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Recent Developments: F.T.C. v. Superior Court Trial Lawyers Ass'n.: A Boycott by a Group of Lawyers Constituted an Agreement to Fix Prices in Violation of the Antitrust Statutes

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when they are awarded, they most often serve as a statutorily-imposed punitive measure, the need to include them in compensatory damages diminishes. Under this view, attorney's fees would seem to be an appropriate consideration in measuring an award of punitive damages.

Id. at 350-51, 568 A.2d at 41.

The court was equally unimpressed by the argument that jury discretion would be affected. To the contrary, the court saw it as an opportunity to provide needed guidance to the jury. Citing *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), it pointed to the Supreme Court's concern over the lack of direction provided to juries in measuring the amount of punitive damages. *St. Luke Church*, 318 Md. at 351-52, 568 A.2d at 42. The amount of a prevailing party's legal fees would furnish a degree of guidance to the jury not previously provided. *Id.*

The court looked at the approaches taken by certain states which allow consideration of attorney's fees in the award of punitive damages. It rejected the Connecticut approach which limits the award of punitive damages to the amount of attorney's fees incurred by the prevailing party. *Id.* at 352-53, 568 A.2d at 42-43. Rather, the court agreed with the Kansas approach where the amount of attorney's fees is merely one objective factor for the jury to consider. *Id.*

Thus, the court of appeals reversed the court of special appeals and reinstated the jury's punitive damage award. The decision satisfied two of the court's goals. By presenting the jury with evidence of a prevailing claimant's attorney's fees, the jury is provided with helpful guidance in measuring an award of punitive damages as well as a meaningful way to punish the wrongdoer for flagrant misconduct.

—John A. Nolet

F.T.C. v. Superior Court Trial Lawyers Ass'n: A BOYCOTT BY A GROUP OF LAWYERS CONSTITUTED AN AGREEMENT TO FIX PRICES IN VIOLATION OF THE ANTITRUST STATUTES

In *F.T.C. v. Superior Court Trial Lawyers Association*, 110 S. Ct. 768 (1990), the Supreme Court held that an agreement among a group of trial lawyers to refuse representation of indigent criminal defendants until the government increased their compensation amounted to price-fixing. The Court reasoned that the expressive component of such a boycott was not protected by the first amendment and did not create an exception to the antitrust statutes. As a result, the price-fixing agreement was held to be a per se violation of section 1 of the Sherman Act and section 5 of the Federal Trade Commission Act.

Pursuant to the District of Columbia's Criminal Justice Act (CJA), lawyers in private practice were appointed and compensated to represent indigent defendants in various criminal cases. With the majority of appointments going to a group of about 100 lawyers referred to as "CJA regulars." These cases represented approximately 85% of the total caseload in the District. "After 1970, the Criminal Justice Act set fees at $30 per hour for court time and $20 per hour for out-of-court time, and despite a 147 percent increase in the consumer price index, compensation remained at those levels until the boycott" occurred. *Id.* at 786 (Brennan, J., dissenting).

In 1982, the respondents, Superior Court Trial Lawyers Association (SCTLA), unsuccessfully attempted to persuade the District to raise rates. As a result, in 1983, the SCTLA members met and agreed not to accept any new cases after September 6, 1983, unless legislation was passed providing for an increase in rates. When the legislation was not passed, 90% of the SCTLA members refused to accept new assignments.

The boycott had a severe impact on the District's criminal justice system. Within days, the District's government offered the SCTLA a temporary increase to $35 per hour with a permanent increase to $45 per hour for out-of-court time and $55 per hour for court time. The SCTLA accepted the offer and ended the boycott.

The Federal Trade Commission (FTC), however, filed a complaint against the SCTLA alleging that the agreement was a restraint of trade and characterized the SCTLA's conduct as a conspiracy to fix prices. The complaint was heard before an administrative law judge (ALJ) who recognized the violation of the antitrust laws, but dismissed the complaint because the increased fees would have a beneficial effect. The increased fees would attract new CJA lawyers and allow the current CJA lawyers to reduce their caseload in order to provide better representation. *Id.* at 773.

The FTC disagreed, asserting that as a result of the boycott, the city would spend an additional 4 to 5 million dollars a year for the same legal services. *Id.* Accordingly, the FTC filed a cease-and-desist order to prevent the SCTLA from initiating a similar boycott in the future. *Id.*

The court of appeals found that the SCTLA boycott contained elements of expression warranting first amendment protection. Therefore, a restriction on this form of expression could not be justified unless the restriction was no greater than what was necessary to protect an important governmental right. *Id.* at 774 (citing *United States v. O'Brien*, 391 U.S. 367 (1968)). The court concluded that the *O'Brien* test could not be satisfied by the application of an otherwise appropriate per se rule of antitrust law, but instead required the enforcement agency to prove, rather than presume, that the Sherman Act was violated. *Id.* (citing *Superior Court Trial Lawyers Ass'n v. F.T.C.*, 856 F.2d 226, 248-50 (D.C. Cir. 1988)). The court of appeals, therefore, vacated the cease-and-desist order and remanded the case for a determination of whether the SCTLA actually possessed "significant market power," which would justify the restriction of their first amendment rights.

The Supreme Court reversed, concluding that the SCTLA's boycott was per se violative of section 1 of the Sherman Act and section 5 of the Federal Trade Commission Act. *F.T.C.*, 110 S. Ct. at 774. As the FTC, the ALJ, and the court of appeals all agreed, the SCTLA's boycott constituted a classic restraint of trade within the meaning of section 1 of the Sherman Act. *Id.* The Court rejected the boycott's social justifications, as well the SCTLA's objective in bringing about favorable legislation. *Id.* at 776. In addition, the Court reasoned that because the SCTLA's objective was to gain an economic advantage for those participating in the boycott, the conduct was not protected by the first amendment. *Id.* at 778. The Court pointed out that constitutional protection does not apply "to a boycott conducted by business competitors who stand to profit financially from a lessening of competition in the boycotted market." *Id.* at 777 (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 508 (1988)).

The Court then considered whether the court of appeals was correct in creating a new exception to the per se rules of antitrust liability. The court of appeals relied on *United States v. O'Brien*, 391 U.S. 367 (1968). O'Brien violated a federal statute when he burned his Selective Service registration certificate on the steps of a Boston courthouse. In affirming his conviction, the Court concluded that the statute's incidental restriction on O'Brien's freedom of expression was no greater than necessary to further the government's interest in requiring registrants to have valid certificates continually available. *F.T.C.*, 110 S. Ct. at 778. In light of *O'Brien*, the court of appeals held that the expressive component of the SCTLA's boycott compelled the "courts

to apply the antitrust laws 'prudently and with sensitivity,' with a 'special solicitude for the First Amendment rights' of [the SCTLA]." *Id.* (quoting *Superior Court Trial Lawyers Ass'n. v. F.T.C.*, 856 F.2d at 233-34). Thus, the court of appeals shifted the burden to the FTC to show that the boycotters possessed sufficient market power to warrant a per se violation of the antitrust laws.

The Supreme Court, however, found the court of appeals' analysis to have been critically flawed in two respects. First, the court of appeals exaggerated the significance of the expressive component in the SCTLA's boycott. The Court found nothing unique about the expressive component of the SCTLA boycott. Rather, a rule that would require the courts to apply the antitrust laws with prudence and sensitivity whenever a boycott had an expressive component "would create a gaping hole in the fabric of those laws." *Id.* at 780.

Second, the Court found that the court of appeals was incorrect in their assessment of the antitrust laws. *Id.* at 779. The Court criticized the court of appeals' assumption that the per se rule against price-fixing and boycotts "is only a rule of 'administrative convenience and efficiency,' and not a statutory command." *Id.* at 780. While the Court conceded that the per se rules of liability were in part justified by administrative convenience, the per se rules "reflect a long-standing judgment that the prohibited practices by their nature have a 'substantial potential for impact on competition.'" *Id.* (quoting *Jefferson Parish Hospital District No.2 v. Hyde*, 466 U.S. 2, 16 (1984)). As Justice Douglas stated in a footnote to *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), "whatever economic justifications particular price-fixing agreements may be thought to have, the law does not permit an inquiry into their reasonableness. They are all banned because of their actual or potential threat to the central nervous system of the economy." *F.T.C.* 110 S. Ct. at 781-82 (quoting Socony-Vacuum, 310 U.S. at 225-26 .

The Court also conceded that some boycotts and some price-fixing agreements were more injurious to competition than others, but held that the court of appeals' assumption that absent proof of market power the SCTLA boycott was harmless, was inconsistent with the course of the Supreme Court's antitrust jurisprudence. *Id.* at 782. Here, there was sufficient testimony to demonstrate that the boycott produced a crisis in the District's criminal justice system which achieved the SCTLA's economic goal. Thus, the Supreme Court reversed the court of appeals' decision creating an exception to the per se rules of antitrust liability. *Id.*

The impact of this decision is substantial. Previously, the notion of a boycott had been an agreement among the participants to refrain from engaging in certain activities in order to bring about a change. It was thought that this type of agreement was protected by the first amendment because it was a form of expression. Now, if such an agreement has the objective of bringing about an economic benefit to the participants, the courts must characterize the agreement as a restraint of trade. The courts are then required to apply the per se rules of antitrust liability to the agreement and find it violative of both the Sherman Act and the Federal Trade Commission Act.

—Thomas J. S. Waxter, III

***Needle v. White, Mindel, Clark & Hill*: TRIAL COURT'S DECISION TO SANCTION REVERSED AS CLEARLY ERRONEOUS**

In *Needle v. White, Mindel, Clarke & Hill*, 81 Md. App. 463, 568 A.2d 856 (1990), the Court of Special Appeals of Maryland held that the trial court's decision to impose over $143,000 in sanctions, pursuant to Maryland Rule 1-341, was clearly erroneous. After reviewing all the evidence in the underlying suit, the court held that neither of the plaintiff's attorneys, nor their client, lacked the substantial justification required to bring suit, nor had they brought the suit in bad faith. An attorney need only bring forth a colorable claim to avoid the imposition of sanctions, while a court cannot use the benefit of hindsight to determine the claim's merits.

After a thirteen-year term of employment, Carolyn Gerst was amicably terminated from her position as a bookkeeper for the law firm of White, Mindel, Clarke and Hill. According to the firm, Gerst was discharged simply because a replacement could do a better job. Yet her employers subsequently discovered, among other discrepancies, that approximately $203,000 had been withdrawn from one of the firm's accounts, coinciding with Gerst's final year of employment. Thus, the firm instructed John Foley, a member of the firm, to file a claim for reimbursement with the insurance company with whom they maintained a $100,000 employee fidelity policy. The claim asserted that the loss resulted from dishonest or fraudulent acts by Gerst. Additionally, a complaint against Gerst was filed with the police, satisfying a condition of recovery under the policy. The full $100,000 was eventually remitted to the firm, while Gerst was charged with embezzlement.

At her criminal trial, Gerst alleged that she withdrew the cash at the request of Samuel Hill, a partner in the firm, and then turned the money over to him. This conflicted with Hill's testimony that withdrawals from the account were allowed by internal paper transfer only, and denied ever authorizing cash withdrawals or receiving any cash from Gerst. After a three-day jury trial, Gerst was acquitted.

Thereafter, Gerst retained Howard J. Needle and Sarah C. King for an initial counsel fee, with additional fees on a contingency fee basis. A suit was subsequently initiated against White, Mindel, Clarke and Hill, as well as Hill and Foley personally, for, ultimately, malicious prosecution and intentional infliction of emotional distress. At the extensive hearing on the defendant's pre-trial motion for summary judgment, Gerst asserted that the initiation of criminal charges by the firm was motivated solely by the firm's efforts to collect on its employee fidelity insurance policy, and resulted in her emotional distress. Conversely, the defendants argued that Gerst instituted her civil action as retaliation for the criminal charges filed against her. The motion was denied.

The case proceeded to trial where the issues were whether the law firm instituted a criminal proceeding against Gerst without probable cause for a purpose other than bringing an offender to justice, and whether, as a result, Gerst suffered emotional distress. *Needle*, 81 Md. App. 467, 568 A.2d at 858. Conflicting testimony was heard on the procedure of cash withdrawals and the ultimate destination of the funds in question. Defendants renewed their motion for summary judgment at the close of Gerst's case and again at the conclusion of all the evidence. The trial court denied the former and reserved ruling on the latter.

The issues, including whether Gerst stole money from the defendants, were submitted to the jury. The jury decided that the defendants had a reasonable belief that Gerst took the money and that they did not report the matter to the police with ill will or with a reckless disregard for the truth. Additionally, the jury found that Gerst suffered emotional distress due to the filing of the police report, but that it was not severe, and that Gerst did *not* steal the money. *Id.* at 468, 568 A.2d at 858. Thus, a judgment was entered for the defendants.

Immediately following the verdict, the court, *sua sponte*, scheduled a sanctions hearing on the issue of Maryland Rule 1-341, Bad Faith - Unjustified Proceedings. *Id.* Although having only allowed three business days in between, the court