscript{24}

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  \item 22. 331 F.2d 394, 401 (7th Cir. 1964), _aff'd sub nom._ Atlantic Refining Co. v. FTC, 381 U.S. 357 (1965).
  \item 23. 637 F.2d 467 (7th Cir. 1980), _cert. denied_, 451 U.S. 920 (1981).
  \item 24. _Id._ at 473 (citing Goodyear Tire & Rubber Co. v. FTC, 331 F.2d 394, 401 (7th Cir. 1964), _aff'd sub nom._ Atlantic Refining Co. v. FTC, 381 U.S. 357 (1965)). The Seventh Circuit in _Tire Sales_ summarized at length and quoted from the testimony of dealers to demonstrate the subtle yet real economic pressure which deterred them from purchasing tires from the plaintiff. One dealer, while admitting that Citgo had not expressly threatened his lease, said "I don't have to be
Similarly, the court stated that the threat of lease cancellation, even if not carried out, would be considered coercive for purposes of section 1 of the Sherman Act and section 3 of the Clayton Act.\textsuperscript{25}

*Tire Sales* is consistent with established precedent and is a healthy reaffirmation of the Seventh Circuit’s willingness to recognize the unspoken, but significant economic pressures which govern many supplier-dealer relationships.

**Requirements and Application of the Rule of Reason**

*Basic Requirements of the Rule of Reason*

In common parlance, the term “restraint of trade” for purposes of section 1 means the restraint or elimination of competition. The statute is not read literally; all commercial transactions restrain trade to some extent, but the law prohibits only those actions which unreasonably restrain trade.\textsuperscript{26} Certain types of business conduct are invariably detrimental to competition and are therefore considered *per se* unlawful. These include price fixing, customer and territorial allocations, tying agreements and boycotts.\textsuperscript{27} Horizontal agreements, *i.e.*, those which restrain competition between firms at the same level of economic activity, are almost always considered *per se* unlawful.\textsuperscript{28} Similarly, as previously noted, vertical agreements which fix or maintain prices are also told certain things.” Another testified on cross examination that “they didn’t put a gun to my head,” but he stopped buying tires from the plaintiff because “you had to lean towards them [Citgo] or otherwise they could have made it rough.” 637 F.2d at 472 n.6.


> It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies, or other commodities, whether patented or unpatented, for use, consumption, or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States, or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies, or other commodities of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.


considered *per se* violations.  

The problem of defining the circumstances in which a restraint, which is not *per se* unlawful, may become unreasonable under section 1 has long defied easy solution. Some business practices may restrict competition in one area but increase it in another. Some practices may cause only a marginal lessening of competition as an incident to otherwise lawful business activity. On the other hand, a conspiracy to eliminate a competitor or restrict territories even for nonprice motives can unreasonably alter the competitive balance in the marketplace.  

In an attempt to establish a flexible framework for analyzing the almost infinite variety of possible non *per se* restraints in an equally infinite variety of possible market contexts, the United States Supreme Court, in *Chicago Board of Trade v. United States*, formulated what has come to be known as the rule of reason:  

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

*Chicago Board of Trade* is widely recognized as laying the traditional foundation for rule of reason analysis, but in application, the reasonableness of a restraint—like beauty—seems to be in the eyes of the beholder. The decisions under the rule of reason are at best a mixed bag, combining the peculiarities of the facts addressed and the courts’ own predilections.

At the threshold of the rule of reason is the requirement that the relevant market be defined for purposes of evaluating the competitive impact of the alleged restraint. The relevant market concept encompasses both geographic area and product or product line. Antitrust

31. 246 U.S. 231 (1914).
32. *Id.* at 238.
case law abounds with opinions defining the relevant market and, while the parameters of a particular market will vary with the evidence and the product at issue, the basic analytical structure for making the determination is now well-established. In economic terms, the relevant market is generally defined by reference to the cross-elasticity of supply or demand for the product in the affected geographic area. On a more practical business level, the relevant market should embrace "areas of effective competition and . . . the realities of competitive practice."  

The second inquiry under the rule of reason deals with the consequences of the challenged practice to competition in the defined market. If the restraint affects a de minimis amount of commerce, the restraint will not be deemed unreasonable. Beyond such situations, however, rule of reason analysis requires an examination of the particulars listed in Chicago Board of Trade as they appear from the evidence regarding the nature of the restraint and the status of competition both before and after the conduct in question. The analysis of evidence showing adverse impact on competition is occasionally quantitative.

In the thirty-one years since Chicago Board of Trade, the Seventh Circuit has had few occasions to consider the application of the rule of reason. In the past term, however, the court issued two decisions analyzing non per se restraints under the rule. Both decisions are somewhat unique in that they involved alleged conspiracies to exclude competitors from the market. In contrast, most of the recent decisions invoking the rule of reason have dealt with either dealer terminations for nonprice reasons or the efficacy of vertically imposed territorial restraints, following the Supreme Court decision in Continental T.V., Inc.


35. L.G. Balfour Co. v. FTC, 442 F.2d 1, 11 (7th Cir. 1971). See also Sargent-Welch Scientific Co. v. Ventron Corp., 567 F.2d 701, 709-10 (7th Cir. 1977), aff'd after remand, 570 F.2d 347 (7th Cir. 1977), cert. denied, 439 U.S. 822 (1978); Beatrice Foods Co. v. FTC, 540 F.2d 303, 307-09 (7th Cir. 1976).


It is possible to discern a trend toward a narrower view of the rule from the Seventh Circuit’s ruling for defendants in both cases. The outcome of the cases, however, is less significant than the principles enunciated by the court.

The Recent Decisions

In Juneau Square Corp. v. First Wisconsin National Bank, the plaintiff, a developer, owned a two-building commercial real estate project in the Milwaukee central business district (“CBD”), next to land owned by the defendant, First Wisconsin Bank. Notwithstanding its financial difficulties, which included defaults on the first and second mortgages covering its two office buildings, the plaintiff decided to build a third structure which would be the largest building on the property. It then undertook an extensive search to secure financing. The planned office tower would have added 300,000 square feet of space to the CBD. First Wisconsin also had plans for a large office building which would have placed approximately one million additional square feet of space in the CBD one year after the scheduled completion of the plaintiff’s tower. The CBD, however, could absorb only 200,000 square feet of space annually.

The plot thickened with evidence showing that the plaintiff was a customer of First Wisconsin, which had accumulated a credit file on Juneau Square. Also, both First Wisconsin and Marshall-Michigan, a part owner of Juneau Square and second mortgagee on the project, were clients of the same Milwaukee law firm. The plaintiff’s efforts to secure funding failed and its financial situation worsened. Marshall-
Michigan ultimately foreclosed on its second mortgage, reached agreement with the first mortgagee and sold its interest to Marshall-Wisconsin, a First Wisconsin subsidiary, thus giving the latter complete control of Juneau Square. The plaintiff sued, alleging a violation of section 1 because its attempts to secure additional financing had been thwarted by a conspiracy involving First Wisconsin.

The jury returned a verdict for the plaintiff on its claim under section 1, finding that the defendants had conspired to restrain trade unreasonably "in the leasing, development, construction and financing of rental office space in the Milwaukee CBD." The district court, however, ordered a new trial on the grounds that the verdict was against the weight of the evidence, that the damages awarded by the jury were excessive and that prejudicial errors had been committed by both the court and the plaintiff's counsel. The second trial resulted in a verdict for all the defendants on all issues.

On appeal, the Seventh Circuit found that the district court had not abused its discretion in ordering a new trial. In so doing, the court also approved the following instruction concerning the rule of reason:

The term "restraint of trade" ... contemplates only an unreasonable restraint of trade. The law recognizes that it may be impossible to conduct a business without in some degree restraining trade. The antitrust laws were enacted for the protection of competition, not competitors. The plaintiffs must, therefore, establish that the defendants' acts injured not only the plaintiffs themselves, but competition ... .

The plaintiff is not entitled to recover in this case by showing concerted activities of the defendants restrained interstate commerce to some degree, they must show that there was an unreasonable restraint. A restraint is unreasonable if it tends or is reasonably calculated to prejudice the public interest. ... [T]he plaintiff may not recover unless you find an unreasonable restraint by a preponderance of the evidence as defined in these instructions.

The court noted that the approved instruction was designed specifically to inform the jury that the plaintiff could meet its burden of showing public injury by proving that the defendants' conduct tended to or was reasonably calculated to prejudice the public interest. The court's next observations, however, appear to blur the instruction's language.

unsuccessful after the prospective financiers spoke with First Wisconsin and examined its credit file on Juneau Square. Id.

43. Id. at 805. See Juneau Square Corp. v. First Wisconsin Nat'l Bank, 435 F. Supp. 1307, 1321 (E.D. Wis. 1977).


45. 624 F.2d at 810 (emphasis in original).
The court first observed that the distinction between a restraint of trade and a business tort is "an adverse effect upon competition, however small." In the same paragraph, however, the court appeared to contradict itself, saying that "plaintiffs must show also that the 'effect upon competition in the marketplace is substantially adverse.'" The court did not elaborate on this statement, but rather, reversed course again. It noted that, absent another approved instruction, the jury might have believed it could award damages based on conduct "that had no impact on the relevant market merely because plaintiffs and defendants were competitors..." In the context of the court's earlier statements, the logical converse of the phrase "no impact" would seem to be that "some" impact would suffice under the rule of reason.

Given these apparently contradictory statements, an analysis of the competitive impact evidence might have provided a better indication of the court's thinking. However, the court was not presented with the question of whether the plaintiff had in fact proved a cognizable effect upon competition; hence, no such analysis was warranted.

The Seventh Circuit's other decision, *Havoco of America Ltd. v. Shell Oil Co.*, decided seven days after *Juneau Square*, similarly afforded the court no opportunity to clarify its position on the nature and extent of competitive impact evidence that is required. In *Havoco*, the court set out the rationale and historical premises of the rule of reason which emphasizes not the reasonableness of the conduct itself but rather the reasonableness of the conduct's effect on competition:

The Rule does not exempt restraints which may be argued to be reasonable or expedient, but rather focuses on the reasonableness of the effect of the challenged restraint on competition... An examination of the legality of any conduct alleged to be anticompetitive therefore necessitates a determination as to what the consequences of the conduct have been in the affected market.

The court held that the plaintiff's failure to even allege injury to competition in the relevant market was grounds for dismissal of the complaint. Again, as in *Juneau Square*, the opportunity to relate theory to evidence did not present itself. Since the case was before the Seventh Circuit on the pleadings, there was no occasion for the court to deter-

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46. *Id.*


48. 624 F.2d at 811.

49. 626 F.2d 549 (7th Cir. 1980).

50. *Id.* at 554 (citation omitted).
mine what evidence would satisfy the requirement of showing an adverse impact on competition.

The earlier decisions of the Seventh Circuit give few clues as to the development of the court's thinking on the evidentiary requirements of the rule of reason. Magnus Petroleum Co. v. Skelly Oil Co. involved a de minimis quantum of commerce. In Lee Klinger Volkswagen, Inc. v. Chrysler Corp., a former Dodge dealer sued the automobile manufacturer alleging that the latter's operation of a nearby competing Dodge dealership at a loss violated section 1. The plaintiff conceded that Chrysler did not intend to injure it and did not allege predatory pricing by the competing dealership. Plaintiff remained profitable until it terminated its Dodge dealership to become a Volkswagen dealer. The court observed that, while the plaintiff's withdrawal left one less independent Dodge dealer in the Chicago metropolitan area, the evidence showed that thereafter two company-operated dealerships were sold to independent dealer investors. Thus, the court found no adverse impact on competition.

The Rule of Reason and Unfair Competition

The antitrust law and the common law tort of unfair competition have developed an uneasy relationship over the years. Because the fact patterns associated with both bodies of law are quite similar, the issue of whether acts of unfair competition also constitute antitrust violations often arises.

Early decisions in the First Circuit beginning with Albert Pick-Barth Co. v. Mitchell Woodbury Corp. concluded that conspiracy to destroy or injure a competitor by unfair competitive methods constituted a per se violation of section 1 of the Sherman Act. The Tenth Circuit endorsed this per se approach in Perryton Wholesale, Inc. v. Pioneer Distributing Co. The strength of these decisions, however, has been gradually eroded, even in the First Circuit. In place of the per se
treatment suggested by the *Pick-Barth* line of cases, recent decisions in the Fifth and Eighth Circuits have analyzed unfair methods of competition which injure or destroy a competitor under the rule of reason.  

In *Juneau Square* and *Havoco*, the Seventh Circuit joined the trend, holding that acts of unfair competition should not be considered *per se* violations of section 1. The court in both opinions expressly rejected the *Pick-Barth* line of decisions, citing what it described as the trend toward narrowing the classes of conduct considered *per se* violations of the Act.

In *Juneau Square*, the Seventh Circuit affirmed the trial court’s refusal to give a *per se* jury instruction, noting that “unfair methods” is too vague a concept to warrant *per se* treatment. In holding that such conduct must be judged under rule of reason standards, the court stated:

> In view of the variety of practices—and resulting economic effects—that conceivably may be characterized as unfair methods of competition, . . . the determination whether a practice or practices challenged solely on this basis is cognizable under the Sherman Act is better left to the more particularized consideration possible under the rule of reason.

> We fully concur with Judge Roney’s observation in *Northwest Power Products*, 576 F.2d at 90, that “the line drawn by the *Pick-Barth* doctrine is so vague, and the circumstances in which its application manifests any injury to competition so dependent on individual facts that it does not merit the *per se* characterization some of the early cases give it.”

The court did not analyze the *Juneau Square* facts under the rule of reason since the only issue before it concerned the efficacy of the rejected *per se* jury instruction.

The *Havoco* court, like the *Juneau Square* panel, quoted *Northwest Power Products, Inc. v. Omark Industries, Inc.*, with approval and adopted its reasoning that the vagueness of unfair competition was such that it could not serve as a guideline for business conduct and thus did not warrant *per se* treatment. The *Havoco* panel, however, went well beyond the earlier holding in *Juneau Square*. The court quoted *Northwest Power Products* opinion to the effect that “unfair compe-

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56. *See* *Northwest Power Prods., Inc. v. Omark Indus.*, 576 F.2d 83 (5th Cir. 1978), *cert. denied*, 439 U.S. 1116 (1979); *Stifel, Nicolaus & Co. v. Dain, Kalman & Quail, Inc.*, 578 F.2d 1256 (8th Cir. 1978).
57. 624 F.2d at 812-13.
59. 626 F.2d at 556. Although the *Juneau Square* and *Havoco* decisions were issued only seven days apart and Judge Wood sat on both panels, the *Havoco* court took no note of the decision in *Juneau Square*. 
tition is still competition” and that the common law business tort and
the antitrust laws serve conflicting purposes because the antitrust laws
seek to remove restraints on competition while “the law of unfair com-
petition tends to protect a business in the monopoly over [its customers]
...”60

In Northwest Power, the Fifth Circuit perceived a previously un-
recognized conflict between antitrust and unfair competition. It also
imposed the totally new requirement that, to be cognizable, the nega-
tive impact on market competition from unfair conduct must be greater
than the increase in market share a defendant could legitimately obtain
through a merger.61 The Fifth Circuit cited no authority for its unique
corollary to the rule of reason.

The conflict between antitrust and unfair competition perceived by
the Fifth Circuit, and adopted without further explanation by the Sev-
enth Circuit, is conjectural at best. Not all acts of unfair competition
have a competitive impact. However, unfair competition can be and
frequently is used to eliminate or cripple competition.62 The objective
of the law of unfair competition is not, as the Fifth Circuit stated in
Northwest Power, preserving entrenched competitors, but rather
preventing a competitor from injuring another’s business by acts which
violate accepted standards of commercial conduct.

Although, as the Fifth Circuit observed, unfair competition is not
susceptible to a bright line definition, neither is much of the conduct,
other than per se violations, which restrains trade under section 1.63
The types of conduct which can unreasonably restrain trade by unfairly

60. Id.
61. 576 F.2d at 88-89. The Northwest Power court first noted the conflict between the two
bodies of law by observing that the law of unfair competition tends to protect a business’ monop-
ooly over the loyalty of its employees and its customer lists, while the purpose of antitrust law is to
promote competition by freeing from monopoly a firm’s sources of labor and markets for its pro-
ducts. Id. at 88. The court then stated:

First, absent some market impact comparable to that which would be forbidden by
the law of mergers, the interests protected by the antitrust laws never arise. . . . If a
defendant could achieve a desired result either by lawful merger or by engaging in unfair
competition, the choice of the unfair competition route alone should not give rise to an
antitrust violation.

Second, only if the defendant can gain an increment of monopoly through his unfair
competition would the additional sanctions of the Sherman Act, including treble dam-
gages and criminal sanctions, be appropriately used to deter him. Single damages or
equivalent injunctive relief is thought sufficient to compensate a firm for unfair
competition.

Id. at 89 (citations omitted). The court cited no authority for its unique reasoning which applies
the merger standards of section 7 of the Clayton Act and the monopolization criteria of section 2
1976).
63. 576 F.2d at 88.
injuring a competitor are limited only by the imaginations of the business people involved. By the same token, the competitive impact of an unfair preclusionary practice can be subtle but nonetheless significant in the market. The Fifth Circuit's assumption that antitrust law and the law of unfair competition are incompatible erects a barrier to analysis which is both unnecessary and functionally incorrect. Indeed, the *Havoco* court acknowledged that

> [e]very authority which has rejected the applicability of the *per se* doctrine to acts of unfair competition has nevertheless recognized that such conduct may be actionable under the antitrust laws if the effect is to restrain free competition. An injury which results from unfair competition may, in short, be an antitrust injury if the other elements of the offense are present.64

Having concluded that unfair competition can result in an antitrust violation if other antitrust elements are present, the *Havoco* court, perhaps influenced by *Northwest Power*, added a new and unprecedented requirement which makes proof of negative competitive impact under the rule of reason for unfair conduct all but impossible:

> We think that the market power of the defendant, both before and after the allegedly anticompetitive conduct is a particularly important factor. It is not the unfair means which may have been employed by the defendant that fall within the purview of the Sherman Act. Rather, the sole question is whether those means lessened competition. As noted above, unfair competition is still competition, and will be actionable under the antitrust laws generally only where a defendant with substantial market power uses the unfair means to increase its share of the market by eliminating a competitor, thereby creating the risk of monopoly.65

The requirement that the defendant be shown to possess "substantial" market power before the allegedly anticompetitive conduct, and that there be a risk of monopoly after, finds no support in precedent or economic logic. Indeed, the *Havoco* panel cited no precedent for this aspect of its decision. Requiring the plaintiff to show the extent of the defendant's market power, both before and after the plaintiff's destruction, unduly restricts the application of section 1 to anticompetitive practices. It is also inconsistent with the Supreme Court decisions in *Chicago Board of Trade v. United States*66 and *National Society of Professional Engineers v. United States*.67 *Chicago Board of Trade* sets out the elements of the required examination into the various aspects of the

64. 626 F.2d at 556.
65. *Id.* at 558.
66. 246 U.S. 231 (1948).
alleged restraint and its market impact. 68 National Society similarly emphasizes the competitive impact of the restraint. 69 But neither decision provides precedent or rationale for adding proof of a defendant's market power as an element of unreasonable competitive injury.

Neither Havoco nor Northwest Power suggests any legal or economic rationale for singling out unfair competition for the imposition of this additional requirement, other than the rubric that "unfair competition is still competition." Any act which excludes a competitor from the market is, in a sense, competition. Carried to its logical extreme, competition by means of defamation, violence and coercion are also "still competition." The type of exclusionary conduct should not alter the nature of the evidence required under the rule of reason.

Practical litigating considerations also militate against imposing a requirement that the defendant's market share be proved and be shown to have increased to the level of risking monopoly. Market power is a function of many factors, including time, product, brand limitations, and geography, and may not be readily susceptible to empirical measurement. Market statistics are compiled for major industries, but for smaller industries, service businesses and firms in various levels of distribution, such data may be unobtainable, except by expert testimony or by collecting statistics from each firm in the market under subpoena. The cost of antitrust litigation is already prohibitive for most small and medium sized concerns; the Havoco and Northwest Power criteria compound the difficulty of obtaining antitrust remedies for such businesses.

Havoco erects new barriers to such access with yet another unprecedented requirement—that of evidence of an increase in the defendant's market power to the point of "creating a risk of monopoly." The requirement that the restraint be sufficient to create a risk of monopoly is not mentioned in other rule of reason decisions. The "risk of monopoly" appears similar to the "dangerous probability of monopolization" requirement for determining whether an attempt to monopolize violates section 2 because the potential monopolist might actually achieve his goals. 70 In contrast, whether an act unreasonably restrains trade for purposes of section 1 hinges on whether competition has been restricted in the market.

Havoco is perhaps best viewed in relation to its peculiar facts. The plaintiff, an independent marketer of coal, obtained a ten-year contract

68. See text accompanying notes 31-32 supra.
69. See 435 U.S. at 688-92.
to supply coal to TVA. R&F, a coal producer, induced Havoco to assign its TVA contract to it in exchange for a commission. R&F's parent, Seaway Coal, was subsequently acquired by Shell Oil and refused to pay the agreed-upon commission to the plaintiff. The plaintiff filed a complaint alleging fraud, deceit, unfair competition and tortious interference with contract. The complaint was later amended to allege only a violation of section 1 of the Sherman Act against Shell, charging that it sought to eliminate Havoco as a marketer of oil and gas as well as coal by taking its TVA contract. The Seventh Circuit held that taking a single job or customer from the original supplier does not itself violate section 1 because it is not the equivalent of a lessening of competition in the market. Indeed, in Havoco there were more competitors in the market after the alleged acts than before. It is a basic truism that customers are won and lost in the marketplace.

Thus, the result in Havoco, when limited to its facts, is consistent with the rule of reason. The Havoco panel's dicta, however, adds requirements to proof of antitrust injury which are unnecessary and indeed counterproductive to the analysis which the rule of reason is supposed to engender.

Conclusion

The recent decisions of the Seventh Circuit in both supplier-dealer relations and the rule of reason reflect a tension between pragmatic business economics and a philosophic narrowing of antitrust remedies. Neither viewpoint yet holds sway and clarification can only come from future decisions.