

RECENT CASES

ANTITRUST—PLAINTIFF IN PRIVATE ANTITRUST ACTION HELD IN PARI DELICTO AND THEREFORE WITHOUT STANDING TO COMPLAIN OF INJURIES SUSTAINED BY AN AGREEMENT TO WHICH HE WAS A PARTY AND WHICH CONTAINED TERMS ALLEGEDLY IN VIOLATION OF ANTITRUST LAWS. *Perma Life Mufflers, Inc. v. International Parts Corp.* (7th Cir. 1967).

In 1955 International Parts Corporation originated a franchise plan under which a nationwide network of automotive shops specializing in the Midas exhaust system was established. The franchise was a contract for the purchase of Midas products for resale from a retail outlet licensed by Midas. According to the agreement, holders of the franchise were required to purchase all exhaust system components from Midas. The sale of any competitor's exhaust parts or the sale of any automobile parts other than exhaust system components was forbidden. Plaintiffs obtained franchises in 1955 and 1956 and each operated from four to six shops. After approximately four years of association with Midas, three of the plaintiffs left the franchise plan for the less restrictive program of a competitor. Midas terminated the franchise of the fourth plaintiff without objection from him.

Plaintiffs brought suit under Section 4 of the Clayton Act¹ for violation of Section 1 of the Sherman Antitrust Act;² Section 3 of the Clayton Act;³ and Section 2 of the Clayton Act as amended by the Robinson-Patman Act.⁴ The specific counts were: (1) the defendants⁵

¹ Clayton Act § 4, 15 U.S.C. § 15 (1964).

Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

² Sherman Act § 1, 15 U.S.C. § 1 (1964).

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 Clayton Act § 3, 15 U.S.C. § 14 (1964).

It shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods . . . for use, consumption, or resale within the United States . . . or fix a price . . . on the condition, agreement, or understanding that the lessee or purchaser thereof shall not use or deal in the goods . . . of a competitor or competitors of the lessor or seller, where the effect of such lease, sale, or contract for sale or such condition, agreement, or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce.

⁴ Clayton Act § 2, 15 U.S.C. § 13 (1964), *formerly* 38 Stat. 730 (1914).

engaged in a conspiracy to restrain trade; (2) the terms of the franchise agreement illegally restricted plaintiffs' operation of their muffler shops by requiring that all exhaust parts be purchased from defendants even though certain components were available at a lower cost from defendants' competitors; and (3) the defendants practiced price discrimination against the plaintiffs while Midas franchise holders.

The district court granted defendants' motion for summary judgment⁶ on all counts. On appeal to the Seventh Circuit Court of Appeals, *held*, affirmed as to counts 1 and 2, reversed and remanded as to count 3: Because of their voluntary entry into and successful participation in the franchise agreement, and the fact that each sought to perpetuate the cause of his alleged injury by acquiring additional franchises, plaintiffs were *in pari delicto*⁷ and therefore without standing to complain about violations of Section 1 of the Sherman Act and Section 3 of the Clayton Act. A further basis for dismissal of count 1 was the nonexistence of a conspiracy to violate the antitrust laws.⁸ As to count 3, there were genuine issues of fact precluding disposition by summary judgment.⁹ *Perma Life Mufflers*,

(a) It shall be unlawful for any person engaged in commerce, in the course of such commerce, either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality . . . and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered

⁵ "The defendants were International Parts Corporation, three of its subsidiary corporations, plus six individual officers or agents of the corporate defendants." *Perma Life Mufflers, Inc. v. International Parts Corp.*, 376 F.2d 692, 693 (7th Cir. 1967).

⁶ FED. R. CIV. P. 56(b).

⁷ BLACK'S LAW DICTIONARY 898 (4th ed. 1951).

IN PARI DELICTO POTIOR EST CONDITO POSSIDENTIS, [DEFENDENTIS.] In a case of equal or mutual fault [between two parties] the condition of the party in possession [or defending] is the better one.

⁸ 376 F.2d at 699.

[N]o conspiracy existed as a matter of law. . . . [T]he corporate and individual defendants were a single business entity through which a family business was operated. . . . "While we agree with plaintiff that subsidiary corporations may under certain circumstances 'conspire' to violate the antitrust laws, the record before us indicates by uncontested facts that no such conspiracy was present here."

⁹ 376 F.2d at 700-03. The triable issues of fact were whether plaintiffs were free to handle any products other than those purchased from Midas, notwithstanding the exclusive dealing franchise agreement; whether Midas parts were sufficiently dissimilar in grade and quality from defendants' parts to justify a price differential between Midas franchise holders and other customers of defendant; and whether plaintiffs competed with other purchasers of Midas brand exhaust parts.

Inc. v. International Parts Corp., 376 F.2d 692 (7th Cir. 1966), petition for cert. filed, 36 U.S.L.W. 3174 (U.S. Oct. 17, 1967) (No. 733).

The conclusion of the Seventh Circuit Court of Appeals that plaintiffs were *in pari delicto* is not surprising when considered in conjunction with the policy, which the court has termed "the *Crest* rule,"¹⁰ set forth in the 1966 decision of *Crest Auto Supplies, Inc. v. Ero Manufacturing Co.*¹¹ In *Crest* the court stated:

Plaintiffs refer to a "feeling" in "all the Courts" against the *pari delicto* rule in private anti-trust cases. The only animus we detect in the courts on the *pari delicto* question is directed at protecting those who are coerced into illegal agreements But where a plaintiff participates freely in the alleged anti-trust conduct, the *pari delicto* rule precludes recovery. . . . [T]he doctrine that a plaintiff who is a voluntary party to the allegedly illegal agreement which forms the basis for the anti-trust suit cannot recover thereon was "firmly established in earlier cases" and still remains to be given effect in appropriate actions.¹²

The *Crest* rule was reaffirmed by the Seventh Circuit in the 1967 case of *Florists' Nationwide Telephone Delivery Network v. Florists' Telegraph Delivery Association*.¹³ However, neither *Crest* nor *Florists'* cited the 1964 United States Supreme Court case of *Simpson v. Union Oil Co.*¹⁴ *Perma Life* is the first time that the Seventh Circuit has examined its policy with respect to *pari delicto* in the light of *Simpson*.

In *Simpson*, plaintiff wanted to operate a Union Oil service station. To achieve this goal he entered into lease and consignment agreements with Union Oil. While both agreements were terminable by either party at the end of any year, the consignment agreement ended

¹⁰ 376 F.2d at 698 n.4.

¹¹ 360 F.2d 896 (7th Cir. 1966).

¹² 360 F.2d at 900 (footnotes omitted).

¹³ 371 F.2d 263, 267-68 (7th Cir. 1967).

The core of FTD's defense . . . is . . . that FNTDN's purpose and conduct preclude it from recovery on its damage claim and bar it from equitable relief under the 'clean hands' doctrine.

Such defense, if established, would so bar FNTDN from both recovery of damages and injunctive relief. . . . Cf. *Crest Auto Supplies, Inc. v. Ero Manufacturing Company* [A]lthough factually distinguishable, *Crest Auto Supplies* exemplifies an application of the 'clean hands' doctrine which is pertinent here.

¹⁴ 377 U.S. 13 (1964). See generally, 6 B.C. IND. & COM. L. REV. 318 (1965); 44 NEB. L. REV. 635 (1965); 17 STAN. L. REV. 519 (1965); 43 TEXAS L. REV. 659 (1965); 37 U. COLO. L. REV. 293 (1965); 10 VILL. L. REV. 366 (1965); 50 A.B.A.J. 869 (1964); 14 DE PAUL L. REV. 165 (1964); 33 FORDHAM L. REV. 336 (1964); 78 HARV. L. REV. 279 (1964); 16 SYRACUSE L. REV. 116 (1964).

upon the termination of the lease. After several months, because of the competition, plaintiff wanted to sell at prices lower than those specified in the consignment agreement. When plaintiff lowered his prices, Union Oil cancelled his lease and consequently terminated the consignment agreement. Plaintiff brought a private antitrust action alleging violations of Section 1 of the Sherman Act¹⁵ and Section 3 of the Clayton Act.¹⁶ The district court granted Union Oil's motion for summary judgment holding plaintiff was without standing to sue because he had voluntarily agreed to sell at prices fixed by Union Oil.¹⁷ The Ninth Circuit Court of Appeals affirmed, stating:

Assuming for argument only that the consignment program is illegal . . . [and agreeing] with Simpson that a cause of action in a private antitrust suit for treble damages is a tort action . . . [T]he law does not permit an individual to see and observe a tort violation and then to voluntarily put himself in a position where a tort cause of action would accrue and because of which he might become a litigant.¹⁸

The Supreme Court reversed and remanded on the question as to whether plaintiff suffered any damages.

The *Perma Life* court takes the view that *Simpson* spoke not at all on the defense of *in pari delicto*, stating: "The Court does not mention *in pari delicto* and we think it did not intend to annihilate a principle so long embedded in the law."¹⁹ While it is true that a reversal of a summary judgment decision has only the effect of declaring the existence of triable issues of fact and has no effect on the legal issues involved,²⁰ in *Simpson* the district court considered the damage question closed because plaintiff had voluntarily consented to the alleged illegal terms in the consignment agreement. The Supreme Court in declaring that an issue did exist as to damages, necessarily rejected the application of the *in pari delicto* theory.²¹

¹⁵ 15 U.S.C. § 1 (1964).

¹⁶ 15 U.S.C. § 14 (1964).

¹⁷ 311 F.2d 764 (9th Cir. 1963).

¹⁸ *Id.* at 768.

¹⁹ 376 F.2d at 697.

²⁰ 5 AM. JUR. 2d *Appeal and Error* § 955 (1962).

²¹ In *Simpson v. Union Oil Co.*, 1961 Trade Cas. 77,693 (N.D. Cal. 1960), the court granted summary judgment to defendant and stated at 77,698 that, "[b]oth the doctrine of *in pari delicto* and *volenti non fit injuria* would afford an adequate defense to . . ." plaintiff's right to assert damages. In affirming the summary judgment the Ninth Circuit Court of Appeals cited the RESTATEMENT OF TORTS § 892. 311 F.2d at 768. This has led various writers to submit the view that the Ninth Circuit considered the defense of consent to a tort in its decision. See 78 HARV. L. REV. 279 (1964); Note, *In Pari Delicto and Consent as Defenses in Private Antitrust Suit*, 78 HARV. L. REV.

Rejection of the defense may occur in circumstances where the defense would otherwise be applied if one of the following conditions were present: (1) the party against whom the defense is asserted was coerced or induced by fraud into the illegal agreement;²² or (2) if public policy required that relief be given notwithstanding the plaintiff's voluntary participation.²³ The particular exception found in *Simpson* is not clear. Despite this lack of clarity, this case has been regarded as the beginning of the demise of the defense in private antitrust actions on one hand,²⁴ and as a possible expansion of the concept of coercion on the other.²⁵

The expanded coercion theory rests on the proposal that:

[T]he Court viewed [plaintiff's] action as having been economically coerced, on the theory that nonparticipation was not a meaningful alternative. If so, *Simpson* goes beyond previous decisions, which permitted economic coercion to vitiate the similar defense of *in pari delicto* only where the alternative to participation in the illegal scheme was loss of investment.²⁶

The difficulty with this view is that the facts in *Simpson* do not indicate why nonparticipation was not "meaningful." If plaintiff had not participated there is no indication that he would have been injured economically or otherwise. At worst he would have suffered only disappointment. However, the facts do disclose that plaintiff had no choice in the manner of his participation with Union Oil.²⁷ He could do business on their terms or not at all. There was no

1241 (1965). But, Circuit Judge Cummings in his dissent in *Perma Life* indicates that the defense applied in *Simpson* was *in pari delicto*, stating:

A close study of the *Simpson* case, including the briefs filed therein, convinces me that the Supreme Court would not accept the *in pari delicto* defense in *Perma Life*. . . . In *Simpson*, the Ninth Circuit used the *in pari delicto* theory to deny plaintiff any recovery. That point was fully briefed in the Supreme Court which reversed. . . .

376 F.2d at 704.

With respect to the question of voluntary entry of plaintiffs into the agreements in *Simpson* and *Perma Life*, this possible difference is one without a distinction, for "[e]ven assuming that consent might be a valid defense to such a claim at common law, a finding of voluntariness is as essential an element of consent as it is in establishing *in pari delicto*. . . ." 78 HARV. L. REV. at 1247.

²² 17 AM. JUR. 2d *Contracts* § 229 (1964).

²³ 17 AM. JUR. 2d *Contracts* § 221 (1964).

The rule which limits the enforcement of rights growing out of illegal agreements is generally applied only in cases where the parties are *in pari delicto*. Except when public policy requires that relief be given to such a plaintiff

²⁴ 20 OKLA. L. REV. 97 (1967).

²⁵ 78 HARV. L. REV. 279 (1964).

²⁶ *Id.* at 282.

²⁷ 311 F.2d at 766, 768.

opportunity to bargain over the terms of their relationship. Plaintiff did not conceive or sponsor the vast distribution system. Plaintiff had no interest in the success of the antitrust terms of the agreement; he merely acquiesced to them and his fault would seem to be slight by comparison. But the fact of his voluntary participation still remains. It seems that plaintiff's minimal fault is not enough to relieve him of *in pari delicto* if coercion were the test, since coercion requires involuntary action by plaintiff.

Since fraud was not an issue in *Simpson*, there remains the possibility that *in pari delicto* was not allowed because public interest demanded that plaintiff prevail even though he was a voluntary participant. The Supreme Court has recognized and often referred to "the public interest in vigilant enforcement of the antitrust laws through the instrumentality of the private treble-damage action."²⁸ One authority takes the position that the defense of *in pari delicto* is enforced rather than barred in aid of public policy against antitrust agreements.²⁹ The reasoning is that nonenforcement of the defense would encourage illegal trade practices by permitting plaintiffs to recover their losses from these practices.³⁰ Cases cited in support of this view show that the plaintiff was either a part of the illegal conspiracy forming the basis of the claim,³¹ or instigated the agreement,³² or was a party who materially bargained over the contract terms.³³

It is suggested that the above view is limited in that it fails to consider a class of cases in which the antitrust violation is particularly harmful to competition and the fault of plaintiff is minimal; the very situation that existed in *Simpson*. Under this class of cases it would seem that the interest of the public would best be served by allowing plaintiff to prevail in spite of his token acceptance of anti-

²⁸ *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 329 (1965); *accord*, *Radovich v. National Ball League*, 352 U.S. 445 (1967); *Bruce's Juices, Inc. v. American Can Co.*, 330 U.S. 743 (1947); *see Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948); *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940).

²⁹ See E. TIMBERLAKE, *FEDERAL TREBLE DAMAGE ANTITRUST ACTIONS* 105 (1965); *accord*, Note, *In Pari Delicto and Consent as Defenses in Private Antitrust Suit*, 78 HARV. L. REV. 1241 (1965); Comment, *Limiting the Unclean Hands and In Pari Delicto Defenses in Anti-Trust Suits: An Additional Justification*, 54 NW. U.L. REV. 456 (1959).

³⁰ E. TIMBERLAKE, *supra* note 30, at 105.

³¹ *Lehmann Trading Corp. v. J. & H. Stowlow, Inc.* 184 F. Supp. 21 (S.D.N.Y. 1960).

³² *Kershaw v. Kershaw Mfg. Co.*, 209 F. Supp. 447 (M.D. Ala. 1962).

³³ *Morny v. Western Union Tel. Co.*, 40 F. Supp. 193 (S.D.N.Y. 1940); *see Pennsylvania Water & Power Co. v. Consolidated Gas Elec. Light & Power Co.*, 209 F.2d 131 (4th Cir. 1953).

trust terms in the agreement he entered.³⁴ To deny relief to plaintiff is to allow continuing injury to competition, to use the public monies in a prosecution³⁵ essentially identical to the private action already before the court, and to expend the valuable time of the courts in rehearing essentially the same issues. A suggested test for allowing the public interest exception to the defense of *in pari delicto* is that: (1) the antitrust plan or agreement be one with a substantial potential for harm or one that has substantially affected competition, and (2) the fault of plaintiff be minimal in the conception or implementation of the plan. Such a test would be applicable to *Simpson*; it would still allow the defense to be applied in appropriate cases where plaintiff was a substantial contributor to the scheme; and it would not require the employment of a legal fiction to find coercion where plaintiff did not have to enter into the illegal agreement.

If, as suggested above, the public interest exception is the true basis of the *Simpson* decision, then the voluntary entry of the *Perma Life* plaintiffs into the franchise agreement would not alone be sufficient to support the defense of *in pari delicto*. Further inquiry would be necessary to determine whether plaintiffs were in a position to bargain over the objectionable terms in the agreement or were, instead, required to agree to them as a condition of doing any business at all with defendants.

If the basis of the *Simpson* decision is that plaintiff was coerced into the agreement because "nonparticipation was not a meaningful alternative,"³⁶ then the application of *in pari delicto* in *Perma Life* is even less appropriate than a public interest exception. Plaintiff in *Simpson* had the option of associating with Union Oil, or perhaps with a competing oil company, or with no one at all. Plaintiffs in *Perma Life* were in essentially the same position.

Considering the above arguments it would seem that the summary

³⁴ See 6 H. TOULMIN, A TREATISE ON THE ANTITRUST LAWS OF THE UNITED STATES 587 (1951).

³⁵ Sherman Act § 4, 15 U.S.C. § 4 (1964).

The several district courts of the United States are invested with jurisdiction to prevent and restrain violations of sections 1-7 of this title; and it shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations. . . .

Clayton Act § 4, 15 U.S.C. § 15(a) (1964).

Whenever the United States is hereafter injured in its business or property by reason of anything forbidden in the antitrust laws it may sue therefor in the United States district court for the district in which the defendant resides. . . .

³⁶ 78 HARV. L. REV. 279, 282 (1964).

judgment in *Perma Life* granted on the theory that plaintiffs were *in pari delicto* with defendants is in conflict with the policy followed by the Supreme Court in *Simpson*. If allowed to stand, the Seventh Circuit view on the defense of *in pari delicto* will have the effect of excluding a class of cases from consideration under section 4 of the Clayton Act. Unless the United States Supreme Court decides otherwise, it appears that the Seventh Circuit will have closed the door left open in *Simpson*.

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