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Trade Regulations—Sherman Act—Conspiracy—Conscious Parallelism.—Delaware Valley Marine Supply Co. v. American Tobacco Co

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Should recovery be allowed where persons other than directors, officers, and ten percent stockholders who, because of their relationship to insiders, whether it be through marriage, friendship, partnership or other business associations, might be presumed to have access to confidential information? These difficulties lend themselves to legislative inquiry and enactments better than to judicial contortions. Quite clearly, Congress should act, since *Blau v. Lehman* has clearly established that there is no provision in the act to curb the transfer to and the use of confidential information by non-insiders and, especially, the investment brokerage firms.

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Trade Regulations—Sherman Act—Conspiracy—Conscious Parallelism. —***Delaware Valley Marine Supply Co. v. American Tobacco Co.***[1]—The Delaware Valley Marine Supply Company was organized to sell tax-free tobacco and liquor to vessels engaged in foreign trade in the Port of Philadelphia. In order to purchase tax-free cigarettes a ship chandler must obtain a direct listing. The Supply Company applied for the listing to five major tobacco companies doing business in the Port. Each company had at least one distributor for the Port at that time, Lipschutz Bros. R. J. Reynolds and P. Lorillard also sold to a third distributor who dealt in all ship supplies. Two companies refused by letter, two did not reply and Philip Morris declined to grant the listing after a preliminary investigation. This precluded plaintiff from entering the sea stores business. Plaintiff brought this suit for treble damages alleging a conspiracy in violation of Section 1 of the Sherman Act.[2] The plaintiff did not introduce direct evidence of conspiracy but relied heavily on "conscious parallelism," claiming that the tobacco companies showed a consciously uniform business behavior by their refusals. It was common knowledge in the business that to sell sea stores, all the major brands of cigarettes must be procured. There was other evidence that the cigarette companies were adequately represented in this market, that their sales were increasing and that they had no financial interest in the competitor, Lipschutz, which would prompt the alleged behavior. The lower court granted the defendants a directed verdict on the ground that the plaintiff had not proved damage,[3] expressly avoiding the question of conspiracy.[4] The Court of Appeals affirmed. HELD: Even assuming the evidence supported the existence of conscious parallelism, the plaintiff had

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[1] 297 F.2d 199 (3d Cir. 1961), petition for cert. filed, 30 U.S.L. Week 3267 (Feb. 20, 1962) (No. 734).

[2] 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958). The section in substance provides: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . ."

[3] Delaware Valley Marine Supply Co. v. American Tobacco Co., 184 F. Supp. 440 (E.D. Pa. 1961).

[4] Id. at 449.

failed to produce evidence from which a jury could find that the defendants had conspired in refusing to deal with the plaintiff.

Originally, *Standard Oil Co. v. United States*[5] and *United States v. American Tobacco Co.*[6] set down the "rule of reason" test which has been the basic approach in antitrust cases under Section 1 of the Sherman Act.[7] Later, the U.S. Supreme Court held that private agreements to fix prices necessarily fell within the prohibition of the act and thus the "per se" violation was recognized.[8] It was also early recognized that proof of a section 1 conspiracy is difficult and that direct evidence or testimony may be impossible but that conspiracy could be inferred from the result in a given situation.[9] In 1939, the concept of conscious parallelism was spotlighted by *Interstate Circuit, Inc. v. United States.*[10] There, motion picture distributors and theatre chain operators in New Mexico and Texas were convicted of section 1 violations when they sought to impose restrictions as to prices to be charged for movie admissions. The government's major evidence was a letter from one of the theatre chain operators, Interstate Circuit, to all of the distributors. The names of all distributors were listed on every letter as addressees. The letter asked that certain conditions be observed to assure continued exhibition of the distributors' films by Interstate. One of the conditions was that the films be distributed only to theatres using the set admission prices. The arrangement lasted for two years. The government introduced no direct evidence of the alleged conspiracy yet the court found that the defendants had conspired to restrain trade:

> It was enough that, knowing that concerted action was contemplated and invited, the distributors gave their adherence to the scheme and participated in it. Each distributor was advised that the others were asked to participate; each knew that cooperation was essential to successful operation of the plan. They knew that the plan, if carried out, would result in a restraint of commerce, which . . . was unreasonable within the meaning of the Sherman Act, and knowing it, all participated in the plan.[11]

Thus, consciously parallel business behavior was indicative of concerted action upon which the conspiracy conviction was upheld.

It was felt that in *Interstate Circuit*, Mr. Justice Stone had not meant to take agreement out of antitrust conspiracy.[12] However, the Court of Appeals for the Third Circuit heavily emphasized conscious parallelism in three cases which came before it after *Interstate Circuit*.[13] These cases in-

[5] 221 U.S. 1 (1911).

[6] 221 U.S. 106 (1911).

[7] Supra note 2.

[8] United States v. Trenton Potteries Co., 273 U.S. 392 (1927).

[9] Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 612 (1914).

[10] 306 U.S. 208 (1939).

[11] Id. at 226.

[12] Rahl, Conspiracy and the Anti-Trust Laws, 44 Ill. L. Rev. 743, 759 (1949).

[13] Milgram v. Loew's, Inc., 192 F.2d 579 (3d Cir. 1951), cert. denied, 343 U.S. 929

volved the uniform refusal of defendant motion picture distributors to license plaintiff's theatre for films on the runs[14] he felt his location warranted. There was no express agreement by the distributors by which concert of action necessary for conspiracy could be shown. The court's language in each opinion indicated that it considered uniform conduct of the defendants an extremely important factor in affirming the finding of conspiracy violations on the facts.[15] However, in the *Milgram* case, the court by way of dictum did specify a limitation on the adverse effect of uniform parallel business behavior, declaring: "This does not mean . . . that in every case mere consciously parallel business practices are sufficient evidence in themselves, from which a court may infer concerted action."[16]

A severe blow was dealt to any theory holding that conscious parallelism could form the sole basis of an antitrust conspiracy by *Theatre Enterprises v. Paramount Film Distributing Corp.*[17] Mr. Justice Clark, after agreeing that business behavior is admissible circumstantial evidence from which the factfinder may infer agreement, continued:

> But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the judicial attitude toward conspiracy; but "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely.[18]

This statement, and the dictum in the above mentioned *Milgram* case, find support in the present opinion. The Court of Appeals admitted that conscious parallelism "is of aid in demonstrating the existence of sophisticated and silent agreements which have so often seriously restrained trade."[19] Yet it also recognized that conspiracy remains the essential element of a section 1 case,[20] and that on the facts the plaintiff, even assuming consciously parallel behavior by the defendants to have been shown, had not produced enough evidence for consideration by the jury. The court also

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(1952); Ball v. Paramount Pictures, Inc., 169 F.2d 317 (3d Cir. 1948), cert. denied, 339 U.S. 911 (1950); William Goldman Theatres, Inc. v. Loew's, Inc., 150 F.2d 738 (3d Cir. 1945).

[14] "Runs are successive exhibitions of a feature in a given area, first run being the first exhibition in that area, second run being the next subsequent, and so on, and include successive exhibitions in different theatres, even though such theatres may be under a common ownership or managements." United States v. Paramount Pictures, Inc., 334 U.S. 131, 144 n.6 (1948).

[15] These cases have led several writers to conclude that the court was using a new doctrine of conspiracy, namely, conscious parallelism replaces the requirement of an agreement for an antitrust conspiracy. See Conant, Consciously Parallel Action in Restraint of Trade, 38 Minn. L. Rev. 797 (1954); Note, The Nature of a Sherman Act Conspiracy, 54 Colum. L. Rev. 1108 (1954).

[16] Supra note 15, at 583.

[17] 346 U.S. 537 (1954).

[18] Id. at 541.

[19] 297 F.2d at 202.

[20] Ibid.

found that the circumstances in this case were in striking contrast to other cases where courts have found conspiracy premised on the doctrine of conscious parallelism.[21] In observing that sound business practice could also have explained the defendants' conduct, the court took notice of the fact that the defendants had only two courses of action open to them, *i.e.*, to grant or to refuse the listing. In addition, adequate representation in the market, rising sales, their poor experience with one distributor which went bankrupt, the plaintiff's lack of experience in the business and that the refusals were neither identical nor automatic were all influential factors in the court's decision that conscious parallelism was not enough. Thus, the court felt that reasonable men could not differ as to the fact that the defendants had not conspired against the plaintiff.

The case is a further retreat from the strong language and emphasis on conscious parallelism seen in earlier Third Circuit opinions.[22] The court requires a substantial basis for an inference of a conspiracy violation of section 1. Where the evidence offered is enough to rebut the inferences of agreement established by proof of parallel conduct and rational business justifications are produced, the court will refuse to allow purely circumstantial evidence by way of conscious parallelism to permit submission of antitrust conspiracy to the jury.

The value of conscious parallelism has been much discussed.[23] The views range widely but there is an underlying attitude discernible which realizes that conscious parallelism may be a very useful tool in the antitrust field. There is a sensible reluctance to utilize conscious parallelism as another basis for a violation of the Sherman Act. An important reason behind this view is that in oligopoly situations, competing firms are bound to be conscious of one another's activities in all phases, including marketing and pricing. It would be foolhardy not to be aware of such policies especially where there is little real difference in product. It is quite probable that in many such instances, conscious parallelism may be dictated solely by economic necessity. Avoidance of price wars is a common instance where this takes place. It is certainly to be admitted that the fewer firms involved,

[21] Id. at 205 n.19. The court here listed three circumstances, two of which it said were present in the three cases, in addition to conscious parallelism: (1) "plus" factors such as those emphasized in simple refusal to deal cases; (2) parallelism of a much more elaborate and complex nature; (3) a web of circumstantial evidence pointing very convincingly to the ultimate fact of agreement.

[22] Supra note 13. It should be noted that in each of the cases there was something else in addition to conscious parallelism, as the court in the instant case observed. Particularly noteworthy in *Goldman* and *Ball* was that the plaintiff offered higher premiums for the films than was paid by competing theatres. There, then, there was strong evidence that each distributor was acting in apparent contradiction of his own self interest.

[23] See Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv. L. Rev. 655 (1962); Givens, Parallel Conduct Under the Sherman Act, 5 Antitrust Bull. 273 (1960); Schwartz, New Approaches to the Control of Oligopoly, 109 Pa. L. Rev. 31 (1960); Report of Attorney General's National Committee to Study the Antitrust Laws 39 (1955); Note, Conscious Parallelism—Fact Or Fancy?, 3 Stan. L. Rev. 679 (1951).

the easier it is to conceal a conspiracy in restraint of trade. Legislation has been suggested to meet problems where there is a monopoly by a few firms.[24] That may well be the answer and it should be more effective than a judicially evolved section 1 violation. The court in the instant case, by clarifying the language of previous cases, has taken a strong step in solidifying the usefulness of conscious parallelism, *viz.*, it does not of itself constitute conclusive proof of conspiracy but it is relevant evidence to be weighed with other factors in the detection of an antitrust conspiracy.

EDWARD J. MCDERMOTT

Uniform Commercial Code—Statutory Construction—Additional Terms in Acceptance or Confirmation.—*Roto-Lith, Ltd. v. F. P. Bartlett & Co.*[1]—Plaintiff, a manufacturer of cellophane bags for packing vegetables, ordered from the defendant some emulsion which serves as a cellophane adhesive. The defendant acknowledged before sending the product, the acknowledgment including a disclaimer of all warranties and guaranties. Upon receiving the emulsion, the plaintiff found it to be non-adhesive for his purposes, and brought suit for breach of warranty, whereupon the defendant set up the disclaimer as a defense. The United States District Court for the District of Massachusetts found for the defendant, and the United States Court of Appeals for the First Circuit affirmed. HELD: Section 2-207 of the Uniform Commercial Code controls, and the written acknowledgment was effective even though it materially altered the offer, where plaintiff, knowing of the alteration, voiced no objection and accepted and used the goods.

The law of acceptance prior to the adoption of the Uniform Commercial Code had been subjected to much criticism. At first, and for a considerable period of time, it was certain that an acceptance varying the terms of the offer constituted a rejection;[2] such acceptance could constitute a counter-offer.[3] However, even under these rules, "an acceptance which merely requests a change or addition to the terms of the offer is not thereby invalidated unless the acceptance is made to depend on assent to the changed or added terms."[4]

The drafters of the Uniform Commercial Code attempted to resolve all doubts in this area. To this end, Section 2-207[5] was incorporated into the

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[24] See articles supra note 15.

[1] 297 F.2d 497 (1st Cir. 1962).

[2] Kehlor Flour Mills Co. v. Lindon & Lindstroem, 230 Mass. 119, 119 N.E. 698 (1918); Saco-Lowell Shops v. Clinton Mills Co., 277 Fed. 349 (1st Cir. 1921).

[3] Kennedy v. Russell, 280 Mass. 510, 182 N.E. 834 (1932); Restatement, Contracts § 60 (1932).

[4] Restatement, Contracts § 62 (1932).

[5] Mass. Gen. Laws Ann. ch. 106, § 2-207 (1958) provides:

(1) A definite and seasonable expression of acceptance or a written confirmation which is sent within a reasonable time operates as an acceptance even though it