In the

Supreme Court of the United States

UNITED STATES,

Petitioner

v.

ITT CONTINENTAL BAKING COMPANY

No. 73-1290

Washington, D. C.
November 13, 1974

Pages 1 thru 50

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UNITED STATES, Petitioner	:	
v.	:	No. 73-1290
ITT CONTINENTAL BAKING COMPANY	:	

Washington, D. C.

Wednesday, November 13, 1974

The above-entitled matter came on for argument at 1:53 o'clock p.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
WILLIAM O. DOUGLAS, Associate Justice
WILLIAM J. BRENNAN, JR., Associate Justice
POTTER STEWART, Associate Justice
BYRON R. WHITE, Associate Justice
THURGOOD MARSHALL, Associate Justice
HARRY A. BLACKMUN, Associate Justice
LEWIS F. POWELL, JR., Associate Justice
WILLIAM H. REHNQUIST, Associate Justice

APPEARANCES:

DANIEL M. FRIEDMAN, ESQ., Office of the Solicitor General, Department of Justice, Washington, D.C. 20530
For Petitioner

JOHN H. SCHAFER, ESQ., 888 Sixteenth Street, N.W., Washington, D. C. 20006
For Respondent

C O N T E N T S

P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in No. 73-1290, United States versus ITT Continental Baking Company.

Mr. Friedman, you may proceed whenever you are ready.

ORAL ARGUMENT OF DANIEL M. FRIEDMAN, ESQ.,

ON BEHALF OF PETITIONER

MR. FRIEDMAN: Mr. Chief Justice and may it please the Court:

The Clayton and the Federal Trade Commission Acts provide a civil penalty of up to $5,000 for any violation of an order of the Federal Trade Commission.

The statutes further provide that where the violation consists of a continuing refusal or neglect to obey the order of the Commission, then each day for which the violation continues is a separate offense.

The question in this case, which is here on a writ of certiorari to the Court of Appeals for the Tenth Circuit, is whether where a respondent under a Commission order prohibiting certain acquisitions without the prior approval of the Commission, makes those acquisitions in violation of the order each day that the Respondent continues to hold the illegally-acquired property is a separate offense or whether, as the Court of Appeals held in this case in conflict with a

decision of the Eighth Circuit, there is only a single offense committed in each of those situations: That is, the single act of acquisition.

And what happened in this case for these acquisitions, only single penalties of the maximum of $5,000 was imposed.

In 1960, the Federal Trade Commission issued an administrative complaint against Respondent's predecessor, the Continental Baking Company in which it charged that, since 1952 Continental, which was one of the largest baking companies in the country, had engaged in what it described as the continuous practice of acquiring bakeries throughout the country.

The complaint alleged that 7 specific acquisitions of bakeries made by Continental violated Section VII of the Clayton Act and it also alleged that various practices committed by Continental violated -- constituted unfair acts and practices in violation of Section V of the Federal Trade Commission.

After some hearings were held before an examiner, the case was settled in 1962 through the entry of a consent order. The order did two things, basically.

First, it directed Continental to divest itself of the principal acquisition challenged in the complaint, a firm called "Omar Bakeries" which it was believed was the

eighth largest bakery in the United States and, secondly, it imposed a prohibition upon Continental for 10 years against making certain acquisitions without the authority previously given by the Commission.

QUESTION: Mr. Friedman, do you think that that provision indicates that the Court felt that the holding of the other acquistions was not improper when it specifically spelled out Omar?

MR. FRIEDMAN: I'm sorry, Mr. Justice, this is in the Commission complaint.

QUESTION: All right.

MR. FRIEDMAN: I don't think that -- there was, let me say, there was a time that they entered into the consent order. There was also an Appendix that the parties signed which they said would provide a basis upon which the Commission could determine whether it was in the public interest to enter this order and in the course of that, which was a part of the agreement to settle the case on consent -- and in that agreement with respect to at least two of these acquisitions they concluded that it was not a violation of the Act.

But I don't think the fact that the Commission limited the divestiture to Omar to be fairly viewed as any indication that it concluded that the rest of the acquisitions were not illegal. This was a consent order and this

was a settlement. They agreed to give up the major acquisition they had made in return for which the Commission allowed them to keep some of the others and they both agreed to include this ten-year ban on further acquisitions.

That provision is set out at pages 88 to 89 of the record and what it says, "Directed the Respondent to cease and desist for ten years without the prior approval of the Commission from acquiring, directly or indirectly, through subsidiaries or otherwise, the whole or any part of the stock, share capital or assets of any concern, corporate or noncorporate, engaged in any state of the United States in the production and sale of bread and bread-type rolls."

Now, as I have indicated, the agreement which the parties signed consenting to this order stated two things.

First it stated that in construing this order, any of the parties could properly -- the Commission and the parties could properly refer to the complaint itself and the two provisions of the complaint that we think are significant in determining the purpose of this ban on acquisitions for ten years without prior Commission approval -- one of the allegations was that, as a result of these acquisitions, Continental had eliminated the acquired bakeries as independent, competitive factors.

The other thing that the complaint referred to was there was a substantial trend to industry-wide concentration

in the baking business.

These two allegations are set forth at pages 67 to 68 of the Appendix.

Now, in addition, there were certain things stated in the Appendix which was made a part of the agreement on the consent order, which bore on what the Commission was thinking when it approved this order, and the reason for that is the parties stipulated that these were factors that the Commission could consider in determining whether it would be the public interest to adopt this consent order and at page 84, which is the end of the Appendix, I'd like to read just two sentences just before the first full paragraph.

The party said that, "If this order is adopted by the Commission, the Respondents' alleged continuous practice of acquiring companies baking and selling bread and bread-type rolls will be brought to a halt and the major acquisition forming the gravamen of the complaint will be undone.

"Competition may be restored essentially as it existed before the acquisition of Omar, Inc. and the public interest will be well-served."

Now, it seems to us rather clearly what the parties intended this order to do is two things.

One, to bring to a halt the alleged practice of

Continental of increasing concentration by acquiring one bakery after another.

And, secondly, to undo one of the principal adverse effects on competition resulting from the acquisitions by acquiring divestiture of the major acquisition, the Omar Bakeries.

This order was approved by the Commission in May of 1962 and in 1966 the Commission undertook an investigation to determine whether certain conduct by Continental violated the order.

Specifically, it looked into three transactions which formed the violations involved in this case. The transactions are substantially similar.

In each case, there was an independent bakery which previously had both produced bread and rolls and distributed it and in each case, the independent bakery agreed, in effect, with Continental, that it would give up its production of the bakery products and would, instead, distribute to its previous existing customers, the products that were made by Continental.

In other words, Continental, in effect, took over the routes and provided the bread for these customers that had previously been the property of the independent customers

The stipulated facts in this case on the basis of which the District Court decided it are that the independent

bakery distributed these products of Continental exclusively under Continental's name over the same routes and to the same customers that it had hitherto distributed its own product and since there is a question here as to whether this was an acquisition of assets, I think it is not insignificant that each of the written agreements under which Continental took this over are captioned "sales agreement."

After investigation of these transactions, in 1968 the Federal Trade Commission certified the case in accordance with the statute to the Attorney General, asking that penalties be sought for these three violations of the order.

In the interim -- and the complaint was filed in December, 1968 -- In the interim, in September of 1968, Continental Baking was acquired by the present Respondent, ITT Continental, a wholly-owned subsidiary of International Telephone and Telegraph.

The Government's theory upon which it sought these penalties was that these transactions violated the ban and the order against acquiring directly or indirectly the whole or any part of the assets of a bakery firm.

The District Court held that two of the violations violated the order, but that the third one didn't.

The Court of Appeals affirmed the finding of

two violations, but disagreed with the Court of -- with the District Court as to the third and held that all three of them violated the order.

I think the rationale of these holdings is well set forth in the District Court's findings. It said -- this is at page 14a of the Appendix to our Petition.

It said, "Particularly in businesses where route salesmen are involved, customer lists have a peculiar value and that they frequently represent the principal assets of a business."

It said that "In connection with these transactions the most important assets that Continental acquired were the sales routes and sales volume," and in reversing the one transaction that the District Court had held did not violate the order, the Court of Appeals said that the market -- that is, the customers and the volume -- the business of distributing the bread was acquired and this was a principal asset of the bakery.

This determination reflected one of the facts stipulated in the District Court, which is at page 31 of the Appendix, that "Route books and customer lists are asset of any person, firm or corporation engaged in the distribution and sale of bakery products."

The complaint in this case sought penalties of $1,000 a day for each of these three acquisitions for each

day that they held them from the time of the acquisitions and the transactions until the filing of the complaint.

The District Court rejected this claim, ruling that this was not a continuing violation within the meaning of the penalty provision, but was merely a single violation and assessed a penalty for each of the two violations, the maximum statutory penalty of $5,000.

What the Court said is that the order prescribes only the act of acquisition, not any retention and it said once these two acquisitions were accomplished, the violations were complete and the Court of Appeals for the Tenth Circuit affirmed that holding, saying that the -- once again, the order does not bar the retention of assets illegally acauired, but only the acquisition itself.

Now, subsequent to the decision of the Tenth Circuit in this case, in a case which is now pending on certiorari called Beatrice Foods v. United States, the Eighth Circuit reached the contrary conclusion.

It held in a very similar situation involving a dairy, however, and not a bread company, that it was a continuing violation and it accordingly approved in the Beatrice Foods case the assessment of daily penalties of $200 a day from the date that Beatrice Foods took over the supplying of milk to the dairy to the point that the complaint was filed.

The total violation that was approved in the Beatrice -- the fine, I am sorry, that was approved in the Beatrice Foods case was $156,000 and in upholding --

QUESTION: Approximately how many dollars would have been involved here if the District Court and the Court of Appeals had bought your claim completely?

MR. FRIEDMAN: Well, if the Court gave us the $1,000 a day for which we asked, it would have come to better than a million dollars. But, of course, we don't know what penalty it would have been. If the Court had given the $200 a day --

QUESTION: No, but you asked for $1,000.

MR. FRIEDMAN: We asked for $1,000.

QUESTION: And did you ask for $1,000 for each one of these acquisitions?

MR. FRIEDMAN: Yes, we asked -- there were three counts, each --

QUESTION: So that is $6,000 a day for the --

MR. FRIEDMAN: $3,000 a day.

QUESTION: Yes, yes, I beg your pardon.

MR. FRIEDMAN: $3,000 a day for a period from 1965 to 1966 up to the filing of the complaint in 1970, which would be a very substantial penalty.

QUESTION: Well over a million dollars.

MR. FRIEDMAN: Well over a million dollars but we

do think, Mr. Justice, that that is what Congress intended in the penalty provisions.

QUESTION: I know you do and as you do point out, of course, the Court -- the $1,000 is a maximum.

MR. FRIEDMAN: The $1,000 is the maximum. That is all we asked for but $5,000 is the maximum and not infrequently the courts, when they do assess penalties, give less than the government asks for.

QUESTION: But the $1,000 would have been a maximum in this case.

MR. FRIEDMAN: In this case, yes. That was all we asked.

QUESTION: Mr. Friedman, has the Federal Trade Commission been imposing daily penalties for comparable infringements, as it views it, of orders, consent decrees of this kind, over the past years?

MR. FRIEDMAN: Well, fortunately, Mr. Justice, this is a relatively infrequent occurrence, the violations. There have been very few cases in which continuing penalties were sought.

I think the reason -- the reason is that in most instances, these orders merely bar acquisitions without getting the approval of the Commission and in most instances, what happens is, the people come in and seek the Commission's approval. If the Commission turns them down, they don't go

ahead with the transaction.

If the Commission gives them approval, they do go ahead with it so there has been a relatively infrequent situation.

QUESTION: Is this the first case or the Eighth Circuit case?

MR. FRIEDMAN: I don't know which came first, but they were relatively simultaneous. I don't know exactly when the Eighth Circuit case --

QUESTION: So far as you know, these are the only two cases?

MR. FRIEDMAN: As far as I know, these are the only cases involving daily penalties with respect to the acquisition-type orders.

There may be other cases involving daily penalties.

QUESTION: Is there any regulation of the Commission or any other means by which a party might be notified that the Commission took this interpretation of the statute? That is, that daily penalties were appropriate where an acquisition was made?

MR. FRIEDMAN: The Commission's position -- the Commission did not give -- ordinarily give notice to parties of this fact and I think the theory of it is, Mr. Justice, is that the parties are subject to the order.

They know they are prohibited from making

acquisitions without getting the approval of the Commission and the Commission assumes that these parties, if they have a transaction which is at all dubious, will come in and answer.

And, of course, in this case, the Commission did make inquiries of these people and there was an extensive investigation before the penalty suit was brought.

But the Commission does not follow the practice of giving notice. The theory -- I suppose, in a sense you'd say the theory is that the order itself is notice to them, that they cannot acquire directly or indirectly the whole or any part of the assets of a firm engaged in manufacture and sale of bakery products.

QUESTION: I understand that, but it does seem to me, as evidenced by the fact that we are here today, that it is arguable whether the statute means what the Commission says it means. That being so, I was wondering whether there had been any sort of regulation or notice given in any other way.

MR. FRIEDMAN: No, there is no regulation. I would suggest, Mr. Justice, that this is a factor that the District Court might properly take into consideration in determining the size of the penalty to be assessed, that this Court has, of course, discretion to decide how large a penalty to be assessed.

I would just like to refer to one thing that the

Court of Appeals said in the Beatrice Foods case when it indicated its disagreement with the judgment of the Tenth Circuit in this case, it said that "Such a limited construction of the order as barring only acquisition and not retention, ignores the crucial effects of an acquisition and would render non-acquisition orders virtually meaningless."

QUESTION: And that would indicate the Tenth Circuit case came first, if it is of any significance.

MR. FRIEDMAN: Oh, yes, the Court of Appeals decision in the Tenth Circuit came first, but I wasn't -- in answer to Mr. Justice Powell's question, I couldn't say which suit was filed first. Now, there --

QUESTION: Well, that wouldn't make it meaningless. It wouldn't make the acquisition order meaningless because I take it that divestiture is an appropriate remedy for a violation of an acquisition order.

MR. FRIEDMAN: I would think so, Mr. Justice, and since this case, the Federal Trade Commission Act has been amended specifically to provide for equitable remedies in penalty suits but I think what the Court meant was, meaningless in terms of accomplishing the purpose --

QUESTION: Of the fine.

MR. FRIEDMAN: Of the fine, in terms of accomplishing the purpose of these penalties to provide

enough of a penalty --

QUESTION: The fine penalty.

MR. FRIEDMAN: The fine penalty, yes, and, of course, divestiture isn't a penalty. Divestiture is merely -

QUESTION: But it hurts. But it hurts.

MR. FRIEDMAN: It hurts, yes. But I think that the fact that someone is subject --

QUESTION: Well, what of the theory of divestiture for violation of an order? Is it because continuing to hold it violates the order?

MR. FRIEDMAN: It seems to me it must be, Mr. Justice. It must be because what you are trying to do is undo the violation.

The violation was the acquisition and the retention and the way you undo it is to divest the illegally-acquired--

QUESTION: Because holding it contines to violate the order.

MR. FRIEDMAN: I would think so. I think implicit -- implicit in an order prohibiting an acquisition is that if you make the acquisition in violation of the order, that is a continuing violation.

It is all part of one thing.

QUESTION: I suppose that all it would take is a changing a couple of words in your consent decrees, then, to make it clear.

MR. FRIEDMAN: Well --

QUESTION: From now on.

MR. FRIEDMAN: Well, there is a problem with that, Mr. Justice, from now on.

QUESTION: Because they won't consent.

MR. FRIEDMAN: They won't consent and there are 67 of them. There are 67 of these orders outstanding.

QUESTION: Well, they shouldn't -- now that they know what your position is, they shouldn't consent anyway.

MR. FRIEDMAN; By the way, some of these orders are not consent orders. There are a number we have set out in our Appendix, 10 or 12 of them, that were orders entered following litigation.

QUESTION: Your view of the matter, Mr. Friedman, is that it is something like a contempt order of $1,000 a day and you give the contemptnor an opportunity to terminate it whenever he wants to.

MR. FRIEDMAN: Yes, I think the Second Circuit issue --

QUESTION: But everybody understands that in a contempt order without any ambiguity. Is that not so?

MR. FRIEDMAN: Yes, the Commission's position -- the Commission has not included in these orders the words "or retention." It has limited these orders, both the consent orders and the litigated orders, to the word

"acquisition."

QUESTION: Well, the issue here is whether this is a continuing violation.

MR. FRIEDMAN: Yes.

QUESTION: Because if it is a continuing violation, the statute is perfectly clear that each day is a separate violation.

MR. FRIEDMAN: Yes, that's the question. That is the question in this case and the reason we think it is a continuing violation is because of the purpose of the order.

That is, there is nothing wrong with the acquisition itself. The reason the acquisition is prohibited is because of the consequences of the acquisition.

The acquisition is the means by which a firm acquires a share of the market and makes a change in the structure of the market and what is intended to be prevented, it seems to us, by both underlying Section VII of the Clayton Act and by an order of this type, is to prevent the kind of changes in the structure of the market that result from acquisition.

And it just seems to us that it doesn't make much sense to say, yes, the order prohibits the acquisition and there is a penalty for that but once the order is violated and the acquisition is made, at that point that is the end of it. That is the end of it. Once you have acquired it, in

effect, you can continue to acquire it because the theory seems to be it is not a continuing violation.

QUESTION: But a judge, on the other hand, could accept your theory and still barely slap a defendant on the wrist by making it $5 a day.

MR. FRIEDMAN: That might be an abuse of discretion, I don't know, Mr. Justice, but certainly the judge has considerable discretion and all we are saying is that the judge should exercise that discretion, should not attempt to limit -- not attempt to limit the penalties to the single $5,000 and view just the acquisition as the offense.

Now, this case, we think, is a very different case from the Armour decision on which the courts below have relied and on which Respondent heavily relies in this case.

Armour, we think, involved a different situation, a very different situation from this. In Armour, the question was whether the Greyhound Company would have violated the Meatpackers consent decree by acquiring Armour.

The judgment prohibited Armour from acquiring an interest in a food company. Greyhound, according to the Government's theory, was in a food company and the Government's theory was that even though the language of the decree only prohibited Armour from having an interest in a food-packing company, more broadly, the purpose was to effect a separation between the Meatpackers and the food

companies, that the decree was concerned with the relationship and this Court rejected that reading. This Court said no, we think that what that consent judgment meant -- what that consent judgment meant was that it banned certain action by Armour, taken by Armour and did not ban action taken against Armour by Greyhound and it is in that context that this Court used the words which are relied on by our opponents and by lower courts, that the meaning of a consent decree must be discerned within its four corners and the consent judgment must be interpreted as written.

In Armour, of course, the question, basically, was whether what Greyhound was proposing to do violated the consent judgment.

In this case, that is not the question. The courts below held that what Continental Baking had done did violate the consent order.

The question in this case is whether, after the violation took place, whether the continued holding of the assests, whether the continued holding of the assets constituted a continuing violation.

QUESTION: Well, whether it -- yes, continued to hold and violated the consent order.

MR. FRIEDMAN: That's right.

QUESTION: And the courts below held no, it didn't.

MR. FRIEDMAN: That's right.

QUESTION: Well, Mr. Friedman, supposing I commit the offense of robbery and take $100 from you. Now, you would not say that each day I keep your $100 I am committing the offense of robbery?

MR. FRIEDMAN: No, Mr. Justice, but I think that is a different situation.

QUESTION: Well, and then the Court could require me to make restitution, just as you, in answer to Mr. Justice White said that divestiture could be made, even though a robbery is a one-time offense.

MR. FRIEDMAN: Yes, but the restitution, it seems to me -- that is a different thing. That is to make whole the victim of the robbery.

But here we are dealing with an order which, it seems to me, is not designed merely to protect one individual against the theft of his property.

Here the purpose of the order is to deal with competition in the bakery business and we think that is a very different situation.

QUESTION: But it dealt with it in terms of acquisition.

MR. FRIEDMAN: It dealt with it in terms of acquisition but we think inherent in the ban on acquisition is a further ban upon retaining any asset acquired in

violation of that prohibition.

That is what we think it is.

I should add two other distinctions, if I may, between this case and Armour. In Armour, all that you could go on, basically, was the consent judgment.

Here, what we have is the agreement of the parties that the complaint can be referred to and also this Appendix, which the Commission had before it in dealing and deciding to adopt the order.

Secondly, all that was involved in Armour was the interpretation of the judgment. In this case, we have to interpret the consent order in the light of the statute specifically dealing and providing penalties for continuing offenses and we think that the Armour case does not support the decision below.

QUESTION: Did I understand you correctly, in response to Mr. Justice White, that the consent decree could have been made so clear and unambiguous that there wouldn't be any question to litigate?

MR. FRIEDMAN: Well, I --

QUESTION: Except the amount?

MR. FRIEDMAN: Well, it could have been. That is, the Commission could have, instead of using the word acquisition, could have used the words acquisition retention and it has not done that, Mr. Chief Justice, and it hasn't

done it, I think, because it felt it was unnecessary. Over the years it has entered a large number of these orders containing the same thing.

QUESTION: Well, did you not give some intimation or was it from some other source I got the intimation that if it was made that clear, you would not get consent decrees.

MR. FRIEDMAN: No, no, I did not say that.

QUESTION: You did not.

MR. FRIEDMAN: I did not say that.

QUESTION: You did not intimate that.

MR. FRIEDMAN: I think perhaps Mr. Justice White suggested that the Defendants might not consent. But we think that this is what this order means. We think the notion that someone would say, I will not consent to an order that tells me that if, despite the ban I violated in retaining the assets, I am only -- I am not subject to divestiture or subject to penalties -- I find it hard to believe that the parties to these orders didn't understand that what these orders prohibit is certain acquisitions and an awareness of the fact that if they make the acquisitions and they keep the acquisitions, they are prohibited from making their acting illegally.

QUESTION: Do you have any issue here about construction of the document according to the authorship?

MR. FRIEDMAN: I don't -- I don't think so, Mr. Justice.

QUESTION: The only decrees I ever had to do with, except for the Government, were drafted -- all of them that I had to do with, both for Government and otherwise, were drafted by the Government, much like a union contract is submitted.

MR. FRIEDMAN: I don't know how this was drafted but I suspect, as is true in most of these judgments, there was a great deal of give and take. But I think we gave --

QUESTION: On the form? On this part of the --

MR. FRIEDMAN: No, I don't think there was any dispute. I think this was kind of what had always been assumed. This is what had been done. There were 67 of these outstanding, all of which say "an acquisition" and there is no reference to retention.

And I think it was just the Commission, I am sure, assumed that this --

QUESTION: But in any event, your point is that there is no ambiguity to resolve.

MR. FRIEDMAN: That is right. We think, fairly read, the word "acquisition" includes retention.

I just want to say one other thing before reserving the rest of my time for rebuttal.

The Respondent makes three other arguments which

it says are before the Court. They are offered allegedly as bases for affirmance of the judgment of the Court of Appeals.

Two of them -- we've dealt with them extensively in our reply brief. We don't think they are properly before the Court because of the Respondent's failure to file a cross-petition.

Two of them dealt with the right to the question of whether or not perhaps multiple penalties are available but only to the period for which the penalties would run.

That is, whether the multiple penalties would be available after ITT took over Continental Baking or for the period after which the Commission had concluded that there was a violation.

The third contention is that the actions of ITT in this -- of Continental in this case, the transactions, didn't violate the order at all.

That issue was resolved against the Respondent by the Court of Appeals and what it now appears to be saying is, well, somehow this should be permitted to argue in support of the judgment that no penalty should have been attached, therefore, you shouldn't attach higher penalties.

We think that that is not a permissable method of affirming the judgment. That contention does not seek affirmance of the judgment.

In effect, it is reversal of the judgment and we

think the decisions of this Court have made it very clear there that Respondent can argue points the effect of which would be to support the ruling below.

That is, you can support these decisions below, of course, on grounds not given by the Court of Appeals, but you can't come in and say we support it on the grounds that it is wrong. That is not supporting it. That is seeking to overturn it.

QUESTION: Mr. Friedman, isn't that precisely what the Government did in the Audi case at the last session?

MR. FRIEDMAN: As I recollect, Mr. Justice, in the Audi case, it was contended that the question presented was broad enough to cover the various points that the Government made.

That was my recollection of it.

QUESTION: That was the contention.

QUESTION: That is a nice way to put it.

QUESTION: As I am sure the opposition is contending here.

MR. FRIEDMAN: Thank you.

MR. CHIEF JUSTICE BURGER: Mr. Schafer.

ORAL ARGUMENT OF JOHN H. SCHAFER, ESQ.,

ON BEHALF OF RESPONDENTS

MR. SCHAFER: Mr. Chief Justice, and may it please

the Court:

What this case involves is an attempt by the Government to secure a retroactive rewriting of the consent decree which prevents only acquisitions so as to permit the imposition of daily penalties in addition to those that have already been imposed for something that is not barred by that consent decree. That is, the retention of assets acquired.

The Government's position flies directly in the face, in our judgment, of the Armour decision of this Court, the Hughes decision, the Atlantic Refining decision and our case, I believe, is a fortiori to those cases because, contrary to those cases which arose basically in terms of a construction of those consent decrees, here we are dealing with a penalty action from which the Government is seeking, as I say, retroactively, to interpret this consent decree so as to impose nulti-millions of dollars of penalties on ITT Continental Baking Company so that the underlying rationale of this Court's decision prevents that and I think that if that rationale is ever to be applied, it should be applied in this kind of a case where we are dealing not with a prospective interpretation of the consent decree, what does it mean, but we are dealing instead, as I say, with a penalty action.

The Government's position and our position would

substantially weaken antitrust and other enforcement activity because, as we all know, much of antitrust enforcement is conducted by way of consent decrees and consent judgments.

That is true of the STC and other agencies as well.

If we are going to --now, as the Government urges you -- to import into consent decrees vague concepts of purpose, purpose of the underlying statutes, the purpose of the consent decrees -- you are going to, instead of resolving litigation through consent judgments, you are going to foster litigation.

QUESTION: How do you separate the purpose and the objective of the consent decree from the underlying statutes on which it --

MR. FRIEDMAN: Well, Mr. Chief Justice, what Armour teaches, what Atlantic Refining teaches, and what Hughes teaches is that you look at the document as it is written. It is a contract composed between two opposing parties designed to do nothing but to eliminate the litigation.

It doesn't have any purpose and if it is a statutory purpose, that is irrelevant when you are dealing with this construction. Excuse me.

QUESTION: Well, even when you construe -- even

when you construe a contract, even if the lawyers, the draftsmen have not been careful enough to put in all the necessary desirable preambles, that doesn't stop the Court from looking at the totality to interpret the language of the contract, does it?

MR. SCHAFER: If there is ambiguity, Mr. Chief Justice, in a contract -- it is true, of course, under standard contract law it is permissable for the Court to look at the background of the negotiations.

The Government doesn't claim any ambiguity here. It simply wants you because of what it says is the purposes of this consent decree, to add some words to it. It wants to add some words to it.

It wants you to say the consent decree doesn't proscribe acquiring, that it proscribes acquiring and holding or acquiring and owning or any other language you want to say.

QUESTION: You are suggesting that as they are reading the consent decree by a defendant would be that you can make an acquisition, violate the order and at the maximum, it will cost you $5,000.

MR. SCHAFER: On this decree, that is a fair reading, Mr. Justice White.

QUESTION: That is the sole price for violating the decree.

MR. SCHAFER: No, not the sole price because, as you pointed out, divestiture is a very real price.

QUESTION: As far as the fine is concerned, it is a $5,000 price, that is all, for violation.

MR. SCHAFER: That would be true. That would be true. The Government can avoid that by writing a different consent decree. But that is true. The sole penalty price would be the $5,000, that is true, now $10,000 under the new statute.

But you do have divestiture.

QUESTION: I take it that you would probably also argue that if both of you had known this is what the decree was supposed to mean, the Government would have written it that way in the first place. They would have --

MR. SCHAFER: Unless they are trying to play tricks on us, I would assume that they would write it that way, yes.

As I say, the Government, in its brief, it didn't do it today but in its brief it argues that unless you construe this decree our way, it is going to be a toothless, unenforceable decree and that is not so.

Not only is the penalty involved, but that really seems to me tantamount to arguing that Section VII of the Clayton Act is toothless and unenforceable. The only relief there is divestiture. No one, to my mind, has ever

suggested that Section VII of the Clayton Act is unenforceable.

QUESTION: That is what you were refused here?

MR. SCHAFER: It was denied. The Government did not make a showing warranting divestiture in the judgment of this Court.

QUESTION: Could the Government do that again, in this very case?

MR. SCHAFER: Go back?

QUESTION: Could they now make a better showing and go back?

QUESTION: Bring an independent action.

MR. SCHAFER: Oh, surely, they can charge these were Section VII violations. Oh, no question about that, yes.

QUESTION: And, theoretically they could win it and get divestiture.

MR. SCHAFER: That is quite right and they are arguing and it has been sustained in the courts below that they don't even have to bring in Section VII in order to ask for divestiture.

QUESTION: Why can they try that over? It is in the essence. They have tried out the divestiture matter in this enforcement action.

MR. SCHAFER: Well, I don't know if you really

would say, Mr. Justice White, that they really tried it out. They claim they were denied it, but, in the District Court's judgment, they never made a showing on divestiture. They had it in their complaint.

QUESTION: If they brought a new Section VII action now, I suppose one of your first attempts might be res adjudicata then.

MR. SCHAFER: I hadn't thought it through, but I think you'd have different issues. I think you would have different issues.

Now I should say -- let me go, if I may, to the factual framework of these so-called "acquisitions." These are simply supply contracts. These are contracts by which Continental agreed to supply these former producers of bread and rolls, that the Continental would supply them their requirements of bread and rolls and that those former producers would distribute those breads and rolls in their trading areas.

They were pure requirements contracts or distribution agreements or whatever you want to call them.

Mr. Friedman expresses some wonderment that they are called sales agreements. Well, they are sales agreements. They are agreements to buy and sell bread. That is all they are.

QUESTION: But the bakeries acquired agreed not

to bake anything more of their own.

MR. SCHAFER: Mr. Justice Rehnquist, that comes out of a stipulation. We agreed, the lawyers wrote up a stipulation to resolve this dispute and we agreed to stipulate that it was the understanding of both sides that those former producers would stop selling and what that simply meant was that we knew when we took on the obligations to supply them, that they were no longer going to supply themselves. We did not bargain for that.

QUESTION: It was a better deal for them to get it from you than to make it themselves.

MR. SCHAFER: The economics of the industry are that the small producer is increasingly noncompetitive. These three companies in Missoula, Montana, in Cheyenne, Wyoming and in Durango, Colorado concluded independently and for their own reasons as stated in the Appendix, to cease the production of bread.

They did, however, want to stay in the bread business so they agreed with Continental to purchase Continental bread and to sell it in their trade areas.

They remained independent, competitive entities.

QUESTION: Where does Continental make the bread that it supplies to Missoula and Durango and Cheyenne?

MR. SCHAFER: The Missoula bread came out at Spokane bakery, Spokane, Washington. The bread for Durango

and Cheyenne came out of its Denver bakery.

These companies remained independent, the sole-owned companies. They owned their own assets. They owned their own trucks. They hired their own personnel. They owned their own sales routes, their customer lists.

They owned all their assets. They were not appointed by Continental. There was nothing here but a distribution agreement, a requirements contract, a sales agreement, whatever you want to call it.

QUESTION: Mr. Schafer, did the agreements with Continental prohibit these three small companies from producing bread in the future?

MR. SCHAFER: No, it did not, Mr. Justice.

QUESTION: They were free to do that.

MR. SCHAFER: They were free to do that, yes.

The fact is that Sheppard Baking Company, after this record closed, Sheppard Baking Company in Durango, for its own independent reasons, concluded to switch supplies so that Continental no longer supplies Sheppard in Durango.

QUESTION: But you did stipulate that the understanding was that companies would not continue to produce?

MR. SCHAFER: Yes, we knew that they were no longer going to be producing. They told us that.

QUESTION: Now, that was the understanding. The

contracts may not have been explicit.

MR. SCHAFER: It was not an understanding in a contract bargain sense, Mr. Justice White. It was simply our understanding that as a matter of fact, these companies were no longer, for their own independent reasons, going to bake bread.

QUESTION: But if you had -- unless you had thought they were not going to bake bread, you probably wouldn't have entered into the arrangement.

MR. SCHAFER: They would have had no interest whatsoever in buying Continental bread if they were going to bake their own bread.

QUESTION: Would a resumption of production on their part have been actionable, so far as Continental was concerned?

MR. SCHAFER: Not at all. Not at all.

QUESTION: Mr. Schafer --

QUESTION: Did Continental agree to supply all their requirements?

QUESTION: It did agree to supply all their requirements. They were free to purchase bread -- items from other bakeries but Continental had the right to approve that and the record shows that on some occasions, application was made to purchase other products from other bakeries and that approval was granted.

QUESTION: Mr. Schafer, you mentioned the economics of the bread business. One of these companies had sales of $300,000 a year. What would the profit margin on sales of that magnitude be in the bread business?

MR. SCHAFER: Well, today it would be a substantial loss. I don't know if the record reflects that. That is not high volume.

QUESTION: I understand that.

MR. SCHAFER: It would depend upon the kind of scale that he could achieve in his producing plant.

Now, with that kind of volume, he probably had production costs running from something like 75 percent of his total wholesale prices and you are not competitive at that level. You have got to be producing the bread at something like 45 to 50 percent of the total price you sell it for and the rest of your -- the distribution costs account for another 40 percent or so and then you are looking at a maximum of 50 percent profit.

But a small-volume baker is running very high production costs and for that reason, these bakers, as I say, independently concluded to withdraw from the production end of the business but to engage, as independent companies in the sale of the bread.

QUESTION: Mr. Schafer, do you think the Eighth Circuit Beatrice Food case is at all distinguishable from

your case?

MR. SCHAFER: I think that the underlying issue of violation is clear -- relatively clear there, Mr. Justice Blackmun. We contend we did not violate the order. I don't know -- I don't make that contention as to Beatrice. I think there was that acquisition there. We are contending there was none, but the continuing penalty question is not distinguishable, in our judgment.

QUESTION: There is a clear conflict on that issue.

MR. SCHAFER: It is a clear conflict, Mr. Justice Stewart, on that issue. The Beatrice court adopted in toto the arguments being urged upon this Court in this case and that were urged on the Court in the Tenth Circuit case.

They adopted in toto the Government's argument that to enforce the purpose of this consent decree, you have got to construe this transaction, this consent order, in the way we want you to and as I say, that, in our judgment, is contrary to all of the decisions that this Court has rendered on the matter.

We also contended that the Government, even if you were to look for purposes, even if you, contrary to Armour and the other cases, if you were to agree with the Government that you could look at purposes, it doesn't help the Government here at all because this was a complaint directed against the active acquisitions, the Section VII of

the Clayton Act under which the complaint was filed, of course, reads on acquisitions.

Your concern about concentration and whatnot is completely handled by a ban against acquisitions. The retention argument just doesn't make, in our judgment, any sense. You don't need that.

If I acquire my competitor, of if I acquire my competitor's supplier or my competitor's customer, that act of acquisition is what Section VII reads on and if there is any adverse impact on competition, it is that Act.

It doesn't matter whether I scrap that acquisition and sell it to the junkman or whether I retain it. If I buy my competitor, he is out of business for it is no longer competition and so it is the acquisition that the Government --

QUESTION: If you don't sell it to the junkman and don't scrap it and you continue to hold it and operate, I suppose that you might be entitled -- be forced to divest.

QUESTION: Yes.

MR. SCHAFER: That is true. That is true.

QUESTION: On the theory -- on the theory that at the time of the divestiture, you are still injuring competition.

MR. SCHAFER: In a penalty action, Mr. Justice?

If we are not in the Section --

QUESTION: No, I mean in the Section VII Act.

MR. SCHAFER: Yes, I think that is right. You are still -- because the Act that you committed back in 1970, if you will, the Act that you committed at the time of suit can be said to be causing an adverse impact on competition.

QUESTION: I know, but divestitures normally are not ordered if, at the time of the order, nobody is being hurt.

MR. SCHAFER: Well, it is still a violation.

QUESTION: Well, that question is -- what is the theory on which a divestiture is ordered?

MR. SCHAFER: Well, as I understand the theory, which comes, of course, out of this Court's decisions, the divestiture is almost manditory where a violation of Section VII is found, a divestiture is virtually mandatory because that is the only hope you have of reconstituting the industry before the illegal act occurred.

QUESTION: And the divestiture is the antonym of acquisition.

MR. SCHAFER: That's right.

QUESTION: The way you unring the bell of acquisition is by divestiture.

MR. SCHAFER: That's a good word, yes. That is my understanding of the concept.

QUESTION: But you don't order divestiture if at the time the remedy question comes up there is no longer any

injury to competition.

MR. SCHAFER: That may be.

I have a hard time understanding how that could then be a violation, Mr. Justice White, if there is no --

QUESTION: Well, it was at the time.

MR. SCHAFER: -- impact of -- well, at the time of the suit. The question is whether or not at the time of the suit there was adverse impact on competition.

If there were none, I take it there would be no violation of Section VII. If there were, the routine solution is divestiture to put the industry back to where it was before.

QUESTION: Well, that's what makes a lawsuit.

MR. SCHAFER: Now, in our judgment, the Government position here as I guess I have suggested, violates the two basic principles of consent decree construction settled by Armour, settled by HUghes and other cases.

One is that the language is to be construed as it is written. It is like a contract and this language, as the Government really admits in its oral argument and its briefs, this thing which has to be changed in order to support its claim for daily penalties, it has to be changed to read beyond acquisition. It has to incorporate the concept of holding and retention and that -- that is not construing, then, the consent decree as it was written. It is construing

it in a different way.

Now, the second tenet of construction is that this Court's decisions instruct us that you don't, as I say, look to the purposes underlying the statute or the purposes, so-called, underlying the consent decrees.

As I have said, the Government's position simply doesn't support its claim that you look toward concentration. You solve any concern about concentration by banning the act of acquisition. That is what this order did.

There is no basis in this record, certainly, for a so-called "concern on the part of the Government" that if you don't contrue this consent order to afford the basis for daily penalties, that you are going to have flagrant violations of these consent decrees.

As Mr. Friedman admitted, as far as everybody knows, there have only been two situations like this come up in all the years of Clayton Act enforcement.

Section VII, as I have said, seems to me to be self-enforcing, even though the only remedy there is divestiture and anyway, such fears of enforceability or unenforceability of consent decrees are really irrelevant to how you construe a consent decree because we struck a bargain in 1962.

We labored over it. The Government wanted a 20-year ban. We wanted a five-year ban. We ended up with a

ten-year ban.

The Government wanted to proscribe acquistions of any companies engaged either in the production or the sale of bread and we didn't want that because we wanted to be free to buy -- acquire companies without violating the order that were engaged only in the sale of bread because at that time there were many such independent little companies strung out around the country who were basically one-man shows and who, from time to time, came to Continental and wanted to be acquired because they were getting old or something.

So we bargained for that and we changed the word "production or sale" in the order to "production and sale." And so these are very important words that we bargained over.

As the District Court found, there was a reasonable basis for reading the order the way we read it, not to ban these transactions. There is no basis here to say this was a flagrant violation of this order.

As I have said, there was no -- there has been no record, except for the Beatrice case, of any other situation like this coming up and moreover, these so-called "fears of the Government" about flagrant violations continuing can surely be amply accommodated by changing the outstanding orders they have to the proper procedures with proper

hearings and by writing new orders which read on the situation as they want this one to read.

As I have said, in our judgment, the Government's argument here is short-sighted, consent negotiations and consent decrees and judgments are extremely important to the antitrust enforcement program. They are important to the -- I know, the SEC and to other Government agencies and if we are going to now import all kinds of vague concepts of purpose into these consent decrees, we are going to certainly chill any enthusiasm anybody might have for disposing of litigation and abandoning the right to trial by coming up with a consent disposition of a case.

The Government -- turning, if I may, briefly, to the question raised by the Government as to whether or not we are permitted or should be permitted to raise the other issues that we have raised in this case, for many years, at least up to the American Express decision, this Court routinely held, as consistent with appellate practice, that a party can present any argument in support of the judgment below.

The Government now claims that this Court has gone away from that standard and has adopted a new standard. The Government now claims that we may not, without a cross-petition for certiorari, may not raise an issue where the logical impact of that issue would be to secure reversal

below, even though the party isn't asking for it.

We have cited the Court to Mr. Stearn's article in the Harvard Law Review on this matter of practice. It says virtually everything there is to say.

QUESTION: It says our Strunk opinion is wrong, doesn't it?

MR. SCHAFER: It says the Strunk opinion and others can be read in a number of ways and it says they can be read so as not to bar a party from raising issues in support of judgments below and Mr. Stearn, of course, urges this Court to make that clear and he does point out the tremendous burden that would be imposed on this Court and upon the Solicitor General's office and upon the parties if they were required to file what would really be useless anticipatory petitions for certiorari.

And this case is a good example. We did not know the Government was going to petition for certiorari until after the period of time expired in which we could petition because the Government, as is not unusual, got an extension of time at the last minute.

We got notice of that in the mail after the time had run so we didn't have an extension of time and they did and they filed a petition.

Now, to protect ourselves, we would have been, under the Government's interpretation, we would have had to

file a precautionary petition for certain with this Court.

I don't see any real reason to require that. There is no policy judgment that I can figure out that would warrant that because in our response to the Government's petition, we listed, in our brief in opposition, the points that we would raise or feel were relevant in the event the case came up.

The Government, thereby, is not prejudiced when it prepares its brief on the merits. It knows all the issues that we planned to present and can address itself to them.

So I don't think that there is any reason to insist upon these -- really, what without this strict rule of practice would be unnecessary petition for certiorari.

QUESTION: How about our control of our own docket, though? When we grant a petition for certiorari, we know that the issue is going to be limited to one or two issues.

Now, we could have a cross-petition and deny that, thereby indicating that we just don't want to consider those issues.

You are suggesting, I take it, that if a cross-petition is filed that it would be automatically granted.

MR. SCHAFER: No, I am not, Mr. Justice Rehnquist. I said that it seems to me the proper practice is, as we did here, to list in our brief in opposition to the cert

petition those issues which we feel the Court should reach if it gets into the case.

Now, the Court, at that time, could easily say in its grant, we are limiting this grant to these issues.

The Court is informed, in other words, and the Government is informed, in other words, without a label "petition for certiorari" the Court and the Government are informed of the issues sought to be presented and the Court can at that time or later on control its own jurisdiction by concluding that the issues that one seeks to present are not cert-worthy issues on their own.

I think these issues are clearly cert-worthy that we are trying to present. The underlying issue of whether there was a violation here were distributorship arrangements, requirements contracts, normally --

QUESTION: It is cert-worthy if it is only going to cost you $5,000.

MR. SCHAFER: Well, the important question is, Mr. Justice White, whether or not --

QUESTION: You decided not to, on your own, to file a cert petition?

MR. SCHAFER: Oh, yes. We were content to leave the case where it was. It didn't warrant coming up here for that penalty, that is true. And the order had expired, the order has long since expired. There was no continuing

dispute here that warranted our seeking this Court's attention.

As I say, the issues we are seeking to present, in our judgment, are cert-worthy, is a requirements contract normally thought of, if at all under Section III of the Clayton Act, is that an acquisition of the sort that Section VII of the Clayton Act reads on?

Is the Commission committed to reach a conclusion that a party is incurring daily penalties of up to $10,000 in this case $30,000 per day because the statute has been amended -- is it permitted to do that without putting the party, the Respondent, on notice that it is in jeopardy?

I think that is a very serious issue. Several district courts have agreed with us on that. I think it is clearly an important issue for this Court to reach if it disagrees with us that daily penalties may be imposed here.

If the Court doesn't -- if the Court, in other words, adheres to Armour and adheres to Hughes and Atlantic Refining and the others, of course, these other issues are not reached.

It is only if the Court should disagree with us and conclude that daily penalties may be asserted, then we feel that the question has to be reached of was there a violation here? Is the Commission permitted simply to stand idly by and let a Respondent pile up penalties and, thirdly,

is ITT Continental Baking Company a successor of Continental where there is, in the consent order, no successors and assigns language.

Armour, of course, flatly says that where there is no successors and assigns language in a consent decree, the decree is not binding on its successors and assigns.

I would think that would be dispositive of the issue here.

QUESTION: Mr. Schafer, is there any difference between you and Mr. Friedman as to the maximum amount of the possible penalty on the Government's theory?

MR. SCHAFER: In their complaint, they ask for $1,000 a day, Mr. Justice Powell.

The Court, for reasons that were not stated, assigned a penalty of $5,000 a day for one day's violation for two different transactions, without an amendment to the complaint. We did not oppose that. Frankly, I think the Government could have put in a pro forma complaint amendment and cured that.

The statute now permits $10,00 per day. It has been amended since.

Now, if that amended revision is applicable to this case, and I suppose it is retroactive, you are looking at a possible penalty claim of up to $20 millions of dollars in this case.

Thank you very much.

MR. CHIEF JUSTICE BURGER: Thank you, Mr. Schafer.

Thank you, Mr. Friedman.

The case is submitted.

[Whereupon, at 2:52 o'clock p.m., the case was submitted.]