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defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto.'

The trial court judge had admitted the decrees into evidence. However, he explained to the jury that the respondents had previously conspired to restrict first-runs and clearances in violation of the antitrust laws and that this violation could be used as prima facie evidence to support Theatre Enterprises' claim. The trial court judge, nonetheless, instructed the jury that Theatre Enterprises could not rely exclusively upon that evidence; it needed to affirmatively show that

the respondents conspired to restrict Theatre Enterprises to unreasonable clearances or second-run features. The Court concluded the instructions did not deprive Theatre Enterprises of any of the benefits conferred by Section 5 of the Clayton Act.

Further, the Court noted that the *Paramount* decrees were not based upon any findings regarding first-run features or clearances in Baltimore theaters. Moreover, the conspiracy in the *Paramount* case existed as of 1945 and was enjoined by June 1948; the conspiracy alleged in the instant case began in February 1949. In order to prevail on a conspiracy charge, Theatre Enterprises needed to show additional

evidence connecting the *Paramount* decrees to Theatre Enterprises. The Court explained that Theatre Enterprises could not rely entirely on its allegations of antitrust violations based solely upon a *previous* decree entered against the respondents.

In conclusion, a conspiracy under these circumstances, according to the Court, does not result from the mere uniformity of business behavior; a previous finding of a conspiracy does not conclusively establish a conspiracy. Accordingly, the Supreme Court affirmed the decision of the trial court and the Court of Appeals for the Fourth Circuit in favor of respondents.

District Court held Sherman Act will not reach conspiratorial conduct occurring solely in foreign jurisdictions

by Jennifer Bonjean

Editor's note:

*The United States Court of Appeals for the First Circuit reversed and remanded the following decision on March 17, 1997. The court noted that whether the Government may seek criminal prosecution under Section 1 of the Sherman Act based solely on foreign activity is one of first impression. The court held that international conduct having "substantial and intended effect" within the United States borders may constitute a criminal violation under Section 1. For further information, see *United States v. Nippon Paper Industry Co., Ltd.*, No. 96-2001, 1997 WL 109100 (1st Cir. (Mass.)).*

The United States Government brought a criminal

indictment against Nippon Paper Industries Co., Ltd. ("Nippon"), a Japanese corporation, for violating Section 1 of the Sherman Act, 15 U.S.C. § 1 (1996). The Government alleged that in 1990, Nippon's predecessor, Jujo Paper Co., Inc. ("Jujo"), conspired to fix prices of fax paper sold in the United States. In *United States v. Nippon Paper Industry Co., Ltd.*, 944 F. Supp. 55 (D. Mass. 1996), the United States District Court for the District of Massachusetts granted Nippon's motion to dismiss. The court held that the Government failed to adequately plead its claim that Nippon established a vertical price fixing agreement with Japanese trading companies which ultimately sold Nippon's fax paper to American consumers. Furthermore, the court held that

any conspiratorial conduct by Jujo could not be reached by the court because the criminal provisions of the Sherman Act may not be applied to actions occurring completely outside the boundaries of the United States.

In 1993, Jujo and Sanyo Kokusaku Co., Ltd. merged to form Nippon. In 1990, Jujo manufactured fax paper in Japan and sold the paper to, among others, two Japanese trading companies, Japan Pulp & Paper Co., Ltd. ("JPP") and Mitsui & Co., Ltd. ("Mitsui"). JPP and Mitsui exported the fax paper to their subsidiaries in the United States, which then sold the paper directly to American customers. At no point did Jujo trade directly with the United States. JPP and Mitsui were Jujo's sole outlets to the United States.

The government's conspiracy theory

The Government contended that Jujo and other Japanese manufacturers of fax paper conspired to increase the price of fax paper imported into the United States at meetings held in early 1990. The Government also named the Japanese trading companies and their American subsidiaries as co-conspirators in the scheme. The Government asserted that the Japanese trading houses and their American subsidiaries agreed to sell the paper at inflated prices but acknowledged that neither party attended the meetings. Nippon moved for a dismissal of the indictment on several theories: (1) the court lacked personal jurisdiction over the alien corporation; (2) the Government failed to state a claim under Section 1 of the Sherman Act; and (3) the Government failed to sufficiently plead successor liability. Since the court found for Nippon on the second theory, it did not address the third claim.

Jurisdiction requires more than personal service on alien corporations

On January 4, 1996, the Government served Seiichi Masuko ("Masuko"), the general manager of Nippon's Seattle office, with a criminal summons by certified mail and subsequently made in-hand service to Masuko. The Government maintained that Rule 4 of the Federal Rules of Criminal Procedure authorized the federal district court's jurisdiction over Nippon because the Government served Masuko, an agent of the corporation, within the United States. Rule 4 allows for nationwide service of process on a corporation by delivering a copy of the

summons to the corporation's authorized agent if such service is made within the territorial limits of the United States. The Government contended that service on Masuko within the boundaries of the United States sufficiently established "presence" of Nippon pursuant to Rule 4, thereby sanctioning the court's jurisdiction. In support of this argument, the Government cited *Burnham v. Superior Court*, 495 U.S. 604, 622 (1990), in which the Supreme Court held that minimum contacts are not necessary to establish personal jurisdiction on individuals served within the territorial boundaries of the United States.

While recognizing the validity of the principle set forth in *Burnham* as it pertains to individuals, the court rejected the application of the *Burnham* principle to corporations. The court held that mere service on an alien corporation's agent within the United States does not by itself establish federal jurisdiction over that corporation. Unlike individuals, corporations constitute legal entities which are generally "present" in their state of incorporation. The court concluded that although the rule of nationwide service presents minimal difficulties for making service on American corporations, the rule fails to function effectively as applied to alien corporations. First, serving an alien corporation at its place of incorporation would require serving the corporation on foreign grounds, thereby overextending an American court's jurisdiction. Second, the court reasoned that the requirement of service alone on an agent of an alien corporation would produce absurd and unsound results. For example, the court expressed concern that theoretically the president of an alien corporation could be served while vacationing in the United States, thereby establishing personal jurisdiction over the corporation. In fact, this type of absurd result led to the development of the minimum contacts test introduced in *International Shoe Co. v. Washington*, 326 U.S. 310, 311 (1945). In *International Shoe*, the Court found that mere service on the agent of a corporation within a state does not establish personal jurisdiction over that corporation. Rather, a state may only obtain personal jurisdiction over a corporation if minimum contacts with that state can be established. In *Nippon*, the court applied the *International Shoe* rule and held that mere service of process on an officer of an alien corporation will not render the corporation "present" for jurisdictional purposes. Thus, the *Nippon* court held that a forum cannot exercise personal jurisdiction over a corporation

without establishing the corporation's minimum contacts with a particular forum.

Clayton Act applies only to civil actions

In finding that the Clayton Act, 15 U.S.C. § 22 (1973), applies only to civil actions, the *Nippon* court held that Rules 4 and 9 of the Federal Rules of Criminal Procedure were appropriately applied in this case. The court rejected Nippon's argument that Rules 4 and 9 do not provide federal district courts with jurisdiction in criminal antitrust actions based solely on national contacts. In its motion to dismiss, Nippon contended that Section 12 of the Clayton Act is the only provision for nationwide service in antitrust cases. Section 12 provides in part that "all process in [antitrust] cases may be served in the district of which it [the defendant] is an inhabitant." Nippon argued that because the venue requirement was not satisfied in accordance with the Clayton Act, the federal district court could not exercise jurisdiction over Nippon. The court dismissed Nippon's argument, finding that Congress impliedly intended Section 12 to apply to civil actions. The court reasoned that even if Section 12 applied to criminal actions, Congress could not replace existing federal venue and service of process rules.

Next, the court addressed Nippon's alternative argument that jurisdiction could be established on the basis of national contacts only if the criminal provision limited venue to a federal district in which the alien corporation could be found. In refuting this contention, the court explained that Article III, Section 2 and the Sixth Amendment of the United States Constitution already dictates limitations on the venue of criminal prosecution. Accordingly, the defendant's proposed added restrictions would be inappropriate. Furthermore, the court cited *United States v. Union Pacific Railroad*, 98 U.S. 569, 603-04 (1878), to support the proposition that Congress possesses the power to designate any place in the United States to hear claims arising under federal law. In *Union Pacific*, the Supreme Court held that Congress could create a court in Washington, D.C. to exclusively hear certain federal claims, regardless of the defendant's contacts with Washington, D.C. Thus, the district court rejected Nippon's argument that Rule 4 limits personal jurisdiction of a defendant to those federal districts with which the defendant has sufficient contacts.

Contacts are key to establishing jurisdiction

The determination of whether the court had jurisdiction over Nippon ultimately depended on whether Nippon possessed sufficient contacts with the United States. Nippon operates two offices in Seattle, Washington. One of these offices conducts market research and quality inspections and supervises the transportation of over \$270 million worth of newsprint, publishing paper, and wood chips purchased by Nippon in the United States. The other Seattle office is responsible for acquiring approximately \$40 million in logs and lumber from suppliers in the United States and exporting the material to manufacturing facilities in Japan. Nippon pays operating expenses out of American held bank accounts. Moreover, Nippon owns twenty percent of a Washington paper manufacturing company which generates annual revenues of approximately \$350 million. The substantial evidence advanced with regard to Nippon's business dealings in the United States convinced the court that Nippon had established sufficient contacts with the United States to justify personal jurisdiction over the foreign corporation.

Sherman Act may not reach criminal acts conducted outside of the United States

As a second basis for moving to dismiss the indictment, Nippon argued that the Government failed to state a claim under Section 1 of the Sherman Act. Section 1 of the Sherman Act provides "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several states, or with foreign nations is declared to be illegal." The Government contended that Nippon and its predecessor, Jujo, conspired to sell fax paper being exported to North America at inflated prices and entered into a vertical price fixing scheme with Japanese trading houses and their American subsidiaries. In the alternative, the Government contended that Jujo's conspiratorial conduct was sufficient to support its claim even though the conduct occurred entirely in Japan. In support of this assertion, the Government argued that the Sherman Act may apply to conduct occurring outside of the United States when the effects of a corporation can be felt within the territorial limits of the United States.

The court found that the allegations in the indictment

against Nippon were insufficient to support the inference that Jujo and the Japanese trading houses entered into a vertical agreement. The court noted that the "essential" elements of a vertical agreement in violation of the Sherman Act must be present to sustain an indictment. The essential elements include the place, manner, means, and effect of an alleged violation. The indictment against Nippon alleged that: (1) Jujo directed the trading house to set certain prices for the fax paper; (2) Jujo communicated with the house to ensure that its directives were being followed; and (3) the trading houses distributed the fax paper to the American subsidiaries, which ultimately sold the paper in the United States. However, this evidence failed to convince the court that the existence, manner, and means elements of a violation existed between Jujo and the Japanese trading companies. The court declared that a Sherman Act violation requires some allegation of an express agreement or a description of conduct suggesting an agreement to conspire between the manufacturer and the trading companies. Besides the conspiratorial meetings that occurred in Japan in 1990, at which the trading companies were not present, the Government failed to introduce evidence to suggest that a vertical agreement arose between Jujo and the Japanese trading houses. The court held that neither the direction by Jujo to sell at increased prices nor the additional communication by Jujo to ensure compliance with that direction was sufficient to establish the existence of a vertical price fixing scheme. In support of its holding, the court cited *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764 (1984), in which the Supreme Court held that "compliance by a distributor with a manufacturer's unilateral directive to resell its product at a certain price does not constitute an agreement to conspire on the part of the distributor."

Furthermore, the court found no evidence to suggest that the alleged conspiracy produced any meaningful effects. The indictment alleged that Jujo sold fax paper to the trading houses at specified prices and supervised the trading houses to enforce compliance with those prices. However, the court concluded that these facts failed to establish a price fixing agreement between the Japanese trading companies and Jujo. Accordingly, the allegations presented in the indictment did not fulfill the elements required to establish a Sherman Act violation.

As a final theory, the Government argued that Jujo's conduct alone supported the indictment. The Govern-

ment relied partly on *Hartford Fire Insurance Co. v. California*, 509 U.S. 764, 795 (1993), in which the Supreme Court held that the civil provisions of the Sherman Act apply to foreign conduct that is meant to produce and does in fact produce some substantial effect in the United States. The *Nippon* court again rejected the Government's argument by finding that civil and criminal applications of a statute are not necessarily analogous. The court explained that a strong presumption exists against the application of federal statutes to conduct falling outside of the boundaries of the United States without express authorization by Congress. The court conceded that the civil application of the federal antitrust laws have overcome this presumption but refused to extend this position to criminal "conduct." Faced with a similar issue in *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978), the Supreme Court likewise rejected the argument that criminal responsibility should be based on strict liability under the Sherman Act. In support of its holding, the Supreme Court argued that Congress clearly created the Sherman Act with the intention of preserving the distinctions between criminal and civil offenses based on the language of the statute. The *Nippon* court analogized *Gypsum* and refused to expand application of the Sherman Act to criminal conduct occurring outside of the United States. In reference to *Gypsum*, the *Nippon* court proclaimed that "the traditional distinction between elements of civil and criminal charges must be maintained."

To further bolster its position, the court identified public policy considerations to illustrate that the application of the criminal provisions of the Sherman Act to conspiratorial acts occurring solely outside of the boundaries of the United States would over-extend the proper reach of the Sherman Act. The court acknowledged that antitrust provisions may be loosely interpreted in civil actions to allow the effective regulation of business practices. However, the court determined that the application of this approach to criminal actions would undermine the fundamental tenets of criminal law, predictability and fairness.

Furthermore, the court held that the legislative history of the Sherman Act offers no evidence to suggest that Congress meant to reach extraterritorial conduct when it passed the Act. In response to a hypothetical similar to the factual pattern in *Nippon*, Senator

Sherman remarked:

[E]ither a foreigner or a native may escape 'the criminal part of the law' by staying out of our jurisdiction . . . , but if they have property here it is subject to civil process [A foreigner] may combine or conspire to his heart's content if none of his co-conspirators are here or his property is not here. 21 CONG. REC. 2461, *reprinted in* Earl W. Kinter, ed., THE LEGISLATIVE HISTORY OF FEDERAL ANTI-TRUST LAWS AND RELATED STATUTES, Part I, THE ANTI-TRUST LAWS at 126 (1978).

Accordingly, the legislative history further justified the court's refusal to apply the criminal provisions of the Sherman Act to Jujo's conduct.

In summary, despite finding sufficient contacts to establish personal jurisdiction over Nippon, the United States District Court for the District of Massachusetts granted Nippon's motion to dismiss. The court explained that the Government's criminal indictment failed to present evidence of a vertical price fixing agreement between Jujo and the Japanese trading companies. Furthermore, the court held that the Sherman Act did not permit it to rule on alleged activities occurring solely outside of the United States.

NFL's fixed wage plan exempt from antitrust laws

by Paul Lukitsch

In certain circumstances, labor unions and multi-employer groups may negotiate free from the restrictions embodied in the federal antitrust laws. In *Brown v. Pro Football Inc.*, 116 S. Ct. 2116 (1996), the United States Supreme Court held that the National Football League ("NFL"), a group of football clubs, is immune from a player's association antitrust class action. The class action was brought after an impasse in negotiations; the football clubs, bargaining together, implemented a unilateral wage plan. In reaching its decision, the Court ruled that a "nonstatutory" antitrust exemption implicit in the federal labor laws applies. The Court stated that this exemption, which is aimed at encouraging the collective bargaining process, shielded the employers from the antitrust laws and allowed the implementation of a unilateral wage plan.

In 1987, a collective bargaining agreement between the NFL and the NFL Players Association ("Association"), a labor union, expired. During negotiations over a new contract, the NFL adopted a plan which would permit each club to establish a "developmental squad" of up to six "first-year" or rookie players. The developmental squad would include players who had failed to secure a position on a regular player roster, and under the plan, the developmental squad would play in practice games and occasionally in regular games as substitutes for injured players. The plan provided for these squad members to receive the same weekly salary as regular contracted players.

In April of 1989, the NFL presented this plan to the Association and proposed that the squad members should receive \$1,000 per week. The Association disagreed,

insisting that the developmental squad players should receive the same benefits from club owners as those provided to regular players, including allowing squad members to negotiate individually with club owners regarding their respective salaries. After two months of negotiations, the two groups reached an impasse. The NFL unilaterally implemented its last good faith offer at the proposed \$1,000 weekly salary and distributed uniform contracts to the club owners. The NFL then advised the club owners of resulting disciplinary actions to those owners who did not follow the weekly salary provisions.

As a result of the NFL's unilateral implementation, 235 developmental squad members subsequently brought this class action suit against the NFL and its member clubs. The Association claimed that the NFL's and the club owners' agreement to