Commodity Market Manipulation

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PHILIP MCBRIDE JOHNSON**

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* Substantial parts of this Article will appear in Chapter 5 of P. JOHNSON, COMMODITIES REGULATION (Little, Brown & Co. 1981).
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Commodities futures trading on the national exchanges has grown spectacularly during the past decade. This increase requires special vigilance against the possibility of attempts to manipulate market prices. While the Commodity Exchange Act (the Act) does not contain a definition of the term “manipulation,” it nevertheless bristles with provisions dealing with market manipulation of other forms of market disorders. A review of this statutory base dealing with market manipulation, and of the formative case law on the subject, provides a much-needed survey of the murky legal boundaries of manipulative behavior.

I. Statutory Bases of Market Manipulation

Section 3 of the Act recites the congressional purpose of the statute and states that “the transaction and prices of commodities on such boards of trade are susceptible to speculation, manipulation, and control, and sudden or unreasonable fluctuations in the prices thereof frequently occur as a result of such speculation, manipulation or control. . . .” The infrequency of manipulation suits under the Act raises doubt concerning the accuracy of the foregoing statement, but section 3 helps nevertheless to illustrate the basic anti-manipulation focus of the Act.

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3 Even though the Commodity Exchange Act (the Act) does not contain a definition of the term “manipulation,” it has been held that this omission does not render the Act unconstitutional. Bartlett Frazier Co. v. Hyde, 65 F.2d 350 (7th Cir.), cert. denied, 290 U.S. 654 (1933). Evidently, the question of vagueness has not arisen in a criminal prosecution for manipulation, where the standard is generally higher. See, e.g., United States v. La Mantia, [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) § 20,667 (N.D. Ill. 1978).
Section 4a, authorizing the Commodity Futures Trading Commission (the Commission) to establish daily trading and position limits for speculators, adopts section 3's phraseology with respect to "sudden or unreasonable [price] fluctuations" and also speaks of "unwarranted changes in the price" of a commodity. However, section 4a is expressly concerned with "excessive speculation," which is identified in section 3 as a danger separate from manipulation and control of the market, and thus is not specifically an anti-manipulation provision. Rather, section 4a seems to focus upon market disorders attributable to unbridled speculative activity, without regard to whether that speculative frenzy has a manipulative purpose. It should be noted, moreover, that the regulations adopted by the Commission under section 4a contain a warning that compliance with the daily trading and position limits "shall [not] be construed to affect any provision of the Act relating to manipulation or corners, nor to relieve any contract market or its governing board from responsibility under section 5(d) of the Act to prevent manipulation and corners." Thus, the Commission acknowledges that the potential for manipulation and corners continues to exist even if the daily trading and position limits have dampened "excessive speculation."

Section 5(d) imposes upon all boards of trade, as a condition for designation as a contract market, that their governing boards must provide for "the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators upon such board." The Commission has adopted a "Guideline" for contract markets describing the type of surveillance expected of them to fulfill their section 5(d) duty. The guideline states that the Commission does not "expect contract market enforcement programs to prevent or detect all instances of exchange rule violation," but does expect that such programs will be "reasonably calculated" to enforce those rules.

Section 5a(4), setting further conditions for contract market designation, contains the Act's only reference to the prevention of "squeezes," a phenomenon described later in this Article that may constitute a market manipulation if the requisite intent is present. Section 5a(4) deals with the creation of a period for actual deliveries of the commodity on the futures contract after the market has ceased trading in the contract, and relates that period of the prevention of "squeezes" and "market congestion" endangering price stability.

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6 Id. § 6a.
11 See section II. C. infra.
Section 5a(10)\textsuperscript{12} authorizes the Commission to compel a contract market to adopt delivery points (i.e., locations), and price differentials for delivery of differing grades of a commodity, "as will tend to prevent or diminish price manipulation, market congestion, or the abnormal movement of such commodity in interstate commerce."

Sections 5b\textsuperscript{13} and 6(a)\textsuperscript{14} of the Act are concerned with enforcement actions by the Commission against a contract market for failing to comply with the Act or the Commission's rules, regulations and orders thereunder. Expressly mentioned in section 6(a) is a failure by a contract market to enforce "its rules of government made a condition of its designation as set forth in section 5 of this Act," which would include a failure to enforce its anti-manipulation rules under section 5(d). And section 6b,\textsuperscript{15} governing Commission actions against contract markets leading to cease-and-desist orders and civil penalties, contains a similar reference to the contract market's failure to enforce such rules.

Sections 6(b)\textsuperscript{16} and 6(c)\textsuperscript{17} deal with enforcement actions against persons other than contract markets. Indeed, contract markets are expressly excluded from the coverage of those sections. Both provisions make specific reference to "manipulating or attempting to manipulate" cash commodity prices and futures prices.

A comparison of sections 5b and 6(a), concerning contract markets, with section 6(b) and 6(c) governing all other persons, reveals that manipulation is not even mentioned in the former provisions while it is the first-mentioned violation in the latter sections. An inference can be drawn that Congress did not view the contract markets as potential manipulators, while the risk of manipulation by other persons was clearly and prominently recognized by the Congress. The absence in sections 5b and 6(a) of any reference to manipulation by a contract market, and the emphasis in section 5(d) on the role of contract markets in preventing manipulation by others dealing or operating on those exchanges, raise serious doubt whether a charge of "manipulation" leveled directly against a contract market is compatible with the Act's language. Moreover, as a practical matter, contract markets are incapable of market manipulation in the usual meaning of that term since they do not trade in the markets and, accordingly, cannot place pressure on prices through purchases or sales of cash commodities or futures contracts. At most, the contract markets may adopt rules or policies to which traders may react in the market—often in unpredictable ways—but the establishment of those rules or policies is not "manipulation" within any familiar meaning of that term. If a contract market rule or policy could

\textsuperscript{12} 7 U.S.C. § 7a(10) (1976).
\textsuperscript{13} Id. § 7b.
\textsuperscript{14} Id. § 8(a).
\textsuperscript{15} Id. § 13a.
\textsuperscript{16} Id. § 9.
\textsuperscript{17} Id. § 13b.
be shown to have created an environment or opportunity for manipulation by traders, it might be criticized as a failure to provide for the prevention of manipulation under section 5(d), but it does not follow that a charge of actual manipulation by the contract market would be either accurate or appropriate.  

Section 6c of the Act authorizes the Commission to institute in a federal district court an injunction action against a contract market or other person for violating the Act or for "restraining trading in any commodity for future delivery." As written, section 6c could be construed to make "restraining trading" a basis for injunctive relief separate from a violation of the Act or of any rule, regulation or order of the Commission thereunder. If so, "restraining trading" is not the same as a market manipulation, since the latter is embraced by the section's separate reference to Act violations. The phrase "restraining trading" has not been construed by the courts.

Section 8a(6) empowers the Commission to communicate to the contract markets "the full facts concerning any transaction or market operation, including the names of parties thereto, which in the judgment of the Commission disrupts or tends to disrupt any market...." While this language is broader than the circumstances evidencing a true manipulation, it clearly encompasses market conditions of that nature.

Section 8a(7) authorizes the Commission to alter or supplement contract market rules under various circumstances, including "for the protection of traders or to insure fair dealing in commodities traded for future delivery on such contract market." The breadth of that language, as well as other phraseology dealing with the protection of commodity merchants and consumers, suggest that section 8a(7) may be available to the Commission to alter or supplement exchange rules for anti-manipulation purposes.

Section 8a(9) governing the Commission's issuance of emergency orders to contract markets, expressly identifies "threatened or actual market manipulations and corners" as grounds for such action.

Section 9(b) makes it a felony punishable by a fine of up to $500,000 ($100,000 for individuals) and imprisonment of not more than five years, for any person "to manipulate or attempt to manipulate the price of any

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18 Occasionally, charges of manipulation have been leveled against contract markets by private litigants. A contract market will not be held to have manipulated a market through regulatory actions or decisions if the conduct accords with its rules and is taken in good faith. Lagorio v. Board of Trade of Chicago, 529 F.2d 1290 (7th Cir. 1976); P.J. Taggares Co. v. New York Mercantile Exchange, 476 F. Supp. 72 (S.D.N.Y. 1979). See also Chicago Mercantile Exchange, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,436 (1977).


20 Id. § 12a(6).

21 Id. § 12a(7).

22 Id. § 12a(9).

23 Id. § 13(b).
commodity in interstate commerce, or for future delivery on or subject to the rules of any contract market, or to corner or attempt to corner any such commodity. . . ." Manipulations and corners, therefore, are among the most serious crimes created by the Act.

Finally, section 17(b)(7), establishing the conditions for registration as a futures association, requires that each such futures association must have rules designed to prevent "manipulative acts and practices" and to "remove impediments to . . . free and open futures trading."

II. The Terminology of Manipulation

As noted earlier, the Act does not contain a definition of manipulation. A challenge to the constitutionality of the Act for that reason was unsuccessful. Instead, the task has been left to the federal courts to identify the characteristics and attributes of an unlawful manipulation. To date, the United States Supreme Court has refused to consider the issue, so that federal appellate decisions are the highest source of authority.

The principal cases addressing the manipulation issue are discussed below. As preface, however, it is useful to highlight in general terms the distinctions drawn in this Article between a price "manipulation," a commodity "corner," and an intentional "squeeze." These terms are sometimes used interchangeably in the case law, but will be given more precise meaning here.

A. "Price Manipulation"

The phrase "price manipulation" as used in this Article means the elimination of effective price competition in a market for cash commodities and/or futures contracts through the domination of either supply or demand, and the exercise of that domination to intentionally produce artificially high or low prices. Price manipulation is kindred to the exercise of monopoly power to dictate prices that would be unachievable in a truly competitive environment. The existence of a price manipulation is largely a factual question involving determinations whether the requisite domination or monopoly exists, whether an artificial price is caused by the exercise of that power, and whether the dominant party intended to bring about that artificial price.

B. "Corner"

For purposes of this Article, the term "corner" means control or domination of the available supply of a cash commodity. Since a corner depends upon the existence of a fixed supply of the commodity that can

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21 Id. § 21(b)(7).
22 Bartlett Frazier Co. v. Hyde, 65 F.2d 350 (7th Cir. 1933); see note 3 supra.
be effectively controlled, the term cannot properly be applied to futures contracts where the supply can be dramatically changed by the uncontrollable entry or exit of market participants at any time. The word "corner" is not used here to describe concentrated ownership of a commodity by persons for commercial or other nonmarket purposes, but is limited to concentrations of supply that are achieved for the specific purpose of influencing market prices of the cash commodity or its related futures contract. For example, the supply is "cornered" if it is captured by "long" futures traders for the purpose of making it unavailable to "shorts" for delivery, so that the latter are forced to settle their contracts with the "longs" at inflated prices. The supply is also "cornered" if it is controlled by "short" futures traders for the purpose of depressing futures prices through massive deliveries of the commodity into the futures market.

C. Intentional "Squeeze"

An intentional "squeeze" has all the attributes of a price manipulation, with a single exception. The scarcity of cash supplies available to "shorts" for delivery purposes exists through no active effort of a "long" into the market, but is due to other conditions such as drought, heavy exports, hoarding by commercial users or transportation interruptions. In all other respects, however, the conduct of the "long" during an intentional squeeze is indistinguishable from a price manipulation: the demand ("long") side of the futures contract is dominated by them and is used to intentionally create artificially high prices.

D. Downward Price Manipulation or Squeeze

A downward price manipulation or intentional downward price "squeeze" is extremely rare and has been alleged in only two reported cases. This technique is possible if "short" futures traders were to capture large supplies of the underlying cash commodity and engage in massive deliveries of those supplies into the futures market. The resulting downward pressure on market prices, as "longs" rush to get out, would enhance the value of any remaining "short" futures contracts. If their intent is to create artificially low prices, a "short" manipulation will occur. However, the vast majority of price manipulations and squeezes are effected on the "long" side of the market, for the purpose of raising prices to artificial levels. For that reason, the remaining discus-

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27 It might be hypothesized that "long" manipulations are more common because the capital required to carry them off may be significantly less than for a "short" manipulation. Especially where conditions exist for a "natural squeeze," brought about by a shortage of
sion of market manipulation, corners and intentional "squeezes" will focus on the more common "long" or upward price phenomenon.

III. The Attributes of Market Manipulation

Basically, the principal characteristics of a manipulation are the ability to influence market prices, the intent to do so, and the accomplishment of that purpose to create artificially high or low prices.²⁸ If any one of these three features is absent, a market manipulation will not occur. On the other hand, it must be remembered that section 6(b)³⁹ and section 9(b)⁴⁰ of the Act proscribe manipulative attempts as well as successes.

Under normal competitive circumstances, no single trader or concert of traders can exert the necessary economic power to dictate the direction or level of market prices. There are simply too many other competitors in the market exercising independent judgment, and the influence of any discrete trader is neutralized by the trading activity of others. Market trends thus depend upon a consensus of diverse and unaffiliated traders, interpreting and reacting to their own private perceptions of economic factors.

To create a competitive imbalance, therefore, it is necessary for the aspiring manipulator to gain economic power that is disproportionate to other traders. The accumulation of that power, that ability, requires the achievement of effective control over what other traders need to fulfill their obligations. In commodity markets, this means control of the supply of the underlying cash commodity available for delivery, or control of one "side" of the futures contract, or both. Domination of the available cash supply can prevent other traders from acquiring the cash commodity for delivery purposes except, of course, at a price set unilaterally by the controlling party. This is a "corner" as used in this Article. Control of one "side" of the futures contract can effectively force other traders to deal with the controlling party in order to "offset" their futures contracts, thus giving the controlling party an ability to dictate offset prices, provided that the cash commodity is not readily available to other traders as an alternative means of satisfying their obligations. Therefore, a successful manipulation of the futures market requires control of both means of contract satisfaction: (1) delivery of the cash commodity; and (2) offset of positions in the futures market. When control of both elements is achieved, the conditions for a "classical" market

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²⁸ An artificially high or low price may be an unchanged price when a strengthening or weakening of the price would otherwise occur. See text accompanying notes 172-74 infra.
³⁹ 7 U.S.C. § 9 (1976); see text accompanying note 16 supra.
⁴⁰ 7 U.S.C. § 13(b) (1976); see text accompanying note 23 supra.
manipulation are present. And, where control over offset is present but delivery is foreclosed due to natural or normal cash supply shortage, the conditions exist for a "squeeze."

The case law indicates that the first inquiry is whether the accused person has this ability to influence market prices. If the respondent or defendant lacks the requisite economic power, it is clear that no charge of manipulation can properly be leveled against him. To survey the question of economic power, the courts generally review the conditions existing in the market for both delivery and offset.

A. Available Supply—Grades, Locations, and Eligibility

With respect to whether the accused has successfully foreclosed competition in the delivery of the commodity, the courts have sought first to identify the "available supply" of the underlying cash commodity at the time of the alleged manipulation. This exercise will be familiar to antitrust practitioners who are acquainted with "relevant market" analyses in restraint of trade, monopoly and divestiture suits. As in those controversies, moreover, the definition of "available supply," both in terms of identity and time, can foretell the success or failure of the proceeding.

Invariably included in the "available supply" are quantities of the primary ("par") grade of the underlying cash commodity that are at the location where delivery on the futures contract can be made and that are already qualified for delivery under pertinent contract market rules. In Peto v. Howell, the available supply clearly included all number 2 yellow corn in store in Chicago grain elevators that were regular for delivery on the Chicago Board of Trade's July 1931 corn futures contract. In General Foods Corp. v. Brannan, the available supply included all rye in deliverable position in Chicago for the Chicago Board of Trade's May 1944 rye futures contract. In Great Western Food Distributors, Inc. v. Brannan, the available supply included refrigerator eggs in Chicago that were deliverable on the Chicago Mercantile Exchange's (CME's) December 1947 egg futures contract. Similarly, the available supply in G.H. Miller & Co. v. United States embraced refrigerator eggs in deliverable position in Chicago on the CME's December 1952 egg futures contract. In Volkart Brothers, Inc. v. Freeman, the available supply was defined to include all certificated

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32 The term "regular" means that the commodity has been qualified for delivery under, the rules of the contract market. This may entail certification or registration of title documents with the exchange, or similar procedures.
33 201 F.2d 476 (7th Cir. 1953).
34 260 F.2d 286 (7th Cir. 1958).
35 311 F.2d 52 (5th Cir. 1962).
cotton at ports deliverable on the October 1957 cotton futures contracts of the New York and New Orleans cotton exchanges. And, in Cargill, Inc. v. Hardin,47 the court of appeals found that the available supply included number 2 soft red winter wheat situated in Chicago elevators and eligible for delivery on the Chicago Board of Trade's May 1963 wheat futures contract. Thus, the exact grade of the cash commodity called for in the futures contract and delivered without premium or discount will be included in the calculation of "available supply" if located and qualified where deliveries are permitted. A possible exception to this general rule, however, is supplies of the "par" commodity in deliverable location and condition that are already irrevocably committed to another purpose, such as to a firm export sale or to a processing plant, and that cannot be feasibly replaced with other stock in time to fulfill those commitments.48

A more difficult definitional problem in regard to "available supply" arises when a futures contract permits deliveries of grades of the cash commodity that differ from "par," or allows for delivery of the same grade of the cash commodity from locations outside the primary delivery area. In either case, the cost to the "shorts" of making delivery may be significantly greater than if "par" grade at the primary delivery point were delivered. When these "off-grade" or "out-of-town" cash supplies are deliverable, the courts have decided whether or not to include them in "available supply" depending upon the amount of additional expense that the "shorts" would incur in making delivery of those supplies in satisfaction of their futures contracts. Both quality and locational differences were confronted by the court of appeals in Great Western Food Distributors.49 There, the CME's egg futures contract defined a "par" delivery as refrigerator eggs in Chicago storage.50 However, it also permitted the delivery of fresh eggs, a grade of eggs that normally carried a higher price than refrigerator eggs, but no premium was allowed to the "shorts" if they delivered fresh eggs.51 The futures contract also allowed delivery of out-of-town refrigerator eggs, but at an additional cost to the "shorts" of $315 per carlot for freight and equalizing factors.52 The court of appeals noted not only the added expense to "shorts" in delivering fresh eggs and out-of-town refrigerator eggs, but also found that these supplies were seldom resorted to for delivery purposes.53 From these

47 452 F.2d 1154 (8th Cir. 1971), cert. denied, 406 U.S. 932 (1972).
48 In some cases, the storage facilities where deliverable supplies are located are owned by large commercial firms that may have already committed part of their stocks to customers. These committed stocks are not truly "available" to shorts for delivery unless it is determined that the commitment is not truly binding or that the commitment can be met from stocks not in deliverable position.
49 201 F.2d 476 (7th Cir. 1953).
50 Id. at 480.
51 Id.
52 Id.
53 Id. at 480-81.
findings, the court concluded that the "economic impediment" to delivery of fresh eggs and out-of-town refrigerator eggs warranted excluding them from the calculation of "available supply." Moreover, the court expressed the view that this "economic impediment" could only be eliminated if the price of local "par" eggs were raised to the same level, a likely sign of local market manipulation:

[O]ut of town eggs are economically excluded from the contemplated available supply, unless, of course, the price of local eggs is raised to the Chicago level of out of towns. But this, it would appear, will not occur unless control of the local supply is acquired by one who intentionally raises the price of Chicago refrigerator eggs to the level of out of towns. This, of itself, would constitute an arbitrary fixing of prices.  

A similar analysis and conclusion can be found in the Cargill case. There, the wheat futures contract of the Chicago Board of Trade called for "par" delivery of number 2 soft red winter wheat but also allowed delivery of higher priced hard wheat. No premium, however, was given to "shorts" for delivering hard wheat. The court of appeals noted that hard wheat would have to be transported by "shorts" to Chicago from other locations in order to effect delivery, an additional expense or "economic impediment." It was further found that hard wheat was rarely delivered. Thus, the court determined to exclude hard wheat from the "available supply" and, as in Great Western Food Distributors, concluded that the price of hard wheat did little more than signify the upper limit to which local wheat prices might be manipulated:

Hard wheat was of a higher grade than No. 2 soft red winter wheat, its price was higher, no premium was allowed for its delivery, and the cost of shipment into Chicago for delivery on the future was an additional economic impediment to its delivery. It would be more economic to pay the long 'a premium than to pay the additional charges for premium wheat plus shipping and handling charges.  

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[W]e have been shown no good reason why the futures price should reflect the cost of bringing in a higher price and grade of wheat for which there is no demand in the local area. It is this

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4 Id.
45 Id. at 481.
46 452 F.2d 1154 (8th Cir. 1971).
47 Id. at 1165.
48 Id.
49 Id. at 1165-66.
50 Id. at 1167.
51 Id. at 1165-66.
price which was artificially high and therefore useless to the trade and nation.\textsuperscript{52}

A somewhat different problem of defining "available supply" arose in \textit{Volkart Brothers}.\textsuperscript{53} There, the cotton futures contracts of the New York and New Orleans exchanges permitted delivery of only "certificated" cotton in storage in those two cities.\textsuperscript{54} The evidence showed that the amount of certificated cash cotton on October 15, 1957—the final day for trading in the October 1957 futures contract on the two exchanges—was only about 50 percent of what would be needed by "shorts" if all of them wished to make deliveries.\textsuperscript{55} Volkart argued, however, that there were 1,250,000 bales of uncertificated cotton in store at delivery locations and that these stocks should be included in the "available supply" because, prior to October 15, the "shorts" could have and should have had those stock certificated in preparation for fulfilling their delivery obligation.\textsuperscript{56} Thus, \textit{Volkart} presented the question whether supplies of the cash commodity, of the proper grade and in the right location for delivery, can be excluded from "available supply" simply because they had not completed the certification process as required by exchange rules. The court of appeals held that uncertificated cotton that was barred from delivery only because the "shorts" had failed to seek certification in a timely manner was includable in the "available supply."\textsuperscript{57} It appeared, from the court’s opinion, that certification of the 1,250,000 bales of cotton would not have been a major expense—an "economic impediment"—for the "shorts."\textsuperscript{58} Thus, \textit{Volkart} may not have posed the problem of \textit{Great Western} or \textit{Cargill} where inclusion of cash supplies of higher grade or distant locations might tacitly condone the manipulation of local "par" prices up to the same level as those supplies.

\textbf{B. Available Supply—When Calculated}

The \textit{time} when an "available supply" calculation is made can be critical. Typically, the government urges that "available supply" should include only those stocks that are present on the date or dates when the manipulation is alleged to have occurred. On the other hand, respondents usually urge that "available supply" should include all stock that "shorts", acting responsibly, could bring into deliverable position by the end of the futures contract's delivery period. The former approach, of

\textsuperscript{52} Id. at 1173.
\textsuperscript{53} 311 F.2d 52 (5th Cir. 1962).
\textsuperscript{54} Id. at 56.
\textsuperscript{55} Id.
\textsuperscript{56} Id. at 57.
\textsuperscript{57} Id. at 59-60.
\textsuperscript{58} Id.
course, encourages a finding of "available supply" that is smaller than if the calculation were based upon the latter formulation.

In *Volkart Brothers*, the government urged that the "available supply" should be calculated as of October 15, 1957, the final day of futures trading in the October 1957 cotton futures contracts and the date on which the market manipulation allegedly occurred. The government reasoned that, as of that date, it was too late for "shorts" to buy and to have certificated the 1,250,000 additional bales of cotton located at delivery points. Thus, under the government's theory, the total "available supply"—excluding Volkart's cotton inventory—was roughly 5,000 bales of certificated cotton to meet the delivery needs of "shorts" having futures obligations of 13,400 bales. To get additional cotton for delivery, the "shorts" would have to purchase from Volkart's own inventory up to 7,100 bales. However, Volkart argued that October 15 was not the proper date for calculating "available supply" since, had the "shorts" acted only one or two days earlier to achieve certification of the 1,250,000 bales, that additional cotton could have been delivered on the futures contract. Thus, well over a million bales of properly graded and located cotton would have been among the "available supply" for use by "shorts" in satisfying their delivery obligation of only 13,400 bales. The court of appeals in *Volkart* adopted the respondent's theory on the rationale that the "shorts" had an opportunity to gain ample supplies prior to October 15 and, for that reason, the "available supply" should include the uncertificated as well as the certificated cotton. The court stated that, to confine the "available supply" to October 15, when the "shorts" had forfeited their opportunity to qualify the uncertificated cotton for delivery, would in effect excuse the "shorts" from "the performance of their contracts and from the exercise of due diligence to that end...."

In the *Cargill* case, which roundly criticized *Volkart* in certain respects, the calculation of "available supply" was based upon stocks of soft red winter wheat in deliverable position on May 21, 1963, the final day of futures trading and the date of the alleged manipulation. However, the facts of the case did not present the same question as in *Volkart* since it does not appear that efforts by "shorts" to procure sup-

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59 Id. at 56-57.
60 Id.
61 Id. at 56.
62 Id.
63 Id. at 57.
64 Id. at 59-60.
65 Id. at 60. The court in *Volkart* did not, however, pinpoint a particular date prior to October 15 as the proper date to calculate "available supply," noting merely that the shorts who tendered the uncertificated cotton on the contract had acquired it prior to that date. Id. at 59.
66 See 452 F.2d at 1166; text accompanying note 74 infra.
67 452 F.2d at 1157, 1160.
plies prior to May 21 would have been fruitful. On April 12, 1963, more than a month prior to the final trading day, Cargill owned 2,471,000 bushels of deliverable grade wheat out of a total of 2,804,000 bushels at delivery points.\footnote{Id. at 1159.} Thus, even at that early date, there were only 333,000 bushels of deliverable wheat available from sources other than Cargill to meet a potential “short” delivery need that appears to have exceeded 8,000,000 bushels.\footnote{Id. at 1158.} Moreover, the court found that out-of-town wheat that might have been brought into Chicago for delivery was of the hard wheat variety, which it excluded from the “available supply” as discussed earlier,\footnote{See text accompanying notes 46-52 supra.} and it can therefore be inferred that no other supplies of the deliverable grade of wheat were within the reach of “shorts” even prior to the final day of futures trading.\footnote{452 F.2d at 1164-67.} From April 15 to May 21, 1963, the available supply of deliverable wheat dwindled, due in part to a shipment out of Chicago by Cargill of 770,000 bushels to fulfill an export sale, and on May 21 there were only 20,000 bushels of deliverable wheat available to “shorts” from sources other than Cargill.\footnote{Id. at 1159.} All other deliverable stocks, including those owned by Cargill, were committed to purposes other than the futures market, such as milling and cash transactions.\footnote{Id. at 1161.} On these facts, the issue did not directly arise whether “shorts” had acted irresponsibly in failing to seek out other supplies of soft red winter wheat which, from every indication, simply were not obtainable elsewhere either on May 21, 1963 or on earlier dates approaching that final day of futures trading. Even so, the court of appeals in Cargill criticized the Volkart decision as condoning manipulative squeezes and for stressing too heavily the obligation of “shorts” to make reasonable and timely preparation for delivery.\footnote{Id. at 1166.} This attack was largely gratuitous, it would seem, considering that the Cargill case did not present the court with facts showing that “shorts” had been dilatory in obtaining readily available stocks, as in Volkart.

In Great Western Food Distributors, the court of appeals traced the respondent’s accumulation of Chicago cash eggs throughout December of 1947 and concluded that, subsequent to December 15, Great Western had gained effective control of the Chicago cash eggs supply.\footnote{201 F.2d at 481-82.} Thus, the court reviewed the period prior to December 15 in assessing the “available supply” but, as in Cargill, concentrated mainly on the cash supply on and after December 15, when the respondent’s control “manifested itself most emphatically.”\footnote{Id. at 480.} In G.H. Miller & Co., the court reviewed the
“available supply” from December 16, 1952 through the end of that month. Since the futures price manipulation was alleged to have occurred on December 22 and 23, with a cash market manipulation occurring thereafter, the court clearly assessed the “available supply” both prior to and at the time of the claimed violations. It should be noted, however, that the respondent’s ownership of refrigerator eggs in Chicago on December 16 was a modest 19.5 percent of the “available supply” but increased to 72.1 percent on December 23 and 98.7 percent on the last day of December. The latter dates, clearly, were given more attention by the court in its review of the merits of the case. In General Foods Corp., where the May 1944 rye futures contract was the focus of inquiry, the court reviewed the “available supply” at various times during the month of May, but principally on May 13, 1944 when, according to the government, the respondents took affirmative steps to prevent cash rye from entering the futures market. It is interesting to observe that the General Foods court considered not only the supply of cash rye in deliverable position in Chicago but also the existence of substantial quantities of additional rye in Minneapolis, Duluth, Kansas City and Milwaukee. The court’s inference was that these out-of-town stocks could be deemed available to “shorts” at some time during May. Specifically, the court cited these additional stocks of cash rye in answer to the government’s claim that the respondents had manipulated the market by acquiring large amounts of cash rye in Winnipeg and by attempting other measures to prevent Canadian rye from becoming eligible for delivery on the May futures contract. And, in Peto v. Howell, the court focused mainly on the last day of July, 1931 when it was alleged that the defendant, through the systematic taking of deliveries on the July 1931 corn futures contract, had acquired the entire Chicago supply of cash corn and offered that corn to the remaining “shorts” at excessive prices.

In another decision, Indiana Farm Bureau Cooperative Ass’n, a manipulation of the July 1973 corn futures contract was alleged. The Administrative Law Judge (the ALJ), in his initial decision, focused primarily on the date of the alleged manipulation—July 20—and the remainder of the month in defining “available supply.” While the government’s calculation of “available supply” on July 20 was only 511,000 bushels of corn, the ALJ decided that the proper figure on that date

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77 260 F.2d at 289.
78 Id.
79 Id.
80 170 F.2d at 229.
81 Id. at 228.
82 Id. at 227-28.
83 101 F.2d at 356.
85 Id. at 23,861-62.
should be 4,206,000—which excluded the respondent's holdings—plus 410,000 bushels reaching Chicago between July 20 and August 1, 1973. In doing so, the ALJ included all reported deliverable stock on July 20 that the government had failed to show were firmly committed to other purposes, as well as 340,000 bushels of higher priced "waxy maize." The facts of the case indicate that available supplies of cash corn prior to July 20 were not viewed as sufficient to satisfy all "shorts" wishing to deliver on the July futures contract and, accordingly, the ALJ did not look to that earlier period for signs of irresponsible action by "shorts" in failing to procure supplies in a timely manner. However, the ALJ was highly critical of the "shorts" for maintaining large positions in July corn into the final trading day "even though they had no delivery capability."

It should also be noted that the ALJ in Indiana Farm Bureau stated that his calculation of "available supply" was a "minimal figure," and implied that it would have been proper to also include two other sources of supply: (1) the substantial amount of corn in delivery facilities that had not been graded as of July 20 and thus was not publicly reported as "deliverable," and (2) graded corn located at unapproved storage facilities in Chicago that might have been transferred to authorized delivery elevators. The government had argued that, as of July 20, the ungraded corn could not be qualified in time for delivery in the remaining days of the month, an assertion that the ALJ did not expressly reject.

Had the ALJ included these stocks in his calculation of "available supply," the issue would have been squarely presented—as in Volkart—whether the "shorts" had a duty, prior to July 20, to undertake the grading of those stocks in preparation for delivery. Similarly, it was uncontested that the transfer of graded corn from unapproved elevators to authorized delivery facilities would involve an expense to the "shorts" of from 14 to 18 cents per bushel and, had the ALJ incorporated this corn in his calculation of "available supply," it would have raised squarely the question of "economic impediment." Having chosen to exclude these stocks and to adopt instead a "minimal figure," the ALJ avoided these issues. But the fact that he implied that their inclusion might have been permissible suggests that the "shorts'" duty to prepare, and the obligation to deliver despite higher cost—also indicated by the ALJ's inclusion of higher-priced waxy maize in his "minimal figure"—would have been affirmed.

In a case alleging a "short" manipulation, In re Hohenberg Brothers

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86 Id.
87 Id.
88 Id.
89 Id. at 23,864.
90 Id. at 23,862.
91 Id.
92 Id.
COMMODITY MARKET MANIPULATION

Cotton Co., the Commission exonerated the respondent of charges of having manipulated downward the price of December 1971 cotton futures contracts on the New York Cotton Exchange. The manipulation was alleged to have occurred on November 23, 1971, the first day when delivery notices could be tendered by "shorts" on the December contract. The Commission focused upon November 22 in its assessment of Hohenberg's cash cotton inventory, and found that the respondent then owned 48,000 bales of certificated cotton. Total certificated cotton at about that time was 83,299 bales. The Commission, however, did not make a detailed analysis of "available supply," although it appears to have excluded all uncertificated cotton in describing the respondent's relative ownership of cash cotton. In Hohenberg Brothers, such an analysis may have been unnecessary since the allegation was that the respondent had depressed cotton futures prices by the sudden delivery of 37,500 bales on November 23, an effect that would not necessarily depend upon ownership of any substantial portion of the "available supply" as long as the delivered quantity was sufficient to produce the desired price effect.

To summarize, the calculation of "available supply" is undertaken, at least in "long" manipulation cases, as part of a determination whether the accused had the ability to control the supply—and therefore direction or extent of prices—for the underlying cash commodity. Under the "economic impediment" theory, supplies of the cash commodity that are significantly more expensive to deliver than local stocks of "par" grade, such as higher priced "premium" grades or distant supplies with significant additional expenses associated with achieving delivery, may be excluded from the "available supply." On the other hand, where stocks exist that can be made deliverable inexpensively, they may be included in the "available supply." The calculation is usually made at or about the date of the alleged manipulation and generally attempts to identify the stocks available to the "shorts" for delivery on that date and during the remainder of the delivery period. Occasionally, when it is shown that "shorts" have been dilatory in arranging for supplies to meet their delivery obligations, and especially when those arrangements would not have entailed significant additional expense, the court may include in "available supply" those stocks existing prior to the date of the alleged manipulation that could have been acquired by the "shorts" except for their own fault, even though those stocks were no longer available to


Id. at 20,946.

Id.

See id.

Id. at 20,944.
them when the alleged manipulation occurred. The objective of the courts, it would appear, is to strike a balance between the obligation of “longs” to avoid manipulation and the duty of “shorts” to act responsibly in a delivery month. Shorts are not to be forced to acquire substantially more expensive stocks, as compared to local prices, since the result is to condone a local price manipulation upward to the value of those stocks. On the other hand, shorts will not be heard to complain when their inability to deliver local stocks—resulting in higher “offset” prices—is due to their own refusal to make adequate preparations. The two objectives need not be in conflict, although the Cargill and Volkart decisions are often so portrayed, but can be harmonized through close and careful analysis of the facts of each case.

C. “Dominant” Control of Cash Supplies

Having defined “available supply” of the underlying cash commodity in a particular case, it remains to determine whether the accused’s control of cash stock was sufficient to preclude the “shorts” from fulfilling their contracts except by either purchasing inventory from the accused or offsetting with him in the futures market. As the Cargill court correctly observed, no true economic power can be exerted by a person who lacks control of some part of the cash supply needed by “shorts” for delivery:

Obviously, if there were adequate supplies of deliverable grade wheat available to the shorts [other than from Cargill] to deliver to the longs on the future, Cargill would not be able to exact artificial prices in settlement of its contracts, for rather than paying those prices, shorts would instead procure the wheat and deliver it.99

The one exception to this rule, of course, is when a natural shortage of the cash commodity exists and, for that reason, the long need not acquire cash stocks in order to preclude the shorts from delivering. The economic effect, called a “squeeze,” is the same, however, as if the long had in fact removed those stocks from circulation.

Perhaps the most stunning example of control of a cash supply is Peto v. Howell, where the defendant, through deliveries on the July 1931 corn futures contract, had acquired 97 percent of all deliverable corn in Chicago and 90 percent of the nationwide visible supply of corn, leaving shorts with 1,500,000 bushels of July corn futures and nowhere to turn except to the defendant.100 In General Foods Corp. v. Brannan, the analysis of cash control is less precise but indicates that all of the named respondents collectively controlled over 10,000,000 bushels of

99 452 F.2d at 1164-65.
100 101 F.2d at 356.
Commodity market manipulation

For other reasons, including the court's refusal to treat the positions of all respondents as one, the manipulation charge was dismissed. The court did note, however, that "it is clearly shown that there was no demand for rye in Chicago which could not be readily met from the supply there available." In *Great Western Food Distributors, Inc. v. Brannan*, a control of cash eggs was established from evidence that the respondent embarked in December of 1947 on a program of accumulating cash eggs and eventually held 51 percent of all stocks in Chicago. The appellate decision in *G.H. Miller & Co. v. United States* did not identify the respondents' percentage ownership of cash eggs in December of 1952 but described a systematic accumulation of those stocks through the taking of delivery until they held the "major portion" of deliverable eggs. In *Volkart Brothers, Inc. v. Freeman*, it was conceded that Volkart held a dominant "long" futures position, but it did not appear that the respondent controlled the cash supply of cotton. In fact, the *Cargill* decision expressly cited Volkart's lack of cash control as a distinguishing feature of the *Volkart* ruling. By contrast, in *Cargill*, the court found that soft red winter wheat was scarce at the time of the alleged manipulation but that Cargill owned on May 20, 1963 all of the deliverable supply and, on May 21, owned 50,000 of the total 70,000 bushels of deliverable wheat in Chicago. In *Hohenberg Brothers*, the respondent owned about 48,000 bales out of a total of 83,299 certificated bales of cotton, or about 58 percent, but the ALJ in his initial decision had found that there were 8,000,000 bales of ginned cotton that could have been certified or otherwise qualified for delivery as of November 22, 1971, the day preceding the alleged "short" manipulation. And, in *Indiana Farm Bureau Cooperative Ass'n*, the respondents owned only 228,000 bushels of corn on the date of the alleged manipulation, while the ALJ calculated as a "minimal figure" that the total "available supply" at that time was at least 4,616,000 bushels.

The fundamental question in assessing whether the "available supply" is controlled or dominated by the "long" is whether, after identifying all supplies available from other sources, the "shorts" would still need the "long's" inventory if they wished to make delivery. If so, the "long" is in a position to frustrate those delivery needs or to exact a higher price for the needed inventory. This is true unless, as explained

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101 See 170 F.2d at 222.
102 Id. at 231.
103 Id. at 228.
104 201 F.2d at 481.
105 260 F.2d at 288-90.
106 See 311 F.2d at 56-57.
107 452 F.2d at 1172 n.15.
108 Id. at 1160.
in the next subsection, the “shorts” have an opportunity to offset their positions in the market with “longs” other than the suspected manipulator. Accordingly, it is necessary to determine whether the accused has also foreclosed that option to “shorts” in the futures market.

D. Dominant Futures Position

While the Commission has enforcement authority under the Act with respect to pure cash market manipulations and corners,\textsuperscript{111} its principal orientation is toward manipulations affecting futures prices, in which cash market activity will often play an important role. Thus, the typical manipulation inquiry will review not only the accused’s control of cash commodity supplies, but also that person’s position at the time in the futures market.

While the Commission has held that a dominant position in the market is not essential to a manipulation or attempted manipulation,\textsuperscript{112} that view appears to be intended merely to recognize that market prices can be influenced without entering the market, such as by false rumors and reports that precipitate a price reaction. Domination of the futures market has always been required, however, in cases where the accused has influenced prices through his trading activity.

In \textit{Peto v. Howell}, the relative size of the defendant’s position in July 1931 corn futures on the Chicago Board of Trade in comparison with total open interest in that contract is not disclosed, but his long position of 8,500,000 bushels of futures was inferred to be a very substantial part of the open interest during the delivery month.\textsuperscript{113} In \textit{General Foods Corp. v. Brannan}, the principal respondent was exonerated when the evidence showed that, despite substantial cash holdings in rye, he had not accumulated a dominant “long” position in May 1944 rye futures and, indeed, had reduced his “long” position over the preceding months from a high of 1,490,000 bushels to only 360,000 bushels.\textsuperscript{114} A better case study is \textit{Great Western Food Distributors, Inc. v. Brannan}, where the evidence showed a steady rise in the respondent’s percentage of the open interest in December 1947 egg futures contracts from 33 percent of the “long” open interest on December 1 to as high as 76 percent of all “long” December futures contracts.\textsuperscript{115} During the final week of futures trading,

\textsuperscript{111} See, e.g., § 6(b) of the Act, 7 U.S.C. § 9 (1976), which authorizes the Commission to institute administrative action against any person, other than a contract market, “manipulating or attempting to manipulate or [who] has manipulated or attempted to manipulate the market price of any commodity, in interstate commerce, or for future delivery...”\textsuperscript{112} Id. (emphasis added).


\textsuperscript{113} 101 F.2d at 355.

\textsuperscript{114} 170 F.2d at 226.

\textsuperscript{115} 201 F.2d at 480.
Great Western's percentage of the "long" open interest ranged from 60 percent to 75 percent, a sufficient interest for the court to conclude that its position in the market was dominant. The court also made a practical assessment of the effect of this dominance upon "shorts," and calculated that, from December 15 forward, one-third and eventually one-half of all remaining "shorts" were required to turn to Great Western to satisfy their obligations, even after calculating the supplies of cash eggs—other than respondent's—that could have been used by "shorts" for delivery. In *G.H. Miller & Co. v. United States*, the evidence showed that the respondents accumulated December 1952 egg futures contracts during the month of December so that they held roughly 14 percent of the "long" open interest on December 16, 78 percent on December 19, and 100 percent on December 22 and 23, the days when allegedly artificial prices for the contract occurred. Since the court had upheld a finding that the respondents had the "major portion" of cash eggs available for delivery, it is clear that, on the final days of trading when they also had virtually all of the "long" open interest as well, many of the "shorts" were required to settle their contracts with the respondents. In *Volkart Brothers, Inc. v. Freeman*, the respondent on the date in question—October 15, 1957—had 12,100 bales of "long" October cotton futures on the New York and New Orleans exchanges, out of a total "long" open interest of 13,400 bales, or roughly 90 percent. Volkart itself conceded that this futures position was dominant, but was successful in persuading the court that cash supplies of cotton could have been available to "shorts," had they used due diligence in delivery preparations, which would have freed them from the need to resort to Volkart to satisfy their contracts. Thus, the "long" position, though clearly dominant, did not place Volkart in control of futures prices except for the additional factor of the "shorts' " irresponsible conduct in the face of readily obtainable cash cotton that they neglected to secure. Finally, in *Cargill, Inc. v. Hardin*, the manipulation of the May 1963 wheat futures contract was alleged to have occurred during the final fifteen minutes of trading on May 21, 1963, and the court looked to that short time period in assessing Cargill's "long" position in the market. The court found that, in that period, Cargill held 62 percent of the "long" open interest and concluded that such a percentage established "dominance" over the remaining "shorts" in the market. That percentage consisted of wheat futures totalling 1,990,000 bushels, includ-

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116 Id.
117 Id. at 481-82.
118 260 F.2d at 289.
119 Id. at 289-90.
120 311 F.2d at 56.
121 Id. at 57; see text accompanying notes 59-65 supra.
122 452 F.2d at 1164; see id. at 1160.
123 Id. at 1164.
ing an additional 100,000 bushels acquired by Cargill on that same day.\footnote{Id. at 1160.} Moreover, the court found that available cash supplies of deliverable wheat at that time, in hands other than Cargill's, amounted to only 20,000 bushels.\footnote{Id.} Since this scarcity of cash wheat effectively foreclosed "shorts" from the alternative of delivery, the court found that Cargill's dominant futures position required "shorts" to deal with Cargill as the only means of satisfying their open contracts.\footnote{Id. at 1167.}

E. The Combined "Dominance"

As the foregoing analyses show, the inquiry of a court in assessing the ability of a person to control market prices must always take into account that there are two ways to satisfy futures obligations—by offset in the futures market, or by delivery—and that no one has the true ability to control prices if other market participants can bypass his demands and extinguish their obligations elsewhere. Accordingly, the aspiring manipulator might foreclose all avenues of settlement except through him.

The plan can be achieved by actual control of both the supply of the commodity and the futures market open interest, as in Great Western Food Distributors,\footnote{See text accompanying notes 115-17 supra.} or by simply controlling the "long" open interest if a natural shortage of cash supplies exists, as in Cargill.\footnote{See text accompanying notes 122-26 supra.} It has been suggested that the proper appraisal of manipulative ability is to view both cash and futures activity in combination, rather than separately, since the ultimate issue as to ability is whether the "shorts" have any recourse for fulfilling their obligations except through the suspected manipulator.\footnote{1 Bromberg & Lowenfels, Securities Fraud & Commodities Fraud § 4.6, at 82,330.}

IV. Price Artificiality

Having the ability to create artificial prices is of legal significance in finding an actual manipulation only if it results in the creation of artificial prices.\footnote{Of course, an attempted manipulation—one that fails—is also unlawful. See text accompanying notes 29-30 supra.} Thus, even after the ability issue has been resolved against the accused, it is necessary to make a largely economic analysis of whether the futures or cash commodity over which the accused has dominance reached artificial prices at that time.

It must be noted, first, that the futures market is very often a much more competitive market than the corresponding cash market in the
same commodity. Sales in the cash market can be sporadic. Transactions between cash merchants can involve nonprice considerations, such as pre-existing commercial relationships or the desire to establish new business relationships. Prices in the cash market may tend to reflect unique conditions, such as a sudden need for the commodity on the part of a particular buyer that is not generally applicable to the trade as a whole. Moreover, actual details of many cash transactions are not publicly known where merchants prefer privacy in their dealings. As a result of these factors and many others, the futures markets will frequently be the best available barometer of prices for a particular commodity.

Even when dysfunctions occur in the futures markets, therefore, it is by no means clear that they become less reliable than the cash markets as a source of price information. It may be that, in some instances, the futures market remains the better guide despite imperfections, or that a futures market at its worst is not appreciably less reliable than resort to cash market prices. Therefore, when asking whether the futures price is “artificial,” the question must also include the issue “as compared to what?” And the external reference point identified in answer to that question should have to be shown to be a reliable source of accurate and relevant prices. Futures prices ought not to be compared for this purpose against “nominal” cash quotations, or against actual sales having features foreign to the dynamics of a futures market.

In addition, it must be recognized that futures markets, which seek to record the price impact of world-wide economic developments during most of a futures contract’s life, shrink into largely “local” markets during delivery months. These markets become cash delivery vehicles during the expiring month and, quite properly, are influenced at the time mainly by the economic conditions prevailing at the delivery locations. To say, then, that an expiring soybean futures contract in Chicago should continue to reflect international economic conditions or world prices is to ignore reality.

101 For instance, the stresses felt in the futures market during a period of natural “squeeze” may be no more than the pressures felt among cash merchants and their customers at the same time. A natural “squeeze”—a shortage of cash supplies—creates advantages for cash merchants as well and, where cash commodity has been pre-sold before its acquisition, the seller in the cash market is in much the same position as the short in the futures market. If the inventory is already owned, on the other hand, the seller has great leverage over the buyer. Moreover, it is beyond question that the bargaining power among cash merchants is far from equal, such as in the case of sales by farmers or small elevators to giant exporting companies. It may well be, as a result of these factors, that the cash market is more susceptible, more frequently, to stress than the futures market. To presume, therefore, that cash market prices are a reliable gauge of value when the futures market is in turmoil may be more a declaration of faith than a statement of reality.

102 Examples of sales having features foreign to the dynamics of a futures market include a “distress” sale, an accommodation transaction, and a sale involving unusual location, grade, transportation or other terms.
Finally, when seasonal commodities such as grains are the subject of futures trading, there is a natural and virtually inevitable shrinkage of cash supply as the "crop year" approaches its end and before the next harvest occurs. Cash prices tend to reflect and react to a growing scarcity of cash supply and to the imminent arrival of a new harvest until, near the end of the crop year, cash transactions can take on somewhat unique characteristics. As supplies are approaching exhaustion, for example, sales may be consummated as a "hording" strategy or as "panic" buying. Or, if a surplus of "old" crop stocks is foreseen at the end of the crop year, owners may dump their inventories in distress-type sales, recognizing that the "new" crop will be preferred by buyers over the previous year's supply. Care and caution are required, therefore, in making comparisons between futures prices and the stressful environment in which sales of cash commodities may occur near the end of a crop year.

The importance of offering proof of price artificiality in a manipulation case is vividly illustrated by General Foods Corp. v. Brannan where the government failed to present expert evidence or to otherwise establish that the price of rye or rye futures was artificial.\footnote{170 F.2d at 223.} The discussion will return shortly to the General Foods decision to assess its ruling that a price that has been "stabilized" by action of "longs" is not an artificial price.\footnote{See text accompanying notes 172-74 infra.}

A. Comparison of Contract Prices with Later Value

Artificial prices are generally related to other presumably meaningful prices in the courts' analyses. They are also sometimes compared with the price of the same commodity shortly after the alleged manipulation has run its course. A good example of the latter analysis, sometimes referred to as "burying the corpse,"\footnote{101 F.2d at 356.} appears in Peto v. Howell, where the court found that the defendant's actions had caused the price of July 1931 corn futures to rise 25-1/2 cents during the final three days of futures trading and that, on August 1, the price of corn collapsed until, by that month's end, it had dropped 40 percent from the price exacted by the defendant.\footnote{452 F.2d at 1168 n.13.} In Cargill, Inc. v. Hardin as well, the court cited statistics showing that, following Cargill's May 21, 1963 trading which realized prices up to $2.28 per bushel for May wheat futures, cash prices were reported by month's end as low as $2.03-3/8 per bushel.\footnote{179 F.2d at 1168 n.13.}
B. Comparison with Supply-Demand Factors

The two principal cases containing "artificial price" analyses are Great Western Food Distributors, Inc. v. Brannan and Cargill, Inc. v. Hardin. In Great Western, the government submitted evidence and expert testimony comparing the December 1947 egg futures and cash prices with the actual supply and demand situation in Chicago at that time, for the purpose of showing that the futures price was abnormally high in light of those factors. The court, in this respect, differentiated between what it called the "real" demand for cash eggs—i.e., the commercial demand—and the "technical" demand generated by "shorts" needing to cover their obligation in the market. Implicitly, the court seems to have viewed "short" demand for cash eggs as not part of the bona fide supply/demand equation, a conclusion that would appear to deny the economic interrelationship between the futures and cash markets. However, the court ultimately rejected the government's theory for other reasons, principally that it had not supplied adequate price data for earlier months that it sought to compare with December cash market conditions and made no attempt to describe the similarities or differences that might have existed in economic conditions during the comparative periods. Thus, the court refused to assume that different months of the same futures contract are necessarily subject to identical economic influences even if supply and demand are the same in those periods.

C. Comparison of "Spread" Relationships

A second test utilized by the government in Great Western was to compare the "spread" relationship between the December 1947 and January 1948 egg futures contracts as compared to that relationship between December-January contracts in all but two of the preceding years since 1932. While those statistics showed that the current "spread" had been more than three times greater than the average spread during the earlier years, the court accepted this comparison as probative only after it was satisfied that the previous period reflected "normal" prices, taking into account such factors as the Depression and the intervention of wartime price controls. And a third test used successfully by the government was to compare the historical comparative prices between December egg futures and the price of fresh eggs, a premium grade of

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138 201 F.2d at 482.
139 Id.
140 Id.
141 Id.
142 Id. at 482-83.
eggs.\textsuperscript{143} Using the period 1932-1947, the government showed that fresh eggs commanded an average premium of four cents over December futures in the period whereas, in 1947, the December futures had risen to within 1/2 cent of fresh egg prices.\textsuperscript{144} The government also showed that, in 1947, fresh egg prices had fallen in late December by about 7-1/2 cents per dozen while the December futures experienced no similar drop in price and ended within 1/2 cent of fresh egg prices.\textsuperscript{145}

In \textit{Cargill}, the government employed similar tests of price artificiality. Comparing May 1963 wheat futures prices with prices of May futures in the preceding nine years, the government showed that the rise in May 1963 prices of 18-5/8 cents during the final two trading days had no precedent in the preceding nine years and, in fact, prices on those days in earlier years declined more often than they rose.\textsuperscript{146} In addition, the government compared the “spread” relationship between the May 1963 wheat futures contract and its July counterpart with spread relationships of those months in the preceding nine years.\textsuperscript{147} The statistics showed that the 1963 spread of 18-5/8 cents was not found in any other year and that, in fact, the spread had remained the same or declined in seven of the nine years.\textsuperscript{148} A further comparison was made between the price of May 1963 soft wheat in Chicago and the price of the hard wheat futures contract in Kansas City—the “inter-market spread”—as contrasted with the nine previous years, and showed that the May price in Chicago was “considerably out of line” with Kansas City.\textsuperscript{149}

D. \textit{Comparison with Cash Prices}

The government in \textit{Cargill} sought to show that May wheat futures were over-priced compared to the cash price of soft red winter wheat at that time.\textsuperscript{150} As noted earlier,\textsuperscript{151} this can be a precarious undertaking and, in the court’s words, evoked a “mass of conflicting evidence.”\textsuperscript{152} The court acknowledged “the difficulty of determining the cash price of wheat, for actual cash trades on the Chicago spot market are relatively infrequent and the prices of individual transactions may vary greatly depending on the positions of the parties, the quantity involved, and the time of the transaction.”\textsuperscript{153} The court might also have added, but did not, the difficulty of discerning cash prices for wheat in May of any year,

\textsuperscript{143} Id. at 483.
\textsuperscript{144} Id.
\textsuperscript{145} Id.
\textsuperscript{146} 452 F.2d at 1167.
\textsuperscript{147} Id.
\textsuperscript{148} Id.
\textsuperscript{149} Id.
\textsuperscript{150} Id. at 1168.
\textsuperscript{151} See text accompanying notes 130-34 \textit{supra}.
\textsuperscript{152} 452 F.2d at 1168.
\textsuperscript{153} Id.
since that is usually the dying month of "old crop" wheat. The government's evidence consisted of official government price reports for wheat, which contained cash prices lower than the May futures, and both government and private reports showing that cash prices for soft wheat fell "rather sharply" after the close of the May contract.\textsuperscript{154} Other evidence proferred by the government was a large sale of cash wheat by Cargill itself, several days before the alleged manipulation, at prices well below the ultimate May futures price, and Cargill's later disposition of wheat after trading ceased at prices "substantially below" the criticized May futures price.\textsuperscript{155} The government also cited an incident following the close of futures trading when a wheat warehouse receipt originally bought from Cargill at $2.28-1/4 per bushel would not be bought back by Cargill and the owner had to sell at the receipt for $2.18 to a "short" after being offered as low as $2.05 by milling companies.\textsuperscript{156} Finally, the government introduced an "analytical study" of a USDA expert purporting to establish the "average economic value" of soft red winter wheat at Chicago during May 1963, which concluded that this "economic value" was within a range of $2.10 and $2.17 per bushel.\textsuperscript{157} Cargill, for its part, countered with a private price reporting service showing that cash wheat and futures prices were in harmony, and with the expert testimony of both economists and trade witnesses, to the same effect.\textsuperscript{158} Cargill also noted that it had made actual cash sales at $2.28 on May 20 and 21.\textsuperscript{159} Cargill's efforts were to no avail, however.\textsuperscript{160} Finally, the evidence offered in Indiana Farm Bureau Cooperative Ass'n to show price artificiality was similar to the data presented in Cargill, but with less emphasis on historical averages. The Division of Enforcement showed that Indiana Farm's prices of $3.70 to $3.90 per bushel for July 1973 corn futures on the final day of trading in that contract represented a one-day price rise of at least a dollar more than had been recorded on the final day of July trading during the period 1963-1976, and about a dollar wider spread between July and September futures than had been recorded in that period.\textsuperscript{161} It was also shown that cash sales, including the respondent's, did not exceed $2.88 per bushel in July except for a cash price quoted by the Commodity Credit Corporation after the futures contract had expired.\textsuperscript{162} The ALJ accepted certain cash prices above that level but nevertheless held that Indiana Farm's prices on July 20 were artificially high.\textsuperscript{163} The charge against the respondent was

\textsuperscript{154} Id.
\textsuperscript{155} Id.
\textsuperscript{156} Id. at 1168-69.
\textsuperscript{157} Id. at 1168.
\textsuperscript{158} Id. at 1169.
\textsuperscript{159} Id.
\textsuperscript{160} Id.
\textsuperscript{162} Id.
\textsuperscript{163} Id. at 23,859.
dismissed, however, for lack of intent to manipulate the July futures price.\textsuperscript{164}

E. \textit{Critique of Price Artificiality Analyses}

The author does not profess to be skilled in the art or science of economics, and issues of "price artificiality" are most assuredly the province of economists. It does appear from the cases, however, that the evidence usually offered on the question is the source of as many questions as answers. Reliance upon reported cash prices is warranted only if those figures are reliable, and often they are not. The use of "averages," especially over many years, denies the uniqueness of each incorporated and homogenized figure. It seems fair to say that \textit{no} two futures contracts behave identically, and even when similar features exist, they may be occasioned by quite different market conditions or judgments. Averaging masks those differences and creates a false sense of "normality" among events that may be far from normal either standing alone or when compared with the other grouped events. By the same token, theoretical economic "models" that attempt to show what "should have been" are more reliable in the theoretician's office than in the rough-and-tumble market where traders with "systems" are quickly and painfully dispossessed of their confidence. And, it bears repeating that the sometimes obscured and frequently incomplete cash market data offered in manipulation cases may not be any more reliable than even imperfect futures prices in a court's quest to determine what is normal and what is artificial.

F. \textit{"Abnormal" Commodity Routing}

Artificiality has sometimes also been related to what is referred to as "abnormal" movement of the commodity in commerce. It will be recalled that section 5a(10) of the Act\textsuperscript{165} authorizes the Commission to order a contract market to adopt specific delivery locations or price differential for the purpose, among others, of preventing "the abnormal movement of such commodity in interstate commerce." Manipulation cases sometimes cite the actual or potential rerouting of commodities out of normal channels and into the futures market as a sign of "artificial" prices at the delivery location. In \textit{Cargill}, the point was made succinctly:

[W]e have been shown no good reason why the futures price should reflect the cost of bringing in a higher price and grade of wheat for which there is no demand in the local area. It is this price which was artificially high and therefore useless to the trade and nation.\textsuperscript{166}

\textsuperscript{164} Id. at 23,372.

\textsuperscript{165} 7 U.S.C. § 7a(10) (1976); see text accompanying note 12 supra.

\textsuperscript{166} 452 F.2d at 1173.
Similarly, in Peto v. Howell, the court noted that the defendant's spectacular corner of corn on a virtually nationwide basis disrupted the normal flow of commerce: "The proof was that this corn would normally go to other markets but, because of the tightness of the market brought about by defendant, came to Chicago. This diversion was clearly an interference with the current of interstate commerce..."

These comments seem to adopt the view in Great Western Food Distributors that the needs of "shorts" for the cash commodity to fulfill their delivery obligation are not part of the legitimate demand for that commodity in the local market. Such a premise, as noted earlier, divorces deliveries on futures contracts from other transactions in the cash market, even though they are the same in every economic sense. The view seems, instead, to reflect a nearly moral statement that the movement of a commodity into position for delivery is somehow wrong, despite the clearly lawful existence of a contract contemplating it, unless the commodity is thereafter consumed or commercially marketed locally. Section 8 of the Act recites that the futures market affects interstate commerce, to be regulated as such, and that fact has been vigorously affirmed in Peto v. Howell. It is therefore troublesome to conclude that cash commodities, moving into the part of commerce known as the futures market, have been diverted in some manner from commerce. It may well be that the flow of commodities, originally destined to another location, into the futures market to realize a higher price is inefficient from a marketing—but not an economic—viewpoint since the commodity may then have to be rerouted a second time to its original commercial destination. But there appears to be no other segment of American commerce where a businessman's decision to seek the best price is criticized in this fashion, and a survey of product marketing would likely show many instances of similar "diversion" of goods and articles that the law does not attempt to prevent. It also bears mention that the "diversion" objection to maintaining adequate supplies for future delivery at the delivery location would, if sustained, aggravate rather than relieve market congestion.

G. Stabilizing Prices

Before concluding the discussion of price artificiality, it is necessary to highlight the ruling of General Foods Corp. v. Brannan that a price that is "stabilized" so as not to decline is not artificial if the price was

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167 101 F.2d at 359.
168 In Great Western, the Seventh Circuit found that "[a]dditional proof submitted tended to establish that the real demand, as opposed to technical demand created by a cornering operation, was lower in December 1947 than in the previously mentioned months." 201 F.2d at 482.
169 See text accompanying notes 115-17 supra.
171 101 F.2d at 357-60. See also Board of Trade of Chicago v. Olsen, 262 U.S. 1 (1923).
originally reached through the operation of natural forces. In *General Foods*, it was alleged that the respondents sought to prevent an expected decline in May 1944 rye futures prices due to the imminent sale of 2,000,000 bushels in the market by arranging to have the position transferred to a company that would withhold it from the market. Since planned action designed to control prices by preventing their movement tampers with normal market forces as surely as a scheme to raise or lower prices, this part of the *General Foods* decision is subject to criticism and may not be reliable precedent in future cases.

V. Causation

Once it has been established that the accused manipulator had the economic power—the ability—to influence prices and that prices in the pertinent period were "artificial," the two must be connected to show that the accused's actions were the cause of the price aberration. If the artificial price resulted from other factors, of course, the accused has manipulated nothing. The causality link was expressly addressed in *Cargill, Inc. v. Hardin* where, after finding that May 1963 wheat futures prices were artificial, the court observed that "[t]he question now is whether the artificially high price was caused by Cargill." The court relied heavily on the market pattern for the May contract, noting that the growing scarcity of wheat in Chicago—caused in part by Cargill's own sales for export—could account for the rise in prices for the May contract on May 20, 1963, when news of the export sale became widespread. But the court perceived that, on May 21, "the market was resistant to any further increase in the price" of May wheat futures, and rose only 1-1/2 cents above the May 20 closing price until the final fifteen minutes of trading. During that fifteen minute period, Cargill entered step-up orders to sell approximately 2,000,000 bushels of "long" May futures at prices seven and eight cents higher than the current market quotation. And, while two other commercial firms made trades in that period at similarly high prices, the quantities involved were relatively small compared to Cargill's orders and neither of the two commercials had withheld their entire position, as Cargill did, until the final fifteen minutes of trading.

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170 F.2d at 230-31.
172 Id. at 222.
174 Indeed, the Commission has signalled its intention to view price stabilization as a form of unlawful manipulation. See Hohenberg Brothers Cotton Co., [1975-1977 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶20,271, at 21,478.
175 452 F.2d at 1169.
176 Id.
177 Id.
178 Id. at 1169-70.
179 Id. at 1170.
While most of the other manipulation cases do not expressly isolate causation as a separate element for proof, the importance of this issue is illustrated by Volkart Brothers, Inc. v. Freeman and Indiana Farm Bureau Cooperative Ass'n. In Volkart, the court did not make an express finding whether the price of the October 1957 cotton futures contracts reached artificial levels. Nevertheless, it decided that, even if artificial prices had occurred, the true "cause" was not Volkart's actions but the shortage of certificated cotton brought about by the shorts' irresponsible failure to take steps to certificate other easily available cotton for delivery. Similarly, in Indiana Farm Bureau, the Commission's ALJ discussed causation specifically and refused to blame the respondent for a large rise in prices on the final trading day of the July 1973 corn futures contract, citing huge "shorts" positions of other traders that were carried into the final trading day when there was neither a desire nor ability on their part to make delivery. The decision did not turn entirely on this point, but it is manifest that the ALJ was influenced by what was described at trial as the shorts' "irresponsible" and "imprudent" conduct.

VI. The "Intent" to Manipulate

Absent proof that the accused actually intended to bring about artificial prices by means of his economic power, no manipulation finding can be made. In Great Western Food Distributors, Inc. v. Brannan, the court stated: "the intent of the parties during their trading is a determinative element of a punishable corner. Unintentional corners can develop . . . and should not carry the pain of forfeiture of trading privileges." And, again in Cargill, Inc. v. Hardin, the court acknowledged that "[m]any squeezes do not involve intentional manipulation of futures prices, but are caused by various natural market forces, such as unusual weather conditions which have caused abnormally low crop production or inadvertent destruction of a substantial volume of the commodity itself." The Cargill decision thus stated the issue succinctly: "The aim must be therefore to discover whether conduct has been intentionally engaged in which has resulted in a price which does not reflect basic forces of supply and demand."

1311 F.2d at 59-60.
16 See id. at 23,865.
19 201 F.2d at 479.
20 452 F.2d at 1162.
20 Id. at 1163. The Cargill court's phraseology, however, has caused a great deal of confusion regarding whether the accused must specifically intend to create artificial prices or, rather, must simply intend to engage in conduct that leads to artificial prices. See text accompanying notes 191-97 infra.
A. Direct or Circumstantial Evidence of Intent

Proof of intent must often be based upon circumstantial evidence rather than direct evidence. As the court observed in *G.H. Miller & Co. v. United States*:

"We are fully cognizant of the fact that corners can unintentionally develop and that it is almost impossible to prove by direct evidence that the acts and transactions of the petitioners were undertaken pursuant to an understanding or agreement to act collectively and in a uniform manner. Proof of such concerted action and the intent to so act must generally be circumstantial unless one or more of the participants would so admit." 186

While the circumstantial evidence utilized in key manipulation cases will be summarized below, 187 it should be noted that something very close to "direct" evidence of manipulative intent appears in some of the cases. In *G.H. Miller & Co.*, for example, the court cited testimony in which the principal respondent was quoted as having told one of the "shorts" who came to him for cash eggs in order to make delivery on the final day of the delivery month: "Are you in this deal? Gee, I'm sorry you happen to be in it." 188 And, in *Cargill, Inc. v. Hardin*, an inter-office telegram was produced showing that a Cargill employee, on May 6, 1963, had advised his colleagues as follows: "Excellent wheat summary. Question is how much wheat going to be available June 15 so we can figure old crop needs and what it's going to cost our pals." 189 And, in *Great Western Food Distributors, Inc. v. Brannan*, evidence was admitted by the Judicial Officer that an official of Great Western had said to government investigators that the company's actions in December 1947 egg futures were designed and intended to raise December prices and thereby widen the "spread" between the December and January egg futures while the company held a "spread" position in those contracts. 190 These types of communications, of course, can be taken out of proper context, or can easily be misconstrued. Nevertheless, these examples illustrate the fact that, in providing manipulative intent, effort will be made to find such materials to bolster more circumstantial proof.

B. Specific Intent v. Willful Conduct Without Price Intent

It should be noted that some confusion has arisen on the issue of manipulative intent by reason of a statement by the Commission in *Hohenberg Brothers*. There, the Commission attempted to paraphrase

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186 260 F.2d at 290.
187 See text accompanying notes 201-15 infra.
188 260 F.2d at 289.
189 452 F.2d at 1171.
190 201 F.2d at 484.
the meaning of "manipulation" and, in one sentence, seemed to say that manipulative intent is shown if the conduct is intentionally engaged in, even if the resulting artificial price was not actually intended: "manipulation has been defined generally as conduct intentionally engaged in resulting in an artificial price, i.e., a price that does not reflect the basic forces of supply and demand." But the Commission did not stop there. Its paraphrase of the law continued: "A finding of manipulation in violation of the Act requires a finding that the party engaged in conduct with the intention of affecting the market price of a commodity...." Thus, a fair reading of the Commission's statements is that the necessary intent must attach to the creation of artificial prices, rather than simply to intentional trading that thereafter brought about unintended artificial prices. In other words, the Commission's full statement appears to mean that the manipulator must have a specific intent to create artificial prices.

Nevertheless, the Commission's Division of Enforcement, relying on the first above-quoted portion of the Commission's statement regarding intent, urged the ALJ in Indiana Farm Bureau Cooperative Ass'n to hold that intentional conduct leading to artificial prices, whether or not artificial prices were intended, is sufficient to prove an unlawful manipulation. The ALJ agreed to apply the Division's proposed standard:

While there is language in Hohenberg to support both standards, it seems probable that the more general standard would be applied ... and no specific intent to effect an artificial price would be required. This conclusion is supported by the assertion of the Commission that a showing that questioned activity is "consonant with prudent business practices" is not in itself sufficient to refute an allegation of attempted manipulation.... It is believed that a trader may be presumed to have foreseen the consequences (artificial prices) of his conduct, and therefore to have "intended" those consequences, even though his conduct was commercially motivated.... In any event, an endeavor will be made in the discussion that follows to apply that standard.

Whether the ALJ's approach is adopted by the Commission remains to be seen. In Hohenberg, it seems clear that the Commission intended only to restate existing case law, and not to fashion a new definition. In any event, the ALJ's ruling in Indiana Farm Bureau must be viewed in the

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195 Id.
context that he was in the process of exonerating the respondent, and the selection of the more liberal interpretation would have no effect on the ultimate decisions. Moreover, the ALJ's position can fairly be read to mean that a specific intent to create artificial prices must be proven but can be inferred from conduct that can reasonably be foreseen to cause artificial prices. In other words, conduct that can be expected to generate artificial prices is indirect evidence of a specific intent to produce that result. Viewed in this fashion, the ruling in Indiana Farm Bureau may simply add to the body of law, referenced above, that specific intent to cause artificial prices may be established by circumstantial evidence. Nevertheless, the application of a concept of "reasonable foreseeability" to manipulative intent, if viewed otherwise, would emerge as a new formulation of the law, probably easing the burden of proof in manipulation cases.

That the ALJ's holding in Indiana Farm Bureau on the issue of "intent" may not necessarily be a departure from prior case law requiring specific intent to affect prices can be shown to some extent by analysis of those judicial decisions. In particular, Cargill, Inc. v. Hardin begins the inquiry into intent with the question, "Was the squeeze intentionally caused by Cargill?", and follows immediately with this statement:

Cargill was no novice in futures trading and knew of market conditions which could cause a squeeze.... In an interview with the Department of Agriculture investigators, a Cargill executive said... that the sell order was not placed until the last minute because he "waited and watched because he knew the market was going up." Thus, the court was impressed with Cargill's sophistication about the markets, and unimpressed with the notion that, under prevailing conditions, Cargill might not have realized the "bullish" effect of its late selling effort at scale-up prices. In sharp contrast, the ALJ in Indiana Farm Bureau Cooperative Ass'n concluded that equally astute respondents "could not reasonably have foreseen that [the proven artificial] prices would be reached because of their activity." Accordingly, a concept of "intent" based upon consideration of the sophistication of the accused and the extent to which all circumstances, taken together and in context, would compel such a person to expect his actions to provoke artificial prices, may underpin both Indiana Farm Bureau and the principal case law, and may constitute one of those indirect or circumstantial ways to

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195 In the same vein, the ALJ in Indiana Farm Bureau adopted for purposes of the case a calculation of "deliverable supply" more favorable than necessary to the Division of Enforcement. Id. at 23,862. Likewise, exhibits of the Division excluded at the hearing were admitted for purposes of the decision. Id. at 23,872.

196 452 F.2d at 1170-71.

establish a specific intent to create artificial prices. No tribunal, as yet, has gone so far as to impute knowledge where none exists or to explicitly adopt a "should have known" standard for manipulative intent.

C. Profit and Intent

It appears to be well established that a manipulation is unlawful even if no profit results therefrom, and, therefore, that lack of profit does not prove lack of manipulative intent. In Cargill, the court made this point clearly: "In such [a manipulation] inquiry, the question of whether an alleged manipulator has made a profit is largely irrelevant, for the economic harm done by manipulation is just as great whether there has been a profit or a loss in the operation." While the Commission adopted this view in Hohenberg Brothers and the ALJ followed that lead in Indiana Farm Bureau Cooperative Ass'n, the financial motive of the accused was recognized to be relevant to the issue of intent in both cases. Market conduct that would appear to be to the accused's economic disadvantage would warrant a competency hearing far more often than a charge of intentional market manipulation.

D. Use of "Step-Up" Orders

Almost invariably, the inferences and proof of manipulative intent emerge from a full analysis of the circumstances of each individual case. Each of the elements of a manipulation discussed above is examined in the factual context of the particular proceeding, and often the court deduces intent from the totality of those facts. Unlike the antitrust laws, there appears to be no single act that constitutes "per se" manipulation, but rather each case is examined in all of its pertinent details to determine whether the ability and intent to manipulate existed, and whether they resulted in an artificial price. However, there are certain forms of conduct that seem, at least superficially, to trigger special attention by a reviewing court.

One such act is the entry into the market of "step-up" orders by a person whose other actions have created a probability that prices will rise. In Cargill, Inc. v. Hardin, the court was clearly troubled by the fact that Cargill, in the final fifteen minutes of trading in the May 1963 wheat futures contract, and knowing of the severe scarcity of cash wheat that was then available to "shorts" for delivery, entered step-up orders when the price of futures was only $2.20, at the following levels:

200,000 bushels at $2.27
200,000 bushels at $2.27-1/4
300,000 bushels at $2.27-1/2

\(^{197}\) 452 F.2d at 1163.


400,000 bushels at $2.27-3/4
500,000 bushels at $2.28
390,000 bushels at $2.28-1/4

Note that the lowest order was priced at seven cents over the then-prevailing market price, and that the larger orders carried higher and higher prices. The court stopped short of declaring that practice illegal, as such, but characterized it as "highly unusual market behavior."

On the other hand, the ALJ in Indiana Farm Bureau Cooperative Ass’n faced a similar series of orders to sell July 1973 corn futures contracts during the final half hour of trading on the last day of the contract, as follows:

100,000 bushels at $3.70
100,000 bushels at $3.75
100,000 bushels at $3.80
100,000 bushels at $3.85
90,000 bushels at $3.90

At the time that these orders were placed, July corn futures were trading at $3.70 per bushel and the higher prices in the orders had not been reached during trading. The orders were filled in their entirety, with one minor exception, at the prices sought. The ALJ refused to view those orders as evidence of manipulative intent. His reasoning is related to an assessment of the entire factual context of the case but, at the risk of over-simplification, he appears to have concluded that the Indiana Farm Bureau had a legitimate need for cash corn, could have stood for delivery, and that the price of July futures would have risen in that event as well:

The culpability of placing the five orders hinges on the legitimacy for respondents' taking delivery, for if they had stood for delivery, the market, concededly, would have gone higher. Therefore, these orders, having a reverse effect on the market from taking delivery, cannot be deemed to be a greater offense. Shorts made the decision to pay these prices to respondents and to other longs rather than attempting to obtain corn for delivery. In retrospect, that appears to have been a miscalculation, but it is not proof of a manipulative intent of respondents at the time.

201 452 F.2d at 1160.
202 Id.
203 Id. at 1170.
205 Id.
206 Id.
207 Id. at 23,871.
208 Id. at 23,870.
In *Indiana Farm Bureau*, unlike *Cargill*, the step-up orders involved only one-fifth of the respondent's open position in July corn. Delivery was actually taken on the other four-fifths of the position, and at the highest price of $3.80 per bushel. The ALJ viewed these deliveries as confirmation that cash corn was truly needed for commercial purposes by the respondents and that, since "top dollar" was paid for cash corn, the only profit realized by the respondents was on the step-up orders which constituted only 20 percent of their total July position.

Thus, it appears that "step-up" orders will attract the attention of the reviewing tribunal in manipulation cases, but that they will not necessarily lead to a finding of manipulative intent. In *Cargill*, virtually all of its May 1963 wheat futures position was offered in the market on a step-up basis, while in *Indiana Farm Bureau* only a fraction of the total position was offered in this fashion. It is difficult to assess whether that fact, alone, accounts for the different results in the two cases, but it was probably influential.

E. "Burying the Corpse"

The so-called "burying the corpse" feature—the question of whether deliveries allegedly taken (or cash supplied withheld from the market) to "squeeze the shorts" are later disposed of at significantly lower prices than were reached in the futures market—may be tangentially relevant to manipulative intent as well as to price artificiality. In *Cargill*, for example, the respondent received between $2.27 and $2.28-1/4 per bushel in liquidating its May wheat futures positions and thereafter offered its wheat warehouse receipts to remaining shorts for delivery purposes at a high price of $2.28-1/4. However, between June 4 and June 13, it sold "old crop" wheat in the cash market at prices ranging from $2.10 to $2.13 per bushel, or as much as 18 cents per bushel lower than the prices that it had realized in the futures market and through deliveries by the shorts during late May. This development was not cited specifically by the court as evidence of either manipulative intent or of price artificiality. However, it would seem quite relevant to those issues that an accused manipulator, after insisting that the futures price was not inconsistent with cash market prices, would accept a significantly lower price for the same commodity shortly after the alleged manipulation has been completed. Absent intervening market developments explaining why lower prices were acceptable to the accused after the events in question, the credibility of the accused's assertions that his pricing of

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209 Id.
210 Id.
211 Id.
212 452 F.2d at 1160-61.
213 Id. at 1161.
214 See id. at 1167-72.
215 It must be recognized in *Cargill*, of course, that the "old crop" wheat held by *Cargill*
the futures was based on a good faith belief that cash values were the same might well be questioned.

VII. Definitions of Manipulation

A. Specific Judicial Definitions of Manipulation

As the foregoing sections indicate, proof of manipulation under the Act entails an arduous examination of all of the facts surrounding the events in question. Nevertheless, the courts have not been timid in attempting, in a sentence or two, to capsule this complex concept. Herein are a few of those attempts.

In Peto v. Howell, suit was brought under the Sherman Act rather than under the Commodity Exchange Act for a manipulation of corn futures and cash corn prices in July of 1931. The court of appeals adopted the definition of a "corner" articulated in United States v. Pattern, an earlier antitrust case involving commodities. The court in Peto stated:

[A] corner consists, broadly speaking, in acquiring control of all of the dominant portion of a commodity with the purpose of artificially enhancing the price, one of the important features of which is purchase for future delivery, coupled with a holding from sale for a limited time. . . . [A] corner in the available supply of a staple commodity . . . normally a subject of trade and commerce among the states, and the consequent enhancement artificially of its price throughout the country and compelling all who have occasion to obtain it to pay the enhanced price, or else to leave their needs unsatisfied, is within the terms of [the Sherman Act].

In General Foods Corp. v. Brannan, where the court reached the fragile conclusion that preventing market prices from changing is not a manipulation, the description of the attributes of a manipulation is similarly unique: "[f]urthermore, the common criteria usual in manipulation or corner cases are deceit, trickery through the spreading of false rumors, concealment of position, the violation of express anti-manipulation controls, or other forms of fraud."

was increasingly influenced, as time went by, by the imminence of new crop wheat. In late May, the arrival of new crop wheat was still some time away while, by mid-June, that was no longer true.

217 101 F.2d at 354.
218 226 U.S. 525 (1913).
219 101 F.2d at 357-58.
220 Id.
221 170 F.2d at 224.
manipulation cases contained in previous sections of this Article seems to demonstrate that, instead of "trickery" and "deceit," the proven manipulators have relied upon the open and heavy-handed use of raw economic power that the victims were all too painfully aware of. The court's equation of manipulation with "deceit," therefore, is questionable.

In *Great Western Food Distributors, Inc. v. Brannan*, the court offered the following definition of a "corner":

[A] corner is the executed plan of manipulation of prices of a given commodity whereby a trader or group of traders gains control of the supply or the future demand of a commodity and requires the shorts to settle their obligations, either by the purchase of deliverable quantities of the supply or offsetting long contracts, at an arbitrary, abnormal and dictated price imposed by the cornerer. This manipulation may be effected by creation of an artificial demand through purchases of long contracts in excess of the known deliverable supply... or by the purchase of all of the available cash supply... or by a combination of both. 22

This definition should not be read to mean that a large long position, or control of the cash supply, in and of itself, will necessarily create the opportunity for price manipulation. The shorts must be effectively foreclosed from satisfying their obligations through both channels—offset of futures and cash delivery—except with the dominant long before the requisite economic power to dictate prices will exist.

In *Volkart Brothers, Inc. v. Freeman*, the court quoted from testimony given by an industry representative at a congressional hearing as to the meaning of "manipulation":

Manipulation is, "any and every operation or transaction or practice... calculated to produce a price distortion of any kind in any market either in itself or in relation to other markets. If a firm is engaged in manipulation it will be found using devices by which the prices of contracts for some one month in some one market may be higher than they would be if only the forces of supply and demand were operative.... Any and every operation, transaction [or] device, employed to produce these abnormalities of price relationship in the futures markets, is manipulation." 223

The court in *Volkart* did not rest on the witness' personal definition but elaborated upon it:

Certainly the term "manipulate" means more than the charging of what some may consider to be unreasonably high prices.

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22 201 F.2d at 478-79.
223 311 F.2d at 58.
Otherwise, there would be grave doubts as to the constitutionality of the statutes. . . . There must be a purpose to create prices not responsive to the forces of supply and demand; the conduct must be "calculated to produce a price distortion." There may be a squeeze not planned or intentionally brought about by the petitioners. Such a squeeze should not result in their being punished.\textsuperscript{224}

And to underscore the importance of intent and purpose, the court reiterated that "it must appear not only that they profited\textsuperscript{225} from a squeeze, but that they intentionally brought about the squeeze by planned action."\textsuperscript{226}

In \textit{Cargill, Inc. v. Hardin}, the court observed that "[t]he methods and techniques of manipulation are limited only by the ingenuity of man,"\textsuperscript{227} apparently meaning that manipulation can be triggered by a variety of events such as false rumors intended to cause shock waves in the market. But, with respect to a market manipulation brought about by trader action, the court offered very precise definitions of both a "corner" and a "squeeze":

In its most extreme form, a corner amounts to nearly a monopoly of a cash commodity, coupled with the ownership of long futures contracts in excess of the amount of that commodity, so that shorts—who because of the monopoly cannot obtain the cash commodity to deliver on their contracts—are forced to offset their contract with the long at a price which he dictates, which of course is as high as he can prudently make it.

A squeeze is a less extreme situation than a corner. In this case, there may not be an actual monopoly of the cash commodity itself, but for one reason or another deliverable supplies of the commodity in the delivery month are low, while the open interest on the futures market is considerably in excess of the deliverable supplies. Hence, as a practical matter, most of the shorts cannot satisfy their contracts by delivery of the commodity, and therefore must bid against each other and force the price of the future up in order to offset their contracts. Many squeezes do

\textsuperscript{224} \emph{Id.} at 58-59.

\textsuperscript{225} It is unlikely that the \emph{Volkart} court meant more, in its reference to "profit," than that the manipulation was pursued in search of a benefit. Later cases have so read that statement. \textit{Cargill, Inc. v. Hardin}, 452 F.2d at 1163; Hohenberg Brothers Cotton Co., [1975-1977 Transfer Binder] \textit{COMM. FUT. L. REP.} (CCH) ¶20,271, at 21,478.

\textsuperscript{226} 311 F.2d at 59.

\textsuperscript{227} 452 F.2d at 1163. Regrettably, the \textit{Cargill} court's statement is sometimes hidden behind by persons making reckless accusations of manipulation without any of the proof required in the court decisions discussed in this Article. The court of appeals in \textit{Cargill} surely did not intend that result.
not involve intentional manipulation of futures prices, but are caused by various natural market forces, such as unusual weather conditions which have caused abnormally low crop production or inadvertent destruction of a substantial volume of the commodity itself. However, given a shortage of deliverable supplies for whatever reason, the futures price can be manipulated by an intentional squeeze where a long acquires contracts substantially in excess of the deliverable supply and so dominates the futures market—i.e., has substantial control of the major portion of the contracts—that he can force the shorts to pay his dictated and artificially high prices in order to settle their contracts.228

B. The Commission's Definition of Manipulation

Since its creation in 1974, the Commission has addressed the question of the elements of manipulation on two occasions. The full Commission expressed its view in Hohenberg Brothers and an ALJ discussed the issue in Indiana Farm Bureau Cooperative Ass'n. Hohenberg, it will be recalled, was a case charging a manipulation by shorts in the futures market.229 The full Commission in Hohenberg, however, set forth a definition of both manipulation and attempted manipulation:

[M]anipulation has been defined generally [by the courts] as conduct intentionally engaged in resulting in an artificial price, i.e., a price that does not reflect the basic forces of supply and demand.

A finding of manipulation in violation of the Act requires a finding that the party engaged in conduct with the intention of affecting the market price of a commodity (as determined by the forces of supply and demand) and as a result of such conduct or course of action an artificial price was created.

An attempted manipulation, on the other hand, is simply a manipulation that has not succeeded—that is, the conduct engaged in has failed to create an artificial price. An attempted manipulation requires only an intent to affect the market price of the commodity and some overt act in furtherance of that intent.230

The foregoing statement, as noted earlier,231 has generated debate as to whether the accused must have a specific intent to create artificial prices or whether, without intending that effect, he can be found guilty because his activities in the market were intentionally undertaken and

228 Id. at 1162.
230 Id. at 21,477.
231 See text accompanying notes 191-95 supra.
the creation of an artificial price could be expected to result from that activity. It should be noted that the final two paragraphs of the above quotation from *Hohenberg* refer specifically to an intent to affect market prices. Despite the use of the phrase "conduct intentionally engaged in resulting in an artificial price," which appears in the first quoted paragraph, the more extensive discussion in the succeeding two paragraphs, where intent to actually affect prices is repeated twice, warrants the conclusion that the Commission's standard is the same as that of the courts.

The confusion over the Commission's definition, especially as to intent, has arisen because of the ALJ's opinion in *Indiana Farm Bureau*, where he attempted to apply a standard of inferred intent: "[A] trader may be presumed to have foreseen the consequences (artificial prices) of his conduct, and therefore to have 'intended' those consequences."222 However, as discussed earlier,233 this formulation may be nothing more than a rephrasing of the established principle that proof of manipulative intent must often be based upon indirect or circumstantial evidence, and upon the reasonable inferences to be drawn from the proven facts of the case. A prefatory comment by the ALJ supports that conclusion: "The manipulation cases recognize that 'intent' is a necessary element in the offense of manipulation, but the concept remains somewhat elusive. Intent must be inferred from conduct; at the same time, the culpability of the conduct depends on the intent which accompanies it."234 Since it does not appear that either *Hohenberg* or *Indiana Farm Bureau* intended to quarrel with pre-existing case law requiring specific intent to affect market prices, *Indiana Farm Bureau* can fairly be read to require proof of that specific intent, but to permit the establishment of such intent by reference, at least in part, to market conduct creating a strong inference of manipulative motive.

In *Indiana Farm Bureau*, the ALJ also referred to a definition of manipulation offered by an expert witness for the Division of Enforcement. Characterizing that definition as "perceptive," he quoted the witness' testimony that manipulation is "the socially unacceptable exercise of the capacity to affect price."235

C. Congressional Efforts to Define Manipulation

Congress, of course, has never enacted a definition of commodity market manipulation.236 A definition was offered, however, in the Senate by Senator Pope some years ago:

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233 See text accompanying notes 193-97 supra.
235 Id.
236 See text accompanying note 3 supra.
Squeeze (congestion): These are terms used to designate a condition in maturing futures where sellers (hedgers and speculators), having waited too long to close their trades, find there are no new sellers from who they can buy, deliverable stocks are low, and it is too late to procure the actual commodity elsewhere to settle by delivery. Under such circumstances and though the market is not cornered in the ordinary sense, traders who are long hold out for an arbitrary price.\textsuperscript{237}

The second sentence of Senator Pope's definition seems to identify the event that turns a natural—and lawful—squeeze, or a natural market congestion, into an illegal manipulation. The first sentence, standing alone, would not meet the definition of manipulation fashioned by the courts or by the Commission.

In 1965, the Commodity Exchange Authority, predecessor to the present Commission, urged upon the Congress a definition of manipulation for incorporation into the Act. The proposed definition was not adopted. It seemed, however, to seek to eliminate two established elements of the judicially-defined term, namely proof of an intent to create artificial prices, and consideration of the legal duty of shorts to act responsibly either to meet their delivery obligations or offset their futures in a timely manner:

The word "manipulate" shall be construed to mean the exacting, causing or maintaining of an abnormal or artificial price by any action or course of action which raises, depresses, fixes, pegs, or stabilizes the price at or to a level different than that which would otherwise prevail. Any such exacting, causing, or maintaining of an abnormal or artificial price shall constitute manipulation irrespective of any acts or omissions by the holders of futures contracts adversely affected thereby.\textsuperscript{238}

If adopted, that definition would have eliminated the "intent" requirement described in \textit{Great Western Food Distributors, Inc. v. Brannan} as "a determinative element of a punishable corner."\textsuperscript{239} It also would have overturned the dubious ruling in \textit{General Foods Corp. v. Brannan} that action to stabilize prices is not market manipulation.\textsuperscript{240} Finally, it would have gutted the defense in \textit{Volkart Brothers, Inc. v. Freeman} that the shorts had brought the squeeze upon themselves by their irresponsible failure to procure cotton for delivery when it was available to them.\textsuperscript{241}

\textsuperscript{237} 80 CONG. REC. 8089 (1936).
\textsuperscript{238} H.R. REP. No. 11788, 89th Cong., 1st Sess. 2 (1965).
\textsuperscript{239} See 201 F.2d at 479.
\textsuperscript{240} See 170 F.2d at 230-31.
\textsuperscript{241} See 311 F.2d at 59-60.
VIII. Procedural Issues in Manipulation Cases

A. Burden of Proof in Manipulation Cases

In an enforcement action initiated by the Commission against an alleged manipulator, the Division of Enforcement has the burden of proof. In *Hohenberg Brothers*, the Commission ruled that, even though manipulation can be a criminal offense under section 9(b) of the Act, the burden of proof for the division in administrative proceedings is not "beyond a reasonable doubt" but rather the establishment of the claim "by a preponderance or weight of the evidence." Citing its own regulation section 10.84, the Commission stated that the regulation:

[A]uthorizes the ALJ to make an initial decision based on the record in the proceedings "in conformity with the requirements of the Administrative Procedure Act ["APA"], 5 U.S.C. § 557. Since the ALJ is in a position to observe the demeanor of the witnesses, the weight to be given to his finding reaches its maximum when these findings are based on credibility of witnesses. In weighing the evidence, the ALJ should reach his decision based upon "reliable, probative and substantive evidence" as required by § 7c of the Administrative Procedure Act.

Less deference will be shown by the Commission to an ALJ's findings, however, if the credibility of witnesses is not a key factor in the case. And the Commission in *Hohenberg* further noted that the "burden of proof . . . includes not only the burden of going forward with the evidence but also the burden of persuasion."  

B. Standard for Judicial Review in Manipulation Cases

Section 6(b) of the Act provides that, on judicial review of a Commission decision, the findings of fact will be deemed conclusive "if supported by the weight of evidence."

In *General Foods Corp. v. Brannan*, the court discussed the foregoing standard for judicial review in manipulation cases and concluded that section 6(b)'s test means the preponderance or greater weight of the evidence, rather than the less stringent "substantial evidence" test:

Thus, the standard to be employed is something other than the "substantial evidence rule" controlling in the review of other administrative orders . . . Whatever the requirement be labeled,
we think it means that petitioners are entitled to have the order vacated unless this court concludes that it is sustained by the weight of the evidence and to us that means the preponderance or greater weight.\textsuperscript{249}

Applying the “greater weight” test of \textit{General Foods}, the same court in \textit{G.H. Miller & Co. v. United States} held that, if the Commission’s Division of Enforcement establishes a \textit{prima facie} case of manipulation and the respondents do not present evidence in their defense, the “greater weight” test is satisfied.\textsuperscript{250}

Greater solicitude, however, toward the ALJ’s findings appears in \textit{Great Western Food Distributors, Inc. v. Brannan}. There, the court placed heavy emphasis on the importance of witness demeanor and credibility in manipulation cases, including the veracity and competence of expert witnesses, and declined to engage in a “mechanical reweighing” of the evidence.\textsuperscript{251} First, the court observed that these factors are “often the ‘most telling part’ of the evidence” which create “practical difficulties and pitfalls ... in attempting to redetermine, from an inanimate record alone, issues such as those here presented.”\textsuperscript{252} To illustrate, the court noted that “the intent of the parties during their trading is a determinative element of a punishable corner,” turning frequently upon the veracity of witnesses:

Consequently, the demeanor of the witnesses, as they expound the reasons behind their operations, is of substantial significance in the referee’s [now ALJ’s] findings and conclusions. In addition, the technical and complex nature of the charges made necessitated recourse to extensive use of expert testimony, for here, as is often the case in proceedings under regulatory statutes, the evidence is largely of a dual nature: statistics and parol interpretation of the statistics. In the latter aspect the referee again possesses a greatly advantageous position, for, as the several experts testify, he is able to ascertain their grasp and knowledge, their perspective and understanding of the materials presented to them for interpretation. Their conduct on the stand may enhance or belie their status as experts.\textsuperscript{253}

Thus, the court concluded that its review of the findings and conclusions should take into proper account the superior position of the referee or ALJ:

\textbf{It would seem, then, that the function of this court is something other than that of mechanically reweighing the evi-}

\textsuperscript{249} 170 F.2d at 223-24.
\textsuperscript{250} 260 F.2d at 290.
\textsuperscript{251} 201 F.2d at 479.
\textsuperscript{252} \textit{Id.}
\textsuperscript{253} \textit{Id.}
dence to ascertain in which direction it preponderates; it is
rather to review the record with the purpose of determining
whether the finder of fact was justified, i.e., acted reasonably, in
concluding that the evidence, including the demeanor of the
witnesses, the reasonable inferences drawn therefrom and other
pertinent circumstances, supported his findings. To go further is
to disregard the "most telling part" of the evidence.264

This formulation of the scope of judicial review was also followed in
Cargill, Inc. v. Hardin.255

Neither Great Western nor Cargill expressly overruled the "greater
weight" test enunciated in General Foods and applied in G.H. Miller as
well. Since the "weight of the evidence" test is statutorily created, and
the recent judicial decisions do not profess to negate the ruling in
General Foods, it is fair to construe the cases as a whole as adopting the
"greater weight" standard, but with the admonition that the court
should not substitute its own judgment as to witness demeanor for that
of the trier of facts. Thus, where the believability of a party or witness
underpins a finding by the ALJ, the court will generally give deference
to that finding.

IX. The Puzzles of Manipulation Theory

Manipulation cases raise a number of issues that are rarely resolved
frontally. In earlier sections, certain of the unanswered puzzles have
been alluded to. For instance, it was pointed out that cash market price
reports are often so untrustworthy, and that cash market transactions
are so frequently governed by nonprice considerations, that it is
especially difficult to determine when the futures market—even one ex-
periencing a temporary "squeeze"—is really a less reliable barometer of
true value than the cash market.256 Moreover, it was noted that, by
operation of law as well as by nature, the futures market in a delivery
month becomes a local market subject primarily to local economic
pressures and conditions and, as such, its prices cannot accurately be
compared to regional, national or international commodity prices.257

The greatest puzzle of all, however, may be whether the futures ex-
changes are truly legitimate commodity markets. The Act seems to
answer that question emphatically in the affirmative, while the case law
seems to say "no" or a weak "maybe." Section 3 of the Act258 states that
the futures markets are "affected with a national public interest"

254 Id. at 479-80.
255 452 F.2d at 1163-64.
256 See text accompanying notes 150-64 supra.
257 See text accompanying notes 138-40 supra.
because their transactions are used throughout commerce "as a basis for
determining the price" of physical commodities and are used "by shippers, dealers, millers, and others engaged in handling commodities and
the products and by-products thereof" to hedge against adverse price
changes. Sections 4, 4b, 4h recognize that the futures markets
are also utilized for the acquisition of commodities through delivery on
futures contracts.

On the other hand, certain of the cases seem to treat futures
markets as something other than true commodity markets. While Peto
v. Howell held that a manipulation of futures contracts is an obstruction
to interstate commerce, thus implying that the futures markets are a
part of that commerce, it ruled as well that the shipment of corn into
Chicago to realize the higher price available on the futures market was,
in effect, a removal of that corn from legitimate commerce: 262

Here there was proof that the enhanced price in Chicago caused
the diversion of a substantial lot of available corn in the state of
Iowa and caused it to be shipped into Chicago in the latter part
of July in large quantities. The proof was that this corn would
normally go to other markets but, because of the tightness of the
market brought about by defendant, came to Chicago. This diver-
sion was clearly an interference with the current of interstate
commerce.... 262

A similar disdain for the movement of commodities out of normal
marketing channels into the futures market was expressed in Cargill,
Inc. v. Hardin. 263

Another way of expressing the view that futures markets are not
bona fide commodity markets is that commercial demand for the com-
mmodity is legitimate, while demand created by "shorts" in the futures
market is not. In Cargill, the court held that "there [was] no demand in
the local area" for hard wheat at the time of the alleged manipulation, 264
although it had found that the open interest in the May 1963 wheat
futures contract on that date was 8,000,000 bushels, with less than 75,000
bushels of cash wheat in deliverable position in Chicago. 265 Clearly, the
court did not perceive the shorts' needs as a legitimate demand for cash
wheat. This view was even more vividly stated in Great Western Food
Distributors, Inc. v. Brannan where the court distinguished between
"the real demand [of cash merchants], as opposed to technical demand [of

259 Id. § 6.
260 Id. § 6b.
261 Id. § 6h.
262 101 F.2d at 359.
263 452 F.2d at 1173.
264 Id.
265 Id. at 1158.
shorts] created by a cornering operation."\textsuperscript{266} In \textit{Volkart Brothers, Inc. v. Freeman}, on the other hand, the court treated the delivery obligation of shorts, even when supplies of the cash commodity are low, as legitimate, remarking in fact that a different view would convert the futures market into "a gambling institution."\textsuperscript{267}

Nevertheless, it is clear from the \textit{Cargill} decision in particular that delivery on futures contracts is not considered by some courts to be legitimate, that cash markets are not to be subjected to those pressures and, in fact, neither is the futures market. The court made clear its view that a futures market is not functioning properly unless all shorts can offset their contracts in lieu of delivery and, even then, without significant market impact:

While the obligation to make or take delivery is a bona fide feature of the futures contract, in reality the futures market is not an alternative spot market for the commodity itself, and indeed the functions performed by the futures market would probably be severely hampered if it were turned into an alternative spot market. . . . The main economic functions performed by the futures market are the stabilization of commodity prices,\textsuperscript{268} the provision of reliable pricing information, and the insurance against loss through price fluctuation. The functions can be fulfilled only if both longs and shorts can offset their contracts at non-manipulated prices. If in a squeeze situation, the shorts must be forced either to pay manipulated prices to offset their contracts or in the alternative to bring in higher priced outside supplies which are neither wanted nor needed in the local market, then both the cash and the futures markets will be dislocated.\textsuperscript{269}

The \textit{Cargill} court does not explain why, if the delivery obligation is a "bona fide feature" of the futures contract, its exercise is not. The court appears to say that, in a "squeeze"—tight cash supply—situation, neither the cash market nor the futures market should be allowed to reflect that fact since, if either does, a "dislocation" occurs and one or both of those markets will be deemed to have been manipulated by the longs. The longs are told, in effect, to "cool it" even though higher prices are clearly attainable as the result of the shorts' strong demand for either cash commodities or for offset. If, as the court opined, the function of the futures market is to "stabilize" prices rather than to reflect the

\textsuperscript{266} 201 F.2d at 482.
\textsuperscript{267} 311 F.2d at 59-60.
\textsuperscript{268} It can only be presumed that the \textit{Cargill} court's use of the term "stabilization" means the role of the futures market in reducing normal cash market gyrations through hedging services and a more liquid, competitive environment. It is certainly not a purpose of the futures markets to dictate prices or to prevent their movement.
\textsuperscript{269} 452 F.2d at 1172-73.
true forces of supply and demand, the court's rationale would be difficult to assail. But, assuming that its use of the term "stabilization" was simply an unfortunate choice of words, then the message of Cargill is that the demand created by shorts, though real enough, is not legitimate and may not lawfully be reflected in the market.

Any analysis that declares that demand in the futures market is not legitimate cuts that market loose from its historical ties with the cash commodity market. If, as Cargill states, it is one of the "main economic functions" of a futures market to provide to commercial dealers "reliable pricing information," it is difficult to see how that can be achieved if shorts are expected to stay out of the cash market, if longs are not allowed to insist upon delivery, and if the futures market must register prices that are oblivious to tight cash supplies or the "bona fide" rights and obligations of those who transact business in the same commodities through the futures contract.

A natural corollary to the Cargill viewpoint would be that cash merchants, bidding for and offering scarce supplies, should also curtail their competitive instincts or else face charges of manipulation. The corollary does not hold, it appears, because vigorous bidding among cash dealers is viewed as "legitimate," while the same phenomenon in the futures market is not. In any event, for the time being, the practitioners would be well advised to understand that, at least in some courts, price increases in either the cash market or in the futures market that can be traced to the needs of short futures traders will be viewed with suspicion, and longs who seek the best available price under those circumstances may be charged with price manipulation.

X. Manipulation and Antitrust

Because manipulation and monopoly power are similar concepts, it is not surprising that the antitrust laws are sometimes invoked in commodity market manipulation cases. Before the enactment of the Grain Futures Act in 1922, manipulation was attacked under the Sherman Act in United States v. Patten. And, as indicated in previous sections, the case of Peto v. Howell, although post-dating the creation of the Grain Futures Act, also was grounded in the antitrust laws. More recently, the antitrust laws were invoked in Chicago Mercantile Exchange v. Deaktor and Ricci v. Chicago Mercantile Exchange. Deaktor and Ricci are best known for the rulings of the United States Supreme Court that issues raised concerning compliance by a contract

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271 226 U.S. 525 (1913).
272 See 101 F.2d at 354; text accompanying notes 216-20 supra.
market with its duties under the Commodity Exchange Act should be referred to the Commission for its expert views before the antitrust claims are considered by the court.\textsuperscript{275} And antitrust grounds were alleged in \textit{P.J. Taggares Co. v. New York Mercantile Exchange},\textsuperscript{276} where it was held that a self-regulatory action taken by a contract market in the face of a perceived threat of manipulation cannot be attacked under the antitrust laws in the absence of an allegation of fraud or bad faith,\textsuperscript{277} citing the earlier case of \textit{Daniel v. Board of Trade}.\textsuperscript{278}

It has been held, however, that when claims under both the Commodity Exchange Act and the antitrust laws, for the same activity, are asserted, the antitrust grounds may be dismissed as superfluous. In \textit{Smith v. Groover},\textsuperscript{279} an action alleging manipulation in the soybean futures market, the district court dismissed antitrust counts upon finding that the activity complained of was covered by the Act and that application of the antitrust laws would produce inconsistent remedies and other conflicts.\textsuperscript{280} Citing the decision in \textit{Schaefer v. First National Bank},\textsuperscript{281} the court in \textit{Smith} stated:

\begin{quote}
Where the law provides a special statutory remedy for specific conduct, as well as a general provision which is comprehensive enough to include that specific conduct and a wide variety of other conduct, the general remedy is inapplicable. . . . The specific statutory prohibitions contained in the CEA, as amended, must prevail over the general prohibitions of the Sherman Act.\textsuperscript{282}
\end{quote}

Section 15 of the Act\textsuperscript{283} directs the Commission to consider antitrust policy and "endeavor to take the least anticompetitive means of achieving the objectives of this act, in issuing any order or adopting any Commission rule or regulation" or when requiring or approving a rule of a contract market or registered futures association. That mandate places the Commission directly in the mainstream of review of its own actions and many actions of the markets and others having antitrust implications. While its duty to consider antitrust policy under section 15 refers mainly to static rules that it or others may adopt, it also governs

\textsuperscript{275} 414 U.S. at 115; 409 U.S. at 305-06.
\textsuperscript{276} 476 F. Supp. 72 (S.D.N.Y. 1979).
\textsuperscript{277} Id. at 76.
\textsuperscript{278} 164 F.2d 815 (7th Cir. 1947). See also Lagorio v. Board of Trade of Chicago, 529 F.2d 1290, 1292 (7th Cir. 1976).
\textsuperscript{279} 468 F. Supp. 105 (N.D. Ill. 1979).
\textsuperscript{280} Id. at 115-17.
\textsuperscript{281} 326 F. Supp. 1186, 1190-92 (N.D. Ill. 1970), aff'd, 509 F.2d 1287, 1300 (7th Cir. 1975).
\textsuperscript{282} 468 F. Supp. at 116. Dismissal of the antitrust count in a complaint invoking the Act as well can have great significance. Treble damages and attorneys' fees, available in actions brought under the Clayton Act, are not provided for under the Act.
“orders” of the Commission including, presumably, any order emanating from an administrative proceeding where a charge of market manipulation has been heard and decided. Thus, the power and authority of the Commission to resolve antitrust issues in its proceedings has existed since the 1974 amendments to the Act, when section 15 was added.

Prior to that time, when the agency did not have such authority, the procedure followed by the courts was to suspend the pending litigation, refer the Act issues to the agency for its views, and then renew the litigation in the district court to decide any issues remaining under the antitrust laws. Today, it would appear that a full referral of all issues would be proper, and the Commission has announced that it will receive favorably any judicial referrals in cases where both antitrust and Act claims may be asserted:

A significant issue of regulatory policy might be raised in private litigation that will warrant the Commission's time and attention. Such an issue might concern, for example, an apparent conflict between the antitrust laws and a course of business being pursued by a contract market in the exercise of self-regulatory responsibilities. Since the Act entrusts regulatory policy over this type of issue to the Commission, and the resolution of this issue may be necessary before the court may reach a decision on the merits of the case, the Commission will generally accept referral of the antitrust issue in order to ensure that the courts may proceed with the benefit of the Commission's policy determination.\(^{284}\)

Thus, the Commission believes that weighing antitrust policy against the Act’s regulatory objectives has been “entrusted” to it, that it has the right to “resolve” that issue, and that it may render a “determination” for communication back to the trial court. It should be noted, as well, that the Commission has stated that the procedure outlined for referral in Ricci and Deaktor, where the district court was charged with deciding the antitrust issues after the agency had spoken to Act-related questions, “has no doubt been affected by the enactment in 1974 of Section 15...”\(^{285}\)

Accordingly, it appears likely that, when a complaint alleging manipulation is grounded in both the Commodity Exchange Act and the antitrust laws, the court may dismiss the antitrust counts, as in Smith, or may refer the matter to the Commission where the “public interest reflected in the antitrust laws will be weighed against the public interest protected through regulation of the futures trading industry.”\(^{286}\) On


\(^{285}\) Id.

\(^{286}\) HOUSE COMM. ON AGRICULTURE, REPORT ON H.R. 13113, H.R. REP. No. 93-975, 93d Cong., 2d Sess. 28 (1974).
the other hand, where the case simply alleges a violation of the Act, a matter that the Commission considers to be "within the normal competence of the courts to resolve," the Commission will resist or refuse referrals in most cases.\textsuperscript{287} The Commission, however, does not cite a claim of market manipulation as one of these matters although it opposed a referral of that issue in \textit{Smith} and the court then declined to make a referral.\textsuperscript{288}

XI. Other Forms of Manipulation

By far, the most common usage of the term "manipulation" is to describe activity of a trader or group of traders in the market that is intended to raise, lower or stabilize prices of the commodity or of the futures contract at artificial levels. All of the cases examined thus far have been of that nature. But in \textit{Cargill Inc. v. Hardin}, the court alluded to the possibility that price manipulation might be achieved in other ways as well: "The methods and techniques of manipulation are limited only by the ingenuity of man."\textsuperscript{289} Standing alone, the court's statement might suggest that manipulation would subsume a wide variety of other wrongful conduct. However, the court then stated that manipulation entails "conduct [that] has been intentionally engaged in which has resulted in a price which does not reflect basic forces of supply and demand."\textsuperscript{290} It seems clear, therefore, that the court in \textit{Cargill} meant simply to say that there are ways other than the classical corner or intentional squeeze to disrupt the accuracy of market prices.

One such way is through the dissemination of false rumors and market reports designed to precipitate a market price reaction. Section 5(c) of the Act\textsuperscript{291} makes it a condition of contract market designation that the exchange's governing board "provides for the prevention of dissemination by the board or any member thereof, of false or misleading or knowingly inaccurate reports concerning crop or market information or conditions that affect or tend to affect the price of any commodity in interstate commerce." In one administrative case before the Commodity Exchange Authority in 1950, \textit{In re Ralph W. Moore},\textsuperscript{292} a long in the market composed and circulated a false memorandum purporting to be from the Departments of State and Agriculture to the President describing a government plan to make heavy export sales of the same commodity.\textsuperscript{293} While the false memorandum was discovered before it could have

\textsuperscript{287} See text accompanying note 284 supra.
\textsuperscript{288} Smith v. Groover, 468 F. Supp. at 122.
\textsuperscript{289} 452 F.2d at 1163.
\textsuperscript{290} Id.
\textsuperscript{291} 7 U.S.C. § 7(c) (1976). In \textit{Cargill}, the court stated that "one of the most common manipulative devices [is] the floating of false rumors which affect futures prices..." 452 F.2d at 1163.
\textsuperscript{292} 9 Agric. Dec. 1299 (1950).
\textsuperscript{293} Id. at 1303-04.
a market impact, the respondent was found to have been guilty of attempted manipulation.294

In some instances, it appears that discrete transactions in the futures market may result in a charge of market manipulation. In *In re David G. Henner*,295 it was alleged that the respondent had purchased futures contracts at a price significantly above the prevailing market price in order to affect the day's closing price.296 The closing price or range for a trading session is of special importance because it is disseminated to the trade and influences the prices at which orders are placed on the following day and, in addition, is used by clearing agencies in their daily calculation of settlement prices. Thus, tampering with the closing price or range has far-reaching consequences for the market as a whole. This abuse, sometimes called "high balling" if a price rise is sought or "low balling" if the objective is to depress the closing price, was held in *Henner* to be a form of manipulation.297

A more difficult question is presented when noncompetitive trades are made during a trading session. Typically, these abuses are isolated and affect only a small portion of the total trading in the futures contract. The likelihood that they will have a market-wide impact is small. Indeed, in most instances, these trades are made well within the overall price range of the market as a whole. Moreover, their purpose is usually other than to have an impact on the direction or trend of market prices. However, in *Smith v. Groover*, the complaint alleged prearranged trades among certain floor brokers in soybean futures and contended that such trading is a form of price manipulation.298 In denying a motion to dismiss based upon the position that such activity does not constitute market manipulation, the court said:

> The practice of "bucketing" customers' orders can be just as manipulative of futures prices as the "squeeze." If, as plaintiffs claim, defendants executed certain futures transactions by pre-arrangement among themselves rather than by open outcry in the trading pit, their conduct "manipulated" the price at which plaintiffs traded and also affected the current quoted price for soybean futures in the pit. . . . [B]y creating their own market for trading in soybean futures, defendants insulated plaintiffs' transactions from competitive forces and thereby manipulated the price at which soybean futures were traded.299

If, in fact, the "bucketing" of soybean futures was so pervasive and done at prices so far "away" from the rest of the market as to affect soy-

294 *Id.* at 1313.
296 *Id.* at 1152.
297 *Id.* at 1174-75.
299 *Id.* at 121.
bean futures prices in general, the conclusion in Smith would comport with the pre-existing body of manipulation law provided, of course, that intent to affect the market prices is also shown. But if Smith is read to mean that any noncompetitive trade is a manipulation, it would reflect a major shift in the law. Noncompetitive trading that does not impact the general market and is not intended to do so, seems far removed from the concerns of the Congress in proscribing manipulation, namely, its impairment of the ability of commercial dealers to rely upon the futures market as a pricing and hedging mechanism.\footnote{In Secretary of Agric. v. Massey, CEA Dockets Nos. 2 and 3 (November 9, 1933), the Commission formed under the original Grain Futures Act held that non-competitive and pre-arranged trades do not constitute manipulation under the Act. As a result, the Act was amended in 1936 to specifically prohibit such conduct. See Senate Agriculture Comm., Hearings on H.R. 6772, 74th Cong., 2d Sess. 217-18 (1936).} But, if it cannot be shown that noncompetitive trading caused general market prices to reach "artificial" levels through conduct intended to achieve that result, labeling this practice as "manipulation" would stray from even the expansive definition of the Cargill case. These abuses are, of course, reachable and punishable under other provisions of the Act, such as sections 4b(D)\footnote{7 U.S.C. § 6b(D) (1976).} and 4c(a)(A).\footnote{Id. § 6c(a)(A).} It seems unnecessary, therefore, to strain the traditional meaning of "manipulation" in these cases.

Two other forms of manipulation bear mention, although neither can be properly regulated. First, there is government manipulation of market prices, achieved mainly through programs unabashedly intended to frustrate the laws of supply and demand. Whether it is a USDA program to withhold supplies from the market, to retard crop production, or to put a "ceiling" or "floor" on commodity prices; whether it is presidentially or congressionally imposed price controls; or whether it is concerted cartel-type action by the governments of foreign producing countries, the danger is ever-present that the futures markets will not be free to record accurately the true supply or the true demand for a commodity in keeping with a pure economic model.

Second, there is regulatory manipulation, where various types of restrictions are imposed on the futures markets in the face of a real or perceived danger that the market may "over-heat." Examples of such intervention are the Commission's order of November 3, 1976 directing the New York Mercantile Exchange under section 8a(9) of the Act\footnote{Id. § 12a(9).} to confine all trading in the November 1976 Maine potato futures contract to the liquidation of then-open positions, and raising the margins on that contract to 100 percent of the value of the commodity.\footnote{[1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,233, at 21,249-50.} In March of 1979, the Commission unsuccessfully ordered the Chicago Board of Trade to terminate all trading in its March wheat contract and fixed its
own settlement price for open contracts, acting again under section 8a(9). And, in January of 1980, the Commission closed for two days the grain futures markets in Chicago, Kansas City and Minneapolis under section 8a(9) following the President’s announcement of a grain embargo to the Soviet Union. These actions, whether or not lawful or well-intentioned, were a direct restraint on futures market free operations and were intended to override the ability of buyers and sellers in the market to negotiate prices freely. Therefore, to the extent that the markets fall short of the economic theory of “pure competition,” contributing factors are not limited to unlawful manipulations, intentional squeezes or false rumors but must also include acts of government and regulatory intervention.

305 See Board of Trade of Chicago v. CFTC, [1977-1980 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶20,780 (N.D. Ill.), rev’d, 605 F.2d 1016 (7th Cir. 1979).
