Fishman v. Estate of Arthur M. Wirtz

807 F.2d 520 (1986) | Cited 140 times | Seventh Circuit | November 21, 1986

Before CUDAHY and EASTERBROOK, Circuit Judges, and FAIRCHILD, Senior Circuit Judge.

CUDAHY, Circuit Judge

This appeal concerns the 1972 purchase by defendant Chicago Professional Sports Corporation ("CPSC") of the Chicago Bulls professional basketball team. Plaintiffs Illinois Basketball, Inc. ("IBI") and Marvin Fishman, who had also sought to purchase the Bulls, brought suit alleging that the Bulls had been acquired through violations of the Sherman Act and Illinois common law. The district court found that IBI and CPSC had been competing to control a natural monopoly market in the presentation of live professional basketball in Chicago. In the court's view, the plaintiffs had "won" when they executed a contract with the Bulls' former owners. The sale was, however, contingent upon the approval of the National Basketball Association ("NBA"), and the court found that the defendants had set out to destroy the plaintiffs' victory through anticompetitive acts. It ruled that they had violated sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1, 2 (1982), by refusing the plaintiffs a lease at the Chicago Stadium and by participating, with certain NBA members, in a group boycott of IBI, and it awarded plaintiff IBI treble damages for these violations. The court also ruled that the defendants had interfered with IBI's contract rights and prospective advantage in violation of Illinois law and entered an alternative judgment for actual and punitive damages.

We agree with the district court that the refusal to lease the Chicago Stadium violated sections 1 and 2 and constituted tortious interference with prospective advantage, and we affirm its judgment as to liability on these bases. We do not agree that the judgment can be sustained on the NBA boycott claim or on the claim based on tortious interference with contract. We also believe that the district court erred in its award of damages and that the case must be remanded on that account.

I. LIABILITY ISSUES

A. Facts

The facts as found by the district court are set out at length in the district court opinion. Fishman v. Wirtz, 1981-2 Trade Cas. (CCH) P64,378 (N.D. Ill. Oct. 28, 1981) ("Liability Opinion"). We set forth only those that are necessary to understand the issues on appeal.

1. Negotiations to Purchase the Bulls. In 1971 the Chicago Professional Basketball Corporation ("Chicago Basketball") decided to sell the Chicago Bulls. Plaintiff Fishman formed an investors'

group (which included defendants Albert Adelman, Lester Crown, Philip Klutznick and James Cook and non-defendants Edward Ginsberg and George Steinbrenner III) to investigate purchasing the Bulls. By January 1972 this group had reached an agreement in principle with Chicago Basketball to acquire the Bulls for $3.3 million. Several members of the Fishman group thought it unwise to buy the team without a lease commitment from a local arena, and Chicago Basketball president Elmer Rich arranged a meeting between the group and Arthur Wirtz, who with his son William, controlled defendant Chicago Stadium Corporation ("CSC"). The Bulls had been playing at the Chicago Stadium under a series of short-term leases.[1] The group asked Wirtz for a three-year lease at a lower rate than that which Chicago Basketball was paying. Wirtz refused and, in light of this rejection, the group made Rich a lower offer for the Bulls, which was rejected.

Fishman then formed a new investors' group, later incorporated as IBI,[2] which resumed negotiations with Rich. By April 1972, he had competition: first, Peter Graham, a Vancouver investor and owner of an arena in San Diego, and, second, a group largely composed of the other members of the first Fishman group (with the addition of Arthur Wirtz). This group was later incorporated as defendant CPSC.[3] Between March and May 1972, Graham and IBI both offered to purchase the Bulls for $3.25 million; CPSC offered $3.3 million. Chicago Basketball rejected Graham's offer on May 4, 1972, and Graham dropped out of the competition. Negotiations continued with both IBI and CPSC. On June 2, 1972, IBI submitted to the Bulls' attorney a signed offer to buy the Bulls for $3.3 million; that same day the Bulls' Executive Committee recommended that IBI's offer be accepted because IBI was willing to pay all cash at closing. Rich wrote to Adelman, advising CPSC of this recommendation. On June 5, 1972, Adelman telephoned Rich and attempted to renew negotiations on CPSC's behalf. Adelman reminded Rich that Fishman's group had no place to play and still needed NBA approval. Rich responded to Adelman by letter dated June 7, stating that he did not see how an offer by CPSC could get preference over IBI's. He also advised Adelman, however, that if CPSC wanted to make a new offer it would have to submit a signed contract incorporating all terms required by Chicago Basketball.

On June 9, CPSC sent Chicago Basketball an executed stock purchase agreement and a cashier's check for $3.3 million. This time, CPSC also agreed to pay the entire purchase price in cash at the closing. On June 12, Ginsberg telephoned Rich and increased the CPSC offer by $50,000 in order to top IBI's offer. Finally, on June 13, CPSC again modified the stock purchase agreement in hopes of winning Rich's approval.

Nevertheless, on June 14, 1972, Chicago Basketball formally accepted and executed IBI's contract. The contract provided that any sale was subject to approval by the NBA and obligated Chicago Basketball to use its best efforts to secure NBA approval. The district court found:

IBI's contract and offer was [sic] perceived by the Bulls to be preferable to CPSC's offer for several reasons, among them was the fact that various ambiguities and problems in the CPSC offer would require additional negotiations, with what was viewed as, the somewhat difficult CPSC group, and it was unlikely, as a consequence, that the agreement would be ready for presentation at the June 15-16 NBA meeting.

Liability Opinion, 1981-2 Trade Cas. at 74,748.

2. The June NBA Meeting. The NBA Constitution provides that all business and policy decisions of the NBA are to be made by its Board of Governors, which is comprised of one representative from each NBA franchise. Any transfer or sale of ten percent or more of any franchise must be approved by three-quarters of the Board of Governors. Thus, the contract between IBI and Chicago Basketball needed the affirmative vote of thirteen out of seventeen governors for the sale to become final. The NBA Board of Governors met in White Sulphur Springs, West Virginia on June 15-16, 1972. By that time, the NBA Commissioner and NBA Finance Committee had investigated and approved IBI's financial and moral fitness to be the owner of an NBA franchise, and the proposed sale was on the agenda for presentation to the full Board at the June meeting.

Prior to the execution of the IBI-Chicago Basketball contract, several CPSC shareholders had sent telegrams to the NBA Commissioner and the Board of Governors advising them that CPSC's cash offer for the Bulls was larger that IBI's and the "we have reached an agreement with Arthur Wirtz owner of the Chicago Stadium for a ten year lease which insures the availability of the best arena with the largest seating capacity in Chicago at which the Chicago Bowls [sic] can play." CPSC also sent its president, James Cook, and its attorney to White Sulphur Springs, although CPSC had no scheduled business before the NBA. On the evening of June 14, Cook discussed CPSC's position with several NBA members; he later admitted that "his purpose was to secure nonapproval of the transfer to IBI as this would be the only possible way his group could possibly acquire the Bulls." Id. at 74,749.

On June 15, Rich presented the proposed sale of the Bulls to the Board of Governors. Only ten of the seventeen governors voted to approve the transfer.[4] Two reasons for not approving the transfer to IBI were mentioned: (1) IBI did not have a lease and, specifically, did not have a lease at the Chicago Stadium, and (2) CPSC had made it known that it wanted to purchase the Bulls. After the vote, it was suggested that, since IBI's primary problem was the lack of a lease, the negative vote be rescinded to allow IBI to secure a lease commitment. The proposed transfer could then be presented at the next NBA meeting, to be held in New York City on July 11, 1972.

3. IBI's Efforts to Acquire a Stadium Lease. After being informed that a stadium lease was the prerequisite to NBA approval, Rich and Fishman decided to each approach Wirtz separately to discuss acquiring a lease at the Chicago Stadium. From June 19 to June 29, 1972, Fishman attempted to arrange a meeting with Wirtz, but Wirtz would not see him or return his telephone calls. Wirtz did, however, meet with Rich on June 21. At this meeting, Wirtz told Rich that he would not discuss a lease with Fishman because IBI did not own the Bulls. He told Rich that he would consider giving Chicago Basketball (Rich's organization) a ten-year lease, which would be assignable only if Chicago Basketball "guaranteed" the assignee's performance, including rent payments, for the entire ten-year

term. Wirtz explained that he needed a ten-year term. Wirtz explained that he needed a ten-year guarantee because of his concern about IBI's financial responsibility. The district court found, however, that "Wirtz never met with Fishman to learn about IBI's financial stability. Moreover, the rent for the Chicago Stadium was often taken 'off the top' of the office receipts and, accordingly, the 'guarantee' concept appears to have been unrelated to any business needs of the Chicago Stadium." Id. at 74,751.

At the same June 21 meeting, Wirtz asked Rich to sell the Bulls to his group or, in the alternative, to present both offers to the NBA and let the Board of Governors choose between them. Rich stated that he would discuss all matters raised by Wirtz with Chicago Basketball and asked Wirtz to put his ten-year lease proposal in writing, which Wirtz said he would do. Speaking on his own behalf, Rich stated that Chicago Basketball would only consider a lease that it could freely sublease to any buyer without the Stadium's consent and without remaining financially liable. He also stated that he would not consider a sale to CPSC because Chicago Basketball had already executed a contract with IBI.

After this meeting, Rich contacted Wirtz several times, asking for the promised lease proposal. On June 27, Wirtz wrote Rich, again stating his position that the Bulls should be sold to CPSC. He did not enclose or discuss a lease with, or assignable to, IBI. In this letter, the district court found the "Wirtz made it clear that he was going to use the power of the Chicago Stadium and whatever influence he could assert among NBA governors to obtain the Bulls." Id. at 74,751-52. Wirtz sent copies of this June 27 letter to the NBA Commissioner, the President of the NBA and the owner of the Los Angeles Lakers. With this communication, the district court found, "Wirtz made it clear to the members of the NBA that IBI did not, and would not, have a lease at the Chicago Stadium, that the Crown-Wirtz group would have such a lease, and that the Crown-Wirtz group wanted to purchase the Bulls." Id. at 74,752.

Rich and Wirtz met again on June 29. Wirtz attempted to raise the issue of effecting a sale to CPSC and not IBI, but Rich interjected that he was there only to discuss a lease for IBI and that his attorney had advised him not to discuss any other disposition of the Bulls. On July 10, Wirtz wrote Rich stating that he would not lease the Chicago Stadium to IBI and that he would not lease the Chicago Stadium to IBI and that he intended to attempt to obtain the Bulls for CPSC.

Since mid-May 1972, when IBI learned that Wirtz was allied with the competition, IBI had been investigating alternative sites for the Bulls' home arena. On July 5 after Wirtz had refused to make any sort of lease at the Chicago Stadium available to IBI and six days before the July NBA meeting, IBI executed a lease at the International Amphitheatre.

4. The July NBA Meeting. The NBA Board of Governors met in New York City on July 11, 1972 and, once again, the Chicago Basketball-IBI sale was on the agenda. Prior to the meeting, CPSC continued its efforts to effect a rejection of IBI's application and obtain the franchise for itself. Telegrams were sent to the NBA Commissioner and several NBA members, stating that CPSC still

wanted to purchase the Bulls and had a commitment for a ten-year lease at the Chicago Stadium. William Wirtz wrote Abe Pollin, NBA President and owner of the Washington Bullets, setting forth the seating capacity of the International Amphitheatre; Ginsberg sent a copy of the letter and telegram to New Irish, owner of the New York Knicks; other individual defendants also communicated with individual members of the NBA.[5] The effect of these communication was to make "it clear to NBA members that, although the Chicago Stadium was not available to the Bulls (and the NBA) if the Bulls were sold to IBI, the Chicago Stadium would be available to the Bulls (and the NBA) if the IBI sale was aborted, and the Bulls sold to the Crown-Wirtz group." Id. at 74,753.

At the July 11 meeting, Rich again requested the NBA Board of Governors to approve the transfer of the Bulls to IBI. Rich told the Board that Wirtz would not make a lease at the Stadium available to IBI and that, as a result, IBI had arranged a lease at the International Amphitheatre. There was some discussion prior to the vote. Certain NBA governors, including Alan Rothenberg (Los Angeles Lakers) and Joel Axelson (Kansas City Kings), openly expressed their desire to have the team sold to CPSC and not IBI. After the discussion and upon a vote, the proposed transfer was defeated. Ten members voted to approve the transfer and seven voted not to. Those opposed to the transfer were Irish (New York Knicks); Jack Kent Cooke (Los Angeles Lakers); Pollin (Washington Bullets); Putnam (Atlanta Hawks); Axelson (Kansas City Kings); Ray Patterson (Houston Rockets); Richard Bloch (Phoenix Suns) (hereinafter collectively the "NBA no-votes").

According to the district court:

There were two primary reasons for the votes cast against IBI by each of at least six, and perhaps seven, members who so voted: (1) The Chicago Stadium, which was withheld from IBI, but available to the Crown-Wirtz group, was vastly superior to any other arena in Chicago and was in their opinion the only adequate facility in Chicago for NBA basketball; and/or, (2) The Crown-Wirtz group was considered the more preferable group to acquire the Bulls and in order to make their acquisition of the Bulls possible the sale to IBI had to be prevented.

Specifically, each "no" vote, with the exception of Phoenix, admitted that they so voted because IBI had a lease at the International Amphitheatre, which they deemed entirely inadequate and unacceptable. The Phoenix governor, Robert [sic] Bloch, testified that he "had no present recollection" of why Phoenix voted against the transfer to IBI.

Further, the following NBA members admitted that a substantial contributing factor in their decision to vote against the transfer to IBI was the request and invitation of the Crown-Wirtz group, and others on its behalf, to aid the efforts of the Crown-Wirtz group to acquire the Bulls: Los Angeles by Alan Rothenberg and at the direction of Jack Kent Cooke; Kansas City by Joel Axelson; Atlanta by Bill Putnam; Houston by James Foley at the direction of Ray Patterson. In addition, Rich received phone calls form Abe Pollin and Ned Irish asking what it would take to favor the Crown-Wirtz group. Consequently, an inference can be drawn from all the circumstances that a substantial contributing factor in the decision of NBA members Abe Pollin (Washington) and Ned Irish (New York), who voted against the transfer, was for the same reason.

1. A Petition for Rehearing with Suggestion for Rehearing In Banc was filed by appellants but was dismissed after the parties advised this court that they had reached a settlement.

2. IBI was incorporated on June 13, 1972. Its shareholders were to have included Marvin Fishman, Robert Block, A. E. Stanley III. Lloyd Levin, Thomas Nadler, Robert Paliofito, Harold Paliofito and Jonathan Kovler. See infra note 35.

3. CPSC was incorporated on May 18, 1972. Its original shareholders were defendants Lester Crown, Philip Klutznick, Arthur Wirtz, James Cook and Albert Adelman and non-defendants Edward Ginsberg, George Steinbrenner III, Arnold Meyer, Lamar Hunt and Jonathan Kovler.

4. The governors representing the New York Knicks, Los Angeles Lakers, Washington Bullets, Kansas City Kings and Detroit Pistons voted against the transfer. The portland Trailblazers were not represented at the meeting. There is some question as to how William Putnam of the Atlanta Hawks voted. Putnam recalled that he voted not to approve but notes from the meeting indicate the opposite.

5. Ginsberg spoke with Pollin several times about his group's interest in acquiring the Bulls. Arthur Wirtz provided NBA Commissioner Kennedy and Pollin with copies of his correspondence with Rich. William Wirtz did the same for Jack Kent Cooke (owner of the Los Angeles Lakers) and invited Cooke to call him and discuss the matter. William Wirtz also called William Putnam (Atlanta Hawks) and told him that CPSC could obtain a lease at the Chicago Stadium, whereas IBI could not. Arthur Wirtz called Ray Patterson (Houston Rockets) to deliver the same message. Some of the NBA governors took the initiative. Irish (New York Knicks) and Pollin telephoned Rich and asked what could be done to cause a sale to CPSC. Alan Rothenberg (Los Angeles Lakers) spoke to fellow NBA member to persuade them not to approve the transfer to IBI.

6. Defendant Emprise Corporation operates the food and beverage concessions at various arenas throughout the country, including the Chicago Stadium. Defendant Chicago Blackhawk Hockey Team, Inc. owns and operates the Chicago Blackhawks, a National Hockey League ("NHL") franchise; Arthur Wirtz owns a controlling interest in this corporation. As of 1972, defendant Atlanta Hockey, Inc. owned the Atlanta Flumes, also an NHL franchise. Prior to 1979, other defendants in this suit included the NBA; Madison Square Garden Center, Inc.; California Sports, Inc.; Missouri Valley Professional Sports; Texas Sports Investment, Inc.; Atlanta Hawks Basketball, Inc.; Phoenix Professional Basketball; and Capital Bullets, Inc. The last seven were the owners of the seven teams that voted against the transfer of the Bulls to IBI. The claims against these eight "NBA defendants" were the same as those against the defendants here. In December 1978, these defendants settled with the plaintiffs for $750,000 and the claims against them were dismissed. Finally, Washington Hockey, Ltd. was named as a defendant but was dismissed on its motion for summary judgment in May 1977.

7. The complaint also alleged that defendants had monopolized, attempted to monopolize, and conspired to monopolize the market for indoor sports arenas in Chicago and had conspired to restrain trade with respect to indoor sports arenas in Chicago. Consolidated Complaint, Counts III, IV. The district court ruled that plaintiffs lacked standing to bring this

claim because there was insufficient evidence that they planned to acquire or build an indoor sports arena in Chicago. Liability Opinion, 1981-2 Trade Cas. at 74,790. Further, the complaint alleged that defendants had monopolized, attempted to monopolize, and conspired to monopolize the market for major league professional winter sports in Chicago and had conspired to restrain trade in that market. Consolidated Complaint, Counts V, VI. The district court did not discuss these counts in its opinion, nor do the parties mention them on appeal.

8. Defendant Atlanta Hockey, Inc. has not appealed to this court.

9. The national sports franchise market could be a relevant market under the facts of this case, but this would change the theory of the suit as pleaded by the plaintiffs. If the relevant market were the market for franchises, the charge would be monopsony, that is, that CPSC had made itself the only buyer of basketball franchises in Chicago. But, given the case that the plaintiffs brought, the trial court correctly defined the relevant market.

10. As defendants point out, the Court also stated that "the aggregate of towns in Otter Tail's service area is the geographic market in which Otter Tail competes for the right to serve the towns at retail." 410 U.S. at 369 (footnote omitted). But it goes on to explain "that competition is generally for the right to serve the entire retail market within the composite limits of a town, and that competition is generally between Otter Tail and a prospective or existing municipal system." Id. at 369-70. Thus, the Court recognized that the area of effective competition between Otter Tail and each of the municipal systems was a single town, which was a natural monopoly.

11. The dissent states that the "generation of power is highly competitive . . . " Infra p. 92. The struggle for access to generation owned by third parties other than the local serving utility has been going on for many years with varying degrees of success. A provision for mandatory "wheeling" was rejected in the Federal Power Act amendments of 1935 (S. Rep. 621, 74th Cong., 1st Sess. 19, cited in City of Paris v. Kentucky Utilities Co., 41 FPC 45 (1969)) but was incorporated in a somewhat limited form in the Public Utility Regulatory Policies Act of 1978, Pub. L. No. 95-617, § 203 (codified at 16 U.S.C. 824j (1982)). The regulated structure of the electric utility industry makes it questionable how much generation in adjacent utility serving areas really "competes," although there has certainly been an effort in recent years to further competition.

12. As the dissent indicates, infra p. 103, Joseph Schumpeter said that the capitalist process creates a "gale of creative destruction." J. Schumpeter, Capitalism, Socialism and Democracy 84 (2d ed. 1947). Schumpeter also said, among other things, " . . . the capitalist process unavoidably attacks the standing ground of the small producer and trader," id. at 140, and "the capitalist process not only destroys its own institutional framework, but it also creates the conditions for another," id. at 162.

13. The defendants rely heavily on the Court's approving quotation from R. Bork, The Antitrust Paradox (1978) - that Congress designed the Sherman Act as a "consumer welfare prescription" - in Reiter v. Sonotone Corp., 442 U.S. 330, 343, 60 L. Ed. 2d 931, 99 S. Ct. 2326 (1979). Reiter is not, however, on point: It held that a consumer who pays a higher price for goods because of an antitrust violation has been injured in her "property" and may sue under § 4 of the Clayton Act.

14. As a matter of fact, the concept that ultimate consumer loss is an essential element of an antitrust claim may have

puzzling implications for the application of antitrust principles to industries where prices are pervasively regulated. Retail electric rates, for example, are regulated in most jurisdictions to be "just and reasonable." The law presumes that rate regulation has denied monopoly profits to the electric utility and has precluded any injurious impact on consumers. Yet antitrust principles have been broadly applied to all aspects of the electric utility industry. See Otter Tail, 410 U.S. 366, 35 L. Ed. 2d 359, 93 S. Ct. 1022 ; Mishawaka, 616 F.2d 976; and Cantor v. Detroit Edison Co., 428 U.S. 579, 49 L. Ed. 2d 1141, 96 S. Ct. 3110 (1976).

15. The dissent does argue that a merger of two successive monopolists might result in lower consumer prices than would be the case if the monopolies were independently operated. Infra pp. 76-77. Under this theory, which is surely not in the mainstream of the antitrust laws, consumers might be better off if the Bulls and the Stadium were in the same hands. This argument was not brought to the attention of the district court nor was it argued to this court. It was therefore waived. But we will nonetheless attempt to briefly address it. While we do not have the benefit of briefing on the point, we believe that the dissent fails to take into account potential anticompetitive effects which might result if the Bulls and the Stadium were under common control. See IV P. Areeda & D. F. Turner, Antitrust Law, P1011b (1980). Also, even if integration of the successive monopolies in this case would result in lower prices to consumers, the purchase of the Bulls by CPSC did to result in the merger of two monopolists. Instead, after the sale of the franchise to CPSC, the Bulls were in the hands of a group of investors, one of whom was Arthur Wirtz, and the Stadium was controlled by William and Arthur Wirtz. While there was some overlap in the shareholders of CSC and CPSC, it is unrealistic to assume that these two corporations would act as a single monopolist since they were controlled by different sets of investors. Thus, we think the successive monopoly objection is not so simple as it might appear and can be addressed only if it is argued, and a record made on it, in the trial court.

16. A patent is not a natural monopoly in the same sense as is a franchise for the provision of electric power at retail - or even a professional sports franchise. The market could accommodate two or more producers of antistatic yarn but - to advance policies wholly divorced from those informing the antitrust laws - an administrative decision is made to confer a temporary monopoly on one producer. A patent monopoly is acquired in an ex parte administrative proceeding without consideration of those factors that might lead a different producer to dominance in the marketplace. Market and competitive concerns are sufficiently foreign to the world of patents that we would consider it ill-advised to recreate the law of antitrust in reliance upon a decision addressing patent fraud.

17. The objective economic reality argument is also at odds with the stress the defendants place on Fishman's asserted brief that the Amphitheatre was in fact the better site for Bulls games. See Appellants' Brief at 11-13, 70-73. If the preferences of individuals with the power to grant an NBA franchise are not relevant to this discussion, we do not see how Fishman's could be. Whatever Fishman's views at various points (and the evidence was conflicting, with the district court characterizing the defendants' testimony at points as "lack[ing] in credibility" and "astoundingly unbelievable"), they were not consensus views and do not seem dispositive of whether the stadium was an "essential facility." Fishman became very interested in the Chicago Stadium when it became apparent that it was the key to NBA approval. further, his statements to the NBA about the Amphitheatre after he signed a lease there were an understandable attempt to salvage his position.

18. The district court also briefly discussed the § 2 offense of "monopoly leveraging," although it is unclear whether it

intended to distinguish this from the withholding of an essential facility. Defendants argue on appeal that this violation had not been proven because there was no proof that CSC possessed monopoly power in in the adjacent arena market. However, the district court did make such a finding, Liability Opinion, 1981-2 Trade Cas. at 74,755, based on evidence that CSC could raise its rents to team sports events far above those being charged by the Amphitheatre, without causing those events to switch arenas.

19. Contrary to the dissent's assertion, infra pp. 100-01, this opinion does not reinstitute the Pick-Barth doctrine under which business torts are per se violations of the Sherman Act. We would agree with the dissent that any such result would be uncalled for. Thus, we do not hold here that a conspiracy to commit a business tort results in a per se violation of the antitrust laws. We have affirmed the district court's finding of a per se violation in this case because the defendants, who were found to have both market power and exclusive access to an essential facility, had engaged in a group boycott of IBI. As we have already stated, supra, this conclusion is consistent with the Supreme Court's decision in Northwest Wholesale Stationers, 472 U.S.284, 105 S. Ct. 2613, 86 L. Ed. 2d 202 (1985). thus, our opinion in this case does not conflict with our earlier decisions rejecting the Pick-Barth doctrine. See Havoco, 626 F.2d at 554-56, and Juneau Square Corp. v. First Wisconsin National Bank, 624 F.2d 798, 812-13 (7th Cir.), cert. denied, 449 U.S. 1013, 101 S. Ct. 571, 66 L. Ed. 2d 472 (1980). Even if we were to agree with the dissent that the § 1 claim in this case should be analyzed under the Rule of Reason, we would still conclude that the defendants' refusal to deal constituted a violation of that section. In applying the rule of Reason, "the factfinder weighs all of the circumstances of a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition." Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 49, 53 L. Ed. 2d 568, 97 S. Ct. 2549 (1977) (citation omitted). As we have already explained, the defendants' conduct in this case had the effect of foreclosing competition for the Bulls, supra (slip Opinion) p. 24, and the defendants have not suggested to this court any benefits to competition which would result form their decision to withhold the Stadium from IBI, supra (slip opinion) p. 25 & n.15. The dissent also contends that we lack the plurality of actors necessary to find a contract or conspiracy in restraint of trade in violation of § 1. Infra pp. 101-02. While this argument was not raised by the defendants on appeal or, apparently, anywhere else, we will nevertheless address it here. the district court found a conspiracy between CSC and CPSC (which is also referred to by the district court in its opinion as the "Crown-Wirtz group"). Liability Opinion, 1981-2 Trade Cas. at 74,774-75. The dissent argues that under Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752, 81 L. Ed. 2d 628, 104 S. Ct. 2731 (1984), an agreement between CSC and CPSC to withhold the Stadium from IBI cannot form the basis of a conspiracy for purposes of § 1. We disagree. The Supreme Court held in Copperweld that a firm and its wholly-owned subsidiary are not capable of conspiring in violation of § 1. The dissent argues that we should extend Copperweld so as to preclude us from finding a conspiracy between two corporations which have "common investors and [which] are under common control," infra p. 102. Even if we were to agree with this proposed extension of Copperweld, we do not believe that the facts of this case fit the hypothetical posited by the dissent. It is true that there was some overlap between the investors in CSC and CPSC since Arthur Wirtz owned and controlled CSC (along with his son, William Wirtz) and also invested in CPSC; however, CSC and CPSC were not under common control in the same sense as is a corporation and its wholly-owned subsidiary or as are two corporations owned in identical proportions by the same set of investors, see Century Oil Tool, Inc. v. Production Specialties, Inc., 737 F.2d 1316 (5th Cir. 1984) (two corporations were commonly owned by three men, two of whom each owned 30% of each corporation and one of whom owned 40% of each) (cited by dissent, infra p. 102). A large number of individuals had invested in CPSC; there is no indication that Arthur Wirtz controlled or could control CPSC independent of the wishes of his co-investors. Thus, while there was some overlap in the ownership of CSC and CPSC, the two

corporations lacked the "complete unity of interest" necessary to find them to be a "single enterprise for purposes of section 1." Copperweld, 467 U.S. at 771. And, viewing matters more broadly, a multiplicity of antitrust actors is supported by the disparity of economic interests between the stadium owners and the team owners. Further, this is a case where CPSC is a corporation virtually "in formation," where the various investors can be seen as actors independent of the corporation itself. This is not some legal fiction of shareholders forming a conspiracy with their corporation; here the corporation was barely emerging from the interactions of the investors, who were certainly real economic actors in their own right. Copperweld eliminated the legal fiction of parent-subsidiary conspiracy as a basis of antitrust liability. It should not be extended to shelter independent actors having diverse economic interests acting jointly. 19a Atlanta Hockey, Inc. did not appeal, and accordingly this opinion does not affect the entry of judgment against it.

20. As plaintiffs point out, some cases do not require that the contract in question actually be breached but rather require only, for instance, that performance be rendered impossible, see Bailey v. Meister Brau, 535 F.2d 982, 987 n.6 (7th Cir. 1976), or that the terms of the contract be coercively modified, see Hannigan v. Sears, Roebuck & Co., 410 F.2d 285, 291 (7th Cir.), cert. denied, 396 U.S. 902, 90 S. Ct. 214, 24 L. Ed. 2d 178 (1969). While these cases show the courts' unwillingness to unduly restrict the tort based on technicalities, we do not think that they speak to the point made in Belden. NBA approval of the sale - and thus the right to own the Bulls - was not what was bargained for in the IBI-Chicago Basketball contract. Nor do we think that the cases holding that the plaintiff's interest need not be enforceable under the contract will support the weight the plaintiffs seek to place on them. For instance, in Kemper v. Worcester, 106 Ill. App. 3d 121, 435 N.E.2d 827, 62 Ill. Dec. 29 (5th Dist. 1982), the court held that interference with an at-will employment contract is actionable even though the plaintiff had no more than a reasonable expectation of future employment. This is completely consistent with Belden : The at-will employment contract represented a "foundation for an on-going business relationship." Id. at 124, 435 N.E.2d at 830. This is entitled to protection, as was the contingent contract in Belden. The point is, however, that the protection it merits is not so extensive as the protection afforded an unconditional contract right.

21. The dissent takes issue with our conclusion that the defendants' violation of the federal antitrust laws eliminates their competitors' privilege. Infra pp. 103-04. While we recognize that there are no Illinois cases which have used the Sherman Act as the basis of tort liability, we do not believe that Illinois case law precludes this result. We have found no cases which indicate that the illegality or wrongfulness of the conduct of a competitor is to be judged solely by reference to state law. Also, the defendants' conduct in this case might well be unlawful under the Illinois antitrust law. Ill. Ann. Stat. ch. 38, para. 60-1 et seq. (Smith-Hurd Supp. 1986). This statute contains provisions similar to §§ 1 and 2 of the Sherman Act. See Ill. Ann. Stat. ch. 38, para. 60-3 (Smith-Hurd Supp. 1986). while we have found no essential facilities cases decided under the Illinois antitrust law, Illinois courts are required by this statute to "use the construction of the federal [antitrust] law by the federal courts as a guide in construing" the state act "when the wording of [the state act] is identical or similar to that of a federal antitrust law . . . " Ill. Ann. Stat. ch. 38, para. 60-11 (Smith-Hurd Supp. 1986). this puts a reverse twist on the Erie doctrine. An Illinois court might find that the conduct of the defendants in this case violated the state antitrust law and that the defendants, therefore, are not shielded by the competitor's privilege. thus, contrary to the dissent's assertion, there might be tort liability in this case even without the Sherman Act.

22. This section addresses only the damages of plaintiff IBI. Plaintiff Fishman had also sought $318,000 in damages representing his lost salary as IBI's chief executive officer. Since Fishman would have had to stop working full-time in

real estate to become IBI's chief executive officer and since he had earned more than $318,000 in real estate, the district court ruled that Fishman could collect no damages on his lost salary claim. Fishman has not appealed this ruling.

23. The district court decided to count only those benefits directly accruing to CPSC (and thus, hypothetically, to IBI) in its damages calculation. It noted that the individual defendants had enjoyed substantial benefits from: (1) the "ego" satisfaction and publicity inherent in owning a professional sports team; and (2) the significant tax losses that can be passed through to the shareholders of a subchapter S corporation like either CPSC or Chicago Basketball. Neither of these benefits are enjoyed by the corporation itself. See infra note 36.

24. Factors making franchises "comparable" included: (1) the size of the home city; (2) the degree of population growth in the home city; (3) the city's interest in basketball; and (4) whether the franchise was an "expansion" franchise. Damages Opinion, 594 F. Supp. at 865-67.

25. Defendants had proposed a method of valuation variously called "stock value" or "cash to seller." Basically, this method would look only at the cash paid for comparable teams, ignoring any assumed liabilities. See Appellants' Brief at 83-86; Appellants' Reply Brief at 45-47.

26. In a motion to amend, plaintiff IBI had challenged the $3.6 million figure for opportunity cost. The district court had assumed that IBI would have used the same pattern of using equity to fund that IBI would have used the same pattern of using equity to fund operating losses as CPSC. Damages Opinion, 594 F. Supp. at 877. IBI argued that the amount of equity was overstated by the inclusion of CPSC's higher purchase price, CPSC's Fishman litigation expenses, and opportunity cost accruing after the date as of which damages were measured. The district court agreed and revised the deduction for opportunity cost downward. Fishman v. Estate of Wirtz, 609 F. Supp. 982 (N.D. Ill. 1985).

27. Neither of the other two cases relied upon by the defendants squarely address the issue before us.

28. It is not indisputable that CPSC's offer should establish the market value of the Bulls in 1972. CPSC's control of the Stadium effectively gave it the power to exclude other bidders; therefore, one may not necessarily conclude that the $3.35 million paid by CPSC represents the price which the Bulls could have commanded under the conditions of an unfettered market.

29. Cf. Sinclair Refining, 289 U.S. at 699 (damages for breach of contract to assign a patent): Value for exchange is not the only value known to the law of damages. There are times when heed must be given to value for use, if reparation is to be adequate. [citations omitted]. An imaginary bid by an imaginary buyer, acting upon the information available at the moment of the breach, is not the limit of recovery where the subject of the bargain is an undeveloped patent. Information at such a time might be so scanty and imperfect that the offer would be nominal. The promisee of the patent has less than fair compensation if the criterion of value is the price that he would have received if he had disposed of it at once, irrespective of the value that would have been uncovered if he had kept it as his own.

30. The dissent criticizes the yardstick measure because it ostensibly does not recognize distinctions between price gain in basketball teams in general and price gains unique to the Bulls. Infra pp. 108-09. But these distinctions (while perhaps

academically defensible) were not argued to us, and we think it unnecessary to address them. In any event, gains in value form price inflation are at least partially offset (and perhaps fully offset) by the higher opportunity costs attributable to inflation which should be offset against the gain in value of the Bulls. See infra section C. 2. Similarly, the dissent argues that the district court has ignored any discrepancies due to transfer prices between the Stadium and CPSC. Infra p. 109. This point has not been argued as a ground for error on appeal, and we see no need to address a "problem" which does not appear of record. The dissent also suggests that the damage award should be adjusted to take into account the increase in value of the bulls that is due to the entrepreneurial skills possessed by CPSC but not by IBI. Infra p. 109. Again, the defendants did not raise this possible criticism of the damage award before this court, and as the dissent itself suggests, there is no evidence that any of the increased value was due to "extraordinary entrepreneurial gains."

31. While the district court computed the 1982 value of the Bulls by examining the purchase price of "comparable" teams, the use of this method is not incompatible with saying that these teams are not fungible. To compute damages one must use the most comparable figures available and other basketball teams provide such baseline figures, which may be adjusted to take into account, to the extent practicable, the actual experience of the Bulls.

32. This is the problem with the defendants' "stock value" methodology. Taken alone, the cash component of these franchise purchases is as unenlightening as everyone agrees looking only at liabilities assumed would be.

33. Unlike liabilities for unearned deferred compensation, differing liabilities for earned deferred compensation can change the value of a franchise. Thus, if the "comparable" five NBA teams had had very small liabilities for earned deferred compensation and if the Bulls had had quite large ones, the district court's methodology would have led to an overstatement of the Bulls' net value in 1982. The district court has not addressed this specific problem (and it is questionable whether the defendants raised it there). since the determination of damages will be remanded for other reasons, the district court may consider on remand any issue which may have been raised with respect to the treatment of earned deferred compensation.

34. Defendants are at great pains to explain that opportunity cost is entirely different from mitigation of damages. They contend that opportunity cost "is an economic concept which must be utilized to accurately measure gain." Appellants' Reply Brief at 51. They are only half right - opportunity cost is a concept that is used to measure relative gain. If someone has earned $100, he does not have only $10 because the next-best investment would have earned him he has $100. And if he loses $100 but could have salvaged his position and lost only $90, it is still true that he has lost $100. Opportunity cost is a "real" but not an "out of pocket" cost. Afram Export Corp., 772 F.2d at 1369. The law may turn the real but hypothetical cost into an out-of-pocket cost by making the alternative investment legally relevant; this it does through the rule regarding mitigation of damages. The dissent contends that we should consider CPSC's opportunity cost as critical and not IBI's mitigation efforts. Rather than deducting the profits which IBI could have made in an alternative investment, the dissent argues that we should instead reduce the increase in value of the Bulls, which is the starting point of the district court's damage calculation, by the imputed cost of CPSC's equity capital. Essentially, the dissent appears to contend that since IBI did not take the risk associated with an investment in the Bulls, it should not be awarded as damages the return associated with that risk. This approach may not be economically incorrect, but it seems to us to ignore the crucial distinction in law between the wrong-doer and the wronged. IBI wanted to buy the Bulls and assume the attendant risks, but the defendants' illegal conduct precluded IBI from taking this particular risk and from reaping

the corresponding return. Instead, as the dissent points out, CPSC put its capital at risk and received a return commensurate with the risk-bearing service it supplied. If we were to accept the dissent's approach and reduce the damages by the value of the risk assumed by CPSC (i.e., the imputed cost of CPSC's equity investment), IBI's potential recovery would be drastically reduced or eliminated. Infra p. 111. This result, according to the dissent, would be appropriate, because IBI could have invested in some alternative opportunity, as risky as the Bulls, which would have returned a profit in line with that risk. Infra p. 112. Thus, under the dissent's approach, IBI would really recover no damages but would have instead the profits from its alternative and equivalently risky investment. Under this analysis, in being pushed from an investment it wanted (the Bulls) to a theoretically equivalent investment it may not have wanted, IBI would have suffered no damage. It would be kept whole by another investment as risky as the Bulls. While the dissent's economic approach is understandable, it seems not to take account of the well-accepted legal concept that undue risk may not be forced on the wronged party, see infra p. 67. While that party may have been willing to accept a particular (an perhaps unique) business risk and opportunity, it may not be required, when wrongfully done out of that investment, to invest immediately in another line of business with its own unique configuration of risks.

35. IBI issued its first stock in 1974, when Fishman caused IBI to issue three shares to himself in preparation for this lawsuit. See Damages Opinion, 594 F. Supp. at 881-82.

36. Plaintiffs argue that IBI shareholders were going to put equity into the Bulls, not because they were expecting a great return (3% over prime according to the defendants), but rather because they planned to use the Bulls as a tax shelter. Plaintiffs note that between 1972 and 1975 tax benefits had returned to CPSC's shareholders almost 70% of their equity investment. They assert that it is unfair to "pierce" the corporate veil to deduct a return on the investors' uninvested capital yet to ignore the tax benefits those investors lost when they were unable to buy the Bulls. We do not think that this analysis is inequitable. The value of the tax benefits to each of the investors depends on so many factors personal to each investor that we think that it would obviously be very difficult to try to ascertain their "value." In any event, the district court did not ignore this aspect of the damage problem in its calculations since the value of these tax benefits to an NBA owner is certainly reflected in the market prices of the comparable NBA franchises, which are the bases for the district court's damages award. A recognized tax shelter will be valued, at least in part, to reflect the tax benefits it makes available.

37. We are assuming for the purpose of calculating opportunity cost that IBI's organizers did in fact invest in that corporation and the IBI then placed these funds in an alternative investment.

38. Anent the dissent's contention that IBI should "cover" its lost purchase, infra pp. 108-09, finding a new investment opportunity for equity investors is certainly not as simple or routine a task as the dissent seems to imply.

39. IBI also appealed the district court's refusal to adopt its proposed judgment order, which would have allowed IBI to execute upon both the federal antitrust treble damages and the Illinois common law punitive damages in such a way that no one defendant would have to pay both types of damages. Because we have reversed the district court's judgment on punitive damages, we do not have to reach this issue.

40. Antitrust Improvements Act, Pub. L. No. 96-349 (1980) (effective Sept. 12, 1980).

41. The plaintiffs make no claim for interest on any amounts prior to May 31, 1982. The need for interest to compensate the plaintiffs fully in this case is not so great as if the damages all occurred as of July 1972 when IBI's contract to purchase the Bulls was terminated.

42. Congress also amended the Clayton Act to permit the government to recover prejudgment interest when it prevails in antitrust suits. 15 U.S.C. § 15a (1982). In contrast to section 15(a), a court can award the government prejudgment interest, not only when the other party engages in delaying tactics, but also when it is necessary to "compensate the United States adequately for the injury sustained . . . " 15 U.S.C. § 15a(4) (1982). Therefore, although Congress was well aware of the policy of allowing prejudgment interest to make a plaintiff whole, it chose not to give courts the authority to consider this policy in the context of awarding prejudgment interest to the private antitrust plaintiff.

43. We agree with the defendants and the dissent that the Supreme Court suggested in General Motors Corp. v. Devex, 461 U.S. 648, 657, 76 L. Ed. 2d 211, 103 S. Ct. 2058 (1983), that there is a presumption in favor of prejudgment interest even if a statute is silent on the question of interest. We do not believe, however, that this presumption necessarily applies under the Clayton Act given its subsequent amendment by Congress to specifically provide for the award of such interest only in very limited situations.

44. The district court also entered judgment in favor of plaintiffs and against all defendants on Count III (restraint of trade in indoor sports arena market) and Counts V and VI (monopolization of market for professional winter sports in Chicago and restraint of trade in that market). We must reverse these as not consistent with the district court's findings of liability. It found that plaintiffs lacked standing to allege antitrust violations in the arena market (Count III) and never mentioned Counts V and VI at all.

1. In 1966, the NBA awarded an expansion franchise for Chicago to Chicago Basketball. After considering both the Chicago Stadium and the International Amphitheatre, at that time Chicago's two indoor sports arenas, Chicago Basketball selected the Amphitheatre as the Bulls' home arena for the 1966-67 season. In January 1967, McCormick Place, Chicago's convention and exposition facility, burned down. The Amphitheatre was selected as the replacement site for McCormick's scheduled events. To facilitate this switch, Arthur Wirtz, at Mayor Daley's request, took the Bulls as a tenant at the Chicago Stadium. In June 1967, Chicago Basketball and CSC executed a three-year lease agreement. When McCormick Place was not rebuilt by either the 1970-71 or 1971-72 seasons, additional one-year leases were executed.

1. Although the majority is right to point out that a patent does not always create a monopoly, or even market power, the court in Riegel assumed that the patent in question created an absolute monopoly.

2. Whether it would work is an open question. See Richard Schmalensee, The Control of Natural Monopolies 68-73 (1979); Oliver E. Williamson, Franchise Bidding for Natural Monopolies - In General and with Respect to CATV, 7 Bell J. Econ. 73 (1976).

3. The majority writes as if I were making the dissent's points in Otter Tail, so that the majority's failure to respond somehow refutes me. The dissenting Justices were arguing that Otter Tail should not be held liable. I am trying to find out why Otter Tail was held liable. My approach supplies a coherent reason. That the majority in Otter Tail did not offer

a reason for its own decision hardly shows that I am wrong.

4. Part of the value of a team is publicity for the owner and tax advantages for the investors. Part of the $3.3 million price compensated Rich for surrendering these benefits of ownership. The district court said that it was awarding Fishman and IBI nothing for the lost publicity and tax benefits. The implication is that the value of the profit stream expected from the Bulls was less than $3.3 million. The price was therefore not a bargain; it was a premium.

5. There is a related problem of selection bias. Plaintiffs sue only when the price rises. If defendants must pay the full value when the price goes up, but swallow their losses when the price falls, then on average they expect to pay more than their gains: sometimes they pay the plaintiffs, sometimes they pay through business losses. Then defendants as a group are penalized more than their expected profits from the violation; there is too much deterrence.

6. To put this a little differently, banks lent to CPSC, with guarantees, for prime plus one-half percent because if CPSC had gone belly up the guarantees would have made the banks whole. If CPSC had failed no one was going to make its investors whole; their risk (and the appropriate rate of interest) was therefore the same as the banks would have demanded without the guarantees.

7. The majority observes that by 1975 CPSC's lenders released the guarantees. But by 1975 CPSC's investors had a great deal of equity in the venture. This equity was the debt investors' "cushion", enabling them to charge lower rates. (Releasing a guarantee is one way to lower the rate.) CPSC's cost of capital includes the cost of all of its capital, debt and equity alike, just as a utility's cost of capital looks at all sources of capital. "Opportunity cost" refers to the implicit cost of the equity investment in CPSC. That cost always exceeds the price the banks charged for their safer debt investments. (The interest actually paid to banks is subtracted as an actual expense of the corporation and plays no role in the opportunity cost adjustment.)

8. A plaintiff is effectively investing his antitrust damages with the defendant, so the right rate of interest is the one defendant pays to banks for its own capital. This rate compensates for the possibility of nonpayment plus the value of delay. the risk may be less than the risk of a single venture, because the defendants are diversified, so the rate appropriately would be somewhat less than the opportunity cost of CPSC's money.