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Anti-Trust Law - Sherman Act: Conspiracy in Patent Anti-Trust Cases - United States v. Singer Manufacturing Company, 374 U.S. 174 (1963)

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dustry.[19] Market share is only one of the several factors to be considered in finding a *prima facie* violation of this section. A showing that the merging corporations do a large dollar volume of business or that the corporation's share of the market would increase in a horizontal merger does not indicate a violation of this section.[20] The current test is not impact on competition between the corporations involved but is one of qualitative substantiality of the resulting effect on competition in the relevant market.[21]

In section 7 cases it is necessary to determine the proper "section of the country" (relevant geographical market) before appraising the probable competitive effects of the proposed merger or acquisition. The four-county area in which the appellees had offices and were permitted to do branch banking under Pennsylvania law was selected as the relevant geographical market in the instant case. The number of commercial banks in the area would be reduced to forty-one if the merger was effected. There was testimony by bankers, several of them being competitors of PNB and Girard, that the larger bank would be better able to compete with large out-of-state banks, would promote economic development in the area, and would have no adverse effect on competition. In addition it can be argued that competition among banks is not as vigorous as in other commercial and industrial areas generally, partly because of the present network of federal regulation and supervision over banking activities.[22] In light of these facts, the intent of Congress in amending section 7, and prior decisions of the federal courts, the Supreme Court's holding that a merger resulting in 30% of the market share amounts to a *per se* violation appears unfounded.

[19] Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

[20] Briggs Mfg. Co. v. Crane Co., 185 F. Supp. 177 (D.C. Mich. 1960).

[21] Vanadium Corp. of America v. Susquehanna Corp., 203 F. Supp. 686 (D.C. Del. 1962).

[22] See 1 DAVIS, ADMINISTRATIVE LAW, § 4.04 (1958), where federal supervision of banking is referred to as one of the most successful systems of economic regulation.

ANTI-TRUST LAW–SHERMAN ACT: CONSPIRACY IN PATENT ANTI-TRUST CASES

Singer Manufacturing Company completed the design of a mechanism to be used in a household sewing machine in April, 1953 and filed an application for a United States patent thereon. Singer subsequently purchased the June 9, 1952 United States application of one Harris which covered the same mechanism. In November of 1955, Singer negotiated a cross-licensing agreement with Vigorelli, an Italian firm, to avoid inter-

ference proceedings in the United States Patent Office on conflicting applications filed by the two companies. Singer then discovered the existence of a United States application by Gegauf, a Swiss firm, which Singer believed enjoyed priority over its Harris application. Using the possibility of litigation and the existence of strong Japanese competition as bargaining points, Singer concluded a cross-licensing agreement with Gegauf. Singer then convinced Gegauf that Singer was in a better position to enforce the patents against the competition, and purchased Gegauf's application. Singer withdrew its Harris application from the interference proceeding, and when the Gegauf patent issued, Singer instituted infringement actions against Japanese and European infringers. Finally, Singer brought a proceeding before the United States Tariff Commission, seeking to exclude all infringing machines from the United States. The United States instituted a civil anti-trust suit seeking to restrain alleged violations of sections 1 and 2 of the Sherman Act. The Supreme Court, in reversing the holding of the District Court for the defendant, Singer, held that the entire course of dealings between Singer, Vigorelli, and Gegauf constituted an illegal combination or conspiracy in restraint of trade. *United States v. Singer Manufacturing Company*, 374 U.S. 174 (1963).

In essence, the Court held that a course of conduct involving the negotiation of a license and an assignment of a patent established an illegal conspiracy where an element in the inducement to enter into such agreements was the possible exclusion of infringing manufacturers from the market. The case establishes no novel principle of law, nor does it explicitly overturn any previously-established rules. However, the decision does indicate a furtherance of the trend to require very little in the way of proof to establish a combination or conspiracy in restraint of trade. In particular, the freedom to use the patent grant has been further limited by the indication that the motives of the parties in dealing with the limited monopoly will be vigorously scrutinized by the courts.

To emphasize the significance of this case in limiting the freedom of patentees to interchange their rights under the patent grant, an inquiry into the elements necessary to establish conspiracy in patent anti-trust cases is required. Cases involving the use of patents in alleged conspiracies have often arisen in the so-called "patent pool" situations, wherein a group of patents are aggregated under single ownership or control.[1] "Patent pools" are not illegal *per se;* in fact, the Court has actually spoken well of patent aggregation, where the arrangement allows more efficient use of

[1] 4 TOULMIN, ANTI-TRUST LAWS OF THE UNITED STATES (1950); 1 WOOD, PATENTS AND ANTI-TRUST LAW (1942); Morison, *The Patent Grant and Free Enterprise–The Abuses of Patent Monopolies*, 38 A.B.A.J. 739 (1952); Comment, *Patent Pooling and the Anti-Trust Laws*, 17 U. CHI. L. REV. 357 (1950); Note, *Patent Pooling and the Sherman Act*, 50 COLUM. L. REV. 1113 (1950).

patented subject matter.[2] However, these arrangements have often led to *per se* violations of the Sherman Act, and have been properly condemned by the courts.[3] Such conduct has most often been based on formal agreements.[4] In these cases, proof of the conspiracy is not difficult; the issue becomes solely whether the concerted action in question or its object is illegal.

Open conspiracies in restraint of trade based upon formal agreements are rarely before the courts today. In the usual situation, the alleged illegal conspiracy must be shown by circumstantial evidence, and the courts have given the Justice Department broad leeway in the introduction of such evidence. The so-called "conscious parallelism" cases illustrate the establishment of conspiracies without formal agreement.[5] In *Interstate Circuit, Inc. v. United States*,[6] a case involving alleged restraint of trade in copyrighted matter, the defendant, an exhibitor of motion pictures, entered into agreements with each of a group of motion picture distributors. The distributors were to use their influence on other exhibitors in the area, causing them to raise their admission prices. While it was admitted that separate agreements between the defendant exhibitor and each distributor would have been legal, the Court found that the uniform price rise showed that a conspiracy existed between the distributors, without evidence of a formal agreement between them. Similarly, in *Eastern States Retail Lumber Dealers' Association v. United States*,[7] the Court found that a combination of retailers had tacitly agreed that they would not buy from wholesalers who competed with them at retail. This combination was struck down as an illegal conspiracy in restraint of trade.

[2] See, e.g., Standard Oil Co. (Indiana) v. United States, 283 U.S. 163, 171 (1931), where the Court stated, "An interchange of patent rights . . . is frequently necessary if technical advancement is not to be blocked by threatened litigation. . . . [S]uch interchange may promote rather than restrain competition."

[3] Hartford-Empire Co. v. United States, 323 U.S. 386 (1944) (division of markets); United States v. Masonite Corp., 316 U.S. 265 (1942) (price fixing); Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20 (1912) (price fixing).

[4] United States v. Line Material Co., 333 U.S. 287 (1948); United States v. National Lead Co., 332 U.S. 319 (1947); Hartford-Empire Co. v. United States, 323 U.S. 386 (1944); United States v. Masonite Corp., 316 U.S. 265 (1942); United States v. United Shoe Machinery Co., 247 U.S. 32 (1917); Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20 (1912).

[5] For general discussions on growth of the "conscious parallelism" doctrine, see Conant, *Consciously Parallel Action in Restraint of Trade*, 38 MINN. L. REV. 797 (1954); Rahl, *Conspiracy and the Anti-Trust Laws*, 44 ILL. L. REV. 743 (1950); Wood, *The Supreme Court and a Changing Anti-Trust Concept*, 97 U. OF PA. L. REV. 309, 329 (1949); Adelman, *Effective Competition and the Anti-Trust Laws*, 61 HARV. L. REV. 1289, 1324 (1948); Note, *Conscious Parallelism—Fact or Fancy?* 3 STAN. L. REV. 679 (1951).

[6] 306 U.S. 208 (1939).

[7] 234 U.S. 600 (1914).

Mere parallel behavior, without evidence of knowledge and at least tacit agreement, is not in itself illegal. In the words of the Supreme Court,

> Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but conscious parallelism has not yet read conspiracy out of the Sherman Act entirely.[8]

The Justice Department thus must show a nexus between the individuals or corporations who are alleged to be parties to a conspiracy.

In the area of patent anti-trust law, *United States v. United States Gypsum Company*[9] is analogous to the "conscious parallelism" cases which have developed in the general field of anti-trust law. U. S. Gypsum Company issued substantially identical patent licenses to nearly all manufacturers in the gypsum industry, thereby fixing prices. It had previously been held that a patentee may fix the price at which a single licensee must sell the article.[10] In the Gypsum Case, however, the Court held that since all licensees involved *knew* the industry was being regimented by this technique, an illegal conspiracy resulted.

To determine whether a conspiracy exists, the Court will examine the entire course of dealing between the alleged conspirators. That is, the Court will look beyond the formal agreements between the parties to their actual conduct under such agreements. For example, in *United States v. General Electric Company*[11] the District Court for the Southern District of New York found,

> The eight illegal practices already discussed . . . when taken along with the character of the various licenses and agencies, and the course of dealing among all the parties, establishes beyond a reasonable doubt that the defendants conspired among themselves . . . .[12]

More recently, the Supreme Court stated that the existence of a conspiracy is "to be judged by what the parties actually did, rather than what they said."[13]

It has also been established that a showing of arm's length bargaining between the parties does not preclude the existence of a conspiracy. The mere fact that the negotiations and course of dealing between two parties

[8] Theater Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 541 (1954). See also Delaware Valley Marine Supply Co. v. American Tobacco Co., 297 F. 2d 199 (3d Cir. 1961) *cert. denied*, 369 U.S. 839 (1962).

[9] 333 U.S. 364 (1948).

[10] United States v. General Electric Co., 272 U.S. 476 (1926).

[11] 80 F. Supp. 989 (1949).

[12] *Id.* at 1011.

[13] United States v. Parke, Davis, & Co., 362 U.S. 29, 44 (1960). See also FTC v. Beech Nut Packing Co., 257 U.S. 441 (1922); United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944).

are adversary in some respects will not be determinative of the question of conspiracy. In *United States v. Masonite Corporation*,[14] a case involving an alleged conspiracy to fix prices through patent licensing agreements, the various licensees were attempting to discover competitive non-infringing products, and some of them had actually distributed competitive products. The Court held that the efforts by the licensees to compete with the licensor did not preclude the existence of a conspiracy. Similarly, in *United States v. Line Material Company*,[15] the Court found a conspiracy even though the licenses constituting the agreements between the parties "were the results of arm's length bargaining in each instance."[16]

From the foregoing, several general principles regarding conspiracy in patent anti-trust cases can be obtained: 1) Mere interchange of patents or rights thereunder cannot alone constitute a conspiracy; 2) A conspiracy may be established without evidence of formal agreement between the parties; 3) To establish a conspiracy, the Court will look to the entire course of conduct between the parties and not merely formal agreements, where they exist; 4) At least implied or tacit agreement on an illegal course of conduct is required; and, 5) A conspiracy may arise even if the agreements constituting the conspiracy are the results of arm's length bargaining.

In the Singer case, the Court followed the principles set forth above. There was no claim by the government that the interchanges of patent rights, in themselves, were illegal.[17] While there was no formal agreement to exclude the Japanese competition, the Court held that no formal agreement was required to show a conspiracy.[18] It found that the course of dealing between Gegauf and Singer established an implied agreement to exclude the Japanese.[19] It found that this implied agreement was sufficient to constitute a conspiracy.[20] Finally, it found that the existence of arm's length bargaining did not preclude a finding of conspiracy.[21]

The instant case, therefore, enunciated no new principle of law on the subject of conspiracy in patent anti-trust suits. As previously stated, the importance of this case lies in the application of existing principles to the evidence of agreement to exclude a Japanese competitor. The Government's case hinged on several statements, made by Gegauf and Singer personnel, to the effect that the best arrangement should be found to en-

[14] 316 U.S. 265 (1942).

[15] 333 U.S. 287 (1948).

[16] *Id.* at 297.

[17] United States v. Singer Mfg. Co., 374 U.S. 174, 189 (1963).

[18] *Id.* at 193.

[19] *Id.* at 194.

[20] *Id.* at 193.

[21] *Ibid.*

force the Gegauf patent against the Japanese.[22] The written agreements between Gegauf and Singer in no way mention an agreement to exclude the Japanese, nor was any evidence adducd showing that a verbal agreement existed. Moreover, no showing was made that Gegauf had any power to enforce such an agreement, if made, against Singer. The trial court, far from finding a conspiracy to exclude the Japanese, found that the "dominant and sole purpose of the license agreement was to settle the conflict in priority."[23] The Supreme Court found this holding to be clearly erroneous and reversed the conclusions of the District Court.

The Singer case should stand as a warning to those who must advise clients relative to their bargaining for the exchange of patents or rights thereunder. Where a common motive exists to enforce the patents against infringers, and litigation to exclude the infringer results, little more is required to establish an illegal conspiracy in restraint of trade.

[22] *E.g.*, "We agree that something should be done against Japanese competition in your country and maybe South America. . . . [I]t may be possible that we can both strengthen our positions with respect to the Japanese competition which you mention. . . ." United States v. Singer Mfg. Co., 374 U.S. 174, 184 (1963).

[23] United States v. Singer Mfg. Co., 205 F. Supp. 394 (1962).

ASSOCIATIONS AND SOCIETIES: RELIGIOUS SOCIETIES– PROTECTION OF ENTRUSTED PROPERTY AGAINST CHANGE IN FUNDAMENTAL DOCTRINES

The Landmark Baptist Church of Traskwood, Arkansas, functioning on property restricted by three deeds to the use of "Landmark Baptists," was rent with a dissension which matured in a bill by the minority group of church members to enjoin the pastor and majority faction from using the church property. Their assertion was that the property was subject to a trust under which the church premises must be used only to promote the doctrine of the Landmark Baptist Church; and that the pastor had and was teaching doctrines fundamentally, basically, and radically different from the faith of a Landmark Baptist Church in violation of that trust. The bill seeking to enjoin and eject the majority faction failed in the Chancery Court of Saline County, Arkansas, but this decision became reversed in the Supreme Court of that state. At a subsequent rehearing, the Supreme Court extended the injunction and ejected the majority faction from the property. *Holiman v. Dovers*, 336 S.W. 2d 197 (Ark. 1963).

In a case of this sort with constitutional overtones, it is necessary to establish: the court's jurisdiction where religious matter is involved; the rights of a minority in this congregational, independent church; the trust