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ANTITRUST DEVELOPMENTS IN THE FIFTH CIRCUIT—OCTOBER 1974 TERM

by

Harry M. Reasoner* and John L. Carter**

THE Fifth Circuit's October 1974 Term reflects again the major role it has come to play in antitrust jurisprudence.¹ Both in volume of cases and in the importance and influence of its decisions, the Fifth Circuit has consistently been one of the leading circuits in the country in recent years.² During the October 1974 Term the court handed down important decisions across the antitrust spectrum.³

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1. The circuit's term runs from October 1 to September 30. Antitrust cases decided during the October 1974 Term are reported in volumes 503 through 518 of the *Federal Reporter, Second Series*.

2. For a general survey of antitrust cases in the Fifth Circuit see Comment, *A Survey of Antitrust Law in the Fifth Circuit*, 11 Hous. L. REV. 640 (1974). For a discussion of cases during the court's 1974 fiscal year see *Fifth Circuit Survey, Antitrust*, 6 TEXAS TECH. L. REV. 427 (1975).

3. Under § 2 of the Sherman Act, 15 U.S.C. § 2 (1970), the long struggle of Woods Exploration & Producing Co. v. Aluminum Co. of America, 509 F.2d 784 (5th Cir.), cert. denied, 44 U.S.L.W. 3183 (U.S. Oct. 6, 1975), finally came to an end. Woods' holding that a single oil and gas field can constitute a relevant market for purposes of a monopolization claim could have dramatic and far-reaching consequences for the oil and gas industry. See Cooper, *Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two*, 72 MICH. L. REV. 373, 409 & n.123 (1974). The Woods litigation is extremely difficult to evaluate as precedent, however, because its procedural history both in the state and federal courts is convoluted and peculiar. See Woods Exploration & Producing Co. v. Aluminum Co. of America, 438 F.2d 1286, 1293-96 (5th Cir. 1971), cert. denied, 404 U.S. 1047 (1972), and the opinions of the district court, 284 F. Supp. 582 (S.D. Tex. 1968), and 304 F. Supp. 845 (S.D. Tex. 1969), and the opinion of a Texas appellate court, 382 S.W.2d 343 (Tex. Civ. App.—Corpus Christi 1964, writ ref. n.r.e.). Also of potentially great significance in antitrust litigation in the oil and gas industry is the court's questioning of reliance on orders by the Railroad Commission of the State of Texas as a basis for a state action defense. See Parker v. Brown, 317 U.S. 341 (1943); Gas Light Co. v. Georgia Power Co., 440 F.2d 1135 (5th Cir. 1971).

In another Fifth Circuit case a classic § 2 claim was raised as a defense in a suit to enforce a patent. Becton, Dickinson & Co. v. Sherwood Medical Indus., Inc., 516 F.2d 514 (5th Cir. 1975). The court reiterated the Fifth Circuit rule that intentional fraud must be shown. *Id.* at 521; Sulmeyer v. Coca Cola Co., 515 F.2d 835 (5th Cir. 1975), also contained a claim of monopolization in violation of § 2. See notes 82-85 *infra* and accompanying text.

In the Robinson-Patman Act area, 15 U.S.C. § 13 (1970), Judge Morgan's discussion in International Air Indus., Inc. v. American Excelsior Co., 517 F.2d 714, 717-29 (5th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3400 (U.S. Jan. 5, 1976) (No. 75-943), of what is needed beyond a mere price difference to establish sufficient primary line competitive impact to make the price difference illegal price discrimination, is an impressively thoughtful and significant one. The court adopts much of the analysis of Professors Areeda and Turner in their seminal article on predatory pricing. Areeda & Turner, *Predatory Pricing and Related Practices Under Section 2 of the Sherman Act*, 88 HARV. L. REV. 697 (1975). The article promises to bring light to an area that has been one of the murkiest in antitrust law. See ABA, ANTITRUST LAW DEVELOPMENTS 116 (1975). For other cases dealing with the Robinson-Patman Act see M.C. Mfg. Co. v. Texas Foundries, Inc., 517 F.2d 1059 (5th Cir. 1975) (no evidence of injury to competition); Hampton v. Graff Vending Co., 516 F.2d 100 (5th Cir. 1975) (remand for determination whether gum sales are "in commerce" within the meaning of the Robinson-

The most important developments of the term were contained in the circuit's decisions dealing with the classic elements of a private treble damage action claiming restraint of trade. The discussion is organized to fit the basic elements involved in any such case: (1) jurisdiction and exemptions raised as affirmative defenses to assertions of jurisdiction, (2) the conduct alleged to constitute a restraint of trade, (3) the fact of damage or, stated another way, the causation of damage by the proven restraint, and (4) the amount of damage.⁴

I. JURISDICTION

Recent decisions of the Supreme Court of the United States have greatly clarified the meaning of the "in commerce" standard of jurisdiction under the Clayton and Robinson-Patman Acts.⁵ The Supreme Court has not, however, settled the meaning of the broader "affecting commerce" standard of jurisdiction under the Sherman Act. The rule, as generally stated in the Fifth and other circuits, is that an activity is subject to regulation under the Sherman Act if it is in interstate commerce or has a substantial effect on interstate commerce.⁶ The latter formulation is the one which invokes controversy. The Ninth Circuit in *Page v. Work*⁷ held that "the test of jurisdiction is not that the acts complained of affect a business engaged in interstate commerce, but that the conduct complained of affects the interstate commerce of such business."⁸ The Fifth Circuit appeared to adopt this test,⁹ but subsequently rejected it during its October 1972 Term.¹⁰

Patman Act); *Bacon v. Texaco, Inc.*, 503 F.2d 946 (5th Cir. 1974) (summary judgment that no violation of the Robinson-Patman Act occurred because gasoline sales were not "in commerce"); and *Umphres v. Shell Oil Co.*, 512 F.2d 420 (5th Cir. 1975) (plaintiff failed to offer substantial evidence to support the elements of a price discrimination claim).

On the procedural front, the *National Screen Services Corp.* trilogy contains a thorough discussion of collateral estoppel and the applicability of the statute of limitations. *Exhibitors Poster Exch., Inc. v. National Screen Serv. Corp.*, 517 F.2d 110 (5th Cir. 1975); *Poster Exch., Inc. v. National Screen Serv. Corp.*, 517 F.2d 117 (5th Cir. 1975); *Poster Exch., Inc. v. National Screen Serv. Corp.*, 517 F.2d 129 (5th Cir. 1975). And, in *Lee v. Venice Work Vessels*, 512 F.2d 85 (5th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3391 (U.S. Jan. 12, 1976), the court held that a plaintiff could not maintain a cause of action under the Sherman Act against the heirs of a party alleged to have committed a violation, at least in an instance in which the estate of the deceased party had been fully administered and closed prior to the time that the heirs were first served with process.

4. See generally E. TIMBERLAKE, *FEDERAL TREBLE DAMAGE ANTITRUST ACTIONS* (1965); Note, *Standing To Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 COLUM. L. REV. 570 (1964).

5. *United States v. American Bldg. Maintenance Indus.*, 43 U.S.L.W. 4838 (U.S. June 24, 1975) [§ 7 of the Clayton Act, 15 U.S.C. § 18 (1970)]; *Gulf Oil Corp. v. Copp Paving Co.*, 419 U.S. 186 (1974) (Robinson-Patman Act). See also *Hampton v. Graff Vending Co.*, 516 F.2d 100, 102 (5th Cir. 1975).

6. See *Goldfarb v. Virginia State Bar*, 43 U.S.L.W. 4723, 4726-27 (U.S. June 16, 1975).

7. 290 F.2d 323 (9th Cir. 1961).

8. *Id.* at 330. But see *Ford Wholesale Co. v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1204 (9th Cir.), *cert. denied*, 419 U.S. 876 (1974); *Gough v. Rossmoor Corp.*, 487 F.2d 373, 376 (9th Cir. 1973), both of which cite *Page* with approval, but do not appear to follow its formulation.

9. See *Rosemound Sand & Gravel Co. v. Lambert Sand & Gravel Co.*, 469 F.2d 416 (5th Cir. 1972).

10. See *Battle v. Liberty Nat'l Life Ins. Co.*, 493 F.2d 39 (5th Cir. 1974), *cert.*

In *St. Bernard General Hospital, Inc. v. Hospital Service Association*,¹¹ decided during the October 1974 Term, the court again emphatically rejected the test of *Page v. Work*. The defendant, Hospital Service Association, was a nonprofit mutual insurance association of hospitals established to administer a health insurance plan to subscribers, which was sold under the trade name "Blue Cross." The plaintiff, General Hospital, limited to nonvoting membership in the defendant association because it was a hospital operated for profit, filed a class action suit on behalf of all member hospitals operated for profit. Under a contract between General Hospital and the defendant association plaintiff was paid by the association for the hospital charges incurred by Blue Cross subscribers. General Hospital was required to rebate to the defendant association all amounts paid to it by the association that were in excess of the average per case payment made to the nonprofit member hospitals. General Hospital alleged that the rebates that it was required to make were fixed arbitrarily by the defendant association and its nonprofit hospital members. It further alleged that the effect of the rebate system was to force it to forego all profit on the business of Blue Cross insureds or to pass the extra cost on to the insureds, thus encouraging them to use the nonprofit member hospitals.

General Hospital characterized this conduct as a group boycott in per se violation of section 1 of the Sherman Act.¹² Based on affidavits and depositions, and relying on *Page v. Work*, the district court dismissed General Hospital's claims for lack of jurisdiction, holding that it was limited to assessing the impact of the alleged restraint upon "the rendition of hospital services, . . . a purely local activity" which had no substantial effect on interstate commerce.¹³

The Fifth Circuit reversed, holding that the district court's inquiry into the question of jurisdiction was insufficient, and remanded for determination of the issue. While not deciding the issue of jurisdiction, the court clearly indicated that any collateral effect on the treatment of out-of-state patients or the purchase of supplies from out-of-state sources that the alleged restraint might have could constitute a sufficient effect on interstate commerce to give jurisdiction under section 1 of the Sherman Act.¹⁴

The appellate court's view of jurisdiction is expansive. The central impact of the alleged restraint would clearly be on an intrastate activity.¹⁵

denied, 419 U.S. 1110 (1975); *Lehrman v. Gulf Oil Corp.*, 464 F.2d 26 (5th Cir.), *cert. denied*, 409 U.S. 1077 (1972). The view that now apparently prevails in the Fifth Circuit was recently adopted in the Seventh Circuit. *United States v. Finis P. Ernest, Inc.*, 509 F.2d 1256 (7th Cir.), *cert. denied*, 44 U.S.L.W. 3223 (U.S. Oct. 14, 1975). That court stated the issue as: "Our problem of interpretation is whether the elements of restraint and interstate commerce may be satisfied separately or whether jurisdiction requires that the restraint be upon the interstate commerce." *Id.* at 1258. The court concluded that the elements could be satisfied separately.

11. 510 F.2d 1121 (5th Cir. 1975).

12. 15 U.S.C. § 1 (1970); *see, e.g., Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959).

13. 510 F.2d at 1123-24.

14. *Id.* at 1124.

15. *Cf. Goldfarb v. Virginia State Bar*, 43 U.S.L.W. 4723 (U.S. June 16, 1975).

Nevertheless, the court found strong support in the opinion of the Third Circuit in the cognate case of *Doctors, Inc. v. Blue Cross*.¹⁶

The court distinguished its holding from the recent decision of *Hospital Building Co. v. Trustees of the Rex Hospital*,¹⁷ in which the Fourth Circuit in an en banc opinion affirmed the dismissal of a hospital's similar Sherman Act complaint for lack of jurisdiction. The Fourth Circuit had distinguished complaints alleging restraints which affect many hospitals, such as that in *Doctor's Inc.*, from that in *Hospital Building Co.*, which involved an alleged restraint on one plaintiff hospital's plans for expansion. The Fifth Circuit found this distinction persuasive, but recognized that the logic of the *Hospital Building Co.* decision might support the result reached by the district court.¹⁸ The court found comfort in the Fourth Circuit's conclusion that "each case must turn on its own facts" with regard to questions of the sufficiency of the effect on interstate commerce to sustain jurisdiction.

The state of the law in this area is troublesome. It is an invitation to prolonged dilatory struggles over jurisdiction, multiple appeals, and the waste of effort in a forum without jurisdiction. The Supreme Court has granted certiorari in *Hospital Building Co.*,¹⁹ and it is to be hoped that clarifying guidelines will be given.

II. STANDING

Although the language of section 4 of the Clayton Act is broad in its literal sweep,²⁰ the courts have held that the class of persons with standing to sue is more limited. The Fifth Circuit has held that only those who are within the "target area" of the antitrust violation have standing to seek treble damages for a Sherman Act violation.²¹ In *Jeffrey v. Southwestern Bell*²² the plaintiff class consisted of telephone users. The complaint alleged that the defendant telephone company, its parent company, and the parent company's equipment manufacturing subsidiary had conspired to sell that subsidiary's products at less than the cost of manufacturing those products.

16. 490 F.2d 48 (3d Cir. 1973).

17. 511 F.2d 678 (4th Cir. 1975), *cert. granted*, 44 U.S.L.W. 3178 (U.S. Oct. 7, 1975).

18. 510 F.2d at 1126.

19. 44 U.S.L.W. 3178 (U.S. Oct. 7, 1975).

20. "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court . . ." 15 U.S.C. § 15 (1970).

21. See ABA, *ANTITRUST LAW DEVELOPMENTS 257-70* (1975). The Fifth Circuit has recently restated its recognition of these limitations:

[P]laintiffs must show that their injuries were incurred 'by reason of' the defendants' illegal activities. As recently noted by the Supreme Court, the courts of appeal have imposed limitations on this aspect of the standing test, 'concluding that Congress did not intend the antitrust laws to provide a remedy in damages for all injuries that might conceivably be traced to an antitrust violation.' *Hawaii v. Standard Oil Co.* [405 U.S. 251] at 263, n. 14.

Battle v. Liberty Nat'l Life Ins. Co., 493 F.2d 39, 48-49 (5th Cir. 1974), *cert. denied*, 419 U.S. 1110 (1975).

Other courts have used a standing test based on the "directness" of the alleged injury from the alleged antitrust violation. See generally P. AREEDA, *ANTITRUST ANALYSIS* 74-76 (2d ed. 1974).

22. 518 F.2d 1129 (5th Cir. 1975).

The plaintiffs asserted that the defendant's motive was to allow the subsidiary to sell its equipment at prices lower than those of the equipment manufacturer's competitors. The plaintiffs claimed injury in that the defendant telephone company charged higher rates to telephone service subscribers in order to compensate the enterprise for the loss resulting from the below-cost sales. The telephone company allegedly was able to charge the higher rates to its customers because, unlike the equipment manufacturing subsidiary, it enjoyed a monopoly position. The Fifth Circuit concluded that the plaintiff class of residential subscribers was not in the target area and did not have standing to sue because the alleged conspiracy "was aimed at manufacturers, sellers, and lessors of telephone equipment."²³

The court further held that the plaintiffs also lacked standing to assert claims for injunctive relief under section 16 of the Clayton Act,²⁴ because they could not show they were threatened with loss or injury proximately resulting from the alleged violation.²⁵

III. EXEMPTIONS

In *Jeffrey v. Southwestern Bell*²⁶ the court ruled that even if the plaintiffs had standing, the action of the Dallas City Council in approving the phone company's rates immunized it from attack under the state action exemption.²⁷ The Fifth Circuit also twice dealt with the exemption from the effect of the antitrust laws given by the McCarran-Ferguson Act²⁸ to the activities of insurance companies that are regulated by state law and had one occasion to analyze the exemption given to labor union activity.²⁹

23. *Id.* at 1131.

24. 15 U.S.C. § 26 (1970).

25. 518 F.2d at 1132. See ABA ANTITRUST LAW DEVELOPMENTS 257 (1975). The court also noted that, because telephone rates are subject to control by local governmental units within the State of Texas, which control had in fact been exercised by the city of Dallas, the plaintiff's antitrust attack would fail on its merits under the state action exemption doctrine of *Parker v. Brown*, 317 U.S. 341 (1943).

26. 518 F.2d 1129 (5th Cir. 1975).

27. *Id.* at 1132-34; see note 25 *supra*.

28. Section 1012(b) of the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15 (1970), provides:

No Act of Congress shall be construed to invalidate, impair, or supersede any law enacted by any State for the purpose of regulating the business of insurance, or which imposes a fee or tax upon such business, unless such Act specifically relates to the business of insurance: *Provided*, That after June 30, 1948, the Act of July 2, 1890, as amended, known as the Sherman Act, and the Act of October 15, 1914, as amended, known as the Clayton Act, and the Act of September 26, 1914, known as the Federal Trade Commission Act, as amended, shall be applicable to the business of insurance to the extent that such business is not regulated by State law.

There are variant spellings of "McCarran" in the Fifth Circuit. The court in *Meicler v. Aetna Cas. & Sur. Co.*, 506 F.2d 732 (5th Cir. 1975), spelled the name "McCarran." The later decision in *Crawford v. American Title Ins. Co.*, 518 F.2d 217 (5th Cir. 1975), spelled the name "McCarron." The former is the correct spelling of the senator's name according to the Congressional Record. 91 CONG. REC. 1442 (1945).

29. The labor activities exemption grows out of §§ 6 and 20 of the Clayton Act, 15 U.S.C. § 17 (1970), 29 U.S.C. § 52 (1970), and certain provisions of the Norris-La Guardia Act, 29 U.S.C. §§ 101-10, 113-15 (1970). See ABA, ANTITRUST LAW DEVELOPMENTS 399-400 (1975).

A. *McCarran-Ferguson Act*

In the first of the cases dealing with the McCarran-Ferguson Act, *Meicler v. Aetna Casualty & Surety Co.*,³⁰ the Fifth Circuit affirmed a district court's dismissal of an action for failure to state a claim upon which relief could be granted.³¹ The gist of the plaintiffs' complaint was that they had been reclassified into a higher rate category by one of the defendants. The remaining defendants, all of the automobile casualty insurance companies licensed to do business in Texas, had allegedly acquiesced in this reclassification and refused to sell insurance to the plaintiffs except at a rate higher than the rate that the plaintiffs had previously paid. The defendant insurance companies moved to dismiss the action on the ground that the activities of which the plaintiffs complained were subject to regulation by the State of Texas and, thus, were exempt from the federal antitrust laws. Since it was uncontroverted that the rates at which insurance was sold to each particular classification of insured within the state were established by the state insurance commission, the issue was whether such regulation reached the conduct of which the plaintiffs complained, *i.e.*, the reclassification. The court read the plaintiffs' ambiguous complaint as broadly as possible, treating the plaintiffs as either asserting (1) that the defendants had complied with the Texas Driving Insurance Plan (the classification regulations) or (2) that the defendants had conspired to avoid the Plan's provisions.³² The court held, however, that the same result would be reached in either instance. If the parties had complied with the plan, the concerted activity clearly fell within the McCarran-Ferguson Act antitrust exemption. If the defendants were alleged to have conspired to avoid the plan, they would have engaged in concerted action to "fix, maintain, increase or reduce . . . the cost of insurance," an activity prohibited by the Texas antitrust laws and, therefore, also regulated by the state.³³ As a result, the court held the McCarran-Ferguson Act antitrust exemption would apply in either instance.

Finally, the Fifth Circuit addressed the plaintiffs' contention that their complaint fell within the McCarran-Ferguson Act boycott exception to the antitrust exemption.³⁴ The court concluded that "the boycott exception was designed to reach insurance company 'blacklists' [directed at insurance agents or other insurance companies] rather than a refusal to sell to a particular segment of the public at other than a specified price."³⁵ Thus, the court of appeals held the boycott exception was inapplicable in this instance.

30. 506 F.2d 732 (5th Cir. 1975).

31. 372 F. Supp. 509 (S.D. Tex. 1974).

32. In their brief appellants specifically charged that each appellee was not making a separate determination of fault before assessing a penalty point when an insured is involved in an accident, as the Plan requires. Texas Driving Insurance Plan § C(1)(b)(1). 506 F.2d at 734.

33. TEX. BUS. & COMM. CODE ANN. § 15.02(b)(2) (1968).

34. "Nothing contained in this chapter shall render the said Sherman Act inapplicable to any agreement to boycott, coerce, or intimidate, or act of boycott, coercion, or intimidation." 15 U.S.C. § 1013(b) (1970).

35. 506 F.2d at 734. See also *Transnational Ins. Co. v. Rosenlund*, 261 F. Supp. 12, 26-27 (D. Ore. 1966).

The Fifth Circuit again considered the McCarran-Ferguson Act exemption in *Crawford v. American Title Insurance Co.*³⁶ The plaintiffs there complained that the defendant title insurance companies and their agents had engaged in a combination and conspiracy to fix the price of title insurance in the greater Birmingham area. The Fifth Circuit, in a per curiam opinion, adopted the decision of the district court dismissing the plaintiffs' claim on the ground that the Alabama Insurance Trade Practices Law³⁷ prohibited all unfair methods of competition. Although the opinion makes it clear that, under Alabama law, the rates for title insurance are not regulated by the state, the district court held that if prices were fixed by the title insurance companies, the insurance companies would have violated the prohibition of unfair methods of competition. Accordingly, the district court held that the defendants were protected from suit under the Sherman Act by the McCarran-Ferguson Act.

Judge Godbold, in a powerful dissent,³⁸ stated his view that before allowing a defendant to prevail on a McCarran-Ferguson Act defense, it is necessary that the defendant establish not only that the activity is subject to regulation by the state, but also that the activity in question has been effectively regulated.³⁹ As Judge Godbold recognized, there is much authority to the contrary. Further, injecting the federal courts into a review of the adequacy of state regulation would add another troublesome area of friction in federal-state relationships.

B. Labor Union Exemption

In *Embry-Riddle Aeronautical University v. Ross Aviation, Inc.*⁴⁰ the jury in the district court had found that the defendants, Ross Aviation, Inc., its principal officer, and Local 2003 of the International Association of Machinists and Aerospace Workers had entered a combination or conspiracy in restraint of trade that injured the plaintiff. The plaintiff, Embry-Riddle, and Ross had been bidders for a contract with the United States Army to train Army personnel by using members of the defendant union, Local 2003. Embry-Riddle claimed that after it had been awarded the contract, the union and Ross entered a contract for the payment of wages, to which Embry-Riddle was bound as a successor employer. Ross and Local 2003 were

36. 518 F.2d 217 (5th Cir. 1975).

37. ALA. CODE tit. 28A, § 227 (1973).

38. 518 F.2d at 220.

39. Judge Godbold stated:

In my view, a court faced with the issue of whether a claim of a § 2(b) exemption is well founded must consider not merely whether the state is regulating insurance but whether it is doing so adequately. [15 U.S.C. § 1012(b) (1970)] The language of the proviso, as illuminated by the legislative history, requires such an inquiry. The proviso embodies the compromise which the Senate accepted after rejecting this section without the proviso. The Senate accepted the proviso only after being told that it carried into the Act a requirement that state legislation be adequate. This concept of adequacy is contained in the 'to the extent' language in the closing phrase of the proviso. The required inquiry simply has not been made in this case.

Id. at 221.

40. 504 F.2d 896 (5th Cir. 1974).

found to have had the specific intent of causing Embry-Riddle to default on its contract so that Ross could then obtain the training contract for itself. The apparent motive for the union's participation in the alleged agreement was the higher salaries that resulted for its members. On the basis of the jury findings, the district court entered judgment against the union. The union appealed and as one of its three grounds for reversal claimed that the alleged activity was exempt from the operation of the antitrust laws. While recognizing that a union can properly engage in activities designed to injure or eliminate an employer, the court of appeals held that the union had gone too far in this instance because of its "*concerted* purpose [with] . . . a favored employer."⁴¹ This result seems reasonable on the recited facts, but the difficulty in the application of the labor union activities exemption is apparent: How would the union properly have taken advantage of the leverage given it by the fact that Ross and Embry-Riddle were bidding against each other and both needed its services?⁴²

IV. RESTRAINT OF TRADE

Of over a dozen opinions handed down by the Fifth Circuit during its October 1974 Term that involved an alleged restraint of trade in violation of section 1 of the Sherman Act,⁴³ only one affirmed a district court judgment awarding damages.⁴⁴ Of the other decisions, some involved instances in which damages or causation had been insufficiently proven, but a surprising number involved instances in which it was held that the plaintiff simply had not proven a restraint of trade. Indeed, all of the decisions in which a restraint of trade was found in the trial court and upheld on appeal involved price fixing, an offense that the courts have classified as a per se violation of the Sherman Act.

A. *Vertically Imposed Price and Customer Restrictions*

Despite the continuing debate among commentators concerning the wisdom of applying per se analysis to vertical price and territorial restriction agreements,⁴⁵ the Fifth Circuit gave little comfort to the advocates of applying rule-of-reason analysis to such vertical agreements.⁴⁶

41. *Id.* at 903-04 (emphasis by the court).

42. See Keeffe, *Inconsistency is the Hobgoblin of Labor and Antitrust Law*, 61 A.B.A.J. 1276 (1975).

43. 15 U.S.C. § 1 (1970).

44. That decision, *Greene v. General Foods Corp.*, 517 F.2d 635 (5th Cir. 1975), affirmed a judgment in which the plaintiff was awarded \$295,000. See notes 47-53 *infra* and accompanying text. Other decisions affirmed district court findings of a violation, but reversed or remanded the judgment for the plaintiff because of erroneous findings of causation or amount of damage. *E.g.*, *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934 (5th Cir. 1975). See notes 55-58, 97-100, 116-18 *infra* and accompanying text.

A judgment awarding plaintiffs over \$1,000,000 based on a finding of a violation of the Sherman Act § 2 prohibition of monopolization was also affirmed in *Woods Exploration & Prod. Co. v. Aluminum Co. of America*, 509 F.2d 784 (5th Cir.), *cert. denied*, 44 U.S.L.W. 3183 (U.S. Oct. 6, 1975).

45. See, e.g., Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282 (1975).

46. The basic argument of those who support the application of rule of reason

In *Greene v. General Foods Corp.*⁴⁷ the plaintiff, Greene, a former distributor of the defendant General Foods' products, alleged that he had been required to sell certain products purchased from General Foods to particular customers at prices established by General Foods ("the MFSA price"). General Foods conceded that it had reached an agreement with certain retail customers that its products would be delivered to those customers at MFSA prices, but maintained that since the agreement was between General Foods and the customer there was no violation of the Sherman Act. In support of its position, General Foods pointed to the fact that, with respect to sales at MFSA prices, Greene was paid a "distribution fee." General Foods also relied on the fact that it assumed the risk of default on credit sales to MFSA price customers since it was responsible for collection of accounts receivable generated by such sales. Greene pointed to the fact that goods delivered to MFSA customers were goods from his inventory and that some of his customers had been reclassified MFSA customers. Greene argued that his distributorship had been terminated by defendant because of his refusal to adhere to an illegal price fixing agreement with respect to the MFSA accounts.

The jury concluded that Greene's distributorship had been terminated by the defendant because of Greene's refusal to adhere to the MFSA prices in dealings with certain customers. The district court entered judgment for Greene. The Fifth Circuit, after observing that the products conveyed to the customers were owned outright by Greene and had not merely been consigned by General Foods, concluded that the jury's finding that an illegal resale price maintenance agreement existed between Greene and General Foods should not be disturbed.

At the outset, General Foods attempted to claim that the fact that Greene had originally participated in this scheme himself affected his standing to file a lawsuit concerning it. Relying upon *Perma Life Mufflers, Inc. v. International Parts Corp.*⁴⁸ and *Simpson v. Union Oil Corp.*,⁴⁹ the Fifth Circuit had

analysis to resale price maintenance agreements and other vertically imposed agreements in restraint of trade is that such agreements may promote better servicing, distribution, and marketing of the manufacturer's product—in other words, retailers will compete with each other by providing additional services in connection with the sale of the manufacturer's products upon which the price is fixed. See Posner, note 45 *supra*. At least some members of the Fifth Circuit appear to have adopted Professor Comanor's response to that argument:

What is important is not whether these restrictions enhance market coverage or customer contact, for this they may well do, but rather whether restrictions of this character are likely to improve the competitive processes through which resources are allocated to these activities. While society generally approves of improved market coverage, it also generally deplores higher dealer markups and higher costs of distribution. Whether the additional gains are worth the additional costs is, of course, the essence of the problem of resource allocation—a problem whose solution we normally leave to the market place.

Comanor, *Vertical Territorial and Customer Restrictions: White Motor and Its Aftermath*, 81 HARV. L. REV. 1419, 1431 (1968), cited in *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934, 942, n.5 (5th Cir. 1975).

47. 517 F.2d 635 (5th Cir. 1975), petition for cert. filed, 44 U.S.L.W. 3306 (U.S. Nov. 10, 1975) (No. 75-693); see notes 122-25 *infra* and accompanying text.

48. 392 U.S. 134 (1968).

49. 377 U.S. 13 (1964).

no trouble in disposing of this argument. While not speaking to the situation where a plaintiff "is equally responsible as a co-adventurer,"⁵⁰ the court rejected the application of the *in pari delicto* defense in circumstances where great disparities in size and circumstance would give a coercively disproportionate bargaining power.

After a scholarly discussion of the history of the legality of vertically imposed price, customer, and market restrictions, the court flatly held that General Foods' sophisticated marketing scheme was a per se violation of the Sherman Act.⁵¹ While General Foods attempted to argue that the "key question in this case is who are the parties to the contract of sale in the [particular] transactions,"⁵² Judge Wisdom, relying heavily on *Simpson*, concluded that "courts in enforcing the antitrust laws must look to the effect a particular business practice has upon competition and not the legal form in which it is cast, in assessing its validity."⁵³

Although *United States v. Arnold, Schwinn & Co.*⁵⁴ suggests that with certain limitations a manufacturer can impose territorial and price restrictions if the manufactured goods are not sold to a distributor but are delivered on consignment, the opinion in *Greene* raises a serious question as to whether any very large major manufacturer can properly create a distribution system utilizing independent distributors and yet retain pricing control over its products.

While *Greene* is no doubt the strongest statement from the Fifth Circuit during its October 1974 Term of its position on vertical price and market restrictions, *Copper Liquor, Inc. v. Adolph Coors Co.*,⁵⁵ a decision significant in many other respects, also dealt with the issue of vertical territorial restraints. The jury had found in that case that Coors, the defendant, imposed both territorial and price restrictions on its distributors, one of whom was alleged to have terminated the plaintiff as a customer because of his failure to adhere to Coors' "pricing policy." Thus, the court was not presented with the situation in which only vertical territorial restrictions were imposed, as in *Schwinn*.⁵⁶ Nevertheless, Coors argued that its territorial restrictions were necessary in order to attract distributors and to maintain its market penetration and the quality of its product, which was subject to serious deterioration if improperly handled. While recognizing that other circuits have recognized limited exceptions to the apparent per se prohibition of territorial restrictions established by the Supreme Court in *Schwinn*,⁵⁷ the

50. 517 F.2d at 646; see notes 127-28 *infra* and accompanying text.

51. 517 F.2d at 646-47.

52. *Id.* at 647-48.

53. *Id.* at 656.

54. 388 U.S. 365 (1967).

55. 506 F.2d 934 (5th Cir.), *petition for rehearing and petition for rehearing en banc denied*, 509 F.2d 758 (5th Cir. 1975); see notes 97-100, 116-18 *infra* and accompanying text.

56. Judge Gee, concurring in the result, argued that since price fixing was involved it was unnecessary for the court to consider the question whether vertically imposed territorial restrictions alone were a per se violation of the Sherman Act. *Id.* at 955.

57. The Fifth Circuit cited *Tripoli Co. v. Wella Corp.*, 425 F.2d 932 (3d Cir.) *cert. denied*, 400 U.S. 831 (1970), and *United States v. Safety First Prods. Corp.*, 1972 Trade Cas. ¶ 74,223 (S.D.N.Y. 1972), for the proposition that a manufacturer may restrict the

court refused to recognize a "quality control" exception in this case.⁵⁸

B. Combination, Conspiracy, or Agreement

Two cases decided by the Fifth Circuit during its October 1974 Term demonstrate that proof of an agreement, combination, or conspiracy must be based on evidence other than a plaintiff's circumstantial speculation. In *Shumate & Co. v. National Association of Security Dealers, Inc.*,⁵⁹ the Fifth Circuit upheld a directed verdict for defendants given at the close of the plaintiff's evidence. The plaintiff, a securities broker-dealer who was a member of the NASD but not of any major stock exchange, alleged injury to himself as a result of two conspiracies in restraint of trade among certain of the defendants. The first conspiracy among the defendants allegedly was to exclude securities listed on major stock exchanges from the NASD Automated Quotation System for a period of eight weeks. The second conspiracy allegedly was to ignore quotations for securities listed on major stock exchanges that were also given on the Automated Quotation System after the six-week period. With respect to the first conspiracy, the district court found that correspondence between the defendants that discussed the exclusion was enough evidence of conspiracy to raise a fact issue for the jury, but that the plaintiff had presented no evidence to show that it had been injured by that alleged conspiracy. With respect to the second conspiracy, however, the district court held that the plaintiff had not established a sufficient link between the defendants to raise an issue of conspiracy for submission to the jury. The plaintiff's only evidence of conspiracy was the similar conduct of several of the defendants.

The court of appeals did not decide whether the evidence of existence of the second conspiracy was sufficient, but affirmed the decision of the district court because of the plaintiff's failure to present any evidence that it had suffered any injury from either alleged conspiracy.⁶⁰

In *Umphres v. Shell Oil Co.*⁶¹ the plaintiff, Umphres, alleged that the defendant, Shell, had engaged in horizontal and vertical price fixing, price discrimination, and illegal tying arrangements. The district court found that the plaintiff's evidence with respect to all of his allegations was insufficient to raise an issue of fact and granted the defendant's motion for judgment. On appeal, the Fifth Circuit affirmed per curiam. Most significant is the court's determination that Umphres' claim of horizontal price fixing based on "testimony that retail gasoline prices of certain name-brand service stations

customers to whom dangerous products are resold without committing a per se violation of the Sherman Act. The court refused, however, to extend this exception to include the case before the court, since in this case the territorial restriction not only aided Coors in retaining control over the quality of its product, but also over wholesale and retail prices. 506 F.2d at 944. For a general discussion of these exceptions see Robinson, *Recent Antitrust Developments 1974*, 75 COLUM. L. REV. 243, 270-81 (1975).

58. See Note, *Copper Liquor, Inc. v. Adolph Coors Co.: Should We Return to a Rule of Reason*, 29 Sw. L.J. 629 (1975).

59. 509 F.2d 147 (5th Cir.), cert. denied, 44 U.S.L.W. 3258 (U.S. Oct. 6, 1975); see notes 101-03 *infra* and accompanying text.

60. 509 F.2d at 149.

61. 512 F.2d 420 (5th Cir.), cert. denied, 44 U.S.L.W. 3258 (U.S. Nov. 3, 1975).

in Houston tended to fluctuate in concert,"⁶² was insufficiently supported by evidence. The court found persuasive the fact that the witness had personal knowledge with respect to price changes at only five of approximately twenty-eight hundred service stations in the Houston metropolitan area. *Umphres* is, however, a reiteration of the principle that mere parallel conduct, without more, is insufficient to raise an issue of combination, conspiracy, or agreement.⁶³

C. Dealer Termination

The success of many terminated distributors, such as Greene,⁶⁴ in pressing antitrust claims against their former suppliers has led to a rash of litigation in which the terminated distributor can point to nothing but the fact of termination and replacement. In *Burdett Sound, Inc. v. Altec Corp.*⁶⁵ Judge Morgan, in affirming a decision to grant the defendant's motion for summary judgment, cautioned strongly against such claims:

Lest any other former distributor succumb to the temptation of treble damages, we reiterate that it is simply not an antitrust violation for a manufacturer to contract with a new distributor, and as a consequence, to terminate his relationship with a former distributor, even if the effect of the new contract is to seriously damage the former distributor's business.⁶⁶

Burdett presents clearly a case of termination without allegations of price-fixing, boycotts, or attempts to drive another competitor out of business. The plaintiff alleged various unfair acts, but these were insufficient as a matter of law to transform his grievance into an antitrust claim.⁶⁷

*Wilson v. I.B.E. Industries, Inc.*⁶⁸ involves a considerably more complex terminated-dealer situation in which the plaintiffs alleged that the defendants had sought to force them to stop dealing with a certain class of customers.

62. *Id.* at 422.

63. For a summary discussion of the authorities dealing with the evidentiary significance of parallel conduct see ABA, ANTITRUST LAW DEVELOPMENTS 34-37 (1965). Professor Turner's brilliant article, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655 (1962), remains unsurpassed as a theoretical treatment of the area.

64. See text accompanying notes 47-54 *supra*.

65. 515 F.2d 1245 (5th Cir. 1975).

66. *Id.* at 1249. See generally Bohling, *Franchise Terminations Under the Sherman Act: Populism and Relational Power*, 53 TEXAS L. REV. 1180 (1975). See also *Joseph E. Seagram & Sons v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

67. 515 F.2d at 1248; *cf.* *Tower Tire & Auto Center, Inc. v. Atlantic Richfield Co.*, 392 F. Supp. 1098 (S.D. Tex. 1975), in which the court, in reliance on *Albert Pick-Barth Co. v. Mitchell Woodbury Corp.*, 57 F.2d 96 (1st Cir.), *cert. denied*, 286 U.S. 552 (1932), held that a plaintiff had stated a cause of action under the Sherman Act when he alleged that the defendants had conspired and acted to use unfair trade practices with the intent to injure the plaintiff as a competitor. This district court is not alone in recognizing the validity of the *Pick-Barth* doctrine; see *Van Dyke Ford, Inc. v. Ford Motor Co.*, 1975-2 Trade Cas. ¶ 60,560 (E.D. Wis. 1975); *Mr. Hanger, Inc. v. Rizzuto*, 1975-2 Trade Cas. ¶ 60,540 (S.D.N.Y. 1975). The First Circuit, its originator, however, appears to have had some second thoughts about the validity of the doctrine. *George R. Whitten, Jr., Inc. v. Paddock Pool Builders, Inc.*, 508 F.2d 547, 560-62 (1st Cir. 1974).

68. 510 F.2d 986 (5th Cir. 1975).

Plaintiffs contended that they were terminated because of their refusal to stop dealing with such customers.⁶⁹ Defendants contended that the plaintiffs' supplies of gasoline and service station lease had been terminated because they had paid the defendants with bad checks. The trial resulted in a hung jury. The district court granted judgment for the defendants on the ground that there was no evidence of a contract, combination, or conspiracy in restraint of trade. On appeal the plaintiffs contended that the case was controlled by *United States v. Arnold, Schwinn & Co.*,⁷⁰ which they asserted held that a distributor's attempt to impose any restriction on a dealer's resale of the distributed products was a per se violation of the Sherman Act. The Fifth Circuit concluded that the distributor-lessors had legitimate interests that they were entitled to protect in dealing with the plaintiffs and distinguished *Schwinn*:

We therefore believe that *Schwinn* requires proof of something more than an agreement to cut off one or two customers for reasons that have nothing to do with the supplier's pattern of distribution or the demands of competition. Since the record reveals, at best, only a one-time demand that the appellants stop dealing with two of its customers, we hold the per se rule of *Schwinn* inapplicable. Accordingly, the situation before us is simply a distributor's refusal to deal with a retailer, and it therefore lacks any anti-trust overtones.⁷¹

While the Fifth Circuit has not formally adopted the requirement of showing "firm and resolute enforcement" of vertical restrictions in order to make out a violation on a *Schwinn* theory, the *Wilson* case can be read as philosophically in line with the "firm and resolute enforcement" rationale.⁷²

In *Kestenbaum v. Falstaff Brewing Corp.*⁷³ the court again recognized that a supplier has a legitimate interest in a dealer or franchisee that will support some reasonable efforts to exert influence over the business activities of the dealer or franchisee. After holding that a franchisor can restrict the class of persons to whom his franchisee may sell his franchise, the court also held that the franchisor may also restrict the sales price of one of its distributorships "in order to insure that the purchaser will have a chance to realize a reasonable return on his investment."⁷⁴ This result means that while the franchisor cannot dictate the resale price of the products he sells to the franchisee,⁷⁵ he can within reasonable limits dictate the resale price of

69. *Id.* at 987.

70. 388 U.S. 365 (1967).

71. 510 F.2d at 988.

72. Several courts have held that a distributor's territorial restriction on resale of products by the distributor's customer is not a per se violation of the Sherman Act unless the restriction is enforced on a firm and resolute basis. *See, e.g., Colorado Pump & Supply Co. v. Febco, Inc.*, 472 F.2d 637 (10th Cir.), *cert. denied*, 411 U.S. 987 (1973); *Janel Sales Corp. v. Lanvin Parfums, Inc.*, 396 F.2d 398 (2d Cir.), *cert. denied*, 393 U.S. 938 (1968). The "firm and resolute" gloss on *Schwinn*, while subject to logical criticism, is understandable as an attempt to mitigate the extreme effects of a literal application of the *Schwinn* per se rule. *See Robinson, supra* note 57, at 273. *See also Copper Liquor v. Adolph Coors Co.*, 506 F.2d 934, 943-44 (5th Cir. 1975).

73. 514 F.2d 690 (5th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3417 (U.S. Jan. 12, 1976) (No. 75-987). The decision in *Kestenbaum* is important in several respects. *See notes 90-94, 104-07, 119-21 infra* and accompanying text.

74. 514 F.2d at 696.

75. *See text* accompanying notes 47-50 *supra*; ABA, ANTITRUST LAW DEVELOPMENTS 7 (1975).

the franchise itself, which he has also sold to the franchisee. It is significant to note that very similar arguments (*i.e.*, that the seller maintains an interest in the method and manner in which his product is resold by his customer) are advanced by those who argue that vertically imposed restraints on distributors should not be considered *per se* violations of the Sherman Act.⁷⁶

D. Tying Agreements

In addition to the allegations of tying contained in *Umphres*,⁷⁷ two other cases in the Fifth Circuit in the October 1974 Term involved allegations that defendants had engaged in illegal tying arrangements. In both cases defendants were successful in establishing that the elements of tying had not been proven.

In *Forrest v. Capital Building & Loan Ass'n*⁷⁸ two lawyers challenged the practices of certain Baton Rouge savings and loan associations that required lenders to pay the legal fees incurred by the association in connection with loans made by the association. The plaintiffs complained that the arrangement constituted an illegal tying arrangement, which, the plaintiffs asserted, was a *per se* violation of sections 1 and 2 of the Sherman Act.⁷⁹ The Fifth Circuit found the arrangement to be a proper one and concluded that no tying arrangement existed because there were not two separate products involved (*i.e.*, a tying product and a tied product).⁸⁰ The court relied on the fact that the rendition of the legal services was merely ancillary and inseparable from the making of the loan itself. Further, the fact that the association itself did not receive remuneration (at least direct remuneration) from the sale of the lawyer's services was also deemed significant.⁸¹

In *Sulmeyer v. Coca Cola Co.*⁸² the plaintiff, the trustee in bankruptcy for Bubble Up Corporation, argued that certain practices of the defendant Coca Cola Company were in effect boycott and tying arrangements, *per se* violations of section 1 of the Sherman Act. Specifically, the plaintiff complained that many of the Coca Cola franchisees had dropped the Bubble Up product in order to distribute Coca Cola's competing soft drink, Sprite.⁸³

76. *E.g.*, Posner, note 45 *supra*. See also note 46 *supra*.

77. *Umphres v. Shell Oil Co.*, 512 F.2d 420 (5th Cir.), *cert. denied*, 44 U.S.L.W. 3258 (U.S. Nov. 3, 1975); see text accompanying notes 61-63 *supra*.

78. 504 F.2d 891 (5th Cir. 1974), *cert. denied*, 421 U.S. 978 (1975).

79. See generally ABA, ANTITRUST LAW DEVELOPMENTS 38-43 (1975); Fortner Enterprises, Inc. v. United States Steel Corp., 394 U.S. 495 (1969).

80. 504 F.2d at 891; see *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594 (1953).

81. In a case involving factual allegations similar to those made in *Forrest* a federal court in New Jersey held that there was an insufficient effect on interstate commerce to establish jurisdiction under § 1 of the Sherman Act. *Mortensen v. First Fed. Sav. & Loan Ass'n*, 1975 Trade Cas. ¶ 60,570 (D.N.J. 1975); see part I *supra*.

82. 515 F.2d 835 (5th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3380 (U.S. Dec. 23, 1975) (No. 75-893).

83. The plaintiff also argued that since Coca Cola eventually granted Sprite franchises to about 85% of its franchisees, it had monopolized the relevant market, which the plaintiff claimed consisted of bottlers franchised to distribute Coca Cola, in violation of § 2 of the Sherman Act. Coca Cola argued that the relevant market was not so limited. Apparently the jury agreed with Coca Cola and the court of appeals held that the jury could properly have found the relevant market to consist of all soft drink bottlers. *Id.* at 848.

The court also found that the jury's rejection of the plaintiff's conspiracy to monop-

Coca Cola had instituted an advertising program under which the United States was divided into 197 marketing areas. When Sprite became available to eighty percent of the consumers in a marketing area, Coca Cola agreed to spend twenty cents on television advertising for each gallon of Sprite syrup purchased by the area bottlers during a three-year period. The plaintiff claimed that this program was an illegal tying arrangement.⁸⁴ The court of appeals held that the arrangement did not constitute the sale of two products, stating: "The individual bottler obviously benefited from the additional advertising, but he did not 'purchase' it."⁸⁵ The court also rejected the claim that the program amounted to a per se illegal group boycott because the program did not require participating bottlers to give up their Bubble Up franchise. Since there was, accordingly, no evidence of an agreement to boycott the plaintiff's product, the court of appeals held that the reasonableness of any restraint of trade created by the implicit effect of the program (such as the possibility that it was uneconomical for a bottler to attempt to market two lemon-lime drinks) was properly submitted to the jury. Read as a whole, *Sulmeyer* is an affirmation of the principle that casualties of legitimate hard competition are not entitled to redress under the antitrust laws.

E. *Unreasonable Restraints*

Rejecting the per se theories of the plaintiff in *Sulmeyer*, the jury apparently found that the plaintiff had not established by a preponderance of the evidence that the restraints of which it complained were unreasonable.⁸⁶ While the plaintiff has the burden of showing affirmatively that practices are unreasonable restraints of trade, *Sulmeyer* is illustrative of the tactical desirability to a defendant of affirmatively presenting persuasive business justifications, which are not anticompetitive, for practices under attack in any antitrust suit.

lize claim was justified on the ground that the jury could have found a lack of specific intent to gain monopoly power. The case illustrates the critical role of market definition in any attempt to monopolize claim. Coca Cola had no intent to franchise a high percentage of all soft drink bottlers as distributors of Sprite. Indeed, it did not even offer Sprite franchises to independent bottlers. *Id.* at 851. Had the relevant market been found to consist solely of existing Coca Cola bottlers, then the jury's finding that Coca Cola lacked the requisite intent to monopolize would have been open to question.

The fact that Bubble Up chose to limit its efforts to obtain distribution of its product to existing Coca Cola bottlers did not, in the view of the Fifth Circuit, limit the relevant market to that group. *Id.* at 850-51. Such analysis is significant, since high market share figures can be created for almost any product if the market for the product is defined as the customers of that product's manufacturer.

For an excellent comprehensive recent discussion of attempt to monopolize theory, see Cooper, *supra* note 3, *passim*.

84. The plaintiff apparently relied on *Siegel v. Chicken Delight, Inc.*, 448 F.2d 43 (9th Cir. 1971), *cert. denied*, 405 U.S. 955 (1972), in which it was held, *inter alia*, that a franchisor's requirement that franchisees agree to purchase the franchisor's cooking equipment and paper products in order to obtain a franchise was an illegal tying arrangement.

85. 515 F.2d at 844. The court's conclusion that there was no sale of advertising to the franchisees obviated the need for the court to consider the defendant's argument that Sprite syrup and Sprite advertising are part of one product. See note 80 *supra* and accompanying text.

86. 515 F.2d at 841-42.

In *Golden v. Kentile Floors, Inc.*⁸⁷ the plaintiff, as a former employee of the defendant, had been entitled to receive benefits from the defendant's profit-sharing plan as long as, in the judgment of a committee of three of the defendant's present employees, the plaintiff was not engaged in competition with the defendant. The agreement between plaintiff and defendant, which allowed the plaintiff to participate in the plan, provided that the plaintiff had no vested right to benefits under the plan. The committee found that the plaintiff was competing with the defendant and, after giving notice to the plaintiff of its intention to do so, declared that the plaintiff had no further right to participate in the profit-sharing plan. The plaintiff attacked this limitation on his pension rights as an unreasonable restraint of trade. The court of appeals, relying on common law concepts of restraint of trade, held the restraint reasonable, pointing to four factors: (1) the forfeiture provision did not prevent the plaintiff from retaining or continuing employment with a competitor; (2) the plan imposed no restriction on any other potential employer; (3) the forfeiture, by the express terms of the plan, did not operate to divest a "vested" right; and (4) the forfeiture provision, in the context of the entire Kentile plan, was supported by reasonable business justifications.⁸⁸ The court emphasized that the contract did not provide that the plaintiff could not compete against the defendant, but merely provided that he could not at the same time require the company to make payments to him.⁸⁹

*Kestenbaum v. Falstaff Brewing Corp.*⁹⁰ involved claims of price fixing, territorial restraints, a general combination in restraint of trade, and restraints on the sale of a distributorship. Because of the form of the court's charge and a lack of crucial evidence,⁹¹ the district court's judgment for the plaintiff was reversed. The court's discussion of the necessity for proving public injury in private treble damage actions alleging unreasonable restraints of trade is particularly illuminating. While recognizing that where per se offenses are involved it is unnecessary for the plaintiff to establish an injury to competition in order to establish a cause of action,⁹² the Fifth Circuit reaffirmed that the requirement has not been removed in a case in which the reasonableness of a restraint is at issue. While the test remains

87. 512 F.2d 838 (5th Cir. 1975).

88. *Id.* at 845-46.

89. *But see* *Bowen v. Wohl Shoe Co.*, 389 F. Supp. 572 (S.D. Tex. 1975).

90. 514 F.2d 690 (5th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3417 (U.S. Jan. 12, 1976) (No. 75-987); *see* notes 73-76 *supra*, notes 104-07, 119-21 *infra*, and accompanying text.

91. 514 F.2d at 693-94. A general charge on all alleged offenses was submitted to the jury and damages were awarded. The court found a failure to prove injury from the alleged price fixing. It was, therefore, forced to reverse and remand the entire case because it was impossible to determine what damages the jury attributed to the alleged price fixing. The case is an object lesson, as the court emphasized, in the desirability in antitrust cases of adequately utilizing a special verdict, which has a liability-injury-damage unit for each alleged violation. *See* FED. R. CIV. P. 49(a); *Brown, Federal Special Verdicts: The Doubt Eliminator*, 44 F.R.D. 245, 338 (1967).

92. 514 F.2d at 699; *see* *Radovich v. NFL*, 352 U.S. 445 (1957). The Fifth Circuit also affirmed this rule in *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934, 947 (5th Cir. 1975): "[T]he restrictions here are too intimately related with practices within the per se proscription of *Parke, Davis* [resale price maintenance]. The plaintiff therefore need not have alleged or proved a 'public injury,' as Coors contends."

inherently ambiguous, the court did emphasize the critical point that—absent the showing of a per se violation—more than a showing of mere individual injury must be made. A plaintiff is not required to demonstrate specific economic injury to competition, but is required to “show that the restraint tends or is reasonably calculated to prejudice the public interest”⁹³ Thus, as a general proposition, where a restraint of trade is not a per se violation and no injury to the public can be reasonably calculated to occur, no recovery can be had even though a particular plaintiff might show injury to himself because of his peculiar situation.⁹⁴

V. FACT OF DAMAGE

Mere proof of a violation of the antitrust laws and proof that the plaintiff has suffered some damage is insufficient to prove a cause of action under the Sherman Act. A plaintiff must establish a sufficiently direct causal relation between the damages he has incurred and the antitrust violation that he has proven. Proof of this causation or fact of damage from the violation is often difficult and closely intertwined with the proof of the amount of his damages. While the trier of fact in an antitrust suit is given some leeway in evaluating the amount of damage the successful plaintiff has suffered, stricter evidentiary standards have been imposed upon proof of the fact of damage. It is in the area of fact of damage proof that the Fifth Circuit made some of the most significant of its decisions during the October 1974 Term. Two of the major decisions of the term discuss the causation issue at length. Several others are predicated upon findings of insufficient evidence to support the submission of the causation issue to the jury.

Much of the current causation discussion in the Fifth Circuit may be traced to *Terrell v. Household Goods Carriers' Bureau*.⁹⁵ In *Terrell* the court concluded that a prior decision by the Fifth Circuit en banc had affirmed a judgment against the defendant on the issues of both antitrust violation and the fact of damage. Therefore, on remand the only issue remaining to be tried was the amount of damage. On remand, however, a second district judge had submitted to the jury interrogatories that pertained to both causation and the amount of damage. Accordingly, on appeal from an adverse judgment entered pursuant to a second jury verdict in favor of the plaintiff, the defendant questioned the sufficiency of the evidence of causation. Although apparently concerned about the prior decision on causation,⁹⁶ the court held that the issue of causation was not before it.

Cognizant of the decision in *Terrell*, the Fifth Circuit did not allow itself to be drawn into the same quandary again in *Copper Liquor, Inc. v. Adolph*

93. 514 F.2d at 699.

94. See *Lamb Enterprises, Inc. v. Toledo Blade Co.*, 461 F.2d 506, 517 (6th Cir.), cert. denied, 409 U.S. 1001 (1972); *Harrison v. Prather*, 435 F.2d 1168, 1176 (5th Cir. 1970), cert. denied, 404 U.S. 829 (1971); *Arthur Murray, Inc. v. Reserve Plan, Inc.*, 406 F.2d 1138, 1145 (8th Cir. 1969); ABA, ANTITRUST LAW DEVELOPMENTS 265-67 (1975). But see *Syracuse Broadcasting Corp. v. Newhouse*, 295 F.2d 269, 276-77 (2d Cir. 1961).

95. 494 F.2d 16 (5th Cir.), petition for cert. dismissed, 419 U.S. 987 (1974).

96. *Id.* at 22 n.11.

*Coors Co.*⁹⁷ In *Coors*, although affirming the trial court decision that the defendant had committed a per se violation of section 1 of the Sherman Act, the Fifth Circuit remanded the case for further proceedings to determine "(1) whether the violation caused [the plaintiff] injury and (2) if so, to determine damages in light of the principles stated in [its] opinion."⁹⁸

The president of the corporate plaintiff testified that he had never sold the defendant's product at anything other than a loss.⁹⁹ He had used the product as a 'loss leader' and claimed that he had been terminated as a customer because of his failure to adhere to Coors' pricing policies. The plaintiff claimed that as a result of its termination, it had not been able to sell as many of its other products as it otherwise would have. The amount of these lost sales had been purportedly calculated by the plaintiff's damage expert on the basis of a lower volume of bank deposits by the plaintiff in the month immediately following his termination as a customer by the defendant's distributor. The court rejected the obviously spurious notion of using bank deposits for an isolated month as a measure of sales volume by pointing to the fact that the plaintiff's average bank deposits for several months following the plaintiff's termination showed no decline in its average bank balance. The court emphasized the distinction between actual sales records and bank deposits. The court's analysis of how damages might be proved is instructive and illustrates the inevitable intertwining of fact-of-damage and amount-of-damage issues.¹⁰⁰

*Shumate & Co. v. National Association of Securities Dealers, Inc.*¹⁰¹ also discussed the quantum of proof necessary to establish the fact of damage. In that case the district court had directed a verdict for the defendant in the face of the plaintiff's allegations of two conspiracies. The Fifth Circuit concluded that in both instances the plaintiff had not presented evidence of the fact of damage from the alleged conspiracies.¹⁰² The court reiterated the critical distinction recognized in *Terrell* between "damages which are definitely attributable to the wrong and only uncertain in respect of their amount" and damages that are "uncertain" because they "are not the certain result of the wrong."¹⁰³ A damage award is appropriate only in the first instance.

*Kestenbaum v. Falstaff Brewing Corp.*¹⁰⁴ also turned on the court's fact-of-damage analysis. One of Kestenbaum's claims was that the defendant,

97. 506 F.2d 934 (5th Cir. 1975); see notes 55-58 *supra*, 116-18 *infra*, and accompanying text.

98. 506 F.2d at 936.

99. Below cost sales are illegal in some circumstances in Texas. TEX. BUS. & COMM. CODE ANN. § 15.33(b)(2)(A) (1968). There is no indication in the opinion in *Coors*, however, that the possible applicability of the statute was drawn to the court's attention.

100. 506 F.2d at 951-55.

101. 509 F.2d 147 (5th Cir.), *cert. denied*, 44 U.S.L.W. 3183 (U.S. Oct. 6, 1975).

102. See note 59 *supra* and accompanying text.

103. 494 F.2d at 20, citing *Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 562 (1931).

104. 514 F.2d 690 (5th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3417 (U.S. Jan. 12, 1976) (No. 75-987); see notes 73-75, 90-93 *supra*, notes 119-21 *infra*, and accompanying text.

Falstaff, and its distributors, including Kestenbaum, had entered a price fixing agreement pursuant to which they agreed to maintain the price of Falstaff beer so that it would be competitive with the price of brands distributed on a regional basis. Kestenbaum admitted, however, that his prices would have remained the same in the absence of the alleged agreement.¹⁰⁵ Further, the evidence established that other distributors whose circumstances were similar to Kestenbaum's had raised their prices and had suffered substantial reductions in sales. Therefore, there was no evidence of any injury to Kestenbaum from the alleged price fixing agreement itself. Kestenbaum argued further, however, that Falstaff's policy of increasing its prices to him by fifty percent of the amount of any increase in price that he might impose established injury in fact. The court responded that "while Falstaff's increase in price to Kestenbaum may be classified as arbitrary, such increase is not itself violative of the antitrust laws, nor does it afford a basis for proof of injury even though it is coupled with a price ceiling requirement which is a per se violation."¹⁰⁶ Therefore, the court of appeals concluded that the plaintiff had not offered sufficient evidence of the fact of damage from the illegal price fixing to raise an issue for the jury. The court also concluded that the trial court erred in submitting any issue to the jury inquiring if the defendant was guilty of vertically imposing territorial restrictions upon Kestenbaum's sales because of his failure to offer any proof that damages resulted from such a restraint.¹⁰⁷

In *M.C. Manufacturing Co. v. Texas Foundries, Inc.*¹⁰⁸ the court again reversed a district court decision on the ground that the plaintiffs had failed to offer sufficient evidence to raise the issue of fact of damage. One of the plaintiffs had been the third lowest bidder on a particular government contract. The defendants were the successful bidder and that bidder's supplier of a particular part necessary for the manufacture of the product upon which bids had been submitted. The plaintiffs (the unsuccessful bidder and its parent company) claimed that the defendant bidder had been able to make a lower bid because the defendant supplier had sold its product to the defendant bidder at a lower price than it had offered to sell its product to the plaintiffs. This, the plaintiffs claimed, was actionable under both the Robinson-Patman Act¹⁰⁹ and section 1 of the Sherman Act.

105. *Id.* at 694.

106. *Id.*

107. *Id.* at 697.

108. 517 F.2d 1059 (5th Cir. 1975). There is an interesting development collateral to this case. Texas Foundries, Inc., the defendant in the federal antitrust suit, filed suit in state court to collect from the antitrust plaintiffs money due to Texas Foundries on an open account. M.C. Manufacturing filed a "plea in bar" alleging that, pursuant to FED. R. Civ. P. 13, the sworn account claim should have been filed as a counterclaim in the action in the federal court. The Texas district court overruled this plea and granted judgment to Texas Foundries. The Texas court of civil appeals affirmed this decision, noting that in personam judgments were sought in both the federal and state courts and that no final judgment had been reached in the federal court at the time the state district court reached its decision. *M.C. Mfg. Co. v. Texas Foundries, Inc.*, 519 S.W.2d 269 (Tex. Civ. App.—Beaumont 1975, writ ref'd n.r.e.), cert. denied, 44 U.S.L.W. 3398 (U.S. Jan. 12, 1976).

109. 15 U.S.C. § 13 (1970). The Fifth Circuit also held that the plaintiffs had not established a violation of the Robinson-Patman Act in this instance because they had not,

The plaintiffs' Sherman Act claim was predicated on their assertion that the defendant bidder and the defendant supplier had entered a conspiracy with the intent of driving the competitive plaintiffs out of business. Assuming that the plaintiffs' theory of the case was accepted by the jury, the court concluded that a Sherman Act violation had been established, but that the defendants should have been granted a directed verdict because of plaintiffs' failure to show injury from the discriminatory pricing scheme.¹¹⁰ The court's conclusion was based on the uncontroverted fact that had the defendant bidder been unsuccessful in obtaining the government contract, the contract would have been awarded to the second lowest bidder, a company unconnected with either defendant. The plaintiffs attempted to circumvent this result by arguing that had they received the same conspiratorial price that the defendant supplier had given to the defendant bidder, their bid would have been lower than that of the second lowest bidder. The Fifth Circuit rejected this contention on the ground that the purpose of the Sherman Act is to protect fair competition, not hypothetically to broaden conspiracies to give excluded competitors the benefit of them.

Terrell, Coors, Shumate & Co., Kestenbaum, and M.C. Manufacturing Co. emphasize the necessity of establishing the fact of damage with competent evidence. The emphasis is a most salutary one. In view of the broader standards often applied to the quantum of damages awarded in antitrust cases, it is particularly important to require a reasonable degree of certainty in determining that a plaintiff has been damaged. In the absence of proof of causation, antitrust damages become an unwarranted burden for a defendant and a windfall for the plaintiff that serves no statutory or social purpose.¹¹¹

VI. DAMAGES

The area of damages in private antitrust actions is one of the most troubling in our jurisprudence. Many antitrust claims are based on theoretical potential economic consequences that may result from particular conduct. A cause of action may be established on the basis of that conduct with no trace of the kind of intent or negligence required in tort law. Yet that conduct can be the basis for enormous damage claims based on theories which are completely esoteric to laymen.¹¹² As Judge Friendly observed, in determining damages in an antitrust action "a jury's common sense is less available than usual to protect it."¹¹³ Intricacies of a complicated business,

and, in the view of the court, could not establish an injury to competition. For a discussion of the theoretical underpinnings of the plaintiff's section one claims see *Areeda & Turner*, *supra* note 3.

110. 517 F.2d at 1063-64.

111. The Fifth Circuit in *Terrell* emphasized that a defendant need not demonstrate that the antitrust violation was the sole proximate cause of his injury, but cautioned that, in a case where it was not, the jury must be instructed to allocate the damage resulting from that violation. 494 F.2d at 20.

112. See, e.g., the damage claims of the plaintiff in *Telex Corp. v. International Business Machs. Corp.*, 367 F. Supp. 258 (D. Okla. 1973), *rev'd in part and aff'd in part*, 510 F.2d 894 (10th Cir. 1975).

113. *Herman Schwabe, Inc. v. United Shoe Mach. Corp.*, 297 F.2d 906, 912 (2d Cir.), *cert. denied*, 369 U.S. 865 (1962).

of economic theory, and of cost accounting can leave a jury uncomprehending and feeling its way by a vague emotional sense of what it thinks are appropriate moral standards. Unfortunately, suffering caused by hard competition can easily be confused with wrongful injury. Maxwell Blecher, one of the most effective plaintiffs' antitrust lawyers in the country, puts it this way:

[T]he jury's decision is not reached by applying highly technical, sophisticated, legal concepts to a relatively complex fact situation. It is, in my judgment, made on the simple basis of morality. The plaintiff wins because the jury, through the mysterious chemistry that operates inside the jury room, has determined that the plaintiff has been wronged or, in the language of the street, has been kicked around by the defendants and is thus entitled to some recompense.¹¹⁴

Plaintiffs who have been "kicked around" with practices judged to be harmful to our economy and, thus, prohibited by the antitrust laws should, of course, be compensated for proven damages they have incurred. To recompense plaintiffs who have been buffeted by the forces of competition because of their own inadequacies, economic or technological changes, or simply because they failed in the competitive struggle, is, however, destructive of the very values which the antitrust laws were designed to protect. The complexity of the area demands rigorous and careful analytical application of legal standards. Several of the Fifth Circuit's opinions in the damage area are praiseworthy examples of the standard that is required for a socially beneficent antitrust policy. The court, while reiterating the fact that somewhat broader standards for measuring the amount of damage are applied in the antitrust area than are applied in many other substantive areas of the law, exhibited a greater concern for the quality of evidence and the theoretical bases utilized in proving amount of damages.¹¹⁵

In *Copper Liquor, Inc. v. Adolph Coors Co.*,¹¹⁶ which turned on the plaintiff's failure to prove the fact of damage, the court offered a powerful critique of the evidence of damages that had been accepted by the district

114. Blecher, *Trial of an Antitrust Treble Damage Suit: The Plaintiff's Viewpoint*, 38 ANTITRUST L.J. 50, 52 (1968).

115. During the October 1973 Term the Fifth Circuit affirmed two major decisions in which damages were awarded because of violations of the antitrust laws. *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975); *Terrell v. Household Goods Carriers' Bureau*, 494 F.2d 16 (5th Cir.), *cert. dismissed*, 419 U.S. 987 (1974). The plaintiff in *Terrell* had previously been unsuccessful in proving damages. *Household Goods Carriers' Bureau v. Terrell*, 452 F.2d 152 (5th Cir. 1971) (en banc). Both *Lehrman* and *Terrell* incorporated to a certain extent the "yardstick" method of proving the amount of damage. *Bigelow v. RKO Radio Pictures*, 327 U.S. 251 (1946). The yardstick method utilizes the profitability of a similarly situated firm that is not subject to the antitrust restraint to gauge the damage done to the firm that is restrained. See Parker, *Measuring of Damages in Federal Treble Damage Actions*, 17 ANTITRUST BULL. 497 (1972); Comment, *Monetary Recovery Under Federal Antitrust Statutes*, 45 TEXAS L. REV. 856 (1967). *Lehrman* utilized a combination of the yardstick method and the "before-and-after" method of proving the amount of damage. The before-and-after method of proving damages measures the damage done to the antitrust victim by that firm's profitability prior to the time that the restraint was imposed. *Id.*

116. 506 F.2d 934 (5th Cir. 1975); see notes 55-58, 97-100 *supra* and accompanying text.

court. The plaintiff in *Coors* had attempted to prove his damages by showing a decline in the amount of deposits to his checking account in the single month after defendants had refused to sell him additional Coors beer. The plaintiff's expert then used this percentage loss together with an average volume of sales to calculate the plaintiff's damages. As was discussed in the preceding section, the court rejected the use of deposits for a single month and pointed out that the plaintiff's average bank deposits on a monthly basis had not declined after the termination. Further, the court emphasized the need for proper foundation evidence such as sales records and cost data to support expert testimony and the need to take into account negative factors affecting future profits (such as the fact that Coors beer was in short supply). The decision on rehearing in *Coors* makes it clear, however, that "just and reasonable estimates based upon relevant data" are appropriate once actual injury has been demonstrated.¹¹⁷ The significance of the decision is in the rigor of the analysis used in reviewing the relevant data pertaining to the amount of damage and the proof of the fact of injury.¹¹⁸

In *Kestenbaum*,¹¹⁹ another case that turned on the plaintiff's failure to prove the fact of damage, the court of appeals also found a failure to prove adequately the amount of damages, stating that "[a]n award may not be based . . . solely on speculation or guesswork."¹²⁰ Some of the damages awarded to Kestenbaum by the district court were apparently based on the plaintiff's assertion that he had lost good will as a result of the defendant Falstaff's alleged antitrust violations. The only evidence of the amount of this good will was the plaintiff's own testimony. While holding that an owner was entitled, in most instances, to give an opinion as to the good will of his business, the court cautioned that the defendant should have the right to cross-examine the plaintiff with respect to his opinion, and further emphasized that if the opinion were based solely on "speculative factors," the testimony could lack sufficient probative force to warrant submission to the jury.¹²¹

In *Greene v. General Foods Corp.*¹²² the plaintiff, Greene, asserted that the measure of his damages was the profit that he had foregone as a result of certain products being sold pursuant to General Foods' price fixing scheme, rather than at the higher price he could have obtained had he been free to establish the price at which those products were to be sold. Further, Greene had postulated damages that resulted from the partial destruction of his business because of his termination as a distributor after he had refused to adhere to the price fixing scheme. The opinion reflects an apparently

117. *Copper Liquor, Inc. v. Adolph Coors Co.*, 509 F.2d 758 (5th Cir. 1975).

118. *Compare Woods Exploration & Producing Co. v. Aluminum Co. of America*, 509 F.2d 784 (5th Cir. 1975), *cert. denied*, 44 U.S.L.W. 3183 (U.S. Oct. 6, 1975); *see note 3 supra*.

119. *Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690 (5th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3417 (U.S. Jan. 12, 1976) (No. 75-987); *see notes 73-76, 90-94, 104-07 supra* and accompanying text.

120. 514 F.2d at 698.

121. *Id.* at 699.

122. 517 F.2d 635 (5th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3306 (U.S. Nov. 10, 1975) (No. 75-693); *see notes 47-54 supra* and accompanying text.

balanced and conservative appraisal by his expert of the plaintiff's damage.¹²³ While not free from criticism, the damage evidence submitted in *Greene* has some value as a model for a plaintiff attempting to show damages based on allegations of lost past profits and partial destruction of his business.

Greene is also significant for the court's recognition of the basic economic fact that a plaintiff should not be allowed to recover both lost future profits and "going concern value" of a business destroyed by an antitrust violation.¹²⁴ Since the going concern value (measured by good will) represents only discounted future profits, it would seem obvious that courts would not permit recovery for both.¹²⁵

It is also significant that the Fifth Circuit in both *Greene*¹²⁶ and *Kestenbaum*¹²⁷ noted that the plaintiff's voluntary involvement in a practice in restraint of trade can be a factor to be accorded significant weight in measuring the damages to be awarded. The court in the latter case stated that "by-products of a restriction inuring to a plaintiff's benefit can be considered in computing damages."¹²⁸ Thus, if a plaintiff profits from involvement in the scheme he alleges to be illegal, such profits should be offset against the damages he incurs through participation.

VII. CONCLUSION

The significance of the antitrust decisions of the Fifth Circuit during its October 1974 Term is not the enunciation by the court of dramatic changes in substantive legal principles. Rather, the significance is found in the court's rigorous analysis of the evidence presented to support the specific elements of an antitrust violation,¹²⁹ the court's concern for the quality of the evidence to be considered,¹³⁰ and the court's attentiveness to realistic economic analysis in formulating legal standards.¹³¹ These developments

123. 517 F.2d at 660-66.

124. *Id.* at 663.

125. In *Lehrman v. Gulf Oil Corp.*, 500 F.2d 659, 664 (5th Cir. 1974), *cert. denied*, 420 U.S. 929 (1975), the court said, that "[i]t is clear that an award including both [lost future profits and going concern value] is inappropriately duplicitous." The court in *Lehrman* was willing to presume that the jury's verdict did not include an award of both types of damages. *Id.* at 665. The decision indicates the desirability of having the components of a damage award separately identified by a jury.

126. 517 F.2d at 646.

127. 514 F.2d at 695; *see* notes 73-76, 90-93, 104-07, 119-21 *supra* and accompanying text. The court in *Kestenbaum* noted that the decision in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968), did not foreclose the possibility that a court could hold that a party who had equal responsibility for establishing a practice that is illegal under the antitrust laws may be barred from recovering damages under the antitrust laws by the doctrine of *in pari delicto*. 514 F.2d at 695 n.4. *See also* a similar reference in *Greene*: "We have no occasion here to consider to what extent the 'in pari delicto' doctrine will continue to function in private antitrust litigation, if indeed the plaintiff is equally responsible, or a co-adventurer." 517 F.2d at 646; *see* notes 48-50 *supra* and accompanying text.

128. 514 F.2d at 695.

129. *E.g.*, *Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690 (5th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3417 (U.S. Jan. 12, 1976) (No. 75-987).

130. *E.g.*, *Copper Liquor, Inc. v. Adolph Coors Co.*, 506 F.2d 934 (5th Cir. 1975).

131. *E.g.*, *International Air Indus., Inc. v. American Excelsior Co.*, 517 F.2d 714 (5th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3400 (U.S. Jan. 5, 1976) (No. 75-

seem to reflect a heightened concern for these same matters recently demonstrated in the decisions of the Supreme Court.¹³² Certainly, they reflect the sophistication of the circuit in dealing with a complex, vital, and rapidly expanding area of civil practice.¹³³

943); *Greene v. General Foods Corp.*, 517 F.2d 635 (5th Cir. 1975), *petition for cert. filed*, 44 U.S.L.W. 3306 (U.S. Nov. 10, 1975) (No. 75-693).

132. *See, e.g.*, *United States v. General Dynamics Corp.*, 415 U.S. 486 (1974), *discussed in Note*, 53 N.C.L. REV. 535 (1975). *See also Alcorn, Merger Analysis for Banks and Others—Maine Bancorporation and Connecticut National Bank*, 12 Hous. L. REV. 539 (1975).

133. *See the relevant portion of REPORT OF THE DIRECTOR, ADMINISTRATIVE OFFICE OF UNITED STATES COURTS*, in CCH TRADE REG. REP. No. 199, at 7 (Oct. 20, 1975).