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MONOPOLY—EXTENSION TOWARD PER SE VIOLATION

The Justice Department brought injunctive action under section 4 of the Sherman Act[1] against Grinnell Corporation and three affiliates which Grinnell controlled through preponderant stock ownership. Grinnell manufactures automatic sprinklers, fire and burglar alarms, and other machinery used in the alarm industry, and its affiliates are corporations supplying subscriber-customers with fire and burglar alarm services from central points through automatic alarm systems installed on subscribers' premises. Defendants had acquired an 87 per cent share of the accredited national Central Station Protective Service (CSPS) market, attained through pre-affiliation market allocation agreements between the affiliate corporations and their competitors, discriminatory manipulation of prices to forestall competition in violation of Sherman Act section 1,[2] and acquisition and dismantlement of competing companies. Grinnell, in acquiring the preponderance of stock in the affiliate corporations and directing the policy of the four corporations toward monopolization, violated section 2.[3] *Held*: Where the Government has borne the burden of defining the relevant market and proving that defendant occupies an overwhelming share of that market, a presumption arises that defendants have monopoly power and have exercised that power in violation of section 2 of the Sherman Act; this presumption may be rebutted only by defendants' proving either that monopoly power does not in fact exist, or that their dominance is the result of superior skill, efficiency, foresight, or other legal means. *United States v. Grinnell Corp.*, 236 F. Supp. 244 (D.R.I. 1964), *prob. juris. noted*, 85 S.Ct. 1538 (1965) (Nos. 1081-86, 1964 Term; renumbered Nos. 73-77, 1965 Term).

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[1] Sherman Act § 4, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 4 (1958), giving the Attorney General of the United States power to institute equitable proceedings to prevent and restrain violation of the Act.

[2] Sherman Act § 1, 26 Stat. 209 (1890), as amended, 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] Sherman Act § 2, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 2 (1958):

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a misdemeanor. . . .

The remedies granted in the principle case were to enjoin further section 1 restraints of trade, to require divestiture by Grinnell of all stock in the other defendant corporations, and to enjoin employment by any defendant of one Fleming, defendant's predominant management leader.

The monopolization charge in the principal case was based on section 2 of the Sherman Act, which establishes three separate offenses: attempt to monopolize, conspiracy to monopolize, and monopolization, of any part of interstate commerce.[4] The charge in *Grinnell* was monopolization, the completed act prohibited by the statute. Historically, the elements in proving a charge of monopolization have been definition of the relevant market, proof of monopoly power, and the presence of that "deliberateness" which converts monopoly power to monopolization.[5] The "relevant market" in the principal case is the national Central Station Protective Service accredited by insurance underwriters. This is the "area of effective competition"[6] within which defendants and competitors operate. "Monopoly power" is power to control prices or exclude competition,[7] the best proof of which is actual use of such power. Absent proof of the exclusion of competitors or price control, courts look to the relative size of defendant in the defined market, freedom of entry, response of prices to changes in market supply and demand, and profit levels, to determine the existence of monopoly power.[8] The third element is "deliberateness" by a defendant in converting his monopoly power into a prohibited monopolization. Section 2 does not require proof of specific intent,[9] merely that monopoly power be attained or maintained through deliberate acts. There must be monopoly power plus "the purpose or intent to exercise that power."[10] Historically, these three elements have been necessary to sustain a monopolization charge. In practice, monopolization has been proved

[4] See statute in note 3 *supra*. See generally ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 43 (1955).

[5] ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 55 (1955).

[6] Standard Oil & Standard Stations v. United States, 337 U.S. 293, 299 n.5 (1949). For discussion of market definition generally, see United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377 (1956); Note, *The Market, a Concept in Antitrust*, 54 COLUM. L. REV. 580 (1954); Turner, *Antitrust Policy and the Cellophane Case*, 70 HARV. L. REV. 281 (1956).

[7] United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377, 391 (1956); United States v. Griffith, 334 U.S. 100, 107 (1948).

[8] United States v. Aluminum Co., 148 F.2d 416, 424 (2d Cir. 1945). For an economic analysis of such factors see MASSELL, COMPETITION AND MONOPOLY, LEGAL AND ECONOMIC ISSUES 191-95 (1962). For a survey of the use of these factors to regulate the size of industry, see KAYSEN & TURNER, ANTITRUST POLICY, AN ECONOMIC AND LEGAL ANALYSIS 24-44 (1959).

[9] United States v. Aluminum Co., 148 F.2d 416, 432 (2d Cir. 1945):

> In order to fall within § 2, the monopolist must have both the power to monopolize, and the intent to monopolize. To read the passage as demanding any "specific" intent, makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing.

[10] United States v. Griffith, 334 U.S. 100, 107 (1948); *accord*, American Tobacco Co. v. United States, 328 U.S. 781, 809 (1946).

under two sets of circumstances: one, the acquisition and maintenance of monopoly power through section 1 violations,[11] or, two, monopoly power coupled with the use of such power to maintain monopoly position even though not through prohibited restraints of trade.[12] A third circumstance has been mentioned in *dicta*, "that one who has acquired an overwhelming share of the market 'monopolizes' whenever he does business . . . even if there is no showing that his business involves any exclusionary practice."[13]

Grinnell extends the third set of circumstances. Looking to prior monopolization cases, the court concluded that "to a moral certainty" monopolies are the result of competitor acquisitions or section 1 restraints of trade. The court reasoned that the enormous amount of testimony and trial time consumed by such cases has been due to a lack of certainty by both lawyer and judge as to how such an antitrust case will be viewed by the Supreme Court, coupled with judicial unwillingness to take the risk of reversal which would accompany an effort to draw sharp boundaries as to the relevance and materiality of evidence and issues. The court noted development of section 1 per se rules which are beyond presumptions, and are actually rules of law. An irrebuttable per se rule is not possible because of the available defense that monopoly power is "the result of superior skill, superior products, natural advantages, technological or economic efficiency, scientific research, low margins of profit maintained permanently and without discrimination, legal licenses, or the like."[14] Therefore, in an effort to reduce the size of such cases and to effectuate certainty of issues and evidence, Judge Wyzanski declared in the principal case that the government need prove only the relevant market and control of an overwhelming (but mathematically undefinable) share of that market by defendant. This set of facts creates a presumption of monopoly power and monopolization in violation of section 2, and the burden of proof "shifts" to defendant, not merely to introduce evidence to the contrary, but to prove "that its eminence is traceable to such highly respectable

[11] Standard Oil Co. v. United States, 221 U.S. 1, 61 (1911); United States v. Griffith, 334 U.S. 100, 106 (1948).

[12] United States v. Griffith, *supra* note 11, at 107; United States v. United Shoe Machinery Corp., 110 F. Supp. 295, 342 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954).

[13] United States v. United Shoe Machinery Corp., *supra* note 12, at 342, referring to United States v. Aluminum Co., 148 F.2d 416, 428 (2d Cir. 1945). Judge Wyzanski discussed the three tests in *United Shoe, supra* note 12, at 342.

[14] United States v. Grinnell Corp., 236 F. Supp. 244, 248 (D.R.I. 1964).

causes as superiority in means and methods which are 'honestly industrial.' "[15]

The proof needed to rebut this newly-created presumption was not defined in the principal case. The court would seem to mean that the "burden of persuasion" shifts to the defendant when it stated, "Unless he [defendant] maintains the burden of proving himself within the exception, the occupant in the dominant position stands condemned. . . ."[16]

The direction of the principal case is away from what has historically been the underlying theory of section 2 cases—the "Rule of Reason"—and toward the "Per Se Doctrine." The Rule of Reason looks to all the surrounding circumstances to determine whether the particular act under investigation is an unreasonable restraint of trade.[17] "Monopoly in the concrete" is not prohibited by the Sherman Act[18] because of faith by its framers that market forces would take care of monopoly if the economy was kept free of unreasonable restraints on competition. The result is a "flexible public policy directed against all undue limitations on competition, both in the form of realized monopolization, and in the lesser mode of partial but significant restraints of trade tending to the same end."[19] The policy is to favor competition and condemn monopoly;[20] under the Rule of Reason, the means is to restrict only those restraints of trade which are unreasonable.

Implementing the same policy, but by a less flexible approach, is the Per Se Doctrine. Under this approach, acts which restrict competition by their inherent nature are illegal under the Sherman Act. Where the purpose and effect of such acts are to restrain trade, they are deemed violations of the Sherman Act without regard to reasonableness.[21]

In recent years, Clayton Act section 7 cases have used percentile shares of the relevant market as an important factor in determining whether mergers would result in lessening of competition.[22] Such is the

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[15] *Id.* at 248. This defense is generally referred to as the "thrust upon" defense, first enunciated by Judge Hand in the United States v. Aluminum Co., 148 F.2d 416 (2d Cir. 1945).

[16] 236 F. Supp. 244, 257 (D.R.I. 1964).

[17] Standard Oil Co. v. United States, 221 U.S. 1 (1911); Chicago Bd. of Trade v. United States, 246 U.S. 231, 238 (1918).

[18] Standard Oil Co. v. United States, 221 U.S. 1, 61 (1911).

[19] ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 8 (1955).

[20] United States v. Aluminum Co. 148 F.2d 416, 428 (2d Cir. 1945); ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 11 (1955).

[21] von Kalinowski, *The Per Se Doctrine—An Emerging Philosophy of Antitrust Law*, 11 U.C.L.A. L. REV. 569 (1964).

[22] United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963); Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

methodology of *Grinnell*, but, in effect, the decision declares a new rule of substantive law for monopolization.

Dean Wigmore divides the burden of proof into two categories, the burden of "risk of non-persuasion" and the duty to produce evidence satisfying the judge that a directed verdict is not warranted.[23] The first burden never shifts. The second burden, however, does shift. As a trial proceeds, the duty to bring forth evidence may pass to the other party as the result of a presumption which, unless met with contrary evidence, compels decision against whomever the presumption arises. Under this theory, presumptions pass the duty of producing contrary evidence to the person against whom they operate. Once rebuttal evidence is produced, the presumption vanishes and the trier of fact must make a decision based on all the evidence without assistance by the presumption.[24]

The opposing theory of presumptions, adopted by the Uniform Rules of Evidence in 1954,[25] is that a presumption has the effect of placing the "risk of non-persuasion" as to an issue of fact upon the party against whom the presumption operates.[26] *Grinnell* adopts the Uniform Rules position, and would require defendants to overcome a risk of non-persuasion that monopoly power does not exist, or that the monopoly was "thrust upon" them or otherwise legally acquired. The burden is not merely to produce evidence which would cause the presumption to vanish and the facts to be determined on all the evidence, but rather defendant must now prove non-existence of the presumed fact. Failure to sustain this burden will result in judgment for plaintiff. Under Wigmore's premise that risk of non-persuasion is fixed by law and never shifts, the *Grinnell* "presumption" changes the rule of law. There is no longer any need for "the purpose or intent to exercise" monopoly power. An overwhelming share of a relevant market is per se illegal monopolization, and defendant can only rebut this presumption by putting forth facts showing that its overwhelming share of the market is attributable to "laudable business conduct."[27]

Applying the rationale of the principal case to other means of deter-

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[23] WIGMORE, EVIDENCE § 2485 (3d ed. 1940).
[24] *Id.* at § 2487.
[25] UNIFORM RULES OF EVIDENCE 14(a).
[26] For a general analysis of the "Thayer-Wigmore" presumption theory and the type of presumption adopted by the Uniform Rule of Evidence, see Laughlin, *In Support of the Thayer Theory of Presumptions*, 52 MICH. L. REV. 195 (1953).
[27] 236 F. Supp. 244, 257 (D.R.I. 1964).

mining monopoly power would mean that proof of power to exclude competitors or control prices would also raise a monopolization presumption, and only power to exclude or control prices would need be proved to find monopoly power. There is no reason why such alternate proof of monopoly power should not also raise the presumption of monopolization and cast the burden of disproving such charge on the defendant. There is no less certainty that one who has monopoly power proved through an ability to exclude competitors or control prices has achieved such power through section 1 violations or other acts in restraint of trade.

The probability of such activities is strong enough to require defendant to bring forth evidence to the contrary, but *Grinnell* changes *what* must be proved, not merely *who* must produce the evidence. In Wigmore's presumption theory, evidence of price control and exclusion would still be necessary if the defendant was able to produce contrary evidence. But under the *Grinnell* theory, price control and exclusion need not be proved. The section 2 monopolization charge has thus been reduced from three elements to two. Deliberateness is no longer an element of the charge. There is simply a ban on monopoly power in the economic sense.

Acceptance of monopoly prohibition in the economic sense is to deny the underlying basis of the Rule of Reason on this point. The *Grinnell* theory assumes that faith that a free market will prevent the formation of monopolies is misplaced, probably because it either does not work or is not susceptible of adequate enforcement. In essence, *Grinnell* concludes that it is necessary to absolutely prohibit monopoly as the better way of insuring a competitive market. The question of saving the court's time and energy is in fact secondary. The important question is whether it is now time to re-evaluate the Rule of Reason approach to the monopoly problem. It has been suggested that the policy of antitrust be "protection of competitive process by limiting market power."[28] If *Grinnell* is to be a step in that direction, such a step should be made openly. The Rule of Reason is not sancrosanct; it can and perhaps should be changed. Since 1945,[29] the courts have looked to market

[28] KAYSEN & TURNER, *op. cit. supra* note. 8.

[29] United States v. Aluminum Co., 148 F.2d 416 (2d Cir. 1945); American Tobacco Co. v. United States, 328 U.S. 781 (1946); United States v. United Shoe Machinery Corp., 110 F. Supp. 295 (D. Mass. 1953), *aff'd per curiam*, 347 U.S. 521 (1954); United States v. E. I. du Pont de Nemours & Co., 351 U.S. 377 (1956); see also preface by Edward S. Mason in KAYSEN & TURNER, *op. cit. supra* note 8, at xiii.

structure as having growing importance in monopolization cases. The importance of *purpose* to use, or of past activities, has correspondingly diminished. Even if restricted to the narrow area of cases where monopoly power is found by proof of preponderant control of the relevant market, the *Grinnell* decision that such a monopoly is a violation of section 2 should be openly stated, and not hidden behind a guise of procedural change.