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Antitrust Regulation And Problems Of Oligopoly Structure: Helix Milling Co. V. Terminal Flour Mills Co., 523 F.2D 1317 (9Th Cir. 1975).

ANTITRUST REGULATION AND PROBLEMS OF OLIGOPOLY STRUCTURE: *HELIX MILLING CO. V. TERMINAL FLOUR MILLS CO.*, 523 F.2d 1317 (9th Cir. 1975).

Although the objective of the Sherman Act[1] is to promote economic competition,[2] the Act explicitly prohibits only agreements in restraint of trade,[3] and monopolization.[4] Thus, the express wording of the Sherman Act is not always congruent with the policies of discouraging barriers to market entry[5] or preventing the destruction of competition.[6] For example, market control by a few sellers, oligopoly, although characterized as "inherently anticompetitive,"[7] is one type of economic structure which is legal under the Sherman Act. While the nature of oligopoly is an important factor in Sherman Act analysis,[8] it is not a Sherman Act violation in itself. Nevertheless, because the Act prohibits competitors from determining an industry's competitive structure through collaboration,[9] careful examination of oligopolistic markets is necessary to prevent further concentration and

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[1] Sherman Act, 15 U.S.C. § 1 *et seq.* (1970).

[2] *E.g.*, Northern Pac. Ry. v. United States, 356 U.S. 1 (1958). For general studies on antitrust regulation and industrial organization, see A. NEALE, THE ANTITRUST LAWS OF THE U.S.A. (1970); F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PERFORMANCE (1970). *See also* R. CAVES, AMERICAN INDUSTRY: STRUCTURE, CONDUCT AND PERFORMANCE (1972).

[3] Sherman Act § 1, 15 U.S.C. § 1 (1970). The Supreme Court has noted:

> Trade restraints . . ., aimed at the destruction of competition, tend to block the initiative which brings newcomers into a field of business and to frustrate the free enterprise system which it was the purpose of the Sherman Act to protect. [Footnote omitted].

Associated Press v. United States, 326 U.S. 1, 13-14 (1945).

[4] Sherman Act § 2, 15 U.S.C. § 2 (1970).

[5] A "market" is a specific geographic and product area in which certain competitive circumstances are relevant to defining the areas of competition. "Behavior" or "conduct" describes a firm's acts within a given market. "Structure" refers to market character such as the number of competing firms in an industry and the capacity of other firms to enter the market. Within a given market structure, "[m]arket power is the capacity to act other than as a perfectly competitive firm would. The existence of such power may sometimes be inferred from structure or performance or both." P. AREEDA, ANTITRUST ANALYSIS 133 (1974).

[6] For example, a monopoly in itself is not illegal. Under the rule of reason, however, any acts which contribute to unreasonable restriction of competition are illegal. *E.g.*, Standard Oil Co. v. United States, 221 U.S. 1 (1911). *See* United States v. United States Steel Corp., 251 U.S. 417 (1920).

[7] *E.g.*, Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

[8] *E.g.*, United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

[9] Associated Press v. United States, 326 U.S. 1 (1945).

reduction of competition.[10]

Section 1 of the Sherman Act[11] is violated when an unreasonable restraint of trade within an oligpoly results from a firm's course of action which serves to exclude competition from that market.[12] Courts have accentuated the anticompetitive and exclusive nature of oligopoly by utilizing concepts of "barriers to market entry"[13] and "market entrenchment"[14] to reveal the dangers posed by oligopolies to economic competition. These analytical tools aid in recognition and correction of restraints on competition,[15] and deter increasing oligopoly power and concentration. The Ninth Circuit recently employed these analytical devices in *Helix Milling Co. v. Terminal Flour Mills Co.*,[16] where the court considered the problem of firms in an oligopolistic industry selecting their own competition. *Helix* held that a valid cause of action was raised under § 1 of the Sherman Act by plaintiff's claim that it was unlawfully excluded from competition by defendants' refusal to sell it a production facility.[17]

The court in *Helix* reviewed a summary judgment dismissing a claim for damages under § 1 of the Sherman Act[18] and § 7 of the Clayton Act.[19] Plaintiff Helix Milling Company's only flour mill was destroyed by fire. It sought to reenter the flour and millfeed market of the Pacific Northwest by negotiating to purchase an available mill owned by a competitor, defendant General Foods.[20] General Foods, however, decided to sell its mill to a third competitor, defendant Terminal Flour Mills Co.[21] Helix, alleging that purchase of an existing facility was the only financially feasible method of reentry into

[10] *E.g.*, United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

[11] Sherman Act § 1, 15 U.S.C. § 1 (1970).

[12] *See, e.g.*, United States v. Griffith, 334 U.S. 100 (1948), for principles relating to exclusive practices of monopolies.

[13] *See* note 38 *infra* and accompanying text.

[14] *See* notes 40-49 *infra* and accompanying text.

[15] *See* Helix Milling Co. v. Terminal Flour Mills Co., 523 F.2d 1317 (9th Cir. 1975), *cert. denied*, 423 U.S. 1053 (1976).

[16] *Id.*

[17] *Id.* at 1322.

[18] Sherman Act § 1, 15 U.S.C. § 1 (1970).

[19] Clayton Act § 7, 15 U.S.C. § 18 (1970).

[20] General Foods wanted to sell its mill because the mill "was not meeting its profit objectives." 523 F.2d at 1319.

The geographic area in the Pacific Northwest flour market included Oregon, Washington, Idaho and part of Montana. A geographic market is a territorial area of effective competition. *See, e.g.*, United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963).

[21] Terminal owned or controlled two mills, one located in Portland, Oregon, and another in Spokane, Washington.

the market,[22] brought suit to enjoin Terminal Flour's purchase and acquisition of General Foods' mill.[23] Plaintiff further sued for damages for violations of § 1 of the Sherman Act and § 7 of the Clayton Act.[24] Helix claimed that the defendants' agreement would result in Terminal Flour's illegal acquisition of the mill and prevent the plaintiff from participating in the Pacific Northwest flour market.[25] Terminal Flour, however, moved for summary judgment on the grounds that the uncompleted acquisition was not a valid basis for a claim under § 7 of the Clayton Act and that the attempted acquisition did not violate § 1 of the Sherman Act.[26]

The Ninth Circuit held that the uncompleted acquisition of General Foods' mill by Terminal Flour was not specifically within the language of § 7,[27] stating that the "language of § 7 speaks in terms of a completed acquisition rather than an attempted merger."[28] However, the court of appeals reversed the district court's dismissal of the § 1 claim that the acquisition would constitute an illegal combination in restraint of trade by blocking Helix' market reentry.

Helix' allegations concerning the competitive structure and market shares of the Pacific Northwest market were basic to its Sherman Act claim that defendants' illegal contract of acquisition excluded it from competition. The Ninth Circuit found that Helix made significant allegations relating to the "necessary market and the substantial shares of those markets held by General and Terminal."[29] Within the Pacific Northwest flour market, six firms had competed for sales,

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[22] 523 F.2d at 1319.

[23] With the commencement of Helix' suit, General Foods revoked its acceptance of Terminal Flour's offer to buy the mill and Terminal Flour cross-claimed for specific performance of the contract. Terminal Flour maintained its cross-claim for three years, after which the court dismissed the cross-claim on Helix' own motion. 523 F.2d at 1319.

[24] In addition to its antitrust claims, Helix also sued on grounds of misrepresentation and promissory estoppel by General Foods in failing to consummate the Helix-General Foods negotiations for sale of the mill. 523 F.2d at 1319.

[25] *Id.* at 1319-20.

[26] *Id.* at 1319.

[27] *Id.* at 1323. Plaintiff had argued that defendants' negotiations, agreement and contract—enforceable but for the antitrust claim—rendered the acquisition complete under § 7 of the Clayton Act. Brief for Appellant at 14, Helix Milling Co. v. Terminal Flour Mills Co., 523 F.2d 1317 (9th Cir. 1975). Nevertheless, the Ninth Circuit held that § 1 was the only proper basis for a cause of action due to the incomplete acquisition which precluded a § 7 claim.

[28] 523 F.2d at 1323. The court cited Carlson Companies, Inc. v. Sperry & Hutchinson Co., 507 F.2d 959 (8th Cir. 1974), as impliedly supporting this premise. That case referred to damages resulting upon "completed illegal acquisitions" when the threat of injury has become a reality. *Id.* at 962.

[29] 523 F.2d at 1321.

including those of plaintiff and defendants.[30] Terminal Flour's acquisition of General Foods' mill would significantly decrease competition in the relevant market,[31] leaving only four competitors, with the three largest controlling more than 90% of the market production capacity.[32] Helix also alleged that Terminal Flour would gain a significant share of the substantial submarket sales to the Defense Supply Agency (DSA), in which Helix and Terminal Flour formerly had been the major suppliers.[33] Since § 1 is violated when significant competition is eliminated between merging competitors,[34] the court indicated that the distortions in market structure alleged by Helix substantiated its Sherman Act claim.

Based on Helix' allegations, the court held that General Foods' sale of the mill to Terminal Flour, instead of Helix, could result in an unreasonable restraint of trade.[35] Due to the "closed nature of the market," defendants' course of action could be found necessarily to exclude Helix from competition.[36] Thus, the closed nature of the market as evidenced by virtually insuperable barriers to market entry was integral to the court's decision.

The significance of the *Helix* decision rests in large measure on the court's treatment of the anticompetitive characteristics of oligopolistic markets. In an oligopolistic market a limited number of firms control the sales of identical or similar products where, commonly, each seller controls a substantial fraction of the industry's output.[37]

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[30] The largest percentage share available to Helix before its mill was destroyed was less that 4%, representing the smallest capacity in the Pacific Northwest market. Plaintiff's Proposed Statement of Agreed Facts, Record at 539.

[31] A relevant market includes those suppliers of the same or similar products in the same geographic area. *See, e.g.*, Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

[32] Based on figures representing each firm's daily production capacity, Terminal Flour held a 19.6% market share while General Foods held a 10.3% market share. 523 F.2d at 1319.

[33] *Id.* Helix had held a 56% share of the DSA submarket; in Helix' absence from the market, Terminal Flour held 64% of the submarket sales and General Foods held 8%. *Id.*

[34] *Id.* at 1321. *See* United States v. First Nat'l Bank & Trust Co., 376 U.S. 665 (1964).

[35] 523 F.2d at 1320-21.

[36] *Id.*

[37] In an oligopoly situation such as that in the Pacific Northwest flour market, each of a few sellers of undifferentiated products have a significant share of the market. *See* J. BAIN, INDUSTRIAL ORGANIZATION (1959).

> [One] result of the relative absence of product differentiation, together with the restricted importance of sales promotion, is that the

Individual calculations of price and output distinctly influence similar determinations of other firms, creating industry interdependence. In addition, an oligopoly is characterized by limited opportunity for market entry which serves to preserve the existing structure. Thus, efforts to regulate oligopolistic markets focus on the degree of concentration, the extent to which entry barriers are controlled or increased by the participants, and the extent to which mutual interdependence eliminates opportunities for individual decision making.[38]

The Ninth Circuit's analysis in *Helix* reflects increasing concern for the application of antitrust principles to oligopoly structure and behavior which might tend to encourage concentration and interdependence.[39] The development of law concerning oligopoly has focused on Supreme Court efforts to limit the growth of oligopoly market power and structural concentration.[40] In *Brown Shoe Co. v. United States*,[41] a Clayton Act § 7 case, the Court recognized and developed

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> shares of the market secured by the various rival sellers are potentially quite unstable.

J. BAIN, PRICE THEORY 335 (1952). Nevertheless,

> Relatively stable oligopolistic structure seems necessarily to result from the existence of certain barriers to entry which protect a group of established firms, permitting them to operate profitably without inducing many new firms to enter the industry and share the market.

Id. at 272. *See generally*, F. SCHERER, INDUSTRIAL MARKET STRUCTURE AND ECONOMIC PEROFRMANCE (1970).

[38] *See* Mueller, *The New Antitrust: A "Structural" Approach*, 12 VILL. L. REV. 764 (1967).

Entry barriers are an important element of market structure as a major factor for maintaining or increasing concentration in an oligopoly market. While analysis of market shares and concentration is significant in determining effects of structural changes in competition, the threat of potential competition and resulting establishment of entry barriers also has a distinct bearing on competition. Traditional barriers include economies of scale, absolute cost advantages, and product differentiation. *See* J. BAIN, BARRIERS TO NEW COMPETITION 14 (1956). Other types of barriers include advertising costs, corporate "bigness" and limit pricing. One author has suggested that analysis of entry barriers should supplement market share analysis. Disner, *Barrier Analysis in Antitrust Law*, 58 CORNELL L. REV. 862 (1973).

[39] 523 F.2d at 1320. The need to restructure oligopoly markets in order to fulfill antitrust objectives results from such circumstances as the "absence of vigorous price competition, wider price-cost margins than would exist under effective competition, protection of inefficient firms, and a consequent misallocation of economic resources." Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207, 1225-26 (1969).

[40] *See* Brodley, *Oligopoly Power Under the Sherman and Clayton Acts—From Economic Theory to Legal Policy*, 19 STAN. L. REV. 285, 297 (1966) [hereinafter BRODLEY].

[41] 370 U.S. 294 (1962).

basic concepts concerning means of restricting oligopoly power and increased concentration.[42] The Court analyzed the scope and character of a horizontal merger in terms of the relevant product market,[43] the geographic market,[44] and the probable effect of the merger on the structure of competition within the relevant market.[45] The Court emphasized the importance of market shares in determining the degree of concentration.[46] Moreover, reduction of competition and increased concentration are also functions of high entry barriers.[47] In

[42] *Brown Shoe* was the "first to recognize clearly the inherent undesirability of oligopoly power," BRODLEY, *supra* note 40, at 299, and reflected the Court's efforts to promote public policy by stemming the "rising tide of economic concentration." The *Brown Shoe* Court examined the legislative history of the 1950 Amendments to § 7, Celler-Kefauver Act of 1950, Act of Dec. 29, 1950, Pub. L. No. 899, 64 Stat. 1125 (codified at 15 U.S.C. § 18 (1970)), and acknowledged the congressional purpose to stifle economic concentration:

> [N]ot only must we consider the probable effects of the merger upon the economics of the particular markets affected but also we must consider its probable effects upon the economic way of life sought to be preserved by Congress. Congress was desirous of preventing the formation of further oligopolies with their attendant adverse effects upon control of industry and upon small business.

370 U.S. at 333.

[43] The relevant product market is an area of goods or "line of commerce" in which products subject to restraint compete. *See* Brown Shoe Co. v. United States, 370 U.S. 294 (1962).

[44] The geographic market is a territorial area of effective competition. *Id.*

[45] The Court explained in *Brown Shoe,* a § 7 Clayton Act case, that the Clayton Act not only proscribes "acquisitions which might result in a lessening of competition between the acquiring amd the acquired companies," but also requires a broad examination of "their effect on competition generally in an economically significant market." 370 U.S. at 335. This examination of all competition which may be affected by horizontal combination utilizes the market share as the most important factor for consideration.

[46] In United States v. Philadelphia Nat'l Bank, 374 U.S. 321, 363 (1963), the Court established a presumption of illegality under § 7 of the Clayton Act where a merger "produces a firm controlling an undue percentage share of the relevant market, and results in a significant increase in the concentration of firms in that market." The Court further explained that relevant market share information will reveal whether there is concentration which is "so inherently likely to lessen competition substantially that it must be enjoined in the absence of evidence clearly showing that the merger is not likely to have such anticompetitive effects." *Id.* The Court also noted that "if concentration is already great, the importance of preventing even slight increases in concentration and so preserving the possibility of eventual deconcentration is correspondingly great." *Id.* at 365 n.42. The presumption that anything which alters or creates an oligopoly market is illegal is the primary means by which the antitrust statutes are adapted to promote public policy to encourage competition and control oligopoly market structure. *See* BRODLEY, *supra* note 40, at 339-40.

[47] *See* note 38 *supra.* The presumption presented in *Philadelphia Bank* may be

Helix, the Ninth Circuit considered market shares[48] and entry barriers in determining the validity of Helix' claim under § 1 of the Sherman Act.

The *Helix* court emphasized that, absent a valid business purpose, an agreement or collaborative action which prevents market entry of competitors and effectively allows existing competitors to

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misleading by impliedly attaching lesser importance to factors such as entry barriers which may tend to increase concentration. A commentator has noted in this regard that "[e]ntry barriers bear an important relationship to the question of whether an oligopoly market structure will lead to undesirable manifestations of oligopoly power." BRODLEY, *supra* note 40, at 348. *See* J. BAIN, BARRIERS TO NEW COMPETITION (1956).

United States v. Von's Grocery Co., 384 U.S. 270 (1966), has been criticized for failing to go beyond considerations of relevant market shares to an analysis of other economic indications which might serve to refute presumptions of unlawful concentration preventing competition. Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282, 308 (1975) (Posner pointed to "the obvious ease and rapidity of entry into the retail grocery business" as a major factor not considered in *Von's Grocery*). In *Von's Grocery*, the Court analyzed a horizontal merger's effect on the preservation of competition between small businesses with emphasis on preventing any movement toward concentration. The Court, however, did not make any "reference to oligopoly, entry, or other concepts that might be relevant to an appraisal of the effect of the merger on competition." *Id.*

Any possible analytical defects in the *Von's Grocery* decision may have been overcome by the Court in United States v. General Dynamics Corp., 415 U.S. 486 (1974). In that case, relevant market share figures were de-emphasized in favor of other economic factors revealing unique market deviations. In sustaining a horizontal acquisition, the Court examined all "pertinent factors affecting the . . . industry" rather than relying exclusively on market share statistics. *Id.* at 498.

[48] *See* United States v. First Nat'l Bank & Trust Co., 376 U.S. 665, 672 (1964). *Lexington Bank* was a horizontal merger case under § 1 of the Sherman Act. In that case, two major competitive banks, in a service market of commercial banking and a county-wide geographic market including four other competitors, had combined in restraint of trade. Since the action was brought under § 1, restraint of trade had to be proved instead of a probability of competitive injury. The Court made no comprehensive market analysis but rather presented a simple rule prohibiting merger between major competitors in the relevant market, a concentrated oligopoly. The Court considered relevant market shares and concluded that "significant competition will be eliminated by the consolidation," constituting an unreasonable restraint of trade. *Id.* at 669. The Court reviewed the § 1 railroad cases which

> . . . stand for the proposition that where merging companies are major competitive factors in a relevant market, the elimination of significant competition between them, by merger or consolidation, itself constitutes a violation of § 1 of the Sherman Act.

Id. at 671-72. *See* United States v. Southern Pac. Co. 259 U.S. 214 (1922); United States v. Reading Co., 253 U.S. 26 (1920); Northern Securities Co. v. United States, 193 U.S. 197 (1904).

select their competition will be illegal.[49] The court's determination was based on the notion that the Sherman Act is violated when a combination, even in the absence of an explicit agreement, is intended to eliminate potential market participants from that market.[50] Although the sale from General Foods to Terminal Flour did not technically "exclude" Helix, the court used principles from "refusal to deal" or "boycott" cases to demonstrate that any collaborative action for the purpose of preventing competitor entry into a market is illegal.[51] Even though Helix was not a competitor or distributor whose behavior was the object of coercive activities by defendants, the court analogized General Foods' decision to sell its mill to Terminal Flour to a boycott situation where firms unlawfully influence the activities of their competitors. Thus, the *Helix* court indicated that the defendants' actions could have been intended to assure Helix' elimination from competition.[52] More importantly, however, the court emphasized the potential consequences of defendants' conduct rather than any conspiratorial motive for which those results were attained.[53]

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[49] 523 P.2d at 1320. The court stated: "The Sherman Act prohibits competitors from selecting who or what their competition will be." *Id.*

[50] The Supreme Court noted in United States v. General Motors Corp., 384 U.S. 127, 142-43 (1966), that "it has long been settled that explicit agreement is not a necessary part of a Sherman Act conspiracy . . . ."

In the context of an oligopoly, exclusionary behavior without valid business reasons may be classified as a § 1 restraint of trade. Even beyond this, a violation may result where "market power may be an essential ingredient in determining the propriety of some kinds of conduct which may have a business justification." Turner, *The Scope of Antitrust and Other Economic Regulatory Policies*, 82 HARV. L. REV. 1207, 1229 (1969).

[51] *See, e.g.*, United States v. General Motors Corp., 384 U.S. 127 (1966); Associated Press v. United States, 326 U.S. 1 (1945). *General Motors* dealt with a situation where extensive collaboration among car dealers, dealer associations and GMC prevented entrance of and cooperation with discount dealers. "Exclusion of traders from the market by means of combination or conspiracy is . . . inconsistent with the free-market principles embodied in the Sherman Act . . . ." 384 U.S. 127, 146 (1966).

In *Associated Press*, the Court determined that the Associated Press By-laws forbidding members to sell news to non-members constituted a concerted refusal to deal which was intended to inhibit competition. 326 U.S. 1, 13-14. The Court also found that "[c]ombinations are no less unlawful because they have not as yet resulted in restraint." *Id.* at 12. In balancing the industry's advantages in maintaining the restrictions against possible public injury, the Court found an illegal refusal to deal which did not fall within the Sherman Act's rule of reason.

[52] *See* 523 F.2d at 1321.

[53] Not all anticompetitive combinations are unlawful under the rule of reason, rather only those "contracts or acts which were unreasonably restrictive of competitive conditions, whether from the nature or character of the contract or act or where the

The Ninth Circuit recognized that illegal collaboration in refusing to deal is determined by examining whether a course of conduct will effectively result in a restraint of trade.[54] Under prevailing authority,[55] the nature of such action often does not require extended inquiry into the "reasonableness of the conduct in the circumstances."[56] Instead, "[i]t is sufficient that a restraint of trade . . . results as the consequence of a defendant's conduct or business arrangements."[57] A threshhold determination in examining consequences of the defendants' conduct is whether their agreement was a restraint of trade *or* an activity primarily designed to further a legitimate business purpose only indirectly or incidently affecting competition.[58] The ulti-

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surrounding circumstances were such as to justify the conclusion" of illegality. Standard Oil Co. of New Jersey v. United States, 221 U.S. 1, 58 (1910)(Justice White's opinion noted that not every trade restraint violates § 1 of the Sherman Act, only those which are unreasonable). *See generally* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division,* 74 YALE L.J. 775, 781 (1965).

[54] *See* Associated Press v. United States, 326 U.S. 1, 12 (1945). In *Associated Press,* the inability to buy news would have serious effects in destroying competition and blocking entry into the news industry.

[55] *See, e.g.,* Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). The Court stated in *Klor's* that the nature of a refusal to deal cannot "be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy." *Id.* at 213.

[56] United States v. General Motors Corp., 384 U.S. 127, 146 (1966). The Court in *General Motors* quoted Northern Pac. R.R. v. United States, 356 U.S. 1,5 (1958):

> [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.

Examination of economic motivation for conduct is not necessary when concerted action deprives a firm of access to merchandise for sale. United States v. General Motors Corp., 384 U.S. 127, 146 (1966). *See* Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961), where the Court would not allow justification that a refusal to deal served to keep unsafe gas burners off the market. *See* Comment, *Use of Economic Sanctions by Private Groups: Illegality Under the Sherman Act,* 30 U. CHI. L. REV. § 171 (1962).

[57] United States v. Griffith, 334 U.S. 100, 105 (1948), *quoted in* 523 F.2d at 1321. See 334 U.S. at 106-8, for the analogous proposition that expansion of market power or position through restraint of trade is in violation of § 2 prohibition of monopolization:

> And even if we assume that a specific intent to accomplish that result [expansion of market power] is absent, he is chargeable in legal contemplation with that purpose since the end result is the necessary and direct consequence of what he did.

Id. at 108.

[58] 523 F.2d at 1320, *citing* United States v. Hilton Hotels Corp., 467 F.2d 1000 (9th Cir. 1972), *cert. denied,* 409 U.S. 1125 (1973); Joseph E. Seagram & Sons, Inc. v.

mate objective of parties engaged in restraint of trade is immaterial if a consequence of the scheme is the prevention of competition.[59] The presence of either anticompetitive purpose or effect is sufficient to establish an unreasonable exclusion from a market in restraint of trade.[60] Regardless of whether the defendants had a specific purpose to exclude Helix, a restraint of trade could be found since exclusion necessarily resulted from the conduct of General Foods and Terminal Flour in negotiating the purchase of the mill.[61] The undesirable result of plaintiff's exclusion from competition was emphasized by the Pacific Northwest market structure and the market shares held by General Foods and Terminal Flour.[62] As claimed by Helix, a completed acquisition could have eliminated significant competition between General Foods and Terminal Flour.[63]

Since the court held that a jury could find that Helix' exclusion from competition would increase market concentration, eliminate significant competition, and necessarily restrain trade, Helix was not

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Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), *cert. denied,* 396 U.S. 1062 (1970). *See* Barber, *Refusals to Deal Under the Federal Antitrust Laws,* 103 U. PENN. L. REV. 847, 877 (1955).

[59] See 523 F.2d at 1320; United States v. Hilton Hotels Corp., 467 F.2d 1000, 1002 (9th Cir. 1972).

[60] *See* Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969). Although the court found that plaintiff in *Hawaiian Oke* offered no evidence of an anticompetitive motive for defendant's termination of plaintiff's distributorship, the court noted that it is possible for a combination to have so adverse an effect on competition as to restrain trade unlawfully. *Id.* at 78. The *Helix* court noted this with approval and distinguished *Hawaiian Oke* as a case where the defendant was not in competition with the plaintiff. 523 F.2d at 1320-21.

[61] Helix may show § 1 illegality in a refusal to deal situation either by establishing anticompetitive intent *or* by demonstrating adverse effects on market competition as a result of defendants' course of conduct. *See* United States v. Griffith, 334 U.S. 100, 105 (1945); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969).

In remanding the case for trial, the *Helix* court noted the possibility that a "jury could find here such anticompetitive intent from defendants' action in agreeing to a course of action which would necessarily exclude Helix from the market. . . and whose successful attainment would result in an acquisition which could be found to involve a violation of § 1." 523 F.2d at 1321.

[62] 523 F.2d at 1321.

[63] The *Helix* court cited United States v. First Nat'l Bank & Trust Co., 376 U.S. 665, 671-72 (1964) for the principle that:

> [W]here merging companies are major competitive factors in a relevant market, the elimination of significant competition between them, by merger or consolidation, itself constitutes a violation of § 1 of the Sherman Act.

523 F.2d at 1321.

required to prove actual public injury,[64] but merely that "it would have purchased the mill but for the contract between Terminal and General."[65] In this regard, plaintiff alleged that it "was ready, willing and able to purchase the mill,"[66] and presumably, Helix could prove its qualifications to enter the market as a competitor.

By permitting the Sherman Act cause of action and calling for proof of Helix' ability to purchase the mill and compete in the market, the court permitted Helix, a company no longer participating in the oligopoly, to regulate the sale of available assets in the market. The status of Helix as a former competitor was a strong indication of its qualifications to compete and position to challenge defendants' conduct and thus made its case easier. Nevertheless, the court placed an initial burden on the defendants to show why the mill should not be sold to Helix as a market entrant regardless of its position as a former competitor. Moreover, the court's reasoning apparently entitles any potential competitor to claim exclusion from the market upon denial of a bid to purchase.[67]

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[64] 523 F.2d at 1322. *See, e.g.*, Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961). *See* Associated Press v. United States, 326 U.S. 1 (1945). The *Associated Press* Court noted with respect to problems of public injury that:

> Combinations are no less unlawful because they have not yet resulted in restraint. An agreement or combination to follow a course of conduct which will necessarily restrain or monopolize a part of trade or commerce may violate the Sherman Act, whether it be "wholly nascent or abortive on the one hand, or successful on the other."

Id. at 12, *quoting* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 225 (1940).

[65] 523 F.2d at 1322.

[66] Brief for Appellant at 4. Proof of ability to purchase could be shown by demonstrating, for example, financial capability, affirmative action to make the transaction such as active negotiations, ability to enter into all necessary contracts, and appropriate background and experience. *E.g.*, Martin v. Phillips Petroleum Co., 365 F.2d 629 (5th Cir.), *cert. denied*, 385 U.S. 991 (1966).

[67] The potential problem of allowing virtually any bidder a § 1 cause of action is somewhat alleviated by standing requirements as well as proof of damages. Ordinarily, the plaintiff must have suffered direct injury from proscribed conduct, usually evidenced by status as a competitor in the market in which the violation restrained trade. Direct injury must be established by showing more than mere intent to enter a particular industry; adequate business involvement and injury may be shown, for example, by demonstrating substantial preparedness to enter, amount of expenditures in seeking entry, extent of negotiations, and prior experience in the business. *See generally*, Note, *Standing to Sue for Treble Damages Under Section 4 of the Clayton Act*, 64 COLUM. L. REV. 570 (1964).

Once standing is established, a plaintiff must prove that the violation was the actual cause of loss; the defendant then bears the risk of uncertainty in measuring damages. Story Parchment Co. v. Paterson Parchment Paper Co., 282 U.S. 555, 562 (1931). Damages may not be speculative, but approximations are sufficient if they are

Under the rule in *Helix*, a valid claim could be established by a potential market entrant upon proof of an attempt to enter a market with a reasonable chance of business success on the basis of experience, attempts to participate, financial capability, and availability of facilities. Nevertheless, the Ninth Circuit recognized that General Foods and Terminal Flour were most likely aware of the consequences of their agreement to the plaintiff, specifically as a former competitor.[68] Thus, the court fashioned its requirements of proof with special regard to the closed nature of the market, the availability of a single facility, plaintiff's former competitive status as proof of its ability to compete, the defendants' knowledge of plaintiff's position and bid.

The *Helix* decision illustrates the Ninth Circuit's concern that the consequences of any agreement between defendants would reduce competition and increase concentration in the Pacific Northwest market. In order to avoid this result, the court permitted the jury to decide whether Helix' reentry into the market as a qualified competitor was necessary to increase competition within the industry. This is consistent with judicial recognition of the inherent dangers of oligopoly,[69] which has facilitated the use of both § 1 of the Sherman Act[70]

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a "just and reasonable estimate of the damage based on relevant data." Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251, 264 (1946). Measurement of harm may be shown indirectly through loss of profits caused only by a violation. Methods of proof include showing profits before and after a violation, or profits of comparable firms. *See* Bigelow v. RKO Radio Pictures, Inc., 327 U.S. 251 (1946); Richfield Oil Corp. v. Karseal Corp., 271 F.2d 709 (9th Cir. 1959), *cert. denied,* 361 U.S. 961 (1960); Note, *Private Treble Damage Antitrust Suits: Measure of Damages for Destruction of All or Part of a Business,* 80 HARV. L. REV. 1566 (1967).

[68] The Ninth Circuit recognized the implications of defendants' knowledge of plaintiff's outstanding bid:

> In such a factual setting, where entry to the market by the plaintiff allegedly is prevented by a merger or acquisition which would violate § 1 of the Sherman Act and *where the defendants were aware of the bid by the plaintiff,* there is a Sherman Act § 1 cause of action [footnote omitted].

523 F.2d at 1322 (emphasis added). *See* United States v. Associated Press, 52 F. Supp. 362 (S.D.N.Y. 1943) (Hand, J.), *aff'd,* 326 U.S. 1 (1945).

[69] The anticompetitive nature of oligopolistic organization is difficult to define, particularly in situations of merger and acquisition.

> [R]egardless of the intentions of the merging parties, it is possible for the gradual transformation of an industry from one of many competing firms to one of only a few competitors to increase the incidence of collusion. This is the fundamental economic rationale of the antimerger law.

R. POSNER, ANTITRUST 398 (1974). *See* Shepherd, *Conglomerate Mergers in Perspective,* 2 ANTITRUST L. & ECON. REV. 15 (1968).

[70] The structural complexities of oligopoly markets often render it difficult to

and § 7 of the Clayton Act[71] in preventing anticompetitive alteration of existing market structures.[72]

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determine economic values in the context of § 1. The Sherman Act is not ordinarily used to prevent potential collusion in an economy of oligopolistic interdependence. Section 1 as judicially interpreted specifically proscribes only unreasonable contracts, combinations or conspiracies in restraint of trade, some of which may be per se illegal. Section 7 of the Clayton Act, instead, is used prophylactically to prevent emerging oligopolies and unduly concentrated market power by looking to the long-term consequences of a merger or acquisition. Accordingly, emphasis is placed on efforts to identify and prevent anticompetitive alteration of market structures. "[T]he primary role of Section 7 enforcement is to preserve and promote market structures conducive to competition." Merger Guidelines of the Department of Justice § 2, 1 CCH TRADE REG. REP. ¶ 4510 (1975). The purpose of § 7 of the Clayton Act is "to arrest incipient threats to competition which the Sherman Act did not ordinarily reach." United States v. Penn-Olin Chem. Co., 378 U.S. 158, 171 (1964). The application of this principle to oligopoly markets rests upon "[t]he core question [which] is whether a merger may substantially lessen competition, and [which] necessarily requires a prediction of the merger's impact on competition, present and future." FTC v. Proctor & Gamble Co., 386 U.S. 568, 577 (1967). *See, e.g.,* United States v. E. I. duPont de Nemours & Co., 353 U.S. 586 (1957).

[71] The Merger Guidelines of the Department of Justice provide instructive criteria for scrutiny of horizontal mergers and structural alterations challenged under § 7 of the Clayton Act. Clayton Act purposes include:

> (i) preventing elimination as an independent business entity of any company likely to have been a substantial competitive influence in a market; (ii) preventing any company or small group of companies from obtaining a position of dominance in a market; (iii) preventing significant increases in concentration in a market; and (iv) preserving significant possibilities for eventual deconcentration in a concentrated market.

Merger Guidelines of the Department of Justice § 4, 1 CCH TRADE REG. REP. ¶ 4510 (1971). These criteria are not exclusive:

> Market shares are the primary indicia of market power but a judgment under § 7 is not to be made by any single qualitative or quantitative test. The merger must be viewed functionally in the context of the particular market involved, its structure, history and probable future . . . . Moreover, the competition with which § 7 deals includes not only existing competition but that which is sufficiently probable and imminent.

United States v. Continental Can Co., 378 U.S. 441, 458 (1964).

[72] The consequences of horizontal merger, for example, were noted in United States v. Aluminum Co. of America, 377 U.S. 271, 280 (1964):

> It would seem that the situation in the aluminum industry may be oligopolistic. As that condition develops, the greater is the likelihood that parallel policies of mutual advantage, not competition, will emerge.

Alcoa cited United States v. Philadelphia Nat'l Bank, 374 U.S. 321 (1963), as supporting the dual necessities of preventing a market from becoming unduly concentrated and preventing increased concentration in an already concentrated market. Brown

The prospect of further concentration in the Pacific Northwest flour market prompted a careful examination of all allegations to allow a § 1 claim in order to prevent significant reduction of existing competition and excessively restrictive barriers to market entry.[73] Such scrutiny required consideration of all economic factors in the oligopolistic industry, especially definition of existing and potential competitive market shares. Thus, Helix was given the opportunity to show that the defendants' agreement might "contribute directly and materially to the growth or maintenance of concentrated oligopoly power in a definable market."[74]

The general applicability of the *Helix* decision in permitting challenges of oligopoly restructuring should put firms in such an industry on guard as to any potentially anticompetitive effects of market restructuring.[75] According to *Helix,* barriers to market entry may not be

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Shoe Co. v. United States, 370 U.S. 294 (1962), was also cited in regard to the use of § 7 to prevent probable and substantial lessening of competition.

Various alternatives to restructuring under currently available statutory means have been suggested by a number of scholars. *See, e.g.,* Turner, *The Scope of Antitrust and Other Economic Regulatory Policies,* 82 HARV. L. REV. 1207 (1969). Such suggestions have included: (1) possible legislative efforts to restrict "unreasonable market power" beyond the strictures of § 1 and defined in terms of excessive market shares, (2) application of § 2 of the Sherman Act to oligopolies in the same manner used to adjudge illegal monopolies, (3) rigorous application of § 7 of the Clayton Act to horizontal mergers or acquisitions where their illegality in concentrated markets is based on strict definitions of relevant product and geographic markets and specific market share percentages. Other definitive criteria within the third alternative might include, for example, number of sellers, level of buyer concentration, product homogeneity and prior history of collusion. Posner, *Oligopoly and the Antitrust Laws: A Suggested Approach,* 21 STAN. L. REV. 1562, 1593-1603 (1969)(Posner emphasized behavioral correction rather than market restructuring in the context of § 1 remedies to noncompetitive pricing in oligopoly markets). *See also* Adams, *Market Structure and Corporate Power: The Horizontal Dominance Hypothesis Reconsidered,* 74 COLUM. L. REV. 1276, 1279 (1974).

[73] Possible, though difficult, defenses to such forced restructuring might include proof of ease of alternative methods of entry, proof that a valid business dealing resulted only indirectly in anticompetitive consequences, and proof of a plaintiff's own inability to purchase or enter the market.

[74] BRODLEY, *supra* note 40, at 315. The *Helix* court gave weight to the *Lexington Bank* rule, *supra* note 48, that § 1 is violated where significant competition is eliminated between merging competitors holding substantial shares of relevant markets. 523 F.2d at 1321. The defendants' agreement to sell the mill to Terminal might serve to intensify an already concentrated market which would violate § 1.

[75] Courts must consider whether eliminated competition is significant within the context of total industry competition and what effect such eliminated competition will have on the structure of a defined relevant market. Justice Frankfurter phrased this requirement very simply in his concurring opinion in Associated Press v. United States, 326 U.S. 1, 27 (1945): "The decisive question is whether it is an unreasonable

enhanced or raised by intraindustry competitor selection which effectively excludes entry by qualified potential competitors. This rule encourages the development of judicial regulation of oligopolies[76] with the specific goal of inhibiting techniques of competitive exclusion. *Helix* implies that a firm must sell its assets to a qualified competitor not currently within the market. Such a requirement is dictated by policy against market entrenchment or concentration which renders consequences of industrial conduct determinative of trade restraints.

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restraint. This depends, in essence, on the significance of the restraint in relation to a particular industry."

[76] This is not to imply that any oligopoly market tending toward increased concentration is presumptively evil. "Antitrust law must not attempt to restructure every market with relatively few sellers, for the effort is always costly and sometimes unnecessary or futile." P. AREEDA, ANTITRUST ANALYSIS 235 (1974). Judicial hesitancy to restructure oligopolies and reduce economic concentration is often justified by the presence of such factors as "workable" competition, high level industrial efficiency, economies of scale, and overall "net economic performance" in terms of consumer satisfaction and comfort. *Id.* at 235-36. Rather, courts should be concerned only with limited industrial restructuring of harmful concentration or "all acquisitions likely to lessen competition or to lead toward monopoly." Kramer, *Economic Concentration and the Antitrust Laws,* 1975 WASH. U. L. Q. 165, 177.

Upon finding antitrust violations, district courts have considerable leeway to correct those situations giving rise to the violations.

> The fashioning of a decree in an antitrust case in such way as to prevent future violations and eradicate existing evils, is a matter which rests largely in the discretion of the court.

Associated Press v. United States, 326 U.S. 1, 22 (1945), *citing* United States v. Crescent Amusement Co., 323 U.S. 173 (1944). In *Crescent Amusement,* the Court acknowledged the need to deter unlawful conduct and encourage growth of competition by allowing a considerable range of discretion in district courts. *Id.* at 185-86. Decrees may include for example orders of dissolution or reorganizational alternatives designed to eliminate the source or basis of antitrust violation. *See e.g.,* United States v. Terminal R.R. Ass'n, 224 U.S. 383 (1912).