OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT

OF THE

UNITED STATES

CAPTION: ATLANTIC RICHFIELD COMPANY, Petitioner V.

USA PETROLEUM COMPANY

CASE NO: 88-1668

PLACE: Washington, D.C.

DATE: December 5, 1989

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IN THE SUPREME COURT OF THE UNITED STATES

ATLANTIC RICHFIELD COMPANY,

Petitioner : No. 88-1668

v. :

USA PETROLEUM COMPANY :

Washington, D.C.

Tuesday, December 5, 1989

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 10:07 a.m.

APPEARANCES:

RONALD C. REDCAY, ESQ., Los Angeles, California; on behalf of the Petitioner.

JOHN G. ROBERTS, JR., ESQ., Deputy Solicitor General, Department of Justice, Washington, D.C.; on behalf of United States and FTC as amici curiae, supporting the Petitioner.

MAXWELL M. BLECHER, ESQ., Los Angeles, California; on behalf of the Respondent.

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P R O C E E D I N G S

(10:07 a.m.)

CHIEF JUSTICE REHNQUIST: We'll hear argument first this morning in Number 88-1668, Atlantic Richfield Company v. USA Petroleum Company.

Mr. Redcay.

ORAL ARGUMENT OF RONALD C. REDCAY

ON BEHALF OF THE PETITIONER

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

The Ninth Circuit decision in this case creates a new private antitrust cause of action on behalf of competitors, the least-favored class of antitrust plaintiff to challenge price cutting, which is the essence of competition, and without requiring the competitor to prove that below prices pose any credible threat of injury to the consumer interests that are the primary concern of the antitrust laws.

Specifically, the Ninth Circuit decision permits a competitor to recover profits and sales lost as a result of increased competition from low prices imposed on its rivals by vertical maximum price fixing.

The error in the Ninth Circuit's decision is that it permits an antitrust recovery simply because a plaintiff's injury is causally linked to an antitrust

violation without requiring a determination whether the injury reflects the reasons why the Defendant's conduct violates the antitrust laws or whether allowing such a recovery would be inimical to the purposes of the antitrust laws.

As was also true of the competitor claims in Brunswick and in Cargill, the antitrust recovery sought here would be inimical to the purposes of those laws.

Now the procedural history and the facts are rather straightforward and are, in all material respects, undisputed. USA filed this lawsuit to challenge ARCO's 1982 marketing program designed to appeal to price-conscious consumers. At that time, ARCO decided to convert its marketing strategy from one of higher prices for more service and credit to lower prices with less service and hopefully larger volumes. ARCO, in effect, emulated a marketing strategy that theretofore had been employed mostly by the independent refiners.

ARCO also at that time engaged in many measures to cut the costs of refining and distributing gasoline, allowing it to lower its wholesale and retail prices. The resulting lower prices both at ARCO-owned and operated stations and at independently owned and operated ARCO brand stations were tremendously successful in attracting new customers, and the market share of ARCO brand gasoline

increased from approximately 12 percent to around 15 to 16 percent in a little over a year. As I said, it was this increased competition that led USA to file this lawsuit.

USA's complaint alleges a broad brush attack on ARCO's marketing program. USA in fact alleged that ARCO's changes in marketing techniques had actually caused it to enter an entirely distinct market, the discount gasoline market, of which USA said ARCO already had a 45 percent market share.

USA then alleged that ARCO was attempting to monopolize this market through predatory pricing in violation of Sherman Act Section 2.

Now USA also alleged Sherman Act Section 1 price fixing because much of the gasoline of ARCO that was sold in competition with USA was sold not by ARCO directly but, rather, by ARCO independently-owned ARCO dealers who competed with USA. USA needed Section 1 in order to hold ARCO responsible for the low prices of these ARCO dealers because, otherwise, USA's injury was too remote to confer standing in USA to challenge the allegedly predatory ARCO prices.

USA, therefore, alleged that ARCO had coerced its dealers to pass along these price cuts to consumers through threatened revocation of discounts, reductions of supply and termination of franchises.

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After ARCO moved for summary judgment on both Sherman Act counts, USA abandoned its discount market allegations and its predatory pricing case. It dismissed its Section 2 claim, and it eschewed any intention of proving predatory pricing in support of its Section 1 claim.

And USA made abundantly clear in opposing the summary judgment motion at issue here that it was not going to prove predatory pricing but, rather, that all it needed to prove was that ARCO had engaged in vertical maximum price fixing in violation of Section 1 and that price fixing was the cause, in fact, of USA's injury.

Now this contention, which is -- which is set out most clearly in USA's Statement of Genuine Issues in Opposition to ARCO's Summary Judgment Motion, framed the antitrust injury issue that the district court decided adverse to USA and which the Ninth Circuit then decided in USA's favor.

QUESTION: Well, as it -- as the case comes to us, is it conceded or clear that USA was injured and was injured by the agreement on maximum prices?

MR. REDCAY: What is clear as it comes to Your Honors is that there -- there was vertical maximum price fixing assumed here and that USA was injured as a result of the low pricing that resulted from the vertical maximum

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price fixing. What is not --

QUESTION: Well --

MR. REDCAY: What is not --

QUESTION: -- that -- that is -- well, then, maximum price fixing by agreement.

MR. REDCAY: It -- by coercive agreement.

QUESTION: Well, the -- the nonowned stations, there was an agreement, wasn't there?

MR. REDCAY: What is alleged in the complaint is that ARCO used coercion to cause those dealers to succumb to that coercion and charge prices lower than the dealers otherwise would have charged but for their -- but for the coercion and their succumbing to the coercion, which in fact is --

QUESTION: Well, that's -- that's tantamount to an -- I mean it should be treated the same as an agreement?

MR. REDCAY: Under -- under -- it is an agreement -- it is a combination conspiracy in violation of Section 1.

QUESTION: Yes. All right, then.

MR. REDCAY: Yes. This is a -- this is a case like Brunswick and Cargill and other antitrust cases --

QUESTION: So there was a Section 1 violation?

MR. REDCAY: For purposes of deciding this

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issue, there was an assumption of a Section 1 violation.

QUESTION: Yes.

MR. REDCAY: The problem is with the contention and that theory with these two facts undisputed doesn't pass muster under either of the two standards set forth in Brunswick for determining antitrust injury, each of which serves an important antitrust policy of avoiding overdeterrence by making sure that the treble -- the scope of the treble damage remedy that is -- that is imposed on any particular violation be related to the fact -- that which makes the conduct unlawful.

USA's claim fails at the threshold level because its lost profits and sales are not the type of injury that the rule against vertical maximum price fixing was intended to prevent.

QUESTION: Mr. Redcay, how -- how do you think the Albrecht decision bears on this question?

MR. REDCAY: I think Albrecht obviously is the Court's -- Court's articulation that -- that a coercive vertical maximum price-fixing agreement is, per se, illegal. Albrecht does not deal with or address the particular antitrust injury issue that is presented here.

I think that the way Albrecht bears on the issue is to make it perfectly clear that this Court most recently reaffirmed in Sharp that vertical maximum price

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fixing involved an agreement to force the dealer to adhere to a specific price.

QUESTION: Well, it seems to me if you have to look for a -- an antitrust injury, as you claim, that you are somehow altering the per se rule under Albrecht, whether you say so or not.

MR. REDCAY: Justice O'Connor, I don't believe so. I believe that Albrecht, which of course did involve a claim by a coerced dealer, or there it was a coerced distributor of newspapers, is perfectly consistent with our position.

Our view is that because it is the coercion that makes vertical maximum price fixing unlawful, that is the, to use the words of Brunswick, that is the vat. The coercion is the vat which makes the conduct unlawful, and as a result of that the coerced dealer, such as the plaintiff in Albrecht, certainly satisfies the threshold Brunswick standard, and the coerced dealer is a proper private plaintiff to bring this kind of a cause of action, and that -- we take no issue with either the per se rule or the antitrust injury of the coerced dealer.

QUESTION: So you wouldn't be here, I take it, if the dealer was suing?

MR. REDCAY: That's -- if the dealer was suing, what we would have to do is defend the case --

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QUESTION: You'd have to get Albrecht overruled or some -- and some others.

MR. REDCAY: We would -- we would -- what we would do, Your Honor, is to prove that -- that ARCO didn't engage in coercive price fixing. But we're here on a summary judgment because the wrong plaintiff is here.

USA, in effect, if I can -- if I can make it this way, USA is attempting to usurp a rule that this Court has created to protect the coerced dealer's pricing discretion and is trying to apply it to a wholly different injury that's never been identified in any of this Court's opinion as a reason for imposing illegality.

Another way of looking at it is that USA is taking a square peg, its claim as a competitor of a coerced dealer, and is trying to put it into a round hole. the -- that rule against vertical maximum price fixing.

Now Brunswick is intended to prevent just that kind of a squeeze, allowing only the round hole, the coerced dealer's claim, like the plaintiff in Albrecht, into the round hole in order not to divorce the private antitrust remedy from the purposes of the Sherman Act.

QUESTION: Mr. Redcay, reference is made to Albrecht. Do you think that case was correctly decided?

Don't be afraid.

(Laughter.)

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MR. REDCAY: If I were -- if I were sitting --

QUESTION: Justice White won't mind. Go ahead.

(Laughter.)

MR. REDCAY: I find more -- when I read the opinions in Albrecht, I will say that I find more persuasive Justice Harlan's dissent, and I do believe that in light of GTE v. Sylvania and Matsushita and Cargill and more recent decisions of the Court, I think that if the question of Albrecht were squarely presented, that I think that Albrecht should be overruled and that the vertical maximum price fixing should turn on the rule of reason and not a per se rule.

But I -- I have the comfort of not being here arguing that particular issue today.

QUESTION: You see, I was on the Eighth Circuit when Albrecht was reversed, but I didn't sit on the panel.

MR. REDCAY: Well, the interesting thing is that --

QUESTION: (Inaudible) if we don't overrule Albrecht?

MR. REDCAY: Certainly. In fact, it is my position that the issue of whether or not vertical maximum price fixing is to be judged under a per se rule or a rule of reason is irrelevant to the antitrust injury issue that's presented here.

Under a per se rule, the anti -- the procompetitive effects of price ceilings that result from vertical maximum price fixing are ignored for purposes of determining illegality because those procompetitive effects are presumably by law ignored -- they're outweighed by the anticompetitive effects on the coerced dealer.

Under a rule of reason, the procompetitive effects must be balanced against the anticompetitive effects to determine if the conduct is unreasonable and, therefore, illegal.

What is important for antitrust injury purposes, however, is that under either of those scenarios, the effects on competitors of the coerced dealers are procompetitive by definition; and, therefore, it really doesn't matter to me whether you apply a rule of reason or a per se rule.

QUESTION: If ARCO could have predicted that consequence, and that apparently is the consequence that occurred, does that mean that it was entitled as a matter, say, of business judgment and legal ethics to enter into the agreements that it did?

MR. REDCAY: Well, what is alleged here is -- is --

QUESTION: Assume -- assume a price-fixing

agreement.

MR. REDCAY: Right. Assuming there is a price-fixing agreement, then obviously ARCO has violated the law, and ARCO is subject to all the -- all the sanctions that are available, criminal sanctions as well as civil sanctions by the class of plaintiffs against -- for whom the rule is designed to protect.

QUESTION: And I assume their attorneys could not participate in -- ethically in drawing the agreements?

MR. REDCAY: That -- that's correct. But what is involved here isn't drawing agreements.

QUESTION: Well, let's -- let's assume they were in agreement.

MR. REDCAY: Correct. And the problem I -- the problem in arguing any standing or antitrust injury issue is that one assumes the violation. We obviously dispute that any violation occurred, but -- but what you need for purposes of standing or antitrust injury or these doctrines that are designed to identify who may properly bring a claim, you need some issue that will be available to summary adjudication and to quick determination.

And so --

QUESTION: But as I understand the law, sitting in the corporate board room, ARCO should not have engaged in this conduct if, in fact, it constituted an agreement

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to fix maximum -- maximum prices.

MR. REDCAY: Correct. But what is involved -- the problem we have here is a case where the evidence is highly ambiguous.

What ARCO wanted to do, as I indicated in my statement of facts, was it wanted to lower its gasoline prices. It wanted to become more competitive. And because it distributes through independent dealers, it had -- it was in a situation where it had to come up with a situation to get those prices down to dealers. And so it lowered -- it lowered the wholesale price, but that's about all it could do, and then it tried to persuade, as the courts have made very clear that ARCO can engage in exposition, persuasion and argument to get its dealers to lower the prices.

And we believe that's all ARCO did, that's all ARCO's people were counseled to do. The question we will have to try if we ever have to try it is whether that exposition, persuasion and argument went over the line and went into coercion. We don't believe it did, but in any event we certainly don't believe that, as I said, the square peg should be allowed to recover because, otherwise, ARCO would be responsible in treble damages not only to all the dealers they allegedly coerced but to USA, to Shell, to Mobil, to Chevron. And it's that kind of

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broad exposure which rules like Brunswick are designed to prevent.

QUESTION: (Inaudible) if, as Justice Kennedy suggests, if ARCO had just said would you like to be a dealer; yeah; well, here, sign up, and here's an agreement that expressly says don't sell for any higher price. There were express price-fixing agreements, you -- then you would be arguing the same thing, I suppose?

MR. REDCAY: That -- that the dealer would have the ability to challenge that but not a competitor of the dealer. Yes, Your Honor.

QUESTION: Mr. Redcay --

QUESTION: But -- but there's a lot of things you can do alone but not by agreement.

MR. REDCAY: That -- and that's correct, and that -- that is the reason for making those illegal, but it is not a reason for allowing any particular plaintiff who might be able to say that he was injured as a cause in fact of that to be able to recover treble damages, which is a very potent remedy.

QUESTION: Mr. Redcay, it seems to me you may -- you may be understating the effect of our agreeing with your argument. You say that's no doubt that the coerced dealers would -- would have a cause of action. You say that coercion of the dealers is the evil at which

the antitrust law is directed. It doesn't seem to me that's true at all.

You're -- you're relying on the language of -- of Brunswick that says that loss must be the type that the antitrust laws were intended to prevent and that flows from that which makes the defendant's acts unlawful.

It seems to me that if minimum price fixing -- or maximum price fixing is unlawful, the loss it's intended to prevent is -- is obtaining control of the market and therefore being -- thereafter being able to raise the prices. I'm not sure that the antitrust law is addressed against the coercion of retailers. Who cares if retailers are coerced?

MR. REDCAY: The -- the only reason that I care and I take the position is because Albrecht is on the books, and I think as long as Albrecht is on the books that would be a more difficult case. And I was -- I was -- I'm not arguing to overrule Albrecht.

QUESTION: I -- I think the logic of your theory might have to lead us to say that there is no cause of action on the part of anybody except a consumer who is ultimately harmed by the market monopolization that this maximum price fixing produces.

MR. REDCAY: There's -- there are two different articulations in Brunswick. One is the -- if whether or

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not the conduct is that which the law is intended to prevent; and the other is whether or not consumer welfare is injured.

I think in -- in your case, Justice Scalia, your -- if both of them are required, then you're right. I -- we have an easier case because I think here our -- our defense satisfies both of those standards.

Thank you.

QUESTION: Thank you, Mr. Redcay.

Mr. Roberts.

ORAL ARGUMENT OF JOHN G. ROBERTS, JR.

ON BEHALF OF UNITED STATES AND FTC

AS AMICI CURIAE, SUPPORTING THE PETITIONER

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

Prior to 1982, USA Petroleum was quite content with conditions in the gasoline market. According to its complaint, the major oil companies did not compete on the basis of price but, instead, advertised heavily and offered extras like credit cards, clean stations and attendants to pump gas, check the oil and wipe the windshield. They left price competition on the basis of the bottomline price at the pump to the independents like USA.

In 1982, ARCO changed its strategy. It saw what

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the independents were doing, said two can play that game, and embarked on a campaign to lower the price consumers would have to pay for ARCO gasoline. The campaign was successful. ARCO increased its market share, while USA lost sales and profits to the newly competitive ARCO dealers.

Now the crux of USA's complaint is that ARCO lowered its prices by forcing the ARCO dealers to do so; but so far as the antitrust laws are concerned, any coercion of ARCO dealers by ARCO is none of USA's business. The dealers can stand up and sue ARCO.

QUESTION: Well, let's -- may I ask right there the same -- really the same question Justice Scalia asked, I suppose. But if the ultimate test is whether there is adverse effect on competition within the market as a whole, how would a dealer have standing to make the argument? Couldn't -- couldn't you -- couldn't ARCO defend on the same ground, well, the market as a whole is much more competitive this way, it's too bad that you're hurt?

MR. ROBERTS: The reason that this Court has identified in Albrecht for finding this practice illegal is the coercion on the dealers. It doesn't look to the level of the particular price. It has said that it is the --

QUESTION: But that may be so, but do you think there is antitrust injury in the sense the term is used in Brunswick and other cases if the suit had been brought by a dealer? Would there be antitrust injury?

MR. ROBERTS: Yes, I do, Your Honor, because the antitrust injury inquiry looks to whether the injury flows from the reason the particular restraint is unlawful. The reason the restraint is unlawful is because it limits the freedom of the dealers, because it may prevent some of them from surviving, because it may prevent some of them from offering additional services to consumers.

All those were the reasons identified in Albrecht. That's the reason this is illegal. The one who suffers those injuries can bring suit, and that's the coerced dealers.

QUESTION: In reality, though, it seems to me that's the definition of a -- of the violation, not a definition -- not a description of the injury. That's just like saying that the -- the evil in minimum price fixing is prescribing a minimum price. That's not the evil. That's the violation. The evil is harming consumer welfare.

MR. ROBERTS: Well --

QUESTION: It seems to me that in this case the evil or the violation is coercing the dealers, and the

evil is how that disrupts the market.

MR. ROBERTS: Maybe it would be better if you looked at the price by itself and the antitrust violation. The violation, the reason this is illegal, is the coercion.

There's nothing wrong with the price that ARCO dealers were -- at which they were selling their gasoline. The case comes to this Court on the assumption that no predatory pricing is involved. The price is a lawful price, and USA's complaint is that they're forced to compete against that lawful price.

QUESTION: You could say the same thing about an agreement. You could say there's nothing wrong with everybody charging a price. The evil is the agreement, not the harm that it causes to anybody but the agreement in a -- in a run of the mine Sherman Act violation.

The agreement is what makes that invalid. Coercion is what makes this invalid. But neither agreement nor coercion is the evil against which the law is directed, it seems to me.

MR. ROBERTS: I think that's precisely correct, and that's why in an agreement case, horizontal conspiracy to fix prices, we don't look to what level the price is. It's the agreement that is the evil. That's why the particular violation is met. You don't look to the level

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of the prices. So, too, here --

QUESTION: (Inaudible) is agreed. Is that where your logic would lead?

MR. ROBERTS: Well, it -- it is two groups. The person -- the person who agreed can sue, and cases are brought by co-conspirators. And consumers, the ultimate beneficiaries of the antitrust laws, as this Court made clear in the Reiter case, they always have -- suffer antitrust injury.

And, in fact, as a theoretical matter I think consumers could sue in this case, although it would be hard to establish damages, consumers who, for example, preferred credit cards and additional services.

But it is the dealers who have in the past brought vertical maximum price fixing cases to this Court. That was true in Kiefer-Stewart. It was true in Albrecht. For that matter, it's true in the other vertical restraint cases such as Monsanto and Sharp.

In contrast, the Ninth Circuit majority below did not, and USA cannot, point to a single case in which the Court has allowed a competitor of the coerced dealer to bring suit complaining about the coercion his rival faces.

QUESTION: Is it the government's position that these kind of agreements are beneficial for the economy?

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MR. ROBERTS: We have argued in the past, Your Honor, to this Court that these types of agreements should be evaluated under a rule of reason in particular cases and not a per se rule, but we do not submit that Albrecht should be reconsidered in this case. It -- it is a particularly inappropriate vehicle for such reconsideration because the Court has to reach the antitrust injury requirement whether the violation is per se illegal or illegal under a rule of reason.

And that's why we think the per se label makes absolutely no difference whether the violation is per se illegal or illegal under a rule of reason.

And that's why we think the per se label makes absolutely no difference to a resolution of the antitrust injury question. The per se label goes to the substantive violation under the Sherman Act. The antitrust injury inquiry goes to the question of who can sue to remedy that violation, in this case under Section 4 of the Clayton Act.

Per se violations of the antitrust laws are not somehow more sinister or evil than rule of reason violations. The per se label simply goes to the evidentiary showing that the plaintiff must carry. So there is no sound policy reason for making an exception to the antitrust injury requirement in per se cases.

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We think that Matsushita made clear that there was no such exception. That case involved horizontal price fixing paradigm, per se illegality, and yet the Court still went through the Brunswick antitrust injury analysis.

The approach of the majority below, we think, would render the antitrust injury requirement superfluous. It would, for example, lead to a different result in cases this Court has already decided. For example, in Cargill the allegation was that a merger violated the antitrust laws and that the merged entity would be able to lower prices, heightening the competition faced by the plaintiff. The Court nonetheless held there was no antitrust injury.

The Ninth Circuit test asks whether competition in a market has been affected, and if you are a competitor then you have standing. Applying that test to Cargill would lead to a different result. The Ninth Circuit's approach, as Judge Alarcon noted in dissent, really reduces simply to a cause in fact test. But, as the Court made clear in Brunswick, there's more to the antitrust injury requirement than that.

The bottom line here is that USA Petroleum liked it a lot better when it did not have to compete with ARCO dealers on the basis of price at the pump. Now if those

new lower prices that consumers like so much are the result of illegal coercion of the ARCO dealers, those dealers can sue; but USA Petroleum, a competitor of those dealers, should not be permitted a reward of treble damages --

QUESTION: Mr. Roberts, would --

QUESTION: (Inaudible) would make the same argument is there was horizontal agreement to -- among two competitors of -- ARCO's -- one of ARCO's competitors?

MR. ROBERTS: I believe so, Your Honor, with -- with one --

QUESTION: That -- and that they agreed that -- with each other that they would have their dealers charge no more than a certain price?

MR. ROBERTS: Well, certainly if there were -- if there were -- if this --

QUESTION: And the result was that, same here. They were -- the prices were lowered, and USA got hurt. So it's irrelevant to you that these maximum prices were set by agreement, either vertically or horizontally?

MR. ROBERTS: I think that's right, Your Honor. The antitrust injury requirement does apply in horizontal cases. Both Brunswick and Cargill were horizontal cases.

The one caveat in those cases, which I think makes this easier, is that it's difficult to find the

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suitable plaintiff. Here, we have the dealers who can sue. In the horizontal case, the only plaintiff, I think, is the consumer who may, at least in the short term, suffer no injury at all, as he has lower prices.

QUESTION: Well, why couldn't the dealers sue in those cases, too?

MR. ROBERTS: Well, certainly the dealers could -- could sue in the case where the alleged horizontal agreement is at the -- at the supplier level.

QUESTION: Right. May I ask you this? What if the -- what if ARCO had 50 percent of the market instead of 15 percent? Would you make the same argument?

MR. ROBERTS: The predatory pricing argument would be more credible in that case, although I -- I think that few commentators think even 50 percent of the market is enough to have a dangerous --

QUESTION: I'm curious to know. I understand it. Assuming no predatory price, I'm just curious to know what the government's position would be in that case.

MR. ROBERTS: In the absence of predatory pricing, there is no antitrust injury other than by the coerced --

QUESTION: What about a 70 percent of the market?

MR. ROBERTS: Again, assuming no predatory

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pricing, which is --

QUESTION: You'd say the same thing?

MR. ROBERTS: -- the district court and the court of appeals, the answer is still the same.

QUESTION: Thank you, Mr. Roberts.

Mr. Blecher, we'll hear now from you.

ORAL ARGUMENT OF MAXWELL M. BLECHER

ON BEHALF OF THE RESPONDENT

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

The Court has been presented with four distinct analytical approaches to resolving this question of antitrust injury, and before I deal with those four analytical approaches I'd like briefly to place the litigation in its proper context, which I don't believe Mr. Redcay, in fairness, has done.

What's alleged in the complaint and what's assumed to be the factual predicate for the appeal process through the Ninth Circuit and here is that ARCO organized and enforced a vertical price-fixing combination with its dealers to eliminate the independent segment of the gasoline selling market by setting a price either below the market level or below some standard, of course, which was not set out with specificity in the complaint. That's what they were charged with.

Now, ARCO --

QUESTION: But you ultimately withdrew your claim of predatory pricing, did you not?

MR. BLECHER: I withdrew, Mr. Chief Justice, my claim of Section 2 under the Sherman Act. It is absolutely incorrect, and I invite the Court's attention respectfully to the transcript of the argument before District Judge Gray in October of 1986 where we told him it wasn't necessary to reach the question of predation because if they applied this Court's decision in Matsushita it was only necessary in a Section 1 case that we show the level of price to be below the prevailing market price.

But there's no place where we ever withdrew the claim of predatory price which is alleged in the complaint, as distinct from the entire requisite elements of monopolization.

QUESTION: Let me call your attention to page 25a of the Petition for Writ of Certiorari which -- and which is the beginning of part IV of the Ninth Circuit's opinion. In the second sentence there it says, "We are asked to determine whether a retail competitor suffers antitrust injury in the form of lost profits as a result of a nonpredatory maximum vertical price-fixing agreement."

I would think the Ninth Circuit certainly understood that you have predatory pricing (inaudible).

MR. BLECHER: I don't believe that's true because I believe if you look at the decision of Judge Gray which is in the petition --

QUESTION: I'm talking about the Ninth Circuit's opinion, not Judge Gray's opinion.

MR. BLECHER: The Ninth Circuit was responding to Judge Gray's opinion. What Judge Gray found was that we failed to prove a properly defined relevant market in which there was a dangerous probability of monopolization.

In light of those facts, he concluded that we could not establish the requisite antitrust injury. That's what he found, and that's what the Ninth Circuit, as a shorthand expression in my view, was talking about predation.

QUESTION: Well, they certainly say they're considering it on the assumption that the pricing is non-predatory. They say that in so many words.

QUESTION: And they found for you even though -- even though they assumed or held or -- thought that predatory pricing was (inaudible).

MR. BLECHER: Yes. Well, now we get into the semantic question of what becomes predatory.

I told the district court and we told the Ninth

Circuit, and I believe the predicate of their decision was that we were talking about setting a price below the market level. But at not time did we actually say we can't prove price predation by a -- by a below cost standard.

QUESTION: But you aren't defending the Ninth Circuit.

MR. BLECHER: I am defending the Ninth Circuit, and I'm --

QUESTION: (Inaudible.)

MR. BLECHER: The point is --

QUESTION: (Inaudible.)

MR. BLECHER: Let's assume no predation.

QUESTION: Are you still saying (inaudible)?

MR. BLECHER: Absolutely. By setting the price below the market level. That's where we're coming at.

Now -- now ARCO's response to this -- there's four separate responses, and let's take them in some order. ARCO is the party to the case. What they say is required is that we prove full monopolization. In their view, we have to prove a dangerous probability of -- successful monopolization achieved by pricing below some appropriate level of cost.

Now that's impossible to square with this Court's decision in Copperweld, because in Copperweld the

Court said plainly, unequivocally, whatever the requirements of Section 1 are, they don't involve monopolization under Section 2.

QUESTION: Wait. They -- they say you have to prove it. They don't say that anybody has to prove it in order to establish a violation of Section 1. Their point is in order for your client to sue, that's what needs to be proven.

MR. BLECHER: But -- but I submit to you that you can't possibly reread -- rewrite Section 1 to include the elements of monopolization under Section 2 under the rubric or guise that this is antitrust injury.

QUESTION: They are not saying that there's no violation of Section 1. They're saying there may well be a violation of Section 1 but you have no standing to complain about it.

MR. BLECHER: They're saying we have standing, I think, Justice Scalia. I think they're saying we don't have -- haven't shown antitrust injury unless we take the simple price-fixing combination under Section 1 and under the rubric of antitrust injury prove each required element of Section 2, which is the low cost pricing and a dangerous probability of monopolization.

Now by doing that, they use the rubric or the guise of antitrust injury and they reconvert this

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violation into a Section 2 violation. That's why we abandoned the Section 2 violation, because we couldn't prove a relevant market in a dangerous probability monopolization.

QUESTION: It's only thus converted when your client sues. They assert that had the -- had the coerced dealers sued, they could have -- they could have recovered under Section 1.

MR. BLECHER: That's totally illogical because if the antitrust laws have the solicitude, as this Court has frequently said, it should be for interbrand competition.

Here is a case in which resell price maintenance has been used as a vehicle to distort interbrand competition, and --

QUESTION: What sort of resale price -- you think resale price maintenance is minimum fixing as well as maximum fixing?

MR. BLECHER: I believe it is, Your Honors. I read -- Sharp made no distinction when it talked about vertical resale price maintenance. It equated, as I read it, Dr. Miles on the one hand, which has traditionally been treated as a minimum case, with Albrecht on the other and made no distinction and said both facilitate cartelization and both remain, per se, illegal. So I

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don't -- I don't recognize -- I don't think it's necessary to recognize a distinction.

But my point is ARCO's argument would require us to prove under a guise after you find an antitrust violation that is, per se, illegal. ARCO comes along and says to prove antitrust injury you now have to prove a dangerous probability monopolization, thereby engrafting the requirements of Section 2 into a simple Section 1 case.

I don't see how you can possibly square that with Cargill or preserve the integrity of the treble damage action in doing that.

Now, the newspapers in their amicus brief have a different solution. They want you to repeal Albrecht, and they want to adapt a rule of reason. I must say that's a more reasonable position than ARCO's, but it's wrong for the reasons that this Court has repeatedly expressed most recently in Sharp, just before that in the 324 Liquor case involving Duffy, and before that in a sweeping discussion about the -- about the vice of price fixing in the Maricopa County case.

I don't think we're ready yet, and that after -- after nearly 100 years of rejecting low fixed prices as procompetitive, I don't think we're yet ready to abandon the per se rule that all price fixing should be

condemned.

Now, the government has a fourth approach --

QUESTION: (Inaudible.)

MR. BLECHER: Excuse me, the third approach. Excuse me. The government has offered a third approach, and that third approach is that we don't need -- they don't endorse ARCO's position that we need to prove the elements of monopolization. And, of course, I want to repeat the reason we voluntarily withdrew the monopoly claims, because of the recognition that we could not prove the dangerous probability of monopolization in any properly defined relevant market.

Now that comes back to become, in ARCO's view and in Judge Gray's view, the basis for dismissal of the Section 1 case. That's totally illogical and fails to recognize the time honored distinction between Sherman 1 and Sherman 2.

QUESTION: (Inaudible) U.S. position?

MR. BLECHER: The U.S. position is that we don't have to prove the full -- panoply of facts necessary to show a Section 2 violation. We simply have to show that the price is below cost, and in that argument the government presumes that there is some level of conspiratorial or combined vertical price fixing that's good. It leaves open the question of whether Albrecht and

Sharp survive as condemning all vertical price fixing, and it ignores the language of Matsushita, which is the argument we made to Judge Gray, and the argument we made to the Ninth Circuit and the argument that I respectfully make here.

I believe the Court --

QUESTION: Mr. Blecher, once again, I don't think it's fair to say that they -- they assert that that kind of price fixing is good. They -- I think their argument would assert that it is still bad, or at least until we overrule prior case law.

However, it is not the kind of badness that your client can complain about, other people can complaint about --

MR. BLECHER: I believe my answer to that is that if any -- if the Court has solicited about the true interbrand effect of price fixing, the distortion of the -- of the -- of the marketplace in terms of interbrand competition, our client should be the favored plaintiff to bring this kind of case, not the dealer. The dealer is at least a co-conspirator.

The dealer, his limitation and the limitation of Albrecht is that it applies only to intrabrand competition. But in this circumstance, USA is alleging a restraint in the interbrand market, and as a consequence

to that it ought to be the favored plaintiff.

QUESTION: Aren't low prices generally thought to be good for the consumer?

MR. BLECHER: Yes, but not if they're arrived at by a grievant.

We're not against low prices, Mr. Chief Justice.

QUESTION: Well, no, but -- but you -- you're claiming damages because you lost sales from somebody who was selling lower than you were.

MR. BLECHER: That's true, but by agreement, not by the marketplace. We're totally willing to accept what happened in the marketplace, and let me give you just some illustrations of what ARCO could do. It could simply lower the price to its dealers, the wholesale price and hope that some of that gets passed on into the marketplace.

It could lower the price of its vertically integrated stations that it owns and hope that has an effect on depressing price.

It could lower dealer rents and hope that that loosens up the market.

But what they can't do, consistent with the edicts of this Court, is sit down with their dealers or coerce them by one means or another and organize a price-fixing conspiracy that, to me, has all the earmarks of the

Parke-Davis case.

QUESTION: Well -- well, one can accept that what they did with their dealers was illegal and still not feel that your client should be able to sue for it when the result was to lower prices.

MR. BLECHER: But then who?

QUESTION: The dealer --

MR. BLECHER: I ask the question respectfully. Then who? The government doesn't think this is a violation. They think it's good. The dealers are not the ones likely to sue because it -- we don't even know that that they have sustained any damage.

QUESTION: A dealer sued in Albrecht.

MR. BLECHER: Yes, because he was terminated. But if a dealer is not terminated and ARCO maintains their margin of profit, they may not even have a respectable compensable damage claim. So why would we want to rely on the dealers to bring this case?

And their concern, as I suggest to you, Mr. Chief Justice, is much narrower. They're concerned only with the price of ARCO stations. Our client and others similarly situated want to be accorded the right to attack this kind of conduct because it affects competition --

QUESTION: (Inaudible) absent -- absent the agreement that dealers would have -- would have acted

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differently?

MR. BLECHER: Absolutely.

QUESTION: They would have priced their product differently?

MR. BLECHER: Absolutely.

QUESTION: And you --

MR. BLECHER: They did.

QUESTION: -- think you would have been hurt because of the way you were.

MR. BLECHER: They -- we likely wouldn't have been, but that doesn't mean, Justice White, that -- that ARCO is without some means to force lower prices --

QUESTION: I understand.

MR. BLECHER: -- to try to force lower forces by legitimate tactics. Why should there be solicitude when counsel gets up and acknowledges that they engaged in an organized plan to break the Sherman Act? Why should anybody have any solicitude about who gets to collect here as long as --

QUESTION: Well, are you arguing for a prophylactic rule?

MR. BLECHER: No. I'm saying that this Plaintiff is certainly within the penumbra of protection of a law which says you shouldn't fix prices because you distort markets by doing that, and we operate within that

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market, and we were directly injured by it, and it seems to me to stand antitrust injury on its head to say that you inject into the analysis questions of predation or questions of Section 2 law.

QUESTION: Of course, if -- if Texaco were completely and vertically integrated, it could have done this, I take it, if it owned -- if it owned a retail --

MR. BLECHER: Then we'd have a Section 2 case, Justice Kennedy. And then the arguments that Copperweld talk about, about stricter scrutiny, would justifiably apply.

I totally agree that Section 2 conduct requires greater scrutiny than Section 1 conduct.

QUESTION: What wouldn't be a Section 1?

MR. BLECHER: If they were totally vertically integrated, we'd be talking Section 2 law, and we'd be talking monopolization.

QUESTION: Well, that wouldn't be Section 1.

MR. BLECHER: That is correct.

QUESTION: They could have -- if they were totally integrated, they could have charged these very same prices that were -- that this conspiracy, as you call it, resulted in without violating Section 1.

MR. BLECHER: I think that's correct. And then we'd be talking Section 2.

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QUESTION: But we wouldn't be talking about a violation of Section 2 with only 15 percent of the market.

MR. BLECHER: I think that's right. That's why we gave up the Section 2 case, was the recognition that we could not carve out a properly defined relevant market, and in the properly defined relevant market there was no dangerous probability of monopolization. That's why we gave up.

Now those concessions somehow now become engrafted upon what we have to prove to win under Section 1. I have to say to you in all candor that's ridiculous to say Section 1 is now become Section 2. What difference is there? And that's what we argue.

QUESTION: Only -- only for you, Mr. Blecher. Not for everybody.

(Laughter.)

QUESTION: It's -- it's just not --

MR. BLECHER: Then I'd just bring a discrimination case.

(Laughter.)

QUESTION: But it's not fair to describe our cases, is it, as you did earlier, to say who cares, you know, who sues, there's been a Section 1 violation? I mean, as Brunswick indicates, we do care who sues. It's not an "any stick to beat a dog" approach in the antitrust

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laws.

MR. BLECHER: Of -- of course.

QUESTION: It has to be someone who's been injured by the kind of evil that the law -- was meant to -- to affect.

MR. BLECHER: Of course, but then you've got to define what it is that price fixing does in the marketplace, and what price fixing does is it distorts the market. Vertical price fixing eliminates all retail competition. If our plaintiff is a participant in that market by anybody's standards, even the dissent in McCready, we're a participant in a market which was -- in which injury was inflicted, and we do have standing, and the injury that we sustain is antitrust injury. There can't be any question about that.

It's only when you begin to engraft these additional requirements on it that distort the meaning of Brunswick that has given, if you will give me the liberty to tell you, it's given district judges a license to toss antitrust cases out by the right and left flank. And that's the --

QUESTION: Have you given us your fourth --

MR. BLECHER: The fourth one is our position, Your Honor, which is really your position, the position of this Court in Matsushita.

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In Matsushita, the Court said in footnote 8 that unlike Section 2 which requires -- apparently requires some below cost standard, some standard of pricing below an appropriate level of cost which has yet to be defined, Section 1 is violated by an agreement to price to eliminate a competitor if the price is either below the cost standard or below the prevailing market price.

Now that's precisely what we alleged in this complaint, precisely what the district judge found was unacceptable. It is exactly what we believe the majority of the Ninth Circuit said was acceptable --

QUESTION: May I interrupt there, Mr. Blecher, because this is, it seems to me, a little different twist on the case.

I thought the Ninth Circuit assumed the agreement was simply an agreement to fix maximum prices. You are now describing the agreement as an agreement to drive your client out of business.

MR. BLECHER: Absolutely. That was the predicate.

QUESTION: Did the Ninth Circuit rely on that fact?

I mean, it's quite clear. It seems to me it's a very different case. If they have a marketwide policy of saying the dealer can't charge more than so many cents a

gallon, that's one case. It's another case if the policy is wherever your stations are next door to -- to USA's stations you cut the price --

MR. BLECHER: I think that --

QUESTION: -- and therefore in order to drive them out of business.

You think it's the latter case?

MR. BLECHER: I think, Justice Stevens, they appreciated that when they set up the factual predicate at the beginning of the decision and at 859 F.2d 696 the majority says, "USA complains that it has suffered financial losses and is being driven out of the market by ARCO's illegal price fixing. This is the type of injury that the antitrust laws were meant to prevent." Yes.

QUESTION: It's quite different to say they're being driven out of the market as a result of a marketwide program on the one hand and being driven out of the market as a result of a program specifically intended to drive the particular competitor out of business.

MR. BLECHER: The allegation was they intended to drive the price-cutting independent segment of the market out of business. That was the allegation, and we are in that class of price-cutting independents, and that's what I believe was the factual predicate that's set up at the outset of the opinion, and I believe --

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QUESTION: And you think that when the district court found, as I think it did, at least according to the court of appeals, that there was no predatory pricing, the prices were not predatory, that would not cover pricing directed at particular competitors?

MR. BLECHER: Yes. I think what the district court said unequivocally in a very short statement was that if we could not prove the requisite elements of monopolization we couldn't show antitrust standing because the Ninth Circuit accepted the argument that the agreement to fix low prices was procompetitive and, therefore, the only way it crosses the line and becomes anticompetitive is when there's a threat of monopolization.

And what that does is it sets up a totally separate analytical approach to antitrust injury. On the one hand, we've already proven a per se violation from which -- which means that there's presumed anticompetitive effects.

QUESTION: Well, I understand, but --

MR. BLECHER: And now -- now the district court comes along and says that isn't enough; you can't rely on that anticompetitive effect. Over here under the rubric of antitrust injury you've got to prove it all over again, and what I'm going to make you prove now is that there was a dangerous probability of monopolization.

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QUESTION: Is it your -- is it your theory of the case that there was a not a marketwide program here but one that only operated in the areas in which there were independent competitors?

MR. BLECHER: Yes. The program, the contention, the allegation is that it was aimed at -- at the independent segment, that ARCO wanted --

QUESTION: And so there would be a defense if they could prove -- in your view, then, it would be a defense if they could prove that the same program was followed even in the segments of the market where there was no independent competition?

MR. BLECHER: I don't know that -- that it would be a defense if, in fact, they engaged in the same conduct against independents.

What we say is they -- they selected --

QUESTION: Well, but it would be pretty hard to say it's selective conduct if it wasn't selective.

MR. BLECHER: I think you've got a fact controversy.

QUESTION: But your theory is -- is that it was selective.

MR. BLECHER: Yes.

QUESTION: Not merely that it was (inaudible).

MR. BLECHER: Yes. They zoned the market and

went -- targeted the independents, and those are the places they took the price down to below market where we couldn't survive. That was the program.

In a nutshell, that's the way it was alleged and understood, and it's in that context that I think the Ninth Circuit says, well, if that's what you're alleging and they took the price under the market, you don't need to show it's predatory because that complies with the first leg of this Court's statement in footnote 8 in Matsushita which says that if there's a conspiracy to drive people out of business by charging a price below the market level, that's -- that's antitrust injury, and you said it point blank.

And I -- and I must wonder -- I must wonder why we're here, then, because this case falls squarely within the first clause of the Matsushita statement of antitrust injury.

QUESTION: Well, if -- if you're right, Mr. Blecher, why did the court of appeals, do you think, discuss at such length the Seventh Circuit's decision in the Jack Walters & Sons v. Morton Building, and say they disagreed with it?

MR. BLECHER: Well, I -- I can't -- I can't substitute myself for Judges Reinhardt and Nelson, but I'll tell you what I think is on their head. I think that

the Seventh Circuit in Jack Walter and Indiana Grocery said that there can be good price fixing. I shocked by Judge Posner's statement, more or less repeated by Judge Flaum, that price fixing can be procompetitive; it's a legitimate competitive weapon.

And I think the Ninth Circuit wanted to say to the extent that you're citing Seventh Circuit law that says price fixing can be good, we reject it; until the Supreme Court tells us otherwise, all price fixing across the board is bad.

Now, it was a gratuity in that sense. It was a gratuity in that sense, but that's the case they relied on. And if you look back at Judge Gray's decision, the only case he really cites for this proposition to -- to throw us out is Jack Walter.

QUESTION: But you would think that if the Ninth Circuit saw your case as you saw it, they would have said, you know, what the Seventh Circuit said doesn't apply here because it was a conspiracy to drive plaintiffs out of business.

MR. BLECHER: No, I think they had to get over the Seventh Circuit's statement that predatory pricing was required in order to accept if you -- if you define predatory as some measure of cost. I think they had to get around that to -- to say that we could win by showing

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a below market price, which is what we alleged and claimed we were going to be able to prove.

Now, there's been some comment, Justice O'Connor and others, on Albrecht. I -- this isn't the case to overrule Albrecht, and I don't believe Albrecht should be overruled, but I submit to you if it is and we go to a rule of reason test, we subsume the arguments that ARCO has made by a rule of reason analysis; and we certainly have to get affirmed, because all that would say is instead of having a presumption of illegality under -- under the per se rule, that we would have to prove the actual anticompetitive effect of the planned program.

And if we did that to the satisfaction of the fact finder, once again the injury, antitrust injury, to this plaintiff would flow from that determination of antitrust -- anticompetitive effect.

What I'm telling you is that there is no separate analytical --

QUESTION: What anticompetitive -- under rule of reason, what anticompetitive effect would you prove?

MR. BLECHER: The elimination of a subset of sellers who offered price competitive and the elimination of price competition at the retail level.

QUESTION: So it's the ultimate effect of -- of

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the action?

MR. BLECHER: Absolutely. And if we prove that, even if Albrecht were out the window, it wouldn't really make any difference at this level. It would simply mean that we'd have a longer, more arduous trial with a lot more jury instructions.

But if we were to persuade the finder of fact that there was an anticompetitive effect, the injury of which we're complaining flows inexorably from that.

QUESTION: What is the answer?

MR. BLECHER: And therefore, we don't have a different standard of antitrust injury, whether it's per se or rule of reason.

But --

QUESTION: Do you think the -- the elimination of sellers who were charging higher prices is an anticompetitive effect?

MR. BLECHER: If done by combination --

QUESTION: When there is no -- when there is no monopolization or attempt to monopolize, just the elimination of -- of -- of people who were charging more? I thought that happens every day. I thought that's good competition.

MR. BLECHER: By unilateral conduct, not by combination. I can hardly see this Court saying to

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industry we'll let you get together to knock your weak competitors out of business.

QUESTION: No, but you're assuming no per se. We're in a non-per se environment now, so that the --

QUESTION: But there would still be a combination?

MR. BLECHER: Of course, there would still be a combination, and the only difference then is we'd have to prove what the actual marketplace effect was, and then -- and if the elimination of the competitors is deemed to have an actual or prospective anticompetitive effect, we could win.

QUESTION: What I'm saying is I don't see how it can unless you have the material for a Section 2 case.

MR. BLECHER: I must respectfully suggest that engrafting Section 2 under Section 1 eliminates. What you've just said is there can't be a conspiracy to restrain trade that isn't the equivalent of a conspiracy to monopolize. I -- I -- I would think that's not analytically correct.

There can be something that restrains trade and affects competition but not in the way that's likely to produce monopoly power. The whole purpose of Section 1 was to stop those kinds of activities before they reach the apex of monopolization under Section 2.

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QUESTION: May I ask you what the -- what your view -- what do the undisputed facts show with respect to the impact of this program on your client? What -- what change in its market share --

MR. BLECHER: The accepted facts, Justice Stevens, because there's no record except the complaint, really --

QUESTION: I see.

MR. BLECHER: The alleged and accepted facts for this purpose is that we lost sales and profits as a consequence and closed stations as a consequence of our inability to charge a price as low as ARCO was charging. ARCO was charging at retail less than what it costs us --

QUESTION: Did -- do you allege how -- how significant the impact was on your business?

MR. BLECHER: I think we have a dollar damage number, but I can't frankly remember what it is. It's very --

QUESTION: You mean you didn't go down from 6 percent to 2 percent?

MR. BLECHER: It's very substantial, and the company was forced to constrict itself during this period. And the record is clear, and the undisputed fact are that -- that literally dozens of independent marketers and refiners went out of business as a consequence of this,

and many others shifted their operations from independent to the ARCO flag.

So the effect of this in the marketplace, at least in California, was very substantial, which is why I believe, Justice Scalia, we can show anticompetitive effect wholly apart from the elements of monopolization.

This has had a very significant effect on the marketplace, and what I want to suggest to you is if in any way you condone this, in any way you say this cannot be reached by people directly in the -- the target of and within the impact zone, I think you can reasonably expect that Chevron and Mobil and Shell are not going to sit still as they have on the sidelines probably in obedience to this Court's decisions. I think they're going to join the fray and sign up their dealers, and what we're going to have is a cartelized industry which will facilitate some kind of horizontal price movement.

And down the road, no one will know whether they're raising the price or lowering the price because there won't be a market price. There won't be the interplay of retailers now uncontrolled that we see setting a market price today. It will be eliminated.

And so there's an enormous danger here to sanction this kind of approach to vertical price fixing.

QUESTION: If it's -- if it's so easy to do all

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that and it's such an obvious consequence, you would think that they'd be able to persuade their dealers to do it instead of coercing them. I mean, if it's all that easy --

MR. BLECHER: Well, they do --

QUESTION: -- which you say is okay.

MR. BLECHER: Well, they -- I didn't say that, and I think that question --

QUESTION: Oh, you don't think that's okay?

MR. BLECHER: No. I don't know that the persuasion/coercion distinction has yet been endorsed by this Court, and there's, I believe, a difference --

QUESTION: I suppose, also, that -- that the increase in ARCO's share must have reflected some decrease in the shares of the other majors, too, hasn't it?

MR. BLECHER: Mainly at the expense of the independents, Justice Stevens. I think the evidence will show mainly at the expense of the independents, most of whom are gone and in the graveyard.

This program worked beautifully. It accomplished exactly what they wanted it to do.

Well, it's for all those reasons that I think that Matsushita and the standard that -- that I believe the Ninth Circuit correctly applied, which is that -- that -- that we need only establish to show antitrust injury a

price below the market level. We don't need to prove monopolization, and we don't need to prove predation. And a below cost sense is all that ought to be required.

QUESTION: Thank you, Mr. Blecher.

Mr. Redcay, you have one minute remaining.

REBUTTAL ARGUMENT OF RONALD C. REDCAY

ON BEHALF OF THE PETITIONER

MR. REDCAY: Thank you, Mr. Chief Justice.

I would like to begin with the case that Mr. Blecher says is controlling, and that's Matsushita. Matsushita was a horizontal price-fixing case in violation of Sherman Act Section 1, but the plaintiffs in that case did not even -- and obviously the plaintiffs were injured as a result of the alleged horizontal price fixing.

But the plaintiffs there didn't contend that they could -- they could recover simply by showing a price fixing agreement and cause, in fact, injury. They recognized that they needed to prove a horizontal conspiracy to engage in predatory pricing, and this Court wrote a landmark opinion addressing when you can have predatory pricing and when you cannot because all parties, including the Court, recognized that only such a conspiracy could cause the plaintiffs there cognizable injury.

And what the Court said in that case and then

reaffirmed in Cargill was that -- that the only time you can have an antitrust recovery is where the competitors' and consumers' interests are coincident, and those interests are only coincident when the low prices pose the kind of danger of obtaining the power that can ultimately lead to higher prices.

So I think that Matsushita also is a controlling case, and I think it supports our position.

CHIEF JUSTICE REHNQUIST: Thank you, Mr. Redcay.

The case is submitted.

(Whereupon, at 11:08 a.m., the case in the above-entitled matter was submitted.)

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BY Lora M. May

(REPORTER)