NOTES

ANTITRUST LAW—PROCEDURE—PRELIMINARY INJUNCTION INAPPROPRIATE TO PRESERVE CONTRACT DEFENSE OF FEDERAL ANTITRUST VIOLATION

In *Response of Carolina v. Leasco Response*[1] the Court of Appeals for the Fifth Circuit found that it was inappropriate to preserve the defense of federal antitrust law violation in a state court contract action by means of a preliminary injunction. In this consolidated case appellees, Response of Carolina and Datatron, were franchisees who filed antitrust actions against Leasco, their franchisor, with whom each had both a franchise agreement contract involving certain computer programming and a computer equipment lease.[2] Shortly before filing its action, each franchisee had ceased rental and royalty payments due under its respective contract with the franchisor. As part of the relief requested in their antitrust actions, appellees sought and obtained preliminary injunctions. With respect to franchisee Carolina, the district court enjoined further prosecution by Leasco of its state action in contract (filed one day before Carolina filed its antitrust action in federal court) for unpaid royalties and rentals and the recovery of possession of the leased computer equipment.[3] It also enjoined actions that would interfere with Carolina's business.[4] In Datatron's suit, the court

1. 498 F.2d 314 (5th Cir.), *cert. denied*, ___ U.S. ___, 43 U.S.L.W. 3326 (Dec. 9, 1974).

2. The alleged violations involved both federal and state antitrust laws. The violation important for purposes of this decision and this analysis is the alleged illegal territorial restraint in the form of a contract provision requiring a 70% royalty on sales made by the franchisee outside its primary area of responsibility. Such violations fall under the prohibition of section 1 of the Sherman Act, 15 U.S.C. §1 (1970). While no attempt is made to characterize the 70% clause as clearly in violation of the Sherman Act, it appears that this provision is highly questionable under the "rule of reason" approach to the Sherman Act. *See* Note, *Antitrust Law—Vertical Restraints—Per Se Mandate of Schwinn Extended to Location Clause in Franchise Agreement*, 26 MERCER L. REV. 629 (1975), for further discussion of the "per se" and "rule of reason" approaches to the federal antitrust laws. *See also* Superior Bedding Co. v. Serta Associates, Inc., 353 F. Supp. 1143 (N.D. Ill. 1972), where the court held that a similar pass-over plan was not an unreasonable restraint of trade. There, however, the plan required a licensee to pay *7%* of his gross receipts on sales made outside his area of primary responsibility to the licensee in whose area the sale was made.

3. While the court of appeals stated that Leasco sought recovery of unpaid royalties and rentals *and* possession of the equipment, the quoted portion of the district court's order indicates that Leasco sought either money judgment *or* repossession of the equipment. 498 F.2d at 316 n.2. Under the district court version, then, it appears that Leasco was not seeking by court action to terminate the franchise agreement if it could obtain payment of rents and royalties. Because the court of appeals dealt with the case as if both payment and repossession were sought, this analysis deals with the case in the same manner.

4. 498 F.2d at 316 n.2.

enjoined Leasco from failing to perform its obligations under the contract and from removing equipment from Datatron's possession, from interfering with Datatron's business, and other actions.[5] The court of appeals reversed the district court's preliminary injunctions "because there was no irreparable loss or damage caused by a violation of the federal anti-trust law."[6]

In order to understand the court of appeals' reversal of the grant of preliminary injunctions, it is necessary to consider two broad areas: the first is the defense, in contract actions, of illegality on the basis of federal antitrust law violations; the second concerns the nature and use of the preliminary injunction, particularly in relation to antitrust litigation. The defense in contract actions of illegality on the basis of federal antitrust law violations[7] has been pleaded since the beginning of the century. In 1902, the Supreme Court decided in *Connolly v. Union Sewer Pipe Co.*[8] that the alleged defense of a Sherman Act violation was insufficient in a contract action brought in federal court to recover the cost of materials bought. The violation alleged was that the Union Sewer Pipe Co. was an illegal combination, but the Court held that this status alone did not, under the Sherman Act, invalidate all sales made by such combinations.

In 1909, however, in *Continental Wall Paper Co. v. Louis Voight & Sons, Co.*[9] the Supreme Court allowed the illegality defense where it found the defendant was forced to become part of an illegal scheme (as the alternative to going out of business) by means of the contract sought to be enforced. The Court stressed that in this case both the combination of manufacturers and the agreement with the plaintiff were illegal. It distinguished *Connolly* by stating that the question raised there was

> whether a voluntary purchaser of goods at stipulated prices, under a collateral, independent contract, can escape an obligation to pay for them upon the ground *merely* that the seller, which owned the goods was an illegal combination or trust.[10]

The Court emphasized that it would not be a party to carrying out an illegal agreement even though "the result of applying that rule may sometimes be to shield one who has got something for which as between man and man he ought, perhaps, to pay, but for which he is unwilling to pay."[11]

Six years later in *D.R. Wilder Manufacturing Co. v. Corn Products Refining, Co.*[12] the Supreme Court refused to allow the illegality defense

5. *Id.* at 316 n.3.
6. *Id.* at 317.
7. The defense of illegality in contract actions on the basis of federal antitrust law violations will hereinafter be referred to as the illegality defense.
8. 184 U.S. 540 (1902).
9. 212 U.S. 227 (1909).
10. *Id.* at 261 (emphasis in the original).
11. *Id.* at 262.
12. 236 U.S. 165 (1915).

to a state court contract action for goods bought by the defendant where the alleged illegality was that the plaintiff was an illegal combination and therefore had no legal existence. The reasons for the Court's decision were that defendant had previously recognized and dealt with plaintiff as an existing legal entity, that plaintiff's status as an illegal combination was unrelated to the sales contract, and that the contract itself was not inherently illegal. The Court distinguished *Continental Wall Paper* on the ground that the contract there was illegal not because one of the parties to it was an illegal combination, but because inherent in the contract were "elements of illegality."[13] The "elements" to which the Court looked were:

> (a) the relations of the contracting parties to the goods sold, (b) the want of real ownership in the seller, (c) the peculiar obligations which were imposed upon the buyer, and (d) the fact that to allow the nominal seller to enforce the payment of the price would have been in and of itself directly to sanction and give effect to a violation of the Anti-Trust Act inhering in the sale.[14]

In denying the illegality defense to a federal court contract action in *A.B. Small Co. v. Lamborn & Co.*,[15] the Supreme Court held that the contracts sued on were not themselves illegal but were collateral to an illegal combination. The rationale was much like that in *Wilder*, but the Court elaborated somewhat on the nature of a collateral agreement. The Court observed that this appeared to be a situation involving the sale of goods owned by the buyer to a seller who was not a party to the illegal combination, and there was no restriction on the buyer's rights to resell the goods.

More than twenty years later the Supreme Court again confronted the illegality defense issue in *Bruce's Juices, Inc. v. American Can Co.*[16] There the question was whether renewal notes representing the purchase price of goods sold and delivered were uncollectible in a state court action if it was found that the vendor violated the Robinson-Patman Act.[17] In the face of a lengthy dissent by Justice Murphy, the Court found that even assuming (but not deciding) that plaintiff committed such a violation, defendant would not be allowed to avoid payment on the notes. Behind the Court's decision were two major concerns: (1) the alleged antitrust violation arose in connection with discounts in sales to others and thus the alleged discrimination would not be effected simply by enforcement of the contract between Bruce's and American Can; and (2) Bruce's had already filed an antitrust action against American Can and because both treble damages and criminal sanctions were available under the Robinson-Patman Act, to

13. *Id.* at 177. This is one place where one can get some judicial guidance concerning how to make the determination that a contract is inherently illegal.

14. *Id.*

15. 267 U.S. 248 (1925).

16. 330 U.S. 743 (1947).

17. 15 U.S.C. §§13, 13a (1970).

allow Bruce's to escape payment would provide it with a windfall in addition to the other available remedies. The Court took care to point out that its holding was consistent with its earlier holding in *Continental Wall Paper* by citing that case as supporting the view that when the contract sued upon is not intrinsically illegal, *i.e.*, is not "an agreement to which both defendant and plaintiff are parties, and which has as its object and effect accomplishment of illegal ends which would be consummated by the judgment sought,"[18] the court will not allow the defense where the result will be that the defendant will obtain property under a contract for sale without having to pay for it. The essential bases for the Court's decision, then, seem to be that the antitrust violation was not inherent in the transaction between the parties and that the remedies set out in the antitrust laws are exclusive.[19]

The defendant in *Kelly v. Kosuga*[20] raised the defense of illegality under the Sherman Act in an action brought in federal court to recover the unpaid balance due on goods he contracted to buy from the plaintiff and later refused to accept. Defendant alleged that this sale was arranged subsequent to threats by the plaintiff that he would flood and thereby depress the market for these goods unless defendant and others entered into agreements to purchase the goods from him. The Court, noting that the illegality defense based on a violation of the antitrust laws was not favored, stated:

> [W]hile the effect of illegality under a federal statute is a matter of federal law after *Erie R. Co. v. Tompkins*, 304 U.S. 64, still the federal courts should not be quick to create a policy of nonenforcement of contracts beyond that which is clearly the requirement of the Sherman Act.[21]

The Court therefore required defendant to pay for his goods.

Notwithstanding the fact that the criteria which emerge from these Supreme Court cases governing the application of the illegality defense are anything but clear, lower federal courts have not hesitated to consider the defense: some have allowed it to bar recovery on the contract[22] and some have not.[23] In addition, some state courts have entertained the antitrust violation defense and have themselves made the determination whether the defense was sufficient, *i.e.* whether or not the *federal* antitrust laws

18. 330 U.S. at 755.

19. *Id.* at 757.

20. 358 U.S. 516 (1959).

21. *Id.* at 519.

22. Farbenfabriken Bayer A.G. v. Sterling Drug, Inc., 307 F.2d 207 (3rd Cir. 1962); Beloit Culligan Soft Water Serv., Inc. v. Culligan, Inc., 274 F.2d 29 (7th Cir. 1959).

23. Denison Mines, Ltd. v. Michigan Chem. Corp., 469 F.2d 1301 (7th Cir. 1972); El Salto, S.A. v. PSG Co., 444 F.2d 477 (9th Cir. 1971); Dickstein v. duPont, 443 F.2d 783 (1st Cir. 1971); Sunshine Packers, Inc. v. American Can Co., 395 F.2d 86 (5th Cir. 1968); Lewis v. Seanor Coal Co., 382 F.2d 437 (3rd Cir. 1967).

have been violated.[24] The practice of the state court deciding the federal antitrust issue for purposes of a defense was expressly approved by the Second Circuit in *Lyons v. Westinghouse Electrice Corp.*[25]

Two features become evident from this account of some of the past uses of the illegality defense: (1) all levels of courts from the Supreme Court to lower federal courts to state courts have heard and decided the merits of the illegality defense; and (2) while the concerns and policies of the several courts which have considered the defense are similar[26] and the analytical approaches used in reaching decisions are similar,[27] there emerges no clear principle for determining whether a given contract will be enforceable because it is collateral to an alleged antitrust violation, or that it will be unenforceable because it is an embodiment of the violation.[28]

Review of the second major area of concern in *Response of Carolina*, the use of the preliminary injunction, indicates that this device is an extraordinary remedy, to be used with particular restraint when a federal plaintiff is seeking to enjoin a state court proceeding.[29] Preliminary injunctions are,

24. American League Baseball Club of New York, Inc. v. Pasquel, 188 Misc. 102, 66 N.Y.S.2d 743 (Sup. Ct. 1946); Jamaica Sash & Door v. Prudential Improvement Serv., Inc., 137 N.Y.S.2d 593 (Sup. Ct. 1954).

25. 222 F.2d 184, 187 (2d Cir. 1955). The court goes on to suggest that the import of the grant to federal courts of exclusive jurisdiction over wrongs committed under the antitrust acts is that decisions of other courts on questions concerning the federal antitrust laws will not operate to collaterally estop the federal court.

26. Among these are the interests in enforcing the antitrust laws, in not allowing a party to a contract to get something for nothing, in not allowing the court to become a party to a violation of the antitrust laws through enforcement of an illegal agreement, in accommodating the tension between the fact that the antitrust statutes provide express sanctions and the fact that the effects of non-enforcement of a contract may be to work a penalty in some cases. *See* Sobel, *Anti-Trust Defenses to Contract Actions: A Question of Policy Priorities*, 16 ANTITRUST BULL. 455, 465 (1971). Mr. Sobel also cites two other policies which he thinks are important in these cases: "[T]he policy of encouraging uniform interpretations of antitrust laws and the policy of keeping simple contract actions simple . . . ." *Id.* at 465.

27. The basic approach seems to be to ask whether the alleged illegality is inherent in the contract, or whether the portion sued on is collateral to the illegality.

28. The difficulty is, how is it decided whether a contract provision is inherently illegal or that it is instead collateral to the illegality? The problem area is not with the extreme cases but with the cases in the middle where there is some overlap of illegality in the contract sued upon. Several suggestions have been made by courts and commentators as to what makes an agreement collateral to the illegality or what factors a court should look at in deciding the question. *See* Comment, *The Defense of Antitrust Illegality in Contract Actions: A Suggested Rationale*, 15 KAN. L. REV. 183 (1966), where it is argued that one constant thread running through the cases where the defense was allowed to defeat recovery is that the particular defendant has involuntarily entered the contract in the face of economic coercion by the plaintiff. *See also* text accompanying note 13, *supra*.

29. 11 C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE: CIVIL §2942, at 378 (1969). Note that 28 U.S.C. §2283 (1970) provides:

> A court of the United States may not grant an injunction to stay proceedings in a State court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments.

however, extremely valuable tools, particularly in private antitrust actions,[30] because antitrust litigation often takes place over extended periods of time, and there is a need to prevent further violations and to protect witnesses from retaliation.[31] In addition, the need and cost of discovery in such litigation are apt to be great. The tests adopted by the Fifth Circuit in *Response of Carolina* for determining whether an injunction should issue were enunciated in *Canal Authority of Florida v. Callaway*.[32] These tests are to be applied in light of the principle that a preliminary injunction should not be granted to protect the status quo unless the court's ability to render meaningful decrees on the merits would otherwise be jeopardized.[33]

The central concern in *Response of Carolina* is the rather narrow question of whether a preliminary injunction to preserve the status quo, including the possible contract action defense of illegality on the basis of antitrust law violations, is appropriate pending resolution of a federal antitrust action. In *Helfenbein v. International Industries*[34] the district court refused to issue a preliminary injunction for a threatened unlawful detainer action in a state court where the suit for injunction was based on the claim that the lease contracts sued upon contained tie-in agreements which violated state and federal antitrust laws. In affirming, the court of appeals reasoned that because the threatened eviction was premised on plaintiff's default in rent and interest payments, among other things, and because there was no defense as to these items under state laws because the lease contract provided for summary eviction upon any default by plaintiff sublessee, there existed no equitable ground for a federal court to intervene. In addition, the court stated: "There is no authority under the federal anti-trust laws to enjoin state enforcement or remedy for collection of *ordinary debts*

30. 15 U.S.C. §26 (1970) is the injunctive relief provision, including preliminary injunctions, for private parties in antitrust suits. It reads:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue . . . .

31. MacIntyre, *Anti-Trust Injunctions: A Flexible Private Remedy*, 1966 DUKE L.J. 22.

32. 489 F.2d 567 (5th Cir. 1974).

The four prerequisites are as follows:

> (1) a substantial likelihood that plaintiff will prevail on the merits, (2) a substantial threat that plaintiff will suffer irreparable injury if the injunction is not granted, (3) that the threatened injury to plaintiff outweighs the threatened harm the injunction may do to defendant, and (4) that granting the preliminary injunction will not disserve the public interest . . . . *Id.* at 572.

33. *Id.* at 573.

34. 438 F.2d 1068 (8th Cir. 1971).

incurred for goods delivered or services rendered."[35] As the eviction proceeding did not involve enforcement of the conduct prohibited by the federal antitrust laws, *i.e.*, the alleged tie-in agreement,[36] the defenses which plaintiffs desired to protect via the injunction from "loss or damage" were considered to arise from state laws, and injunctive relief under 15 U.S.C. § 26 (1970) was not allowed to protect such defenses.

Milsen Co. v. Southland Corp.[37] concerned the question of whether a preliminary injunction should issue in order to prevent what was alleged to be the irreparable harm to a franchisee in defendant franchisor's move to terminate the franchise agreement pending trial of plaintiff's antitrust action against the franchisor. The court of appeals found that the district court had made a clear error of law[38] in using the *Kelly* cases to control all aspects of the case, and in part reversed the lower court's denial of an injunction. The court decided that while the *Kelly* rationale was applicable with regard to the rent in question, it should not be the basis for allowing the defendant to collect franchise fees or terminate the franchise agreement until the federal antitrust questions were settled. As distinguishing factors, the court noted that the *Kelly* cases involved goods bought and resold, whereas in *Milsen* what plaintiffs owed were franchise fees which were used to finance defendant's allegedly illegal scheme. Moreover, refusal by the buyers to pay their debts in the *Kelly* cases entailed possible loss of profit but not loss of their businesses, while in *Milsen* plaintiff would have lost its stores if it had refused to cooperate with defendant's anti-competitive practices. "Most important," said the court, "if a court allows defendants to collect the franchise fees or terminate the franchises, it must in effect approve the possible anti-trust violations."[39] The *Milsen* court stated clearly that it was not holding that plaintiff was not required to pay any franchise fees to defendant, but that the reasonable value of the services which benefitted plaintiffs and were not bound up with illegal practices by defendants should be offset in any treble damages award to franchisees. The court noted that "[m]any courts have held defendants who are or may be guilty of anti-competitive practices should not be permitted to terminate franchises, leases or sales contracts when such terminations would effectuate those practices."[40] The *Milsen* court approved of the view of other courts that

35. *Id.* at 1071 (emphasis added).

36. The court noted that

> [t]here is no evidence that the eviction proceeding is based upon plaintiffs' refusal to continue to buy according to any tie-in agreement. The essence of plaintiffs' complaint is that the state court action arises from their failure to pay for what they have received. *Id.* at 1071-72.

37. 454 F.2d 363 (7th Cir. 1971).

38. *Id.* at 368.

39. *Id.*

40. *Id.* at 366.

> [t]he public interest in encouraging anti-trust prosecutions by private parties . . . and the need for such parties to continue in their businesses while the legal claims are tried have persuaded courts to restrain terminations pendente lite.[41]

Similarly, in *Bergen Drug Co. v. Parke, Davis & Co.*,[42] the Third Circuit reversed the lower court's denial of injunctive relief where plaintiff alleged that without an injunction restraining defendant's refusal to sell to plaintiff, the plaintiff could not successfully prosecute the main claim under the federal antitrust laws because it would be unable to secure the cooperation of other drug wholesalers and retailers as witnesses because they would fear the same sort of retaliation. Other cases indicate that the grant of a preliminary injunction to prevent termination of distributorship[43] or carrier[44] agreements is appropriate in the context of a pending antitrust suit, even though plaintiff may not have clearly demonstrated that his antitrust action was likely to succeed.[45]

In *Response of Carolina*, the franchisor's attack on the district court's grant of an injunction was based on two challenges: (1) that the franchisees' situation did not meet the prerequisites for a preliminary injunction; and (2) that issuance of such an injunction was prohibited by 28 U.S.C. §2283 (1970). The court of appeals based its reversal on the first point and thereby avoided decision on the anti-injunction statute question.

The court assumed at the outset that there is no state court jurisdiction to decide a federal antitrust law defense, although it made no citation to authority. In laying out the four prerequisites for a preliminary injunction,[46] the court focused on the irreparable harm requirement. It then moved into a discussion of the antitrust violation defense as it appeared in *Bruce's Juices* and *Kelly* and as it was used in *Continental Wall Paper v. Voight*. This latter use of the defense, where the violation is inherent in the contract, the court characterized as the "Voight exception." The court then made its key move: *If* the agreement sued on was collateral to the antitrust violation, then it follows that there was no irreparable harm because of an antitrust violation, and quite naturally, no preliminary injunction should issue. The court buttressed its position that the illegality defense should be sparingly allowed with two policy arguments: (1) a party to a contract should not get something for nothing; and (2) the remedies enumerated in the antitrust laws should be exclusive. This case, announced the court, involved an agreement collateral to any antitrust violation and therefore, there was no irreparable harm caused by antitrust law

41. *Id.* at 366-67.
42. 307 F.2d 725 (3rd Cir. 1962).
43. Brandeis Mach. & Supply Corp. v. Barber-Greene Co., 503 F.2d 503 (6th Cir. 1974).
44. Lepore v. N.Y. News, Inc., 346 F.Supp. 755 (S.D.N.Y. 1972).
45. *Id.* at 758-59.
46. *See* note 32, *supra*.

violation and no injunction should issue. As a small concession to consideration of the facts before it, the court near the end of its opinion noted that

> [t]he substantial amounts owed Leasco by appellees are not argued to be monies due from appellees under the 70% clause for selling outside their territories of primary responsibility . . . rather the record reflects that appellees terminated all payments.[47]

There appear to be two major problems with the court's opinion. First, its analysis of the use of the preliminary injunction and the use of the illegality defense in the same legal context is questionable. Second, this problem in analysis leads to the result that it is difficult to determine what the court's decision means—in particular, what is the state court supposed to do now? The fundamental problem which this case presents is whether a preliminary injunction should issue in order to preserve appellees' possible illegality defense and their status as franchisees under their franchise agreements with appellant Leasco. There appear to be several questions which bear on this problem. Is the defense permissible in the particular case? What court can and should make this decision? How is it to make this decision? When is the decision to be made in relation to the rest of the litigation between the parties both in state and federal court? This court concentrated on the question of whether or not the defense should be allowed in the particular case, virtually to the exclusion of the other issues. Unfortunately, it appears that the court cannot answer this first question in a manner that results in guiding principles without consideration of the other questions. Further, the court does not give reasons for its stance on the permissibility of the illegality defense in this particular case. It does not take note of, discuss, analyze, or give reasons for its apparent decision that the agreement sued on is collateral to any illegality. Nor does the court indicate that it appreciates the difficulty of making the decision, or what factors and policies should be considered. Yet other courts have shown great concern for these matters.[48] The court, instead, grounds its decision on the hypothetical: "If the contract provisions sued on in the state court do not embody or further the anti-competitive practices . . . ."[49]

The court in *Response of Carolina* showed little appreciation for or understanding of the preliminary injunction device. Its argument that franchisees would get a windfall which would amount to an augmentation of statutory remedies if the preliminary injunction were allowed to stand is not persuasive in an analysis of the intended uses of *preliminary* injunctions. Preliminary injunctions effect adjustments in the timing of decisions. The preliminary injunction issued by the district court did not mean

47. 498 F.2d at 320.
48. *See* text accompanying notes 12-15, *supra*.
49. 498 F.2d at 319.

that the franchisees would not ultimately have to pay for what they received. It meant that they were not required to pay immediately. It meant that the decision of whether the franchisor was guilty of antitrust violations should be made *before* a decision which might help to effectuate such violations was made. The cost to the franchisor was that it had to wait to receive payment. The cost to the franchisees of dissolving the injunction may very well be that they will be unable to pursue their antitrust remedies. This decision thus undercuts the legislatively[50] and judicially[51] sanctioned policy of encouragement of private enforcement of the antitrust laws. It also undercuts one of the basic purposes of the antitrust laws, the protection of small businesses.[52]

The court relies heavily on *Helfenbein* where the Eighth Circuit found that because there was no attempt to enforce the alleged antitrust violation in the threatened eviction proceedings, no injunction under 15 U.S.C. §26 (1970) should issue. One striking difference between the *Helfenbein* case and *Response of Carolina* is that at least with regard to the 70% clause, the state court in the contract action could be involved in enforcing the alleged antitrust violation quite directly in the latter case. Although the court here apparently found the rationale of the *Milsen* case inapposite,[53] *Milsen* nevertheless offers alternatives which would, perhaps, help to solve some of the problems raised by this decision. The *Milsen* court found it very easy to isolate debts that it thought the franchisee clearly owed on provisions independent of any possible antitrust violations. Thus the court required the franchisees to pay the rent while at the same time enjoining termination of the franchise agreement. The Fifth Circuit in *Response of Carolina* might have better accomodated the competing policies and problems in this case had it taken the following course of action: (1) refused to enjoin the action to collect on debts clearly unrelated to antitrust violations—the rent and reasonable royalties; (2) issued an injunction against actions by the franchisor which would effectively terminate the franchise agreements; and (3) issued an injunction preventing the payment of royalties under the highly questionable 70% royalties clause.[54]

50. Section 4 of the Clayton Act, 15 U.S.C. §15 (1970), 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.

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

52. J. VAN CISE, UNDERSTANDING THE ANTITRUST LAWS 17-21 (6th ed. 1973).

53. 498 F.2d at 319.

54. At this point there arises the question of what standard should be used to evaluate whether particular contract provisions are in violation of the federal antitrust laws, and thus should not be enforced until the merits of the antitrust violation charge have been decided. *See* text accompanying notes 44-45, *supra*, where it is suggested that something less than a clear showing of a violation would be sufficient.

The second major problem with the case is that it is difficult to ascertain what follows from this decision other than the fact that the lower court's grant of a preliminary injunction will be set aside. The court did not discuss the question of who should decide the federal antitrust violation defense, it merely announced that the state court may not. But as the *Lyons* case[55] indicated, this issue is by no means clearly settled. Having made this announcement, the court unfortunately failed to give a clear statement of whether it has decided the issue and if so, which way. The apparent instruction to the state court is that it should enforce only that part of the contract which does not violate federal antitrust laws. But what is the state court to do about the 70% clause? The alternatives seem to be: (1) assume the federal court decided it is enforceable; (2) assume the federal court decided it is not enforceable; (3) decide for itself whether the clause violates federal antitrust laws;[56] or (4) enforce the whole contract without considering the illegality defense and leave the franchisees to seek redress by way of their treble damages suit.

While all the implications of this decision are not clear, what is clear is that the Fifth Circuit did not give a full and adequate hearing on the antitrust violation defense because it failed to consider the competing policies involved or to enunciate what criteria it used to decide whether an agreement is collateral to a possible violation. In addition, the court has delayed, and perhaps precluded the possibility of such a full hearing. This decision, therefore, appears to deal a blow to the private enforcement of antitrust laws and to the protection and preservation of small businesses. The practical lesson of the case is that one who defaults on a contract with one against whom he has charged federal antitrust violations may be faced with a state court contract action barrier which he cannot scale because he has been deprived of the valuable preliminary injunction tool on the basis of that default.

SUSAN S. COLE

55. *See* note 25, *supra*, and accompanying text.

56. The attendant dangers of this alternative, of course, include non-uniform interpretation of the federal antitrust laws.