ORIGINAL

In the

Supreme Court of the United States

Brunswick Corporation,

Petitioner,

v.

Pueblo Bowl-O-Mat, Inc., et al.,

Respondents.

No. 75-904

Washington, D. C.
November 3, 1976

Pages 1 thru 50

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BRUNSWICK CORPORATION, Petitioner,	:	
v.	:	No. 75-904
PUEBLO BOWL-O-MAT, INC., et al., Respondents.	:	

Washington, D. C.,

Wednesday, November 3, 1976.

The above-entitled matter came on for argument at 10:37 o'clock, a.m.

BEFORE:

WARREN E. BURGER, Chief Justice of the United States
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
JOHN PAUL STEVENS, Associate Justice

APPEARANCES:

BERNARD G. SEGAL, ESQ., Schnader, Harrison, Segal & Lewis, 1719 Packard Building, Philadelphia, Pennsylvania 19102; on behalf of the Petitioner.

MALCOLM A. HOFFMANN, ESQ., 12 East 41st Street, New York, New York 10017; on behalf of the Respondents.

C O N T E N T S

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P R O C E E D I N G S

MR. CHIEF JUSTICE BURGER: We will hear arguments next in 75-904, Brunswick Corporation against Pueblo.

Mr. Segal, you may proceed whenever you're ready.

ORAL ARGUMENT OF BERNARD G. SEGAL, ESQ.,

ON BEHALF OF THE PETITIONER

MR. SEGAL: Mr. Chief Justice, may it please the Court:

I rise to address the Court in a case which has aptly been called by the Court of Appeals, a case of first impression nationally, one which explores largely virgin anti-trust territory, and one which involves, for the first time since the Clayton Act was passed, that we have a money damage verdict under that Act.

I should like to emphasize initially that what we are here for is to argue legal issues, not facts; that we are here to argue the subject of damages, as governed by those legal issues.

There are just a few uncontroverted facts, salient facts, that I think are necessary just as background. The plaintiff, the plaintiffs are subsidiaries of Treadway Companies, which is a chain of bowling centers that operates in the United States, and each subsidiary operates a different bowling center.

Brunswick Corporation is one of the two largest

manufacturers and distributors of bowling equipment in the United States, and is the defendant, the petitioner here.

I should tell Your Honors that the reason the litigation arose is that prior to 1964 the bowling industry -- really prior to the early 1960's -- was in a boom period, and the bottom fell out of it in around 1963, 1964. There was a precipitous decline, and the petitioner found itself on the verge of bankruptcy. It had borrowed $300 million because, in selling to the bowling centers, the plaintiffs here, it did that on conditional sales, with a down payment, but with a very substantial portion of it, major portion of the money, being on a note basis.

And it had $400 million outstanding with these bowling centers, of which $100 million was more than 90 days' delinquent.

What it needed was some way to get cash flow. It appraised all of these centers, it selected those which it thought would give it cash flow. It first tried to get them to pay. It then tried to dispose of them, dispose of the equipment, as the Court of Appeals carefully outlines. Failing all that, it took over these stations to operate them, where it thought they would create a cash flow.

And what we have involved here are three local markets, in which it took over stations. Two of them, it took over a station that was one of the smaller bowling stations,

one of them it found that -- bowling centers, I should say to Your Honors -- it found that it simply couldn't get the cash flow. And after a few years it just closed it down and left the market. That was Poughkeepsie.

The others, it remained in the market.

The complaint of the plaintiffs is that it should not have taken over those stations. That if it had not done so, those stations -- I'm calling them stations, those bowling centers would have folded.

And, you can tell, Your Honors, I don't do much bowling.

Those bowling centers would have folded. And if they had folded, the plaintiffs would have shared with the other centers in each of these three local markets, with the business that would thus have been released.

That is the entire theory of the case.

Now, Your Honors, there are just, for some reason -- I guess I know the reason -- the respondents endeavor to change that theory here. And I therefore read Your Honors just what the Court of Appeals said. It happens to be at page 25a of the Petition for the Writ of Certiorari.

"The thrust of plaintiff's Section 4 theory was that damages were to be computed by first assuming that each Brunswick-acquired center would have closed down at the moment of takeover." In other words, no one else could have taken

over. They were just closed down.

"... but for the takeover and then by projecting what portion of the closed center's business would have been captured by Treadway's centers."

Now, I should say to Your Honors that in these three markets there is no showing of any kind that the plaintiffs had any less share of the business, or that the defendant got any more share of the business during the eight years, from the time of takeover until the time of the second trial.

There's no showing that there was any difference in facilities. Indeed, the only showing was that three of the independent centers increased their facilities. No showing except that the defendant gave up completely the Poughkeepsie market, gave up one of its bowling centers in the Paramus market. The three markets are Paramus in New Jersey; Poughkeepsie in New York, and Pueblo in Colorado.

I say there's no showing of any of those because the case proceeded on the rather simple ground.

Now, at the trial there were two -- there was a charge of violation of Section 1 of the Sherman Act, and the plaintiff withdrew that.

There was a charge of a violation of Section 2 of the Sherman Act, and this is important, because the judge, in charging the jury, took up every bit of evidence of what was called behavioral evidence, that the plaintiffs offered; every

shred of it, and gave it to the jury and said: This is for the section 2 Sherman Act charge. And if you find these things are true, then you give a verdict to the defendant -- to the plaintiffs.

And the jury brought in a verdict for the defendant on the section 2 Sherman Act.

Now, when it came to the Clayton Act, Section 7, there the court restricted his charge to a structural charge. He said: The defendant admits that it's No. 1 in bowling; it's the largest manufacturer in bowling, and it serves as a banker for those to whom it sells.

And finally, the court said, that the percentage of bowling center facilities in a local market that Brunswick obtained by the mere act of taking over a bowling center, you find that that was more than an insubstantial share -- were the trial court's words -- if you find that was more than an insubstantial share, say, beyond ten percent or fifteen percent, then you may find a verdict for the plaintiffs.

Now, that was the only thing that was -- that's before this Court, the only thing on question one, the only thing that was given to the jury, when everything else had found for the defendant -- my friend on the other side has some 30 pages of facts. He talks of findings by the jury.

Well, I can't understand -- if there were findings, they were for the defendants. But since this is a law case,

Your Honor, I don't argue anything but the facts. I have read Your Honors the --

QUESTION: Did the jury give a general verdict, Mr. Segal, or --

MR. SEGAL: A general verdict for the defendant in Section 2, Sherman Act, and a verdict of something under $7 million after trebling under the Clayton Act.

QUESTION: But there were no special interrogatories?

MR. SEGAL: None whatever, Your Honor.

QUESTION: Mr. Segal, how about -- was there a prayer for equitable relief?

MR. SEGAL: There was, YOur Honor.

QUESTION: And on the Section 7 case?

MR. SEGAL: On the -- there was a general prayer for equitable relief, and --

QUESTION: Were there proceedings held by the judge going to equitable relief?

MR. SEGAL: Well, he curiously relied on the jury's verdict, and --

QUESTION: Well, but did he give some equitable relief?

MR. SEGAL: He gave -- he granted divestiture.

QUESTION: Yes?

MR. SEGAL: And the Court of Appeals --

QUESTION: And in the process, did he make some

findings?

MR. SEGAL: I would say no, Your Honor, because, says the Court of Appeals, that one of his errors was that he relied primarily on what he regarded as the findings of the jury, and the findings of the jury could only be in Section 2, and Section 2 is decided for the defendants.

QUESTION: Well, he said a lot of things about the facts.

MR. SEGAL: He said a lot of things about the facts.

QUESTION: So it may be that --

MR. SEGAL: That's one of the reasons he was reversed, Your Honor.

QUESTION: Yes. Well, but it's also one of the -- it's also, maybe, one of the reasons that you just can't ignore them.

MR. SEGAL: But we aren't here on that, Your Honor.

QUESTION: All right. All right.

MR. SEGAL: Your Honors had two petitions. One consisted of two solid pages of questions by --

QUESTION: On the question that you raise here, we must assume that there has -- we judge this case on the assumption that there was a violation of Section 7.

MR. SEGAL: I am willing to assume, for the purposes of argument, and to proceed --

QUESTION: Yes.

MR. SEGAL: -- that there was a violation of Section --

QUESTION: And your arguments take up from that point.

MR. SEGAL: Take up from that point.

QUESTION: Right.

MR. SEGAL: Now, it so happens that Your Honors --

QUESTION: Mr. Segal, you make that assumption with respect to the second question as well as the first?

MR. SEGAL: I make that assumption --

QUESTION: The second question is the failing company defense argument.

MR. SEGAL: The second question, Your Honor, we say there can't be liability because of the failing company.

I am now addressing myself to question one.

QUESTION: For that question only you assume there is a violation?

MR. SEGAL: No, no.

Now, my friend objects to the fact that in making our concession, since the court had said that there was enough for the jury to find violation, and we're sending it back to that, we assume that. My friend seems to think that that makes a mighty difference and opens up the whole question, and therefore my direct answer is the answer I gave Mr. Justice White, that we are perfectly willing to assume, for purposes of argu-

ment in this case, that the acquisition by the defendant -- the acquisitions -- constituted a violation of Section 7 for the purposes of the first Act.

QUESTION: And I take it you are also willing to assume that the Act which was a violation, namely the acquisition, also caused some damages?

MR. SEGAL: No.

QUESTION: Just the very Act. Just the very Act --

MR. SEGAL: No. And that I should make clear right now to Your Honor, --

QUESTION: Well, I know, but I thought your argument was that there wasn't any -- that whatever damage was caused was not caused by any lessening of competition.

MR. SEGAL: The entire damage theory, the entire damage theory in this case, as said by the Court of Appeals succinctly, had a single line of damages. There were five witnesses.

QUESTION: Right.

MR. SEGAL: Indeed, their testimony was so identical that the trial judge charged: If you believe one, you must believe all five. Which is a curious charge, but they really were identical.

And the jury took without a dollar change what they said was the minimum loss of -- what? Of what the plaintiffs would have had if, instead of taking over the station, they had given up the station.

QUESTION: The bowling alleys.

MR. SEGAL: Yes, bowling alleys.

QUESTION: This isn't CBS.

MR. SEGAL: Bowling alleys -- yes. That's my next case, Your Honor.

[Laughter.]

MR. SEGAL: It proves I prepare in advance, anyway.

The sole evidence in this case is what I have just said.

QUESTION: Mr. Segal, just to elaborate on Justice White's question a little bit, there is at least "but for" causation here, isn't there? In the sense of acquisition by Brunswick and loss of profits on behalf of the plaintiffs.

MR. SEGAL: Mr. Justice Rehnquist, the whole thing is a "but for".

QUESTION: Well, but isn't there at least that, so you argue from there, rather than argue whether there was "but for" --

MR. SEGAL: That's what we are here for. The court held that mere presence, mere presence, without any lessening, let alone substantial lessening of competition, would be enough.

QUESTION: But if it's mere presence that was the violation --

MR. SEGAL: Mere presence was the violation.

QUESTION: All right. But you're willing to assume that all the damage -- that there was damage from mere presence, but that that is not what damage has to flow from. You're saying there must be --

MR. SEGAL: Precisely, Your Honor.

QUESTION: -- some additional proof of lessening of competition.

MR. SEGAL: Yes.

QUESTION: Do you equate mere presence with mere survival?

MR. SEGAL: Yes, Your Honor, in this case.

QUESTION: The survival of these failing alleys, bowling alleys.

MR. SEGAL: In this case, the whole case of the plaintiffs is premised on the fact that the bowling centers would have gone out of business if we had not taken them over, and therefore, if we had not taken them over, the business would have been distributed.

In other words, what he is complaining about, Your Honors, is the maintenance of competition, not the destruction of competition.

QUESTION: The question put to you by Mr. Justice White used the word "damage" resulting from the fact that -- or the presence of Brunswick. Is it not possible to say that damage is an inappropriate word? It has been suggested in the

briefs that the plaintiffs below were seeking a windfall that would result to them, as a result of the elimination of competition. Is there a distinction between that sort of economic gain and damages sustained as the result of a wrong?

MR. SEGAL: Precisely, Your Honor. We take the position, and there -- every case one reads is consonant with this position: that damage has to be something which, under this Act, flows from either a reduction in competition or a creation of monopoly. And that what is here called damage is just the result of ordinary competition. If any other -- if the original people had stood there, the original operators, we would have had the same picture.

If we had forgiven the debt, which, here for the first time, my friend says we could have done, if we had said, "All right, you can owe us $400 million and we won't collect", they would have had the same presence as they have now, they would have had the same business, because there is not a shred of evidence, no showing that we got any more business after we came than our predecessors had. There is no showing we got any more business than anyone else would have had.

And the only increases in facilities are by others, not by us, we have closed down. We have not increased. There is not a shred of evidence, I say without any question whatever, no showing of any kind that we gained anything.

QUESTION: Mr. Segal, let me put what I understand to

be your opponent's strongest case against you, and see if -- make sure you address it directly.

As I understand their theory, it is that the acquisition was unlawful, which you assume for purposes of question one, --

MR. SEGAL: Right.

QUESTION: -- and that, therefore, the presence in the market was unlawful, which you assume --

MR. SEGAL: May I interrupt Your Honor? The presence not of Brunswick, the presence of the station, the presence of the center.

QUESTION: Correct. Which they say would not be there but for the violation of law.

And that therefore there's a continuing violation. They say also that the presence caused injury to them, even though it may not have caused any adverse impact on competition.

And they then say that the statute provides that they can recover for an injury which flow -- injury to business or property flowing from a violation of law. Your response, as I understand it, is: No, you can only recover for an injury if it is also an injury which causes an adverse impact on competition.

MR. SEGAL: Correct.

QUESTION: And what is the support for that?

MR. SEGAL: The support for that -- well, this Court

has never had a case involving damages. But its pronouncements in the non-damage in the government and the equity cases have been used by cases like Gottesman in the Second Circuit, where they have now said, and pretty uniformly -- originally there was a big split -- that you can recover.

All of them say, however, that the only thing you can recover -- and I say with no hesitancy whatever, that there is not a case that doesn't say this -- that the only thing you can recover for is damages flowing from either the lessening of competition or the creation of monopoly. That when the threat ripens into reality, and you can prove that flowing out of the reality is a damage to you, then you can recover. And that is the only place you can recover.

The difference, Mr. Justice Powell, that you made is precisely the difference that the cases make.

QUESTION: Mr. Segal, with those cases in which one could assume, for purpose of decision -- and I haven't read them all -- that there was an injury in fact, but yet no damage flowing from an injury to competition?

MR. SEGAL: Well, that was the ultimate holding, because this is the first case of a money damage.

In each case, when it came back, the court said: Oh, well, you're just saying you're injured by the competition; you're not proving that you're injured by a lessening of competition, or by a creation of monopoly. So, though we have

said the rule is you can recover, you have not proved any more than has been proved here. You have not given us the prerequisite for a damage verdict; namely, damage flowing from a lessening of competition, which I will use for both terms.

QUESTION: I'm not sure I made my question as precise as I should have. Did they assume, in so saying, that there was an injury flowing from the violation, even though not flowing from an injury to competition?

MR. SEGAL: I can't say that expressly, but --

QUESTION: You see, that's a very narrow, narrow question here,as I understand it.

MR. SEGAL: -- in every case, Your Honor, you had that as a fact.

QUESTION: That there was injury in fact?

MR. SEGAL: Sure, or it wouldn't have arisen.

QUESTION: I see.

QUESTION: Well, in this case, do I understand it, Mr. Segal, that you argue -- that you concede, at least arguendo, that had there been a showing here of sales below cost by your deep pocket client, at the bowling alleys acquired and at issue in this case, that that would have laid the foundation for vulnerability for a monetary damage?

MR. SEGAL: If that resulted in a diminution of the level of competition.

QUESTION: Yes. And so that your answer would be

yes, wouldn't it?

MR. SEGAL: Yes. Yes. On our assumption there would have to be damages, if that were true.

QUESTION: Right. Was there evidence of sales below cost here?

MR. SEGAL: No evidence of sales below cost. There was -- oh, there are 30 or 40 pages -- there were things that, for instance, --

QUESTION: Trips to Europe, and so on?

MR. SEGAL: Yes. Now, that was trips of two people for the whole United States.

QUESTION: Unh-hunh.

MR. SEGAL: We demonstrated --

QUESTION: Cutrate for groups and so on?

MR. SEGAL: No, not cutrate. There was only one charge of cutrate in the record, and that was that in order to attract youngsters in the summer, we gave them a special rate in the mornings, when youngsters normally didn't play.

But our total promotion cost was under three percent, whereas the plaintiffs' total promotion cost was three percent.

QUESTION: But there was evidence, wasn't there, --

MR. SEGAL: Oh, yes, there was evidence -- all that was under Section --

QUESTION: -- that those four plaintiffs were sales people --

MR. SEGAL: -- all that was Section 2, Your Honor.

QUESTION: Yes, but the jury's verdict on Section 2 might have been premised upon the proposition that there was no intent, that there were in fact sales below cost, but there was no intent.

MR. SEGAL: But of course the court said that's not evidence for you on Section 7.

The court said: You must find these three propositions, the three that I've outlined to Your Honor. And that's said by the Court of Appeals, and that is categorically the case, as one reads the charge of the jury.

QUESTION: But if, as I understand you now concede, that a case for monetary damages resulting from a violation of Section 7 in these circumstances, could be based upon sales below cost by the bowling alleys acquired by your client, then shouldn't the plaintiff, even if the Court of Appeals theory is wholly wrong, shouldn't he be entitled to prove that on a new trial?

MR. SEGAL: Provided that the sales below cost have resulted in what there is no showing of here, a lessening of competition.

QUESTION: Well, that is unfair competition then, isn't it? Per se. Sales below cost by a monopolist?

MR. SEGAL: Well, sales below cost may get you no business, Your Honor. You've got to show it got me something.

Sales below cost will show the violation but not the damage.

QUESTION: Well, then, shouldn't the plaintiffs be entitled, on a new trial, even assuming you're quite right about how erroneous the Court of Appeals was, to show sales below cost and resulting damages?

MR. SEGAL: Right. But in this case -- and I emphasize this once before I leave it -- there is not a shred of effort by any of the five witnesses on damages to show that there was any damage from predatory conduct. The plaintiffs decided that the place where they could get real money here was millions of dollars, if they could establish that because the centers were continued in operation instead of closed, they were entitled to what they lost.

That's what they gambled on. And I would stake whatever reputation I may have that there's not a shred of evidence of damage on any other point in this case.

Now, Your Honor, I think I've said enough about question one, as my time runs on, and I will talk, therefore, about question two.

MR. CHIEF JUSTICE BURGER: You have seven minutes left, including your rebuttal, Mr. Segal.

MR. SEGAL: Then I will be very brief, because I would like a little time for rebuttal.

The simple question here is: Obviously the law is,

that if what the defendant took over in each case was a failing company project, then the violation of the antitrust law does not exist, whether it's Section 2 or Section 7.

We proceeded on the postulate that since the entire theory of the plaintiffs was that if we hadn't taken over the centers would have had to fold, they would have had to go out of existence.

I will just quote to you the testimony of their witnesses on damages. One of them said - he was asked: What was the assumption on which he gave these figures, which the jury adopted without change.

He said: Well, that the centers would have -- no, I'm sorry. He said: Well, the centers would have fallen of their own economic weight if Brunswick didn't prop them up.

And I read from the brief of the Respondents in the Court of Appeals. He said that these centers were marginal and sub-marginal bowling centers that would otherwise have folded if it weren't for what we put into them.

So --

QUESTION: Mr. Segal, would you comment either -- you can save it for rebuttal if you want to save the time -- but I'd be interested in your response to their argument that the failing company defense really does not or should not apply in the vertical acquisition situation.

MR. SEGAL: Oh, Your Honor, on that, they are just

dead wrong.

I would say to Your Honors that they cite the U.S. Steel case, and, Your Honor, --

QUESTION: U.S. Steel case?

MR. SEGAL: Yes. And in that case it was sent back for the sole purpose of whether the facts substantiated the failing company doctrine, and that was vertical.

In the cases that have been -- Brown Shoe. Brown Shoe gave the entire congressional debate to show that the amendments of 1950 were intended to apply to vertical companies.

And I say to Your Honors here again there isn't a case that denies it in a vertical case.

QUESTION: Well, let me try and put the question a little more forcefully, because I want to be sure I get your thinking on it.

It seems to me that the theory of the failing company defense is that in a horizontal acquisition it doesn't make much difference whether it goes out of business or it's acquired by a competitor, because you end up with the same kind of market. But in the vertical acquisition case, you have really a kind of a different theory, in the Procter & Gamble case in the law, that's a deep pocket getting into a market and presumably changing things that would otherwise exist.

Now, one may question the wisdom of Procter & Gamble, but it's part of the law.

Now, how does the theory of the failing company defense fit when the vice is adding a deep pocket competitor to the market that wouldn't otherwise be there?

MR. SEGAL: Well, Your Honor, again, the question is: deep pocket may be a violation, it may be that, in a government suit, it can be enjoined. It may be that it can be divested. But the Act is categorically specific in applying to vertical, as the Brown Shoe shows, that the --

QUESTION: I know the Act does, but does the failing company defense -- does the theory of the failing company defense fit here? That's all --

MR. SEGAL: Oh, both those cases apply it. The debate is on the failing company in both of them.

QUESTION: I see.

MR. SEGAL: And they make it categorically so, and I think that's so, because whether it's vertical or not the theory is that they don't want a company which would disappear from the market to disappear. And if the only alternative is for X to take it over, Congress has decided, as a matter of antitrust policy, that it prefers to have that entity remain in the market rather than to have it disappear. And therefore, it says if it's a failing company you can take it over.

Now, the only issue here was -- not whether it would apply, actually; the issue was, had we proved it.

And, very simply, this is our belief, there can be

no doubt that the theory on which this case was tried and on which damages were sought was that if we didn't take them over, they would have withered and died and left the market. Otherwise there's no damage theory at all.

Both the trial court and the Court of Appeals felt that it was our affirmative duty to prove it. I say to Your Honors, having now tried cases for forty years, that any time I got an admission, I never tried to prove what was admitted by the other party.

And when the admission is the entire theory, the entire basis, the only way that they can prevail at all, then, Your Honors, I wasn't -- I didn't try the case, but I'm frank to say if I had been there I would have considered it poor advocacy, to see whether you could better that, better the whole foundation stone of the other side's case.

And I say to Your Honors that without the failing company doctrine, there is no claim for damages here. And with the filing company doctrine, we're entitled to judgment on the matter of damages.

Thank you.

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

Mr. Hoffmann.

ORAL ARGUMENT OF MALCOLM A. HOFFMANN, ESQ.,

ON BEHALF OF THE RESPONDENTS

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

Mr. Segal started his remarks by referring to the uncontroverted facts. I hope I may be allowed to have your indulgence for, say, five minutes of my time to controvert the uncontroverted facts.

I hope also that if I fail to controvert some of them, in the course of this argument before this Court -- that my failure to do that will not be considered an admission.

We have a case, Your Honor, of vertical integration. What has happened is that the largest bowling supplier, the maker of the equipment used by bowling center operations, integrated forward into the bowling operation business. It made the pinsetters, which are the most costly equipment that a bowling center has to use and to buy, and it made the lanes.

It represents, for each center who buys from Brunswick, perhaps $700,000 of investment, if it's a 40-lane center, which is not an uncommon size.

There we start, Your Honor, and comes the 1960's, and my adversary would have you believe that in the 1960's Brunswick tottered on the edge of bankruptcy. No such thing, not even in the worst years which preceded its decision to go into the bowling center operation business, was it anywheres

near that. Indeed, in its worst years, its collections received from bowling center debtors were $87 million and more; taking away interest on debts and the like, and this is even broken down to the bowling operation, you have a balance on the plus side of cash flow of $32 million.

This is the giant which Judge Gibbons referred to coming into the land of the pygmies, which are the bowling center operators in debt to Brunswick itself.

Now, if we cast the case into an abstract, theoretical case, about: Is it all right to recover damages for mere presence? Which is the language -- and, forgive me, Your Honors, I think it's somewhat unfortunate language, which is in the first question's premise.

If you cast it in so general a way, then you discount the whole factual showing of what this case is about. A twice-tried case, a ten-year case, a case in which Judge Whipple made many findings about predatory practices, a case in which, unlike my adversary's representation to the Court, there were independent findings made by Judge Whipple on the equity side, in addition to the findings made by the jury itself.

QUESTION: May I suggest, Mr. Hoffmann, that you talk into the microphone.

MR. HOFFMANN: Oh, I'm so sorry.

MR. CHIEF JUSTICE BURGER: You may not be on the record.

MR. HOFFMANN: I'm so sorry.

Now, we had not only Judge Whipple making findings of practices which would be not possible for any competitor of the plaintiffs, other than an integrated supplier and bowling center operator, but we also had the Third Circuit endorsing these findings and saying that there was sufficient evidence to present to the jury on the latter part of Section 7.

That is to say, on a substantial lessening of competition, and a tendency to create a monopoly.

Now, if Your Honor please, facts is facts, as Mrs. Wiggins said. The case is one which bristles with such evidence. Not something casual, a byproduct, it bristles with evidence.

QUESTION: Mr. Hoffmann, just so I understand what your position is here, suppose that the Court of Appeals had expressly said, or suppose we read the record as indicating this, that there was a violation here in the sense that there might be a lessening of competition in the future, or a tendency to create a monopoly, but that the record is barren of any actual impact on competition. But, nevertheless, there is a violation of Section 7.

But -- and the Court of Appeals says: nevertheless, damages is recoverable from the mere fact of the violation.

MR. HOFFMANN: Yes, sir.

QUESTION: Now, what is your position on that?

MR. HOFFMANN: My position is that is wisdom, Your Honor. The --

QUESTION: You say the damages --

MR. HOFFMAN: I say that damages may be, and I would like to explain that if I may, Mr. Justice White.

The presence itself is not something which happened in one split instant of time when Brunswick acquired a bowling center. The presence is something which started that way, and that was illegal on the premise which Mr. Segal accepts, and which is in your questions.

And it continues. The retention, the holding on. This Court has said, in so many words, in IT&T and Continental Baking, is equally acquisition. An acquisition itself is what is prohibited under Section 7, providing the whole statute is satisfied. Providing also there is the necessary tenancy effect.

Now, there's no magic in probability as opposed to established lessening in competition. If the tort is the acqusition, and if the plaintiff can show damages causal from that tort, then he satisfies, it seems to me, the normal test for damages.

And may I suggest that here, Your Honor, the acquisition itself is contaminated, not just because it is an acquisition, but because the trial court and the Third Circuit agreed felt that it was wrong to bring into these small markets

the pygmies referred to by Judge Gibbons, the integrated strength of the Brunswick Corporation.

That is vividly illustrated by the circumstance that it is a creditor and all these fellows were its debtors, or at least half of them. Brunswick was No. 1, but they had a sizable competitor in AMF, which, incidentally, the Third Circuit noted, did not see fit to go forward and integrate in competition with its own customers.

So this acquisition is wrong because it brings into this market the power of Brunswick.

QUESTION: Do you know of any cases that would support a recovery of damages on the premise that you can recover damages just from the violation itself, without any proof of injury to competition?

MR. HOFFMANN: Your Honor, this is --

QUESTION: This is a new question.

MR. HOFFMANN: -- this is what is called a new question in this case, but I think we have many analogies to cases involving status.

I was about to say the status here is an unlawful status of Brunswick in these three small markets. It had no business being there.

When the fox goes into the hen house, it's bad for him to be there from the first -- we don't have to wait for the farmer to rout him out with a shotgun.

So it's this status, Your Honor, which I think is wrong. It may not apply to every acquisition, but it seems to me it applies to the acquisitions here.

And I'd like to break down what happened, because I think this is critical to the first question.

Brunswick had many thousands of pinsetters out on the installment plan. Brunswick sold them under conditional bills of sale, and with a right to foreclose on the property in the event of nonpayment.

What Brunswick did was, in most instances, when it was dissatisfied that it couldn't get paid, was to repossess both the pinsetters, which are automatic equipment for setting up the pins in an alley, and without which, today, there's almost no bowling done -- both the pinsetters and the lanes, which are thin veneer wood, sitting on a cement base, and which are easily removable.

They removed them, and resold them.

Thus, Step one is Brunswick exercised a choice. Once it decided to repossess those pinsetters and lanes, the bowling center, as a practical matter, could not longer function.

This isn't a case where the market necessarily put out one of the weak competitors. Brunswick put out of business its own customer, by deciding to go this route. Now --

QUESTION: If Brunswick was just a bank and not a manufacturer, --

MR. HOFFMANN: It also has that function of being a bank, --

QUESTION: Well, but if it were just a bank and not a manufacturer, would there be something illegal about their foreclosing?

MR. HOFFMAN: No, if it stayed in the banking business, certainly not. But if, as a bank, it decided to foreclose on a delinquent creditor, in order now to take over its business and go into a different market, I would submit, yes, there is something wrong with that.

You see, --

QUESTION: Mr. Hoffmann, along that line, let's assume for the moment that instead of the Brunswick Corporation acquiring the bowling centers, they had been acquired by another great national corporation -- you name it: General Motors or IBM -- that had an even deeper pocket, and make all of the other factual assumptions that you make in this case, would you see any distinction?

MR. HOFFMANN: Your Honor, there's a shifting then of the nature of the power which is brought into the market. I could conceive of a situation in which one of the world's biggest corporations went into the bowling center operating business without any potential of impact of lessening of competition, in which case, if that potential wasn't there, even the subjunctive language of the statute that it may

substantially lessen or tend to create a monopoly, even that language would not be satisfied, and thus there would be no -- excuse me?

QUESTION: But if -- if one of these other giants acquired these centers, it would certainly have the financial resources to do the things that you fear, that Brunswick has done or will do; would it not?

What difference would it make whether --

MR. HOFFMANN: Well, it could convert money into power, and if it converted money into power, then certainly the case becomes similar.

QUESTION: But the point I --

MR. HOFFMANN: Your Honor, I evaded your question --

QUESTION: The point I am leading up to make, Mr. Hoffmann: Isn't your complaint really that this is a conglomerate type merger and not a vertical merger, in the normal sense? The parties normally in a vertical merger are the competitors of the acquiring company that dries up the customers.

But here -- what's the other company in this business?

QUESTION: AMF.

MR. HOFFMAN: Your Honor, the horizontal impact --

QUESTION: Yes, AMF is not complaining.

MR. HOFFMANN: The horizontal impact is felt the moment Brunswick becomes a bowling center proprietor. Then

it is the horizontal competitor of these other bowling proprietors in the same competitive market. And it's then that this power, of which we complain, comes into play.

But I wanted to, if I may, break down this acquisition into two steps. The first I describe as being in effect the foreclosure. The second is the choice made by Brunswick, which was to run the center as a bowling center. The bowling center consists of more than just the lanes and the automatic pinsetters. There are liquor licenses, restaurants, nurseries involved, a big parking lot, and a piece of real estate, and so on, to make a bowling center and good will as well.

Brunswick decided to do it that way.

Now, this isn't, then, a case where we're confronted with what happened in the market. Brunswick could have forborn on the debt, and the record has much evidence that when it chose to do so, it did that. It did that in San Juan for years. It did that in Jacksonville, Florida, and elsewhere. It just made more favorable arrangements with the debtors, because, I suppose, it thought that in this way it had some future prospect of being paid in full for what it had sold.

So that was a choice which it didn't make in this instance.

QUESTION: Mr. Hoffmann, in your view, could Brunswick, without actually foreclosing but continuing to be a larger and larger partner of a particular alley, and perhaps

acquiring more and more dominance of its policy; could your client eventually have had a cause of action against it, even though it hadn't formally taken over title to the place?

MR. HOFFMANN: Mr. Justice Rehnquist, I find that a difficult question, because, without knowing the methods used to accomplish that, I wouldn't know whether we couldn't find that it had run afoul of the law. It might very well, if not having engaged in an acquisition, run afoul of Section 2 or Section 1 as well of the Sherman Act.

You know, this is really a clash of policy, it seems to me. The --

QUESTION: Mr. HOffmann, my problem is that by taking over and letting -- suppose Brunswick had just said: We will forgive the debt, which you suggest, and let them keep on running it?

MR. HOFFMANN: Or forbear.

QUESTION: Sir?

MR. HOFFMANN: Or forbear; make it easier to pay.

QUESTION: Would you have any complaint?

MR. HOFFMANN: No, we couldn't have a complaint unless we were in that competitive market, and we were differently treated. Then I think we might well have a complaint. Indeed, we had an aspect of this case that involved that, which was ultimately -- we ultimately lost on.

QUESTION: Well, I was -- well, if you go back to

your original answer, you wouldn't have a title -- you wouldn't have either a 2 or a 7 violation, would you?

MR. HOFFMANN: If all they did was to forbear --

QUESTION: Yes.

MR. HOFFMANN: -- and not rush. You might have had a violation of 2(a) of the Robinson-Patman Act.

QUESTION: Well, what's the difference -- well now, just exactly what was the difference? The same bowling alley would run -- right?

MR. HOFFMANN: Yes.

QUESTION: And now it's running solely because your complaint is Brunswick is running it.

MR. HOFFMANN: Yes.

QUESTION: And what's the difference? What happened when Brunswick took it over?

MR. HOFFMANN: Most eloquently, if Your Honors would be good enough to just look at the Appendix to our brief, it answers, I think, this question as well as a question which Mr. Segal answered, about selling below cost.

I have an Appendix here, Appendix A, it's 1a attached to this brief of the Respondents, this blue brief. This is taken from the records of Brunswick, and it shows how these centers were run.

If you would look at the first line, from '65 through '68, Belmont, all at a loss each year. Same from '69 through

'70, then a small profit in '71 and in '72.

We also highlight an aspect of the case which pointed to how much it would be in the hands of an independent proprietor, using testimony which showed that they had at least a differential of $2,000 a lane advantage, because they didn't pay themselves for their machines. They didn't -- the cost of annual payment and interest made this $2,000 differential.

But, in any case, they ran these centers, as you see, year after year, at a loss. Dutchess, they ran it at a loss until finally they got tired of it, and stopped running it at all.

Now, Interstate was run only for the first year at a loss, and you would have thought that the enemy troops had marched on City Hall, if you read the Reply Brief of my adversary, about that circumstance, because he says, well, we were misrepresenting to the court that it was run at a loss.

And Fair Lawn is one center, one of a number of centers in the Parramus market, where in fact a profit yield took place.

But as your eye goes down the page, you see there are others there, Ten-Pin-on-the-Mall, the one closest to our center in Parramus, it was run at a loss. Lodi, run at a loss.

Now, sir, that's an answer to the question about price, as well. If the deep pocket runs centers for five years at a loss, that means the price wasn't sufficient to

yield a profit, and it means that, for one reason or another, -- and I'm not trying to argue the Section 2 aspects of the case --

QUESTION: Mr. Hoffmann, I was just trying to recall the brief, does the record show that these were actual losses, or are these computed losses based on an assumption that if they had paid --

MR. HOFFMAN: These are losses just simply derived, including the parentheses, from the Brunswick books --

QUESTION: It doesn't make an assumption as to paying interest that the independents had to pay, or something like that?

MR. HOFFMANN: That comparison is based -- the comparison is based upon our testimony, but the loss figures for Brunswick are simply taken off their records, which are in evidence as part of the Appendix, Your Honor.

QUESTION: Would -- go ahead.

QUESTION: No, after you.

QUESTION: Mr. Hoffmann, suppose Brunswick had come into a market and made a vertical acquisition of a perfectly healthy bowling center, they just decided to get into the retail market. And suppose one of these centers was that kind of a center.

Obviously I am moving you towards the second point in the case.

MR. HOFFMANN: Yes, sir.

QUESTION: But isn't it critical to your case, in proving your damages, that these centers were not healthy centers?

MR. HOFFMANN: Well, if Your Honor please, the thing that is critical is that because we feel, and I think this Court has, in numerous damage cases, agreed with us, that once you have the tort committed and show the violation, you don't have to go with mathematical precision to your damage demonstration --

QUESTION: I understand that.

MR. HOFFMANN: But, you see, Your Honor, if I may add this, if you have to tie, let's say, an advertising program to a loss of damage by the competitor -- I mean a loss of profit by the competitor, it's an exceedingly difficult thing to do.

QUESTION: But suppose, in my example, the Brunswick acquires a perfectly healthy bowling center, and the business figures remain exactly the same for all of the centers in the city for five years. Now, you would have -- but it might very well be that the -- that a court might find the acquisition to be a violation of the Section 7.

MR. HOFFMANN: Yes, sir.

QUESTION: But how about your action for damages?

MR. HOFFMANN: My action for damages -- I would be

able to claim no damages in that case, on the theory of --

QUESTION: So it is --

MR. HOFFMANN: -- on the theory of presence.

QUESTION: So it is important that you prove something more than a violation, to recover damages?

MR. HOFFMANN: Your Honor, we have proved, and I think the record is clear in this, the --

QUESTION: Which is true in any antitrust matter, you have to prove your damages. You have to show an injury.

MR. HOFFMANN: Indeed yes. But, if Your Honor please, if the wrongdoer puts the company out of business, then the natural economic cost has been changed by the wrong.

QUESTION: Yes.

MR. HOFFMANN: It's been changed by the substitution now of this deep pocket for a company which, not might but would have gone out of business. And here, with the greatest of respect, the Third Circuit erred, in my opinion. The --

QUESTION: Mr. Hoffmann, let me interrupt you just once more, because I want to be sure I understand your theory.

As I understand, none of the plaintiffs actually went out of business.

MR. HOFFMANN: All three centers involved did not go out of business.

QUESTION: Right.

MR. HOFFMANN: But we also carried out businesses

at a loss.

QUESTION: Now, what is the legal significance of the facts set forth in this Appendix, namely, as you contend, that the companies taken over by Brunswick lost money; what difference does that make? What's this -- I just don't quite follow you.

MR. HOFFMANN: The difference is that in the normal course an independent operator operating a center at a losing rate is going to go out of business.

QUESTION: This is just further evidence of the fact you consider already established, that they would have gone out of business instead of being taken over.

MR. HOFFMANN: Precisely so.

QUESTION: That's the only difference there.

MR. HOFFMANN: It's also evidence -- now, with great respect, it's also evidence as to the power to control price. Because normally --

QUESTION: Is there any evidence that the prices in the market changed as a result -- I didn't think there was.

MR. HOFFMANN: Your Honor, it's diminution. There is evidence about price changes here and there. There are all kinds of evidence under attempts to prove the second part of Section 7. But it isn't tied with precision to damages to these three plaintiffs.

QUESTION: Do you contend the price was raised or

lowered by reason of the acquisition?

MR. HOFFMANN: We submit the price is necessarily lowered, because normally in the market the price would be enough to reflect at least some income.

QUESTION: So then you started to speak some time ago about a clash of policies. Is the clash, on the one hand, the public interest and low prices, and the other policy the policy of the small businesses staying in business? Or what is the clash of policies here?

MR. HOFFMANN: Your Honor, those are not the two antipodal things, I hope.

The two policies are Section 4 of the Clayton Act, which is designed to create private avengers for antitrust violations in great numbers, to augment the forces of the Department of Justice, and which provides, with no exceptions, for three-fold damages and for attorneys' fees, wherever the plaintiff has been injured in his business or property by reason of a violation of the antitrust laws.

That policy is an important one, and it applies to Section 7, as is indicated by legislative history. Not just statements of people, which Mr. Justice Jackson said, aren't read by the President when he signs bills. But it's by what the Congress did. In 1914, the Clayton Act, Section 7, prohibition of acquisition of stock, directly or indirectly, of a competitor.

Three bills went through. The first two would have not put that under Section 4 for three-fold damages.

The final bill that went out did.

In 1950, once more, modification of Section 7, now to include the remedy for what had become the lawyer's device to escape old Section 7, and that was to throw the acquisition of assets, as well as stock, into Section 7. And when that happened, Congress again had a chance to change Section 4. It did not do so.

Just this past year, in the antitrust laws, we made again a change, this time of Section 4, in which, among other things, a State was given a right to sue for injury done a citizen. No effort made to take out Section 7 from the thrust of Section 4.

So then that's the policy. Is there a policy opposing? Is there a policy in favor of acquisition by capital?

I suggest, as Mr. Justice Brennan pointed out in the Philadelphia Bank case, the policy is the opposite. The policy is to -- not to expand by taking over the businesses and ingenuity and efforts of other men, but to do it internally. That's what the Congress was after. And it only may be done under Section 7, when it is done in such a way as to satisfy the reach of the statute.

Do I have a minute or two? On failing business -- I have not?

QUESTION: Mr. Hoffmann, may I ask this question?

MR. HOFFMANN: Certainly.

QUESTION: Does the record show the principal products sold by Brunswick to your clients, for example?

MR. HOFFMANN: Yes, it does.

QUESTION: What are they?

MR. HOFFMANN: The principal products are the automatic pinsetting equipment, which is far the more costly. It's about $8500. That varied some over the years. Per installation, per lane. And you say, in a 40-lane center, that's very sizable.

And then about $4500 for the lane itself, the wood veneer that goes on the bed. Those are the principal items. But there are other things: balls -- there's continuous, if your mind is reaching towards commerce, there is continuous maintenance service and, what's more, credit relations which have to be serviced all the time.

QUESTION: What is the depreciable life of the pinsetting equipment and of the bowling alleys?

MR. HOFFMANN: It wasn't known at the time of trial. It was believed to be twenty years. It wasn't known then, because automatic pinsetters were discovered by AMF, invented by AMF, in about 1956.

QUESTION: Is there any evidence in the record as to the annual sales of other types of equipment to set up centers?

MR. HOFFMANN: Such as the bowling balls, --

QUESTION: The balls and --

MR. HOFFMANN: -- and the gloves and other things. Yes, there is such evidence.

QUESTION: What percent is really of total sales would that be, say, of the Brunswick Corporation to bowling centers?

MR. HOFFMANN: I don't have that figure in my head.

QUESTION: If you eliminate the pinsetters, --

MR. HOFFMANN: It's a small percentage.

QUESTION: -- it's a very small percentage.

MR. HOFFMANN: It is a small percentage.

QUESTION: So, quite unlike the typical vertical integrated acquisition, where the purpose, among others, is to acquire customers who will be buying on a regular basis from the acquiring corporation.

MR. HOFFMANN: Well, the regular -- the machines themselves, the pinsetting machines, Your Honor, needs regular servicing, which includes repair parts. These things, you know, are under great pressure, the heavy balls are rolled down the alley, and those repair parts come from Brunswick. The machines need servicing and so on, so there's a continuous aspect of business, which I can't break out for you now, but it's in the record, as to price.

My colleague here has the figures. They are in A-1603

in our Appendix, and they are set up under the heading of machines and miscellaneous. The machines and miscellaneous, servicing aspects of them, are three percent of the gross income figure.

The pro shop and other things that use supplies add to that.

QUESTION: Mr. Hoffmann, I wonder if you -- I see your time is up -- -ut I wonder if you could just, in a word, tell us your answer to the dilemma that they feel you are in under question two; how you can't have it both ways?

MR. HOFFMANN: Yes, sir. It's no dilemma, Your Honor, it seems to me, because this is a matter for defense, failing business; it's not altogether clear that it's even desirable to have such a defense. But it has never been held, nor even suggested, that failing business is a state of nature which prevents the operation of Section 7.

And in the Buffalo case, and in Citizen Publishing and in International Shoe, and all the historic failing-business cases, that was made clear. And what needs to be shown wasn't even asserted by the defendant.

Part of this wasn't even in their pleadings, never an attempt made at the trial, for example, to show that there was no viable alternative, but the Brunswick acquisition, which was part of the showing necessary.

Indeed, as to a couple of the centers which were

picked up in a bankruptcy sale, Brunswick urges, even now, that they should be separately dealt with; Fair Lawn and Interstate, they say were profit-making centers.

But even there, sirs, there were other people who wanted to buy. There was, indeed, a curious episode where somebody bought a center and within 24 hours' time he was given a $5,000 profit by Brunswick. Indeed, Brunswick called up the chairman of the board at eleven o'clock at night -- this is all in the evidence -- in order to get the approval to buy back from Mr. Vitola a center which he had taken at that bankruptcy sale.

So that you don't have the elements of the defense. You have no consideration given to the alternatives. Failing business is not an affirmative prescription of law. You don't make a determination: Well, this is a failing business, therefore it's all right to acquire it.

QUESTION: I take it, under the Court of Appeals remand that you might lose on the failing company doctrine.

MR. HOFFMANN: I didn't so read that, Your Honor.

QUESTION: You didn't?

MR. HOFFMANN: No.

QUESTION: But it was --

MR. HOFFMANN: I was much more concerned about commerce.

QUESTION: Yes. Are there more proceedings to be had

with respect to whether there were alternatives?

MR. HOFFMANN: Your Honor, if Brunswick has the chance, in a new trial, I am sure they will make some effort to repair this mischief.

But I don't think the remand is to be interpreted that way, on failing business.

The remand essentially is on instructions --

MR. CHIEF JUSTICE BURGER: I think your time is up now.

MR. HOFFMANN: -- Your Honor.

Thank you very much.

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

Mr. Segal, you have something further?

REBUTTAL ARGUMENT OF BERNARD G. SEGAL, ESQ.,

ON BEHALF OF THE PETITIONER.

MR. SEGAL: Your Honors having just two minutes, I do want to correct something.

MR. CHIEF JUSTICE BURGER: We have enlarged yours to correspond. You will have a few more minutes.

MR. SEGAL: Thank you very much, Your Honor.

Mr. Chief Justice, I do not want to have the record stand where I said we were in serious financial condition, and my friend rises to say: No, indeed, things were booming for us. And I therefore read to Your Honors just four sentences from the opinion of the Court of Appeals, particularly

because it is Judge Gibbons, to whom my friend refers as having indicated that things were riding very high and handsome for us.

I read Judge Gibbons:

"Over the years, Brunswick" --

QUESTION: What page of the Appendix?

MR. SEGAL: Page 7a, Mr. Justice Stewart.

QUESTION: Thank you.

MR. SEGAL: "Over the years, Brunswick had borrowed close to $300 million in order to finance the manufacture and sale of bowling equipment. By late 1964 its receivables were in excess of $400 million of which more than $100 million were over 90 days' delinquent. Brunswick was clearly in serious financial difficulty.

"In an effort to reverse its deteriorating condition, Brunswick's management decided on a plan." And it's that plan that Your Honors have before you.

So that, as in so much that my friend has done, he is simply not arguing this case, Your Honor.

Let me give you another example. He took Your Honors' time to say that in cases like the movie cases you don't have to be precise in damages.

Your Honors, this is the most precise case I have known in my entire experience. Five witnesses got up and said, Here's the minimum, here's the maximum. And they were identical.

The jury took the identical figures, not a penny difference, and he argues to Your Honor a theory as to whether damages can be.

What we have here, if Your Honors please, is very simple.

We have a judge who frankly says, "I am venturing into new ground." In my judgment he relished Your Honors taking certiorari on the case. It rides throughout his opinion that he would love to have it determined.

He has concluded that if someone is there and admittedly, as the questions of Your Honors have indicated, if we had forborn, there wouldn't be a change in the market. There is not a showing by anybody that the market situation is changed, that anybody has a greater share than before, that anybody has more equipment, other than three independents who put in a little more equipment.

What we have here is a judge who has concluded that in this limited area of liability, namely, Section 7, where we are breaking new ground, if you don't deliver what Section 7 says, namely, a lessening of competition, you nevertheless can have damages.

Now, one of Your Honors has asked: Are there any cases? And I say this again categorically, every case I have read, and we have given the quotations in our brief, that has pronounced the new theory that you can have damages under

Section 7, says only if you can demonstrate the damage flows from a lessening of competition or a creation of monopoly.

On the second point, Your Honor, I think I have said enough. The sole question that the Court of Appeals decided against us, on the failing company doctrine, is that it was our obligation affirmatively to prove.

And I leave Your Honors with a thought, that if anything has been demonstrated this morning by my friend's own argument, it is that these were failing companies. Why would we adduce proof, when it ran throughout the case, where the case was rampant, where the whole theory of the case was; that if we hadn't taken over, they would have failed.

No, no one else would have taken over. No one would. Why did we? Why were we willing to operate some of them at a loss? Because we needed cash flow. We would have been bankrupt if we didn't get cash flow. We needed money, dollars, not profits.

We didn't worry about depreciation, which caused losses; we needed cash flow. And the record shows the cash flow for every center.

I thank you, Your Honors.

MR. CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

[Whereupon, at 11:42 a.m., the case in the above-entitled matter was submitted.]