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Conspiracy: Evidentiary Value of Conscious Parallelism

Michael J. Doyle

can rely on the technicalities of mere building code violations to abrogate his lease.

In adopting the exception to the general rule of *caveat emptor,* as applied to implied warranties, Wisconsin has afforded a greater degree of protection to the lessee who leases a furnished dwelling unit for one year or less, although the exact grounds upon which his remedy can be sought must await further court interpretation.

EDMUND C. CHMIELINSKI

Conspiracy—Evidentary Value of Conscious Parallelism: The plaintiff in *Delaware Valley Marine Supply Company v. American Tobacco Company*[1] sought treble damages against five tobacco companies and their present distributor on the ground that the companies entered into a conspiracy in violation of Section 1 of the Sherman Anti-trust Act[2] by refusing to sell their tobacco products to the plaintiff. The plaintiff sought to organize a ship chandler concern, but, due to its inability to obtain tobacco products, never commenced to do business. All five tobacco companies were then selling to the defendant distributing company Lipschutz Bros., Inc., an already established and reliable firm. In addition, two of the tobacco companies had a second outlet. Thus it appears, and the court so found, that the defendant companies already had adequate representation in the market and that no real need for the plaintiff's services existed. As is the usual case in actions brought under Section 1, there was no direct evidence of an expressed agreement between the defendant companies. The Circuit Court of Appeals in affirming the trial court's directed verdict for the defendants viewed the evidence most favorable to the plaintiff, thereby deciding the case under the assumption that the five companies were each aware of the other's refusal to deal with the plaintiff.

The Sherman Anti-trust provision under which the action was brought in the main case is relatively clear. Its purpose is to prevent conspiracies, a conspiracy being "a combination of two or more persons by concerted action to accomplish a criminal or unlawful purpose or to accomplish some purpose not in itself criminal or unlawful, by criminal or unlawful means."[3] The difficulty arises in determining what is sufficient proof of the existence of a conspiracy and then actually obtaining the necessary quantum of proof. It is not necessary to prove a conspiracy by direct evidence of an express agreement, written or oral.

[1] Delaware Valley Marine Supply Co. v. American Tobacco Co., 297 F. 2d 199 (3d Cir. 1961), *cert. denied,* reported in B.N.A., Antitrust & Trade Reg. Rep., No. 38, p. A-8 (April 3, 1962).

[2] 26 Stat. 209 (1890), 15 U.S.C. §1 (1958): "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] EULER, MONOPOLIES AND FEDERAL ANTI-TRUST LAWS §16 (1929).

Circumstantial evidence has always been enough.[4] "Proof of a formal agreement is unnecessary, and were the law otherwise such conspiracies would flourish. . . ."[5]

In recent years the theory of conscious parallelism which found its origin in *Interstate Circuit v. United States*[6] has rapidly developed into a legal doctrine. However, parallel business behavior per se has never been held to conclusively establish a conspiracy or agreement.[7] "But that case and others recognize that such behavior is another item to be weighed, and generally to be weighed heavily in the determination."[8] It was said in *Milgram v. Loew's Inc.* that:

> This uniformity in policy forms the basis of an inference of joint actions. This does not mean, however, that in every case mere consciously parallel business practices are sufficient evidence, in themselves, from which a court may infer concerted action. Here we add that each distributor refuses to license features on first run to a drive-in even if a higher rental is offered. Each distributor has thus acted in apparent contradiction to its own self interest. This strenghthens considerably the inference of conspiracy for the conduct of the distributors is, in the absence of a valid explanation inconsistent with decisions independently arrived at.[9]

The above not only affirms the theory that uniform conduct per se is not unlawful, but also makes reference to the so-called "plus factors." "Plus factors" are circumstantial evidence other than uniform action such as prior misconduct (background of illegal licensing agreements), raising of prices when surplus existed, policing of dealers, and use of a delivered price system.[10] A conspiracy was held to exist in *Morton Salt Co. v. United States* where in addition to uniformity of action "there was a completely free exchange of pricing information" and "any changes which were of interest to the other salt producers were communicated immediately."[11] The "plus factors" are used to bridge the gap

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[4] United States v. A. Schroder's Son, Inc., 252 U.S. 85 (1920); American Tobacco Co. v. United States, 328 U.S. 781 (1946).

[5] C-O-Two Fire Equipment Co. v. United States, 197 F. 2d 489, 494 (9th Cir. 1952), *cert. denied,* 344 U.S. 892 (1952).

[6] Interstate Circuit, Inc. v. United States, 306 U.S. 208 (1939). For an interesting argument that the doctrine of "conscious parallelism" arose out of a misinterpretation of Justice Stone's opinion in the cited case see Handler, *Contract, Combination or Conspiracy,* 3 A.B.A. ANTI-TRUST SECTION REP. 38, 40 (1953).

[7] Theatre Enterprises, Inc. v. Paramount Film Distributing, Corp., 346 U.S. 537 (1954).

[8] Morton Salt Co. v. United States, 235 F. 2d 573, 577 (10th Cir. 1956).

[9] Milgram v. Loew's, Inc. 192 F. 2d 579, 583 (3d Cir. 1951), *cert. denied,* 343 U.S. 929 (1952).

[10] C-O-Two Fire Equipment Co. v. United States, *supra* note 5.

[11] Morton Salt Co. v. United States, *supra* note 8. See also, American Column and Lumber Co. v. United States, 257 U.S. 377 (1921) (restriction of output); United States v. American Linseed Oil Co., 262 U.S. 371 (1923) (price uniformity).

between fact and inference—from the fact of parallelism to an inference of conspiracy. Thus the value of "conscious parallelism" varies with the kind of parallelism and the factual setting in which it is found.[12] In the instant case, in as much as there was no direct evidence of conspiracy, the plaintiff relied on "conscious parallelism" but did not come forth with any "plus factors" which appear necessary under the law as it is today. The plaintiff did try to establish that the defendants acted contrary to their self interest because the plaintiff offered to pay C.O.D. However, the court rejected this because there was no evidence that the plaintiff made a better offer for the defendants' products than the defendants were already receiving from their present distributor, nor was it shown that plaintiff could provide better facilities than were furnished by the present distributor. On the other hand, the defendants showed that they had adequate representation, and that neither their investigations nor the plaintiff's applications indicated that the plaintiff "had the experience, financial responsibility and other attributes which would qualify it as a potentially successful distributor."[13]

It is also of importance that in the principal case there was no complicated system arrived at as in the *Morton* case[14] (pricing system) nor any intricate changes in business methods as in the *Interstate Circuit* case where the court said:

> It taxes credulity to believe that the several distributors would, in the circumstances, have accepted and put into operation with substantial unanimity such far reaching changes in their business methods without some understanding that all were to join, and we reject as beyond the range of probability that it was the result of mere chance.[15]

All that was arrived at uniformly in the main case was a simple "no" answer from five companies to an application for a distributorship. The court pointed out that if the number of companies involved were greater than merely five perhaps an inference of concerted action might conceivably be justified, but under the existing circumstances no such inference could be supported.

It is perhaps of some import to note that the defendants in the principal case argued that there could be no finding of "conscious parallelism" because the manner of rejection of the plaintiff's applications was not uniform, but the court held that it was not necessary for the manner of rejection to be uniform as long as there was uniformity of action on a crucial point, namely the fact of rejection. "If it were other-

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[12] Report of the Attorney General's National Committee to Study the Antitrust Laws 39-40 (1955).
[13] Delaware Valley Marine Supply Co. v. American Tobacco Co., *supra* note 1, at 206.
[14] Morton Salt Co. v. United States, *supra* note 8.
[15] Interstate Circuit, Inc. v. United States, *supra* note 6, at 223.

wise, a charge of conspiracy could always be avoided by agreeing to go home by different roads."[16]

In applying "conscious parallelism" as an aid in proving conspiracy, it must be kept in mind that in almost every case there are hypotheses other than conspiracy which could explain away the parallel behavior of the alleged conspirators. Parallel behavior in itself is not mystifying. It is common that in small groups, even without communication, oral or written, individuals become aware of their group membership and adjust to a mode of behavior which reflects the group's objectives and, to a degree sublimates individual ones.[17] In the words of Handler[18] ". . . rational beings necessarily react the same way to common stimuli. People wear raincoats or use umbrellas in a rainstorm. Human behavior is no different in the domain of economics. Every prudent seller will deny credit to a bad risk."

Thus the doctrine of "conscious parallelism" is not carried to extremes and business behavior is not restricted merely because of knowledge of a competitor's actions. Sorkin suggests that "only when the pattern of (behavior) is so involved and complex as to render it improbable that the similarity of pattern is the result of anything other than agreement"[19] should an inference of agreement be drawn.

In essence the instant case will afford similarly charged defendants with a ready defense to the contention that industry wide rejection of a new customer "per se" amounts to dealing contrary to one's economic self-interest.

MICHAEL J. DOYLE

[16] Delaware Valley Marine Supply Co. v. American Tobacco Co., *supra* note 1, at 204.
[17] Phillips and Hall, *The Salk Vaccine Case: Parallelism, Conspiracy and Other Hypotheses,* 46 VA. L. REV. 717 (1960).
[18] Handler, *Anti-trust—New Frontiers and New Perplexities,* 6 THE RECORD 59, 65 (1951).
[19] Sorkin, *Conscious Parallelism* 2 ANTI-TRUST BULL. 281, 301 (1957).