OFFICIAL TRANSCRIPT
PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. 82-914

TITLE MONSANTO COMPANY, Petitioner v.
SPRAY-RITE SERVICE CORPORATION

PLACE Washington, D. C.

DATE December 5, 1983

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IN THE SUPREME COURT OF THE UNITED STATES

MONSANTO COMPANY,

Petitioner

v. No. 82-914

SPRAY-RITE SERVICE CORPORATION

Washington, D.C.

Monday, December 5, 1983

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 p.m.

APPEARANCES:

FRED H. BARTLIT, JR., ESQ., Chicago, Illinois; on behalf of the Petitioner.

WILLIAM F. BAXTER, ESQ., Department of Justice, Washington, D.C.; as amicus curiae.

EDWARD L. FOOTE, ESQ., Chicago, Illinois; on behalf of the Respondent.

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C O N T E N T S

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P R O C E E D I N G S

CHIEF JUSTICE BURGER: We'll hear arguments next in Monsanto Company against Spray-Rite Service Corporation.

Mr. Bartlit, you may proceed when you're ready.

ORAL ARGUMENT OF FRED H. BARTLIT, JR., ESQ.,

ON BEHALF OF THE PETITIONER

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

This case is the first opportunity for this Court to consider the antitrust illegality of non-price vertical restraints since the 1977 Sylvania decision.

Sylvania recognized that non-price vertical restraints are not per se illegal even though they may have some effect on price. Sylvania said that the rule of reason would apply to such restraints, and noted that there will be no departure from the rule of reason unless there is a demonstrable economic effect, not formalistic line drawing.

Despite Sylvania, the Seventh Circuit found non-price vertical restraints to be per se unlawful. They did that, Petitioner urges, by using two rules of law that seriously cut away from and limit the usefulness of Sylvania to businessmen.

What the Seventh Circuit did was this: the

Seventh Circuit said that the non-price restraints in this case were part of a price-fixing conspiracy. They used a rule in determining whether a conspiracy existed which makes it very easy to find a resale price fixing conspiracy. The Seventh Circuit said that all you need is an interest in a manufacturer on the part of price, a concern about price, which you will almost always have, coupled with complaints from distributors followed by a distributor termination.

In this case, of course, the situation was exacerbated because the complaint occurred -- the last complaint of record occurred 15 months prior to the termination, and in the interval between the last complaint and the termination, there was a renewal of the distributor.

QUESTION: Mr. Bartlit, you're not suggesting, are you, that the only evidence before the Court of Appeals were complaints from distributors plus the fact of termination by Monsanto?

MR. BARTLIT: No, Justice Rehnquist, I'm not. There was other evidence. We don't believe it was sufficient to go to the jury on the issue of conspiracy. But the Court used a standard for finding a conspiracy which was a very slender standard and made it easy to get to a jury in almost any business context on

the question of the underlying conspiracy.

Then the Seventh Circuit, having made it easy for a plaintiff to get to the jury on the question of whether there was the underlying conspiracy made it even easier for the jury to find that the programs in question were part of the conspiracy, because the court didn't require that there be any evidence at all linking the programs in question to the conspiracy.

The result is that it is now very easy for a plaintiff to get to the jury any time a manufacturer uses procompetitive, non-price programs like these. We think that it's particularly troublesome in this case where the economic effect of the programs was demonstrated and where the programs are so much like those in Sylvania.

Sylvania gave an example of the kind of non-price program that might be procompetitive, even though it was a restriction. The Court in Sylvania said that there might be instances where a manufacturer who had a new product might find it worthwhile to motivate or inspire distributors into engaging in non-price promotional activities, devoting their labor, devoting their capital to selling this new product in order to get the product off the ground. Of course, that's what happened here in this case.

Monsanto had a new product, a series of herbicides. There names are Ramrod and Lasso. They were good products. They'd been around for a number of years, but Monsanto hadn't been able to get off the ground with these products.

In 1968 Monsanto had about 3 percent of the soybean market and about 15 percent of the corn market. Monsanto was facing large, dominant, entrenched competitors. They had one main competitor in corn, a Swiss or German company that had 70 percent of the market. Their competitors in beans had between them about 70 percent of the market.

Monsanto management took a look at the situation and tried to figure out why if the products were good hadn't they been able to get off the ground. They determined that it was a question of customer knowledge. Herbicides can kill corn, they can kill crops. Farmers were sticking with -- "Dance with them what brung you," as I think Bear Bryant once said. They were happy with the products that had done the job in the past, and they didn't want to take a chance.

Monsanto felt that they had to put in some programs which would encourage distributors, wholesale distributors to get out in the grassroots, in the farm belt and get across the story of Monsanto products, and

that's what they did. Monsanto put in a whole series of sophisticated marketing programs all designed to create an incentive for the distributors to get out and do the job of educating the retail stores and educating the farmers. Of course, the farmers would go to grain elevators and feed stores and little stores throughout the farm belt; and it was thought necessary to have distributors who would go out and do the job.

The programs were interesting. They ranged from Monsanto actually paying cash money to distributors who would convince the employees in the feed stores and grain elevators to go to technical herbicide schools and learn about the product. Monsanto paid cash money for distributors who would go out and get the products on the shelves early in the season so they'd be there when the farmers came in. Monsanto had a territorialization and a shipping policy. Distributors were assigned territories, 15 or 20 distributors in a territory, not exclusive, and distributors could only pick up at shipping points within their territory. So they would be focused on the area in which they were in, and they would try to do a good job at developing their territory.

Monsanto also announced -- and this was the first thing they did -- Petitioner announced that we want distributors who will get out in the farm belt and

do the grassroots job of working with the retail stores and educating them. All distributors got that notice a year in advance in 1967. Monsanto told distributors if you're not willing to do that, we're not going to work with you in the future. And Respondent in this case, Respondent's president testified he understood that Monsanto -- he knew what Monsanto wanted, and he understood what they wanted, and he knew they were serious about it.

The result of this sophisticated series of marketing programs was very procompetitive. Plaintiff's expert testified that the programs did have the effect desired by Monsanto. The programs did tend to focus the distributor's sales attention on the little retail stores throughout the farm belt. And, of course, the market share figures, the bottom line market share figures show that the programs work.

The corn market went from a market in which Monsanto had 15 percent and Geigy had 70 percent to a much more competitive market. Monsanto went up to almost 30 percent, and Geigy down to 50 or 55 percent. The same thing happened in soybeans.

The plaintiff's expert testified that the reasons for Monsanto's dramatic improvement in the four-year period from 1968 to 1972 were: good products,

which we'd always had; emphasis on technical sales; product promotion; and Monsanto hired a lot of salesmen. So we know that the vertical programs in this case actually worked.

Furthermore, while Sylvania acknowledged that to achieve these kinds of gains in interbrand competition between brands of two different manufacturers, Geigy and Monsanto, there might have to be some loss of intrabrand competition -- that is, competition between Monsanto's various distributors.

It doesn't look like there was much diminution of intrabrand competition in this case, because what happened is this. This market had always been characterized by deep, intense price discounting, and it continued throughout the period of time from 1968 to 1972. Indeed, prices were lower in 1972, in 1971 than they'd been back in 1968. So we didn't see a situation where the prices that were paid went up during this period of time.

Similarly, there isn't any evidence of any pattern of terminating distributors who were deep price cutters. It's true that the distributor who was terminated in this case had been a price cutter. He'd been a price cutter since 1963. Nothing changed. He'd been --

QUESTION: Well, I mean he was terminated because he was a price cutter, was he not?

MR. BARTLIT: No. We disagree with that, Your Honor.

QUESTION: Well, now -- now, let me call your attention to page in your petition for writ of certiorari A-17, which is part of the Court of Appeals finding. It says, "Yapp testified that Donald Fischer, a Monsanto District Manager, told him that Monsanto terminated Spray-Rite because of price complaints about Spray-Rite."

Now, certainly the jury was entitled to believe that.

MR. BARTLIT: Yes, Justice Rehnquist, there was evidence from which a jury could have concluded that that was at least part of Monsanto's motives. That's not sufficient to find a conspiracy, of course.

QUESTION: But it is sufficient to find the reason why Monsanto terminated.

MR. BARTLIT: Yes, sir. But it's not sufficient to find a conspiracy. That's a lawful reason.

Now, we believe that the evidence was overwhelming that that was not the reason. That was --

QUESTION: Well, but you -- you can't argue that here after --

MR. BARTLIT: That's right, Your Honor.

QUESTION: -- A jury finding affirmed by the Court of Appeals.

MR. BARTLIT: I can't. The evidence -- the evidence showed that, by way of background, that the plaintiff in this case made 75 percent of his sales to only six customers; that he testified that he didn't have salesmen; that, as the appendix shows, he advertised that he -- his margins were so low because he sold as a broker that he didn't have the money to provide the services which he admitted were required in this technical market. That's at the appendix at page 101, his own advertisement. But nevertheless, there was evidence in which the jury was entitled to disregard all of that evidence and determine that Monsanto had a price motive.

The effect of the termination, of course, there was no effect on prices in the marketplace. There was vigcrous price competition at all times. Plaintiff's expert testified at trial -- and this is a quote -- that the market was "highly competitive at all times before and after the termination" -- "highly competitive at all times before and after the termination."

So we didn't have a situation where products

were in the hands of discounters, and after the decisions were made and the programs were implemented suddenly people were paying a lot more for toasters or mixmasters or whatever. That was not the case we had here.

The programs were unusual because it was not strictly a territorialization. We also actually paid distributors to do the work that we thought they had to do.

Now, at trial plaintiffs agreed on the record that there was no claim that these programs violated the rule of reason, nor could they have, I suppose, in light of the evidence showing what happened in the marketplace. Instead, plaintiffs said that they were part of price fixing, and that without the price fixing, the programs would have been okay, but there was a price fixing conspiracy. They said, first, there was a resale price fixing conspiracy; and second, the programs were part of the conspiracy.

Now, the key to this case and the reason why this case threatens the ability of businessmen to use Sylvania is this: the evidence which plaintiffs relied on and the evidence which the Court relied on in finding a conspiracy is the kind of evidence which one would expect to see in a marketplace where you have people

like Monsanto trying to stimulate competition with other brands through the use of programs like this.

Obviously, on the fundamental question of whether there was a price fixing conpsiracy, the statement of the court below that all one needs are complaints, price concern, followed by a termination fifteen months later. You're going to have that scrt of thing in every market, and the ease with which that underlying conpsiracy can be proven threatens this Court's judgment in Sylvania.

QUESTION: But are you suggesting a different standard of proof for the element of a conspiracy in a case like this than we ordinarily have for facts to be found by a jury?

MR. BARTLIT: No, Justice Rehnquist. I'm suggesting that a standard cf proof for a conspiracy be adopted, for vertical conspiracies, which is consistent with this Court's statement of the rule of law in cther cases like Machal, other decisions of this Court.

In other words, this Court has never found a price fixing conspiracy, resale vertical price fixing conspiracy based on the termination of a single distributor. It has never done that.

QUESTION: Well, but this Court is not ordinarily a finder of fact. If we know what the issue

is, if the issue is one of conspiracy, why shouldn't it be submitted to the jury the same way other issues of conspiracy are and let the sufficiency of the evidence be determined by the ordinary standards that are used?

MR. BARTLIT: Justice Rehnquist, we took the position that there wasn't sufficient evidence to submit the question of a vertical resale price fixing conspiracy to the jury on this case. That's the position we took. We moved for a directed verdict. We didn't object to the jury instruction. We moved for a directed verdict on the grounds there wasn't sufficient evidence to prove a conspiracy. There's normal marketplace evidence, the kind of thing one would expect to see.

QUESTION: Well, when you say "normal marketplace evidence," that doesn't necessarily to me, from what little I know about the market, negate the possibility of a conspiracy.

MR. BARTLIT: No, Justice Rehnquist. But if a court adopts as a rule of law that it's sufficient to get to a jury if all you have are the kinds of activities that one would expect to find in any competitive market, the ease with which a conspiracy can be found threatens the use of programs that are in existence at the same time.

QUESTION: That's typical of lots of mixed motive findings of fact.

QUESTION: Mr. Bartlit, let me try to get the chronology straight. When -- in what year were these programs put into effect?

MR. BARTLIT: Justice Blackmun, the programs were put into effect over a period of time. In 1967 --

QUESTION: Well, specifically, did they go into effect before or after Spray-Rite's termination?

MR. BARTLIT: Some went into effect before, and some went in in 1968 simultaneous with the termination. The distributors were notified in 1967 that Monsanto had this program under way. More and more sophisticated vertical programs were put under way over a period of time.

The second thing that the Court of Appeals did was to require no real evidence of any linkage between the vertical programs and the claimed underlying retail price fixing conspiracy. Plaintiffs relied at trial and rely before this Court on two kinds of evidence. First, that Monsanto was concerned about prices. One would expect any manufacturer to be concerned about prices. One would expect a manufacturer like Monsanto who wanted to make sure that distributors had the wherewithal to engage in non-price competition to be interested in

margins. And Monsanto was interested in margins, and one would expect that.

Secondly, the -- the court relied on internal Monsanto documents which showed that in putting these programs into the field, Monsanto was considering the sizes, the margins, was considering all aspects of pricing, as one would expect.

The result of this decision was that, a) distribution systems are, as a practical matter, frozen. Once you have a complaint, no matter how ancient it is, you can't terminate a distributor.

Second, procompetitive price -- procompetitive non-price vertical restrictions like those in this case will be discouraged. Petitioner urges that this Court has an opportunity to draw a line between procompetitive programs like this which don't hurt intrabrand competition and benefit interbrand competition and true programs that have a deleterious effect on price.

I'll reserve the rest of my time.

CHIEF JUSTICE BURGER: Mr. Baxter.

ORAL ARGUMENT OF WILLIAM F. BAXTER, ESQ.,
AS AMICUS CURIAE

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

I am here amicus on behalf of the United

States government, and I think this case is here because there is an important and fundamental conflict between the policy that is reflected in the Sylvania decision and the policy that is reflected in Dr. Miles and its progeny.

Each of those two rules is addressed to the form of agreement. Non-price agreements are to be judged by the rule of reason. Price agreements are illegal per se.

The conflict arises because non-price agreements work only through and to the extent that they have an effect on intrabrand pricing. In almost all commercial contexts the two different types of agreement will have the same function, the same purpose, and the same basic economic effects, and accordingly, will leave the same evidentiary footprints, if I might put it that way, so that it becomes empirically impossible unless we have evidence about the form of agreement to know which it was that was involved.

If both these rules are to remain operative -- and I assume for the purposes of my presentation today that both are to remain operative -- it is necessary for this Court to build a fence of some sort, a fence that will produce contained enemies, if not good neighbors. And I offer to the Court the following reconciliation of

these two bodies of doctrine.

If a supplier adopts a bona fide program, distribution program embodying non-price restrictions, and if that program is reasonably addressed to an identifiable distributional problem such as the dissemination of information at the point of sale, then the case must be judged by the rule of reason unless the plaintiff is able to show by direct or circumstantial evidence that there was an explicit agreement about the prices that the distributors were to charge.

Now, if I may stress what I regard as the most critical of these points I have made here, namely that non-price and price agreements have essentially identical functional consequences, I would like to say there's nothing particularly new or startling about that proposition. Indeed, the shadow of that proposition appeared in the Sylvania decision itself, most visibly in Justice White's concurring opinion.

And I ask you to consider with me the exact role that was seen for non-price agreements in Sylvania. By hypothesis, a supplier has decided that a program involving non-price restrictions is necessary for him to succeed in interbrand competition.

Now, what is it that these non-price restrictions are to achieve? They are to achieve, as

Sylvania explicitly recognized, an attenuation of intrabrand price competition, an attenuation that is sufficient to allow distributors who are complying and incurring the costs of complying with non-price restrictions to cover those costs with the resulting intrabrand prices. If someone else not complying with those rules is beating intrabrand prices down below a level which is sufficient to cover the compliance with the programs desired by the supplier, the non-price program must fail in its purpose. And therefore, if Sylvania is to have any operational meaning as opposed to existing as a mere theoretical possibility in the literature, it must enable a supplier under these circumstances working together with his distributors to build an operational non-price program.

We were told in Broadcast Music that the characterization of conduct that was arguably subject to a per se rule was not to be determined by literal definitions but by a sensible, functional approach to the question of whether the behavior had desirable efficiency effects.

The lesson in Broadcast Music in this context, I urge upon the Court, is to recognize the need for functioning a fence of the kind I have described so that both the Sylvania decision and Dr. Miles and its progeny

may themselves have functional roles to play in the shaping of our distribution systems.

QUESTION: You're not then suggesting an abandonment of the per se rule in all circumstances, Mr. Baxter.

MR. BAXTER: No. I have never suggested -- oh, I am not suggesting the abandonment of the per se rule in my presentation today. Section 2(b) of our brief, of course, is addressed to that point, but I am not arguing that point today.

QUESTION: And if we were to follow what you're arguing today, what precisely would be the evidentiary proof that it would take to get to a jury?

MR. BAXTER: Well, it would depend, Justice O'Connor, on the characteristics of the case. In a large number of cases -- I take for an example the Cernuto decision in the Third Circuit below -- there is no evidence that there was an articulated non-price set of restrictions put into effect, no evidence that there was a point of sale problem that needed to be addressed by point of sale non-price restrictions. Under those circumstances, Dr. Miles, Parke-Davis, et cetera, would continue to apply in just the way they apply today.

But, as I indicated in what I proposed as an accommodation, if a supplier was able to show that he

had adopted an articulated program involving non-price constraints addressed to an identifiable problem of the sort that Sylvania recognized, a distributional problem that is appropriately addressed by non-price restraints, then under those circumstances a plaintiff would have to show that in addition to agreeing on the non-price restrictions, there was an explicit agreement with respect to price. It would change the burden of proof faced by a plaintiff in this subcategory of cases.

QUESTION: Could evidence of uniform retail prices constitute evidence of an explicit agreement then?

MR. BAXTER: I think it could under extreme circumstances, but uniform pricing is at best circumstantial evidence, and often it is not very probative.

QUESTION: Well, how is a district judge to know whether there are extreme circumstances where he should let a case with uniform prices go to the jury?

MR. BAXTER: Well, that is a problem, of course, we have faced for many years in the area of horizontal agreements. The problem addressed in the Interstate Circuit case and Theater Enterprises. One simply has to look for clues whether the price parallelism is really telling you anything, whether it is merely a manifestation of intense competition which

tends to drive prices into parallelism, or whether they're in some sense that parties are acting against their self-interest, restraining their own competitive efforts in an attempt to work in cooperation with their rivals.

It is not an easy fact question to sort out. I don't pretend that it is.

QUESTION: Mr. Baxter, what about this case? Do you think there's enough evidence to go to the jury?

MR. BAXTER: I have no personal opinion on that, Justice Stevens. I have not attempted to formulate one. This case is here because --

QUESTION: Isn't the issue before us -- isn't that the issue before us, whether there's enough evidence --

MR. BAXTER: Oh, no, I don't believe it is at all, sir. I believe the question before you is whether the Seventh Circuit applied an appropriate legal standard in addressing itself to the propriety of the district judge's refusal to grant the motion for a directed verdict.

And my position today is that the Seventh Circuit did not apply an appropriate legal standard in addressing itself to that question. The question whether the evidence was sufficient is a very different

question. It would require a command of the record beyond my own, and I express no view on that, Your Honor.

QUESTION: Mr. Baxter, had Congress not adopted the proviso in its appropriation act, would you have made possibly a different argument to us today?

MR. BAXTER: We have not withdrawn part 2(b) of our brief, Justice O'Connor. Beyond that I would prefer not to deal with that question.

Thank you, Mr. Chief Justice.

CHIEF JUSTICE BURGER: Mr. Foote.

ORAL ARGUMENT OF EDWARD L. FOOTE, ESQ.,

ON BEHALF OF THE RESPONDENT

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

This Court decided the Sylvania case in a decision written by Justice Powell in 1977. That case started with the proposition that the district court had committed error in giving the appropriate instruction to the jury. The district court was asked in Sylvania to give the jury a rule of reason instruction. The district court in Sylvania refused to give a rule of reason instruction. The case went up, and this Court decided that a rule of reason instruction should have been given.

That was in 1977. Now, Mr. Yapp started trial

in Rockford, Illinois in 1980 in January. At no time during that trial did Monsanto tell Judge Roskowski, the trial judge, that he ought to submit a rule of reason instruction. Indeed, the trial court was instructed on this issue that it is per se illegal for a manufacturer to utilize territorial restrictions pursuant to a comprehensive price fixing plan. Therefore, if you find that the defendant basically agreed on a stabilization plan and the resale price maintenance was part of that or part of a plan to restrict access to the product, then you've got to find essentially for the plaintiff.

There was no objection to that instruction. Indeed, the word "pursuant to" in the instruction was suggested by Monsanto's counsel.

Further, the court was -- the jury was instructed that under the per se rule, you don't consider business justifications. You don't consider the reasonableness of these restraints.

When this case was in the Seventh Circuit, Monsanto told the Seventh Circuit that they should apply a rule of reason and the instruction was wrong. That's the first point they made in the brief they filed in the Seventh Circuit.

We're here now on another issue it seems, but how are we going to try cases if the district judge

isn't first given the opportunity of ruling on the issue. Perhaps Mr. Baxter should have tried this case and said to Judge Roskowski in January of 1980 please instruct the jury in the following way in helping you determine how you apply the facts to this case.

But that isn't what happened. That isn't what happened at all. Indeed, in this case, in the reply brief Monsanto now says on page 4 of their reply brief that they do not argue the jury instructions. If they do not argue the jury instructions, I respectfully suggest to this Court that the jury had every right to do what they did. The jury had ample evidence.

Mr. Bartlit's statement to this Court is not a statement of the inferences that the jury had a fair opportunity to resolve in favor of Spray-Rite. That's the same statement Mr. Bartlit made in opening statement to the jury. It's the same statement he makes now. The fact of the matter is if Monsanto stabilized the price of Lasso -- Lasso was a new product; it came out in 1968. Lasso determined to get rid of price cutting on this productive new product. The jury found that Lasso was in fact a success. The reason it was a success is because it was proprietary, and the farmer is the person who had to pay the different margin as a result of a price stabilization plan that Monsanto visited upon this

industry.

The testimony of Mr. McCormick, which we've cited at length in our brief, is a classic case of how you go about to stabilize a market. He contacted every distributor. He got every distributor to agree to the procedure and those that didn't they cancelled, they coerced. They told them directly if you sell out of this territory which we've arbitrarily set up as a primary area of responsibility, if you sell outside this area, we're going to not renew your contract next year. They did the same thing to our client, Mr. Yapp, twice.

QUESTION: Well, Mr. Foote, is it your position that Monsanto could not unilaterally discontinue the respondent here because of dissatisfaction with his price activities, his price cutting?

MR. FOOTE: Under Colgate, Your Honor, as counsel, all of us agree, you can unilaterally do about anything in this field. Our point, and the jury believed and found a special interrogatory submitted by counsel for Monsanto, that the termination was part of a stabilization plan. That is a jury question. I didn't know, and I suspect the Court very seldom has cases in which the issue before the Court is the sufficiency of the evidence to go to the jury. But I'll be very happy

to reargue that case.

There's an ample amount of evidence to go to the jury under the established law with respect to the agreements of other distributors, tacit agreeements.

As an example, Justice Rehnquist, when Mr. Fischer, the gentleman terminated, my client, said he was doing it because of price complaints, that was November of 1968. The fall season had begun for the fall and winter of 1968 and '69 for the spring planting, and Monsanto had its program in effect. They called in all the distributors, and they told the distributors -- Mr. McCormick's testimony and Mr. Dilley's testimony is absolutely explicit -- they called them all in. They said we're going to stabilize the price of a new product, Lasso. We want you to follow the prices. We want you to follow our suggested prices. They did follow the suggested prices.

At the same time that Mr. Fischer was telling our client that he was terminated because of price complaints, Mr. Bailey, who is like -- Mr. Bailey is like in the General Motors case that came out of California, there were Chevrolet dealers who wanted to get rid of the discount houses. They asked General Motors to help them.

Mr. Bailey was like those Chevrolet dealers

who wanted the discount eliminated. He, having met with the management at a district meeting in St. Louis, went back to Minneapolis and wrote a memorandum to the dealers saying we've finally arrived at a situation where Monsanto recognizes it's got to take care of this problem.

Their stores -- they had competing stores -- are going to use the suggested prices. A blessing really has fallen on us. None of us will obviously cut the price because it will risk termination, continuity of our dealership. It is a document that so reeks with a kind of antitrust behavior that when Monsanto found out about it, they wrote them and said gee, we really didn't say that. But that's what he testified to in front of the jury. And he said when I left that meeting, I knew that Monsanto wanted me to use the resale prices. And he was delighted to do it. He was like the folks, the Chevrolet dealers who wanted to get rid of another kind of an outlet.

Now, our client was the other kind of an outlet. So was Mr. Mulvahill who did more for the farmers up in Minnesota and North Dakota than anybody. He was the Yapp of that area. And they cancelled him after telling him to his face, if you don't stay in this little territory that we've sent you, we're going

to cancel you. You can't --

After they terminated my client they had face-to-face meetings with him in which they said if you sell to Mr. Yapp, we'll terminate you. Don't sell to Mr. Yapp. So he didn't. He had to acquiesce to that form of activity.

So when we talk about a statement of facts, it is true that the jury could have believed that all of these programs were innocent. They didn't. My own view is the jury had no alternative under the instruction it was given -- it was not objected to -- to find that these primary areas of responsibility were created as part of a plan to help stabilize the market. In fact, Mr. McCormick, the representative who called on these various dealers, distributors, said that's how we interpreted it, that the primary area of responsibility meant they had to sell in that area. They couldn't sell outside. Why not? Because they didn't want people like Mulvahill and other discounters and price discounters to go outside their area and discount the price.

QUESTION: Well, it's your position then that the evidence showed that the price stabilization wasn't just a unilateral act of Monsanto.

MR. FOOTE: Absolutely.

QUESTION: But it was pushed on them really by

some of the dealers?

MR. FOOTE: Some of the dealers loved it. Others it had to push on. It's a classic case, as Justice Brennan some years ago in Parke-Davis talked about a situation where some of the drugstores, some of the Parke-Davis outlets were willing to go along with the suggested prices; others were unwilling. They had to be talked to. And those that were unwilling didn't get any product.

It's exactly the same as we have here. It's the same situation I respectfully suggest the Court considered in the General Motors case.

QUESTION: Yeah, but where did the impetus, the first impetus, according to the evidence in this case, for the price stabilization come from, from Monsanto or from the dealer?

MR. FOOTE: I think originally it came from the dealers. The dealers did not -- many of the dealers did not like to have price competition between territories. They complained to Monsanto about that. One of the top people at Monsanto, Mr. Arvin, then came to my client's door and said you are not using dealer prices. You are selling into another area at low prices. And he acknowledged it. He said well, if you don't get your prices up, we're going to cancel your

distributorship.

One and a half years later, acting again on complaints, this time from Mr. Hopkins, the same gentleman who signed our client's dealer agreement, a Mr. Bone, appears, and he says to Mr. Yapp on a telephone, I'm sending you our dealer prices. You're not using them. You're going into other areas. You've got to use our dealer prices. If you don't use our dealer prices, we will retaliate against you. A few months later they did retaliate.

It's a mixed question, Justice Rehnquist.

QUESTION: Mr. Foote, could I ask you --

MR. FOOTE: Yes.

QUESTION: -- I think there's some confusion in the briefs as to exactly when the last dealer complaint took place prior to termination of Spray-Rite.

MR. FOOTE: Well, I think Mr. Stein testified in the summer of 1968 that he reviewed in the district office in St. Louis a number of complaints because it was the attitude at that time of the management in St. Louis that they continuously got complaints.

Now, there's a footnote in the brief that says that that evidence is not before the Court because another part of Mr. Stein's testimony, I believe, was limited by the Seventh Circuit. But the briefs on that

are explicit, if the Court please.

The question they asked Mr. Stein that was limited as a result of the Seventh Circuit decision was his opinion, since he wasn't present and didn't participate, on why my client was terminated.

QUESTION: So it is your opinion that 15 months did not elapse between the last --

MR. FOOTE: That is correct. Indeed, Mr. Fischer, when he terminated my client said we've received many, many complaints from the field, and that was in November of 1968. The jury had a perfect right to believe that what Mr. Fischer was talking about were complaints from the distributors. The inference of that is a jury question.

But what are we doing in this Court. I read the Attorney General's brief when they asked the Court to take the case, and they said they wanted you to change the rule of reason. They suggested you use it as an opportunity to change the per se rule to a rule of reason. Counsel said the same thing to the Seventh Circuit.

Now, of course, we now know that they do not question the jury instruction that was given in this case, which plainly says this is per se illegal. And the issue, the issue on the question of the per se

instruction as to whether non-price restrictions limiting the territory is part of price stabilization was sent to the Court of Appeals. The appeal on that was the jury instruction.

Issues presented for review, page 3 of the brief, in the Seventh Circuit. Did the district court err in refusing to apply the rule of reason of Sylvania to Monsanto's marketing programs? That's the first issue. That was briefed for ten pages.

Now, when you come to the directed verdict issue, what was the issue that was requested? Five. There were some damage issues. I'm not going to address those, of course. Did the district court err in denying Monsanto's motion for a directed verdict on the issue of whether Monsanto and its distributors conspired to fix the resale price of herbicides?

QUESTION: Well, but Petitioner isn't obligated to make the same arguments here that he made in the Seventh Circuit. In fact, a sensible counsel would probably not make them.

(Laughter.)

MR. FOOTE: Well, I've got to concede that Mr. Bartlit is a sensible counsel, Your Honor, so I suppose he would want to go beyond it. But it seems to me that you have to know what he asked the Seventh Circuit to do

in order to understand the Seventh Circuit's opinion. That's my point.

The Seventh Circuit did not address, as counsel mistakenly argued to this Court, the sufficiency of the evidence on these nonrestrictive, nonrestrictive, I mean non-price restrictive, issues. That is covered in the Court's decision under the instructions section. This opinion is divided into two parts. The first part discusses the jury instruction, and then at page 1238 you come to the sufficiency of the evidence.

Counsel preserved and wanted the Seventh Circuit to decide two issues under the sufficiency of the evidence: the boycott issue and the general price stabilization issue.

Under the jury instructions section, which counsel now say to this Court they're not questioning, is where they asked the Seventh Circuit to apply the Sylvania case to non-price restrictions. And I respectfully suggest that their criticism of Judge Bower's decision is plainly unfair.

At page 1237 of the opinion of Judge Bower in answer to the question what kind of jury instruction should we give -- mind you, as we pointed out in our briefs, they never gave a rule of reason instruction. They never asked for a rule of reason instruction. The

Court had no alternative but to get a per se instruction.

But passing that point, the Seventh Circuit at pages 1236 and 1237 of Fed Second 684 --

QUESTION: Do you have a corresponding citation to the appendix to the petition? If you don't, don't worry. I just wondered if you had it offhand.

MR. FOOTE: I do not handily, I'm sorry, Justice Rehnquist. But at this point, the court is discussing Sylvania and comparing it with this Court's Sealy decision and saying what is obvious, that in Sealy, in Sealy this Court said that territorial restrictions are invalid if they're part of a price stabilization program. Remember how that case came up.

The district court found price stabilization. Also found problems in the territorial restrictions. A former, later on head of the Antitrust Division, Dick McClaren, argued that case to this Court, and said to this Court well, don't consider the price fixing issue. We want you to consider only the isolated problem of territorial restrictions as they relate to our business. And this Court appropriately said we're not going to do that. The territorial restrictions are part of the price fixing.

Exactly the case we've got here. Judge Bower did exactly -- Judge Bower, in looking at this, did not

reject Sylvania. He said Sylvania applies to a situation that the Court has outlined, non-price restrictions that do not involve price stabilization. Sealy involves cases in which there are non-price restrictions that are tied to price stabilization.

QUESTION: And is that a question of fact in each case whether the non-price restrictions are tied to the price restrictions?

MR. FOOTE: I don't think so. I think it's a question of what the court instructs the jury.

QUESTION: Well, but the court can instruct the jury -- in fact, it usually does instruct the jury on questions of fact.

MR. FOOTE: Oh, but in setting the standard the court has to tell the jury to what extent in each case, as was done in this case, the jury has to be instructed, as they were, that unilateral actions are not unlawful.

QUESTION: Yeah, but I'm just going to quote a sentence from Judge Bower's opinion, referring to the Sealy court: "The court rejected Sealy's contention and held that the manufacturing and resale restrictions were unlawful because they were part of a per se unlawful price fixing scheme."

Now, must -- in order for a court to make

this, must a jury make a finding that the non-price restrictions were "part" of the price restriction?

MR. FOOTE: Well, if I wanted to preserve this point and it was January of 1980, I would tell Judge Roskowski put it up alternatively. Say to the jury the first thing you've got to find is whether or not these price restrictions -- non-price restrictions are part of a stabilization program. But the only instruction given to the jury was that if you find that the non-price restrictions are part of stabilization, then it's unlawful per se because that's what Monsanto and Spray-Rite agreed was the instruction.

So I agree with you, Your Honor, or Justice --

QUESTION: Well, Mr. Foote, isn't it true that the second special interrogatory is directed at precisely this issue?

MR. FOOTE: It is. And the answer was for Spray-Rite. In fact, that was because of the damage issue. Because of the MCI case and other problems, Monsanto argued that we couldn't desegregate our damages. And they asked the court to submit interrogatories so that if they got one answer on one of the issues, they could then argue that our damages were not desegregated. And I think there's -- but the effect of it is that the special interrogatory was answered by

the jury in our favor and says that the non-price restrictions were part of a stabilization of price plan.

But the argument made before I stood up here was that the Seventh Circuit addressed the sufficiency of the evidence on non-price restrictions. It did not. It analyzed the question of what the proper instruction should be.

When you get over to the sufficiency of the evidence point, which is again and --

QUESTION: Is it your point they didn't need to analyze it under the instruction?

MR. FOOTE: They weren't asked to.

QUESTION: Then what's the answer to my question?

MR. FOOTE: Pardon me, Chief Justice. They were asked to evaluate the sufficiency of the directed verdict on whether the termination related to a price fixing scheme. They were not asked to review the sufficiency of the evidence as to whether or not the non-price restrictions were part of a stabilization plan, which the jury also found in our favor. So the jury found everything in our favor, because they couldn't have done anything else after listening to Mr. McCormick's testimony. He repeatedly told people that he was out to stabilize the market, and he did. It says

that he got agreements from people to do it, and those who wouldn't go along with him, he threatened termination or cancellation. A classic case.

We would have to reverse Sealy if that doesn't constitute sufficient evidence. I think the case is stronger than Sealy on the facts. I think the case is stronger than General Motors on the facts. And I think a review of the record, which, of course, this Court doesn't want me to do, will support that.

I only get into it in response to an opening argument which is a statement of facts that the jury rejected.

Lasso ended up with a 14 percent margin after the price stabilization plan was put into effect. Before that, Mr. Yapp, my client, sold at a 6 percent margin. Most -- when Mr. Yapp was competing in this area, the farmers got the difference between 6 and 7 percent and 14 percent. That's what the jury had a right to conclude.

Further, that other companies that manufacture herbicides operated on a 14 percent margin. That's in the appendix. So the notion that there wasn't an effect on the market only can be arrived at by rejecting our evidence and accepting inferences from Monsanto, which obviously a point I'm not going to debate. I think

Monsanto's counsel would agree that I have the right to have the evidence construed most favorably to our side.

Let me address a confusing point: the mere allegation point. It is true that Judge Bower, after talking about the allegations in Sealy and the allegations in Sylvania, says that mere -- uses the expression "mere allegation." Sealy applies, rather than Continental, if there is no allegation that the territorial restrictions are part of a conspiracy to fix prices. It is seriously contended that this Court ought to censure Judge Bower by his expression of allegation.

In the petition filed in this Court by the United States, they suggested in a footnote that it probably out to say "proof" instead of "allegation." Well, I respectfully suggest that that is a red herring. What in the world -- in reading page 1237 of 684 Fed Second, you've got to conclude that Judge Bower, who is a former United States Attorney, a district court judge, and a court of appeals judge for many years, doesn't want the world to believe that he thinks that all you have to do in a case is make allegations. That's the thrust of what they would like -- that's one of the reasons why they asked this Court to take the case. I believe that that's the reason the Court took the case; that it should follow practice it has done in

other instances and dismiss the rest. That is not a serious point for this Court to review, I respectfully suggest.

What is the point, then, this Court should review? It's not the jury instructions. Mr. Baxter was not there in January of 1980 to put his particular form of law to the jury. I don't know what the jury would have done with it. I don't know whether the district court would have accepted his new principle.

But we know one thing. Nobody argued it. Mr. Bartlit didn't argue it. I didn't argue it. Earl Jinkinson didn't argue it. Nobody argued it. Because it wasn't given, it wasn't offered.

Wasn't the predicate of this Court's case, Sylvania case, when Justice Powell said there was an instruction at the trial judge for a rule of reason which the trial judge rejected. That's how the case came up. That's totally absent in this case.

So what's -- if we don't have jury instructions to argue about, if we don't have sufficiency of the evidence to argue about, if we are not going to take seriously the notion of mere allegation, meaning by that that the court of appeals in the Seventh Circuit, speaking through Judge Bower, actually believes you don't have to allege anything -- I

mean you don't have to prove anything but only allege things, then what is this case all about? Why are we here?

QUESTION: Counsel, what was the evidence that showed the agreement or conspiracy?

MR. FOOTE: The evidence that showed the agreement or conspiracy starts with substantial complaints. It's a series of five or six events.

QUESTION: Was there more than evidence of competitor complaints --

MR. FOOTE: Ch, yes.

QUESTION: -- By the --

MR. FOOTE: Substantially more.

QUESTION: -- Distributor complaints. What else?

MR. FOOTE: It started historically with distributor complaints, some of whom requested that we do something about this. This went on through '66 and '67. During that time Monsanto didn't have to do anything with those complaints, as other courts of appeals have reviewed cases where they did nothing except label --

QUESTION: Well, what I'm asking is what was the evidence of a conspiracy or agreement other than the complaints by the distributors, in a nutshell?

MR. FOOTE: Monsanto reacted to those complaints, went about to stabilize prices by either telling dealers such as Yapp that they should increase their suggested -- increase their prices to the suggested price that the other dealers wanted, or they'd terminate them. And they did terminate those, my client and Mr. Mulvahill.

QUESTION: Well, so the evidence was, as the other side has suggested, simply the complaints of distributors followed by the termination.

MR. FOOTE: That is plain nonsense, I respectfully suggest, Justice O'Connor.

QUESTION: Well, then, what else?

MR. FOOTE: After that they had a -- they adopted a wholesale stabilization plan for the entire product Lasso. Lasso was a new product. It was the future of the company. Its success -- it was very successful, Justice O'Connor. It became -- in fact, they said in their books this is part of the evidence; that -- that it was almost -- it dominated a certain kind of herbicide. In effect, it had no substitutes.

So Lasso becomes the product they're trying to protect. Starting in the summer of 1968, their people went out for two years and admitted in front of the jury that they stabilized the price of Lasso. They said we

went around to all the distributors, got them all, the word was signed up. If they weren't "signed up," they then threatened them, either --

QUESTION: Well, that market -- the -- the Lasso product came on line after the termination?

MR. FOOTE: It was announced almost at the same time. Our position was that it was -- that the termination of our person was necessary because our client was a price cutter who they feared. They have testified repeatedly they did not want him to get any Lasso product. In addition to that, after they terminated him and wouldn't get any product from him directly, we couldn't get the product from Monsanto directly, they went around and boycotted other dealers so they wouldn't sell to us. And the testimony on that, Justice, was very explicit.

They extracted concessions from people who were going to sell to us not to sell to us.

CHIEF JUSTICE BURGER: Your time has expired now, counsel.

Do you have anything further, Mr. Bartlit?

MR. BARTLIT: Yes, sir.

CHIEF JUSTICE BURGER: You have three minutes remaining.

ORAL ARGUMENT OF FRED H. BARTLIT, JR., ESQ.,

ON BEHALF OF THE PETITIONER -- REBUTTAL

MR. BARTLIT: Sir.

I was very dramatically taken to task for not submitting a rule of reason instruction. The fact is I did. I did. Page 3983 of the record shows Monsanto submitted the instruction but withdrew it when Spray-Rite abandoned any claim that the programs were unlawful under the rule of reason. So I withdrew the instructions, and it went to the jury on a per se standard. We say there's no evidence from which programs like this which are procompetitive can be per se unlawful, so that we were entitled to a directed verdict. We would have been delighted to have submitted this case on a rule of reason basis.

Second, in response to a question, Respondent's counsel says the impetus for this came from dealers. Now, that's not right. Dealers had been complaining for years, and we did nothing until we got in a marketing situation where we had to put in programs in order to succeed against an entrenched 70 percent competitor. So we know this is not GM, and it's not Sealy where the impetus was a horizontal impetus from dealers. It came from a manufacturer who was in trouble.

QUESTION: Mr. Bartlit, can I ask you exactly what disposition you think the Court should make of the

case?

MR. BARTLIT: Yes, sir. I think that the directed verdict should have been granted on two grounds and that the Court should remand to the Seventh Circuit with instructions to direct the lower court to enter a directed verdict motion.

QUESTION: But what about the boycott evidence, the post-termination evidence?

MR. BARTLIT: Your Honor, the --

QUESTION: You didn't even challenge that, if I --

MR. BARTLIT: No, sir, I didn't. And that's because the record shows that 2662 through 2680 and in the appendix at A-23 that there was no claim at any time that the boycott caused any of the damage that was entered in this case. Plaintiff's expert didn't attribute damage to the post-termination boycott. It was a separate situation.

QUESTION: I thought you had a footnote on your brief that said that there were three elements of damage, and we couldn't unscramble them, and that's why --

MR. BARTLIT: Yes, sir. But the boycott wasn't one of them. The Seventh Circuit --

QUESTION: So you say as a matter of law,

there's no evidence in the record of damages flowing from the boycott.

MR. BARTLIT: Yes, sir. And that's the Seventh Circuit -- their brief at page 33 and the Seventh Circuit at A-23, the Seventh Circuit doesn't attribute any damages to the boycott.

Thank you very much, Mr. Chief Justice.

CHIEF JUSTICE BURGER: Thank you, gentlemen.

The case is submitted.

We will hear arguments next in Copperweld against Independence Tube.

(Whereupon, at 2:00 p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represent an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of the United States in the Matter of:

#82-914 - MONSANTO COMPANY, Petitioner v. SPRAY-RITE SERVICE CORPORATION

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