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# Antitrust—The Defense of In Pari Delicto—A New But for Standard—Javelin Corp. v. Uniroyal, Inc., 546 F.2d 276 (9th Cir. 1976)

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ANTITRUST—THE DEFENSE OF *In Pari Delicto*—A NEW "BUT FOR" STANDARD—*Javelin Corp. v. Uniroyal, Inc.*, 546 F.2d 276 (9th Cir. 1976).

## I. INTRODUCTION

Despite past declarations that the defense of *in pari delicto* is dead in antitrust cases,[1] parties continue to assert the defense under its own name or under some other label and the lower courts continue to recognize the defense in certain circumstances. The perseverance of this defense results from the Supreme Court decision in *Perma Life Mufflers v. International Parts Co.*[2]

The Ninth Circuit has ruled on the validity of *in pari delicto* on very few occasions,[3] and thus has remained in the background with respect to the continued efforts of the courts to resolve the ambiguities of the *Perma Life* decision. It appears, however, that by its recent decision in *Javelin Corp. v. Uniroyal, Inc.*[4] the Ninth Circuit has now come to the forefront, being the first of the circuits to establish its own standard, independent of *Perma Life*, for determining whether a plaintiff in a private antitrust suit may recover. Although the *Javelin* decision contains many of the same inconsistencies which have accompanied the application of the *in pari delicto* defense since the *Perma Life* decision, the standard which it sets forth is likely to have a significant impact on the use of the *in pari delicto* doctrine as a defense in private antitrust litigation.

This note will examine the role which the *in pari delicto* doctrine played in antitrust litigation prior to the *Perma Life* decision, discuss the effect which *Perma Life* has had on the status of the defense, and explore the nature and likelihood of its continued application as it relates to the antitrust laws[5] in light of the *Javelin* decision.

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1. *See, e.g.*, Calnetics Corp. v. Volkswagen of America, Inc., 532 F.2d 674, 688-89 (9th Cir. 1976); Dobbins v. Kawasaki Motors Corp., 362 F. Supp. 54, 62-64 (D. Ore. 1973); Schokbeton Prod. Corp. v. Exposaic Indus., 308 F. Supp. 1366, 1369 (N.D. Ga. 1969); Morton v. National Dairy Prods. Corp., 287 F. Supp. 753, 765 (E.D. Pa. 1968), *aff'd*, 414 F.2d 403 (3d Cir. 1969), *cert. denied*, 396 U.S. 1006 (1970).

2. 392 U.S. 134 (1968).

3. *See* Calnetics Corp. v. Volkswagen of America, Inc., 532 F.2d 674 (9th Cir. 1976); Dreibus v. Wilson, 529 F.2d 170 (9th Cir. 1975).

4. 546 F.2d 276 (9th Cir. 1976).

5. The term "antitrust laws" refers to the provisions of the Sherman Act, 15 U.S.C. §§ 1-7 (1970 & Supp. V 1975), the Clayton Act, 15 U.S.C. §§ 12-27 (1970 & Supp.

## II. THE NATURE OF THE PROBLEM

The uncertainty concerning the vitality of the *in pari delicto* defense stems from two principal sources. The first is the tension that exists between two equally strong but conflicting aspects of public policy. The courts are faced with balancing the public interest in encouraging private enforcement of the antitrust laws against the public interest in seeing that the courts do not become the instruments of wrongdoers, and more specifically, the notion that a wrongdoer should not be assisted in profiting from his wrongdoing. The second source is the failure of the courts to acknowledge the real meaning of the term *in pari delicto* and to adequately distinguish it from other similar equitable defenses such as unclean hands, consent and illegality.[6]

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V 1975), the Robinson-Patman Act, 15 U.S.C. §§ 13-13b, 21a (1970) and the Federal Trade Commission Act, 15 U.S.C. §§ 41-58 (1970 & Supp. V 1975) prohibiting the restraint or monopolization of trade. The principal antitrust laws are the Sherman Act and the Clayton Act.

Sections 1 and 2 are the key provisions of the Sherman Act. Section 1 provides in part:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy declared by sections 1 to 7 of this title to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars, or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 1 (Supp. V 1975). Section 2 provides:

> Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding one million dollars if a corporation, or, if any other person, one hundred thousand dollars or by imprisonment not exceeding three years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 2 (Supp. V 1975).

6. The term "in pari delicto" means "of equal fault." The doctrine of *in pari delicto* is a common law principle which was originally applied in contracts cases. Where the parties participated equally in the illegal or fraudulent contract and were equally at fault, the court would generally not aid the plaintiff unless compelled by statute to do so. However, where the parties were not *in pari delicto*, the court of equity would give relief to the one who was comparatively innocent, and the parties were said to be *in particeps criminis*. According to Pomeroy, not being *in pari delicto* meant that "both have not, with the same knowledge, willingness, and wrongful intent, engaged in the transaction, or the undertakings of each are not equally blameworthy." 3 J. POMEROY, EQUITY JURISPRUDENCE § 942 (5th ed. 1941). There was, however, an important limitation on the principle: even where the contracting parties were *in pari delicto*, the courts would interfere on behalf of the plaintiff in some circumstances where the contract was against public policy, as in the case of usurious contracts. *Id.* § 941.

For an explanation of the unclean hands doctrine, see note 17 *infra*. Consent refers to a situation in which the plaintiff does not commit an offense himself, but knowingly allows an offense to be committed against him. The defense of illegality is a challenge

### *A. Public Policy Considerations*

The principal remedy available to private parties injured by violations of the antitrust laws is the private treble damage action.[7] The chief functions of this action are to (i) provide redress for those injured by antitrust violations; (ii) prevent loss or damage to others (by providing injunctive relief); (iii) serve as a deterrent to those contemplating violations; and (iv) provide a force of private investigators to supplement the Justice Department's efforts at law enforcement.[8] The principal arguments advanced on behalf of the *in pari delicto* defense are directed primarily to the deterrent rationale of the statute and its unjust enrichment aspects. Proponents of the defense argue that optimal deterrence results where the plaintiff's fault is small compared with defendant's, but that where the parties' fault is more nearly equal the treble damage statute actually encourages rather than deters illegal conduct because the plaintiff knows that he can engage in discriminatory or monopolistic practices and still collect treble damages from a co-conspirator when the situation gets out of hand.[9] Furthermore, they question whether the public derives any benefit from allowing the plaintiff to recover damages in addition to retaining the fruits of his illegal participation in the scheme. They claim, as did Justice Harlan

to the plaintiff's right to bring the action on the ground that his business is illegal and therefore he has no legal right which can be protected. *See* Maltz v. Sax, 134 F.2d 2 (7th Cir.), *cert. denied*, 319 U.S. 772 (1943); Blackford, *"Business or Property" Entitled to Protection Under Section 4 of the Clayton Act*, 26 MERCER L. REV. 737, 742-44 (1975); Note, *In Pari Delicto: The Consumer's Best Friend*, 30 OHIO ST. L.J. 332, 340 (1969).

7. Section 4 of the Clayton Act provides:

> Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

15 U.S.C. § 15 (1970).

The other remedy available to private parties is injunctive relief under section 16 of the Clayton Act, 15 U.S.C. § 26 (1970). Antitrust violators are also subject to single damage suits by the government under section 4A of the Clayton Act, 15 U.S.C. § 15a (1970); criminal proceedings under section 1 of the Sherman Act, 15 U.S.C. § 1 (Supp. V 1975); and government proceedings in equity under section 15 of the Clayton Act, 15 U.S.C. § 25 (1970). *See* ANTITRUST ADVISOR § 2.4 (C. Hills ed. 1971).

8. 13 J. VON KALINOWSKI, ANTITRUST LAWS & TRADE REGULATION § 99.03 (1976). The policy of encouraging private suits is evidenced by the fact that the statutory provisions entitle private plaintiffs to use as prima facie evidence decisions in prior government suits based on the same alleged acts, 15 U.S.C. § 16(a) (1970); and by the provisions for recovery of attorneys' fees. 15 U.S.C. § 15 (1970).

9. Ellis, *In Defense of In Pari Delicto*, 56 A.B.A.J. 346, 347-48 (1970). *See also* Comment, 46 ILL. L. REV. 654, 662 (1951).

dissenting in *Perma Life*, that this is a "bizarre way to 'further the overriding public policy in favor of competition' . . . to pay violators three times their losses in doing what public policy seeks to deter them from doing."[10]

Another argument in favor of the defense is that the court, by striking defendant's affirmative defense rather than allowing it to be proved at trial, is doing more than granting the plaintiff a right to maintain his cause of action; many times the court is essentially paving the way for the plaintiff's recovery even before a hearing on the merits.[11] From the plaintiff's point of view, however, it would seem that permitting the defense effectively denies the plaintiff the right to prove any damages he actually suffered.

Opponents of the defense make four principal arguments. They urge that when the Sherman Act[12] was introduced in Congress, alternative antitrust bills expressly granting the *in pari delicto* defense were rejected. This suggests that Congress did not intend that the defense bar recovery.[13] They also note that allowing the defense would permit two wrongdoers to go free rather than only one since there is no assurance that any action would be brought against either of the parties by the government or by injured third parties.[14] The opponents also assert that the deterrent theory is sound even if the plaintiff is equally at fault because the plaintiff has no assurance that his co-conspirator, the government or a third party won't bring an action against him before he has a chance to sue for treble damages.[15] Finally, it is posited that a value judgment was made at the inception of the antitrust laws that the public interest in furthering competition far outweighed any

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10. 392 U.S. at 154.

11. *See, e.g.*, Purex Corp. v. General Foods Corp., 318 F. Supp. 322 (C.D. Cal. 1970), in which the court summarized the balancing process as follows:

> This court is mindful that it should be slow to grant motions to dismiss affirmative defenses. A defendant should be given the opportunity to *prove* his allegations if there is any possibility that the defense might succeed after full hearing on the merits.

*Id.* at 323. Motions to strike affirmative defenses are not favored and may only be granted if the insufficiency of the defense is clearly apparent. If there are either questions of fact or disputed questions of law, the motion must be denied. Carter-Wallace, Inc. v. Riverton Laboratories, Inc., 47 F.R.D. 366, 368 (S.D.N.Y. 1969).

12. 15 U.S.C. §§ 1-7 (1970 & Supp. V 1975).

13. Bushby, *The Unknown Quantity in Private Antitrust Suits—The Defense of In Pari Delicto*, 42 VA. L. Rev. 785, 787 (1956) [hereinafter cited as Bushby].

14. Trebuhs Realty Co. v. News Syndicate Co., 107 F. Supp. 595, 600 (S.D.N.Y. 1952).

15. Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134, 139 (1968).

equitable considerations between the parties, and Congress has not seen fit to amend the laws to provide for such a defense.[16]

Although the arguments against the *in pari delicto* defense appear to be much stronger than those in favor of it, there may be some basis for argument that the common law doctrine has not effectively been abolished in antitrust litigation because there have as yet been no cases where the parties have been found to be truly in *pari delicto.*

### *B. Judicial Misapplication of the Doctrine*

Some courts now consider *in pari delicto* to be identical to or part of the unclean hands doctrine.[17] There is a distinction between the two doctrines, however, which is important in the context of this discussion. That distinction is one of degree. To be *in pari delicto* the plaintiff must be of equal fault with the defendant in the transaction sued upon; however, the unclean hands doctrine requires that the plaintiff be a participant in the illegal transaction, but not to the extent of being equally responsible in the formation or execution of the illegal activity.[18]

Since the importation of the two doctrines into antitrust law as affirmative defenses, however, an erroneous distinction between the two doctrines has emerged. An antitrust plaintiff is now said to have unclean hands if he is guilty of some misconduct *unrelated* to the matter in litigation, and which may or may not involve the defendant.[19]

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16. Bushby, *supra* note 13, at 800. Bushby points out that although the government has stressed the importance of antitrust suits it has never (so far as had been ascertained) filed an amicus brief in a private antitrust suit on the issue of the *in pari delicto* defense, nor has it urged Congress to legislate on the subject. *Id.* at 798-99.

17. "Unclean hands" is a shorthand expression for the maxim that he who comes into equity must come with clean hands. Although in general it means that the courts will not interfere on behalf of one who in his prior conduct has violated good faith or other equitable principles, Pomeroy, in his treatise on equity, emphasizes one important limitation on the doctrine: it is confined to conduct which is connected with the matter in litigation and with which the opposing party is concerned. "The dirt upon [plaintiff's] hands must be his bad conduct in the transaction complained of. If he is not guilty of inequitable conduct toward the defendant in that transaction, his hands are as clean as the court can require." 2 J. POMEROY, EQUITY JURISPRUDENCE § 399 (5th ed. 1941). *See also* Note, *Antitrust—The Defenses of Pari Delicto and Unclean Hands,* 29 N.Y.U.L. REV. 1463, 1464 (1954); Note, *In Pari Delicto: The Consumer's Best Friend,* 30 OHIO ST. L.J. 332, 339 (1969).

18. *See* Comment, *Limiting the Unclean Hands and In Pari Delicto Defenses in Antitrust Suits: An Additional Justification,* 54 NW. U.L. REV. 456 (1959); Note, *Antitrust —The Supreme Court's Rejection of In Pari Delicto as a Defense,* 3 VAL. L. REV. 234 (1969).

19. This is the sense in which the term "unclean hands" is used in this note. *See*

Prior to *Perma Life* some courts found a plaintiff to be *in pari delicto* by virtue of his participation (of whatever degree) in the illegal scheme for which he was suing the defendant.[20] In other courts he was considered to be *in pari delicto* only if he was equally responsible with the defendant in the formation of the illegal conspiracy.[21]

These distinctions in the quality of the conduct of the plaintiff arose as an attempt to measure the logical nexus between the plaintiff's alleged wrongdoing and the matter in litigation in order to determine whether the plaintiff's participation was so great as to bar his recovery. For example, if the wrongdoing alleged by the defendant is *unrelated* to the plaintiff's claim, it does not meet the requirements of the *in pari delicto* doctrine and can therefore be summarily disposed of by the court.[22] Only where the plaintiff is charged with some misconduct connected with the transaction being litigated is it necessary even to inquire into the quality of the plaintiff's participation. The court must then consider such factors as the nature and extent of the participation, whether the plaintiff consented to the transaction on which he is suing, and if so, whether his consent was voluntary or amounted to economic coercion.[23]

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*generally* Comment, *Limiting the Unclean Hands and In Pari Delicto Defenses in Antitrust Suits: An Additional Justification*, 54 NW. U.L. REV. 456 (1959); Note, *Rethinking In Pari Delicto: An Antitrust Policy Analysis*, 3 FLA. ST. U.L. REV. 360 (1975).

20. *See, e.g.*, Pennsylvania Water & Power Co. v. Consolidated Gas, Elec., Light & Power Co., 209 F.2d 131 (4th Cir. 1953), *cert. denied*, 347 U.S. 960 (1954); cases cited note 23 *infra*.

A reasonable explanation for the willingness of the early courts to allow the defense on less than a showing of equal fault is that since the antitrust laws were relatively new, the policy of promoting their private enforcement had not yet begun to balance the well-established common law policy that one should not be allowed to profit from his wrongdoing. Moreover, since growth of business was encouraged at this stage of the country's industrial development, there were relatively few antitrust suits by the Justice Department, which meant that it was able to enforce the antitrust laws without the help of private parties. However, in the 1930's, as trusts became more powerful and their unfair practices more difficult to detect, it became apparent that the most effective way to enforce the antitrust laws was through the private treble damage action by persons who were directly affected by the violations, and that allowing the defense of *in pari delicto* not only defeated the purpose of the laws by allowing the defendant to escape liability, but also deprived the plaintiff of his right to seek redress for injuries suffered.

21. *See* cases cited note 23 *infra*.

22. For a good discussion of this distinction, see Pennsylvania Water & Power Co. v. Consolidated Gas, Elec., Light & Power Co., 209 F.2d 131 (4th Cir. 1953), *cert. denied*, 347 U.S. 960 (1954).

23. The pattern which evolved in the early antitrust cases was that the defense was allowed in two groups of cases: (1) those in which the plaintiff actively participated in initiating and organizing the same illegal scheme that caused his damage, *see, e.g.*, Tilden v. Quaker Oats Co., 1 F.2d 160 (7th Cir. 1924); Bluefields S.S. Co. v. United

The concern over the status of the *in pari delicto* defense and the debate as to the wisdom of applying it to bar a plaintiff's cause of action developed in the 1950's following the Supreme Court's decision in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*[24] That case upheld the right of a wholesale liquor dealer to prosecute an antitrust action against the defendants for setting maximum wholesale prices for liquor despite evidence that the plaintiff was a party to an illegal agreement setting minimum retail prices for liquor.[25] Although *Kiefer-Stewart* contained no explicit reference to either the doctrine of *in pari delicto* or unclean hands (or the policy of the antitrust laws), it has come to stand for the proposition that the doctrine of unclean hands is inapplicable to antitrust actions.[26]

It is apparent that part of the problem the courts have experienced with the *in pari delicto* doctrine is due to their improper characterization of some other defense as *in pari delicto*. In many cases where

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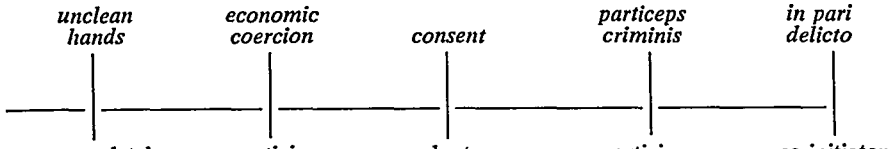
Fruit Co., 243 F. 1 (3d Cir. 1917); Morny v. Western Union Tel. Co., 40 F. Supp. 193 (S.D.N.Y. 1940); and (2) the "small dealer" cases in which the plaintiff became a party to the illegal scheme as a result of economic coercion, *see, e.g.*, Eastman Kodak Co. v. Southern Photo Materials Co., 273 U.S. 359 (1927); Northwestern Oil Co. v. Socony-Vacuum Oil Co., 138 F.2d 967 (7th Cir. 1943), *cert. denied*, 321 U.S. 792 (1944); First Nat'l Pictures, Inc. v. Robison, 72 F.2d 37 (9th Cir.), *cert. denied*, 293 U.S. 609 (1934); Eastman Kodak Co. v. Blackmore, 277 F. 694 (2d Cir. 1921).

To establish economic coercion, the plaintiff traditionally had to show that the alternatives available were so undesirable as to make dealing with the defendant amount to compulsion. However, under Simpson v. Union Oil Co., 377 U.S. 13 (1964), a plaintiff need now show only loss of an economic opportunity. *See* Perma Life Mufflers v. International Parts Corp., 392 U.S. at 155 (Harlan, J., dissenting).

A diagram of the various doctrines that are related to *in pari delicto* in terms of the parties' relative fault might look somewhat like this:




| completely separate transaction w/ defendant or 3d party | participation w/ defendant but only to avoid economic loss | voluntary participation with defendant but not a co-initiator | participation w/ defendant but not initiator | co-initiator equally responsible |
|---|---|---|---|---|

24. 340 U.S. 211 (1951).

25. *See* Bushby, *supra* note 13.

26. *See* Interborough News Co. v. Curtis Publishing Co., 108 F. Supp. 768 (S.D.N.Y. 1952); Trebuhs Realty Co. v. News Syndicate Co., 107 F. Supp. 595 (S.D.N.Y. 1952). *See also* 13 VAN KALINOWSKI, ANTITRUST LAWS & TRADE REGULATION § 109.02 (1976); Bushby, *supra* note 13.

the defendant raises a defense of illegality[27] the court associates it with *in pari delicto*, attaches that label to it and then proceeds on the authority of *Perma Life* to dispose of it accordingly. As soon as the label of *in pari delicto* is attached to the defense, attention is diverted from the real conflicting policies to be balanced (antitrust policy against the equities between the parties) and the focus shifts to the common law principle that one should not be allowed to profit from his wrongdoing. Before reaching the merits, the court preliminarily weighs the relative fault of the parties and determines that the defense must be stricken, either because the plaintiff *is not in pari delicto* (and therefore the defense is inapplicable) or because he *is in pari delicto* but a "fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement."[28]

## III. THE *Perma Life* DECISION

The debate over the vitality of the *in pari delicto* defense was sparked anew by the Supreme Court's decision in *Perma Life Mufflers, Inc. v. International Parts Corp.*[29] The plaintiffs in *Perma Life* operated Midas Muffler shops under franchise agreements with defendants, manufacturers of automobile mufflers and exhaust system parts. Certain terms of the franchise agreements prevented plaintiffs from purchasing from other sources and from selling outside of designated territories, tied some products to the sale of others, and fixed resale prices. Plaintiffs alleged that these provisions constituted illegal restraints of trade. Defendants asserted that plaintiffs had enthusiastically sought the franchises with full knowledge of the restrictive provisions and, moreover, that plaintiffs had profited from the arrangement.

The district court granted summary judgment for defendants on the ground that plaintiffs' claims were barred by the doctrine of *in pari delicto*,[30] and the Seventh Circuit affirmed.[31] The Supreme Court reversed, holding that the common law doctrine of *in pari delicto* was "not to be recognized as a defense to an antitrust action."[32] Justice Black, in the plurality opinion, pointed out that there is no indication

27. Under the Federal Rules of Civil Procedure, the defense of illegality is to be pleaded affirmatively. FED. R. CIV. P. 8(c).

28. 392 U.S. at 139.

29. 392 U.S. 134 (1968).

30. *See id.* at 135-36.

31. 376 F.2d 692 (7th Cir. 1967).

32. 392 U.S. at 140.

in the antitrust acts that Congress intended its application to treble damage actions and that even if the defense did exist, it was not applicable to the facts before the Court.[33] Justice Black's frequently quoted opinion reflecting the views of only three other justices,[34] was based exclusively on considerations of the public policy favoring private enforcement of the antitrust laws.[35]

Despite its broad language, the *Perma Life* decision did not resolve the question of the applicability of *in pari delicto* in antitrust cases. The four concurring justices agreed with the result based on the facts of the case but expressed support for the defense in appropriate circumstances. Justices White and Marshall favored the denial of recovery where the plaintiff and defendant were "substantially equally responsible" for the plaintiff's injuries.[36] Justice Fortas was of the opinion that *in pari delicto* has a significant but limited role in antitrust law, and suggested that under the facts presented, plaintiffs should be barred from recovery only on those portions of the agreement which they actively sought and initiated.[37] Justice Harlan, with Justice Stewart concurring in part and dissenting in part, thought that where there was substantially equal responsibility between the parties, *in pari delicto* should be available as a defense except where the plaintiff was coerced into entering the illegal agreement. Justice Harlan emphasized the need for maintaining a proper distinction between the terms "in pari delicto," "consent" and "unclean hands" and suggested that, correctly used, the term "in pari delicto" referred to a defense that should be permitted in antitrust cases.[38]

The Court was ostensibly attempting to carry out the congressional intent to prevent the importation of traditional common law doctrines into the purely statutory field of antitrust law. The Court stated that "[t]here is nothing in the language of the antitrust acts which indicates

33. *Id.* at 138.

34. In addition to the principal opinion, joined in by Justices Douglas, Brennan and Chief Justice Warren, there were three concurring opinions, by Justices White, Fortas and Marshall, and an opinion by Justice Harlan, concurring in part and dissenting in part, joined by Justice Stewart.

35. The Court stated:

> The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement.

392 U.S. at 139.

36. *Id.* at 143, 145, 148-49.

37. *Id.* at 147-48.

38. *Id.* at 153-55.

that Congress wanted to make the common law *in pari delicto* doctrine a defense to treble-damage actions."[39] In the view of the majority, accomplishment of the objectives of the antitrust laws requires a complete disregard for the equities between the individual parties.[40]

If, as the Court suggests, Congress did not intend that the antitrust laws be weakened by the application of broad common law defenses, then surely Congress could not have intended that the law be diluted by any *other* defenses consisting of the same elements, but with different names. It seems clear that the intent of the Court in *Perma Life* was to abolish from antitrust law only the label of *in pari delicto*, not the underlying concept of equal fault. This is the only reasonable conclusion that can be drawn from the contradiction which exists between the Court's express holding and its statement in the succeeding paragraph of the opinion. The Court's statement of the holding is unequivocal: "We therefore hold that the doctrine of *in pari delicto*, with its complex scope, contents, and effects, is not to be recognized as a defense to an antitrust action."[41] In the following paragraph the Court states: "We need not decide, however, whether such truly complete involvement and participation in a monopolistic scheme could ever be a basis, wholly apart from the idea of *in pari delicto*, for barring a plaintiff's cause of action . . . ."[42] Assuming that the application of the common law doctrine of equal fault (*in pari delicto*) would undermine the policies of the antitrust laws, on what basis can it be argued that the concept of equal fault under some other name and of some other origin would have a different result?

The language of *Perma Life* indicates that the Supreme Court used the term "in pari delicto" in a very broad sense. The Court noted that "[a]lthough *in pari delicto* literally means 'of equal fault,' the doctrine has been applied, correctly or incorrectly, in a wide variety of situations in which a plaintiff seeking damages or equitable relief is himself involved in some of the same sort of wrongdoing."[43] The Court did not make it clear whether it considered a plaintiff who was only "involved" in the wrongdoing, but not equally responsible, to be *in pari delicto*.

If the Court did use the term "in pari delicto" to refer to a broad range of participation or involvement, then, translating the *Perma Life* decision into common law terms, what the Court really held was that a plain-

39. *Id.* at 138.
40. J. VAN CISE, UNDERSTANDING THE ANTITRUST LAWS 101 (1973).
41. 392 U.S. at 140.
42. *Id.*
43. *Id.* at 138.

tiff who only has unclean hands will not be barred from maintaining an action, but a plaintiff who is truly *in pari delicto* probably will be barred should such a case ever arise.

If, on the other hand, the Court used the term "in pari delicto" in a narrow sense, to refer only to a situation in which the plaintiff is equally at fault with the defendant, then the Court must have held only that, should a case arise in which the plaintiff and defendant are equally at fault, then the plaintiff will probably be barred, but the defendant will have to furnish another name for the defense he raises.

The courts which have been faced with the task of interpreting *Perma Life* are divided on the question of whether an equally culpable plaintiff should be allowed to recover. The obvious reason for the split among the circuits is the difference in the way they have interpreted the meaning of the term "in pari delicto" as it was used in *Perma Life*. Some courts have taken *Perma Life* at face value and have indicated an intention not to allow *any in pari delicto* type defense.[44] Some of these same courts, however, have indicated a willingness to consider the plaintiff's participation in determining damages.[45]

Courts taking a narrow view of the holding of *Perma Life* basically follow the view expressed by the Seventh Circuit in *Premier Electrical Construction Co. v. Miller-Davis Co.*[46] that *Perma Life* held "only that plaintiffs who do not bear equal responsibility for creating and establishing an illegal scheme, or who are required by economic pressures to accept such an agreement, should not be barred from recovery simply because they are participants."[47] Relying heavily on the language of the concurring opinions in *Perma Life*, these courts and several commentators have vigorously defended the continued application of the doctrine in situations where it can be shown that the plaintiff

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44. *See* Greene v. General Foods Corp., 517 F.2d 635 (5th Cir. 1975); Hunt v. Mobil Oil Corp., 410 F. Supp. 10 (S.D.N.Y. 1976); Fairfield Cty. Beverage Distribs. v. Narragansett Brewing Co., 378 F. Supp. 376 (D. Conn. 1974); Schokbeton Prod. Corp. v. Exposaic Indus., Inc., 308 F. Supp. 1366 (N.D. Ga. 1970); Morton v. National Dairy Prods. Corp., 287 F. Supp. 753 (E.D. Pa. 1968), *aff'd*, 414 F.2d 403 (3d Cir. 1969), *cert. denied*, 396 U.S. 1006 (1970).

45. Kestenbaum v. Falstaff Brewing Corp., 514 F.2d 690 (5th Cir. 1975), *cert. denied*, 424 U.S. 943 (1976).

46. 422 F.2d 1132 (7th Cir.), *cert. denied*, 400 U.S. 828 (1970).

47. *Id.* at 1138. Cases following this view are Columbia Nitrogen Corp. v. Royster Co., 451 F.2d 3 (4th Cir. 1971); General Beverage Sales Co.-Oshkosh v. East Side Winery, 396 F. Supp. 590 (E.D. Wis. 1975); Midway Enterprises, Inc. v. Petroleum Marketing Corp., 375 F. Supp. 1339 (D. Md. 1974).

voluntarily participated in the illegal scheme from the outset and was equally responsible for carrying out its objectives.[48]

Implicit in the decisions of those courts which have limited *Perma Life* to its facts is the assumption that the Supreme Court intended to abolish from antitrust law only the label of *in pari delicto* and not the underlying concept of equal fault as a bar to recovery. Justice White pointed this out in his concurring opinion in *Perma Life* when he stated: "I also agree that the *in pari delicto* defense in its historic formulation is not a useful concept for sorting out those situations in which [a plaintiff should be barred from recovery]. Judgments like these would be better made by hewing closer to the aims and purposes of section 4 of the Clayton Act . . . ."[49] Surprisingly, the courts seem to have given very little thought to this important aspect of the *Perma Life* decision. This view has been expressly articulated in few cases. In *Dobbins v. Kawasaki Motors Corp.*,[50] for example, where defendants claimed that the plaintiff actively sought the territorial restrictions of which it complained, the court stated:

> What the [*Perma Life*] opinion *implies* is that the common law doctrine of *in pari delicto* is inappropriate to antitrust actions. If a defense of the plaintiff's participation and involvement is to be raised in a private antitrust suit, then it must be a defense fashioned by the nature of the statutory causes of action themselves, rather than a defense lifted from a pre-existing doctrine.[51]

The *Dobbins* court held that the defense of plaintiff's complete participation and involvement does exist, although not as the doctrine of *in pari delicto*.

## IV. JAVELIN CORP. V. UNIROYAL, INC.

Prior to the *Javelin* decision, the Ninth Circuit had considered the *in pari delicto* issue only twice since the *Perma Life* decision. In *Dreibus v. Wilson*,[52] decided in 1975, the court upheld the district court's dismissal of a suit for failure to state a claim on the ground that the allegations of the complaint itself showed that the plaintiffs were the persons responsible for the establishment of the exclusive dealer-

48. *See* Ellis, *In Defense of In Pari Delicto*, 56 A.B.A.J. 346 (1970); Note, *In Pari Delicto: The Consumer's Best Friend*, 30 OHIO ST. L.J. 332 (1969).

49. 392 U.S. at 143.

50. 362 F. Supp. 54 (D. Ore. 1973).

51. *Id.* at 63 (emphasis added).

52. 529 F.2d 170 (9th Cir. 1975).

ship which was the basis of their antitrust claim. The court cited without discussion *Premier Electrical Construction Co. v. Miller-Davis Co.*[53] and *Columbia Nitrogen Corp. v. Royster Co.*[54]

In February 1976 the Ninth Circuit decided *Calnetics Corp. v. Volkswagen of America, Inc.*,[55] in which the plaintiff charged defendants with monopoly and conspiracy to exclude plaintiff from competition. Defendants contended that plaintiff had been a party to an illegal commission agreement with an employee of one of the defendants and that the sales resulting from that agreement should not be used as a basis for calculating plaintiff's damages.

The Ninth Circuit viewed defendants' illegal sales contention as a type of *in pari delicto* or unclean hands defense.[56] Defendants claimed that their defense was not a challenge to Calnetics' right to bring an antitrust action because of its participation in the illegal commission agreement but was simply a challenge to plaintiff's right to use the sales made during the existence of the illegal agreement as a basis for proving its damages. The court, however, failed to see any distinction, particularly since the whole contention centered around the illegal agreement. Basing its rejection of the defense on *Perma Life* and citing in addition two subsequent cases rejecting similar illegality defenses,[57] the court held that Calnetics was entitled to recover damages actually suffered even though its previous market position had been attained only through illegal conduct.[58]

On the basis of only two decisions, it would be difficult to attribute to the Ninth Circuit any specific position on the *in pari delicto* issue. After its decision in *Javelin Corp. v. Uniroyal, Inc.*,[59] however, there can be no doubt as to the court's position. The *Javelin* case indicates that the Ninth Circuit has chosen not to struggle with the uncertainties

53. 422 F.2d 1132 (7th Cir.), *cert. denied*, 400 U.S. 828 (1970).

54. 451 F.2d 3 (4th Cir. 1971).

55. 532 F.2d 674 (9th Cir. 1976).

56. *Id.* at 688.

57. Semke v. Enid Auto. Dealers Ass'n, 456 F.2d 1361 (10th Cir. 1972) (unlicensed dealer in new cars sued auto dealers association for interference with business efforts); Purex Corp. v. General Foods Corp., 318 F. Supp. 322 (C.D. Cal. 1970) (cause of action acquired by virtue of illegal acquisition).

58. 532 F.2d at 689. It was generally held, prior to *Perma Life*, that profits realized during the time of participation in the illegal activity could not be used as a measure of damages, Eastman Kodak Co. v. Blackmore, 277 F. 694 (2d Cir. 1921), but that damages incurred subsequent to withdrawal from participation could be recovered, Victor Talking Mach. Co. v. Kemeny, 271 F. 810 (3d Cir. 1921). *See* Note, *In Pari Delicto and Consent as Defenses in Private Antitrust Suits*, 78 HARV. L. REV. 1241 (1965).

59. 546 F.2d 276 (9th Cir. 1976).

of *Perma Life*, but has established its own standard for measuring the relative fault of the parties in an antitrust action.

*Javelin* involved a tire wholesaler and distributor (Javelin) who, in 1967, joined a group of tire distributors (Tire Brands, Inc.) five years after the group was formed. Members of the group were required to buy a certain quota of tires from Uniroyal, one of the founding members, and were assigned exclusive territories. Within a year after joining the Tire Brands group, Javelin became very successful and began marketing its own brands of tires which resulted in a steady decline in the number of tires it purchased from Uniroyal. Because of its failure to maintain the quota, Javelin was expelled from Tire Brands in 1972. Javelin then brought an action against Uniroyal and Tire Brands in federal district court alleging antitrust violations.[60] The district court granted summary judgment for defendants on the ground that Javelin was *in pari delicto*,[61] and Javelin appealed.

The Ninth Circuit first discussed the approaches that have been taken by some of the other circuits in dealing with the *in pari delicto* defense since *Perma Life*. It noted the Fifth Circuit position of disallowing the defense and the position of the Fourth, Sixth and Seventh Circuits that some participation in the formation of the conspiracy would bar a plaintiff's recovery.

The court opted for the more liberal approach, stating that

> [w]e agree that under certain circumstances a plaintiff may be barred from recovery, but believe that the mandate of *Perma Life* and the policy behind it demand that such circumstances be rare, and limited to where a plaintiff participated in the formation of the conspiracy.[62]

On this basis the court held that "[a] plaintiff is barred from recovery, only when the illegal conspiracy would not have been formed *but for* the plaintiff's participation."[63] The court explained that under its "but for" test, the degree of plaintiff's participation "must be equal to that of any defendant and a substantial factor in the formation of the conspiracy."[64]

60. Javelin claimed that the assignment of exclusive sales territories was a conspiracy and that the requirement that members buy stock in Tire Brands as a condition of membership was a tie-in agreement, all in violation of section 1 of the Sherman Act, 15 U.S.C. § 1 (Supp. V 1975). 546 F.2d at 278.

61. The *in pari delicto* defense was asserted by defendants only after the district court indicated that it would grant summary judgment on that basis. 546 F.2d at 278.

62. *Id.* at 279.

63. *Id.* (emphasis added).

64. *Id.*

Applying the "but for" test to the facts before it, the court found that Javelin had not participated in the formation of the Tire Brands group and in fact had not become a member of the group until five years after its formation. On these facts the court had no difficulty concluding that "under the standard we set forth above, this degree of participation falls well short of barring Javelin's cause of action."[65]

In adopting the "but for" standard, the court purports to follow the mandate of *Perma Life* and the policy behind it. It indicates that the standard will further the policy of the antitrust laws by placing a heavy burden on the defendant to prove the plaintiff's equal participation.

Certainly the Ninth Circuit does follow the mandate of *Perma Life* by its establishment of the "but for" standard. It recognizes and employs the concept of equal fault and simply discards the common law label of *in pari delicto*. The *Javelin* court expressly states that "[t]he instigator of an illegal scheme clearly is barred under this test."[66] It is submitted that the "but for" standard is nothing more than the *in pari delicto* doctrine in its purest form. The test is the same: establishing equal fault and determining plaintiff's degree of participation still involve the process of weighing the relative fault of the parties. The *Javelin* court agrees with Justice White, concurring in *Perma Life*, that the "problem of who is entitled to recover is one of degree of responsibility posing 'the issue of causation in particularized form.' "[67] However, even viewing the issue as one of causation, the moral element associated with the *in pari delicto* doctrine is not eliminated. It is still present in the court's determination to bar a plaintiff at all, regardless of the standard applied.

It seems that the real question is not whether the plaintiff should be barred under the "but for" standard or the *in pari delicto* doctrine, but whether he should be barred at all. As noted above, the *Javelin* court expressed the belief that its test was consistent with the policy of the antitrust laws. It noted that the plaintiff sues as a "private attorney general" and that the courts should encourage this function.[68] But is the "but for" standard really any more consistent with the policy of the antitrust laws than the doctrine of *in pari delicto*? Under the narrow interpretation which has been given to *Perma Life* by *Javelin* and the cases cited therein, the answer is clearly that both standards

65. *Id.* at 280.
66. *Id.* at 279.
67. *Id.* at 279-80 n.3.
68. *Id.* at 279-80.

are consistent with that policy: the "but for" standard by virtue of the fact that it is not a moralistic common law doctrine such as that condemned in *Perma Life*, and the *in pari delicto* standard because (1) it has lost its moralistic connotation in antitrust law, (2) it is not as broad, in its true form, as the defense rejected by *Perma Life*, and (3) it is identical to the "but for" standard in all material respects.

## V. CONCLUSION

The supposed abolition of the common law doctrine of *in pari delicto* as a defense in antitrust litigation appeared at first, and still appears to many, to be based on the premise that accomplishment of the purposes of the antitrust laws requires a complete disregard for the equities between the individual parties. The courts, however, are placing the utmost importance on the degree of the parties' participation in and responsibility for the illegal transaction. A re-examination of the *Perma Life* decision reveals that it was not the inquiry into the relative fault of the parties which the Supreme Court objected to, but the importation into antitrust law of broad common law barriers to suits which Congress wished to encourage. Although this theory of *Perma Life* has seldom been articulated in subsequent cases, it is implicit in the decisions such as *Javelin* which hold that a plaintiff who is a co-equal in the conspiracy will be barred. The Ninth Circuit has adopted a test called the "but for" standard which is indistinguishable from *in pari delicto*, and yet does not go against the Supreme Court's mandate in *Perma Life*. Thus, it appears that the doctrine of *in pari delicto*, by some name, if not its own, is likely to play a definite role in antitrust litigation until Congress expressly provides litigators with an alternative defense.

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