BEFORE THE FEDERAL TRADE COMMISSION

Federal Trade Commission

v. Docket No C-1043-83

Superior Court Trial Lawyers' Association

PETITION FOR MODIFICATION OR INTERPRETATION OF INJUNCTIVE DECREE TO LIMIT SCOPE OF DECREE TO PRICE FIXING

Pursuant to 15 U.S.C. Section 45(b) and 16 C.F.R Section 2.51, the Superior Court Trial Lawyers' Association (the "Association"), by undersigned counsel, petitions for modification of the injunctive decree imposed by the Federal Trade Commission in the above-referenced case, which decree prohibits collective action among the Association's members for the purpose of "fixing, increasing, stabilizing or otherwise affecting in any way" the level of fees paid by the District of Columbia Superior Court to court-appointed lawyers. The Association makes this request because the modification in question is in the public interest.

Such modification is compelled on the grounds discussed above because the Association wishes to contemplate the possibility to protest collectively the Superior Court's anticipated suspension of payments due to the Association's members. The Court has engaged in two indefinite suspensions of payments to the Association's members in the last two years, and has indicated such a suspension will happen in the near future. In 1998 and 1999, the Court, pleading lack of funds, suspended the payment

of fees to lawyers who had previously rendered services to the Court under the Criminal Justice Act. Since each suspension was a breach of contractual obligations - and since Court officials threatened another such suspension and breach in the summer of the year 2000, which was prevented only at the last moment – the members of the Association now feel an urgent need to consult together as to the propriety and desirability of a possible work-stoppage if Court officials move toward another breach of contract in the future.

Ordinarily, given the legitimacy of the purpose of such consultations, Association members could feel free to discuss a possible work stoppage without any fear that their conduct would be questioned under the antitrust laws, the justification being essentially that the proposed consultations would not involve any effort to raise or lower the price of the lawyers' services. Thus the proposed consultations would be exclusively pro-competitive.

Counsel for the Association, however, have recently been advised by staff members of the FTC's Bureau of Compliance that, in their view at least, the proposed consultations would violate a ten-year old FTC injunctive decree whose sole purpose was to preclude Association members from using a group boycott as part of a scheme to raise and fix the prices for court- appointed legal services. With this enforcement threat, the result is that a decree designed to prevent unlawful price-fixing activities is being used to discourage perfectly legitimate efforts to enforce contractual obligations. Since the members of the Association simply cannot afford to pursue such legitimate efforts in the face of a serious and official threat of penalizing actions by the FTC, they are in obvious need of an immediate remedy. They need to be able to plan ahead for another summer

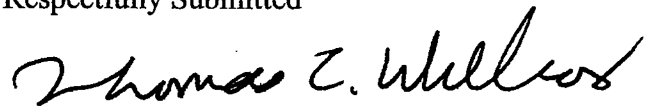
crisis, and the only possible way they can do so is to obtain a clarifying interpretation or modification of the ten-year old decree to remove the cloud over legitimate future activities.

Finally, the Association needs a ruling by the FTC regarding this second possible protest as soon as possible because it cannot wait until the Plan is implemented to take such action. The Association would lilke any such protest to commence when the Plan starts, and therefore needs the FTC action now.

For the above reasons, the FTC should modify its order to limit its scope to price-fixing.

WHEREFORE, Respondent the Superior Court Trial Lawyers' Association asks, for the reasons set forth above in this Petition For Modification of Injunctive Decree and in the accompanying Memorandum of Law in Support thereof, that the Federal Trade Commission modify or interpret the decree imposed upon the Association in the above-referenced case to limit the scope of said decree to price-fixing.

Respectfully Submitted



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MEMORANDUM OF LAW IN SUPPORT OF PETITION FOR MODIFICATION OR INTERPRETATION OF INJUNCTIVE DECREE TO LIMIT SCOPE TO PRICE-FIXING

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I. SUMMARY OF MEMORANDUM

In 1990, the Supreme Court held that collective action by the Superior Court Trial Lawyers' Association ("the Association") to increase the rates paid to its members constituted unlawful price-fixing {Section II.A, p 8}. As a result of this decision, the FTC imposed an injunctive decree (the "Decree") on the Association which prohibits group boycotts by the Association of the Court relating to any effort to "fix, increase, stabilize or impact in any way the level of fees" for court appointed legal services, as well as any recommendations by the Association that any of its members engage in such activity. {Section II.B, p.10 }. The Association has complied with the Decree without incident for 10 years.

A new situation has now arisen. The District of Columbia Superior Court is having a "compensation crisis," during which the Court periodically engages in indefinite suspensions of payments to CJA lawyers. {Section II.C , p. 10}. Such indefinite suspensions produce uncertainty about the real value of CJA compensation and therefore reduce competition in the market for CJA appointments. {Section II.C.1 , p. 10}.

As a result, the Association wishes to consider the option of a collective work stoppage of the Superior Court indigent appointments process to protest such indefinite suspensions of payments. (the "Proposed Protest"). {Section II.C.3 , p. 13}. However, the Association is of the view, based on communications with the FTC's Bureau of Compliance, that the Bureau views the Proposed Protest as falling within the scope and thus prohibited by the Decree. The result is that the Association cannot engage in the Proposed Protest without running the risk of serious penalties. Moreover, the Decree prohibits any member of the Association from "discouraging

any lawyer from providing court-appointed legal services" in connection with any unlawful boycott. {Section II.B, p. 8}. Thus, the Association cannot at this time discuss meaningfully the possibility of the Proposed Protest. {Section II.D, p. 15}.

Obviously, the Association makes this request now because it cannot meaningfully consider a work stoppage as a response to an indefinite suspension of payments unless it knows that the FTC will not seek sanctions for such behavior. The Court could choose to suspend CJA payments at any time, and the FTC's process for modifying decrees may take months. Accordingly, if the Association were to wait until the indefinite suspension of payments takes place before requesting a modification from the FTC, the Association would face an extended wait for a response without being able to take action. In short, the Association needs relief from the FTC as soon as possible. {Section III, p. 12}.

The FTC should modify or interpret the Decree to make it clear that it prohibits only price-fixing. {Section IV, p. 12}. The Proposed Protest is not a violation of the explicit terms of the Decree, {Section IV.A.1, p.14}, which the FTC intended to be limited to price-fixing. {Section IV.A.2 , p. 15.}. Most importantly, the Proposed Protest is procompetitive, lawful under the Sherman Act and should not be discouraged. {Section II.A, IV.A.3 , p. 15}.

The Proposed Protest would not be a per se violation of the Sherman Act because it neither relates to price nor seeks to disadvantage competitors. {Section II.A, IV.A.3 , p.15}. It is not a "naked restraint" because its primary motivation is not to restrain competition and because case law holds that a collective refusal to deal by competitors based on a contractual dispute with a client does not give rise to antitrust liability. {Section IV.A.3.c, p. 20}. Finally, the substantial procompetitive effects of the Proposed Protest in terms of encouraging competition among CJA

lawyers suggest the conclusion that it is lawful under a Rule of Reason analysis. {Section IV.A.3.d, p. 23}.

II. FACTS

A. The SCTLA Decision

The dispute which lead to the imposition of the Decree is described in FTC v. Superior Court Trial Lawyers' Association, 493 U.S. 411 (1990) [1] (the "SCTLA Decision"). In that case, the Supreme Court held that the Association's efforts in 1983 to boycott the Superior Court in order to obtain a rate increase for court-appointed legal services was a violation of the antitrust laws.

In holding that the lawyers' activities constituted a per se violation of the Sherman Act, the Supreme Court rejected the argument that an increase in rates produced higher quality legal representation for indigent defendants. It stressed that that the boycott was intended to reduce competition and obtain higher pay for a group of competitors, saying "[t]his constriction of supply is the essence of `price-fixing' whether it be accomplished by agreement upon a price which will decrease the quantity demanded or by agreeing upon an output, which will increase the price offered." Id. at 425.[2]

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[1]on remand, 897 F.2d 1168, reh. den., 1190 WL 166448, cert den. Addison v. FTC, 498 U.S. 1025 (1991).

[2]The Association raised as an affirmative defense before the Supreme Court the contention that its activity was protected by the Court's decision in Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,365 U.S. 127 (1961) ("Noerr"), in which the Court held that a trade association's efforts to block collectively through legislation public construction projects which would have aided competitors of the members of the association.

The SCTLA Court rejected the Association's argument that the Noerr holding meant its efforts were lawful expressive activity to petition the government for legislative action, reasoning

Concluding that "this case involves not only a boycott but also a horizontal price-fixing arrangement - a type of conspiracy that has been consistently analyzed as a per se violation for many decades," id. at 436, fn. 19, the Court held the Association's activity as per se unlawful under the Sherman Act.

B. The Decree

The Decree (attached in its entirety as Exhibit A) imposed by the FTC as a result of the SCTLA Decision has various provisions restricting the right of the Association and its officers to engage in collective activity for the purpose of impacting CJA pay rates.

According to the Decree, the Respondents had to "cease and desist from entering into,

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that such an exception could be expanded by competitors to allow unlawful activity provided that within such action was an appeal to the government to make the proposed price lawful. SCTLA, supra, at 427.

The Association also asserted the "Sixth Amendment defense," invoking the principles enunciated in NAACP v. Claiborne Hardware, 458 U.S. 886 (1982) ("Claiborne Hardware"). In this case, the Supreme Court upheld the right of black citizens in the South to boycott merchants accused of racial discrimination, describing the effort as a "nonviolent, politically motivated boycott designed to force governmental and economic changes" and to "effectuate rights guaranteed by the Constitution itself." Id. at 907-12. Thus, the Court concluded in Claiborne Hardware that the nonviolent elements of the boycott in question were entitled to the protection of the First Amendment. Id.

The Association argued that its strike for higher rates, as the boycott in Claiborne Hardware, should be protected because the Association was seeking to secure the rights of its members to be paid fair wages and the rights of criminal indigents to their Sixth Amendment right to counsel. However the SCTLA Court rejected this argument. The Court reasoned that the "undenied objective" of the CJA boycott was an economic advanrtage for those who participated. In contrast, the Claiborne Hardware action focused essentially on constitutional rights, and was therefore lawful. SCTLA at 427.

The Court also addressed the attempted justification of the SCTLA boycott on the grounds of the lawyers' concerns for the Sixth Amendment rights of their clients. It reasoned that sincere constitutional concerns alone do not justify an exemption from the antitrust laws, as such a holding would allow government contractors to avoid the antitrust laws by voicing their own views of duties owed by the government. Id. at 777, fn. 11 (citations omitted).

continuing, cooperating in or carrying out any agreement, understanding or planned common course of action, either express or implied," if such joint action was part of an effort to "fix, increase, stabilize or otherwise affect the level of fees . . . of court-appointed legal services." FTC v. SCTLA, 107 F.T.C. 510 (1986), at 603-604 (emphasis added).

C. The Impact On The Market For Court-Appointed Legal Services Of The Compensation Crisis, And The Proposed Protest and Its Competitive Impact

At present, the rate of pay ($50 an hour for all work) for CJA appointments is not in controversy. However, since the fall of 1998, the Superior Court has twice engaged in an indefinite suspension of payments to CJA lawyers - - an action which obviously discourages lawyers from participating in the market for CJA appointments.

In response to this activity by the Court, the Association has considered the feasibility of the Pay Protest. The Association views the Pay Protest as procompetitive because of its potential for encouraging the Superior Court to honor its contractual obligations and encouraging lawyers to take CJA appointments.

1. The Compensation Crisis

In July of 1998, the Superior Court halted payments to CJA lawyers, citing financial difficulties caused by a recent federal takeover of certain court operations. Needless to say, CJA lawyers did not view these indefinite delays in payments as part of the bargain they entered into when the accepted appointments from the Superior Court.

Payment of the monthly $2 million CJA payroll did not resume until Congress appropriated the needed funds in November, 1998. However, the same crisis occurred again in the fall of 1999, when the Court again suspended payments for several months. Moreover, press

reports have indicated a new crisis could occur at the end of any new fiscal year.[3]

In short, the Superior Court is likely to engage in additional suspension of payments to CJA lawyers in the near future. Moreover, because resumption of such payments depends on legislative and political factors outside of the Court's control, such suspensions will be indefinite in nature.

2. The Proposed Protest

As a result of the pay crisis, the Association has considered a work stoppage by CJA lawyers, during which the Association members would cease to take new appointments at the Superior Court referred to above as the Pay Protest. See, Affidavit of Betty M. Ballester, President of the Association, attached as Exhibit B (the "Association Affidavit").

3. The Proposed Protest Is Procompetitive

When the Court breaches numerous contractual obligations[4] by engaging in an indefinite

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[3]See December-January D.C. Bar Report, "District of Columbia Courts Funding Finalized for Fiscal 2000" " . . court-appointed lawyers under the CJA program may see a repeat of fiscal 1999 when the court was unable to meet payroll for those services nearly two months before the end of the fiscal year." See also, "D.C. Courts Seek $30M Increase," Legal Times, May 8, 2000, pp. 1-3 (Court officials seeking additional funds to cover, inter alia, a $4.5 million shortfall in the budget for the Defender Service Program).

The Court ultimately covered the shortfall by the shifting of accounts. However, no specific assurances were given to CJA lawyers that a pay suspension would not happen again.

[4]Case law has held that failure to pay a CJA voucher is a breach of contract. In Thompson v. Superior Court, 407 A. 2d 678 (D.C.C.A. 1979) the Court of Appeals, while rejecting claims that reductions in vouchers made by judge prior to their approval were unlawful, made it clear that once the judge had approved the voucher, such voucher was a complete contract: "To the extent that the complaint seeks money damages in excess of the amounts actually approved by the Superior Court judges and subsequently paid . . . there is no claim against the [court]." Id. at 681 (emphasis added), citing Camenish v. United States, 553 F.2d

suspension of payments to all lawyers, collective action to protest such activity has a procompetitive effect on the market in question.

The procompetitive effects of the Proposed Protest on the market for CJA appointments is demonstrated by the analysis provided by Dr. James Ratliff, Senior Economist, Law and Economics Consulting Group (the "Ratliff Opinion"), attached as Exhibit C). The Ratliff Opinion reviews the relevant facts of the present situation and observes that a CJA payment at present has two parameters, price and time. Further, the fact that the "time of payment is chosen at the discretion of the court," coupled with the prior suspensions of payment by the court "have created reasonable uncertainty among the lawyers about when their future payments would be delivered." Id. at Para. 21.

Dr. Ratliff thus opines that the Proposed Protest would be procompetitive because it would increase certainty about timing of payment and thereby "facilitate competition on both price and total compensation dimensions" of the CJA appointment market.

D. The Threat of FTC Action Based On The Decree Prevents the Association From Considering The Proposed Protest As A Procompetitive Responses to Unlawful Behavior By the Court

The Association can consider neither the Proposed Protest as a procompetitive response to an indefinite suspension of payments because of the threat of penalties based on the Decree.

1271, 1273 (D.C. Cir. 1975).

The Association has been informally advised that the FTC's Bureau of Compliance considers the Proposed Protest a violation of the Decree, and would therefore seek substantial penalties against it.[5] In these circumstances, the Association cannot afford to consider the Proposed Protest as a course of strategy at this time. See, Association Affidavit at Para 8.

III. THE FTC SHOULD REOPEN THE DECREE AS SOON AS PRACTICABLE BECAUSE THE ASSOCIATION CANNOT WAIT FOR AN INDEFINITE SUSPENSION OF PAYMENTS IN ORDER TO SEEK A MODIFICATION OF THE DECREE

Obviously, the Proposed Protest would involve collective action by the officers and members of the Association, and any such collective activity would require planning discussions before put into effect. As the Association understands it, however, the Bureau of Compliance would regard such activity as amounting to the "discouraging" of lawyers "from providing court-appointed legal services," even though such discouragement is precluded by the Decree only if it is part of an effort "to affect the level of fees." See Section II.B, supra. The Association does not believe that its Proposed Protest (and attendant planning discussions) are encompassed within the Decree's prohibitions, but its officers and members cannot afford to embark upon such planning activities under threat of enforcement sanctions. As a result, the Association has a genuine need for an FTC ruling on the Pay Protest before another suspension-of-payments crisis occurs. A ruling after either of these incidents took place would be unquestionably too late.

IV. THE FTC SHOULD MODIFY OR INTERPRET THE DECREE TO LIMIT ITS SCOPE TO PRICE-FIXING

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[5]This informal opinion has been given in communications counsel for SCTLA has had with FTC Trial Attorney Eric Rohleck in early February, 2000.

The Association asks that the FTC change or interpret the Decree so as not to preclude the Proposed Protest.[6] Such modification is in the public interest because the Decree at present hurts the members of the Association by denying them the ability to protest collectively an anticipated breach of contractual obligations by the Superior Court.

A. The FTC Should Modify the Decree Because Modification Is In The Public Interest

The Proposed Modification of the Decree is in the public interest because the Decree, at present, prevents the Association from rightfully engaging in the procompetitive activity of exercising its right to protest the serial breaches of contracts by the Superior Court.

In considering this Petition, the FTC must weigh the reasons favoring the modification requested against opposing considerations. The Commission must also consider whether the

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[6]16 C.F.R. Section 2.51 "Requests to Reopen" (attached in its entirety as Exhibit D), provides that any subject of a formal cease and desist order may file with the FTC a request for modification of the order in question. In addition, such a request must make a satisfactory showing on grounds such as that the public interest so requires, and may not be satisfied by conclusory allegations in the absence of affidavits stating why such relief should be granted. Section 2.51 also provides opportunity for public comment on the proceedings

Section 2.51 further requires that the FTC act on the request within 120 days of receiving it by determining whether the request in question is set forth in sufficient detail so as to require the reopening of the order for consideration of the relief requested. Should the Commission determine that the petition has met this standard, it may reopen the proceedings, or take other such appropriate action. Any such action, however, must be completed within an additional 120 days.

In the present case, the Association has shown that the Decree, as it believes the FTC's Bureau of Compliance interprets it, prevents CJA lawyers from considering a procompetitive protest of a breach of the contractual obligations of a major client of its members. See Association Affidavit, page 13 supra, and Ratliff Opinion, page 11 supra. Thus, the Association has made the requisite threshold showing to compel the FTC to reopen the Decree on the grounds of a modification for reasons in the public interest. See, United States v. Louisiana Corp., 754 F.2d 1445 (9th Cir. 1985).

particular modification sought is appropriate to remedy the identified harm. MidCon Corp., supra, at 103. The FTC has granted such requests for modification in the past. See, Chevron Corp., 105 F.T.C. 228 (1985) (public interest warrants modification where potential harm to respondent's ability to compete outweighs any further need for the order); Interco, Inc., supra (public interest supports elimination of 'fencing in' provisions in consent decree); Pasteur Merieux Serums et Vaccins, S.A. CCH Trade Reg. Rep. 23,601 (FTC 1994) (requirements of order continue to impose significant costs and may adversely affect public health needs); Red Apple Companies, Inc., CCH Trade Reg. Rep. 24,108 (FTC 1996) (modification prevents respondent from incurring significant losses while decree as unmodified provides no corresponding benefits to competition); Clinique Laboratories, CCH Trade Reg. Rep. 23,330 (FTC 1993) .[7] Under these authorities, and for the reasons explained below, the Commission should grant the requested relief

1. The Proposed Protest Is Not A Violation of the Explicit Terms of The Decree

By its explicit terms, the Decree is directed against efforts to "fix, increase, stabilize, or otherwise affect the level of fees." See, Section II.A, IV.A.3 , supra. The Proposed Protest, however, does not seek to alter the $50 rate for the Court's unpaid obligations, nor the rates of payment for any future work. Rather, it seeks to compel the Superior Court to comply with its contractual obligations. Thus, the plain wording of the Decree does not include the Proposed

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[7]Should the FTC decline to reopen the Decree, or rule against the Association, the Association could appeal such a ruling to the District Court for the District of Columbia pursuant to the procedures and standards set forth in the Administrative Procedures Act, Title 5, U.S.C.A., Sections 702 et seq.

Protest.[8]

In short, a plain reading of the Decree compels the conclusion that the Decree refers only to price-fixing.

2. The FTC Viewed the Decree as Prohibiting Only Price-Fixing When It was Issued

Consistent with the plain language of the Decree is language in the FTC v. SCTLA Decision, page 9 supra, that issued the Decree, which language makes it clear that the FTC imposed the Decree in order to prevent future price-fixing. Responding to arguments from the Association and its officers (the "Respondents") that imposition of the Decree was not necessary, the FTC opined that "[t]he entry of an order is appropriate to prevent the Respondents from initiating another boycott to raise the CJA fees whenever they become dissatisfied with the results or pace of the city's legislative process," and "[t]he order prohibits concerted action to raise the fees paid by governments under programs to provide counsel to indigent criminal defendants." Id. at 602 (emphasis added).

In short, the Commission has made it clear that it intended to prohibit price-fixing, and only price-fixing, by means of the Decree.

3. The Proposed Protest Is Not A Violation Of The Sherman Act

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[8]The Ratliff Opinion buttresses this conclusion. As Dr. Ratliff notes in examining the question "[i]s an attempt to influence the time-of-payment parameter, t, an attempt to fix the price of the service? . . . There are numerous examples from everyday business and commerce that suggest it is a pervasive linguistic convention that the word "price" refers only to the nominal payment, p." Id. at para. 16.

Accordingly, "from a common-usage linguistic perspective, in the present (p,t) principal-agent context, any action to influence the time-of-payment parameter, t, would not be considered an action to fix the price, p." Id. at para. 17.

The Proposed Protest is not a violation of the per se rule because it does not affect the $50 rate for court-appointed legal services in Superior Court in any way. The Proposed Protest is subject to the Rule of Reason because it is not facially anticompetitive and has substantial procompetitive benefits. Moreover, case law holds that a boycott to protest a breach of contract or unlawful activity is not a violation of the antitrust laws.

a. Restraint of Trade Analysis

The reasonableness of a restraint of trade is determined solely by its effect on competition. National Society of Professional Engineers v. United States, 435 U.S. 679, 691-92 (1978). Considerations based on the assumption that the competition itself is unreasonable or on factors unrelated to the effect on competition are irrelevant. Id; accord, SCTLA, supra, at 424.
To determine whether joint action unreasonably restrains competition, courts have applied either the per se or the Rule of Reason analysis. The per se rule applies if the restraint falls into the category of "agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and . . . illegal without elaborate inquiry as to the precise harm they have caused or the business excuse of their use." Northern Pacific R. Co. v. United States, 356 U.S. 1, 5 (1958). Typical per se restraints include horizontal and vertical price-fixing agreements, horizontal market division and customer allocation arrangements, and certain "tying" arrangements.

All restraints not falling into the per se category are analyzed under the Rule of Reason. Under this approach, the fact finder weighs all of the circumstances of a case to determine whether the restraint imposed "is such as merely regulates and perhaps thereby promotes competition, or whether it is such as may suppress or even destroy competition." Professional

Engineers, supra, at 691. In recent years, the courts have developed a further dichotomy, distinguishing between a "naked restraints" analysis, applicable where the effects of a challenged conduct are clear and the traditional Rule of Reason, applicable where the competitive effects of a practice are not clear.

Liability will be found under a "naked restraints" analysis if there are no credible pro-competitive effects attributable to a challenged restraint, i.e., the restraint is a "naked" restraint on competition. In such a circumstance, defining the relevant market and assessing market structure and other relevant factors, usually required in Rule of Reason cases, is made unnecessary. Indiana Federation of Dentists, supra at 45 (evidence of sustained adverse effects on competition, without an offsetting procompetitive justification, sufficient to establish liability); NCAA v. Board of Regents of University of Oklahoma, 468 U.S. 85, 110 (1984)(where there is a naked restriction on price or output, market power need not be shown). If the defendant can show that pro-competitive effects exist, however, the restraint is not "naked" and an adverse effect in a relevant market must be shown. See e.g., Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 216 (D.C.Cir. 1986), cert. denied, 479 U.S. 1033 (1987).

Courts also have applied what amounts to a "naked restraints" analysis where there is evidence that defendants actions were "at least partially motivated by the desire to lessen competition, and because of [their] line of business, [they] stood to reap substantive economic benefits from making it difficult for respondents to compete." Hydrolevel Corp., supra, 456 U.S. at 571 (holding professional organization liable for anticompetitive actions of members seeking to use organizations' standards to benefit their employers by harming their employers' competitors).

On the other hand, where there is evidence of a plausible procompetitive justification for a challenged restraint, the courts will apply a Rule of Reason analysis and factors such as safety and product quality may become relevant. See, e.g., Consolidated Metal Prods. v. American Petroleum Inst., 846 F.2d 284, 292, 294-96 (5th Cir. 1988) (upholding safety-based standard); Clamp-All Corp. v. Cast Iron Pipe Inst., 851 F.2d 478 (1st Cir. 1988), *cert. denied*, 488 U.S. 1007 (1989) (upholding standard because it lowered information costs and insured product quality).[9]

b. The Proposed Protest Would Not Be Per Se Unlawful Because It Would Not Relate To Price

The Proposed Protest would not be a per se violation of Section One of the Sherman Act because it would not impact on the rates paid to CJA lawyers. The intended scope of the per se rule is only to practices "which because of their pernicious effects on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and . . illegal without elaborate inquiry as to the precise harm they have caused or the circumstances for their use." Northern Pacific R. Co. v. United States, 356 U.S. 1, 5 (1958).

Cases in which the Supreme Court has applied the per se approach have generally involved joint efforts by a firm or firms to disadvantage competitors by either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle. See, e.g., Silver v. New York Stock Exchange, 373 U.S. 341 (1963) (denial of necessary access to exchange members); Radiant Burners Inc. v. People Gas Light &

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[9]Under either the naked restraints or Rule of Reason standards, if plausible justifications are advanced for the restriction, the plaintiff must then prove that a reasonable less restrictive alternative exists. United States v. Brown University, et al., 5 F.3d 658, 679 (3d Cir. 1993).

Cable Co., 346 U.S. 656 (1961)(denial of necessary certification of product); Associated Press v. United States, 326 U.S. 1 (1945)(denial of important sources of news); Klor's Inc. v. Broadway Hale Stores, Inc., 359 U.S. 207 (1959). In these cases, the boycott often cut off access to a supply facility or market necessary to enable the boycotted firm to compete. Silver, supra; Radiant Burners, supra, and frequently the boycotting firms possessed a dominant position in the relevant market. Silver, supra, Associated Press, supra; Fashion Originators Guild of America Inc. v. FTC, supra.

In contrast to the above approach, the Supreme Court has also been slow to condemn rules adopted by professional associations as unreasonable per se. See, California Dental, supra; FTC v. Indiana Federation of Dentists, supra; Professional Engineers, supra. Moreover, it has declined to apply the per se rule to collective action such as that in the present case where the defendant is neither seeking to disadvantage a competitor nor deny a supplier access to necessary inputs. For example, in Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co., 472 U.S. 284 (1985), the Court considered a group boycott by a non profit cooperative buying association of a retail office supply store. Id. at 290.

In 1978, the membership of the association voted to expel the store, which sold office supplies at both the retail and wholesale levels. The store sued, alleging that the action constituted a group boycott, and therefore a per se violation of Section One of the Sherman Act. Id. at 296.

In assessing whether or not the boycott was a per se violation, the court noted the cases cited above which limited the application of the per se rule. Further, the court required some showing by the plaintiff that the boycott in question was likely to have anticompetitive effects:

> A plaintiff seeking application of the per se rule must present a threshold case that the challenged activity falls into a category likely to have predominantly anticompetitive effects. The mere allegation of a concerted refusal to deal does not suffice because not all concerted refusals to deal are predominantly anticompetitive.

Id. at 298.

As with the expulsion in Northwest, the Proposed Protest would not be considered per se unlawful because the Association would be denying neither the Superior Court nor any competitor any business element for effective competition. Far from seeking to disadvantage a competitor, the purpose of the Proposed Protest would be to induce the Court to honor its pre-existing contractual obligations, or refrain from unlawful activity. Accordingly, a court would not find the Proposed Protest to be per se unlawful.

c. The Proposed Protest Is Not A "Naked Restraints"

The "naked restraints" standard of the Rule of Reason should not apply to the Proposed Protest. This is so because the primary motivation behind the Proposed Protest is not to restrain competition and because case law holds that a collective refusal to deal by competitors based on a contractual dispute with a client is sufficient evidence of proper motivation so as to compel the dismissal of an antitrust claim.

As noted above, using the "naked restraints" standard, the court looks to see if the restraint is facially anticompetitive. If it is, then the burden shifts to the defendant to produce evidence of procompetitive effects. Brown University, page 20 supra.

Courts have typically declined to find collective action facially anticompetitive and to apply the "naked restraints" analysis where the primary motivation behind the restraint does not include

a desire to restrain competition. See, Plueckhahn v. Farmers Ins. Exchange, 749 F.2d 241 (5th Cir.) cert denied 473 U.S. 905 (1985) (restrictions on certain employee transfers among related insurance entities were adopted to eliminate conflict of interest problems and passed muster under rule of reason analysis, even assuming existence of conspiracy); America's Best Cinema Corp. v. Fort Wayne Newspapers, Inc., 347 F. Supp. 328 (N.D. 1972)(refusal to run advertisements, except for name and telephone number, from theaters that show X-rated films held reasonable as attempt to maintain newspapers "family image"); Alexander v. National Farmers Org., 687 F.2d 1173 (8th Cir. 1982) (non-coercive two-week refusal to deal conducted by Capper Volstead farm cooperative law is lawful because not directed at eliminating competition).

Courts rarely apply the naked restraints analysis if the defendant can produce substantial evidence of procompetitive effects. See, Rothery Storage & Van Co. v. Atlas Van Lines, Inc., supra, page 17 (National moving company's restrictions on ability of local affiliates to compete held lawful as necessary ancillary restraints to maintain "complex partnership" between the firms involved).

Further, courts have held that a collective refusal to deal with a client based on a contractual dispute is sufficient evidence of proper motivation so as to compel the dismissal of an antitrust claim. For example, in Blackburn v. Crum & Forster, 611 F.2d 102 (5th Cir.) cert.denied, 447 U.S. 906 (1980) the defendants-insurance companies - refused to sell insurance through the plaintiffs- insurance agents - after one of the defendants alleged fraud by one of the plaintiffs in a business transaction In addition, another defendant refused to provide the plaintiffs with certain insurance. Because the plaintiffs' contract was canceled for fraud, other insurance companies

were reluctant to use them as their agents, and eventually they went out of business. Id. at 103.

The plaintiffs alleged that the root of the defendants' discontent was not the alleged fraud, but rather the diminishing proportion of the agents' insurance business that the defendants had been enjoying. According to the plaintiffs, the insurers terminated the agency contract and canceled the policy in question not only to prevent the plaintiffs from serving other insurance companies, but also to make an example of the plaintiffs that would deter other independent agents from saving the insurers' competitors. Consequently, the plaintiffs alleged an illegal group boycott by the defendants

The Blackburn court characterized the facts out of which the plaintiffs' antitrust charges arose as a "legitimate business conflict." The court further noted that "[c]learly, related insurance companies and their holding company could wage an unlawful group boycott." Id. at 104. However, it declined to apply the per se rule because of the vertical relationship between the defendant insurance companies, and the plaintiff agents. Moreover, in declining to find the boycott unlawful under the rule of reason and affirming the trial court's dismissal of the complaint, the court noted it had found nothing in the record to indicate an unreasonable restraint of trade, but rather ample evidence of a dispute between business partners and its aftermath:

> The [defendants] chose to sever their relationship with [the plaintiffs] whose actions they deemed fraudulent. The decision by [one of the insurance companies] to terminate the . . . policy denotes only the company's resolution not to protect agents whose alleged faulty records or fraudulent proclivities would subject the insurer to frequent claims or litigation. We need not resolve the contractual controversy to perceive that such dispute would permit reasonable insurers to terminate a relationship with the agents.

Id. at 105.

The facts and holding in Blackburn demonstrate why the Proposed Protest is not a naked restraint. As the defendants in Blackburn had a legitimate foundation based on prior dealings to refuse to deal with the plaintiffs in that case, so the Association in this case has a right, based on its prior dealings with the Superior Court, to refuse to do business with that institution. Thus, as the collective action in Blackburn was found lawful because of its benign motive based on a contract dispute, so should be the collective action at issue in this Petition.

d. The Proposed Protest Passes Antitrust Scrutiny Under The Rule of Reason

If the Bureau of Competition were inclined to try to demonstrate a violation of the antitrust laws under the Rule of Reason, it would have a difficult task. It would have to establish that the Association and its members have market power in a properly defined market and that the effects of the Proposed Protest on that market would likely be, on balance, negative. Market definition is a fact-intensive and difficult process of assessing the area of effective competition in which the relevant players - here lawyers- compete with one another. Moreover, as of the Proposed Protest would increase certainty over the timing and value of payments, it would likely increase competition for CJA appointments in general.

The numerous cases in which various restraints similar, if not more restrictive in nature to the Proposed Protest and alleged in litigation as constituting refusals to deal or group boycotts, have been declared lawful under the Rule of Reason further buttress the conclusion that Proposed Protest is lawful under that standard. In these cases, as in the present one, the restraining party is a horizontal combination of traders which refused to deal with a non-competing party at another level of competition and which had a plausible explanation for their activity. See, E.A.

McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee, 467 F.2d 178, 187 (5th Cir. 1972) (Exclusion by committee of representatives of various airlines from tourguide of tours by particular tour operator neither coercive nor exclusionary and therefore lawful); Chastain v. AT & T, 401 F.Supp. 151, 160-62 (D.D.C. 1975)(Refusal to provide automatic telephone service to manual mobile phones by AT & T and its subsidiaries did not constitute illegal group boycott because use of such phones would interfere with the efficiency of AT & T's mobile telephone service); Indeed, the Supreme Court has recognized that a restraint in a limited aspect of a market may actually enhance marketwide competition. See, Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 18-23 (1979) (efficiencies of joint selling arrangement will increase sellers' aggregate output and thus be procompetitive). See also, Worthen Bank & Trust v. National Bank Americard, Inc., 485 F.2d 119, 129 (8th Cir. 1973) (Restrictions by bankcard company on member banks from issuing cards of its competitors may promote competition between major credit card companies). Accordingly, the Proposed Protest cannot be regarded as unlawful under a Rule of Reason analysis.

V. CONCLUSION

Ten years after the SCTLA Decision and ensuing Decree, the Association finds the livelihood of its members undermined by the prospect of repeated breaches of contract by the Superior Court, leaving CJA lawyers uncertain of when payments by the Court might stop or resume, if at all. Further, because of the Decree, the Association finds itself unable to protest this activity collectively. The Association needs the requested relief as possible. Without it, the Association cannot consider the Proposed Protest as a responses to an indefinite suspension of payments. In short, the Decree at present prevents the Association from considering or

encouraging its members to engage in lawful and procompetitive activity, while the proposed relief would give the Association and its members the ability to take lawful and procompetitive activity when the Superior Court again engages in a breach of its numerous contracts with CJA lawyers.. The FTC should modify or interpret the Decree to provide the Association and its members with this ability.

lawyers, but economic issues emerged as well.[154] The entry of an order is appropriate to prohibit the respondents from initiating another boycott to raise the CJA fees whenever they become dissatisfied with the results or pace of the city's legislative process. [78]

The respondents object also to the entry of paragraph IV of the order, requiring the individual respondents to notify the Commission, for a period of five years, of any change in their law practice. According to the respondents, this provision is "pure harassment" and "serves no legitimate purpose."[155] We disagree. The order prohibits concerted action to raise the fees paid by governments under programs to provide counsel to indigent criminal defendants. Because the level ... for such legal services in other jurisdictions is similar to or low... n the District of Columbia, the individual respond... nancial incentive to engage in similar conduct in ... xample, the fees under the federal Criminal Justice ... e $20 and $30 per hour for one year after the SC... ucceeded in raising the District's fee to $35 an hou... in Maryland were $20 and $25. The fees in New Y... ight lived for several years after the boycott, were $... naximum in Virginia for a felony case was $400, ... he District's $1000 fee.[156] We conclude that this p... er also is reasonably related to the violation in thi... iate to prevent a recurrence of the violation. [79]

Th... e demonstrated no recognition that a price-fixin... awful means by which to seek increased reimburs... he government. *SEC v. Savoy Industries, Inc.*, 587 ... .C. Cir. 1978), *cert. denied*, 440 U.S. 913 (1979). Und... nces, there is a cognizable risk that the unlawful c... eated by these respondents absent an order to cease and desist. *See United States v. W. T. Grant Co.*, 345 U.S. 629, 632 (1945).

CONCLUSION

The respondents disrupted the criminal justice system in the District of Columbia and coerced the District government into raising the fees paid to them under the Criminal Justice Act. This coercive, concerted refusal to provide legal services to the District government unless and until the fees for those services were raised constitutes an unfair method of competition in violation of Section 5 of the Federal Trade Commission Act. The Administrative Law Judge concluded

[154] Perrotta Tr. 672; JX 11, at 112–116. The record does not tell us anything more about the previous boycotts.
[155] R.A.B. at 59.
[156] CX 38J. This exhibit, showing a state-by-state breakdown of fees for indigent criminal cases, is reprinted in Hearings Before a Subcomm. of the Senate Comm. on Appropriations, 98th Cong., 1st Sess. 240–41 (1983).

that the disruption of the criminal justice system and the additional cost to the city for the CJA program were not "adverse effects," because the District government assertedly supported an increase in CJA fees. We find neither legal nor factual support for this conclusion. Accordingly, we reverse the Administrative Law Judge's decision and issue the attached order against SCTLA and the individual respondents.

FINAL ORDER

This matter has been heard by the Commission upon the appeal of complaint counsel from the initial decision, and upon briefs and oral argument in support of and in opposition to the appeal. For the reasons stated in the accompanying opinion, the Commission has determined to grant the appeal and reverse the initial decision. Accordingly, [2]

It is ordered, That the findings of fact and initial decision of the Administrative Law Judge be rejected except as specifically adopted in the findings of fact and conclusions of law contained in the accompanying opinion. The findings of fact and conclusions of law of the Commission are contained in the accompanying opinion.

It is further ordered, That the following order to cease and desist be, and the same hereby is, entered:

I.

It is ordered, That respondent Superior Court Trial Lawyers Association, an association, its successors and assigns, and its officers, directors and members; Ralph J. Perrotta, individually and as a director of Superior Court Trial Lawyers Association; Karen E. Koskoff and Reginald G. Addison, individually and as officers of Superior Court Trial Lawyers Association; Joanne D. Slaight, individually; and respondents' agents or representatives, directly or through any device, in connection with their activities in or affecting commerce, as "commerce" is defined in Section 4 of the Federal Trade Commission Act, shall cease and desist from entering into, continuing, cooperating in, or carrying out any agreement, understanding, or planned common course of action, either express or implied, to: [3]

A. Refuse to provide legal services to any government program that provides legal services for persons eligible for appointed counsel in connection with any effort to fix, increase, stabilize, or otherwise affect the level of fees for such legal services;

B. Interfere with the operation of the Superior Court of the District

of Columbia or of any court or of any government agency in connection with any effort to fix, increase, stabilize, or otherwise affect the level of fees for legal services for persons eligible for appointed counsel;

C. Coerce any person not to provide or discourage any person from providing legal services in connection with any effort to fix, increase, stabilize, or otherwise affect the level of fees for legal services for persons eligible for appointed counsel;

D. Encourage, suggest, advise, or induce respondent Superior Court Trial Lawyers Association, any member of Superior Court Trial Lawyers Association, or any other person to engage in any action prohibited by this order;

Provided, That nothing in this order shall prevent respondents om: [4]

(1) Exercising rights under the First Amendment to the United States Constitution to petition any government body concerning legislation, rules or procedures; or

(2) Providing information or views in a noncoercive manner to persons engaged in or responsible for the administration of any program to obtain legal services for persons eligible for appointed counsel.

II.

It is further ordered, That respondent Superior Court Trial Lawyers Association shall:

A. Distribute by first-class mail a copy of this order to each of its members, officers and directors within thirty (30) days after this order becomes final;

B. Distribute by first-class mail a copy of this order to each person who becomes a member, officer or director of Superior Court Trial Lawyers Association within thirty (30) days of such person's becoming member, officer or director, during each of the first three (3) years ter this order becomes final; and [5]

C. Within thirty (30) days after the order becomes final and for ninety (90) days thereafter, post a copy of this order in each location in which notices of meetings of respondent Superior Court Trial Lawyers Association are customarily posted.

III.

It is further ordered, That the respondents herein shall within sixty (60) days of service upon them of this order file with the Commission a report, in writing, setting forth in detail the manner and form in

which they have complied and are complying with this order, and shall file such other reports of compliance as the Commission may from time to time require.

IV.

It is further ordered, That each of the individual respondents named herein shall, for a period of five years after this order becomes final, promptly notify the Commission of the discontinuance of his or her present legal practice, business or employment and his or her affiliation with a new legal practice, business or employment. Each such notice shall include the individual respondent's new business address and a statement of the nature of the legal practice, business or employment in which the respondent is newly engaged. The expiration of the notice provision of this paragraph shall not affect any other obligation arising under this order. [6]

V.

It is further ordered, That respondent Superior Court Trial Lawyers Association shall notify the Commission at least thirty (30) days before any proposed change in its form of organization that may affect compliance obligations arising out of this order.

Chairman Oliver and Commissioner Strenio did not participate.

BEFORE THE FEDERAL TRADE COMMISSION

Federal Trade Commission

v. Docket No C-1043-83

Superior Court Trial Lawyers' Association

EXHIBIT B

Affidavit of Betty M. Ballester, President, Superior Court Trial Lawyers' Association

I, Betty M. Ballester, do depose and say the following:

1. I am a lawyer licensed to practice in the District of Columbia.

2. I routinely accept CJA appointments at the Superior Court of the District of Columbia, and have done so for over ten years.

3. In October, 2000, I became president of the Superior Court Trial Lawyers' Association (the "Association").

4. Since I became president of the Association, I have explored the possibility of a group protest by the Association members regarding future indefinite suspension of payments to CJA lawyers by the Superior Court

5. I have reviewed the injunctive decree (the "Decree") currently imposed against the Association by the Federal Trade Commission. I am aware that the Association may

not refuse to provide any court-appointed legal services, interfere with the operations of the Superior Court, or discourage any person from providing court-appointed legal services, if any of these activities are part of efforts to fix, stabilize, increase or otherwise affect the level of fees of court-appointed legal services.

6. I am also aware that the Decree prohibits any member of the Association from encouraging any other individual from engaging in proscribed activity, and that the FTC may view the protests at issue as a violation of the Decree.

7. Finally, I am aware that the FTC could choose to seek civil, if not criminal, fines of at least $11,000 per violation against the Association and each of its officers, should it feel a violation has occurred.

8. As a result of the above, the Association cannot discuss the possibility of, nor engage in such protests unless the Decree is modified or interpreted so as to make the protests in question lawful.

9. SCTLA is not currently planning any of these protests. However, in the event SCTLA would like to engage in such, they would be most effective if commenced soon after the Court were to commence the unlawful activity in question.

Betty M. Ballester

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Memorandum

To: **Thomas Willcox**
From: **Jim Ratliff**
Date: September 19, 2001
Case: **Superior Court Trial Lawyers' Association**
Re: **Is the Proposed Protest an attempt to fix price?**

Qualifications

1) My name is James D. Ratliff. I received a Ph.D. in economics from the University of California—Berkeley in 1993 and a B.A. in physics and mathematics from Oberlin College in 1979. From 1992 through 1997 I was an Assistant Professor of Economics in the College of Business and Public Administration at the University of Arizona. I am now a Senior Managing Economist at LECG LLC, which provides sophisticated economic and financial analysis, expert testimony, litigation support, and strategic management consulting to a broad range of public and private enterprises.

2) During my doctoral training, my subsequent research, and my teaching to doctoral students in economics, I specialized in advanced microeconomic theory, a subfield of economics which subsumes contract theory, *i.e.*, the economic analysis of contracts. Much of my study of contracts has been in the particular context of principal-agent relationships. My other field of specialization is industrial organization, the subfield of economics most relevant to antitrust analysis.

3) During my more than three years at LECG I have specialized in antitrust analysis, both in litigation and in administrative proceedings before the Antitrust Division of the Department of Justice. The major portion of my litigation work has involved analysis of allegations of price fixing in the context of Section 1 of the Sherman Act. While at LECG, I have also provided economic interpretations of the meaning and effect of contracts in various industries, *e.g.*, the investment banking, pharmaceutical, and semiconductor capital equipment industries.

4) I am not being and have not been compensated in any way by any party for my work in this matter.

Assumptions and assigned task

5) I have been asked to consider an assumed situation characterized by the following facts:

   a) The Superior Court of the District of Columbia appoints lawyers under the Criminal Justice Act ("CJA") to provide counsel to indigent defendants.

   b) The CJA provides that, in order for a lawyer to obtain payment for services provided, the lawyer must submit a claim for compensation and reimbursement to the Superior Court supported by a statement specifying the time expended, services rendered, and expenses incurred while the case was pending before the court.

c) As a matter of law, as soon as a judge approves a voucher in this regard, a contract exists between the Superior Court and the lawyer applicant for the payment of services.

d) The contract that exists as a matter of law does not explicitly specify in any way the time at which the Court should deliver payment to the CJA lawyer.

e) The Superior Court has twice indefinitely suspended payments to CJA lawyers. Court officials have indicated that such a suspension could happen occur in the future.

f) The present rate of pay for CJA appointments is $50 per hour for all work. This rate of pay is not in controversy.

g) The Superior Court Trial Lawyers' Association (the Association) is operating under an injunctive decree ("Decree") imposed by the Federal Trade Commission (FTC) which restricts efforts by the the Association to "fix, increase, stabilize or otherwise affect the level of fees... of court-appointed legal services."

h) The Association contemplates a protest (the "Proposed Protest") of the Superior Court in the event the court indefinitely suspends payments to CJA lawyers at some future time. The Proposed Protest would consist of all members of the Association ceasing to accept new CJA appointments.

i) The purpose of the Proposed Protest would be to protest such an indefinite suspension, if it occurred, and to provide an incentive for an earlier end to such suspension than would occur absent the Protest. An auxiliary purpose of preannouncing the Association's intent to implement such a Protest in the case of an indefinite suspension is to deter such an indefinite suspension from occurring in the first place.

j) The Association believes that the FTC would view the Proposed Protest as a violation of the provisions of the Decree.

6) I have been asked to provide an economist's perspective, informed by modern contract theory and antitrust analysis, as to whether the Proposed Protest is properly interpreted economically as being an effort to "fix, increase, stabilize or otherwise affect the level of fees... of court-appointed legal services."

Summary of findings

7) I analyzed the question of whether the Proposed Protest would be properly seen as an attempt to fix prices from two independent perspectives. First, I answered the question with respect to the meaning of "price" as used in everyday business and commerce. I conclude that the Proposed Protest is intended to influence not the price but the time at which the price is paid. This time of payment is a nonprice component of a CJA lawyer's compensation. Therefore the Proposed Protest is not properly seen, from this common-usage linguistic perspective, as an attempt to fix price.

8) I then asked the question from the perspective of the goals of antitrust law and, specifically, the goals of the prohibition of price fixing embodied in Sherman Act §1.

The result of my general analysis was that a collective effort to affect a nonprice component of compensation could be either procompetitive or anticompetitive, and that which particular outcome obtained in any particular situation depends upon the particular facts obtaining, such as how the time of payment is determined absent the collective effort and upon how flexibly negotiable the nominal payment is.

9) For example, when, contrary to the particular facts of this case, (a) the time of payment is known with certainty by a lawyer prior to accepting an assignment, (b) the court has an unblemished record adhering to the specified payment schedule, and (c) the nominal fee is locked in for a significant length of time, a collective effort to accelerate the time of payment could be anticompetitive.

10) However, when, as in the present case, (a) the time of payment is not known with certainty by a lawyer prior to accepting an assignment, (b) the time of payment is chosen at the discretion of the court, (c) prior suspensions of payment by the court have reasonably created substantial uncertainty by the lawyers about when their future payments would be delivered, and (d) collective action to affect the nominal payment is effectively prohibited, then a collective effort to deter or end a suspension of payment would be procompetitive because it would facilitate competition on both price and total-compensation dimensions.

Analysis

Principal-agent relationships and incomplete contracts

11) In the present matter, the relevant economic relationship between the Superior Court and a CJA lawyer is that of principal and agent, respectively. In a typical principal-agent relationship there are many dimensions of interest to the parties. These include the details of the agent's performance on behalf of the principal and the details of the compensation paid by the principal to the agent.

12) In the real world, contracts are always incomplete to some degree. In other words, they do not specify all of the details of performance and compensation that are of interest to the parties. Such incompleteness can arise for many reasons, *e.g.*, problems of observability and/or verifiability, contingencies that cannot be foreseen or that are too numerous or improbable to warrant explicit contractual attention, careless omission, etc.

13) In order to focus expeditiously upon the relevant issues and questions, I consider a principal-agent relationship characterized by only two parameters: a nominal payment, p, and a time, t, at which the agent receives the nominal payment p from the principal. (In other words, for simplicity I have ignored other dimensions, such as specifications of the agent's performance.)

14) Because there is a positive time value of money (*i.e.*, it is better to have a dollar earlier rather than later), the value of the agent's compensation (both as a benefit to the agent and as a cost to the principal) depends on both elements of the parameter pair (p, t).

A common-usage linguistic analysis

15) The question currently presented can be simply expressed as: Is an attempt to influence the time-of-payment parameter t an attempt to fix the "price" of the service? I analyze

this question from two different perspectives. First, I analyze the question as a linguistic one in the context of everyday business and commerce. Secondly, I analyze the question from the perspective of the goals of antitrust law and Sherman Act Section 1 in particular.

16) There are numerous examples from everyday business and commerce that suggest that it is a pervasive linguistic convention that the word "price" refers to only the nominal payment p.

17) Therefore, from a common-usage linguistic perspective, in the present (p, t) principal-agent context, any action to influence the time-of-payment parameter, t, would not be considered an action to affect the price, p.

An explicitly antitrust analysis

18) However, relying on this verbal distinction between the price and non-price components of compensation might be too facile and rely too much on a linguistic technicality to well serve the goals of antitrust analysis. It is more appropriate to address directly the goals of Sherman Act §1. Therefore the relevant question is: Would the Proposed Protest aid or, alternatively, impede price competition?

19) Here the answer is contingent, depending upon the particular facts in any situation.

20) Consider a hypothetical situation, whose facts are contrary to those obtaining in the actual matter at hand, in which the nominal payment, p, was locked in at a particular value for the next year. Further suppose that the time-of-payment, t, was precisely specified to be ninety days after the services are rendered and that the principal had an unblemished record of complying with these terms. Now suppose that a group of agents collectively acted to reduce the time of payment to thirty days. This would have the clear effect of raising the value of the agents' compensation at the expense to the principal of raising the principal's costs. Although the collective action did not technically affect the price component of compensation, it clearly affected its value.

21) The actual facts in the present matter are substantially different. The most significant differences are that (a) the time of payment is not known with certainty by a lawyer prior to accepting an assignment, (b) the time of payment is chosen at the discretion of the court, and (c) prior suspensions of payment by the court have reasonably created substantial uncertainty by the lawyers about when their future payments would be delivered.

22) Under these conditions, lawyers cannot effectively negotiate and hence compete on price because a lawyer's compensation (p, t) depends on an unknown and uncontrolled value, *viz.* t. The more uncertainty about t that can be removed, the more informative about total compensation the nominal price, p, will become. Because collective action to affect the nominal payment is effectively prohibited, a collective effort to deter or end a suspension of payment would be procompetitive because it would facilitate competition on both price and total compensation dimensions.

[Code of Federal Regulations]
[Title 16, Volume 1, Parts 0 to 999]
[Revised as of January 1, 1998]
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Ex. D

[Page 43-44]

TITLE 16--COMMERCIAL PRACTICES

CHAPTER I--FEDERAL TRADE COMMISSION

PART 2--NONADJUDICATIVE PROCEDURES--Table of Contents

Subpart E--Requests to Reopen

Sec. 2.51 Requests to reopen.

(a) Scope. Any person, partnership, or corporation subject to a Commission decision containing a rule or order which has become effective, or an order to cease and desist which has become final, may file with the Secretary a request that the Commission reopen the proceeding to consider whether the rule or order, including any affirmative relief provision contained therein, should be altered, modified, or set aside in whole or in part.

(b) Contents. A request under this section shall contain a satisfactory showing that changed conditions of law or fact require the rule or order to be altered, modified or set aside, in whole or in part or that the public interest so requires. This requirement shall not be deemed satisfied if a request is merely conclusory or otherwise fails to set forth by affidavit(s) specific facts demonstrating in detail the nature of the changed conditions and the reasons why these changed conditions or the public interest require the requested modifications of the rule of order. Each affidavit shall set forth facts that would be admissible in evidence and shall show that the affiant is competent to testify to the matters stated therein. All information and material that the requester wishes the Commission to consider shall be contained in the request at the time of filing.

(c) Opportunity for public comment. A request under this section shall be placed on the public record except for material exempt from public disclosure under rule 4.10(a). Unless the Commission determines that earlier disposition is necessary, the request shall remain on the public record for thirty (30) days after a press release on the request is issued. Bureau Directors are authorized

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to publish a notice in the Federal Register announcing the receipt of a request to reopen at their discretion. The public is invited to comment on the request while it is on the public record.

(d) Determination. After the period for public comments on a request under this section has expired and no later than one hundred and twenty (120) days after the date of the filing of the request, the Commission shall determine whether the request complies with paragraph (b) of this section and whether the proceeding shall be reopened and the rule or order should be altered, modified, or set aside as requested. In doing so, the Commission may, in its discretion, issue an order reopening the proceeding and modifying the rule or order as requested, issue an order to show cause pursuant to Sec. 3.72, or take such other action as is appropriate: Provided, however, That any action under Sec. 3.72 or otherwise shall be concluded within the specified 120-day period.

(Sec. 6(g), 38 Stat. 721 (15 U.S.C. 46(g)); 80 Stat. 383, as amended, 81 Stat. 54 (5 U.S.C. 552))
[45 FR 36344, May 29, 1980, as amended at 46 FR 26291, May 12, 1981; 47 FR 33251, Aug. 2, 1982; 50 FR 53305, Dec. 31, 1985; 53 FR 40868, Oct.