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Trade Regulations - "Monopolizing" under Section 2 of the Sherman Antitrust Act

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should exclude economic losses under Section 402(A) and relegate them solely to an assumpsit action based on the Commercial Code. It should have logically eliminated contributory negligence as a defense since the action is not predicated upon negligence. The court should have more fully explained its rationale underlying the adoption of such a significant change of law. Now the doctrine's explanation, extension or limitations must await clarification thereby continuing the confusion until such time as the appropriate fact situations are presented to the court. Such a categorical change in the Pennsylvania law, albeit a desirable change, demands a more complete elucidation.

J. Jerome Mansmann

TRADE REGULATIONS—"Monopolizing" under Section 2 of the Sherman Antitrust Act—An inquiry into an alleged violator's willfulness is necessitated.

United States v. Grinnell Corp., 384 U.S. 563 (1966).

While a monopolist[1] must continue to flex his economic muscles with extreme caution and enlightened awareness of the antitrust laws, the *Grinnell*[2] decision, at least, permits him to maintain a legal existence. Since the *Alcoa*[3] doctrine was announced in 1945, the sustenance of monopoly power[4] has been singularly vulnerable to an indictment under Section 2 of the Sherman Antitrust Act.[5] Fashioning a virtual per se principle for a "monopolizing" offense, *Alcoa* allowed for a monopolist only when that powerful position is "thrust upon him,"[6] and sounded the dirge for the honestly industrial monopolizer. Authored by Mr. Justice

1. A monopolist is defined in terms of monopoly power, *i.e.*, to control prices, United States v. U.S. Steel Corp., 251 U.S. 417 (1920), or exclude competition, Patterson v. United States, 222 Fed. 599 (6th Cir. 1915), *cert. denied*, 238 U.S. 635 (1915) or regulate production. See also United States v. E.I. duPont de Nemours & Co., 351 U.S. 377 (1956). Such monopoly power has generally been inferred from a predominant percentage-share of the relevant market: 80% in American Tobacco Co. v. United States, 328 U.S. 781 (1911), and 90% in United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945). See also 1955 ATT'Y. GEN. NAT'L. COMM. ANTITRUST REP. 43-44, 48-55.

2. 384 U.S. 563 (1966).

3. United States v. Aluminum Co. of America, 148 F.2d 416 (2d Cir. 1945).

4. See note 1, *supra*, for meaning of "monopoly power."

5. 26 Stat. 209 (1890), 15 U.S.C. § 2 (1940), "Every person who shall monopolize . . . any part of the trade or commerce. . . ."

6. In United States v. Aluminum Co. of America, 148 F.2d 416, 430 (2d Cir. 1945), Judge Learned Hand illustrated this "thrusting" with only three situations: "A market . . . so limited that it is impossible to produce . . . except by a plant large enough to supply the whole demand . . . [c]hanges in taste or in cost which drive out all but one purveyor. A single producer may be the survivor . . . by virtue of his superior skill, foresight and industry."

Douglas, the majority[7] opinion in *Grinnell*, at once, settle this dichotomously disputed[8] proscription of Sherman section 2 and dispelled the paradoxical[9] notion of the *Alcoa* pronouncement.

Grinnell Corporation (Grinnell) through its wholly-owned or solely-controlled subsidiaries American District Telegraph Co. (ADT), Holmes Electric Protective Co. (Holmes), and Automatic Fire Alarm Co. of Delaware (AFA), engaged in providing central station protective services[10] (CSPS). The district court's delineation of the relevant market[11] —accredited companies[12] in the CSPS business operating nationally— revealed that the Grinnell congeries controlled over 87% of that market. Inferentially, this predomination satisfies the initial requisite to the outlawed "monopolizing"—monopoly power.[13]

Grinnell's ill-fated attainment of this position originated in 1906 and 1907 when contracts among and between the defendant corporations preempted for each, a geographical segment of the nation. These restrictive agreements also limited each to offering only designated services in their delimited segment.[14] Indisputably violative per se of Sherman section 1,[15]

7. Three justices dissented (Harlan, J., Fortas, J., and Stewart, J.); however, all took issue solely with the majority's affirmation of the district court's delineation of the relevant market and urged a reversal so that it might be redetermined.

8. One school advances the argument that mere monopoly position was proscribed. Absent the enumerated circumstances, this was the option of *Alcoa*. Contrariwise, the other interpretation would prohibit only the monopolist enlisting positive drive to attain or maintain his predominance. This is the apparent subscription of *Grinnell*. See Adler, *Monopolizing at Common Law and Under Section Two of the Sherman Act*, 31 HARV. L. REV. 246 (1917), and 21 CONG. REC. 2456-2460 (1890).

9. The ostensible purpose of the antitrust laws of the United States is to foster competition; competition which pits one firm against another in a free market. Having promoted this aggressive atmosphere, the antitrust laws later denounce the burgeoning victor as a "monopolizer" and denude him of his powers. Irreconcilably, the very impetus to attain such power originated in the competitive spirit initially encouraged.

10. The various services offered include the following:

(1) automatic burglar alarms
(2) automatic fire alarms
(3) sprinkler supervisory systems
(4) night watchman signal services

Each functions electronically from a central station which is manned twenty-four hours a day.

11. This is a prerequisite to establishing monopoly power therein. See United States v. E. I. duPont de Nemours & Co., 351 U.S. 377 (1956).

12. CSPS companies are accredited by insurance underwriters.

13. See note 1, *supra*, for examples of other inferences.

14. Under one contract, for example, ADT transferred its burglar alarm systems to Holmes which was to operate only in the Middle Atlantic States, and agreed to refrain forever from competing therein. Reciprocally, Holmes transferred to ADT its night watchman signal service and similarly agreed not to compete in that business.

15. See Addyston Pipe & Steel Co. v. United States, 175 U.S. 211 (1899); 1955 ATT'Y. GEN. NAT'L COMM. ANTITRUST REP. 26.

these conspiracies exemplified the defendant's embryonic efforts to gain monopoly proportions. At the institution of the Government's suit (1964), Grinnell held 76% of the stock of ADT, 89% of the stock of AFA, and 100% of the stock of Holmes. Each was effected by outright stock or asset acquisitions. In addition, ADT and Holmes, over the years, purchased and either dismantled or assimilated thirty competitors. Seven of these purchases involved lifetime no-competition pacts. Even at the commencement of the instant suit, each of the defendants (except Grinnell) had an offer outstanding to purchase each of the four largest non-defendant competitors. Such artificial augmentation, designed clearly to obviate competition, occasioned another illustration of the defendant's willfulness which was later to be denounced by the Supreme Court. Further, Grinnell indulged in discriminatory pricing practices which, admittedly, deterred potential competitors from inaugurating a CSPS. ADT, in fact, threatened retaliation against each firm which even contemplated a competing central service. Assuredly, the defendant's now-unlawful will was amply manifested.

In the district court,[16] Judge Wyzanski[17] applied the rebuttable presumption phenomenon to this case. He decided that, ". . . once the Government has borne the burden of proving what is the relevant market and how predominant a share of that market defendant has, it follows that there are rebuttable presumptions that defendant has monopoly power and has monopolized in violation of § 2."[18] This conception reaffirms, indeed extends, *Alcoa*. Under Judge Wyzanski's proclamation, a simple showing of Grinnell's predominance in the relevant market provided a presumptive infringement of Sherman section 2. To exculpate themselves, the defendants would then have to come forward with proof of a cause as permitted by *Alcoa*.

Although pretending it unnecessary to dispose of the district court's novel proposition,[19] Justice Douglas effectively renders it a nullity, as he *held, both* "the possession of monopoly power in the relevant market . . . and the willful acquisition or maintenance of that power"[20] as essential elements of a "monopolizing" violation. By promulgating "willful acquisition or maintenance" of monopoly power as the "second ingredient" of a "monopolizing" contravention of Sherman section 2, the opinion neces-

16. United States v. Grinnell Corp., 236 F. Supp. 244 (D.R.I. 1964).

17. Judge Wyzanski is well acquainted with the antitrust field, particularly Section 2 of the Sherman Antitrust Act, and has rendered erudite contributive decisions in recent years. See United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1953); Union Leader Corp. v. Newspapers of New England, Inc., 180 F. Supp. 125 (D. Mass. 1959), *modified*, 284 F.2d 582 (1960), *cert. denied*, 365 U.S. 833 (1960).

18. 236 F. Supp. 244, 248 (D.R.I. 1964).

19. 384 U.S. 563, n.7 (1966).

20. *Id.* at 570.

sarily decides whether the defendant must demonstrate his honestly industrial methods or the Government must prove the putative monopolizer's willfully predatory connivances.

In favoring the latter approach, the Supreme Court emasculates the district court's pronouncement and recedes drastically from the virtual per se position advanced in *Alcoa*. Mere monopoly power becomes neither presumptive nor essentially conclusive evidence of a Sherman section 2 violation. More importantly, *Grinnell* revitalizes the "rule of reason" as conceived in 1911 by Mr. Justice White and particularized in 1918 by Mr. Justice Brandeis.[21] With reference to "monopolizing," this concept envisions an exploration of the reasonableness of the monopolist's methods. In essence, a demonstration of willful, predatory tactics becomes an indispensible ingredient to branding the defendant monopolist as unreasonable and, consequently, offensive to the antitrust laws. Although Grinnell and its affiliates lost the instant case, the necessitated inquiry into the manners of the monopolist resuscitates, legally, the monopolist with integrity, and alleviates the paradoxical *Alcoa* doctrine by heralding willful, positive drive as the touchstone of a Sherman section 2, "monopolizing" transgression.

H. Kennedy Linge

TRADE REGULATIONS—Group Boycott—Restraint of Trade—A joint refusal to deal resulting in an exclusion of traders from the competitive market is a *per se* violation of section 1 of the Sherman Act.

United States v. General Motors Corp., 384 U.S. 127 (1966).

In a civil action brought by the United States Government, defendants, General Motors Corporation and three Chevrolet dealer associations, were held to have violated the prohibitions of section 1 of the Sherman Act.[1]

21. In Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911), Mr. Justice White conceptualized the "rule of reason." Briefly this concept demands an inquiry into the purpose, power and effect and requires a definite factual showing of illegality of a defendant's conduct. An eminent enumeration of the considerations involved was advanced in Chicago Board of Trade v. United States, 246 U.S. 231 (1918). In that case, Mr. Justice Brandeis, at 238, dissected and analyzed, ". . . the facts peculiar to the business to which the restraint is applied; its conditions before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." In many areas of antitrust law, the "rule of reason" has been discarded in favor of per se or virtual per se principles; this decision may foreshadow its revival.

1. The statute reads in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several