RECENT DEVELOPMENTS

TREBLE DAMAGE SUIT UNDER THE CLAYTON ACT—SOME OVERLOOKED ASPECTS OF DEFENSE

Osborn v. Sinclair Refining Co., 324 F.2d 566 (4th Cir. 1963)

Plaintiff Osborn was the holder of a dealer's sales agreement and service station lease from Sinclair[1] in Reisterstown, Maryland. Osborn also held a Firestone tires, batteries, and accessories (TBA) franchise in Westminster, Maryland, and operated a Firestone TBA business in his Sinclair station. Sinclair had arrangements with Goodyear, a manufacturer of TBA, whereby Sinclair received a commission on the sale of Goodyear TBA to Sinclair dealers. Although Sinclair did not require its dealers to handle Goodyear TBA exclusively, it encouraged them to do so and actively promoted the line. In 1948, Sinclair cancelled Osborn's first lease, partially because of a decline in gasoline sales, and partially for failure to purchase enough Goodyear TBA. After negotiations, plaintiff placed an order for over 1,000 dollars worth of Goodyear TBA, and his lease was renewed. This second lease provided for a rental of one and one-half cents per gallon of gasoline delivered to Osborn, with a minimum of 400 dollars per month,[2] and was terminable by either party at the end of any yearly term on thirty days notice. In a 1949 meeting it was made clear to dealers in the Sherwood division that Sinclair was dissatisfied with the sales of Goodyear TBA, and that unless there was an improvement, some leases would be terminated. After the new lease was negotiated, plaintiff did purchase increased quantities of Goodyear TBA, yet he also purchased ten times as much Firestone TBA. In 1956, Sinclair again terminated Osborn's lease because of insufficient sales of gasoline and Goodyear TBA. Plaintiff subsequently commenced an action under the Clayton Act[3] to recover treble damages, alleging injury resulting from an attempt by Sinclair to monopolize the sale of TBA to its franchise

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[1] Sherwood Bros., Inc. was formerly an independent distributor of petroleum products in Maryland. It became a wholly owned subsidiary of Sinclair in 1935, selling Sinclair products in Maryland and in some areas of adjacent states. The subsidiary was merged with Sinclair in 1955, and its distributing area is referred to as the Sherwood division. Defendant is occasionally referred to as Sinclair-Sherwood or Sherwood.

[2] Sinclair often waived this minimum and accepted lower amounts.

[3] Clayton Act § 4, 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958): "Any person who shall be injured . . . by reason of anything forbidden in the antitrust laws may . . . recover threefold the damages by him . . . sustained."

holders[4] or from a Sinclair-Goodyear combination or conspiracy in restraint of trade.[5]

The United States District Court for the District of Maryland held first, that there was no violation of the antitrust laws within the terms of the agreement between Goodyear and Sinclair, or between Sinclair and its dealers, and second, that the agreements were not *used* illegally. The court held that Sinclair was within its legal rights in refusing to deal with Osborn for failure to purchase enough Goodyear TBA. Sinclair, the court felt, had a legitimate business motive in desiring that its dealers carry a high quality line of TBA.[6]

On appeal to the United States Court of Appeals for the Fourth Circuit, the decision of the District Court was reversed.[7] The Court of Appeals concluded from the undisputed facts that an illegal tying arrangement was entered into by Sinclair and Osborn in connection with plaintiff's second lease. The terms of the arrangement required Osborn to buy "substantial quantities" of Goodyear TBA if he desired to retain his lease and sales agreement with Sinclair.[8] The case was remanded to the District Court for findings on the question of recoverable damages.

On remand, the District Court found damages in the amount of 325 dollars (trebled, 975 dollars) resulting from purchases of Goodyear TBA beyond those which plaintiff would have made absent the illegal arrangement. The court also held that, although the tying arrangement may have been illegal per se, the termination of a dealership pursuant to such a plan is not a per se violation of the antitrust laws, but must itself be an unreasonable restraint of trade before it can be the basis for recoverable damages. The court concluded that since Sinclair believed that Osborn was not selling sufficient amounts of gasoline and was devoting too much effort to his retail Firestone business, there were no recoverable damages resulting from the cancellation. The court further found that Sinclair would have terminated plaintiff's lease and sales agreement in 1956 or 1957 for reasons not related to the antitrust violation, and that Osborn had therefore proved damages amounting to only 12,000 dollars (trebled,

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[4] Sherman Act § 2, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 2 (1958): "Every person who shall monopolize, or combine or conspire . . . to monopolize . . . shall be deemed guilty of a misdemeanor . . . ."

[5] Sherman Act § 1, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958): "Every contract, combination, . . . or conspiracy . . . in restraint of trade . . . is declared to be illegal . . . ."

[6] Osborn v. Sinclair Ref. Co., 171 F. Supp. 37 (D. Md. 1959).

[7] Osborn v. Sinclair Ref. Co., 286 F.2d 832 (4th Cir. 1960), *cert. denied,* 336 U.S. 963 (1961).

[8] The Court of Appeals found the tying arrangement to be unreasonable per se and illegal under the Sherman Act § 1, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958), citing particularly Northern Pacific Ry. v. United States, 356 U.S. 1 (1958). Osborn v. Sinclair Ref. Co., *supra* note 7, at 840. For a discussion of this holding, see Alexander, "Full-Line Forcing Of Less Than Requirements By Threat Of Refusal To Deal—A *Per Se* Violation?," 12 Syracuse L. Rev. 175 (1960).

36,000 dollars).[9] This amount was not awarded, only calculated. The court did not explain how this figure was computed.

On the second appeal to the Court of Appeals, the District Court's decision was again reversed.[10] The court stated that, "having held that there was an unlawful arrangement between Sinclair and its dealers, and that Osborn's refusal to abide by it contributed to the cancellation," [11] it was contrary to the provisions of section 4 of the Clayton Act to deny damages resulting from that cancellation [12] and also contrary to the present state of the case law, which has limited a seller's right to refuse to deal.[13] Accordingly, the court awarded to Osborn the 36,000 dollars treble damages which the District Court had calculated but denied.[14]

At least part of the reason for a second appeal in this case rests with the ambiguous instructions of the appellate court on the remand from the first appeal.[15] The Fourth Circuit found that Sinclair's arrangement violated section 1 of the Sherman Act and that the lease was cancelled in furtherance of the violation. Yet instead of a clear-cut remand for nothing more than an assessment of damages, the court said:

> Since Sinclair had the right to cancel the lease at its yearly termination date, the problem arises whether damages flowing from the cancellation are recoverable as damages resulting from the violation of the antitrust laws.[16]

This language would indicate that the Court of Appeals felt either that further exploration was warranted as to whether the antitrust violation had *proximately caused* the cancellation, entitling Osborn to damages, or whether the mere existence of the contract right to terminate had any bearing on plaintiff's claim.

The District Court, sensing but not quite grasping the first alternative, expounded an interesting theory. The court declared that, although the tying arrangement may have been illegal, the refusal to deal is not per se illegal unless done in concert with others[17] or in furtherance of a monopoly.[18] Absent one of these, said the court, the refusal to deal must be an unreasonable restraint of trade in itself or there can be no claim for damages.[19] As the Court of Appeals labored to explain on the second

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9 Osborn v. Sinclair Ref. Co., 207 F. Supp. 856 (D. Md. 1962).

10 Osborn v. Sinclair Ref. Co., 324 F.2d 566 (4th Cir. 1963).

11 *Id.* at 570.

12 *Id.* at 571.

13 *Id.* at 573. See note 45 *infra.*

14 The case was remanded again for further determination of reasonable attorneys fees.

15 Osborn v. Sinclair Ref. Co., *supra* note 7.

16 *Id.* at 840.

17 Note 21 *infra.*

18 See Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 375 (1927).

19 Osborn v. Sinclair Ref. Co., *supra* note 9, at 861:

> Although the illegal tying arrangement may be illegal per se, and give rise to criminal or civil action by the government or to private claims for dam-

appeal,[20] the District Court misconceived the offense and its relation to plaintiff's cause of action. That court had cited *Klor's, Inc. v. Broadway-Hale Stores, Inc.* and *Radiant Burner's, Inc. v. Peoples Gas Light & Coke Co.*[21] Although these were cases involving refusals to deal, it was not the refusals to deal which violated the antitrust laws, but the combinations or conspiracies of which the refusals were a manifestation. Similarly, in the instant case, Sinclair's tying arrangement was found to violate section 1 of the Sherman Act, which makes illegal "every contract, combination . . . or conspiracy, in restraint of trade . . . ."[22] Osborn's burden was to show that the cancellation of his lease was proximately caused "by reason of anything forbidden in the antitrust laws," [23] *i.e.*, whether the termination was a result of the antitrust violation or was generated by something else.[24] The District Court did provide an answer to this question. Noting that Sinclair believed that Osborn was not devoting a sufficient amount of time to his service station, as reflected in his gasoline gallonage, the court found that:

> Sinclair probably would have terminated plaintiff's lease and dealership in 1956 or 1957 for that reason, entirely apart from the fact that he was not buying enough Goodyear TBA, although as . . . found originally, both reasons affected the actual decision to terminate in 1956 and neither reason predominated.[25]

Thus the cancellation was at least partially caused by an antitrust violation. The District Court then decided that, given two motives, one legal and one illegal, the termination was not in itself an unreasonable restraint of trade giving rise to a claim for treble damages.

The Court of Appeals subsequently overruled this, saying in part that such a holding conflicts with the statutory right to treble damages for injury caused by a violation of the antitrust laws.[26] The question of the relation of the legal motive to the illegal one was not explained on remand or on the second appeal.

One may wonder whether an unsatisfactory dealer should recover treble damages because a part of his supplier's motive in terminating the

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ages such as those awarded [for purchases of undesired quantities of TBA], the termination of a dealership in furtherance of such a plan or arrangement is not per se a violation of the antitrust laws; such a termination will not give rise to a claim for treble damages unless it amounts to an unreasonable restraint of trade.

[20] Osborn v. Sinclair Ref. Co., *supra* note 10.

[21] See Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959).

[22] See Standard Oil Co. v. United States, 221 U.S. 1 (1910).

[23] Clayton Act § 4, 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958).

[24] Emich Motors Corp. v. General Motors Corp., 340 U.S. 558 (1951): "[I]t therefore was necessary for petitioners to introduce, in addition to the [antitrust violation], evidence of the impact of the conspiracy on them, *such as the cancellation of their franchises . . .*" (Emphasis added).

[25] Osborn v. Sinclair Ref. Co., *supra* note 9, at 862.

[26] Osborn v. Sinclair Ref. Co., *supra* note 10, at 571.

franchise was an illegal one, particularly when the record reveals that plaintiff would have lost his dealership anyway, for quite legal reasons. The answer to this seems to rest in a footnote to the opinion from the original trial, written some four years earlier. The District Court there explained that although neither the legal nor the illegal motive predominated, that would be of little moment to Osborn's claim for damages.[27] All that is required is that the illegal motive substantially contribute to the decision to cancel.[28] A court faced with a similar situation has stated that:

> There are a number of factors acknowledged by plaintiff to have contributed to his injury. But the usual rule in tort is that a plaintiff may recover for loss to which the defendant's conduct substantially contributed, notwithstanding other factors contributed also.[29]

If the question on remand involved the problem of whether defendant's violation proximately caused plaintiff's injury, then the result in the appellate court accords with the "substantial contribution" rule.[30] If, however, the question on remand was directed at the bearing on Osborn's claim of the mere existence of Sinclair's contract right to terminate, the problem was not broached by the District Court, and the Court of Appeals buried its answer in a footnote.[31] The mere existence of the contract provision for cancellation has no bearing on plaintiff's claim. If that right is exercised in furtherance of something prohibited by the antitrust laws, the contractual provision "gave the defendant no more immunity from that tort than from any other tort." [32]

A further interesting facet of this case is the amount of damages calculated by the District Court. It is true that damages awarded in suits brought under the Clayton Act need not be established with the exactitude which may be required in other areas of the law.[33] This is in accord with the purpose of section 4, which "supplements the government enforcement of the antitrust laws."[34] But in general, the rules of damages are still applicable, and it is curious that the District Court apparently disregarded the evidence in the record indicating that Osborn could have avoided some of his loss.[35] That court said that Osborn failed to prove:

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[27] Osborn v. Sinclair Ref. Co., *supra* note 6, at 44, n. 5.

[28] Restatement, Torts § 431 (a) (1934), "The actor's . . . conduct is a legal cause of harm to another if . . . his conduct is a substantial factor in bringing about the harm . . . ."

[29] Momand v. Universal Film Exchanges, Inc., 172 F.2d 37, 43 (1st Cir. 1948); see also Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555, 566 (1931).

[30] The court *may* have said this was not the question. See Osborn v. Sinclair Ref. Co., *supra* note 10, at 570.

[31] Osborn v. Sinclair Ref. Co., *supra* note 10, at 575, n. 17.

[32] Vines v. General Outdoor Advertising Co., 171 F.2d 487, 491 (2d Cir. 1948).

[33] Story Parchment Co. v. Patterson Parchment Paper Co., 282 U.S. 555, 563 (1931).

[34] United States v. Borden Co., 347 U.S. 514, 518 (1954); See also Kinnear-Weed Corp. v. Humble Oil and Ref. Co., 214 F.2d 891, 893 (5th Cir. 1954).

> any loss for any period extending more than one year after termination of his lease. His damages for that period would approximate $12,000, most of which he would have sustained whenever his lease was terminated.[36]

Clearly, the calculated figure was not diminished by any mitigating factors. Yet the record indicates that Osborn made no effort to obtain a lease and dealership from Sinclair's competitors who were making these stations available. Apparently this was due to Osborn's reluctance to enter into a short term leasing arrangement such as he had had with Sinclair.[37] However, for purposes of mitigation, the law of damages requires only that the defendant show that similar opportunities were reasonably available, through which plaintiff could have avoided some part of the consequences of defendant's wrong.[38] Sinclair seems to have offered evidence which met this burden. Osborn's understandable penchant for a more satisfactory leasing arrangement does not excuse him from the rules which require that his recovery for damages sustained be diminished by any amount of loss which could reasonably have been avoided. Some account should be taken of the evidence indicating that circumstances similar to those of which he was deprived were reasonably available.

Similarly, there is evidence in the opinion that the 375 dollars awarded for excess purchases of TBA, coerced by the tying arrangement,[39] ought to have been diminished by mitigating factors. The District Court found that although Osborn's lease provided for a rent based on the amount of gasoline sold to Osborn, with a 400 dollar monthly minimum, it was Sinclair's policy to waive that minimum and to accept lower amounts.[40] As intimated by Judge Haynsworth in his later dissent, this waiver was probably in lieu of expected profits from the sale of Goodyear TBA to Osborn.[41] This seems to be a compensation by Sinclair, at least in part, for any involuntary purchases of Goodyear TBA.[42]

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35 The District Court, although holding that he was not entitled to recover damages, found that Osborn's loss from the termination of his lease was $12,000. Osborn v. Sinclair Ref. Co., 207 F. Supp. 856, 864 (D. Md. 1962). On appeal, the Court of Appeals held this figure to be "not clearly erroneous." Osborn v. Sinclair Ref. Co., 324 F.2d 566, 575 (4th Cir. 1963).

36 Osborn v. Sinclair Ref. Co., *supra* note 9, at 864.

37 Osborn v. Sinclair Ref. Co., *supra* note 9, at 863: "He wanted the independence of a long term lease and to be free to develop his business as he saw fit."

38 McCormick, Damages § 33 (1935).

39 Osborn v. Sinclair Ref. Co., *supra* note 9, at 859.

40 Osborn v. Sinclair Ref. Co., *supra* note 6, at 43.

41 Osborn v. Sinclair Ref. Co., *supra* note 10, at 578.

42 The dissent points out, for example, that Sinclair, as primary lessee of the service station, suffered a net rental loss in 1955 of $1586. If Sinclair waived Osborn's minimum rents in that year, in lieu of expected TBA profits, that of course contributed to this deficit. Osborn v. Sinclair Ref. Co., *supra* note 9, at 858, reveals that Osborn purchased $4983 worth of Goodyear TBA in 1955. If Sinclair received its maximum commission of 10% of this amount, it would still have suffered a net loss of $1087.70.

Sinclair did not receive any apparent fruits from its forbidden bargain, yet Osborn *did* receive lower rents because of Sinclair's expectations. Should plaintiff recover treble damages for a phantom loss? One of the established defenses to actions for treble damages for injuries caused by antitrust violations is that of "passing on."[43] The typical situation is one in which plaintiff has paid higher purchase prices resulting from an antitrust violation (*e.g.*, price fixing), yet has passed on this increased cost to his customers.[44] Plaintiff has suffered no legal injury within the meaning of the antitrust laws, in spite of the violation. Analogizing from this hypothetical situation to the instant case, Osborn's increased expenses have at least to some degree been passed *back* to Sinclair, who accepted lower rent (based on volume of petroleum products delivered to plaintiff) in lieu of commissions from Goodyear on expected sale of TBA. It is arguable that any recoverable damages based on coerced TBA purchases should be diminished by the rent allowances accorded by Sinclair.

Curiously, there is no discussion in any of the four opinions in this case to date concerning what would appear to be a significant obstacle to any recovery by Osborn. The antitrust violation which Sinclair was found to have perpetrated was an illegal agreement with the plaintiff. Absent this agreement, Sinclair's policy requiring Osborn to buy substantial amounts of Goodyear TBA may have been legal under the Colgate doctrine.[45] Osborn's role as a party to the agreement was therefore essential to the existence of an antitrust offense. An obvious defense to plaintiff's claim would seem to be that, although he suffered an injury resulting from an agreement which violated the antitrust laws, plaintiff was *in pari delicto* with the defendant in that agreement. The riposte here would be that Osborn was not *in pari delicto* because he was coerced into this agreement through Sinclair's superior economic bargaining position.[46] However, in a leading (and typical) case, in which such an argument prevailed, plaintiff was confronted with the choice of either losing a 50,000 dollar investment, or entering into an illegal contract.[47] As

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[43] See Timberlake, "The Legal Requirements And Proof Of Damages In Treble Damage Actions Under The Antitrust Laws," 30 Geo. Wash. L. Rev. 231, 249 (1961); See generally Comment, 70 Yale L. J. 469 (1961).

[44] Twin Ports Oil Co. v. Pure Oil Co., 119 F.2d 747 (8th Cir. 1941).

[45] See United States v. Parke, Davis & Co., 362 U.S. 29 (1960); FTC v. Beech-Nut Packing Co., 257 U.S. 441 (1922); United States v. Schrader's Son, Inc., 252 U.S. 85 (1920); United States v. Colgate, 250 U.S. 300 (1919). The Colgate doctrine has typically been invoked in cases involving resale price maintenance. The Court of Appeals's reason for rejecting it in the instant case, however, was that defendant's action had gone beyond the narrow limits of the doctrine by entering into the agreement with Osborn. Osborn v. Sinclair Ref. Co., 286 F.2d 832, 839 (4th Cir. 1960). This would indicate that the court felt that the Colgate doctrine would otherwise have been applicable to Sinclair's policy in this situation, which did not involve pricing.

[46] See Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359, 377 (1927); Corbin, Contracts § 1537 (1962).

[47] Ring v. Spina, 148 F.2d 647 (2d Cir. 1945).

has been indicated, Osborn, perhaps, had more latitude. Other service station opportunities were evidently available in the Reisterstown area. Some were apparently even more suitable to his purposes (which emphasized the sale of Firestone TBA, rather than gasoline) than the Sinclair site.[48] Yet plaintiff operated under this agreement for approximately eight years. Granted, his cooperation was sullen, and did not meet Sinclair's expectations, but he did increase his purchases of Goodyear TBA, pursuant to the agreement. Osborn does not fit squarely in the mold of a helpless victim, and the coercion argument is not immediately persuasive on his behalf.[49] Further, in this area where a national policy, espoused by Congress in the Sherman Act, has forbidden agreements in restraint of trade, it is not at all clear that "coercion" should have a broad role in excusing the action taken by person's in Osborn's situation.[50] "For acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one."[51]

The counter arguments have the support of precedent. Section 4 of the Clayton Act indicates the intent of Congress to protect the victims of antitrust violators. The court in *Ring v. Spina,* in surveying the problems involved in the defense of *in pari delicto,* stated that "there appears a definite tendency to hold those not actively engaged in promoting monopoly to be victims, rather than participants in antitrust violations."[52]

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[48] Osborn v. Sinclair Ref. Co., *supra* note 9, at 863:

> Plaintiff opened a Shell station there on February 12, 1957. Plaintiff wanted this property because it was well located and well designed for his Firestone TBA business, although not so well located or designed for the sale of gasoline. Although his sales of gasoline there have been less than his sales at his Sinclair station, his average net earnings for the years 1958-1961 have been higher than . . . during the period 1948-1955 . . . .

[49] Indeed, Osborn's situation is remarkably similar to that in Eastman Kodak Co. v. Blackmore, 277 F. 694 (2d Cir. 1921). After Eastman had suspended him as a customer for the second time, Blackmore agreed to abide by a resale price maintenance contract, in violation of the antitrust laws. In an action for damages against Eastman some eight years later, plaintiff was denied recovery on the theory that he was *in pari delicto* with the defendant. See Mandeville Island Farms v. American Crystal Sugar Co., 64 F. Supp. 265 (S.D. Cal.); *aff'd.,* 159 F.2d 71 (9th Cir.); *rev'd on other grounds,* 334 U.S. 219 (1948), where plaintiff was said to be *in pari delicto* with defendant, and was denied recovery under the Clayton Act, for signing an illegal contract for sale of his crop to one of the three available outlets, all three of which conspired to require identical contracts from all beet growers in plaintiff's area.

[50] The thrust of this suggestion is not that recovery under § 4 of the Clayton Act should be defeated in all cases involving "technical" *pari delicto,* where plaintiff has been forced into some illegal agreement. Rather, it is that the elements of coercion alleged should be examined to see if they are of such compelling force as to remove the plaintiff from the scope of the theory of *pari delicto.* See note 46 *supra.*

[51] United States v. Paramount Pictures, Inc., 334 U.S. 131, 161 (1948).

[52] *Supra* note 47, at 652. Further, at 653, this court said:

> Where the parties stand actually and truly in pari delicto, the law should

It is questionable that the antitrust philosophy requires such zealous protection. While Osborn was by no means an eager participant in an antitrust violation, it is uncertain that his participation was altogether without choice. Certainly Sinclair had the upper hand in bargaining power, but this is crucial only if Osborn, for economic reasons, had to retain his Sinclair dealership. If there were, in fact, equal opportunities available, his choice of the one involving an illegal agreement does not place him clearly or convincingly in the victim's role, and his right to treble damages can be questioned.

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leave them where it finds them. . . . But here without even a showing of economic coercion . . . . considerations of public policy demand court intervention in behalf of such a person, even if technically he could be considered *in pari delicto*. . . . Any other conclusion would mean that for many, perhaps most, victims of restraint of trade, private remedies under the Sherman [*sic*] Act would be illusory, if not quite non-existent.