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judgment is appropriate. The Supreme Court, therefore, reversed the court of appeals and concurred with the district court's grant of summary judgment in favor of the Japanese manufacturers. Nonetheless, the Supreme Court remanded to the circuit court of appeals for consideration of other plausible motives for the alleged predatory pricing conspiracy. On remand, in *In re Japanese Products Antitrust Litigation,* 807 F.2d 44 (3d Cir. 1986), the court of appeals found no other rational motives for the alleged conspiracy and, thus, no genuine issue for trial.

Dissenting opinion

In their dissent, Justices White, Brennan, Blackmun, and Stevens faulted the majority's invasion of the fact finder's province. The American manufacturers presented evidence of the existence of the conspiracy and harm caused by the conspiracy. The dissenters contended that the Court acted as the fact finder when it relied on its own "economic theorizing" over that of the American manufacturers' expert. The dissenters agreed with the court of appeals that the American manufacturers should have had the opportunity to present their evidence to a fact finder to decide whether the Japanese manufacturers used a predatory pricing conspiracy to violate the antitrust laws.

Sufficiently stated antitrust claims held arbitrable under licensing agreement

by Alex Goldman

In ***PPG Industries, Inc. v. Pilkington plc*, 825 F. Supp. 1465 (D. Ariz. 1993)**, the United States District Court for the District of Arizona faced two motions by the defendant ("Pilkington"): (1) a motion to dismiss the monopolization and attempted monopolization counts in the plaintiff's ("PPG") complaint; and (2) a motion to stay proceedings and compel arbitration or dismissal of the claims filed. Relying on the standards for dismissal and PPG's allegation that Pilkington possessed monopoly power in specific markets, the court denied the motion to dismiss the monopolization and attempted monopolization claims. However, persuaded by the language of the 1962 Licensing Agreement ("Agreement") between PPG and Pilkington and the Federal Arbitration Act, the court granted the motion to stay the proceedings and compel arbitration of PPG's claims in England. The court retained jurisdiction over the matter to make sure the arbitration would be carried out in accordance with United States antitrust law.

PPG files antitrust action

In the late 1950s, Pilkington successfully developed and patented a float process for the manufacture of flat glass. Pilkington licensed this technology to PPG under the 1962 Agreement. Pilkington also entered into over 50 licensing agreements involving the operation of 150 float glass manufacturing plants around the world.

In the mid-1970s, PPG patented its own float process, called the "LB process," and made efforts to license, build, develop, and operate plants using the LB technology. These efforts led to a series of disputes between PPG and Pilkington in which Pilkington claimed the LB process was a derivative of its own technology and, therefore, fell under the 1962 Agreement. Pursuant to the Agreement's provisions, Pilkington initiated arbitration proceedings in London for the resolution of these disputes.

The latest dispute arose in 1985. This dispute stemmed from PPG's efforts to involve itself in the construction and operation of an LB process-based flat glass plant in China. Pilkington again submitted the issue to arbitration, and a resolution was reached in 1992. The arbitrators decided that PPG would have independently developed the LB process in due time because of its efforts in China. Nevertheless, the arbitrators awarded Pilkington a "national" royalty. Later in 1992, PPG filed a complaint against Pilkington, alleging antitrust violations under Section 2 of the Sherman Act. The defendant responded with the aforementioned motion to dismiss and motion to stay proceedings and compel arbitration.

Court rejects Pilkington's argument for dismissal

Pilkington contended that the monopolization and attempted monopolization counts failed to state claims upon which relief could be granted and, thus, filed a motion to dismiss these claims pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure. Pilkington argued that in order for PPG's monopolization and attempted monopolization claims to survive dismissal, PPG must have alleged facts that if true would establish a monopoly and a dangerous probability of monopolization. According to Pilkington, the only alleged fact relating to this proof was PPG's allegation that Pilkington enjoyed a 20% share of the worldwide market for flat glass. Pilkington contended that this 20% share was insufficient, as a matter of pleading, to support either the monopolization or the attempted monopolization claims. In support of its position, Pilkington relied upon *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919 (9th Cir. 1980), where the court found a market share of 65% to be sufficient to state an antitrust claim. Pilkington also cited a Supreme Court case, *Spectrum Sports v. McQuillan*, 113 S. Ct. 884 (1993), for the proposition that inquiries as to unfair tactics are not enough for attempted monopolization claims. According to *Spectrum*, factors such as the nature of the product, the specific geographic market involved, and the defendant's economic power in that market must be addressed by a plaintiff alleging Section 2 violations.

The court rejected Pilkington's contentions based upon its application of the standards for a 12(b)(6) motion. Based upon the rules set forth in *Abramson v. Brownstein*, 897 F.2d 389 (9th Cir. 1990), the court treated all of the allegations made by PPG as true and resolved any doubt in PPG's behalf. Furthermore, the court applied the standard used in *Newman v. Universal Pictures*, 813 F.2d 1519, 1522 (9th Cir. 1987), which stated that: "[i]n an antitrust action, the complaint need only allege sufficient facts from which the court can discern the elements of an injury resulting from an act forbidden by the antitrust laws."

The court first applied these rules and standards to the issue of whether PPG's allegation of a 20% worldwide share would be sufficient to state a claim. The court acknowledged that such an allegation, by itself, would not withstand a 12(b)(6) motion. However, resolving every doubt on the complaint in PPG's behalf, the court determined that while PPG alleged a general worldwide market share of 20%, allegations were also made that PPG enjoyed a 100% market share in specific geographic markets such as Australia and Argentina. These allegations, taken as true, were sufficient for the court to hold the monopolization and attempted monopolization claims capable of withstanding a motion to dismiss. The court also rejected Pilkington's argument relating to the "monopoly power screen" set up by the Supreme Court in *Spectrum Sports*. The court did not view *Spectrum Sports* as applicable to the instant case since it did not deal with a motion to dismiss and, furthermore, stood for the notion that mere allegations of "exclusionary conduct" absent allegations of dangerous probability of monopolization would suffice for Section 2 claims. Therefore, the court denied the motion to dismiss the monopolization and attempted monopolization claims.

Dispute is arbitrable under licensing agreement

The court also faced the motion to stay proceedings and compel arbitration. In considering this motion, the court resolved two issues: (1) whether PPG's claims were arbitrable under the Agreement; and (2) whether the Agreement constituted a waiver of the application of United States antitrust law. The pertinent portion of the Agreement was found in Article XII, which provided:

> Any dispute involving the meaning, interpretation, application, or violation of the provisions of this agreement which cannot be settled by discussion and mutual accord shall be settled by arbitration . . . . . The seat of the arbitration shall be in London, and the arbitration shall be in accordance with the laws of England.

Pilkington asserted that the language of Article XII was meant to be broadly construed and that PPG's claims fell under the "disputes" meant to be arbitrated under the Agreement. Furthermore, Pilkington contended that a court resolving PPG's claims would, inescapably, have to examine the application, meaning, and interpretation of the Agreement which was designated exclusively for arbitration in Article XII. Moreover, Pilkington noted that the motion was brought under the auspices of the Federal Arbitration Act ("FAA"). 9 U.S.C. §§ 1-16, 201-08. Pilkington argued that the FAA represents a federal policy favoring arbitration and that this policy "applies with special force in the field of international commerce." *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614 (1985). Pilkington proceeded to argue that the federal law superseded the court's discretion, limiting its role to determinations of arbitrability and the enforcement of subsequent arbitration decisions.

Finally, Pilkington stated that the Agreement did not preclude the application of United States antitrust law during the arbitration. According to Pilkington, Article XII's provision that the arbitration would be "in accordance with the laws of England" referred to a choice of procedural law for the arbitration process rather than a choice of substantive law. Pilkington supported its position by referring the court to the language of Article XIII, which mandated English law as the law governing the provisions of the Agreement. Pilkington asserted that if Article XII mandated English law as substantive law, Article XIII would be redundant.

The court, based on the broad language of the Licensing Agreement and the federal policy favoring arbitration embodied in the FAA, especially in international commerce circumstances, granted Pilkington's motion to stay proceedings and compel arbitration. In doing so, the court rejected PPG's argument that *Mitsubishi* was distinguishable due to a much narrower arbitration agreement in the instant case. Also, the court remained unpersuaded by PPG's position that the prevailing law at the time the parties formed the 1962 Agreement controls as the primary indicator of the parties' intentions.

United States antitrust law not waived by agreement.

The court concluded that the language of Article XII refers to procedural rather than substantive law, accepting Pilkington's contention that to hold otherwise would render Article XIII a redundancy. The court acknowledged PPG's concern that the application of English law, which does not recognize the Sherman Act, would serve as a complete bar to PPG's recovery. Therefore, the court held that the Agreement does not preclude the application of United States antitrust law. However, the court remedied the situation by obtaining a stipulation from Pilkington that all arbitrations would be conducted by applying United States antitrust law as the substantive law relevant to the dispute, regardless of the conflict with correlating English law. Moreover, the court retained jurisdiction over the matter to ensure accordance with the court's decision.

Conspiracy claim based upon previous decree and parallel business behavior not sufficient to establish antitrust violation

by Jennifer A. Hovaniec

In ***Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537 (1954)**, the United States Supreme Court held that mere proof of parallel business behavior by motion picture producers and distributors does not conclusively establish a conspiracy to restrict first-run movies in violation of the Sherman Act. Additionally, the Court held that prior decrees involving the respondent motion picture producers and distributors ("respondents") are only prima facie evidence of an alleged