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Mandatory Inclusion of Commercial Leases in a Cooperative Conversion of Rent Stabilized Apartments Did Not Violate the Sherman Act

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The court rejected this argument. If a class action suit were allowed, uninsured depositors would race to the FDIC in order to assert a preferred claim. The court concluded that this result would make a "mere mockery" of the equality promised by the National Bank Act. Where a fraud affected or potentially affected all depositors, all depositors should be treated the same. Therefore, the court held that a pro rata distribution of assets among all of Penn Square's depositors was the only fair remedy.

Eileen B. Libby

Mandatory Inclusion of Commercial Leases in a Cooperative Conversion of Rent Stabilized Apartments Did Not Violate the Sherman Act

Recently, in ***305 East 24th Owners Corp. v. Parman Co.***, 714 F. Supp. 1296 (S.D.N.Y. 1989), the United States District Court for the Southern District of New York held that a seller's including four long term commercial leases in its offer to convert rent stabilized apartments into cooperative units did not constitute an illegal tying arrangement in violation of the Sherman Act. 15 U.S.C. §§ 1 - 7 (1989). In applying the Second Circuit's five-pronged test to determine whether an illegal tying arrangement existed, the court ruled that the tenants failed to show that the sellers had economic power in the tying product market or that the seller's acts had a substantial anticompetitive effect in the tied product market. Additionally, the court concluded that the commercial lease provision of the conversion contract was not unconscionable because the tenants had meaningful choices in deciding to enter into the contract and the contract terms were not unreasonably favorable to the sellers.

Background

In August of 1980, Parman Co. ("Parman") submitted to the New York State Attorney General a preliminary offering plan to convert the rent stabilized apartments at 305 East 24th Street to cooperative ownership. Under a cooperative conversion, the tenants purchase stock in and become sole owners of the corporation that owns the residence building. The amount of stock a tenant owns represents the value of that tenant's residence. Parman's preliminary offering plan provided that any tenant who chose not to buy into the cooperative would have to vacate the building when it was converted from an apartment to a cooperative. In addition, the plan required that Owners Corp. (the corporation of tenants which owned the building under the cooperative agreement) enter four long term leases enabling the sellers to retain control of the commercial management services, garage services, laundry services, and building management services.

The tenants formed the 305 East 24th Street Tenants' Association ("Tenants' Association" or "Association") and took a number of actions to improve their position in negotiating the cooperative conversion agreement. First, the Tenants' Association retained legal counsel familiar with cooperative conversions. Second, eighty percent of the tenants signed No-Buy Agreements which stated that no tenant who signed the Agreements would purchase cooperative shares until two thirds of the tenants signed releases from the Agreements. Third, the Association sent letters to the tenants on a continuing basis to inform them of the progress in the negotiations. The letters made particular reference to the disputed long term leases.

On January 25, 1983, Parman submitted a formal offering plan to the New York State Attorney General's Office. The formal plan contained the same commercial lease agreements. The cover of the plan included the admonition "See 'Special Risks' Page 1" in bold print. A portion of the "Special Risks" section read, "These leases may not be 'arms-length' transactions and may result in [Owners Corp.] realizing *less* than the full economic value of the garage space and commercial space." (emphasis in the original) Unlike the preliminary plan, however, the formal plan proposed a non-eviction conversion. Thus, if a tenant chose not to buy her shares of the cooperative, she could remain in the building as a rent stabilized tenant.

On August 12, 1983, the Tenants' Association sent Parman a letter proposing to reduce the price per share in the Owners Corp., to reduce the downpayment required to purchase shares, and to increase the rent for the commercial leases. On April 6, 1984, after negotiating with the Tenants' Association, Parman amended the offering plan to incorporate a number of the Association's demands: the price per share in the Owners Corp. was reduced by 25% for current tenants buying into the cooperative; the down payment was reduced from 10% of the purchase price to a flat sum of one thousand dollars; Parman agreed to obtain financing for those tenants unable to acquire it otherwise; and Parman agreed to pay thirty-five thousand dollars of the Tenants' Association's legal fees. The commercial leases were left intact.

Following a Tenants' Association question and answer session regarding the amended plan, the Association's five-member Executive Committee recommended that the tenants sign releases from the No-Buy Agreements. By October 25, 1984, the date of the closing, eighty-five percent of the tenants had signed agreements with Parman to buy shares in Owners Corp.

Owners Corp. sued Parman in the United States District Court for the Southern District of New York to prevent the conversion. Owners Corp. argued that the conversion agreements violated the Sherman Act antitrust provision and that the commercial leases were unconscionable.

Subject Matter Jurisdiction

Parman argued that the district court did not have subject matter

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jurisdiction over the Sherman Act antitrust claim. Previously, the United States Supreme Court had established alternative "in commerce" and "effect on commerce" tests for determining a federal court's jurisdiction over a Sherman Act claim. *McLain v. Real Estate Board of New Orleans, Inc.*, 444 U.S. 232 (1980). Under these tests, the plaintiff must show either that the defendant acted in interstate commerce or, if the activity was local in nature, that the defendant's actions had "an effect on some other appreciable activity demonstrably in interstate commerce." *Id.*, at 242.

Applying the "effect on commerce" test, the court rejected Parman's contention that the sale of the building together with the leases was a purely local activity. The court held that because of New York City's proximity to New Jersey and Connecticut, potential out-of-state competitors were effectively precluded from bidding on the management services provided for under the leases. Therefore, the conversion agreement affected interstate commerce and the court had jurisdiction over the antitrust claim. In addition, the court noted that it had diversity jurisdiction because four of the cooperative conversion stockholders resided outside of New York state and their purchases exceeded three hundred thousand dollars.

The Tying Claim

Owners Corp. alleged that Parman's conditioning the cooperative conversion on including the commercial leases imposed a tying arrangement in violation of section 1 of the Sherman Act. 15 U.S.C. § 1. In a tying arrangement, the sale of one product (the tying product) is conditioned on the buyer purchasing a different product (the tied product).

In order to establish an unlawful tying arrangement, a plaintiff must prove five elements: 1) that separate tying and tied products existed; 2) that the seller had sufficient economic power in the tying product market to coerce the buyer into accepting the tied product; 3) that the seller actually coerced the buyer into accepting the tied product; 4) that the sale had anticompetitive effects in the tied market; and 5) that the sale had a substantial effect on interstate commerce. Applying this test, the court held that Owners Corp. had established that separate products existed, that Parman coerced the buyers, and that the sale involved a substantial amount of interstate commerce in the tied product market. However, the court concluded that Owners Corp. failed to show that Parman had sufficient economic power in the cooperative conversion market or that the sale had anticompetitive effects in the tied product market.

Separate Tying and Tied Products. The court agreed with Owners Corp. that the building and the commercial leases represented two distinct products. In determining that two separate products existed, the court considered whether consumers would commonly seek to purchase the tying product (the building) separate from the tied product (the commercial leases). Parman argued that the sale of the cooperative units with the commercial leases represented one integrated product. The court disagreed and held that there was a demand for cooperative apartments separate from a demand for commercial, garage, laundry, and building management services. In fact, Parman had converted six other buildings into cooperative apartments exclusive of such leases.

Coercion. Next, Owners Corp. argued that Parman coerced it into accepting the leases as part of the conversion. The court agreed for two reasons. First, although the tenants willingly subscribed to the plan, the leases were clearly detrimental to the tenants' interests. Second, the court believed the testimony provided by Owners Corp. that Parman refused to sell unless the leases were included. The Tenants' Association objected to the leases throughout the negotiations and the tenants ultimately agreed to the leases because they thought it necessary to achieve the conversion.

Effect on Interstate Commerce. The court also held that the sale had a substantial effect on interstate commerce. In determining whether the effect of the sale was substantial, the court focused on the dollar amount involved rather than the percentage of the tied product market which was foreclosed by the arrangement. The commercial leases encompassed $300,000 a year in management services over a forty year period. The court held that the dollar amount constituted a substantial amount of interstate commerce in the tied product market.

Economic Power in the Tying Product Market. To establish that the seller had economic power, a plaintiff must show that the seller controlled a large share of the market in the tying product, or that the seller had some advantage not shared by its competitors. Owners Corp. argued that Parman had an advantage over its competitors because 305 East 24th, being the tenants' home, was unique. Therefore, Parman had the economic power to raise prices and compel the tenants to accept "burdensome" terms. The court rejected the argument because the tenants had not shown that the building was irreplaceable or dissimilar to others on the market. Moreover, nearly half of the tenants assigned their purchase rights to someone else or sold their unit within three years of the conversion.

Alternatively, Owners Corp. argued that the building was unique because it represented a once in a life time opportunity to purchase an apartment for an "insider" (discounted) price. The court stated that to construe this as bestowing economic power on the seller would "turn anti-trust law on its head." 714 F. Supp. at 1307.

The court noted that Parman could not offer a cooperative unit to an outsider unless a tenant refused to purchase her shares and did not stay in the building as a rent stabilized tenant. Because the tenants could remain without buying into the cooperative, Parman had to offer the cooperative units at substantially less than their market value. Therefore, the court held that Parman did not have substantial economic power in the tying product market.

Anticompetitive Effects in the Tied Market. Owners Corp. offered testimony that the cooperative agreement precluded other businesses from bidding on the services provided under the commercial leases. The court stated, however, that the agreement must affect an "appreciable" number of buyers in the tied market, thus foreclosing a substantial volume of commerce from competition. In this case, the leases pertained to commercial, garage, laundry and management services in only one building. The court held that any effect the sale had on the vast market for these services was minuscule. Additionally, the court recognized that before the cooperative conversion Parman owned the building and provided the management services, thereby precluding other vendors of management services. After the conversion, Parman continued to provide these services and, therefore, the agreement did not *diminish* competition in the tied market. Therefore, the court rejected Owners Corp.'s Sherman Act antitrust claim.

Unconscionability Claim

The court next considered whether including the commercial leases in the conversion plain was unconscionable. In order to establish an unconscionability claim under New York law, the plaintiff must establish two elements: first, that one of the parties lacked any meaningful choice; and second, that the contract terms were unreasonably favorable to the other party. Addressing the first prong of the unconscionability test, the court concluded that the tenants exercised a meaningful choice because they formed a tenants association, were represented by legal counsel, engaged in negotiations over several months and entered into the cooperative agreements aware of the disadvantageous leases. Also, because the plan was a non-eviction conversion, the tenants were not compelled to purchase their units but could have remained in the building indefinitely as rent stabilized tenants. Moreover, because the tenants purchased their units significantly below market value, the court did not consider them victims of an unconscionable contract.

Regarding the second prong of the unconscionability test, the court concluded that the commercial leases were not unreasonably favorable to Parman when considered in light of the agreement as a whole. When there was an eviction clause in the plan, the tenants signed the No-Buy Agreements. However, after the eviction clause was removed, the tenants rescinded their No-Buy Agreements. The court reasoned that if the tenants believed the commercial leases were so disadvantageous as to make the entire plan inequitable, the tenants would not have rescinded their No-Buy Agreements. Therefore, the court also rejected Owners Corp.'s unconscionability claim.

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Eliminating Abusive Collection Practices by Third Parties Under the Federal Fair Debt Collection Practices Act

Recently, the Supreme Court of Wyoming ruled on the applicability of the federal Fair Debt Collection Practices Act ("FDCPA" or "Act"), 15 U.S.C. §§ 1692 to 1692o (1989), to a Wyoming collection agency collecting a check upon which the drawer had stopped payment. In ***Johnson v. Statewide Collections, Inc.,*** 778 P.2d 93 (Wyo. 1989), the court held that the collection agency violated the FDCPA by failing to properly verify the alleged debt after the consumer indicated that he disputed the debt, by asserting an amount due that the agency was not entitled to recover, and by contacting the debtor when the agency was, or should have been, aware that the debtor was represented by an attorney. The court also held, however, that the collection agency did not violate the FDCPA by using its "doing business as" name in its letters to the debtor, or by failing to advise the debtor that it had returned the dishonored check to the retail store.

Background

On November 11, 1986, Freddie Johnson ("Johnson") purchased a shotgun from a retail store for $129.99 and paid for it by check. Johnson later discovered that the shotgun was defective. He returned the shotgun to the store and requested a refund. The store employee accepted the shotgun but refused to return Johnson's check. Johnson contacted his bank and stopped payment on the check. When Johnson's bank returned the check to the store, the store sent the check to Statewide Collections, Inc. (doing business as "Check-Rite") for collection.

Johnson attempted to resolve the matter by contacting the store, but the store referred him to CheckRite. When Johnson contacted CheckRite, he was referred back to the store and told that he must contact the store with any problems he had with the merchandise or his check.

On November 21, CheckRite sent a "Return Check Notice" to Johnson demanding that he pay $144.99 directly to CheckRite. The amount demanded included a $15 "service charge" in addition to the merchandise price. Johnson immediately contacted his attorney who wrote a letter to the store stating that Johnson disputed the alleged debt. A copy of the attorney's letter was sent to CheckRite.

After receiving the letter from Johnson's attorney, CheckRite sent a second notice directly to Johnson. This notice demanded

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