OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: SPECTRUM SPORTS, INC., ET AL., Petitioners v. SHIRLEY McQUILLAN, ET VIR, dba SORBOTURF ENTERPRISES

CASE NO: 91-10

PLACE: Washington, D.C.

DATE: November 10, 1992

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IN THE SUPREME COURT OF THE UNITED STATES

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SPECTRUM SPORTS, INC., ET AL., :

Petitioners :

v. : No. 91-10

SHIRLEY McQUILLAN, ET VIR, :

dba SORBOTURF ENTERPRISES :

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Washington, D.C.

Tuesday, November 10, 1992

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:49 a.m.

APPEARANCES:

JAMES D. VAIL, ESQ., Cleveland, Ohio; on behalf of the Petitioners.

ROBERT A. LONG, JR., Assistant to the Solicitor General, Department of Justice, Washington, D.C.; on behalf of the United States, as amicus curiae supporting the Petitioners.

JEFFREY M. SHOHET, ESQ., San Diego, California; on behalf of the Respondents.

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P R O C E E D I N G S

(11:49 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument next in Number 91-10, Spectrum Sports, Inc. v. Shirley McQuillan. Mr. Vail, you may proceed whenever you're ready.

ORAL ARGUMENT OF JAMES D. VAIL

ON BEHALF OF THE PETITIONERS

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

In this case you are asked to reverse the decision of the Ninth Circuit Court of Appeals and to reject the rule first announced in Lessig v. Tidewater Oil. You should do for three reasons. First, the Lessig rule is inconsistent with this Court's section 2 jurisprudence. Second, the Lessig rule cannot be reconciled with economic reality. And third, the Lessig rule does not promote competition, but harms it.

These are the key facts. Spectrum Sports and the McQuillans' distributed Sorbothane athletic insoles; each bought the Sorbothane insoles from a manufacturer and had a -- and resold them to retailers. Each of the parties had an exclusive geographic territory in which they sold the Sorbothane insoles. Both parties started selling the soles in 1981, and Sorbo, Inc. terminated the

McQuillans' distributorship in August, 1983. Thereafter, Spectrum became the national distributor of Sorbothane insoles.

The trial court entered judgment for the McQuillans on their section 2 claim. It also entered judgment on behalf of Spectrum Sports, finding it not to have adjudged -- excuse me, finding it not to have violated section 1 in the McQuillans' price fixing claim.

The appellate court affirmed solely on its conclusion that the trial record supported the McQuillans' attempt to monopolize claim. It declined to address any of the other issues that were presented on appeal. The court of appeals relied on the Lessig rule, which permits a judge or a jury to find an attempt to monopolize violation without analyzing the relevant market and determining violation to have occurred based solely on the defendant's conduct.

That rule is inconsistent with the rule of this Court. This Court has long stated that in an attempt to monopolize plaintiff must show that the defendant has a reasonable or dangerous probability of succeeding in monopolizing. This is usually proved by examining the relevant market and examining the defendant's power in that market.

Without knowing what the defendant's market

power is, a fact finder cannot determine how, if at all, the defendant's conduct will affect a particular market. And if we --

QUESTION: Why -- why do we care?

MR. VAIL: We care, Your Honor, because the purpose of the antitrust laws is to protect competition, to make sure that consumers are not --

QUESTION: I mean this -- this has a -- this has a tendency to do that.

MR. VAIL: Well, not --

QUESTION: Even -- even -- even if we don't know the market share, there's -- there's -- there's a tendency to protect competition, isn't there, in finding liability here?

MR. VAIL: Our position is that that is not necessarily the case. Without examining the conduct in the context of a relevant market, one cannot determine whether the defendant's conduct will harm competition. One is unable to distinguish between conduct that may be undertaken with the goal of monopolizing from conduct that is undertaken for personal reasons.

One cannot determine, for example --

QUESTION: You're saying the predatory character of the behavior is not sufficient to do that.

MR. VAIL: That's correct, Your Honor. First of

all, predatory is somewhat difficult to define in the first instance. But moreover, the same conduct might be undertaken by a market player with 2 percent of the market as with -- as one who has 80 percent of the market. Certainly, the party that has 2 percent of the market is not likely to be able to affect that marketplace and harm competition. There may be some effect on the competitor, but there are other laws to deal with harm to another competitor.

The Lessig rule converts a section 2, an attempt to monopolize analysis, from one which requires an analysis of the market and the impact on the market to a per se analysis based solely on the defendant's conduct. This Court has shown an aversion to extending the per se rule, and that would be -- it would be even less appropriate to extend it to a section 2 case.

The -- the Lessig rule has been rejected by every other court of appeals for several reasons. First, it permits there to be a finding of antitrust, of a section 2 violation, without determining anything more than whether or not the defendant's conduct has been improper. There is no distinction made based on the fact that this is a section 2 analysis which looks at only unilateral conduct.

The court, the Ninth Circuit, relies solely on

the defendant's conduct and permits an inference of specific intent and then --

QUESTION: Was the -- was the jury here charged that in order to find the defendant liable it would have to find an attempt to monopolize?

MR. VAIL: In order to find a section 2 violation.

QUESTION: Yeah.

MR. VAIL: The jury was charged that it could find a section 2 violation based on attempt to monopolize, monopolization, or conspiracy to monopolize. The court of appeals, however, found that there -- under the Lessig rule there was adequate evidence to support an attempt to monopolize violation and chose not to reach any of the other issues raised on appeal.

QUESTION: And what did the Ninth Circuit say was sufficient evidence to support an attempt to monopolize?

MR. VAIL: The Ninth Circuit said that -- looked to evidence in the record that Spectrum Sports -- that the Ninth Circuit said that the -- that Spectrum Sports attempted to fix prices, even though the jury had determined it did not. It also looked to evidence of what it deemed unfair conduct in which Spectrum Sports stated to Mrs. McQuillan that if she did not sell her

distributorship she would be out looking for work. And from that, the Ninth Circuit concluded that there was adequate evidence to establish an attempt to monopolize case.

QUESTION: Is -- is that because there are two steps? It takes the act and it infers the intent, and then from the intent it infers dangerous probability. Is that how the --

MR. VAIL: I think that's how --

QUESTION: -- chain of inferences works, in your --

MR. VAIL: That's -- that's how the Ninth Circuit inference works. But, in fact, although many of the circuits will allow specific intent to be inferred, the Ninth Circuit is the only one that disregards or permits the inference of dangerous probability of success. And our point is that nothing about the conduct or even the intent that might be inferred can provide assistance in determining whether or not the defendant actually has a probability of monopolizing.

And it becomes all the more dangerous when we're looking at section -- a section 2 claim where -- which -- where unilateral behavior is more likely to be chilled. There is a -- there is really no benefit that is provided by the Lessig rule.

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QUESTION: The Ninth Circuit permits an inference of dangerous probability of success without any effort having been made to define the market?

MR. VAIL: That is correct, Your Honor. The -- the Ninth Circuit permits -- permits the dangerous probability element to be based solely on conduct. The -- the charge specifically says if you find the conduct to be predatory, or in this case the Ninth Circuit deemed if it were unfair, then you may proceed to infer that there is a -- that the defendant has a dangerous probability of succeeding in monopolizing.

And our position is there is nothing about the defendant's conduct that can allow you to conclude that that defendant has a realistic possibility or probability of monopolizing any particular market.

QUESTION: Mr. Vail, are you -- are you challenging the jury instructions in this case?

MR. VAIL: Yes, we are challenging the jury instructions in this case. We did challenge them on appeal.

QUESTION: Uh-huh.

MR. VAIL: And we are -- we are challenging them in the context that they were given because of the Ninth -- because the Ninth Circuit permits the Lessig -- the Ninth Circuit Lessig rule.

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QUESTION: So if we agree with you it has to go back to the trial court to be tried under different instructions?

MR. VAIL: Yes.

QUESTION: Uh-hum.

MR. VAIL: We think that the Lessig instruction is inappropriate and that the case ought to be reversed with instructions that it may not use -- rely on the Lessig rule.

The -- one aspect of the harm of the Lessig rule is that it -- it truly harms competition. It allows, for example, a competitor with 80 percent of the market, to claim that its 10 percent competitor has violated section 2 because the 10 percent competitor has been able to secure 2 points of the market share from the 80 percent competitor.

The 80 percent competitor may deem that -- the 2 percent -- may deem the smaller competitor's conduct to have been unfair and may think that it was predatory, however that is defined in that instance, and file a section 2 claim. Now clearly that 10 percent competitor cannot monopolize the market, but --

QUESTION: Does the Ninth Circuit rule foreclose the defendant from saying even though you can raise an inference of dangerous probability by proving the conduct,

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that the defendant can put in evidence that he's -- that he's got 80 percent of the market, the defendant has 80 percent of the market, and therefore it's absurd to think that -- that he could succeed?

MR. VAIL: Excuse me, my light is on.

QUESTION: It's lunch time, so why don't you answer me after lunch.

QUESTION: Yes, you can answer Justice Stevens' question at 1:00. We will resume then.

MR. VAIL: Thank you.

(Whereupon at 12:00 p.m., oral argument in the above-entitled matter was recessed, to reconvene at 1:00 p.m., this same day.)

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AFTERNOON SESSION

(12:59 p.m.)

CHIEF JUSTICE REHNQUIST: Mr. Vail, we'll resume where we left off. You were pondering the answer to Justice Stevens' question, I think.

MR. VAIL: Thank you, Your Honor. Mr. Justice, I understand the question --

QUESTION: I don't -- I don't remember the question. Do you want to tell me what it was?

MR. VAIL: As I understand the question, it was whether or not a defendant in the Ninth Circuit had the ability to rebut the Lessig presumption by offering evidence that it did not possess market share or market power.

Is that -- if that's the question, I think that certain panels in the Ninth Circuit do permit that. The Ninth Circuit jurisprudence is certainly confused from time to time from one panel to the next, but I would say that, on balance, yes, the Ninth Circuit would permit that presumption, it would permit that rebuttal.

QUESTION: Well, well, how do you explain the result in this case, then? Because -- is there -- is it subject to reasonable -- could reasonable jurors differ on whether or not there -- there was a dangerous probability of success here?

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MR. VAIL: The -- the instruction -- first of all, I think jurors could not distinguish. But forgetting the facts for the moment, I think the instructions simply permitted the jury to rely on -- to rely on conduct to reach dangerous probability. In this case it was not -- there was no instruction to that effect.

QUESTION: Did -- but did the defendant put in evidence that this is kind of silly, to assume a dangerous probability when we have such a small percentage of the market?

MR. VAIL: There was extensive evidence presented on behalf of the defense to the effect that this was an extremely competitive market with no barriers to entry, yet the verdict was against the defense.

QUESTION: Did you object to the jury instructions in the district court?

MR. VAIL: We did, Your Honor.

QUESTION: And did you raise the jury instruction issue in the court of appeals?

MR. VAIL: We did, Your Honor.

QUESTION: Was the jury instructed in line with Justice Stevens' questions, that the defendant could rebut the inference, or was there an instruction on that point at all?

MR. VAIL: There was not, Your Honor.

QUESTION: Did you ask for one?

MR. VAIL: We asked for an Oahu Gas instruction which allows the jury to look at procompetitive justifications of conduct as well as anticompetitive analysis, and that was objected to by the respondents and the instruction did not go in.

One of the key points or key problems with the Lessig rule is that it is so difficult to determine what is predatory and what is not predatory in any particular situation, that the dangerous probability requirement is there as a safeguard to make sure that this is not -- that the challenged conduct is not simply conduct done for personal motives.

And it becomes very important in a section 2 case because section -- we are trying to promote competition and certainly the competitor who feels harmed or who has lost market share may believe that to be for predatory reasons or unfair reasons. But nonetheless, that such conduct does not implicate the antitrust laws.

Lastly, I'd want to point out to the Court that the Lessig rule engenders unnecessary litigation, a bushel-load, if you will, of litigation in the Ninth Circuit, because of the enticement of treble damages and attorney's fees. And it has such a chilling effect on competition that it -- it really should not be permitted

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to stand.

I think that unless the Court has any questions, I'll reserve the balance of my time.

QUESTION: Very well, Mr. Vail.

MR. VAIL: Thank you.

QUESTION: Mr. Long, we'll hear from you.

ORAL ARGUMENT OF ROBERT A. LONG, JR.

ON BEHALF OF THE UNITED STATES

AS AMICUS CURIAE SUPPORTING THE PETITIONERS

MR. LONG: Thank you, Mr. Chief Justice, and may it please the Court:

Liability for attempted monopolization in violation of section 2 of the Sherman Act should be limited to conduct that creates a realistic probability of actual monopolization. The probability of monopolization can be determined only by defining a relevant market and considering the defendant's conduct in the context of that market.

Section 2 of the Sherman Act, unlike section 1, applies to unilateral conduct. As this Court recognized in Copperweld, it is often difficult to distinguish robust competition from unilateral conduct with long-run anticompetitive effects. Vigorous competition may seem unfair and predatory to an unsuccessful competitor, but the antitrust laws protect competition, not competitors,

and vigorous competition promotes the welfare of consumers.

The Ninth Circuit's approach to attempted monopolization brings many ordinary business torts within the scope of the Sherman Act with its treble damages remedy. Because private antitrust actions are relatively easy to bring and expensive to defend, an overexpansive definition of the attempt defense is likely to chill vigorous competition. Nonantitrust laws are more appropriate vehicles for remedying single firm conduct that does not present a genuine risk of injury to competition.

The probability of monopolization can be assessed only by defining a relevant market; that is, a market in which a monopolist could charge a price above the competitive price for a significant period of time. In general, a higher market share increases the probability of market power, but market structure is also relevant; factors such as barriers to entry and excess capacity.

In our view, the probability of monopolization generally should be considered as a threshold issue in a section 2 case. If it is clear from the defendant's market position that there is no significant possibility of monopoly, then judgment for the defendant is

appropriate. The court and the parties can thereby avoid costly and time-consuming inquiries into specific intent and conduct.

I should add --

QUESTION: When do you get to -- when do you get to being guilty of an attempt but not monopolization?

MR. LONG: Well, when there's a dangerous probability of success. That's the formulation this Court adopted in Swift & Company and -- and that is the standard we think the Court should reaffirm in this case. Obviously --

QUESTION: And you just measure that by examining market power, is that it?

MR. LONG: Typically, we think you must define a relevant market and then make some --

QUESTION: And is intent irrelevant in the case or not?

MR. LONG: No, specific intent is also an element of attempt to monopolize, that's -- that's clear from this Court's decisions.

QUESTION: Uh-hum.

MR. LONG: Aspen Skiing, Times-Picayune, Swift & Company, a number of this Court's decisions have held that specific attempt --

QUESTION: So at some time in this case it might

be a dangerous possibility or probability, what is it?

MR. LONG: Well the -- the formulation in Swift & Company is dangerous probability. We think --

QUESTION: So at some -- some time in this -- on these -- in this very situation, there might arise a dangerous probability.

MR. LONG: In -- yes. And that is -- that is what the jury should be instructed to find, and we think that mere evidence of conduct, of unilateral conduct, cannot be a sufficient basis to infer the dangerous probability of success. Because unilateral conduct is so difficult to characterize, so much conduct that might be claimed to be predatory is actually just vigorous competition.

Predatory pricing is a good example of that. Cutting price is a classic means of competing. It's generally good for consumers. It's very difficult to tell when a price is predatory or --

QUESTION: Mr. Long, if certain conduct would be held to be per se in violation of the Sherman Act, would an attempt to commit that act require the kind of proof you say it does here?

MR. LONG: Well, in our view --

QUESTION: An attempt to commit a per se violation.

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MR. LONG: We don't think so. In our view, there should not be a category of per se section 2 violations. The -- leading commentators Areeda and Turner have suggested there should be a very narrow category, and not anything like any behavior that's been alleged in this case. Predatory pricing, fraudulent procurement of a patent, are the two leading examples they give. The Court need not reach that question in this case because it's -- it's not presented.

QUESTION: Mr. Long, do you have any other cases besides Swift where we've supposedly said that there's an -- a separate dangerous probability? I don't read Swift as saying that there is a separate dangerous probability requirement.

What Swift says is that where the acts are not sufficient in themselves to produce the monopoly but require further acts, then an intent is necessary in order to produce the dangerous probability. The intent is what produces the dangerous probability. And then Holmes goes on to say but when that intent and the consequent dangerous probability exists, this statute, blah, blah, blah, applies.

MR. LONG: That's true, although at the end of the opinion the Court added: Not every act that may be done with intent to produce an unlawful result is unlawful

or constitutes an attempt. It is a question of proximity and degree. That's at page 402 of the opinion.

In the Walker Process case, I think, also, Justice Scalia, the Court held that a dangerous prox -- probability of success --

QUESTION: Plus proximity, okay. And -- and you -- you think that -- that market share is proximity?

MR. LONG: Well, a higher market share, in general, does indicate a greater probability of successful monopolization. We emphasize though, that's not the sole test. You have to consider the structure of the market; if barriers to entry, for example, would be relevant. In some cases a defendant with a relatively low market share could be capable of monopolizing. There could be a dangerous probability if, for example, there were high barriers to entry.

QUESTION: Anyway, what -- what's the other case you mentioned?

MR. LONG: The Walker Process case.

QUESTION: Walker, okay.

MR. LONG: It's cited in our brief at page 10, Your Honor.

QUESTION: Okay.

QUESTION: Would you make the same argument in a conspiracy case?

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MR. LONG: No, not at all. We think that's the basic distinction. Joint conduct does present a significant danger of anticompetitive --

QUESTION: Well, what happened to the conspiracy claim in this case? The jury just returned a general verdict.

MR. LONG: Your Honor, to my knowledge there was not a conspiracy to monopolize claim. The -- the particular claim in front of us was a general verdict.

QUESTION: Well, what -- who has a conspiracy claim?

MR. LONG: I'm sorry, I correct myself, I misspoke. There was a general verdict. The jury was instructed to find the defendants liable for monopolizing, attempting to monopolize, or a conspiracy to monopolize. They found them liable and they didn't specify which of those three.

QUESTION: And what -- and what happened to this conspiracy claim?

MR. LONG: Well, it's -- it was -- it was subsumed --

QUESTION: I mean the Ninth Circuit --

MR. LONG: -- in the general verdict.

QUESTION: -- did the Ninth Circuit deal with it?

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MR. LONG: It did not. It said that it could affirm if it could find sufficient evidence to affirm on any of the three grounds, and it only addressed attempt to monopolize.

QUESTION: And if we agree with you and petitioner, are those issues still -- is the issue of conspiracy still open in the Ninth Circuit?

MR. LONG: Well, since we think there was an error in the legal instruction on attempt and since the jury was just told -- just returned a general verdict, we think the -- the section 2 verdict can't stand. This is under Sunkist Growers. There was a legal mistake. The jury can't be presumed to know that it was misinstructed on the law, and since there's no way to tell that the general verdict didn't rest solely on the attempt claim, we think that the section 2 verdict cannot stand.

QUESTION: Your definition of attempt, for purposes of section 2, is much more restrictive than the definition of attempt to commit crimes generally, is it not?

MR. LONG: Yes, that's correct, although the dangerous proximity approach is one that is still in use in some parts of the criminal law. But we -- we certainly don't advocate that as a general criminal law standard.

We think in the special context of the Sherman

Act, which is both a civil and a criminal statute with a treble damages remedy, that applying something like the model penal code, the substantial step requirement, would allow too many ordinary business torts to be swept into the coverage and would essentially defeat the purpose of section 2 by allowing, actually, a chilling of vigorous competition.

QUESTION: But you don't advocate that as to crimes generally, including --

MR. LONG: No.

QUESTION: -- Crimes that can lead to a RICO prosecution.

MR. LONG: Certainly not. Thank you.

QUESTION: Thank you, Mr. Long. Mr. Shohet, we'll hear from you.

ORAL ARGUMENT OF JEFFREY M. SHOHET

ON BEHALF OF THE RESPONDENTS

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

I'd like to begin by responding to a question Justice White asked which I think raises the most important issue in this case to the proper resolution of it, and that is was there a conspiracy, was there concerted activity underlying the section 2 claim here. And the answer is yes.

We can tell from this record, and it cannot be disputed, that the only section 2 conduct that connects this petitioner to the damage alleged was conspiratorial conduct. In fact, it was a price-fixing agreement in violation of section 2 of the Sherman Act -- I'm sorry, price-fixing agreement that is a per se violation of section 1.

Since --

QUESTION: Did you allege a violation of section 1?

MR. SHOHET: We did, and there was a -- a problem with the jury instruction, which is set forth in our brief, which we believe explains why the jury did not find liability under section 1. But whatever the jury did, it must have based its section 2 verdict on conspiratorial conduct. It was the only conduct -- Spectrum points out that it had no power to terminate this distributorship. That power was with the manufacturer, so the only way you get there is through conspiratorial conduct.

That raises a very important point, and that is this. The controversial Lessig inference isn't -- should -- does not have to be reached in this case, because, as the Solicitor General correctly pointed out, when you have --

QUESTION: Well, that may be -- that may be so, but if we were -- if we insist on reviewing what the Ninth Circuit decided, are you defending it?

MR. SHOHET: I'm saying this. Yes, I can -- I am defending it, but I'm saying it's superfluous. And the reason is each of the elements of the conspiracy to monopolize are identical to the attempt defense, with the exception that the attempt defense requires a dangerous probability.

QUESTION: Well, Mr. Shohet, we granted certiorari to decide the question --

MR. SHOHET: I understand.

QUESTION: -- that was presented.

MR. SHOHET: Okay.

QUESTION: And we certainly want to hear you deal with that.

MR. SHOHET: I will.

QUESTION: As well as any other arguments you might have --

MR. SHOHET: I will.

QUESTION: For an alternate affirming.

MR. SHOHET: I wanted to make that very important point, but the -- but the next point that follows from that conclusion is this was a very limited and narrow application of the Ninth Circuit's rule. It

was not based upon merely unfair or unkind conduct. It was based on a very --

QUESTION: Before you -- before you leave your first point.

MR. SHOHET: Yes.

QUESTION: Is it your legal position that even though the offense of attempt to monopolize requires proof of a dangerous probability of success, the offense of conspiracy to monopolize does not?

MR. SHOHET: Absolutely, does not.

QUESTION: What is your authority for that?

MR. SHOHET: Well, they -- the instructions on the conspiracy to monopolize in this case were proposed by the petitioners and specifically exclude the dangerous --

QUESTION: Well, that may well be, but do you have any -- any authority in any appellate court decision that draws the distinction you draw?

MR. SHOHET: I believe there is authority. I don't have it at the tip of my -- I don't have it right here today, but I believe there is authority for the proposition.

QUESTION: In the Ninth Circuit?

MR. SHOHET: I think there's some -- there's a split in the circuits on that question, Justice Stevens. Some circuits have said that it does not, some say that it

is an element. The Solicitor General --

QUESTION: I thought that the -- my own understanding of the law was a -- a conspiracy is just a joint attempt, and you still have -- you still have to have the other elements of an attempt.

MR. SHOHET: The specific intent requirement is -- all circuits say specific intent is an element, yes, but not a dangerous --

QUESTION: And also a dangerous -- well, but you don't have any cases. You're just telling me you think there are some out there.

MR. SHOHET: I didn't come prepared to address the conspiracy claim, except -- except I would point out that it was stipulated in the instructions here.

QUESTION: Well, I -- that's not what -- my concern. My concern is whether there's any authority for that proposition, and I'm not aware of any.

MR. SHOHET: I'm not aware of any authority, certainly, from this Court.

QUESTION: Yeah.

MR. SHOHET: But, of course, because it's conspiratorial conduct, then the harm inures from the fact, as this Court has said over and over, that when people join together to accomplish an objective forbidden under the antitrust laws that that, in and of itself,

creates a danger beyond the unilateral conduct of one firm. And so my point would be that because of the inherent danger of a conspiracy, it should dispense with the dangerous probability requirement --

QUESTION: Well --

MR. SHOHET: -- for the conspiracy offense.

QUESTION: -- suppose we -- suppose we decide that the Ninth Circuit Lessig is -- case is wrong and that the Ninth Circuit was wrong in applying it here. What -- and the case is then -- that's all we decide and we -- the case goes back to the Ninth Circuit, right? Is the conspiracy issue still open?

MR. SHOHET: I think it is. I do think it is, sir. Because, again, the specific -- the jury had to find conspiratorial conduct to get to either the conspiracy to monopolize claim or the attempt to monopolize. It had to find specific intent for both. So if we find -- if we can determine that the conspiratorial conduct was the basis for the section 2 offense, we don't reach the dangerous probability element unless you make dangerous probability an element of a conspiracy claim.

QUESTION: Well, that's what -- I would think that you would have come prepared to argue the -- whether a specific -- whether dangerous probability is required in a conspiracy case.

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MR. SHOHET: I am.

QUESTION: Because there's a possibility you might lose in this case, in which event the conspiracy case, you say, is open.

MR. SHOHET: True.

QUESTION: And --

MR. SHOHET: I've -- I've -- I've relied on the -- I've relied simply on the fact that there's -- that the conspiracy instructions were stipulated to be correct, they were proposed by the petitioners.

QUESTION: All right, okay, okay.

MR. SHOHET: And there was no suggestion of error in the conspiracy instruction.

QUESTION: Thank you.

MR. SHOHET: So we should be affirmed on the conspiracy instruction, it would seem, if dangerous probability is not an element.

I'd like to explain and go through why we can determine from this record that the only conduct underlying the section --

QUESTION: Well, but, except in your -- in your brief you said: Should the Court find error in the instruction on attempt to monopolize, it should remand the general verdict to the Ninth Circuit.

MR. SHOHET: That's true.

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QUESTION: All right.

MR. SHOHET: That -- that issue could be decided by the Ninth Circuit. I had assumed this Court was not intending to go through and affirm the conspiracy verdict. I simply wanted to alert the Court to the fact that this verdict stands irrespective of the Court's view on the dangerous probability inference of the Ninth Circuit because of the nature of the underlying conduct, and that is concerted conduct.

QUESTION: Well, yeah, but if we decide there's error in the -- in the -- on the -- one of the three claims, namely the Lessig claim, don't you -- do you think the error infects the entire general verdict?

MR. SHOHET: Not if it -- it simply adds a superfluous requirement that is not inherent in the conspiracy.

QUESTION: Well, I know, but the jury might have decided based solely on the Lessig claim.

MR. SHOHET: Well, my point is to get to the Lessig claim, Justice White, they had to find each of the elements of the conspiracy claim, plus dangerous probability. So if dangerous probability is only a requirement for unilateral conduct -- I mean, after all, a conspiracy to monopolize is an attempt to monopolize by two people or more with a specific intent to do so.

QUESTION: No, but the jury might have decided that, well, why get mixed up with conspiracy and all that stuff. All we have to find is a -- is some conduct, anticompetitive conduct, and -- and a bad intent, and they just stop right there.

MR. SHOHET: Well, the answer is because we know.

QUESTION: Just what their general verdict is based on. Let's just assume that's what they did. Does that infect the entire general verdict?

MR. SHOHET: If we could -- if we assume that it was simply based on unilateral conduct, the answer would be yes. But we know in this case it was based on concerted conduct, a price-fixing agreement, because that was the only anticompetitive conduct alleged against this petitioner and the jury was instructed that it must find a proximate cause to the anticompetitive conduct and the damage.

And the damage in this case was the termination. The only damage we claimed was the termination of the right to distribute Sorbothane. That was -- the jury found the same damage on each and every antitrust verdict, so the jury found that the termination of the distributor rights was the damage that led to the verdict. That damage was -- that termination was in concert with the

manufacturer. Spectrum had no ability, by himself, by itself, to do that conduct.

Moreover, the jury found in the section 1 case against the other petitioner, the manufacturer, liability on the resale price maintenance claim. And the only reason resale price maintenance was not found against this petitioner was a quirk in the jury instruction, and I would like to address that.

The -- the -- a central part of the petition was that because the petitioner was exonerated of the section 1 claim, that it had to have been based, the section 2 verdict had to have been based on this general unfair, unkind conduct. The resale price maintenance instruction, which is reported at page 4328 of the reporter's transcript, explains quite clearly how the jury found the section 2 verdict, which could only have been supported on a connection with this petitioner to the price fixing agreement, yet exonerated the petitioner on the section 1 claim.

That jury was not -- that jury instruction was not in error, but it needlessly limited the section 1 offense to a defendant and -- to an agreement, excuse me, between a defendant and a distributor of the defendant's. This petitioner was a defendant, but it did not enter into an agreement with a distributor of itself. Its agreement

was with the manufacturer.

So the manufacturer was found liable but petitioner was not, because of a careful following of the instruction by the jury. But that certainly does not mean that the conduct underlying that price fixing agreement was not conduct from which the jury could have and must have found the section 2 liability.

So, again, we say it was a specific narrow application of the Ninth Circuit's attempt rule because it was predicated on per se unlawful conduct, which, as Justice Connor -- O'Connor pointed out, is always manifestly harmful to competition, is never justified, and therefore is a proper basis from which the inference of specific intent required for, at least, the conspiracy charge, and the attempt charge, is proper. And we would submit, under the Ninth Circuit's approach, is also a proper basis from which an inference of dangerous probability should flow.

Indeed, on that point, the point that the Court granted certiorari on, the issue presented is whether in every section 2 case, in every attempt to monopolize case, Congress intended the separate offense of attempt to monopolize to require, as a threshold matter in every situation, a market analysis showing virtual monopolization, or whether, as the Ninth Circuit provides,

in some limited, very narrow class of cases where the conduct is manifestly anticompetitive and without legitimate procompetitive justification.

We can pick up on Justice Holmes' comment in the Swift Premium case and conclude, without a market share screen, that the specific intent and consequent dangerous probability exists. There is no case -- and the Walker Process case, Justice Scalia, does not address the dangerous probability element. It merely recites that it's an element without any analysis, goes on to say that further development in the record below needs to be done in order to -- in order to determine whether there should be a per se offense under section 2. So it really leaves the question open, if it does anything.

So the issue of whether there's a dangerous probability element at all in the attempt defense, or how we should properly prove it, is certainly an issue that this Court is now addressing, essentially, for the first time since 1905.

The Ninth Circuit rule -- I might also add, the screen that the -- the Solicitor General proposes, which is the market power screen, is going to give -- is not only an expensive impediment and a needless one, but it's going to give us false pos -- false negative results in many cases.

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In the circumstance where a proposed monopolist who has the specific intent, as Justice Holmes said, to acquire that power, is engaging in conduct before he has done significant harm to the markets, the screen will show a false negative if we conduct our market power screen, and assuming we can do it perfectly -- assuming we can do it perfectly --

QUESTION: Mr. Shohet, supposing we -- we accept your submission that a dangerous probability of success is not required in every single case, but wouldn't -- wouldn't you at least have to know what the -- what the defined market was before you could convict someone of attempting to monopolize it?

MR. SHOHET: I would say no, Justice Rehnquist, for this reason, although it is certainly a very important and complex question. I would say that market definition where conduct is plainly anticompetitive, without justification, market definition should be left to the defendant to justify that conduct.

That the jury can properly infer when someone appears to be acting with the specific intent to harm the markets and has no legitimate procompetitive justification for engaging in that conduct, that he is harming a market, a relevant market.

QUESTION: Well, but that -- that's like saying

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in a criminal prosecution the State can charge you with attempt to murder because you were running around with a knife without saying who you were going to murder.

MR. SHOHET: Well, it is a little like that, Justice Rehnquist, but it's a little different than that as well. And it's different because, again, if we accept Justice Holmes' definition of the attempt defense, that when we have specific intent combined with dangerous probability we have dangerous conduct.

Now I would agree with -- with Your Honor that, in fact, no harm to -- can occur except in a relevant market. I accept that and we did allege a relevant market and we put in evidence of the relevant market. But my point is it's sort of a burden-shifting issue. Once you show the plainly anticompetitive conduct, why not shift the responsibility to the defendant to then define the market?

QUESTION: Well, ordinarily the burden of proof is on the plaintiff to prove all of the elements of the case.

MR. SHOHET: True.

QUESTION: And to say why not shift it to the defendant, I mean, the initial inquiry is why shift it -- why shift it to the --

MR. SHOHET: Because the reason is -- the reason

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is because we have plainly anticompetitive conduct that is always harmful -- in this case per se unlawful under section 1, that is always harmful to the markets and never justified.

And the Ninth -- the wisdom of the Ninth Circuit, if there is any, it says in that circumstance we're going to permit but not require an inference from the very conduct that is inconsistent with an intent other than to harm the markets.

QUESTION: But then Congress should have -- if Congress felt that way about that conduct, it should have simply rendered that conduct unlawful. It should have said that such conduct has no justification, we render it unlawful. It did not say that. What it rendered unlawful was an attempt to monopolize. Now, there may be very bad conduct that -- that has no justification, but unless it -- it constitutes an attempt to monopolize, how can we simply assume it does?

MR. SHOHET: Well, we can simply -- we can look at the -- the Ninth Circuit says we can look at the conduct and say where it is inconsistent with an intent other than to hurt the markets and where it is -- makes sense only in furtherance of the acquisition of market power by a -- by a single firm --

QUESTION: But it --

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MR. SHOHET: -- or in concert.

QUESTION: It doesn't make sense as an attempt to monopolize either, unless there's -- unless there's market power.

MR. SHOHET: Well --

QUESTION: Maybe it makes no sense at all, but isn't that the plaintiff's burden --

MR. SHOHET: Well, the point is --

QUESTION: -- to show that it only makes sense in -- in this respect?

MR. SHOHET: As a matter of policy, should we let some big -- some of the big monopolist fish through the net simply because we may catch a few people who have the specific intent to hurt the market but are just very ineffective at doing so or have no realistic hope of -- of accomplishing their purpose? That's the policy question on the table.

Because if Justice Holmes' view of the -- of the attempt defense is correct, the specific intent combined with the exclusionary conduct creates the danger to the market. And I might add, the market power screen is a very imperfect test because it's not going to produce a positive result until a lot of the harm has already occurred to those markets through that exclusionary conduct.

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QUESTION: I don't understand why that's true. Why is that true?

MR. SHOHET: If you accept -- I mean, if the definition of the dangerous probability is intent plus conduct, the moment I take that first step to predatorily price or fix prices, I'm down the road in a very dangerous path. But until I have eliminated a substantial amount of competition with the restraint, I have not developed significant market share.

QUESTION: You're -- you're not down the road to a dangerous path, even -- even with something as -- you know, as obvious as price fixing. You can call that anticompetitive but it's not anticompetitive if you -- if you're in a -- in a fully competitive market and -- and the people who are involved in the price fixing do not, together, have market power, that's not a dangerous path at all. They're just cutting off their own nose to spite their face.

MR. SHOHET: Well, the person --

QUESTION: They're going to go out of business. It's dangerous to them, not to the market.

MR. SHOHET: I say they're either monopolists or they're -- or they're not very smart. But either way, the per se rules condemn it, and not because the per se rules don't address harm to competition, but because the per se

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rules presume that that kind of conduct always hurts competition to some degree and is never justified.

And what we're saying here is the underlying -- facts underlying this case was per se unlawful. So as a matter of law --

QUESTION: The per se rules presume that when there's a conspiracy --

MR. SHOHET: Correct.

QUESTION: -- because a conspiracy contributes to the whole thing added danger.

MR. SHOHET: We contend in this case that -- that the record demonstrates that that's precisely what we have, conspiratorial per se conduct, that conduct being an agreement in January of '82 to fix prices, that the wholesalers would resell the product to their retailers, an agreement on their part to set up resale price maintenance agreements with their retailers and an agreement to police those retailers to eliminate any price cutting or discounting by those retailers.

A particularly pernicious form of resale price maintenance, particularly where there was evidence that there was no interbrand competition or little interbrand competition. So what we had is the setting up of a small cartel here so that at each level the price points were kept high, the retailers were enjoying no competition

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between each other and so they would devote shelf space to this product, and -- and truly injure competition.

Now there's a raging debate between the economists as to whether resale price maintenance should or should not be unlawful. I would submit to the Court in this case, this is the most pernicious and extreme version of resale price maintenance.

QUESTION: This is not a case, then, of predatory price cutting at all, then.

MR. SHOHET: No, it is not.

QUESTION: No.

MR. SHOHET: It's a case of resale price maintenance. There was direct evidence of the agreement --

QUESTION: How did -- how did the resale price maintenance hurt your client?

MR. SHOHET: In June -- in January of '82 the agreement that was made was that we would have to appoint a single national distributor, Spectrum Sports, in order to effectively carry out the resale price maintenance scheme. The regional distributors, including my client, were not being effective at policing the retailers to keep the price cutting down.

And was -- and it was direct evidence by the marketing manger of the defendant Hamilton Kent, the other

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petitioner, that the termination was agreed to be done at that meeting in furtherance of the carrying out of the price fixing.

QUESTION: And because you were unable to keep your re -- your customer's prices up, yep.

MR. SHOHET: We didn't do it as well as petitioner did. The evidence was that petitioner was a very effective and enthusiastic enforcer, and that was from the other defendant, not -- not -- that was direct evidence of a meeting, that he would slow down shipments to the retailers to keep them from cutting the price, and that he was doing quite a good job.

It also has a horizontal component to it because the specific meeting testified to by the -- the -- the marketing manager was called by the other national distributor of medical products, and the testimony was that it was in furtherance of an understanding to keep the price points in the medical market high to keep the price up in the athletic market, so that there was not a lot of competition.

There was testimony that the -- if there was price cutting, the -- the retail -- the medical retailers could go out and purchase the same product in the athletic stores for less than they -- for less than they were getting it from the manufacturer. So there was plenty of

evidence of what the conduct was in this case, and it was quite harmful and -- and -- and always anticompetitive, never procompetitive.

And the quirk that brings us here is that the -- the -- the -- the section 1 instruction was drafted in such a way, with -- with focus on the manufacturer rather than the distributor, so that there -- the jury properly found no liability under section 1.

I'd like to talk a little bit about the Ninth Circuit's approach and the attempt defense, just to -- to focus exactly what it did and what it did in this case. There are three prongs to the section 2 attempt approach in the Ninth Circuit. The one that was applied in this case was the conduct that is per se unlawful under section 1.

Indeed, the jury instruction in this case, and it was instruction number -- it's reported at page 440 of the supplemental appendix, said that our attempt claim was limited to the exclusionary conduct alleged to violate section 1. So there is no question but what the exclusionary conduct in this case was limited by our own claim as set forth in the instruction to the section 1 conduct.

There's been some criticism that I'd like to address, and that is that the Ninth Circuit's approach

collapses the distinction between section 1 and section 2 and permits -- and commits -- permits liability under section 2 without a manifest harm to the markets.

First, with respect to the distinction between section 1 and section 2. There is no distinction between section 1 and section 2 based on unilateral versus concerted activity. Section 2, in fact, includes the conspiracy to monopolize offense. So section 2 has concerted activity within its proscription in the statute. So to suggest that there was some intent by Congress to limit section 2 only to unilateral conduct belies the statute.

Moreover, what section 2 does address itself to is unilateral and joint conduct in furtherance of monopoly power or in the -- the acquisition and maintenance of monopoly power already held, the maintenance of monopoly power already held. Some of the most effective monopolists and people who are attempting to monopolize are going to do that through joint conduct.

Joint conduct is the most harmful conduct to the markets, and there's no reason for the Court to develop a rule that simply writes joint conduct out of section 2. Indeed, it can't write a rule writing joint conduct out of section 2 because the conspiracy offense is in section 2.

Moreover, one would -- I've heard criticism that

if the -- if the -- if the -- if there's a violation of section 1, why have an attempt defense predicated on a per se offense under section 1? Well, this case is one example of why to do that.

But I think Justice O'Connor made a good point which is that the unconsummated section 1 agreement, and a good example of that was in the American Airlines case where you'll recall the president of American called his counterpoint at Braniff and said let's fix prices, this is killing us, this dangerous cutthroat competition in the airline industry is driving us all crazy. And the Braniff president promptly hung up and called the Justice Department.

The fact is that if a private litigant was either -- was injured by that act or was threatened by that act and sought an injunction against it, that litigant ought to be able to go into a Federal court and seek an injunction under section 2 without a showing of market power. Is there any question that we really need to know anything about the market power of either the individuals or their combined market power after the -- the agreement would have been consummated before we're ready to condemn that conduct as threatening monopolization?

QUESTION: Would you make the same argument --

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and maybe American Airlines is pretty big, but say it was some local airline, and I can't think of a name right -- of any right now, but two or three local -- one calls another on the phone that way, would that be a violation of section 2?

MR. SHOHET: I think it would, Justice Stevens, because in that circumstance, without knowing the market share, we know one thing, it's always --

QUESTION: They -- they wanted to fix prices, yeah.

MR. SHOHET: Which is always anticompetitive and never justified. So the rule -- remember, the policy --

QUESTION: So your test is, any attempt to engage in conduct that is per se unlawful under section 1 is a violation of section 2.

MR. SHOHET: No. The Ninth Circuit has thrown out implausible section 1 offenses. There's the -- I think it's the Rickards case, there are one or two Ninth Circuit cases where it's come up where there has been a section -- the Knudsen case where there was a technical violation of section 1, yet the Ninth Circuit held that it was implausible to infer from that section 1 violation an intent to monopolize.

But I would say it's a good starting point, where there's a section 1 violation. But to answer your

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specific question, where there's a price fixing proposal on the table, I would submit that it's a sensible rule that rather than require a market screen and all of the complexity and difficulty of market definition and proof, we start with the proposition that in that case it is likely -- it is reasonable to infer specific intent and dangerous probability.

QUESTION: It's kind of interesting because your theory would really create an attempt defense in section 1. An attempt to engage in, at least, the worst kinds of section 1 violations would be unlawful --

MR. SHOHET: Right.

QUESTION: -- but unlawful under section 2.

MR. SHOHET: Except to bring it under section 2, you impose on yourself an additional screen of specific intent, which is not present under section 1, and it's a mere inference, not a rebuttable presumption. So to use Mr. Vail's example of the 80 percent market share defendant, they're permitted to come forward and presumably that would go out on summary judgment because the court would screen that case right out, and saying it's totally implausible for there to be any harm to competition.

In other words, the Ninth Circuit has not eliminated the dangerous probability element and it's

still a good and viable element under section 2 in the Ninth Circuit. It merely limits to a very narrow case.

In most cases, and the case law under the Ninth Circuit established this -- in most cases there is a requirement for a market analysis because we can't know that it's dangerous, we can't form a judgment about it in the ambiguous conduct. But where the conduct is unambiguous, why throw the plaintiff out on the street for lack of a market analysis when we can start with the inference that there is market danger and intent, and shift over to the defendant to put on all the market evidence it wants.

And, indeed, on a summary judgment, if there's a significant implausibility factor to that position of the plaintiff, these cases are not going to go to the jury. And the Ninth Circuit jurisprudence in the last 10 years reflects that most of these cases are thrown out because they reflect ambiguous conduct or because they're -- they're --

QUESTION: But if it's a question of a permissible inference of intent, I would think it would be difficult to throw many of them out on summary judgment. Because intent is very much a subjective thing.

MR. SHOHET: True, Justice Rehnquist, but the intent issue is not the controversial part of the Ninth

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Circuit. Every circuit permits an inference of intent from conduct. It's the dangerous probability inference that's controversial in this case in the Ninth Circuit.

How else do you prove specific intent but as an inference from conduct? You can have direct evidence through admissions, but that's still an inference from conduct. We can't open people's minds and know what their intent is. But that's not the controversial part of the case before the Court. The controversial part is the inference of dangerous probability from that conduct.

I'd like to conclude -- I'd also like to point out before I conclude that the other instruction -- our instructions in this case demonstrated and reflected that balance, because they were limited to the section 1 conduct and they required the jury to -- they told the jury that you may infer, but need not infer, this dangerous probability from significantly exclusionary conduct that is destructive of competition and plainly harmful to competition.

It specifically admonished the jury that it could not make such an inference from conduct that results from the introduction of a superior product, lower costs, or better business judgment, or hard competition. So the policy inherent in the dangerous probability element, to protect legitimate competition, to protect against the

incursion of the antitrust laws to legitimate business -- which is why we go through dangerous probability screens and why we're so concerned with the conduct, making sure it harms competition, not competitors -- is to protect legitimate competition, which is not at risk under the Ninth Circuit rule because the Ninth Circuit limits the consideration of these cases to conduct that has no procompetitive justification. We are not putting the legitimate businessperson at risk in adopting the Ninth Circuit approach.

In conclusion, I'd like to point out that the universal rejection of Lessig, which the amicus and which the petitioner refer to in their briefs, is a universal rejection of the Lessig case itself, which said that the dangerous probability element is eliminated or is not an element in the case. That is not the Ninth Circuit's rule.

The Ninth Circuit has made it very --

QUESTION: Thank you, Mr. Shohet.

MR. SHOHET: Thank you.

QUESTION: Mr. Vail, you have 5 minutes remaining.

REBUTTAL ARGUMENT OF JAMES D. VAIL

ON BEHALF OF THE PETITIONERS

MR. VAIL: Thank you, Your Honor.

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Just to clean up a couple of matters in the record. One is we have to remember that there was no price fixing, the jury found it wasn't price fixing, that's the starting point. Second, there was a variety of evidence as to whether or not the -- there was competition in the market and what the market was.

But Mr. Shohet really put the question very well. He said, do we really need to know what power a defendant has in the market, is that really something we need to know. And I think the answer is yes. I think the Court has said it's yes, and it makes intuitive sense.

We're concerned in section 2 about monopolization, and if a defendant doesn't have the possibility or the reasonable probability of monopolizing, we're simply not concerned with section 2 of the Sherman Act.

QUESTION: Do you agree that your instruction on conspiracy to monopolize that you tendered to the court did not require proof of a dangerous probability?

MR. VAIL: Your Honor, I cannot answer the question. Simply, this is the first time this has been raised. I don't know the answer to the question. I'd be happy to submit that by letter.

QUESTION: Well, what would you -- just as a general matter, what would you think?

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MR. VAIL: I think that it requires a conspiracy of more than one person agreeing that they are going to attempt to monopolize, and ought to have dangerous probability, require dangerous probability. If attempt requires dangerous probability, the conspiracy to monopolize requires it also.

QUESTION: You say -- you say you think it ought to. Do you know if there are any cases one way or the other on the issue?

MR. VAIL: I do not, Your Honor. I did not come prepared to argue conspiracy; I thought we were talking about attempt to monopolize. And I -- I simply don't know the answer to the question.

QUESTION: Well, it's -- if -- if we agree with you, but the case goes back to the Ninth Circuit, the conspiracy case is either going to be open or it isn't.

MR. VAIL: I think the conspiracy case is closed. I think --

QUESTION: And do you think because the error, it would infect the entire general verdict?

MR. VAIL: Absolutely, Your Honor.

QUESTION: Do you have any cases to that effect?

MR. VAIL: Well, that is the Sunkist Growers case, which says that when there's a legal --

QUESTION: When was that decided?

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MR. VAIL: Sun --

QUESTION: 370, U.S.

MR. VAIL: If you'll bear with me, Your Honor.

QUESTION: And have there been some other cases since that time?

MR. VAIL: Sunkist stands as the rule of this Court.

QUESTION: Well, you mean not in antitrust cases maybe, but in other cases about general verdicts.

MR. VAIL: Well, there are -- there are general verdicts in criminal cases where we would talk about factual problems, but I believe Sunkist stands as the rule of this Court in a general verdict where one of the issues -- where there's a legal error as to one of the issues. I think the whole issue must go back, that's correct.

The key is we're talking about section 2 and we don't want to chill competition, we don't want to chill aggressive competitors. And that one person may think that they've been harmed and it's unfair or predatory, we don't -- that doesn't mean that that person could ever monopolize, and there's no advantage, there's no unmet need that requires the Lessig rule.

The other circuits have functioned perfectly well. There are tort law remedies available. The problem

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with Lessig is that it allows defendants who have no possibility of monopolizing to be caught in the antitrust web and brought down, and that simply isn't the purpose of the Sherman Act.

Thank you, Your Honor.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Vail. The case is submitted.

(Whereupon, at 1:47 p.m., the case in the above-entitled matter was submitted.)

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CERTIFICATION

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and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Ann-Marie Federico

(REPORTER)