J O I N T C E N T E R
AEI-BROOKINGS JOINT CENTER FOR REGULATORY STUDIES

Why the Minnesota Supreme Court Should Overturn a Lower Court Decision on Price-Setting: Part 2

Robert H. Bork and Robert E. Litan

Brief 02-2

June 2002

Ronald Peterson, et al. individually and on behalf of all others similarly situated, Respondents, vs. BASF Corporation, Appellant.	Court of Appeals Docket No. C3-02-857

REQUEST FOR LEAVE TO PARTICIPATE AS AMICUS CURIAE

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IN SUPPORT OF PETITIONER BASF CORPORATION

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Proposed Amicus Curiae

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TO: THE MINNESOTA COURT OF APPEALS

Following Rule 129 of Minn. R. Civ. App. P, Robert H. Bork and Robert E. Litan, scholars of the AEI-Brookings Joint Center for Regulatory Studies ("AEI-Brookings"), request leave to file a brief amicus curiae in support of Appellant BASF Corporation and to recommend that this Court reverse the judgment below.

NATURE OF APPLICANT'S INTEREST

Applicants' interest in this case reflects a broad public policy perspective. AEI-Brookings was established by the American Enterprise Institute ("AEI") and the Brookings Institution (two leading "think tanks") in 1998 to help improve the economic regulatory process. The AEI, founded in 1943, sponsors original research relating to policy issues affecting the foundations of a free society, including competitive free enterprise in the open market. The Brookings Institution, founded in 1916, also promotes scholarship to improve the quality of U.S. public policies. Both institutions are independent, non-partisan, non-profit organizations which support and publish the work of first rank scholars. We, as individual applicants, participate as scholarly experts in studies of the costs and benefits of various regulatory initiatives and

programs, as well as judicial proceedings that have regulatory implications, such as this case. We have both filed several briefs stating public interest positions in U.S. courts. This appeal concerns a significant departure from settled law that can have important implications for economic regulation throughout the United States.

REASONS WHY AN AMICUS CURIAE BRIEF IS DESIRABLE

We as scholars of AEI-Brookings are here concerned with the harm to competition resulting from trial court rulings admitting evidence and adopting jury instructions that allowed the jury to find causation of injury and damages for consumer fraud based on its view of "unfair" pricing and "unfair" disclosure when different prices are charged for two products -- not leaving it to the market to decide what is a fair price. This is economically harmful as a general matter; it is especially harmful where the two products are separately patented and sold in separate fields of use. We, as scholars of AEI-Brookings, also will address rulings that allowed a jury to find causation of injury and damages based on plaintiffs' blatantly illegal "right-to-boycott" claim. Plaintiffs asserted they were fraudulently denied access to information about a product which, if possessed, would have enabled them to organize an effective horizontal group boycott of that product's sales to drive down its price. The antitrust laws do not permit this kind of self-help. Moreover, plaintiffs' lost opportunity to organize a boycott is too speculative and remote to support their claim. Our views on these three judicial errors have not yet been presented to this Court.

The application of the New Jersey Consumer Fraud Act by the Minnesota trial court violates the Due Process Clause of the Fourteenth Amendment of the U.S. Constitution under the 80-year-old precedent of United States v. L. Cohen Grocery Co. 255 U.S. 81 (1921). In Cohen, a seller of sugar was charged with violating a Missouri law making it unlawful for a merchant to set an unjust or unreasonable price for "necessaries" sold in the market. Without dissent, the

U.S. Supreme Court found the statute unconstitutionally vague, leaving open "the widest conceivable inquiry, the scope of which no one can foreshadow or adequately guard against" as to what is a reasonable price (Id. At 89). A precondition for the justiciability of an issue is establishing satisfactory criteria for judicial determination of what may be presented to a fact finder. Baker v. Carr, 369 U.S. 186, 210 (1962). However, no such criteria were put forward or applied in this case. The jury was permitted the unguided discretion to decide that the price difference between the two separately patented and separately marketed BASF products was sufficient and appropriate proof of liability and damages. The verdict creates the awful possibility that BASF, and any other business subject to the New Jersey Consumer Fraud Act, or another like it, face penal sanctions anywhere in the United States for the "unreasonableness" of charging lawfully different prices. Plaintiffs, at an early stage in this litigation, disavowed, as they should have, any claim of illegal price discrimination by BASF. Consumer fraud statutes are not back door price discrimination laws.

This bad law is based on bad economics because it invites a jury's subjective and unguided judgment of reasonable price. It is law, based on standard economics, that a private seller has the right to set whatever price it wants, and to sell or not sell to whomever it chooses. If the price is too high, or the offer to sell excludes too many potential customers, or not enough relevant information about the product is made publicly available, other suppliers are likely to enter the market and offer more choice, at better prices, with better information. Supply and demand alone determine what are objectively reasonable prices -- not courts, price administrators, or juries. Federal and state antitrust laws, including those of New Jersey and Minnesota, have long recognized "the right of trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." United States v. Colgate & Co., 250 U.S. 300, 307 (1919).

The trial court below restricts this right. It leads to bad policy -- that a price differential between different classes of customers in different markets for different patented products is damaging to consumers who lack access to a less expensive product caused by lack of information, field of use licenses, or regulatory or labeling restrictions under federal or state law. This trial result undermines what are ubiquitous and beneficial marketing and pricing strategies, long practiced and promoted in U.S. marketing. The mischief set afoot by letting juries decide the reasonableness of prices, and the adequacy of disclosure of differential prices, in determining whether there has been deception in the marketplace is hard to overestimate. This is both radical economic policy and a serious departure from settled law.

There is a second serious error with a potentially profound adverse effect. At trial, the plaintiffs offered evidence of causation and injury premised on the lack of sufficient information (provided by BASF) about Poast Plus®, one of its patented pesticides, to permit buyers to exercise concerted action to force a reduction in the price of another patented pesticide, Poast®. The "fraud" to which plaintiffs pointed were lawful marketing strategies because there is no legal duty on BASF to disclose the information plaintiffs lack. Plaintiffs have asserted at trial that by being fraudulently denied this information, they have been deprived of the opportunity to organize and implement a horizontal group boycott of Poast®. The U.S. Supreme Court has found such boycotts to be *per se* unlawful, whether organized by sellers or buyers. Even if the concerted boycott, which non-disclosure "frustrated," sought in part to influence governmental action, that is no defense. Federal Trade Commission v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 423 (1990). One cannot sustain damages by being deprived of the opportunity to break the law.

Third, to the extent plaintiffs' claimed damages do not just depend upon being deprived of the opportunity to commit a crime, as a matter of law, this forgone opportunity for self-help is

too speculative and remote to justify recovery. It is "hornbook law" that damages are not recoverable where they are "speculative or their amount and nature" is unprovable. Zenith Radio Corp. v. Hazeltine Research, Inc., 401 U.S. 321, 339 (1971). The verdict below is a direct challenge to U.S. laws and policies promoting free and open market competition.

These are among the issues our proposed brief will address. We believe our expertise as scholars of AEI-Brookings on these matters can be helpful to this Court.

CONCLUSION

For these reasons, we respectfully urge this Court to reverse the judgment below and to grant us leave to participate in proceedings before this Court as amicus curiae.

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Respectfully submitted,

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