IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

NO. A103211, CONSOLIDATED WITH NO. A105309

PEOPLE, EX REL. ROCKARD J. DELGADILLO, AS CITY ATTORNEY, ET. AL.,	)	[JUDICIAL COUNCIL COORDINATED PROCEEDING NO. 4095]
PLAINTIFFS/APPELLANTS,	)	[SAN FRANCISCO SUPERIOR COURT NO. 303753]
VS. B & B GROUP, INC., ET. AL.,	)	[LOS ANGELES SUPERIOR COURT NOS. BC210894, BC214794]
DEFENDANTS/RESPONDENTS.	)	[HONORABLE VINCENT P. DIFIGLIA, JUDGE]

APPENDIX OF NON-CALIFORNIA AUTHORITY IN SUPPORT OF RESPONDENT TRADE ASSOCIATIONS' RESPONSE BRIEF

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Service on Attorney General Required by California *Business & Professions Code* Section 17200

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TABLE OF NON-CALIFORNIA AUTHORITY

EXHIBIT

Exhibit 1

United States Court of Appeals,
Third Circuit.

ALVORD-POLK, INC.; American Blind Factory, Inc.; Delta Paint and Wallpaper Supply Co., Inc.; Fairman Wallpaper and Paint Company; Frank R. Yocum, t/a Frank R. Yocum & Sons Wallpaper Co.; Harry's Wallpaper, Inc.; Lancaster Carpet Market, Inc.; Marvin Kolsky, t/a Headquarters Windows & Walls; Silver Wallpaper & Paint Co., Inc.; Yankee Wallcoverings, Inc., Appellants,
v.
F. SCHUMACHER & CO.; The National Decorating Products Association, Inc., Appellees.

No. 92-1762.

Argued March 17, 1993.
Opinion Vacated Sept. 15, 1993.
Submitted Pursuant to LAR 34.1(a)
On Panel Rehearing Oct. 25, 1993 [FN*].

FN* The motion for oral argument on panel rehearing filed by F. Schumacher & Co. is denied.

Decided Oct. 12, 1994.
Sur Petitions for Rehearing Nov. 15, 1994.

Dealers who sold wallpaper through 1-800 telephone numbers brought federal antitrust and related state claims against competing retailers and wallpaper manufacturers. The United States District Court for the Eastern District of Pennsylvania, Daniel H. Huyett, 3rd, J., entered summary judgment in favor of defendants, and plaintiffs appealed. The Court of Appeals, Lewis, Circuit Judge, held that: (1) fact issues precluded summary judgment on federal and state antitrust claim; (2) defendants were not liable on claims of interference with existing or prospective contracts; and (3) defendants were not liable on defamation claims.

Affirmed in part and reversed in part.

Stapleton, Circuit Judge, filed opinion concurring in part and dissenting in part.

Michael S. Lando (argued), Pittsburgh, PA, for appellant, Fairman Wallpaper and Paint Co.

Margaret M. Zwisler (argued), Howrey & Simon, Washington, DC, for appellee, F. Schumacher & Co.

Richard D. Lageson (argued), Gino F. Battisti, Suelthaus & Kaplan, P.C., St. Louis, MO, for appellee, The National Decorating Products Ass'n, Inc.

Before: STAPLETON, ROTH and LEWIS, Circuit Judges.

OPINION OF THE COURT

LEWIS, Circuit Judge.

For over a decade, retailers who market wallpaper by providing sample books and showroom displays have feuded with dealers who sell at a discount through toll-free "1-800" telephone numbers. In this case, ten 800-number dealers have accused the retailers' trade association and one of the leading wallpaper manufacturers of violating antitrust laws in an attempt to force them out of business. The district court granted summary judgment to the defendants on these and certain state-law claims. We will reverse the grant of summary judgment as to some federal and state antitrust claims but will affirm as to others and as to the 800-number dealers' tort claims.

I.

[1] Our review of a grant of summary judgment is plenary; we evaluate the evidence using the same standard the district court was to have applied in reaching its decision. *Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 1362 (3d Cir.1992); *J.F. Feeser, Inc. v. Serv-A-Portion, Inc.*, 909 F.2d 1524, 1530 (3d Cir.1990); *Erie Telecommunications, Inc. v. City of Erie*, 853 F.2d 1084, 1093 (3d Cir.1988). Plaintiffs have alleged three theories of antitrust liability under the Sherman Act, 15 U.S.C. § 1 (the "Act"). A brief review of the Act and its purposes informs our determination of the standard to be applied on summary judgment.

A.

[2] Section 1 of the Sherman Act provides:

> Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with

foreign nations, is declared to be illegal[.]

15 U.S.C. § 1. The very essence of a section 1 claim, of course, is the existence of an agreement. Indeed, section 1 liability is predicated upon some form of concerted action. [FN1] *Fisher v. Berkeley*, 475 U.S. 260, 266, 106 S.Ct. 1045, 1049, 89 L.Ed.2d 206 (1986); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 767-69, 104 S.Ct. 2731, 2739-41, 81 L.Ed.2d 628 (1984); *United States v. Colgate & Co.*, 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919); *Big Apple BMW*, 974 F.2d at 1364. *See also Weiss v. York Hospital*, 745 F.2d 786, 812 (3d Cir.1984) (section 1 claim requires proof of three elements, the first of which is "a contract, combination or conspiracy"); *Edward J. Sweeney & Sons, Inc. v. Texaco, Inc.*, 637 F.2d 105, 110 (3d Cir.1980) ("[u]nilateral action, no matter what its motivation, cannot violate [section] 1"). A " 'unity of purpose or a common design and understanding or a meeting of minds in an unlawful arrangement' " must exist to trigger section 1 liability. *Copperweld*, 467 U.S. at 771, 104 S.Ct. at 2742, *quoting American Tobacco Co. v. United States*, 328 U.S. 781, 810, 66 S.Ct. 1125, 1139, 90 L.Ed. 1575 (1946). *See also Fisher*, 475 U.S. at 267, 106 S.Ct. at 1049-50; *Sweeney*, 637 F.2d at 111.

> FN1. The term "concerned action" is often used as shorthand for any form of activity meeting the section 1 "contract, combination or conspiracy" requirement. *Bogosian v. Gulf Oil Corp.*, 561 F.2d 434, 445- 46 (3d Cir.1977).

[3] The requirement is an important one, for it emphasizes the distinction between section 1 liability, which is imposed for concerted action in restraint of trade, and liability imposed under section 2 of the Sherman Act for monopolization. *See* ***1000***Copperweld*, 467 U.S. at 767, 104 S.Ct. at 2739-40. Activity which is alleged to have been in violation of section 1 may be subject to a *per se* standard and engender liability without inquiry into the harm it has actually caused. *See Copperweld*, 467 U.S. at 768, 104 S.Ct. at 2740. *See generally Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 723, 108 S.Ct. 1515, 1519, 99 L.Ed.2d 808 (1988). Alternatively, section 1 liability might be imposed for concerted action which violates the "rule of reason" standard without proof that it threatened monopolization. *Copperweld*, 467 U.S. at 768, 104 S.Ct. at 2740.

[4] Congress treated concerted action more strictly than unilateral behavior because

> [c]oncerted activity inherently is fraught with anticompetitive risk. It deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit. This not only reduces the diverse directions in which economic power is aimed but suddenly increases the economic power moving in one particular direction. Of course, such mergings of resources may well lead to efficiencies that benefit consumers, but their anticompetitive potential is sufficient to warrant scrutiny even in the absence of incipient monopoly.

Id. at 768-69, 104 S.Ct. at 2740. For this reason, when we examine an alleged violation of section 1 of the Sherman Act, we look for an agreement that "brings together economic power that was previously pursuing divergent goals." *Id.* at 769, 104 S.Ct. at 2741. A lack of such divergent goals precludes officers of a single company from conspiring. Neither internally coordinated conduct of a corporation and its unincorporated division, nor activity undertaken jointly by a parent corporation and its wholly owned subsidiary, can form the bases of section 1 violations. *Id.* at 769-71, 104 S.Ct. at 2740-42.

[5] An agreement need not be explicit to result in section 1 liability, *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 59-60, 31 S.Ct. 502, 515-16, 55 L.Ed. 619 (1911), *quoted in Copperweld*, 467 U.S. at 785, 104 S.Ct. at 2749 (Stevens, J., dissenting), and may instead be inferred from circumstantial evidence. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540-41, 74 S.Ct. 257, 259-60, 98 L.Ed. 273 (1954); *Sweeney*, 637 F.2d at 111; *Milgram v. Loew's, Inc.*, 192 F.2d 579, 583 (3d Cir.1951). Therefore, direct evidence of concerted action is not required.

In this case, the parties contest the propriety of summary judgment on the issue of concerted action in each of three different alleged fact patterns. Before addressing each fact pattern, we turn to a review of the summary judgment standard applicable to antitrust cases.

B.

A district court may enter summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any

material fact and that the moving party is entitled to a judgment as a matter of law." Fed.R.Civ.P. 56(c). The substantive law determines which facts are material. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S.Ct. 2505, 2510, 91 L.Ed.2d 202 (1986).

A party moving for summary judgment need not produce evidence to disprove its opponent's claim. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S.Ct. 2548, 2552-53, 91 L.Ed.2d 265 (1986), but it does bear the burden of demonstrating the absence of any genuine issues of material fact. *Big Apple BMW*, 974 F.2d at 1362. As in this case, when the nonmoving party will bear the burden of proof at trial, the moving party may meet its burden by showing that the nonmoving party has failed to produce evidence sufficient to establish the existence of an element essential to its case. *Celotex*, 477 U.S. at 322, 106 S.Ct. at 2552.

In reviewing the evidence, facts and inferences must be viewed in the light most favorable to the party opposing summary judgment. *Matsushita Electric Industrial Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S.Ct. 1348, 1356, 89 L.Ed.2d 538 (1986). ***1001** When the moving party has pointed to material facts tending to show there is no genuine issue for trial, however, the nonmoving party "must do more than simply show that there is some metaphysical doubt as to the material facts.... Where the record taken as a whole could not lead a rational trier of fact to find for the nonmoving party, there is no 'genuine issue for trial.' " *Matsushita*, 475 U.S. at 586-87, 106 S.Ct. at 1356.

This traditional summary judgment standard applies with equal force in antitrust cases, *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, ----, 112 S.Ct. 2072, 2083, 119 L.Ed.2d 265, 285 (1992); *Big Apple BMW*, 974 F.2d at 1362-63; however, the meaning we ascribe to circumstantial evidence will vary depending upon the challenged conduct.

For example, evidence of conduct which is "as consistent with permissible competition as with illegal conspiracy," without more, does not support an inference of conspiracy. *Matsushita*, 475 U.S. at 597 n. 21, 106 S.Ct. at 1361 n. 21, *citing Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 763-64, 104 S.Ct. 1464, 1470-71, 79 L.Ed.2d 775 (1984); *Big Apple BMW*, 974 F.2d at 1363. *See generally Fineman v. Armstrong World Industries, Inc.*, 980 F.2d 171, 186-87 (3d Cir.1992). This is because mistaken inferences in such a context "are especially costly[;] they chill the very conduct the antitrust laws are designed to protect." *Matsushita*, 475 U.S. at 594, 106 S.Ct. at 1360; *Monsanto*, 465 U.S. at 763-64, 104 S.Ct. at 1470-71. In such cases, the Supreme Court has required plaintiffs to submit "evidence tending to exclude the possibility" of independent action, i.e., "direct or circumstantial evidence that reasonably tends to prove that [the alleged conspirators] 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.' " *Monsanto*, 465 U.S. at 764, 104 S.Ct. at 1471, *quoting Sweeney*, 637 F.2d at 111.

Conversely, if the alleged conduct is "facially anticompetitive and exactly the harm the antitrust laws aim to prevent," no special care need be taken in assigning inferences to circumstantial evidence. *Eastman Kodak*, 504 U.S. at ----, 112 S.Ct. at 2088, 119 L.Ed.2d at 291; *Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc.*, 826 F.2d 1335, 1339 (3d Cir.1987) (*Monsanto* and *Matsushita* do not apply when challenged action is overtly anticompetitive); *Tunis Brothers Co., Inc. v. Ford Motor Co., Inc.*, 823 F.2d 49, 50 (3d Cir.1987) (implying that *Matsushita* requires evidence tending to exclude the possibility of independent action only when the challenged conduct is as consistent with permissible competition as with illegal conspiracy). *See also In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 906 F.2d 432, 438-39 (9th Cir.1990) ("the key to proper interpretation of *Matsushita* lies in the danger of permitting inferences from certain types of ambiguous evidence"). [FN2]

FN2. Similarly, the analyses set forth in *Monsanto* and *Matsushita* do not apply when a plaintiff has offered direct evidence of concerted action. *Arnold Pontiac-GMC, Inc. v. Budd Baer, Inc.*, 826 F.2d 1335, 1338 (3d Cir.1987). *See also In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation*, 906 F.2d 432, 441 (9th Cir.1990).

II.

With these standards in mind, we will review the evidence, granting reasonable inferences to the plaintiffs. [FN3]

FN3. Our review does not include consideration of evidence which was the subject of the three pending motions to

supplement the record. Nor will we consider citations to evidence in F. Schumacher & Co.'s brief which was not of record before the district court.

Persons interested in decorating or redecorating their homes or offices typically view samples of wallpaper before purchasing. Recognizing this, retailers traditionally have made available to consumers the wallpaper sample books they purchase from manufacturers. They have also provided consumers with information through the use of promotional materials and showroom displays. The purchase of sample books, establishment of a showroom and hiring of knowledgeable sales personnel are costly endeavors and, as one might expect, these costs are reflected in higher prices to consumers. Manufacturers have encouraged retailers to incur these ***1002** costs, however, because of a prevailing notion that their products sell better when marketed thus.

In recent years, a new breed of retailer has emerged. Some companies now accept orders from consumers all over the United States who call toll-free telephone numbers to order wallpaper after having availed themselves of the sample books, displays and assistance offered by conventional retailers. Today, purchasers may visit a conventional retailer's showroom, peruse the sample books, note the brands and product numbers of the patterns they like, and then go home and order wallpaper at a discount from an 800-number dealer. This informed decision has, of course, been funded in part by retailers who will realize no return on their investment. The 800-number dealer will arrange a "drop shipment" directly from the manufacturer to the purchasers' homes. [FN4]

FN4. In the nomenclature of the marketplace, these 800-number dealers are "free-riders," who reduce or eliminate service to create price competition but who benefit from services such as wallpaper sample books, salesperson advice and showroom displays paid for and provided by other, full-service retailers. *See Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 55, 97 S.Ct. 2549, 2560, 53 L.Ed.2d 568 (1977); *Big Apple BMW, Inc. v. BMW of North America, Inc.*, 974 F.2d 1358, 1376-77 (3d Cir.1992).

Both conventional retailers and 800-number dealers are members of the National Decorating Products Association (the "NDPA"), a trade association comprised of independent retailers who sell a variety of decorating products. The NDPA has about 3,300 members who operate approximately 8,500 retail locations. Its policy is established and its business conducted by an 18-member board of directors. It sponsors a number of trade shows and educational programs for its members each year. It also publishes a monthly industry news journal titled *Decorating Retailer,* and it formerly published a similar newsletter called *Wallcovering Industry News.*

A.

In the late 1970's and early 1980's, conventional retailers in the NDPA threatened to cease purchasing products from manufacturers who continued to do business with the 800-number dealers, whom they referred to as "pirates." The NDPA itself actively campaigned against 800-number dealers by lobbying manufacturers to recognize the advantages of conventional retailing and by encouraging them to "level the playing field" between 800-number dealers and conventional retailers.

For example, Robert Petit, NDPA's executive vice president and chief executive officer, spoke to manufacturers, including Michael Landau, president of F. Schumacher & Co. ("FSC"), on this subject. Appendix ("App.") at 190-97, 202. In February, 1983, Petit sent a letter on NDPA letterhead urging retailers to request from manufacturers sample books that did not reveal retail prices. Depriving consumers of this information, Petit argued, would make it more difficult for them to avail themselves of an 800-number dealer's discount. App. at 523. The NDPA also marketed a "sales piracy kit" for conventional retailers to use in disguising or concealing pattern numbers and price information on sample books so that consumers could not so easily acquire the information and then order elsewhere. App. at 271-73, 407.

In 1985, the Federal Trade Commission ("FTC") issued a complaint against NDPA because of these activities. In 1986, the parties entered into a consent decree which provided in part:

NDPA ... shall cease and desist from:
A. Conduct having the purpose or effect of:

* * * * * *

Expressly or impliedly advocating, suggesting,

advising, or recommending that any of NDPA's ... members refuse to deal with any seller of wallcoverings on account of, or that any of NDPA's ... members engage in any other act to affect, or to attempt to affect, the prices, terms or conditions of sale, or distribution methods or choice of customers of any seller of wallcoverings.

App. at 412. The consent decree also provided:

***1003** IT IS FURTHER ORDERED that this Order shall not be construed to prevent NDPA ... from publishing written materials or sponsoring seminars, or otherwise providing information or its members' views on topics including but not limited to cost accounting principles, and suggested prices and product identification numbers in wallcovering sample books to other sellers of wallcoverings, provided, however, that the information or views are not presented in a manner constituting a violation of any provision contained in Part II of this Order.

Id. [FN5]

FN5. We may, of course, consider evidence of activity necessitating the entry of the consent decree, as well as the terms of the consent decree itself, as part of the overall picture, or potential evidence of a pattern of conduct. *See Big Apple BMW,* 974 F.2d at 1361; *cf. Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690, 699, 82 S.Ct. 1404, 1410-11, 8 L.Ed.2d 777 (1962).

In the aftermath of this settlement, as required by the consent decree, NDPA circulated a summary of the consent order in which it informed members that NDPA, as a group of competitors, was "already considered to be an 'agreement.' " App. at 430. The NDPA guidelines for conducting meetings, drafted shortly before entry of the consent decree, also acknowledge that "a trade association is, by definition, a combination of competitors." App. at 740. The guidelines further provide that before a chapter officer delivers a speech or makes a presentation at a meeting, he or she should state that the views expressed are his or her own and not those of the NDPA or any chapter. App. at 743.

Since the entry of the consent decree, NDPA has modified its lobbying efforts to some extent, but it has not ceased them. The following passage from Petit's deposition testimony illustrates his view of the effect of the consent decree on NDPA's lobbying activities:

We changed some of the things we were doing. One of the things that the [FTC] objected to us doing was, for example, having a sales piracy kit. Their feeling on that was that--which we didn't agree with at all[--]that we were projecting a single way for the dealers to take action, and that they felt that this was bad. There was no problem with the FTC of enumerating numerous things that might be done, but not to specialize in one particular thing. So, therefore, we did drop the sales piracy kit.

* * * * * *

We took extra care in everything we did to make sure we lived up to that FTC agreement.

App. at 199. Some NDPA members apparently believe NDPA has substantially altered its activities; one poll revealed that members have resigned because the NDPA is "not doing anything in regard to the sales piracy issue." App. at 200. Petit, however, has continued to impart to manufacturers, including Landau, his view of the advantages of conventional retailing over other methods of marketing wallcovering, such as 800-number sales. App. at 198.

B.

The sentiment against 800-number dealers continued to escalate even after the consent decree was entered. *Decorating Retailer* published several letters from NDPA members, including some retailers who were former or current NDPA officers, urging action against the 800-number dealers. Its editor, John Rogers, often solicited comment for the letters column by sending a variety of articles from a forthcoming issue to a number of people in the industry. In each issue of *Decorating Retailer,* a standard statement appeared in the letters column apprising the reader that: "The editor reserves the right to edit to fit space limitations or publishing policies. Opinions expressed are those of the writer and not necessarily those of the editor." *E.g.,* app. at 496.

Decorating Retailer and *Wallcovering Industry News* also printed several news articles about 800-number dealers, most of which used the term "pirates" among other characterizations to describe them. In May, 1988, one editorial--a *Perspective* column in *Decorating Retailer*--stated that "[t]here are increasing signs that the retailer's voice crying ***1004** in the wallcovering wilderness is being heard," and cited many developments in the industry, such as "a sudden advent of bar coding kits for retailer protection of sample book pattern numbers," as signs that wallpaper suppliers were responding to retailers'

needs. App. at 758.

C.

Undoubtedly, FSC, a leading manufacturer which had always promoted the traditional method of marketing wallcoverings, heard the complaints. In July, 1988, it announced a drop shipment surcharge on wallcovering deliveries directly to consumers, to take effect in September, 1988. App. at 298-99. Under this new policy, FSC would impose a 7 percent surcharge on every order requesting drop shipment. Obviously, this would have the effect of increasing the 800-number dealers' costs while decreasing their ability to compete on the basis of price with conventional retailers.

The minutes from FSC's management committee meeting in April, 1988, state that it considered the policy to be a signal to conventional retailers that FSC was trying to help them. App. at 290. A draft press release, later revised, identified the protection of dealers from piracy as one reason for the surcharge. *Compare* app. at 298-99 *with* app. at 1364-65. Minutes from September, 1989, reveal that the management committee viewed the drop shipment surcharge as "a good first step" against 800-number dealers. App. at 304.

Beyond merely responding to dealer complaints, FSC also claimed that the surcharge was, in part, intended to recoup increased costs of drop shipments. It did not, however, employ any particular formula or calculations to arrive at its surcharge figure or to determine its basis for recoupment. Nor did it consult any source regarding or otherwise study such costs, although the record contains statements by another manufacturer indicating that his costs for drop shipments were no higher than for shipments to stores. App. at 148-49, 622.

Predictably, retailers responded favorably to the imposition of the surcharge. For example, in September, 1988, a *Decorating Retailer* editor's note responding to a letter about 800-number dealers' advertisements stated that "there are signs that telling your troubles to suppliers eventually will be heard and some remedy may result." App. at 485.

Yet the retailers were not entirely satisfied. In January, 1989, at a convention in Halifax, Nova Scotia, Petit revisited the issue of 800-number dealers and the problems they posed for the industry. An August, 1989 memo shows that Petit spoke to at least one manufacturer about "the anger felt by the retailers in lack of support from the wallcovering industry." App. at 185-86. *See also* app. at 190-98, 201-07, 212-29, 404, 416-19, 693-99, 700. During this period, NDPA officer Clyde Morgan also expressed "concern about the 800-number and the effect it was having on me" at a meeting of industry leaders. App. at 183.

The fall 1989 planning session at FSC also reflected continuing concerns about 800-number dealers. In September, 1989, soon after an NDPA meeting, Landau stated at a management committee meeting that the surcharge was a good first step but that other measures were necessary. App. at 304. An October, 1989 memo asked whether "we [should] make another anti-pirate move? If so, what?" App. at 793. In November, 1989, Landau reported to the management committee what he had learned at an NDPA trade show: "retailers squeezed by mass market & 800 #'s." App. at 307. The minutes from that committee's meeting also include the following entry: "800 # s: Meeting with attorneys next week to formulate new strategy." App. at 309.

D.

In January, 1990, FSC announced a local trading policy to be implemented in March, 1990. App. at 694-97. FSC dealers would be prohibited from selling FSC products outside of their "local trading area," thus effectively prohibiting 800-number dealers from selling FSC's products nationwide through their toll-free telephone numbers. Immediately after this policy was announced, Petit circulated a copy of it to the NDPA board of directors, saying, "This is a major step forward ***1005** in our battle against the 800- number operators." App. at 693. He also sent a letter to Landau on NDPA letterhead stating, "On behalf of the members of our decorating products associations, I want to express our appreciation of your actions." App. at 700.

Five FSC executives testified that the purpose of the local trading area policy was to ensure that FSC dealers would realize a return on their investments in sample books and other FSC overhead. App. at 1215, 1218-19, 1222-23, 1238-40, 1249-50, 1340-43, 1520-22, 1550-52. FSC's vice president of sales testified that if FSC had not taken action against the 800-number dealers, it "would continue to have resistance to purchasing sample books with the piracy issue." App. at 691. Indeed, there were several references in planning meetings to safeguarding against free riders and supporting conventional retailers.

[6] Shortly thereafter, according to *Decorating Retailer* and *Wallcovering Industry News* articles, NDPA president John Wells spoke at a trade show in Anaheim, California. The articles describe Wells as urging that "[i]nsisting on supplier support rather than coding books is the answer to piracy problems besetting wallcovering retailers." App. at 440. At the same show Petit, according to one of the articles, applauded manufacturers' efforts to fight 800-number dealers. *Id.* In accordance with NDPA guidelines, Wells specifically stated that his views were his own as an independent retailer, but the articles refer both to him and to Petit in their NDPA capacities. [FN6]

> FN6. FSC and NDPA argue that these articles constitute inadmissible hearsay. Plaintiffs respond that the articles are admissible as statements of NDPA, having been published in its own publications. *See* Fed.R.Evid. 801(d)(2) (statements are not hearsay if they are offered against a party and are statements of which the party has "manifested his adoption or belief in its truth"). We agree: an employee of NDPA had to have written these articles, which were adopted by NDPA when it published them in *Decorating Retailer* and *Wallcovering Industry News.* Wells' statements as reflected in the articles are, therefore, admissible.

In May, 1990, Rogers wrote a *Perspective* column in which he discussed the retailers' opposition to 800-number dealers, reviewed some of the methods retailers had adopted to guard against 800-number dealers' taking their business, and stated, "ultimately, the answer for the individual dealer is that given by Wells: 'I will support those who support me.' " App. at 167. Rogers testified that while the *Perspective* column does not represent the policy of the NDPA, to his knowledge there has not been an occasion when a comment published in it has contravened NDPA's policies.

Both before and after it instituted the policies in question, FSC received letters from retailers urging it to take action against the 800-number dealers. Meanwhile, during this period the FTC repeatedly responded to inquiries from plaintiffs with the assurance that, in its view, NDPA was in compliance with the consent decree entered into in 1986.

E.

Anti-800 number dealer sentiment was not confined to retailers' ranks; manufacturers were also discussing 800-number dealers among themselves. Between 1988 and 1990, wallpaper manufacturers discussed 800-number dealers at meetings of the Wallcovering Manufacturers Association ("WMA"), an organization in which Landau served as a member of the board of directors.

In April, 1988, for example, Landau reported to the FSC management committee that there had been "extensive discussion pirate situation" at the WMA meeting in Hilton Head. App. at 292. Manufacturers also discussed bar-coding, in the context of either "pirate-proofing" sample books or standardizing labels and shipping containers. FSC discussed with other manufacturers steps they were taking to combat 800-number dealers, such as engaging in cooperative advertising, imposing state sales taxes and imposing local trading policies.

800-number dealers were also discussed at conventions sponsored by a chain of wallcovering stores called Wallpaper-To-Go. App. at 313, 315. FSC officials and other wallcovering manufacturers deny that they agreed with other manufacturers to take action ***1006** against the 800-number dealers, however. *See* FSC's brief at 42.

Other manufacturers reacted against the 800-number dealers in much the same fashion as FSC did. In April, 1988, the owner of one company wrote an open letter to manufacturers about 800-number dealers. In it, he suggested that a task force be formed to establish an "effective, standard and universal method of '[p]irate-[p]roofing' sample books." App. at 884. At least one manufacturer took a step in that direction and coded its sample books so that style and price information could not easily be discerned. App. at 139-41. Another imposed a local trading policy, app. at 130-38, 151, and another tried, but discontinued, a cooperative advertising program with conventional retailers. App. at 127-28. By August, 1989, two more manufacturers had imposed a drop shipment surcharge. App. at 160, 789.

III.

In May, 1990, plaintiffs filed suit against NDPA and FSC. Their amended complaint, filed in January, 1991, contained twelve counts, the first four of which provide the central focus for this appeal. In Count I, they alleged that "[t]he individual retail wallcovering dealers, acting through the NDPA" violated section 1 of the Sherman Act by entering into a horizontal

conspiracy to eliminate the competition posed by 800-number dealers. In Count II, the plaintiffs alleged that in response to the pressure exerted by the NDPA, FSC joined NDPA in a vertical conspiracy similarly designed to thwart competition. In Counts III and IV, the plaintiffs alleged that FSC entered into a conspiracy with other, unnamed wallcovering manufacturers aimed at eliminating 800-number dealers. Specifically, plaintiffs challenged FSC's imposition of the drop shipment surcharge and its adoption of a local trading policy as being directed at them. [FN7]

FN7. Their amended complaint indicates that plaintiffs originally were concerned about two additional FSC policies: FSC's failure to discuss cooperative advertising possibilities with 800-number dealers though it did so with conventional retailers, and FSC's charging state sales tax on drop shipments. These policies, however, are not subjects of this appeal.

Plaintiffs also alleged a claim under section 2(d) of the Clayton Act, 15 U.S.C. § 13(d); state-law antitrust and restraint of trade violations; tortious interference with contracts and prospective contractual relations; fraud and misrepresentation; defamation and commercial disparagement and breach of contract. In turn, FSC asserted various counterclaims against the 800-number dealers.

The district court granted defendants' motions for summary judgment on Counts I through IV and granted both plaintiffs and defendants summary judgment on various other claims and counterclaims. Thereafter, the parties settled those claims which had not been disposed of, and plaintiffs filed this appeal challenging the district court's decision on Counts I through IV, the state-law antitrust claims, the tortious interference claim and the defamation claim against NDPA.

[7] The district court had jurisdiction over this case pursuant to 28 U.S.C. § 1331, and we exercise jurisdiction pursuant to 28 U.S.C. § 1291. [FN8] In our analysis of each of ***1007** the plaintiffs' Sherman Act claims, which allege three distinct antitrust theories of liability, we proceed from the premise that "plaintiffs should be given the full benefit of their proof without tightly compartmentalizing the various factual components and wiping the slate clean after scrutiny of each." *Continental Ore Co. v. Union Carbide & Carbon Corp.*, 370 U.S. 690, 699, 82 S.Ct. 1404, 1410, 8 L.Ed.2d 777 (1962).

FN8. NDPA and FSC argue that we lack jurisdiction over this appeal because the district court failed to enter a judgment on a separate document in accordance with Rule 58 of the Federal Rules of Civil Procedure and had not yet awarded costs in accordance with Rule 54(d) of the Federal Rules of Civil Procedure.
In *Bankers Trust Co. v. Mallis*, 435 U.S. 381, 98 S.Ct. 1117, 55 L.Ed.2d 357 (1978) (per curiam), however, the Supreme Court recognized that the rules of civil procedure requiring entry of judgment on a separate document should be interpreted in a common-sense fashion. "If, by error, a separate judgment is not filed before a party appeals, nothing but delay would flow from requiring the court of appeals to dismiss the appeal." *Mallis*, 435 U.S. at 385-86, 98 S.Ct. at 1120. *See also International Brotherhood of Teamsters v. Western Pennsylvania Motor Carriers Assoc.*, 660 F.2d 76, 80 (3d Cir.1981). The district court's failure to enter judgment in accordance with the dictates of Rule 58 appears to stem from oversight. No other plausible suggestion has been advanced. Thus, we reject this jurisdictional argument.
As to costs, we note that the parties' stipulation of settlement, which disposed of those counts as to which the district court had not granted summary judgment and which was entered as an order by the district court, provided that each party was to bear its own costs, thus implicitly if not actually resolving any Rule 54(d) issue.

IV.

At Count I, in which plaintiffs named only NDPA as a defendant, they alleged that conventional retailers, acting through the NDPA, conspired to pressure manufacturers to eliminate them from the marketplace. The district court examined the record for evidence of "officially sanctioned NDPA activity," found none, and ruled that plaintiffs could not meet the "concerted action" requirement because "[t]he NDPA can only act pursuant to a resolution from its board and no such resolution has been identified." App. at 37. We will reverse.

A.

It is both uncontested and uncontestable that NDPA is an association of competing wallpaper dealers. As such, when NDPA takes action it has engaged in concerted action so as to trigger potential section 1 liability. *Weiss*, 745 F.2d at 816 (hospital executive committee's actions are concerted action within the meaning on section 1). "[A]ntitrust policy requires the courts to seek the economic substance of an arrangement, not merely its form." *Weiss*, 745 F.2d at 815. The actions of a group of competitors taken in one name present the same potential evils as do the actions of a group of competitors who have not created a formal organization within which to operate. *See id.* at 816 ("[w]here such associations exist, their actions are subject to scrutiny under section 1 ... in order to insure that their members do not abuse otherwise legitimate organizations to secure an unfair advantage over their competitors"). *See also Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963); *Associated Press v. United States*, 326 U.S. 1, 65 S.Ct. 1416, 89 L.Ed. 2013 (1945).

We agree with NDPA's contention, however, that NDPA can only be held liable for concerted action if it acted as an entity. *See Nanavati v. Burdette Tomlin Memorial Hospital*, 857 F.2d 96, 117-18 (3d Cir.1988) (*Weiss* holds that when a group of competitors "acts as a body, it constitutes a 'combination' "). In *Nanavati*, we held that although the actions of a hospital executive committee might constitute concerted action, the committee does not engage in concerted action when it does not "act[ ] as an entity in furtherance of the conspiracy." *Id.* at 119. As we explained there:

> Our conclusion in *Weiss* was premised on the concept that where individual actors take actions as a group, they are a combination for the purposes of those actions. Where no group action is taken, no such combination can exist. In short, we did not hold in *Weiss* that because the actions of the medical staff constitute the actions of a combination, even where there is no allegation that the staff acted as a group, the 'contract, combination or conspiracy' requirement has been met. Such a group is a combination as a matter of law only for the actions it takes as a group.
>
> *Id.*

In *Nanavati*, the plaintiff did not maintain that the executive committee took any action as a group. *Id.* Instead, he pointed to the actions of medical staff members who were not on the executive committee as the basis for his claim. He argued that the record contained evidence of a boycott against him by members of the medical staff, so the jury had not erred in finding that the executive committee had participated in the boycott. Our search for evidence that members of the executive committee had acted in furtherance of the boycott yielded none; thus, we affirmed the district court's grant of judgment n.o.v. to the executive committee.

[8] *Nanavati* teaches that concerted action does not exist every time a trade association member speaks or acts. Instead, in assessing whether a trade association (or any other group of competitors) has taken concerted action, a court must examine all the ***1008** facts and circumstances to determine whether the action taken was the result of some agreement, tacit or otherwise, [FN9] among members of the association. *See generally Nanavati*, 857 F.2d at 119-20.

> FN9. It would be incorrect to require an official board resolution, or other officially sanctioned activity, to impose liability on NDPA. Recognizing that perpetrators of antitrust violations are often sophisticated businessmen, courts regularly permit agreements to be shown by circumstantial evidence. *See Big Apple BMW*, 974 F.2d at 1364; *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 540-41, 74 S.Ct. 257, 259-60, 98 L.Ed. 273 (1954).

Judicial scrutiny of alleged concerted action, undertaken to determine whether it was the result of an agreement, is an intricate endeavor. In the straightforward case, such as when a stock exchange requires disconnection of a nonmember's private telephone wire, or a hospital executive committee votes to deny staff privileges to a member, the action is obviously a result of an agreement which is stamped with the imprimatur of the association by a vote or passage of a resolution. *See, e.g., Silver*, 373 U.S. at 347, 83 S.Ct. at 1251-52; *Weiss*, 745 F.2d at 816. We can hardly say, however, that this case falls within that genre.

Here, plaintiffs rely on *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 102 S.Ct. 1935, 72 L.Ed.2d 330 (1982), to argue that NDPA took concerted action when its officers spoke out in protest against the 800-number dealers' business methods and when NDPA publications included letters complaining about 800-number dealers. In *Hydrolevel*, the Supreme Court,

relying on general principles of agency law, determined that the American Society of Mechanical Engineers ("ASME") could be held liable for the actions of its officers and agents taken with apparent authority. Writing for the majority, Justice Blackmun held that imposing liability based upon apparent authority comported with the intent of the antitrust laws because ASME possessed great power and the codes and standards it issued influenced policies and affected entities' abilities to do business. *Hydrolevel,* 456 U.S. at 570, 102 S.Ct. at 1945. "When it cloaks its subcommittee officials with the authority of its reputation, ASME permits those agents to affect the destinies of businesses and thus gives them the power to frustrate competition in the marketplace." *Id.* at 570-71, 102 S.Ct. at 1945. Imposing antitrust liability on the association for the actions of its agents would encourage ASME to police its ranks and prevent the use of associations by one or more competitors to injure another. *See generally id.* at 571-73, 102 S.Ct. at 1945-46. *See also* M. Boudin, *Antitrust Doctrine and the Sway of Metaphor,* 75 Geo.L.J. 395, 417-18 (1986). [FN10]

> FN10. Judge Boudin notes that the Supreme Court in *Hydrolevel* viewed ASME as an "extra-governmental agency" regulating its own industry. *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 570, 102 S.Ct. 1935, 1945, 72 L.Ed.2d 330 (1982). *See* M. Boudin, *Antitrust Doctrine and the Sway of Metaphor,* 75 Geo.L.J. 395, 417 (1986). Indeed, *Hydrolevel* and many other trade association cases have focused on this role and on associations' standard-setting or industry-regulating activities. *See e.g. Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 105 S.Ct. 2613, 86 L.Ed.2d 202 (1985); *Moore v. Boating Industry Assoc.*, 819 F.2d 693 (7th Cir.1987). *See generally* ABA Antitrust Section, *Antitrust Law Developments* 86-91 (3d ed. 1992). Notably, the case before us does not involve standard-setting or industry-regulating activity on NDPA's part.

In deciding *Hydrolevel,* the Court rejected ASME's argument that it should not be held liable unless its agents had acted with an intent to benefit it. This argument was irrelevant, the Court held, in part because "[w]hether they intend to benefit ASME or not, ASME's agents exercise economic power because they act with the force of the Society's reputation behind them." *Hydrolevel,* 456 U.S. at 574, 102 S.Ct. at 1946. The Court viewed the imposition of liability regardless of the agents' intent as more consistent with the purposes of antitrust law, since this would encourage ASME to police its agents so as to prevent the anticompetitive effects of their using its name and power even in individual efforts at restraining trade. *Id.*

The issue presented here, however, is markedly different. In *Hydrolevel,* the plaintiff had named three defendants in its conspiracy claim. Although it is difficult to discern the exact contours of the alleged ***1009** conspiracy from the *Hydrolevel* opinion, it is quite clear that the plaintiff there was not seeking to hold ASME liable for concerted action solely on the basis of actions taken by one official with apparent authority. The conspiracy alleged apparently was between the chairman of an ASME standards committee and the plaintiff's primary competitor; the question before the Court was whether ASME could be held liable for its agent's anticompetitive activity in participating in the conspiracy even though no one else at ASME had authorized the violation. Because a conspiracy was alleged to have taken place between the ASME official and another conspirator, the Court did not address the question of whether an agent with apparent authority can cause a trade association to be held liable for violating the antitrust laws by taking action on behalf of the association which would have amounted to such a violation if the association itself, as a combination of competitors, had undertaken it.

[9][10] We believe that the *Hydrolevel* rule that an association's economic power may justify its being held liable for the actions of its agents cannot be extended to defeat the "concerted action" requirement of section 1. Imposing liability on an association, as we did in *Weiss,* does not abolish or diminish the first element of section 1 liability; it merely recognizes that a group of competitors with a unity of purpose are engaged in concerted action, whether or not they act under one name. As we explained in *Nanavati,* in the absence of a co-conspirator, an association's actions satisfy the concerted action requirement only when taken in a group capacity. The potential for antitrust liability arising from the concerted action of a group such as a trade association, as that liability may be established by the apparent authority of an agent to speak on behalf of and bind that association, has not yet been fully explored in a trade restraint case. [FN11] In *Hydrolevel,* for example, the Court described the concept of apparent authority as one which results in liability on a principal's part for an agent's torts. *Hydrolevel,* 456 U.S. at 565-66, 102

S.Ct. at 1942. Thus, if an agent commits fraud, his or her principal is liable if he or she acted with apparent authority to act on behalf of that principal. *Id.* at 566, 102 S.Ct. at 1942. Similarly, if an agent acting with apparent authority makes misrepresentations that cause pecuniary loss to a third party or is "guilty of defamation," the principal is liable. *Id. See also id.* at 568, 102 S.Ct. at 1943; *see generally* Restatement (Second) of Agency § § 215 *et seq.* (a principal is liable for the "torts of its servants" and for its "servants' tortious conduct"). Applying that general principle to the antitrust area leads us to conclude that a principal will be liable for an antitrust violation if an agent acting with apparent authority violates the antitrust laws, as one did in *Hydrolevel* by conspiring with another person. *See Hydrolevel,* 456 U.S. at 572, 102 S.Ct. at 1946 (speaking in terms of finding "ASME ... civilly liable *for the antitrust violations* of its agents acting with apparent authority" (emphasis added)).

> FN11. There is, however, authority for the proposition that a trade association, in and of itself, is a unit of joint action sufficient to constitute a section 1 combination. *See* G.D. Webster, The Law of Associations § 9a.01[1], 9A3-4 (1991) ("There is no question that an association is a 'combination' within the meaning of Section 1 of the Sherman Act. Although a conspiracy requires more than one person, an association, by its very nature a group, satisfies the requirement of joint action. Thus, any association activity which restrains interstate commerce can be violative of Section 1 even if no one acts in concert with the association."); Stephanie W. Kanwit, *FTC Enforcement Efforts Involving Trade and Professional Associations,* 46 Antitrust L.J. 640, 640 (1977) ("Because trade associations are, by definition, organizations of competitors, they automatically satisfy the combination requirements of § 1 of the Sherman Act.")

We are dealing here, however, with a trade association which is charged with violating the antitrust laws by constituting a horizontal conspiracy to eliminate the 800-number dealers. Clearly, an association, as a combination of its members, can violate the antitrust laws through such a conspiracy. This was the nature of the claim which prompted the FTC to initiate its complaint against the NDPA in 1985. The singular characteristic of plaintiffs' allegations here is that the association is now charged with acting through agents whom it has imbued with apparent authority. It is uncontested that the NDPA is highly sophisticated and possesses significant market power; it is unrealistic to think that such a sophisticated trade association, ***1010** wary of the antitrust laws, would ingenuously act as an association in endorsing the type of activity forbidden by the consent decree.

In considering the antitrust implications of this situation, though, our first concern must be whether plaintiffs' allegations demonstrate an antitrust violation. Specifically, we must determine whether statements by NDPA officers demonstrate that NDPA recommended that its members refuse to deal with any seller of wallcoverings on account of the prices or distribution methods of that seller. We must also determine whether the evidence could show that the NDPA officers' statements were made with the apparent authority of the membership of the NDPA for those officers to act as the NDPA's agents. This method of analysis is consistent with *Hydrolevel,* which instructs that a court must find an antitrust violation before deciding whether to hold an association liable for that violation by virtue of the perpetrator's apparent authority. [FN12]

> FN12. We do not, however, require that members of NDPA actually ratify an agent's actions before NDPA may be held liable for them. Such a rule not only would be unrealistic, *see supra* note 9, but it also would contravene the Court's admonition that agents of trade associations acting with apparent authority exercise the associations' economic power regardless of whether they are acting to benefit the associations. *Hydrolevel,* 456 U.S. at 573-74, 102 S.Ct. at 1946-47.

B.

[11] Having focused our inquiry not just upon whether Petit or other NDPA agents might have acted with apparent authority but also upon whether their actions could constitute an antitrust violation in the absence of that authority, we believe that a rational jury could find for the plaintiffs if the evidence presented to us is proven at trial. As noted previously, Petit has acknowledged that since the entry of the FTC consent decree he has continued to urge manufacturers to take steps to hinder 800-number dealers in the conduct of their business.

App. at 199, 407. He described himself as conveying "the concerns of NDPA," app. at 191, and he stated that he views it as part of his job to convey those concerns. App. at 192. Additionally, once FSC announced its local trading policy, Petit circulated a copy of it to the NDPA board of directors along with a memorandum which could be read as triumphant. App. at 693. From this, a rational juror could infer that Petit viewed himself as being authorized by the NDPA to make the statements he made.

Moreover, the record contains evidence from which a rational juror could also infer that Petit's actions represented concerted action. That is, a jury could find that, while representing NDPA, Petit went beyond merely voicing complaints to manufacturers to actually coercing (or attempting to coerce) them into cooperating in eliminating 800-number dealers. There is some evidence that Petit emphasized to manufacturers with whom he met "the anger felt by the retailers in [the] lack of support from the wallcovering industry." App. at 185. *See also* app. at 190-98, 218-29. Such evidence, when viewed against the existing backdrop of urgings from NDPA officers and editors that retailers should support only those manufacturers who supported them, could imply a threat of a retailers' boycott if manufacturers did not take steps to help eliminate 800-number dealers from the marketplace.

In sum, nothing in either the antitrust laws or the FTC consent decree prohibits NDPA from voicing complaints. Granting all reasonable inferences to the plaintiffs, however, a rational jury could find that NDPA did more than serve as a conduit for members' complaints in this case. It could, for example, find that NDPA, acting through its officers, threatened a retailers' boycott of manufacturers and thus could hold NDPA liable for a section 1 violation. For these reasons, we will reverse the district court's grant of summary judgment at Count I.

V.

[12] At Count II, plaintiffs alleged that FSC responded to pressure from the NDPA by conspiring with it to eliminate 800-number wallpaper dealers from the marketplace. Their allegations flow directly from evidence of FSC's taking actions to eliminate free riders from the marketplace in response to conventional retailers' complaints (and, possibly, threats of boycott). There is no dispute that plaintiffs are free riders, and there is no question as to the legitimacy of a manufacturer's ***1011** desire to rid the marketplace of free riders. *See Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 55, 97 S.Ct. 2549, 2560, 53 L.Ed.2d 568 (1977); *cf. Big Apple BMW*, 974 F.2d at 1377-78. Therefore, the scenario which is the focus of Count II is as consistent with procompetitive activity as with allegedly illegal activity. *Monsanto*, 465 U.S. at 763, 104 S.Ct. at 1470.

In *Monsanto*, a case which also involved an alleged conspiracy to terminate a dealership relationship because of other dealers' complaints, the Supreme Court noted:

> Permitting an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came about "in response to" complaints, could deter or penalize perfectly legitimate conduct. [C]omplaints about price cutters "are natural--and from the manufacturer's perspective, unavoidable--reactions by distributors to the activities of their rivals." Such complaints ... "arise in the normal course of business and do not indicate illegal concerted action." ... Moreover, distributors are an important source of information for manufacturers. In order to assure an efficient distribution system, manufacturers and distributors constantly must coordinate their activities to assure that their product will reach the consumer persuasively and efficiently. To bar a manufacturer from acting solely because the information upon which it acts originated as a price complaint would create an irrational dislocation in the market.

Monsanto, 465 U.S. at 763-64, 104 S.Ct. at 1470-71. Thus, we exercise a measure of caution when drawing inferences from such facts; "a fine line demarcates concerted action that violates antitrust law from legitimate business practices." *Big Apple BMW*, 974 F.2d at 1363, *citing Monsanto*, 465 U.S. at 762-64, 104 S.Ct. at 1470-71. *See also Matsushita*, 475 U.S. at 597 n. 21, 106 S.Ct. at 1361 n. 21. [FN13]

FN13. In *Matsushita*, the Supreme Court, in the context of an alleged horizontal price-fixing conspiracy, ruled that the case should not proceed to trial because the petitioners lacked a rational motive to conspire in the manner alleged. It also noted, however, that its ruling was not meant to "imply that, if petitioners had had a plausible reason to conspire, ambiguous conduct could suffice to create a triable issue of conspiracy. Our decision in *Monsanto* ... establishes that conduct that is as consistent with permissible competition as with illegal

conspiracy does not, without more, support even an inference of conspiracy." *Matsushita*, 475 U.S. at 597 n. 21, 106 S.Ct. at 1361 n. 21.

In *Big Apple BMW*, plaintiffs alleged that BMW of North America, Inc. ("BMW") had refused to grant automobile dealerships to them because other dealers had complained about plaintiffs' high-volume, deep-discount business methods. BMW asserted a variety of legitimate business reasons for its actions, including a concern about plaintiffs being "free-rider" dealers. Plaintiffs, however, presented evidence that they would not have posed the "free-rider" problem BMW feared, *see Big Apple BMW*, 974 F.2d at 1377, and that a person with the same advertising tactics as theirs (high-volume, deep- discount "sellathons") had been granted a BMW franchise. *Id.* at 1378. They also presented evidence tending to discredit the other reasons BMW proffered to support its refusal to grant them a franchise. *Id.* at 1377-80.

We reversed the district court's grant of summary judgment because plaintiffs had advanced evidence tending to exclude the possibility of BMW's having acted independently from the complaining dealers. They had "countered each alleged reason with evidence that both discredits BMW NA's witnesses and provides independent support for the [plaintiffs'] claim that BMW NA and its dealers acted in concert to repel" plaintiffs' competition. *Id.* at 1380.

Similarly, in *Arnold Pontiac-GMC, Inc. v. General Motors Corp.*, 786 F.2d 564 (3d Cir.1986), we reversed a grant of summary judgment because defendant General Motors Corporation ("GMC") first favorably viewed plaintiff's franchise application, then heard its dealers' disapproval and threatened non- cooperation, and then denied the application. GMC had not expressed concern about the plaintiff's franchise application until it heard its dealers' complaints. We held that "we must infer that [the dealers'] conduct contributed to GMC's decision not to award [the plaintiff] the Buick franchise." *Arnold Pontiac*, 786 F.2d at 573.

In marked contrast to *Big Apple BMW* and *Arnold Pontiac*, here the 800- number ***1012** dealers concede that they are free riders. It is also undisputed that FSC has for years sold sample books and promotional materials and has encouraged its dealers to invest in these and other overhead costs in order to provide better service to their customers. A jury could find that, because FSC had for years recognized the importance of selling service, its actions aimed at 800-number dealers were entirely consistent with its previously held view of its own self-interest and do not tend to demonstrate that it acted in conjunction with anyone in implementing its policies.

On the other hand, however, the record also contains evidence that may indicate concerted action between FSC and NDPA. Specifically, plaintiffs highlight two examples of what they claim to be FSC's assertion of pretextual reasons for its actions. If FSC in fact advanced reasons for its actions which were pretextual, this would tend to support an inference that it acted as part of a conspiracy with conventional retailers. *See Big Apple BMW*, 974 F.2d at 1374-80.

First, plaintiffs point to evidence in FSC's management committee minutes which contrast the "objective" of its drop shipment surcharge ("To make statement to industry that we are trying to help them") with the "rationale" for this surcharge ("To protect legitimate customers, [t]o increase margins in this area"). App. at 290. They also point to a parallel distinction between FSC's original and published press releases announcing the surcharge. The original press release stated:

> In direct response to retailer requests, we at F. Schumacher & Company are proud to announce that we will assertively support our dealers in their local trading areas and protect them from sales piracy by adding a seven percent surcharge onto all drop shipments ... . While bar coding is a breakthrough for the industry in terms of product identification we feel that it alone is not an entirely effective deterrent against sales piracy.... Our approach attacks the problem at its root and makes the accounts who drop ship feel the effects, rather than leaving the responsibility of policing to the retailers.

App. at 298-99. The final press release stated that the policy was not designed to combat "piracy" but rather to

> help insure that our consumers receive the best possible service and that our wallcovering brands are supported in the most effective and appropriate manner at retail ... This policy seeks to encourage all dealers to concentrate their selling efforts exclusively within their own trading areas where they can provide service directly to the consumers to whom they sell the product.

App. at 486.

Plaintiffs argue that these inconsistencies in and contrasts between the internal and the public explanations of the drop shipment policy reveal that FSC was attempting to disguise the true reason for its

actions. We agree; while the two statements and the two press releases could be seen as being in harmony with FSC's explanation that it took the action it did to protect the investments made by traditional retailers, a jury might view FSC's apparent desire to use more genteel language when explaining its actions to the public as implying a sinister motive.

Second, plaintiffs argue that although FSC acknowledges that dealer complaints were part of the reason for its surcharge, at one time it also stated that the surcharge was intended in part to recoup increased costs associated with drop shipments. FSC did not, however, use mathematical calculations to arrive at its surcharge figure; it neither consulted anyone regarding nor studied such costs, and the record contains statements by another manufacturer indicating that his costs for drop shipments were no higher than for shipments to stores. This, plaintiffs argue, underscores the arbitrariness of the surcharge and evinces FSC's true, sinister motive.

A lack of market research, while perhaps adding luster to plaintiffs' contention that the surcharge was arbitrarily determined, does not necessarily invite an inference that FSC's statement was an attempt to conceal a conspiracy. It is true that the seven percent figure did not reflect an analysis of FSC's costs; however, this does not indicate that FSC was not pursuing its self interests in imposing it. Nevertheless, viewing this evidence ***1013** in conjunction with the press releases and the retailer pressure on FSC, it is not an implausible conclusion that FSC may have imposed the surcharge without first undertaking mathematical calculations because it had agreed with others to impose the surcharge whether it made economic sense or not.

Accordingly, because there is some evidence from which a rational jury could infer that FSC advanced pretextual reasons for its policies, and might in turn infer that FSC had acted in concert with NDPA in deciding to implement policies designed to injure 800-number dealers, we will reverse the district court's grant of summary judgment at Count II.

VI.

[13] At Counts III and IV, plaintiffs allege that FSC conspired with other wallcovering manufacturers to injure the 800-number dealers. We will affirm the district court's grant of summary judgment as to these counts because plaintiffs' evidence tends to show only an opportunity to conspire, not an agreement to do so.

Certainly, direct evidence (or a direct inference) of an agreement between FSC and other manufacturers regarding 800-number dealers could enable plaintiffs to show concerted action. The evidence of an agreement, however, amounts to nothing more than communications on the 800-number subject. Communications alone, although more suspicious among competitors than between a manufacturer and its distributors, do not necessarily result in liability. *Tose v. First Pennsylvania Bank, N.A.*, 648 F.2d 879, 894 (3d Cir.1981). As we have observed, it is only when those communications rise to the level of an agreement, tacit or otherwise, that they become an antitrust violation.

Thus, plaintiffs are left to argue that FSC and other manufacturers conspired based upon their parallel conduct. "[P]roof of consciously parallel business behavior is circumstantial evidence from which an agreement, tacit or express, can be inferred but ... such evidence, without more, is insufficient unless the circumstances under which it occurred make the inference of rational, independent choice less attractive than that of concerted action." *Bogosian v. United States*, 561 F.2d 434, 446 (3d Cir.1977). The circumstances necessary to support such an inference are: (a) a showing that the defendants acted contrary to their own economic interests; and (b) satisfactory demonstration of a motivation to enter an agreement. *Id.*, *citing Venzie Corp. v. United States Mineral Products Co., Inc.*, 521 F.2d 1309, 1314 (3d Cir.1975). *See also Petruzzi's IGA Supermarkets, Inc. v. Darling Delaware Co., Inc.*, 998 F.2d 1224 (3d Cir.1993); *Schoenkopf v. Brown & Williamson Tobacco Corp.*, 637 F.2d 205, 208 (3d Cir.1980).

In particular, when evidence shows communications which provided an opportunity for agreement, a plaintiff must still produce evidence permitting an inference that an agreement in fact existed. *Venzie*, 521 F.2d at 1313. The evidence must give rise to more than speculation. *Id.*

In *Venzie*, for example, plaintiffs contended that two defendant corporations had agreed to refuse to sell fireproofing material to them. The record contained evidence that defendants had made numerous telephone calls, at least one of which concerned the plaintiffs, to each other and had met for lunch. We held that it was for the jury to assess the credibility of the defendants' assertions that they had not discussed or agreed upon the alleged refusal to deal, but, even disregarding statements to that effect, all that plaintiffs' evidence proved was an opportunity for an agreement, which would not suffice to support a verdict. Plaintiffs had failed to highlight evidence

supporting an inference that an agreement in fact existed and thus could not support a verdict. *Venzie*, 521 F.2d at 1312. *See also Tose*, 648 F.2d at 895.

In contrast, a particularly detailed memorandum of a telephone call can give rise to a reasonable inference of agreement. In *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 254 (2d Cir.1987), for example, the plaintiff survived a summary judgment motion by advancing evidence in the form of detailed memoranda indicating the existence of an agreement.

In this case, it is conceded that manufacturers discussed 800-number dealers, and actions they were taking concerning them, at conventions. The evidence of communications ***1014** thus falls somewhere between *Venzie*, in which there were no notations of the subject matter of the conversations, and *Apex Oil*, in which the notations implied an agreement. Plaintiffs, however, seek to infer an agreement from those communications despite a lack of independent evidence tending to show an agreement and in the face of uncontradicted testimony that only informational exchanges took place. Without more, they cannot do so. *Cf. Tose*, 648 F.2d at 894 (mere disbelief of contrary testimony does not prove agreement).

We emphasize that unlike actions such as price-cutting, which provide the classic example of conscious parallelism, FSC's action was in its economic interests. It is simple syllogistic reasoning that if FSC was aware that most of its dealers were conventional retailers, and believed that its products sold better in the conventional setting, it would conclude that it was in its economic interests to keep the conventional retailers satisfied. That FSC may have foregone some short-term opportunity for sales to 800-number dealers does not suffice to show it acted contrary to its self-interests when its actions clearly would benefit it economically in the long term. *Tose*, 648 F.2d at 895; *see* P. Areeda, *Antitrust Law* § 1415e (1986). FSC's listening to retailers' complaints in no way implies that there was an agreement among manufacturers to do the same. *See Venzie*, 521 F.2d at 1314 ("[t]he absence of action contrary to one's economic interest renders consciously parallel business behavior 'meaningless, and in no way indicates agreement,' " *quoting* Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 Harv.L.Rev. 655, 681 (1962)); *see also Houser v. Fox Theatres Management Corp*, 845 F.2d 1225, 1232-33 (3d Cir.1988) (requiring both actions contrary to economic interests and motive to conspire).

VII.

Remaining for disposition are the plaintiffs' state-law antitrust and tort claims. To the extent that their state-law antitrust claims mirror their federal antitrust claims, we will dispose of those claims in like manner. We will affirm the district court's disposition of the state-law tort claims.

A.

At Count VI, plaintiffs alleged that the defendants violated Pennsylvania antitrust law by engaging in the activity alleged as the basis of Counts I through IV. This allegation rises or falls with plaintiffs' federal antitrust claims. *See Collins v. Main Line Board of Realtors*, 452 Pa. 342, 304 A.2d 493 (1973); *Schwartz v. Laundry and Linen Supply Drivers' Union*, 339 Pa. 353, 14 A.2d 438 (1940); plaintiffs' brief at 45; FSC's brief at 47-48. Therefore, our decision with respect to Counts I through IV disposes of Count VI as well. Count VI survives to the extent that it is directed toward the theories of liability upon which Counts I and II are based; to the extent it is a counterpart of Counts III and IV, however, we will affirm the district court's grant of summary judgment.

B.

[14] At Count VII, plaintiffs alleged that FSC and NDPA tortiously interfered with their existing and prospective contracts. We have previously noted that the "factual underpinnings" of such intentional interference claims generally "are intertwined with" the antitrust claims they accompany, *see Big Apple BMW*, 974 F.2d at 1381-82, but that statement does not imply that claims of intentional interference with contractual relations must always survive summary judgment if a plaintiff's antitrust claims survive. It merely implies what to some might be obvious--that antitrust violations or other actions in restraint of trade are examples of improper conduct. We are not bound, therefore, to reverse on the tortious interference claims merely because we are reversing on two of plaintiffs' antitrust claims. Instead, we will affirm the grant of summary judgment to defendants on Count VII because plaintiffs have failed to demonstrate that they would be able to present evidence tending to prove each element of their tortious interference claims at trial.

[15][16] To establish a claim of tortious interference with existing contracts, plaintiffs must prove that the defendants intentionally and improperly interfered with their performance ***1015** of contracts with third persons. *Nathanson v. Medical College of*

Pennsylvania, 926 F.2d 1368, 1388 (3d Cir.1991); *Adler, Barish, Daniels, Levin and Creskoff v. Epstein*, 482 Pa. 416, 393 A.2d 1175, 1183 (1978). To prove their claims of tortious interference with prospective contractual relations, plaintiffs likewise must prove, *inter alia*, the existence of prospective contracts. *Thompson Coal Co. v. Pike Coal Co.*, 488 Pa. 198, 412 A.2d 466, 471 (1979). A prospective contract "is something less than a contractual right, something more than a mere hope[ ]" *id.*; it exists if there is a reasonable probability that a contract will arise from the parties' current dealings. *Glenn v. Point Park College*, 441 Pa. 474, 272 A.2d 895, 898-99 (1971).

Plaintiffs have failed to identify with sufficient precision contracts and prospective contracts which were interfered with by the defendants. They have likewise failed to identify an existing contract which was terminated because of the defendants' actions. Nor have they demonstrated a reasonable probability that they would have entered into prospective contracts with third parties but for defendants' alleged interference. *See General Sound Telephone Co., Inc. v. AT & T Communications, Inc.*, 654 F.Supp. 1562, 1565-66 (E.D.Pa.1987). This case differs in this respect from *Big Apple BMW*, in which we reversed a grant of summary judgment on claims of intentional interference with contractual relations solely because their "factual underpinnings" were "intertwined with the antitrust claims" as to which we were reversing a grant of summary judgment. In *Big Apple BMW*, the plaintiffs had specified transactions in which they claimed defendants' actions had deprived them of specific automobile dealership franchises. In contrast, in this case, plaintiffs have failed to advance more than speculation to support their claim of tortious interference; therefore, we will affirm the district court as to this count.

C.

[17] Finally, at Count X, plaintiffs alleged that the NDPA defamed them by publishing articles and editorials referring to 800-number dealers as "pirates." Under Pennsylvania law, a statement is defamatory if it " 'tends to so harm the reputation of another as to lower him in the estimation of the community or to deter third persons from associating or dealing with him.' " *U.S. Healthcare, Inc. v. Blue Cross of Greater Philadelphia*, 898 F.2d 914, 923 (3d Cir.1990), *quoting Birl v. Philadelphia Electric Co.*, 402 Pa. 297, 167 A.2d 472, 475 (1960). To prove their claim, plaintiffs must show: (1) the defamatory character of the statements; (2) publication by NDPA; (3) the statements' application to the plaintiffs; (4) an understanding by readers of the statements' defamatory meaning; and (5) an understanding by readers of an intent on the part of NDPA to refer to the plaintiffs. 42 Pa.Cons.Stat.Ann. § 8343(a) (1982); *U.S. Healthcare*, 898 F.2d at 923. The law does not require that a plaintiff be specifically named in an allegedly defamatory statement, for a statement might be defamatory if, by description or circumstances, it tends to identify the plaintiff as its object. *Redco Corp. v. CBS, Inc.*, 758 F.2d 970, 972 (3d Cir.1985).

Plaintiffs base their defamation claim upon statements referring to 800-number dealers in general as "pirates." Individual group members may sue based upon statements about a group when the statements were directed toward a "comparatively small class or group all of whose constituent members may be readily identified and the recipients of the [statements] are likely to identify some, if not all, of them as intended objects of the defamation." *Farrell v. Triangle Publications, Inc.*, 399 Pa. 102, 159 A.2d 734, 736-37 (1960). But no claim arises from a defamatory remark directed toward a group whose membership is so numerous that no individual member can reasonably be deemed its intended object. *Id.*, 399 Pa. 102, 159 A.2d at 736. Similarly, no claim exists if, for any other reason, a reader could not reasonably conclude that the statements at issue referred to the particular person or persons alleging defamation. *Id.*, 399 Pa. 102, 159 A.2d at 737.

Relying upon record evidence indicating that in 1990 there were only 20 to 25 800-number dealers in the industry (app. at 1123-24), plaintiffs argue that they may base their claim on statements directed at 800-number dealers in general. *Cf.* Restatement (Second) of Torts § 564A, comment c. As noted above, however, a group's size is not the sole ***1016** consideration in determining whether individual members may assert defamation claims based upon statements about the group. A group may be relatively small, but statements which disparage it may not serve as a basis for an individual defamation claim unless a reader could reasonably connect them to the complaining individual.

In *Farrell*, for example, one of 13 township commissioners asserted a defamation claim against a newspaper which had published a story implicating "a number of township commissioners and others" in corrupt activity. *Farrell*, 159 A.2d at 736. The Pennsylvania Supreme Court held that the plaintiff had stated a claim for defamation. In so holding, however, the court concentrated not on the size of the group discussed but on whether readers "knew that the plaintiff was one of the thirteen commissioners." *Id.* at 738. We similarly do not end our inquiry upon

being apprised that there were between 20 and 25 800-number dealers in 1990; we examine whether the plaintiffs were "sufficiently identified as [objects of NDPA's statements] to justifiably warrant a conclusion that [their] individual reputation[s have] been substantially injured." *Id.* at 736.

Here, there is nothing in the record other than the number of 800- dealers which could support a conclusion that any of the plaintiffs' individual reputations were injured by NDPA's statements about 800-number dealers in general. Indeed, the individual identities of this group's members are, by the very nature of their business, less meaningful than the telephone numbers they promote to facilitate discount purchases. This group appears amorphous and ill-defined when compared to the well-defined group of township commissioners at issue in *Farrell.* Plaintiffs have not produced evidence tending to prove that they belong to such an easily identifiable, cohesive group that a reader would ascribe statements referring to 800-number dealers in general as "pirates" to any of them individually. Thus, we will affirm the district court's grant of summary judgment on Count X.

VIII.

For the foregoing reasons, we will reverse the district court's grant of summary judgment as to Counts I and II, as well as the corresponding portion of Count VI, but will affirm its disposition of Counts III, IV, VII and X and the remainder of Count VI.

STAPLETON, J., concurring in part and dissenting in part:

I would affirm the district court's summary judgment in favor of the defendants on the vertical conspiracy count and, accordingly, dissent from Section V of the court's opinion. I am also unable to join all of Sections IV-A, VII-A, and VII-B. I do join the remainder of the court's opinion. I comment only on the trade association aspect of the horizontal conspiracy charge and on the vertical conspiracy charge.

I.

Trade associations have been held liable for unreasonably restraining trade in violation of section 1 of the Sherman Act, even when they have not been accused of contracting, combining, or conspiring with other unrelated actors. *See, e.g., National Soc'y of Professional Eng'rs v. United States,* 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978). Courts, however, have not articulated how a trade association, by itself, can violate a statute which "does not prohibit unreasonable restraints on trade as such--but only restraints effected by a contract, combination, or conspiracy." *Copperweld Corp. v. Independence Tube Corp.,* 467 U.S. 752, 775, 104 S.Ct. 2731, 2744, 81 L.Ed.2d 628 (1984).

A sound theory of trade association liability under section 1 will recognize the anticompetitive potential inherent in a agglomeration of competitors. Indeed, trade associations have fixed prices, *see, e.g., Goldfarb v. Virginia State Bar,* 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), organized group boycotts, *see, e.g., Fashion Originators' Guild of America, Inc. v. FTC,* 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941), allocated customers and territories, *see, e.g., United States v. Topco Assoc., Inc.,* 405 U.S. 596, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972), and suppressed potential competitors, *see, e.g., United States v. Women's Sportswear Mfr. Ass'n,* 336 U.S. 460, 69 S.Ct. 714, 93 L.Ed. 805 (1949). A sound theory of trade association liability, ***1017** however, also will recognize that some trade association activities are not necessarily inconsistent with the preservation of competition. These activities include cooperative research, market surveys, development of new uses for products, mutual insurance, publication of trade journals, advertising, and joint representation before legislative and administrative agencies. *See* Julian O. van Kalinowski, *Antitrust Laws and Trade Regulation* § 6I.01. Most trade associations are organized for the purpose of pursuing these kinds of activities and most members initially join because of the benefit to be derived therefrom. If such an association thereafter engages in anticompetitive activity, only a limited number of its members may be involved in, or even aware of, the change of course. Finally, a sound theory of trade association liability will conform with the "well-established" rule that "[a] single person or entity acting alone is not subject to the strictures of Section 1." Earl W. Kintner, *Federal Antitrust Law* § 9.7.

The plaintiffs insist that trade association activity is concerted activity for purposes of section 1. Since any activity of an officer of an association engaged in with apparent authority is activity of the association under conventional rules of agency, any such activity, in plaintiffs' view, is thus concerted activity for purposes of section 1. This logic eviscerates the concerted action requirement of section 1. [FN1]

FN1. For the reasons explained in the court's opinion, the agency principles discussed in *American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 102 S.Ct. 1935, 72 L.Ed.2d 330 (1982), and the Supreme Court's application of those principles in that case are not pertinent until a violation of section 1 has been established.

In my view, the agreement element of a section 1 claim is satisfied if, but only if, it is shown that two or more of the association's members have committed themselves to the anti-competitive activity of the trade association and to the accomplishment of its objectives. Thus, in the absence of a conspiracy between the trade association and a third party, the association can be liable only if some of its members are using it to unreasonably restrain trade.

Since a trade association is normally controlled by its members, where an association has engaged in anticompetitive activity, it normally will not be difficult to show the necessary agreement among a group of its members. The focus of the theory on the commitment of its members to anticompetitive activity, however, has important corollary consequences. One is that members of the trade association who neither participate nor knowingly acquiesce in the association's anticompetitive activity, unlike those who do, will not be held liable along with the association. *See, e.g., Kline v. Coldwell, Banker & Co.*, 508 F.2d 226 (9th Cir.1974), *cert. denied*, 421 U.S. 963, 95 S.Ct. 1950, 44 L.Ed.2d 449 (1975); *Phelps Dodge Refining Corp. v. FTC*, 139 F.2d 393 (2d Cir.1943); *see generally*, Earl W. Kintner, *Federal Antitrust Law* § 9.16.

Another collateral consequence of this theory of concerted activity is that, in the absence of membership commitment to an activity engaged in by an association officer or a conspiracy between the officer and some other entity, the activity of the officer is not concerted activity. It seems to me that this must be true without regard to whether the officer had apparent authority to act as he did, although evidence supporting the existence of apparent authority may also constitute circumstantial evidence tending to show concerted activity on the part of the members of the association.

As the district court recognized, if NDPA's directors, acting on behalf of the retailers they represent, had passed a resolution instructing its officers to recruit retailers for a boycott of any manufacturer who dealt with 800-number dealers and to threaten manufacturers with such a boycott, and an officer of the association had carried out this directive, the association clearly would have engaged in concerted activity for purposes of section 1. As the district court emphasized, there is no evidence of such formal corporate action in this record.

The district court erred, however, by not continuing its inquiry beyond this level. If NDPA's directors did not pass such a resolution but, acting on behalf of the retailers they represented, tacitly agreed among themselves to so instruct NDPA's officers, the association would just as surely be engaged ***1018** in concerted activity when an officer carried out this agreement. In this situation, as in the first, NDPA would have been used by its members, through their representatives on the board, to engage in concerted activity. The same would be true if an officer of the NDPA had initiated this kind of anti-competitive activity without the knowledge or approval of the board and the board, after learning of it, had approved or acquiesced in it. As a matter of antitrust theory, however, I do not think that an activity of an NDPA officer, even if engaged in with apparent authority, can constitute concerted activity in the absence of some basis for inferring member commitment to that activity.

With this theoretical background, I turn to the summary judgment record in this case. Plaintiffs urge that a trier of fact could infer from the present record that officers of NDPA, with the approval of NDPA's board and the retailers they represent, threatened FSC and other manufacturers with a dealer boycott if they did not take measures against the 800-number dealers. I do not understand the defendants to urge at this stage that such an inference would not provide a satisfactory basis for imposing section 1 liability. [FN2] They do insist, however, that such an inference cannot reasonably be drawn from the current record. While the issue is a close one, I think there is enough evidence to make the plaintiffs' inference a permissible one.

FN2. I express no opinion on whether the activities the defendants are accused of engaging in constitute an unreasonable restraint of trade within the meaning of section 1 of the Sherman Act.

Mr. Petit, the CEO of NDPA, candidly acknowledged speaking directly to numerous

manufacturers after the consent decree about the concerns of conventional retailers regarding 800-number dealers. Given the past history of the matter and Mr. Petit's view that the scope of FTC's consent decree was of very limited effect, a rational trier of fact could infer that Mr. Petit continued, after the decree, not only to express to manufacturers the concerns of the conventional dealers, but also to call upon them to take specific steps to thwart the 800-number dealers. When he spoke to manufacturers about this matter, he spoke on behalf of the NDPA. As he testified, he spoke about "the concerns of the NDPA." App. 191. Clearly, he viewed himself as authorized by the NDPA to say what he did. As he put it, "That's my job," referring to his campaign among the manufacturers. App. 192.

As the defendants stress, there is no direct evidence of a threat of a boycott by Mr. Petit or anyone else on NDPA's behalf. There is, however, evidence that Mr. Petit emphasized to the manufacturers "the anger felt by the retailers in [the] lack of support from the wallcovering industry," App. 185, and that his demands for action by the manufacturers came against a background of public, oral and written advice from NDPA officers that conventional retailers should deal only with those manufacturers who supported them. When one adds to this evidence the fact that some manufacturers did respond with measures against the 800-number dealers, I believe a trier of fact could conclude that a boycott threat was intended by the NDPA officers and understood by the manufacturers.

Finally, if a trier of fact inferred that NDPA officers implicitly threatened a boycott, it would be permissible for the trier of fact to further infer that the NDPA board members knew of the boycott threat and at least tacitly approved it. Mr. Petit's triumphant memorandum of January 29, 1990, to the board members is strong circumstantial evidence supporting this view. That memorandum, it will be recalled, declared that FSC's decision not to sell to the "sales pirates" was "a major step forward in *our* battle against the 800- number operators." App. 693 (emphasis added). There is, in addition, evidence that the board regularly discussed this matter and it was receiving intense pressure from NDPA membership to do something about the problem. Thus, like my colleagues, I would reverse the district court's summary judgment in favor of the defendants on the horizontal conspiracy charge.

II.

Turning to the charged vertical conspiracy, I start with the undisputed propositions that (1) potential purchasers of wallcovering normally desire to view samples of the merchandise before making a purchase, (2) as a result, ***1019** FSC has for years sold sample books and promotional materials and has for years encouraged other investment from its retailers to facilitate customer selection and satisfaction, and (3) the 800-number retailers are free riders as far as that investment is concerned. Since FSC cannot long remain successfully in business if its retailers are unwilling to make the investment necessary to facilitate customer selection and satisfaction, FSC has a legitimate and compelling interest in making sure free riders do not maintain a competitive advantage over retailers who are willing to make that investment. Nothing in this record tends to show that FSC took any action with respect to the plaintiffs other than to serve this interest. In particular, there is no evidence from which a finder of fact could infer a retail price maintenance conspiracy involving FSC. Under the now-familiar teachings of *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984), the mere fact that FSC's conventional retailers complained and FSC acted in response to those complaints does not preclude summary judgment for the defendants.

In *Monsanto,* a manufacturer and some of its distributors allegedly conspired to sanction a discount distributor. The Supreme Court began its analysis by noting that section 1 outlaws only some sanctions against a discount distributor: unilateral conduct is not forbidden and concerted action is *per se* illegal only when it fixes prices. *Id.* at 760-61, 104 S.Ct. at 1469. The Supreme Court then observed that these distinctions are often difficult to apply in practice because the economic effect of legal and illegal conduct can be similar--indeed, "judged from a distance, the conduct of the parties in the various situations can be indistinguishable." *Id.* at 762, 104 S.Ct. at 1470. Care, the Supreme Court directed, should be taken in inferring a conspiracy from highly ambiguous evidence, lest perfectly legitimate conduct is deterred or penalized. *Id.* at 763, 104 S.Ct. at 1470. The Supreme Court went on to hold that a vertical conspiracy cannot be inferred solely from evidence of complaints from distributors to a manufacturer about a discount distributor and a resulting termination of the discount distributor:

> Permitting an agreement to be inferred merely from the existence of complaints, or even from the fact that termination came about "in response to" complaints, could deter or penalize perfectly legitimate conduct.... Moreover, distributors are an important source of information for manufacturers.

> In order to assure an efficient distribution system, manufacturers and distributors constantly must coordinate their activities to assure that their product will reach the consumer persuasively and efficiently. To bar a manufacturer from acting solely because the information upon which it acts originated as a price complaint would create an irrational dislocation in the market....
> Thus, something more than evidence of complaints is needed. There must be evidence that tends to exclude the possibility that the manufacturer and nonterminated distributors were acting independently. As Judge Aldisert has written, the antitrust plaintiff should present direct or circumstantial evidence that reasonably tends to prove that the manufacturer and others "had a conscious commitment to a common scheme designed to achieve an unlawful objective."
> *Id.* at 764, 104 S.Ct. at 1470-71.

The three pieces of evidence that the plaintiffs in this case have offered to prove a vertical conspiracy fail to meet the standard that the Supreme Court set forth in *Monsanto.* First, the plaintiffs note that the conventional retailers complained to FSC about the 800-number dealers. Complaints like these are precisely what the Supreme Court considered in *Monsanto* and found to be insufficient to prove a vertical conspiracy:

> [C]omplaints about price cutters "are natural--and from the manufacturer's perspective, unavoidable--reactions by distributors to their rivals." Such complaints, particularly where the manufacturer has imposed a costly set of nonprice restrictions, "arise in the normal course of business and do not indicate illegal concerted action."
> *Id.* at 763, 104 S.Ct. at 1470 (citations omitted).

Second, plaintiffs offer evidence that FSC did not use mathematical calculations from its own cost data to set the drop-shipment surcharge, even though the surcharge was ***1020** purportedly instituted to equalize the costs of deliveries to the conventional and 800-number retailers. The absence of mathematical calculation supposedly suggests a vertical conspiracy: in the words of this court, "FSC may have imposed the surcharge without first undertaking mathematical calculations because it had agreed with others to impose the surcharge whether it made economic sense or not."

FSC's determination of the drop-shipment surcharge is not probative of whether FSC acted alone or in conspiracy with the conventional retailers. An arbitrarily chosen surcharge is equally compatible with both unilateral and concerted conduct. Seeking to end destructive free-riding, FSC might have exercised its right under *United States v. Colgate,* 250 U.S. 300, 39 S.Ct. 465, 63 L.Ed. 992 (1919), to unilaterally limit its dealings with 800-number retailers and, toward that end, imposed a substantial surcharge to level the playing field for conventional retailers, or even to cripple the 800-number retailers. While I acknowledge that FSC and the conventional retailers conceivably could have conspired to cripple the 800-number retailers through a substantial surcharge, that concession does not preclude summary judgment for the defendants. Because a surcharge fixed by FSC is equally compatible with both hypotheses, no inference of conspiracy can be drawn: "*Monsanto* ... establishes that conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support even an inference of conspiracy." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.,* 475 U.S. 574, 597 n. 21, 106 S.Ct. 1348, 1361 n. 21, 89 L.Ed.2d 538 (1986).

Plaintiffs' third piece of evidence of a vertical conspiracy is the differently-phrased explanations FSC offered in internal and external communications for the drop-shipment surcharge. This court observes that "a jury might view FSC's apparent desire to use more genteel language when explaining its actions to the public as implying a sinister motive."

FSC's liability under section 1, however, does not turn on whether FSC had "a sinister motive," but whether it acted alone or in combination with the conventional retailers. The varying tones in internal and external communications are consistent with both hypotheses--the sanitized language that FSC used to avoid drawing attention to its moves against the 800-number dealers could have been the result of either a unilateral decision to eliminate free- riding or a conspiracy with the conventional dealers against the 800-number retailers. Once more plaintiffs have presented "highly ambiguous evidence," *Monsanto,* 465 U.S. at 763, 104 S.Ct. at 1470, that does not tend "to exclude the possibility that the manufacturer and nonterminated distributors were acting independently," *id.* at 764, 104 S.Ct. at 1471.

A misreading of *Big Apple BMW, Inc. v. BMW of North America, Inc.,* 974 F.2d 1358 (3d Cir.1992), *cert. denied,* 507 U.S. 912, 113 S.Ct. 1262, 122 L.Ed.2d 659 (1993), may well be responsible for the court's decision on the vertical conspiracy count. In *Big Apple BMW,* we noted that a manufacturer's "inconsistent reasons" for denying a franchise support an inference of conspiracy with existing franchisees.

Id. at 1374. The court seizes on this language from *Big Apple BMW* to argue that FSC's drop-shipment surcharge and the varying tones of internal and external communication about the surcharge are inconsistencies which permit an inference of conspiracy. This analogy is flawed.

In *Big Apple BMW,* unsuccessful applicants for an automobile dealership brought a claim under section 1, charging that the manufacturer and existing dealers conspired to deny them the dealership because they would have been price cutters. The plaintiffs identified actions of the defendants which suggested a conspiracy, but the defendants tendered business reasons for each of their actions. We found that summary judgment was inappropriate: even though the defendants had offered justifications for their actions, these justifications were "internally inconsistent and inconsistent with [the manufacturer's] concomitant treatment of [other] dealers." *Id.* at 1374. For example, the manufacturer claimed that it refused to award a franchise to the applicants because they attempted to bribe one of its employees; ***1021** evidence showed that the same employee solicited the applicants to buy a franchise only a year after the attempted bribe. *Id.* at 1368. The manufacturer claimed that it refused to award a franchise to the applicants because they would have engaged in price advertising; evidence showed that other dealers engaged in price advertising. *Id.* at 1378. The manufacturer claimed that it refused to award a franchise to the applicants because they would have located their dealership in an "automall" adjacent to other manufacturers' dealerships; evidence showed that the manufacturer tolerated other multi-franchise dealerships. *Id.* at 1380.

In *Big Apple BMW,* if the trier of fact believed the plaintiffs' evidence that tended to show pretext, it would be left with no reason to believe that the manufacturer acted unilaterally to advance its own self interest. This case is fundamentally different. A trier of fact in this case could believe that FSC did not calculate the drop charge from its cost data and could agree with every inference plaintiffs seek to draw from the draft press release and this would still not alter the indisputable fact that FSC had a legitimate and compelling self interest in solving the free rider problem and preserving an effective distribution system.

Finding no evidence in the record that tends to exclude the possibility that FSC acted unilaterally against the 800-number dealers, I would affirm the district court's grant of summary judgment on the vertical conspiracy count.

PRESENT: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS and McKEE, Circuit Judges.

SUR PETITION FOR REHEARING
Nov. 15, 1994

The petition for rehearing filed by Appellee, F. Schumacher & Co., in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

PRESENT: SLOVITER, Chief Judge, BECKER, STAPLETON, MANSMANN, GREENBERG, HUTCHINSON, SCIRICA, COWEN, NYGAARD, ALITO, ROTH, LEWIS and McKEE, Circuit Judges.

SUR PETITION FOR REHEARING
Nov. 15, 1994

The petition for rehearing filed by Appellee, The National Decorating Products Association, Inc., in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

37 F.3d 996, 63 USLW 2290, 1994-2 Trade Cases P 70,741

Briefs and Other Related Documents (Back to top)

- 1992 WL 12013853 (Appellate Brief) Reply Brief for Appellant Fairman Wallpaper and Paint Company (Dec. 24, 1992)Original Image of this Document (PDF)

- 1992 WL 12013854 (Appellate Brief) Reply Brief for Appellants (Dec. 24, 1992)Original Image of this Document (PDF)

• 1992 WL 12013851 (Appellate Brief) Brief for Appellee F. Schumacher & Co. (Dec. 04, 1992)Original Image of this Document (PDF)

• 1992 WL 12013852 (Appellate Brief) Brief for Appellee the National Decorating Products Association, Inc. (Dec. 04, 1992)Original Image of this Document (PDF)

• 1992 WL 12013855 (Appellate Brief) Brief for Appellants (Oct. 27, 1992)Original Image of this Document with Appendix (PDF)

END OF DOCUMENT

Exhibit 2

Supreme Court of Ohio.

CITY OF CINCINNATI, Appellant,
v.
BERETTA U.S.A. CORPORATION et al.,
Appellees.

No. 2000-1705.

Submitted Oct. 2, 2001.
Decided June 12, 2002.

City brought action against handgun manufacturers, trade associations, and handgun distributor, seeking to hold them responsible under nuisance, negligence, and products liability theories for the harm caused by the firearms they manufactured, sold, or distributed, and seeking injunctive relief. The Court of Common Pleas, Hamilton County, dismissed the action for failure to state a claim. City appealed. The Court of Appeals affirmed. Appeal was allowed. The Supreme Court, Francis E. Sweeney, Sr., J., held that: (1) public nuisance claims are not limited to injuries to real property; (2) city stated claims for public nuisance, negligence, common-law negligent design, and common-law failure to warn; (3) city's alleged injuries were not too remote from defendants' conduct; (4) City stated a claim for recoupment of costs of government services; and (5) city's claims were not precluded by the Commerce Clause.

Reversed and remanded.

Moyer, C.J., filed a dissenting opinion in which Lundberg Stratton, J., concurred.

Cook, J., filed a dissenting opinion in which Lundberg Stratton, J., concurred.

**1139 *439 Waite, Schneider, Bayless & Chesley Co., L.P.A., Stanley M. Chesley, Paul M. DeMarco and Jean M. Geoppinger; Barrett & Weber and Michael R. Barrett, Cincinnati; Fay D. Dupuis, Cincinnati City Solicitor, W. Peter Heile, Deputy City Solicitor, Richard Ganulin, Assistant City Solicitor; Dennis A. Henigan, Washington, DC, and Jonathan E. Lowy, Legal Action Project, Center to Prevent Handgun Violence, for appellant.

Calfee, Halter & Griswold, L.L.P., Thomas I. Michals and Mark L. Belleville, Cleveland; Gordon, Feinblatt, Rothman, Hoffberger & Hollander, L.L.C., and Lawrence S. Greenwald, Baltimore, MD, for appellees Beretta U.S.A. Corp.

Janik & Dorman and William J. Muniak, Medina; and Harold Mayberry, Jr., for appellee American Shooting Sports Council, Inc.

Janik & Dorman and William J. Muniak, Medina; and Douglas Kliever, for appellees National Shooting Sports Foundation, Inc., and Sporting Arms and Ammunition Manufacturers' Institute, Inc.

Brown, Cummins & Brown Co., L.P.A., and James R. Cummins, Cincinnati; Jones, Day, Reavis & Pogue and Thomas E. Fennell, Dallas, TX, for appellee Colt's Manufacturing Co., Inc.

Renzulli & Rutherford and John Renzulli, New York City, for appellee H & R 1871, Inc.

Rendigs, Fry, Kiely & Dennis, L.L.P., and W. Roger Fry; Renzulli & Rutherford and John Renzulli, New York City, for appellee Hi-Point Firearms.

*440 Buckley, King & Bluso and Raymond J. Pelstring, Cincinnati; Beckman & Associates and Bradley T. Beckman, Philadelphia, PA, for appellee North American Arms, Inc.

Thompson, Hine & Flory, L.L.P., Bruce M. Allman, Robert A. McMahon and Laurie J. Nicholson, Cincinnati; Wildman, Harrold, Allen & Dixon, James P. Dorr and Sarah L. Olson, Chicago, IL, for appellee Sturm & Ruger Co., Inc.

Taft, Stettinius & Hollister and Thomas R. Schuck, Cincinnati; Shook, Hardy & Bacon, L.L.P., Gary R. Long and Jeffrey S. Nelson, Kansas City, MO, for appellee Smith & Wesson Corp.

Porter, Wright, Morris & Arthur, L.L.P., Mark E. Elsener and Michael E. McCarty, Cincinnati; Bruinsma & Hewitt and Michael C. Hewitt, Laguna Hills, CA, for appellees Bryco Arms, Inc., and B.L. Jennings, Inc.

Porter, Wright, Morris & Arthur, L.L.P., Mark E. Elsener and Michael E. McCarty, Cincinnati; Tarics & Carrington, P.C., and Robert C. Tarics, Houston, TX, for appellee Phoenix Arms.

Porter, Wright, Morris & Arthur, L.L.P., Mark E. Elsener and Michael E. McCarty, Cincinnati; Budd, Larner, Gross, Rosenbaum, Greenberg & Sade and Timothy A. Bumann, Atlanta, GA, for appellee Taurus International Manufacturing, Inc.

Barbara E. Herring, Toledo Director of Law, and John T. Madigan, Toledo General Counsel, urging reversal for amicus curiae city of Toledo.

Robert B. Newman, Cincinnati, urging reversal for amici curiae American Association of Suicidology, American Jewish Congress, National Association of Elementary **1140 School Principals, National Association of School Psychologists, Ohio Public Health Association, Inc., and Physicians for Social Responsibility.

Cornell P. Carter, Cleveland Director of Law, Climaco, Lefkowitz, Peca, Wilcox & Garofoli Co., L.P.A., John R. Climaco, Jack D. Maistros and Keith T. Vernon, Cleveland, urging reversal for amici curiae city of Cleveland and its former Mayor, Michael R. White, Educational Fund to Stop Handgun Violence, and Ohio Coalition Against Gun Violence.

Pepper Hamilton, L.L.P., and James M. Beck, Philadelphia, PA, urging affirmance for amicus curiae Product Liability Advisory Council, Inc.

Stanton G. Darling II, Columbus, urging affirmance for amici curiae National Association of Manufacturers and Ohio Manufacturers' Association.

Vorys, Sater, Seymour & Pease, L.L.P., Daniel J. Buckley, Rebecca J. Brinsfield and Margaret A. Nero, Cincinnati, urging affirmance for amici curiae Amateur Trapshooting Association, Fairfield Sportsmen's Association, Inc., Hidden Haven, Inc., Shooting Preserve & Sporting Clays, National Wild Turkey Federation, Whitetails Unlimited, and Wildlife Conservation Fund of America.

*416 FRANCIS E. SWEENEY, SR., J.

{¶ 1} On April 28, 1999, plaintiff-appellant, the city of Cincinnati, filed a complaint against fifteen handgun manufacturers, three trade associations, and one handgun distributor, seeking to hold them responsible under nuisance, negligence, and product liability theories of recovery, for the harm caused by the firearms they manufacture, sell, or distribute. [FN1] The gist of the complaint is that *417 appellees [FN2] have manufactured, marketed, and distributed their firearms in ways that ensure the widespread accessibility of the firearms to prohibited users, including children and criminals. Thus, the complaint asserts, due to their intentional and negligent conduct and their failure to make guns safer, appellees have fostered the criminal misuse of firearms, helped sustain the illegal firearms market in Cincinnati, and have created a public nuisance. In its complaint, appellant sought both injunctive relief and monetary damages, including reimbursement for expenses such as increased police, emergency, health, and corrections costs.

FN1. The lawsuit originally alleged other theories of liability, including fraud, negligent misrepresentation, unfair and deceptive advertising, and unjust enrichment. However, since appellant does not contest the dismissal of these counts, we decline to address these issues.

FN2. The named defendants are Beretta U.S.A. Corp., Bryco Arms, Inc., Colt's Manufacturing Co., Inc., Davis Industries, Fabbrica d'Armi Pietro Beretta Sp.A., Forjas Taurus, S.A., H & R 1871, Inc., B.L. Jennings, Inc., MKS Supply, Inc., Lorcin Engineering Co., Inc., North America Arms, Inc., Phoenix Arms, Raven Arms, Inc., Smith & Wesson Corp., Sturm & Ruger Co., Inc., Taurus International Manufacturing, Inc., American Shooting Sports Coalition, Inc., National Shooting Sports Foundation, Inc., and Sporting Arms and Ammunition Manufacturers Institute, Inc. Of these defendants, only Davis Industries, Fabbrica d'Armi Pietro Beretta Sp.A., Forjas Taurus, S.A., and Raven Arms, Inc. did not move to dismiss.

{¶ 2} Rather than file an answer, fifteen of the defendants ("appellees") moved to dismiss the complaint pursuant to Civ.R. 12(B)(6). The trial court granted the motions to dismiss, finding, inter alia, that (1) the complaint failed to state a cause of action, (2) the claims were barred by the doctrine of remoteness, and (3) appellant could not recoup expenditures for public services. The trial court further **1141 ruled that there was no just cause for delay, and appellant appealed. The court of appeals affirmed on similar grounds. The cause is now before this court upon the allowance of a discretionary appeal.

{¶ 3} This case represents one of a growing number of lawsuits brought by municipalities against gun manufacturers and their trade associations to recover

damages associated with the costs of firearm violence incurred by the municipalities. There is a difference of opinion as to whether these cases state a viable cause of action. While some courts have allowed this type of case to go forward against a Civ.R. 12(B)(6) motion to dismiss (*White v. Smith & Wesson Corp.* [N.D. Ohio 2000], 97 F.Supp.2d 816; *Boston v. Smith & Wesson Corp.* [2000], 12 Mass.L.Rptr. 225, 2000 WL 1473568), other courts have dismissed or upheld the dismissal of similar lawsuits. See, e.g., *Philadelphia v. Beretta U.S.A. Corp.* (E.D.Pa.2000), 126 F.Supp.2d 882; *Camden Cty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.* (C.A.3, 2001), 273 F.3d 536; *Ganim v. Smith & Wesson Corp.* (2001), 258 Conn. 313, 780 A.2d 98. After a thorough review of these cases, we agree with those decisions that permit this type of lawsuit to go beyond the pleadings stage. For the reasons that follow, we reverse the judgment of the court of appeals and remand the cause to the trial court.

*418 I. Sufficiency of Complaint

{¶ 4} The trial court granted appellees' Civ.R. 12(B)(6) motions to dismiss and the court of appeals affirmed. In determining whether the motions were properly granted, we must decide whether the complaint states a cause of action under Ohio law.

[1][2][3] {¶ 5} The standard for determining whether to grant a Civ.R. 12(B)(6) motion is straightforward. In order for a complaint to be dismissed under Civ.R. 12(B)(6) for failure to state a claim, it must appear beyond doubt from the complaint that the plaintiff can prove no set of facts entitling him to relief. *O'Brien v. Univ. Community Tenants Union, Inc.* (1975), 42 Ohio St.2d 242, 71 O.O.2d 223, 327 N.E.2d 753, syllabus. Furthermore, "[i]n construing a complaint upon a motion to dismiss for failure to state a claim, we must presume that all factual allegations of the complaint are true and make all reasonable inferences in favor of the non-moving party." *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753. We reiterated this view in *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 144, 573 N.E.2d 1063, and further noted that "as long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." Id. at 145, 573 N.E.2d 1063.

{¶ 6} In addressing the sufficiency of the complaint, we will examine each claim separately. In particular, appellant maintains that it has stated viable causes of action for public nuisance, negligence, and product liability.

A. Public Nuisance

[4] {¶ 7} Appellant alleged in its complaint that appellees have created and maintained a public nuisance by manufacturing, marketing, distributing, and selling firearms in ways that unreasonably interfere with the public health, welfare, and safety in Cincinnati and that the residents of Cincinnati have a common right to be free from such conduct. Appellant further alleged that appellees know, or reasonably should know, that their conduct will cause handguns to be used and possessed illegally and that such conduct produces an ongoing nuisance that has a detrimental effect upon the public health, safety, and welfare of the residents of Cincinnati.

**1142 [5] {¶ 8} Appellees advance several reasons why the complaint does not state a cause of action for public nuisance. First, appellees maintain that Ohio's nuisance law does not encompass injuries caused by product design and construction, but instead is limited to actions involving real property or to statutory or regulatory violations involving public health or safety. We disagree. The definition of "public nuisance" in 4 Restatement of the Law 2d, Torts (1965) ("Restatement") is couched in broad language. According to the Restatement, a *419 "public nuisance" is "an unreasonable interference with a right common to the general public." 4 Restatement, Section 821B(1). "Unreasonable interference" includes those acts that significantly interfere with public health, safety, peace, comfort, or convenience, conduct that is contrary to a statute, ordinance, or regulation, or conduct that is of a continuing nature or one which has produced a permanent or long-lasting effect upon the public right, an effect of which the actor is aware or should be aware. Id., Section 821B(2). Contrary to appellees' position, there need not be injury to real property in order for there to be a public nuisance. As stated in Comment *h* to Section 821B, "[u]nlike a private nuisance, a public nuisance does not necessarily involve interference with use and enjoyment of land." Id. at 93.

{¶ 9} Moreover, although we have often applied public nuisance law to actions connected to real property or to statutory or regulatory violations involving public health or safety, [FN3] we have never held that public nuisance law is strictly limited to these types of actions. The court of appeals relied on our decision in *Franks v. Lopez* (1994), 69 Ohio St.3d 345, 632 N.E.2d 502, to support its view that allegedly defective product designs are not nuisances.

However, the *Franks* decision was strictly limited to the question of whether the allegedly defective design and construction of a roadway intersection and the failure to erect signage or guardrails constituted a nuisance in the context of sovereign immunity. It does not involve the broader question that we are presented with here.

FN3. See, e.g., *Mansfield v. Balliett* (1902), 65 Ohio St. 451, 467, 63 N.E. 86 (pollution of stream on plaintiff's property due to defendant municipality's discharge of sewage downstream constitutes a nuisance).

[6] {¶ 10} Nor should *Franks* be interpreted to mean that public-nuisance law cannot cover injuries caused by product design and construction. Instead, we find that under the Restatement's broad definition, a public-nuisance action can be maintained for injuries caused by a product if the facts establish that the design, manufacturing, marketing, or sale of the product unreasonably interferes with a right common to the general public.

{¶ 11} Even the Supreme Court of Connecticut, in *Ganim v. Smith & Wesson Corp.*, 258 Conn. at 369-370, 780 A.2d 98, while dismissing the lawsuit for lack of standing, acknowledged that the definition of a common-law public nuisance was broad enough to include allegations nearly identical to those in appellant's complaint. Likewise, in his concurring opinion below, Judge Hildebrandt, in the belief that public nuisance law did not apply to product liability cases, urged this court to revisit the issue, since, in his view "the city should be permitted to bring suit against the manufacturer of a product under a public-nuisance theory, when, as here, the product has allegedly resulted in widespread harm and widespread costs to the city as a whole and to its citizens individually." See, also, ***420***Young v. Bryco Arms* (2001), 327 Ill.App.3d 948, 262 Ill.Dec. 175, 765 N.E.2d 1, where the First District Appellate ****1143** Court of Illinois held that the plaintiffs, surviving relatives of five gunshot victims, sufficiently pled a public nuisance claim against various gun manufacturers, wholesale distributors, and retail gun dealers, finding that the misconduct alleged (that the defendants' marketing and distribution practices allowed an underground firearms market to flourish) fell within the ambit of the Restatement's broad definition of public nuisance.

[7] {¶ 12} Appellees further argue that they cannot be held liable for the harm alleged because they did not have control over the alleged nuisance at the time of injury. Contrary to appellees' position, it is not fatal to appellant's public nuisance claim that appellees did not control the actual firearms at the moment that harm occurred.

{¶ 13} Appellant's complaint alleged that appellees created a nuisance through their ongoing conduct of marketing, distributing, and selling firearms in a manner that facilitated their flow into the illegal market. Thus, appellant alleged that appellees control the creation and supply of this illegal, secondary market for firearms, not the actual use of the firearms that cause injury. See *Boston v. Smith & Wesson*, 12 Mass.L.Rptr. 225, 2000 WL 1473568, at * 14. Just as the individuals who fire the guns are held accountable for the injuries sustained, appellees can be held liable for creating the alleged nuisance.

[8] {¶ 14} Appellees also contend that appellant's nuisance claim cannot go forward because the distribution of firearms is highly regulated and covers "legislatively authorized conduct." As a result, appellees believe that the nuisance claim was properly dismissed because "[w]hat the law sanctions cannot be held to be a public nuisance." *Mingo Junction v. Sheline* (1935), 130 Ohio St. 34, 3 O.O. 78, 196 N.E. 897, paragraph three of the syllabus. Even though there exists a comprehensive regulatory scheme involving the manufacturing, sales, and distribution of firearms, see, e.g., Section 922, Title 18, U.S.Code; Part 178, Title 27, C.F.R., the law does not regulate the distribution practices alleged in the complaint.

[9][10][11] {¶ 15} Finally, appellees argue that the public nuisance claim fails because appellant has failed to plead an underlying tort to support either an absolute public nuisance claim based on intentional or ultrahazardous activity or a negligence-based claim of qualified public nuisance. [FN4] However, the complaint clearly ***421** alleged both intentional and negligent misconduct on appellees' part. For example, Paragraph 119 of the complaint alleged that defendants "intentionally and recklessly market, distribute and sell handguns that defendants know, or reasonably should know, will be obtained by persons with criminal purposes * * *."

FN4. A nuisance can be further classified as an absolute nuisance (nuisance per se) or as a qualified nuisance. *Taylor v. Cincinnati* (1944), 143 Ohio St. 426, 28 O.O. 369, 55 N.E.2d 724, paragraphs two and three of the syllabus. With an absolute nuisance, the

wrongful act is either intentional or unlawful and strict liability attaches notwithstanding the absence of fault because of the hazards involved (*Metzger v. Pennsylvania, Ohio & Detroit RR. Co.* [1946], 146 Ohio St. 406, 32 O.O. 450, 66 N.E.2d 203, paragraph one of the syllabus), whereas a qualified nuisance involves a lawful act "so negligently or carelessly done as to create a potential and unreasonable risk of harm, which in due course results in injury to another." Id. at paragraph two of the syllabus. A qualified nuisance hinges upon proof of negligence. Id.

{¶ 16} Therefore, under these circumstances, we find that appellant has adequately pled its public-nuisance claim and **1144 has set forth sufficient facts necessary to overcome appellees' motion to dismiss.

B. Negligence

[12] {¶ 17} Appellant further alleged in its complaint that appellees were negligent in failing to exercise reasonable care in designing, manufacturing, marketing, advertising, promoting, distributing, supplying, and selling their firearms without ensuring that the firearms were safe for their intended and foreseeable use by consumers. In addition, the complaint alleged that appellees failed to exercise reasonable care to provide a full warning to consumers of the risks associated with firearms.

[13] {¶ 18} In order to maintain a negligence action, the plaintiff must show the existence of a duty, a breach of that duty, and that the breach of that duty proximately caused the plaintiff's injury. *Jeffers v. Olexo* (1989), 43 Ohio St.3d 140, 142, 539 N.E.2d 614. The court of appeals in the instant case upheld the dismissal of the negligence claims on the ground that the city could not establish that the defendants owed it any duty. In reaching this conclusion, the court cited *Gelbman v. Second Natl. Bank of Warren* (1984), 9 Ohio St.3d 77, 9 OBR 280, 458 N.E.2d 1262, and *Simpson v. Big Bear Stores Co.* (1995), 73 Ohio St.3d 130, 652 N.E.2d 702, for the proposition that a duty to control the conduct of a third party arises only if a "special relationship" exists between the parties. See, also, 2 Restatement, Section 315. Since there was no special relationship, the court of appeals concluded that the defendants owed no duty to appellant.

{¶ 19} The court of appeals misconstrued the nature of appellant's negligence claims and erred in relying on the above authorities to dismiss those claims for lack of duty. In both *Gelbman* and *Simpson*, the issue before this court was whether, based on their status as property owners, the defendants owed a duty to protect persons such as business invitees from the negligence or criminal acts of third parties that occur outside the owner's property and beyond the owner's control. In contrast, the negligence issue before us is not whether appellees owe *422 appellant a duty to control the conduct of third parties. Instead, the issue is whether appellees are themselves negligent by manufacturing, marketing, and distributing firearms in a way that creates an illegal firearms market that results in foreseeable injury. Consequently, the "special relationship" rule is not determinative of the issue presented here. Instead, the allegations of the complaint are to be addressed without resort to that rule.

{¶ 20} The court in *Boston v. Smith & Wesson*, 12 Mass.L.Rptr. 225, 2000 WL 1473568, understood this distinction. When the gun defendants made a similar argument, that the city's negligent marketing and distribution claims failed because the defendants did not owe the city any duty to protect it from the criminal acts of third parties, the court stated:

{¶ 21} "Plaintiffs do not allege that Defendants were negligent for failure to protect from harm but that Defendants engaged in conduct the foreseeable result of which was to cause harm to Plaintiffs. * * *

{¶ 22} "Taking Plaintiffs' allegations as true, Defendants have engaged in affirmative acts (i.e., creating an illegal, secondary firearms market) by failing to exercise adequate control over the distribution of their firearms. Thus, it is affirmative conduct that is alleged---the creation of the illegal, secondary firearms market. The method by which Defendants created this market, it is alleged, is by designing or selling firearms without regard to the likelihood the firearms would be placed in the hands of juveniles, felons or others not permitted to use firearms in Boston. **1145 * * * Taken as true, these facts suffice to allege that Defendants' conduct unreasonably exposed Plaintiffs to a risk of harm. Worded differently, the Plaintiffs were, from Defendants' perspective, foreseeable plaintiffs. Thus, the court need not decide whether Defendants owed a duty greater than the basic duty." (Footnotes omitted.) 12 Mass.L.Rptr. 225, 2000 WL 1473568, at * 15.

{¶ 23} The court in *White v. Smith & Wesson*, 97 F.Supp.2d 816, also applied straight negligence

principles. In allowing plaintiffs' negligence claims to survive a Civ.R. 12(B)(6) motion to dismiss, the court noted, "It cannot be said, as a matter of law, that Defendants are free from negligence because they do not owe Plaintiffs a duty of care. It is now, unfortunately, the common American experience that firearms in the hands of children or other unauthorized users can create grave injury to themselves and others, thus creating harm to municipalities through physical and economic injury. It is often for a jury to decide whether a plaintiff falls within the range of a defendant's duty of care and whether that duty was fulfilled. * * * In this matter, the question is whether a reasonably prudent gun manufacturer should have anticipated an injury to the Plaintiffs as a probable result of manufacturing, marketing, and distributing a product with an alleged negligent design."

***423** {¶ 24} The court in *James v. Arcadia Machine & Tool* (Dec. 11, 2001), N.J.Super. No. ESX-L-6-59-99, also recognized the importance of allowing the plaintiffs to advance their negligence claims against the gun defendants. The court reasoned, "With no more than paper allegations and a complete absence of discovery, it would be manifestly unfair to bar the Plaintiff[s] [Newark and its mayor] from attempting to present appropriate evidence to bridge the gap between breach of duty and damages." Id. at 26-27.

{¶ 25} We agree with the rationale employed by these courts and similarly conclude that appellant has alleged a cause of action in negligence. Therefore, we find that the court of appeals erred in upholding the dismissal of the negligence counts.

C. Product Liability

[14] {¶ 26} Appellant also seeks recovery under two products liability theories, for defective design and failure to warn. In its complaint, appellant alleged that the guns manufactured or supplied by appellees were defective because they do not incorporate feasible safety devices that would prevent unauthorized use and foreseeable injuries. As to the cause of action for failure to warn, appellant alleged that appellees manufactured or supplied guns without adequate warning of their dangerousness or instruction as to their use.

{¶ 27} The court of appeals upheld the dismissal of these claims, finding that the complaint was deficient because it did not allege with specificity "a single defective condition in a particular model of gun at the time it left its particular manufacturer." Furthermore, the court held that the city could not bring its claims under the Product Liability Act, R.C. 2307.71 et seq., because it could prove no harm to itself. Nor could it recover economic loss alone under the Act, citing R.C. 2307.71(B) and (G), 2307.79, and *LaPuma v. Collinwood Concrete* (1996), 75 Ohio St.3d 64, 661 N.E.2d 714, syllabus. In his concurring opinion, Judge Painter stated his belief that had the claims not been barred by remoteness, the product liability claims remained viable causes of action under the common law. Judge Painter also said that he disagreed "with the majority's conclusion that the city's products-liability claims fail because the city's complaint did not allege particular guns or defective conditions that caused direct injuries.

****1146** {¶ 28} "Notice pleading is still the law, and the city clearly alleged that each defendant has manufactured defective products by failing to implement alternative safety designs. That was enough to give the manufacturers fair notice of the claims against them."

[15] {¶ 29} We agree with the reasoning of Judge Painter's concurring opinion. Contrary to the appellate court's majority opinion, since Ohio is a notice-pleading state, Ohio law does not ordinarily require a plaintiff to plead operative facts with ***424** particularity. [FN5] Under the Ohio Rules of Civil Procedure, a complaint need only contain "a short and plain statement of the claim showing that the party is entitled to relief." Civ.R. 8(A)(1). Consequently, "as long as there is a set of facts, consistent with the plaintiff's complaint, which would allow the plaintiff to recover, the court may not grant a defendant's motion to dismiss." *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 145, 573 N.E.2d 1063. Appellant's complaint withstands this test of notice pleading, since it alleged that appellees had manufactured or supplied defective guns without appropriate safety features. See *White*, 97 F.Supp.2d at 827. Appellant was not required to allege with specificity that particular guns were defective and as a result caused particular injuries.

FN5. In *York v. Ohio State Hwy. Patrol* (1991), 60 Ohio St.3d 143, 573 N.E.2d 1063, we stated that only in a few circumscribed types of cases, such as a workplace intentional tort or a negligent-hiring claim against a religious institution, do we require that the plaintiff plead operative facts with particularity. Id. at 145, 573 N.E.2d at 1065.

[16] {¶ 30} Nevertheless, appellant is precluded from bringing its statutory product liability claims. Under the Product Liability Act, a claimant (including a governmental entity) cannot recover economic damages alone. Instead, in order to fall within the purview of the Act, and to be considered a "product liability claim" under R.C. 2307.71(M), the complaint must allege damages other than economic ones. *LaPuma v. Collinwood Concrete* (1996), 75 Ohio St.3d 64, 661 N.E.2d 714, syllabus. [FN6] In this case, since appellant alleged only economic damages, it has not set forth a statutory product liability claim and is consequently barred from bringing any such claims under the Act.

FN6. A claimant can recover economic losses only after first establishing that it can recover compensatory damages for harm from a manufacturer or supplier. R.C. 2307.79. "Harm" is defined as "death, physical injury to person, serious emotional distress, or physical damage to property other than the product in question. Economic loss is not 'harm.' " R.C. 2307.71(G). Since appellant did not allege that it suffered harm within the meaning of the Act, it cannot recover for economic loss under R.C. 2307.79.

[17][18][19] {¶ 31} However, the failure to allege other than economic damages does not necessarily destroy the right to pursue common-law product liability claims. Id. at syllabus. In *Carrel v. Allied Prods. Corp.* (1997), 78 Ohio St.3d 284, 677 N.E.2d 795, paragraph one of the syllabus, we held, "The common-law action of negligent design survives the enactment of the Ohio Products Liability Act, R.C. 2307.71 *et seq.*" Therefore, although appellant is precluded from asserting its claims under Ohio's Product Liability Act, it can still assert its common-law negligent design claims. At common law, a product is defective in design "if it is more dangerous than an ordinary consumer would expect when used in an intended or reasonably foreseeable manner or if the benefits of the challenged design do not outweigh the risk inherent in such design." ***425***Knitz v. Minster Machine Co.* (1982), 69 Ohio St.2d 460, 23 O.O.3d 403, 432 N.E.2d 814, ****1147** syllabus. Moreover, a product may be defective in design if the manufacturer fails to incorporate feasible safety features to prevent foreseeable injuries. *Perkins v. Wilkinson Sword, Inc.* (1998), 83 Ohio St.3d 507, 511, 700 N.E.2d 1247. Appellant has set forth a common-law defective design claim by alleging that appellees have failed to design their firearms with feasible safety features. [FN7]

FN7. According to appellant, the feasible safety features include internal locking devices to "personalize" guns to prevent unauthorized users from firing them, chamber-loaded indicators to indicate that a round is in the chamber, and magazine-disconnect safeties that prevent guns from firing when the magazine is removed. On March 17, 2000, Smith & Wesson announced a settlement agreement with various cities, state attorneys general, and the Department of Housing and Urban Development, in which it agreed to change its distribution practices and implement certain safety devices. See Dao, Under Legal Siege, Gun Maker Agrees to Accept Curbs, New York Times (Mar. 18, 2000), at A1.

[20][21] {¶ 32} We likewise find that appellant can bring a common-law failure-to-warn claim. Under the rationale espoused in *Carrel v. Allied Prods. Corp.*, supra, the statute does not clearly state that it intended R.C. 2307.76, the failure-to-warn statute, to supersede the common-law action. Id., 78 Ohio St.3d at 288, 677 N.E.2d 795. Thus, the common-law failure-to-warn claim survives the enactment of Ohio's Product Liability Act, R.C. 2307.71 et seq.

[22] {¶ 33} To recover under a failure-to-warn theory at common law, the plaintiff must prove that the manufacturer knew or should have known, in the exercise of reasonable care, of the risk or hazard about which it failed to warn and that the manufacturer failed to take precautions that a reasonable person would take in presenting the product to the public. *Crislip v. TCH Liquidating Co.* (1990), 52 Ohio St.3d 251, 257, 556 N.E.2d 1177.

{¶ 34} The court of appeals reasoned that the failure-to-warn claim could not go forward because the defendants owe no duty to warn of the dangers associated with firearms, which are open and obvious dangers. Although, in general, the dangers associated with firearms are open and obvious, appellant has alleged sufficient facts in its complaint to overcome a motion to dismiss. As pointed out by Judge Painter's concurrence, some of the allegations involve risks that are not open and obvious, such as the fact that a semiautomatic gun can hold a bullet

even when the ammunition magazine is empty or removed. Therefore, since appellant properly alleges failure to warn, this claim withstands a motion to dismiss. See, also, *White v. Smith & Wesson*, 97 F.Supp.2d at 827-828, where the court refused to hold as a matter of law that the use of handguns involved an "open and obvious risk."

II. Remoteness

[23] {¶ 35} Appellees maintain that even if appellant could establish any of the elements of the individual torts it alleged, the injuries to the city are still too *426 remote to create liability on the part of the gun manufacturers and trade associations. In essence, appellees argue that remoteness bars recovery, since the causal connection between the alleged wrongdoing and the alleged harm is too tenuous and remote and because the claims asserted are indirect and wholly derivative of the claims of others.

[24] {¶ 36} Remoteness is not an independent legal doctrine but is instead related to the issues of proximate causation or standing. *White*, 97 F.Supp.2d at 823; *Boston v. Smith & Wesson Corp.*, 12 Mass.L.Rptr. 225, 2000 WL 1473568, at * 4, fn. 20. Thus, a complaint will fail on remoteness grounds if the harm alleged is **1148 the remote consequence of the defendant's misconduct (causation) or is wholly derivative of the harm suffered by a third party (standing).

{¶ 37} In *Holmes v. Securities Investor Protection Corp.* (1992), 503 U.S. 258, 112 S.Ct. 1311, 117 L.Ed.2d 532, the United States Supreme Court discussed remoteness and stated that, at least in some cases at common law, there must be "some direct relation between the injury asserted and the injurious conduct alleged." Id. at 268, 112 S.Ct. 1311, 117 L.Ed.2d 532. Thus, "a plaintiff who complained of harm flowing merely from the misfortunes visited upon a third person by the defendant's acts was generally said to stand at too remote a distance to recover." Id. at 268-269, 112 S.Ct. 1311, 117 L.Ed.2d 532, citing 1 Sutherland, Law of Damages (1882) 55-56. In *Holmes*, the court explained why directness of relationship is a requirement of causation: (1) indirectness adds to the difficulty in determining which of the plaintiff's damages can be attributed to the defendant's misconduct, (2) recognizing the claims of the indirectly injured would complicate the apportionment of damages among plaintiffs to avoid multiple recoveries, and (3) these complications are unwarranted given the availability of other parties who are directly injured and who can remedy the harm without these associated problems. Id. at 269-270, 112 S.Ct. 1311, 117 L.Ed.2d 532.

{¶ 38} In applying these factors to handgun litigation, the courts have taken divergent positions. While some courts have found that remoteness bars recovery (see, e.g., *Ganim v. Smith & Wesson Corp.*, 258 Conn. 313, 780 A.2d 98, using the "standing" aspect of remoteness), the courts in *White v. Smith & Wesson*, 97 F.Supp.2d 816, and in *Boston v. Smith & Wesson*, 12 Mass.L.Rptr. 225, 2000 WL 1473568, have rejected the remoteness argument. In *White*, for instance, the court concluded that remoteness did not deprive the city and the mayor of standing to sue the gun manufacturers and trade associations, since the plaintiffs were "asserting their own rights and interests and, while their claims would impact the health and safety of others, their claims are not based on the rights of others, but rather the rights of the City to sue for the harm and economic losses it has incurred, as well as their claims of unjust enrichment and nuisance abatement." Id. at 825.

*427 {¶ 39} Similarly, in *Boston v. Smith & Wesson Corp.*, although the court acknowledged that some of the injuries alleged appear to arise from harm to others, it stated that "this alleged harm is in large part not 'wholly derivative of' or 'purely contingent on' harm to third parties. [H]arm to Plaintiffs may exist even if no third party is harmed. * * * Even if no individual is harmed, Plaintiffs sustain many of the damages they allege due to the alleged conduct of Defendants fueling an illicit market (e.g., costs for law enforcement, increased security, prison expenses and youth intervention services). Similarly, diminished tax revenues and lower property values may harm Plaintiffs separately from any harm inflicted on individuals. * * * Indeed, much of the harm alleged is of a type that can only be suffered by these plaintiffs." (Footnote omitted.) 12 Mass.L.Rptr. 225, 2000 WL 1473568, at * 6.

{¶ 40} We agree with the reasoning espoused in *White* and *Boston*. The complaint in this case alleged that as a direct result of the misconduct of appellees, appellant has suffered "actual injury and damages including, but not limited to, significant expenses for police, emergency, health, prosecution, corrections and other services."

{¶ 41} Under the Civ.R. 12(B)(6) standard, we must presume that all factual allegations are true. See **1149*Warth v. Seldin* (1975), 422 U.S. 490, 501, 95 S.Ct. 2197, 45 L.Ed.2d 343, where the United States Supreme Court held that when standing is challenged on a motion to dismiss, the allegations

must be construed as if true. Therefore, in taking the allegations in the complaint as true, we find that the alleged harms are direct injuries to appellant, and that such harms are not so remote or indirect as to preclude recovery by appellant as a matter of law.

{¶ 42} With regard to whether causation is too remote in this case, we turn to the three factors outlined in *Holmes*, 503 U.S. at 269-270, 112 S.Ct. 1311, 117 L.Ed.2d 532. The first concern, difficulty of proof, is minimal in this case, since appellant is seeking recovery, in part, for police expenditures and property repairs, which can be easily computed. Under the second factor, there is little risk of double recovery, since appellant is seeking recovery for injuries to itself only. Finally, no other person is available to bring suit against appellees for these damages. Under the third factor, *Holmes* asks whether "the general interest in deterring injurious conduct" will be better served by requiring that suit be brought by more directly injured victims. Id., 503 U.S. at 269, 112 S.Ct. 1311, 117 L.Ed.2d 532. Although appellant is indirectly attempting to protect its citizens from the alleged misconduct by the gun manufacturers and trade associations, appellant is seeking recovery for its own harm. Under these circumstances, the general interest will be best served by having this plaintiff bring this lawsuit. We believe that appellant can withstand scrutiny under the ***428** *Holmes* test. Consequently, we find that the court of appeals erred in concluding that appellant's claims were too remote for recovery.

III. Recoupment of Cost of Governmental Services

[25] {¶ 43} Appellant alleged in its complaint that due to the misconduct of appellees, it has sustained damages, including "significant expenses for police, emergency, health, corrections, prosecution and other services." Appellees contend that the cost of these public services is nonrecoverable, since these are services the city is under a duty to provide.

{¶ 44} For support, appellees rely in part on *Flagstaff v. Atchison, Topeka & Santa Fe Ry. Co.* (C.A.9, 1983), 719 F.2d 322, a case in which the city sought to recoup police, fire, and other expenses associated with protecting the public from a petroleum gas spill arising from a train derailment. In that case, the court stated that "the cost of public services for protection from fire or safety hazards is to be borne by the public as a whole, not assessed against the tortfeasor whose negligence creates the need for the service. Where such services are provided by the government and the costs are spread by taxes, the tortfeasor does not expect a demand for reimbursement." (Citation omitted.) Id. at 323. The court of appeals accepted this position and held that a municipality may not recover for expenditures for ordinary public services that it has the duty to provide.

{¶ 45} Although a municipality cannot reasonably expect to recover the costs of city services whenever a tortfeasor causes harm to the public, it should be allowed to argue that it may recover such damages in this type of case. Unlike the train derailment that occurred in the *Flagstaff* case, which was a single, discrete incident requiring a single emergency response, the misconduct alleged in this case is ongoing and persistent. The continuing nature of the misconduct may justify the recoupment of such governmental costs. Therefore, if appellant can prove all the elements of the alleged torts, it should be able to recover the damages flowing from appellees' misconduct. Moreover, even ****1150** the *Flagstaff* court recognized that recovery by a governmental entity is allowed "where the acts of a private party create a public nuisance which the government seeks to abate." *Flagstaff*, 719 F.2d at 324. We therefore reject the court of appeals' holding that appellant cannot recover its governmental costs.

IV. Constitutional Arguments

[26] {¶ 46} Appellees further argue that appellant is attempting to regulate a national firearms industry and, therefore, its claims are barred under the Commerce Clause and the Due Process Clause of the United States Constitution.

[27] {¶ 47} The Commerce Clause " 'precludes the application of a state statute to commerce that takes place wholly outside of the State's borders, whether or not the commerce has effects within the State.' " ***429***Healy v. Beer Inst.* (1989), 491 U.S. 324, 336, 109 S.Ct. 2491, 105 L.Ed.2d 275, quoting *Edgar v. MITE Corp.* (1982), 457 U.S. 624, 642-643, 102 S.Ct. 2629, 73 L.Ed.2d 269. Despite the fact that no statute or regulation is involved in this case, appellees maintain that this litigation violates the Commerce Clause because appellant is seeking extraterritorial jurisdiction over conduct occurring outside Cincinnati's city limits. For support, appellees rely on *BMW of N. Am., Inc. v. Gore* (1996), 517 U.S. 559, 116 S.Ct. 1589, 134 L.Ed.2d 809, which found that Alabama's imposition of economic sanctions on BMW violated the Commerce Clause.

{¶ 48} Appellees' reliance on the *BMW* decision is misplaced. In finding a Commerce Clause violation

in *BMW*, the court reasoned that Alabama could not impose punitive damages on BMW where the alleged misconduct (repainting a new car without notifying the dealer or purchaser) arose outside Alabama and did not affect Alabama residents. The court's rationale was that "a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors' lawful conduct in other States." Id. at 572, 116 S.Ct. 1589, 134 L.Ed.2d 809. Thus, Alabama could not "punish BMW for conduct that was lawful where it occurred and that had no impact on its residents." Id. at 573, 116 S.Ct. 1589, 134 L.Ed.2d 809.

{¶ 49} Appellant's complaint seeks injunctive relief to enjoin appellees from continuing to engage in what appellant considers to be the unlawful manufacture, marketing, and distribution of unsafe handguns. Although the injunctive relief sought may affect out-of-state conduct, we reject appellees' argument that such relief would violate the Commerce Clause. Unlike the *BMW* case, which involved an excessive punitive damages award intended to change a tortfeasor's lawful conduct in states outside Alabama, in this case, the alleged harm, which may or may not call for punitive damages, directly affects the residents of Cincinnati. Thus, the fact that appellant's claims implicate the national firearms trade does not mean that the requested relief would violate the Commerce Clause. See *White v. Smith & Wesson*, 97 F.Supp.2d at 830, which likewise found no Commerce Clause violation.

{¶ 50} We find no impediment in the Due Process or Commerce Clause that requires dismissal of this lawsuit.

V. Conclusion

{¶ 51} In conclusion, we find that the court of appeals erred in upholding the dismissal of the complaint, since sufficient facts have been alleged to withstand scrutiny under Civ.R. 12(B)(6). Reversal of the judgment, however, does not mean that appellant will prevail upon remand. What it does mean is that appellant has alleged the facts necessary to withstand a motion to dismiss and will now have the opportunity to pursue its claims. While we do not predict the outcome of this case, ****1151** we would be remiss if we did not recognize the importance ***430** of allowing this type of litigation to go past the pleading stages. As two commentators so aptly noted: "If as a result of both private and municipal lawsuits, firearms are designed to be safer and new marketing practices make it more difficult for criminals to obtain guns, some firearm-related deaths and injuries may be prevented. While no one should believe that lawsuits against gun manufacturers and dealers will solve the multifaceted problem of firearm violence, such litigation may have an important role to play, complementing other interventions available to cities and states." Vernick & Teret, New Courtroom Strategies Regarding Firearms: Tort Litigation Against Firearm Manufacturers and Constitutional Challenges to Gun Laws (1999), 36 Hous.L.Rev. 1713, 1754.

{¶ 52} Accordingly, for the above reasons, we reverse the judgment of the court of appeals and remand the cause to the trial court for further proceedings consistent with this decision.

Judgment reversed and cause remanded.

DOUGLAS, RESNICK and PFEIFER, JJ., concur.

MOYER, C.J., COOK and LUNDBERG STRATTON, JJ., dissent.

MOYER, C.J., dissenting.

{¶ 53} I respectfully dissent from the majority's decision. Appellant alleges an "epidemic of handguns in the hands of persons who cannot lawfully possess them, which has brought terror to the streets, schoolyards, playgrounds, and homes of Cincinnati and has resulted in thousands of preventable shootings of innocent citizens, especially children and police officers." These are serious allegations, and portray a city under siege virtually overrun with criminals bearing illegally obtained handguns.

{¶ 54} However, the issue before us is not whether the city could prove that appellees fail to take reasonable measures that would prevent handguns they sell from being possessed by criminals and minors. Nor is the issue whether this alleged failure "unreasonably interferes with the public's health, safety, welfare, and peace," as alleged by appellant. The issue is not whether we agree with appellant that there exists in Cincinnati an epidemic of violence due to handguns illegally obtained.

{¶ 55} This appeal simply involves a question of law: does the city have standing to assert its claims? The majority holds that appellant has standing. I disagree with this conclusion, and would find the city's alleged injuries to be too remote from the

conduct of appellees and too derivative of the harms suffered by victims of handgun violence to establish proper standing to sue the appellees.

*431 {¶ 56} As the majority's discussion regarding remoteness and proximate causation aptly demonstrates, the harm alleged by the city must not be a remote or tenuous consequence of the appellees' alleged misconduct. Although " '[in] a philosophical sense, the consequences of an act go forward to eternity, and the causes of an event go back to the dawn of human events,' " courts have limited an actor's responsibility for the consequences of the actor's conduct. *Johnson v. Univ. Hosps. of Cleveland* (1989), 44 Ohio St.3d 49, 57, 540 N.E.2d 1370 (quoting Prosser & Keeton, Law of Torts [5th Ed.1984] 264, Section 41). The limitation of proximate causation rests in a very large part on the nature and degree of the connection between the defendant's acts and the events of which the plaintiff complains. Id.

The *Holmes* test

{¶ 57} I agree with the majority that the Supreme Court in **1152*Holmes v. Securities Investor Protection Corp.* (1992), 503 U.S. 258, 269, 112 S.Ct. 1311, 117 L.Ed.2d 532, articulated the reason directness of relationship is a central requirement of causation. "First, the less direct an injury is, the more difficult it becomes to ascertain the amount of a plaintiff's damages attributable to the violation, as distinct from other, independent, factors. * * * Second, quite apart from problems of proving factual causation, recognizing claims of the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries. * * * And, finally, the need to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct, since directly injured victims can generally be counted on to vindicate the law as private attorneys general, without any of the problems attendant upon suits by plaintiffs injured more remotely."

{¶ 58} The factors in *Holmes* are determinative of whether a plaintiff's claims are too remote or derivative. However, I strongly disagree with the majority's analysis and application of the test to the instant case.

{¶ 59} The majority's opinion provides helpful analysis of the two prevailing views reflected in the numerous civil actions by municipalities asserting negligence and public nuisance by gun manufacturers. I find the view represented in *Ganim v. Smith & Wesson* to be persuasive. *Ganim v. Smith & Wesson Corp.* (2001), 258 Conn. 313, 780 A.2d 98. *Ganim* was the first of these cases to be decided by a state supreme court. Affirming the trial court's dismissal for lack of standing, the Supreme Court of Connecticut held that the city of Bridgeport lacked standing because the harms it alleged were too remote, indirect, and derivative with respect to the defendants' alleged conduct. Id. at 365, 780 A.2d 98. The court noted that questions of remoteness and indirectness in the context of standing are analogous to questions of proximate cause in federal standing *432 jurisprudence, which "reflects 'ideas of what justice demands, or of what is administratively possible and convenient.' " Id. at 349-350, 780 A.2d 98, quoting Prosser & Keeton, Torts (5th Ed.1984) 264, Section 41.

A. Alleged injuries of the city are indirect, as they are too remote from the manufacturers' conduct and too derivative of others' harms

{¶ 60} In determining that the plaintiffs could not satisfy the first *Holmes* factor, that of directness, the *Ganim* court emphasized the numerous "links in the factual chain between the defendants' conduct and the harms suffered by the plaintiffs." Id. at 353, 780 A.2d 98. Specifically, the court noted that manufacturers sell handguns to distributors or wholesalers, and that these sales are lawful because federal law requires both buyers and sellers to be licensed. Id. at 353-354, 780 A.2d 98. Distributors then sell the handguns to retailers. Id. These sales are also lawful in that federal law requires both the distributors and the retailers to be licensed. Id. Next, retailers sell the guns legally either to authorized buyers, i.e., legitimate consumers, or to unauthorized buyers through the "straw man" method or other illegitimate means. Id. at 354, 780 A.2d 98. These latter sales would probably be criminal under federal law. Id. Next, the illegally acquired guns enter a black market, eventually finding their way to unauthorized users. Id.

{¶ 61} At this point, either authorized buyers misuse the handguns by not taking proper storage or other unwarned or uninstructed precautions, or unauthorized buyers misuse the guns to commit crimes or other harmful acts. Id. The city then incurs **1153 expenses for various municipal necessities, including crime investigation, emergency and other medical services for the injured, or similar expenses. Id. Finally, the city may suffer financial

consequences, including increased costs for municipal services, increased tax burdens on taxpayers, reduced property values, loss of investments and economic development, loss of tax revenues from lost productivity, injuries and deaths of the city's residents, destruction of families and communities in the city, and the negative impact on the lifestyle of the city's children and ability of its residents to live free from apprehension of danger. Id. at 354-355, 780 A.2d 98.

{¶ 62} The *Ganim* court found that the number of links in this factual chain was in and of itself strongly suggestive of remoteness. Id. at 355, 780 A.2d 98, citing *Steamfitters Local Union No. 420 Welfare Fund v. Philip Morris, Inc.* (C.A.3, 1999), 171 F.3d 912, 930. *Steamfitters Local* focused on the "sheer number of links in the chain of causation" between the tobacco company's suppression of information and the increased costs of health care by the union fund, concluding that the "extremely indirect nature of the Fund's injuries and the highly speculative and complex damages claims" demonstrated that the ***433** union's claims "are precisely the type of indirect claims that the proximate cause requirement is intended to weed out." Id. at 930.

{¶ 63} I agree with this reasoning, and would find that the first factor articulated in *Holmes* militates against granting the city standing for these claims. In the instant case, the city characterizes appellees as corporations that design, manufacture, advertise, import and/or sell firearms that can be fired by unauthorized or unintended users in Cincinnati. Therefore, the links in the factual chain between appellees' conduct and harms suffered by the city are similar to those links enumerated in *Ganim:* manufacturer to distributor or wholesaler, distributor or wholesaler to retailer, retailer to authorized or unauthorized buyers, and ultimately accidental misuse by authorized buyers or criminal misuse by unauthorized buyers. Accidental and criminal misuse of handguns then results in increased expenses for the city for "additional police protection, overtime, emergency services, pension benefits, health care, social services and other necessary facilities and services." In addition, the city alleges that it has sustained "a loss of investment, economic development and tax revenue due to lost productivity--all associated with the defective design, and negligent manufacture, assembly, marketing, distribution, promotion and sale of guns."

{¶ 64} *Holmes* held that indirectness adds to the difficulty in determining which of a plaintiff's damages are attributable to a defendant's misconduct. *Holmes*, 503 U.S. at 269-270, 112 S.Ct. 1311, 117 L.Ed.2d 532. The very fact that there are multiple links between the conduct of the manufacturers and the harms suffered by the city demonstrates the difficulty in determining damages. For example, where a criminal wrongdoer harms another with an illegally obtained handgun, that criminal offender is responsible for injuries caused to the victim. Depending upon how the wrongdoer obtained the handgun, there may be a number of persons linking the offender to the retailer or distributor, who may also be liable. Additionally, there will be enormous difficulties in determining exactly how much of municipal expenses such as police, emergency services, pension benefits, health care, social services and other necessary facilities and services, as well as loss of revenue and investment and economic development, are a result of *only* the manufacturers' actions and *not the actions of the criminal wrongdoer, **1154 the retailer, distributor, or persons who possess guns legally.*

{¶ 65} Finally, factors other than the manufacture, advertisement, distribution, and retail sales of handguns may contribute to the various harms claimed by the plaintiffs. *Ganim*, 258 Conn. at 356, 780 A.2d 98. According to *Ganim*, these may include "illegal drugs, poverty, illiteracy, inadequacies in the public educational system, the birth rates of unmarried teenagers, the disintegration of family relationships, the decades long trend of the middle class moving from city ***434** to suburb, * * * the upward track of health costs generally, * * * and unemployment." Id.

{¶ 66} *Ganim* held that in addition to remoteness, the harms suffered by the plaintiffs were derivative of those suffered by the victims and their families. Id. at 355, 780 A.2d 98. In other words, the city would not suffer the harm of increased costs for municipal services but for the fact that certain residents of the city had been the primary victims of handgun violence. Id. For example, increased medical costs are essentially costs imposed on the victims of handgun violence, and decreased tax revenues from lost productivity are a result of lost productivity and income on the part of otherwise productive residents who have fallen victim to handgun violence. Id.

{¶ 67} I agree with this reasoning. The majority characterizes this first factor as one of "difficulty of proof," and believes the difficulty to be minimal, as the city "is seeking recovery, in part, for police expenditures and property repairs, which can be easily computed." However, in order to prove damages, the city must first identify which incidents

involved the use of illegal handguns or legal handguns in the hands of unauthorized users, and then link that portion of the city's costs to that incident. In many instances the weapon used in a crime is never recovered. How, under these circumstances, can the city prove that the weapon involved was either illegal or in the hands of an unauthorized user?

{¶ 68} In addition to disagreeing with the majority's determination that the expenses borne by the city are easily capable of proof, I strongly disagree with the majority's characterization of the first *Holmes* factor as one of difficulty of proof.

{¶ 69} The question is not whether the city can prove that it has suffered damages, but whether the city can prove that those damages are attributable to the wrongdoing of the gun manufacturers as opposed to other, independent factors. *Holmes*, 503 U.S. at 269, 112 S.Ct. 1311, 117 L.Ed.2d 532. Given the multiple links in the factual chain between the gun manufacturers' conduct and harms suffered by the city, the derivative nature of the harms when viewed in conjunction with harms suffered by the primary victims of handgun violence, as well as the multiple societal factors that contribute to the misuse of handguns, I would find a very high degree of difficulty in determining the amount of the city's damages attributable to the conduct of the gun manufacturers.

B. Recognizing the city's claim would require a court to adopt complicated rules apportioning damages

{¶ 70} The majority finds that since the city is seeking recovery for injuries to itself only, there is little risk of double recovery and, thus, the city withstands scrutiny under the second factor in the *Holmes* test. Furthermore, the majority ***435** finds that since the city is seeking recovery for its own harm, the general interest is best served by having the city bring this lawsuit. I disagree.

{¶ 71} I read *Holmes* differently. The second factor of *Holmes* is whether "recognizing claims by the indirectly injured would force courts to adopt complicated rules apportioning damages among plaintiffs ****1155** removed at different levels of injury from the violative acts, to obviate the risk of multiple recoveries." Id., 503 U.S. at 269, 112 S.Ct. 1311, 117 L.Ed.2d 532. In its complaint, the city paints a horrific picture of murder, assault, suicides, and accidental killings involving either illegal handguns or legal handguns in the hands of unauthorized users. As a result of these violent acts, the city, "in its role of providing protection and care for its citizens, * * * provide[s] or pay[s] for additional police protection, emergency services, pension benefits, health care and other necessary services due to the threat posed by the use of defendants' products." In addition, the city alleges harm as a result of "injuries to certain of its residents and police officers caused by the defendants' products, as well as by the loss of substantial tax revenue."

{¶ 72} Taking, as we must, these pleadings as true, *Mitchell v. Lawson Milk Co.* (1988), 40 Ohio St.3d 190, 192, 532 N.E.2d 753, it follows that for practically every harm the city has suffered, there is at least one injured victim standing between the city and the gun manufacturers. In its complaint, the city states that it is seeking reimbursement for police, emergency, health, corrections, prosecution, and other services. Support for the conclusion that this is a derivative action is found in the complaint itself, which expressly connects the city's damages to death and injuries by individual citizens allegedly resulting from illegal handguns or the use of legal handguns by unauthorized users. This would suggest that many of the city's expenses would not have been incurred but for injuries to the primary victim. For example, the city may incur expenses for police, emergency services, and health care when someone has been injured because of the use of an unauthorized or illegal handgun. The injured person may also have a claim against the gun manufacturers.

{¶ 73} Moreover, the fact that the city seeks damages in part only for its own harm does not in and of itself satisfy the *Holmes* test. The Second Circuit has held that economic injuries alleged by a labor union health and welfare trust fund against tobacco companies were purely derivative of physical injuries suffered by plan participants, and thus too remote to establish standing to sue. *Laborers Local 17 Health & Benefit Fund v. Philip Morris, Inc.* (1999), 191 F.3d 229, 239. However, the court also found that "even were we to assume that the single satisfaction rule would prohibit duplicative recoveries by multiple plaintiffs against a single defendant, it would not cure the ultimate problem set forth in *Holmes*, that is, that courts would be forced to 'adopt complicated rules apportioning ***436** damages.' " Id. at 241, quoting *Holmes*, 503 U.S. at 269, 112 S.Ct. 1311, 117 L.Ed.2d 532. Therefore, I would find that the application of the second factor of the *Holmes* test supports the decision of the court of appeals and the trial court.

C. Directly injured persons can remedy the harm

alleged by the city

{¶ 74} What *Holmes* requires courts to analyze is not whether these damages are capable of being proven, but whether the difficulties inherent in fashioning complicated rules apportioning damages among multiple plaintiffs is justified. Thus, the third factor of *Holmes* states that because directly injured victims can generally be expected to vindicate the law "as private attorneys general" without the problems described by factors one and two, the need for courts to grapple with these problems is simply unjustified by the general interest in deterring injurious conduct. Id., 503 U.S. at 269-270, 112 S.Ct. 1311, 117 L.Ed.2d 532. Accepting the pleadings as true, it is immediately apparent that there are unfortunately numerous directly injured victims of handgun violence in Cincinnati. One successful suit filed by a **1156 directly injured victim is every bit as much a deterrent as the instant suit and may have just as much, if not more, economic impact on the gun manufacturers. Thus, I would hold that an application of the *Holmes* test requires that we affirm the judgment of the court of appeals.

LUNDBERG STRATTON, J., concurs in the foregoing dissenting opinion.

COOK, J., dissenting.

{¶ 75} Like the Chief Justice, I would find that Cincinnati's negligence-based claims are barred by remoteness principles. I write separately, however, because our views on remoteness ultimately diverge in one subtle respect. I also write separately to illustrate why the city has failed to state cognizable claims for products liability and public nuisance.

I

{¶ 76} I agree with much of the analysis contained in the Chief Justice's dissenting opinion. But instead of viewing remoteness principles as germane to the question of whether the city has *standing* to raise the negligence claims at issue here, I would find that the remoteness of the alleged harm precludes the city from establishing *proximate cause* as a matter of law. See *Philadelphia v. Beretta U.S.A. Corp.* (C.A.3, 2002), 277 F.3d 415. Without belaboring the difference (which is essentially academic at this point), I note that the test articulated in *Holmes v. Securities Investor Protection Corp.* (1992), 503 U.S. 258, 112 S.Ct. 1311, 117 L.Ed.2d 532, cited by both the majority and the Chief Justice, *437 analyzed remoteness in the proximate- cause context. Id. at 269, 112 S.Ct. 1311, 117 L.Ed.2d 532. Any relationship between remoteness and standing that can be gleaned from *Holmes* arises from proximate cause being an element of *statutory* standing under the federal RICO statute at issue in that case. See id. at 267-268, 112 S.Ct. 1311, 117 L.Ed.2d 532 (analogizing to antitrust cases, which condition a plaintiff's "right to sue" on a showing of proximate cause); id. at 286- 287, 112 S.Ct. 1311, 117 L.Ed.2d 532 (Scalia, J., concurring in judgment) (observing that proximate cause is one of the "usual elements" of statutory standing). Given that distinction, I hesitate to include a proximate-cause component within a conventional standing analysis, particularly when the negligence causes of action pleaded by the city already require proof of proximate cause as a substantive element.

II

{¶ 77} Inasmuch as proximate cause is an essential element of a products liability claim, see *R.H. Macy & Co. v. Otis Elevator Co.* (1990), 51 Ohio St.3d 108, 110, 554 N.E.2d 1313, remoteness principles also support dismissal of the city's causes of action sounding in products liability. Remoteness aside, however, the city's claims also fail for their failure to plead a compensable injury.

{¶ 78} The majority correctly determines that the city has failed to state a valid statutory claim for relief insofar as an action for purely economic harm is not maintainable under the Ohio Products Liability Act. See R.C. 2307.71(M). I disagree, however, with the majority's holding that the city may maintain its common-law products-liability claims alleging defective design and failure to warn. Even assuming that the Act does not preempt these claims, a proposition of which I am not convinced, [FN8] the city has not pleaded valid common-law causes of action. As the **1157 majority acknowledges, the city pleaded facts suggesting that it has suffered purely economic damages (i.e., increased municipal costs allegedly attributable to the actions of the various defendants). The majority cites no case, however, in which we have allowed products liability to be a viable theory of recovery for a plaintiff situated similarly to the city in this case--namely, a plaintiff whose economic harm is *not* attributed to having been a user, consumer, or foreseeable person present at the time of product failure. See, e.g., *Temple v. Wean United, Inc.* (1977), 50 Ohio St.2d 317, 4 O.O.3d 466, 364 N.E.2d 267, paragraph one of

the syllabus (announcing rule of strict products liability "for *438 physical harm * * * caused to the ultimate user or consumer"); *Lonzrick v. Republic Steel Corp.* (1966), 6 Ohio St.2d 227, 35 O.O.2d 404, 218 N.E.2d 185, paragraph two of the syllabus (allowing products- liability claim by plaintiff injured "while he was working in a place where his presence was reasonably to be anticipated by the defendant"). Today's majority appears to extend products-liability law to new categories of potential plaintiffs without any reasoned explanation of how that can be so.

FN8. See, e.g., *Carrel v. Allied Products Corp.* (1997), 78 Ohio St.3d 284, 292-294, 677 N.E.2d 795 (Cook, J., dissenting in part and concurring in part); *LaPuma v. Collinwood Concrete* (1996), 75 Ohio St.3d 64, 68, 661 N.E.2d 714 (Cook, J., concurring).

III

{¶ 79} As to the public-nuisance cause of action, it is true that principles of remoteness do not necessarily prevent the city from stating a valid claim. See *Camden Cty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.* (D.N.J.2000), 123 F.Supp.2d 245, 264, affirmed (C.A.3, 2001), 273 F.3d 536. Nevertheless, even this cause of action fails because the reach of public- nuisance law does not go as far as the city would have us extend it.

{¶ 80} Admittedly, the law of nuisance appears at first glance to be broad enough to encompass virtually any type of conduct. For example, 4 Restatement of the Law 2d, Torts (1977), Section 821B, cited with approval by the majority, broadly defines what may qualify as an actionable public nuisance. Similarly, this court has described the concept of nuisance in broad terms so as to include "the doing of *anything,* or the permitting of anything under one's control or direction to be done without just cause or excuse, the necessary consequence of which interferes with or annoys another in the enjoyment of his legal rights." (Emphasis added.) *Taylor v. Cincinnati* (1944), 143 Ohio St. 426, 28 O.O. 369, 55 N.E.2d 724, paragraph two of the syllabus. Despite the arguably broad reach of the public-nuisance tort, however, judicial restraint counsels against this court extending it to the allegations of the city's complaint.

{¶ 81} First, the city's allegations of harm cut against holding the named defendants responsible under a public-nuisance theory. The defendants' allegedly wrongful conduct would never ripen into a public nuisance without the conduct of various unnamed third parties, such as criminals and persons who negligently allow minors to obtain guns. In other words, the defendants' marketing and distribution practices cause harm only through intervening actions of persons not within the defendants' control. Where acts of independent third parties cause the alleged harm, it cannot be said that the defendants--here, gun manufacturers, trade associations, and a gun distributor--have the requisite degree of control over the source of the nuisance to allow liability. *Philadelphia v. Beretta U.S.A. Corp.*, 277 F.3d at 422; *Camden Cty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d at 541.

*439 {¶ 82} Second, to allow the public-nuisance doctrine to reach the defendants in this case amounts to an unwarranted legislative judgment by this court. By its decision today, the majority subjects the defendants to potential nuisance liability for the way they design, distribute, and market lawful products. In extending the **1158 doctrine of public nuisance in this manner, this court takes the ill-advised first step toward transforming nuisance into " 'a monster that would devour in one gulp the entire law of tort.' " *Camden Cty. Bd. of Chosen Freeholders v. Beretta U.S.A. Corp.*, 273 F.3d at 540, quoting *Tioga Pub. School Dist. v. U.S. Gypsum Co.* (C.A.8, 1993), 984 F.2d 915, 921; see, also, *Philadelphia v. Beretta U.S.A. Corp.* (E.D.Pa.2000), 126 F.Supp.2d 882, 909, affirmed (C.A.3, 2002), 277 F.3d 415. Even the Restatement, which itself broadly defines the concept of nuisance, counsels courts *against* declaring a given activity to be a public nuisance "if there has been established a comprehensive set of legislative acts or administrative regulations governing the details of a particular kind of conduct." 4 Restatement, Section 821B, Comment *f.* Where, as here, the defendants are subject to extensive federal regulation concerning their activities, the majority's decision to allow a nuisance claim is inappropriate.

{¶ 83} For the foregoing reasons, I respectfully dissent.

LUNDBERG STRATTON, J., concurs in the foregoing dissenting opinion.

768 N.E.2d 1136, 95 Ohio St.3d 416, 2002-Ohio-2480

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIRST APPELLATE DISTRICT
DIVISION ONE

NO. A103211, CONSOLIDATED WITH NO. A105309

PEOPLE, EX REL. ROCKARD J. DELGADILLO, AS CITY ATTORNEY, ET. AL.,	)	[JUDICIAL COUNCIL COORDINATED PROCEEDING NO. 4095]
PLAINTIFFS/APPELLANTS,	)	[SAN FRANCISCO SUPERIOR COURT NO. 303753]
VS. B & B GROUP, INC., ET. AL.,	)	[LOS ANGELES SUPERIOR COURT NOS. BC210894, BC214794]
DEFENDANTS/RESPONDENTS.	)	[HONORABLE VINCENT P. DIFIGLIA, JUDGE]

APPENDIX OF NON-CALIFORNIA AUTHORITY IN SUPPORT OF RESPONDENT TRADE ASSOCIATIONS' RESPONSE BRIEF

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Service on Attorney General Required by
California *Business & Professions Code* Section 17200

TABLE OF NON-CALIFORNIA AUTHORITY

EXHIBIT

Exhibit 3

United States Court of Appeals,
Seventh Circuit.

Dr. Chester A. WILK, D.C., Dr. James W. Bryden, D.C., Dr. Patricia B. Arthur, D.C., and Dr. Michael D. Pedigo, D.C., Plaintiffs-Appellees, Cross-Appellants,
v.
AMERICAN MEDICAL ASSOCIATION, Defendant-Appellant, Cross-Appellee.
Dr. Chester A. WILK, D.C., Dr. James W. Bryden, D.C., Dr. Patricia B. Arthur, D.C., and Dr. Michael B. Pedigo, D.C., Plaintiffs-Cross-Appellants,
v.
AMERICAN MEDICAL ASSOCIATION, Joint Commission on Accreditation of Hospitals, American College of Physicians and American Academy of Orthopaedic Surgeons, Defendants-Cross-Appellees.

Nos. 87-2672, 87-2777.

Argued Dec. 1, 1988.
Decided Feb. 7, 1990.
Rehearing and Rehearing En Banc Denied in No. 87-2672 April 25, 1990.

Chiropractors brought antitrust action against, inter alia, national medical association, hospital accreditation association, and national physicians' association. On remand, 719 F.2d 207, the United States District Court for the Northern District of Illinois, Susan Getzendanner, J., 671 F.Supp. 1465, held that national medical association had engaged in illegal restraint of trade for which injunctive relief was warranted. On appeal, the Court of Appeals, Manion, Circuit Judge, held that: (1) evidence supported finding that national medical association had engaged in illegal boycott against chiropractors; (2) injunctive relief was warranted; and (3) evidence supported finding that neither hospital accreditation association or national physicians' association were liable.

Affirmed.

*354 George P. McAndrews (argued), Robert C. Ryan, Robert H. Resis, McAndrews, Held & Malloy, Paul E. Slater (argued), Sperling, Slater & Spitz, Chicago, Ill., for plaintiffs-appellees, cross-appellants.

Jack R. Bierig, Newton N. Minow, David W. Carpenter (argued), Sidley & Austin, Chicago, Ill., for American Medical Ass'n.

*355 Robert E. Nord, D. Kendall Griffith, Hinshaw, Culbertson, Moelmann, Hoban & Fuller, Ronald J. Russel, Daniel M. Schuyler (argued), James L. Simon, Schuyler, Roche & Zwirner, Perry L. Fuller, Hinshaw, Culbertson, Moelmann, Hoban & Fuller, Phil C. Neal (argued), Neal, Gerber, Eisenberg & Lurie, Chicago, Ill., for other defendants-cross-appellees.

Before WOOD, Jr., RIPPLE, and MANION, Circuit Judges.

MANION, Circuit Judge.

The district court held that the American Medical Association ("AMA") violated § 1 of the Sherman Act, 15 U.S.C. § 1, by conducting an illegal boycott in restraint of trade directed at chiropractors generally, and the four plaintiffs in particular. The court granted an injunction under § 16 of the Clayton Act, 15 U.S.C. § 26, requiring, among other things, wide publication of its order. The court held that two additional defendants, the Joint Commission on Accreditation of Hospitals ("JCAH"), and the American College of Physicians ("ACP"), had acted independently of the AMA's boycott, and dismissed them from the case. *Wilk v. American Medical Association,* 671 F.Supp. 1465 (N.D.Ill.1987). The AMA appeals the finding of liability, and contends that, in any event, injunctive relief is unnecessary. Plaintiffs cross-appeal against JCAH and ACP. We affirm.

I.

We have observed before that "antitrust cases are notoriously extended." *Ball Memorial Hospital Inc. v. Mutual Hospital Insurance Inc.,* 784 F.2d 1325, 1333 (7th Cir.1986). This case is no exception. Plaintiffs Chester A. Wilk, James W. Bryden, Patricia B. Arthur, and Michael D. Pedigo, are licensed chiropractors. Their complaint, originally filed in 1976, charged several defendants with violating § § 1 and 2 of the Sherman Act, 15 U.S.C. § § 1 and 2. It sought both damages and an injunction. (For a list of all the original defendants, see 671 F.Supp. at 1469-70. We discuss here only those relevant to this appeal.) At the first trial, plaintiffs' primary claim was that the defendants engaged in a conspiracy to

eliminate the chiropractic profession by refusing to deal with plaintiffs and other chiropractors. Defendants accomplished this, plaintiffs claimed, by using former Principle 3 of the AMA's Principles of Medical Ethics, which prohibited medical physicians from associating professionally with unscientific practitioners. [FN1] Plaintiffs contended that the AMA used Principle 3 to boycott chiropractors by labelling them "unscientific practitioners," and then advising its members, among others, that it was unethical for medical physicians to associate with chiropractors. According to the plaintiffs, the other defendants joined the AMA's boycott.

> FN1. Former Principle 3 provided:
> A physician should practice a method of healing founded on a scientific basis; and he should not voluntarily associate with anyone who violates this principle.

A jury returned a verdict for the defendants. An earlier panel of this court, however, reversed that judgment. *Wilk v. American Medical Association*, 719 F.2d 207 (7th Cir.1983) (*Wilk I*). In reversing and ordering a new trial, we held that, in applying the rule of reason, the jury had been allowed to consider factors beyond the effect of the AMA's conduct on competition. The district court had improperly failed to confine the jury's consideration to the "patient care motive as contrasted with [the] generalized public interest motive." *Id.* at 229.

Just before the 1987 retrial, plaintiffs abandoned their damages claim and sought only injunctive relief. This shifted the case's focus from the past to the present regarding whether plaintiffs were entitled to an injunction under § 16 of the Clayton Act. After a lengthy bench trial, the district court concluded that the AMA, through former Principle 3, had unreasonably restrained trade in violation of § 1 of the Sherman Act. Because the district court adequately detailed the rather ***356** lengthy and complex facts of this case, we only briefly summarize them here. (The facts relevant to the claims against JCAH and ACP are set out in section IV of this opinion regarding plaintiffs' cross-appeal.)

In 1963 the AMA formed its Committee on Quackery ("Committee"). The Committee worked diligently to eliminate chiropractic. A primary method to achieve this goal was to make it unethical for medical physicians to professionally associate with chiropractors. Under former Principle 3, it was unethical for medical physicians to associate with "unscientific practitioners." In 1966, the AMA's House of Delegates passed a resolution labelling chiropractic an unscientific cult.

The district court found the AMA's purpose in all of this was to prevent medical physicians from referring patients to chiropractors and from accepting referrals of patients from chiropractors, so as to prevent chiropractors from obtaining access to hospital diagnostic services and membership on hospital medical staffs, to prevent medical physicians from teaching at chiropractic colleges or engaging in any joint research, and to prevent any cooperation between the two groups in the delivery of health care services. Despite the Committee's efforts, chiropractic ultimately became licensed in all 50 states.

In 1977, the AMA's Judicial Council (now known as the Council on Judicial and Ethical Affairs, although we will use its previous name, as did the district court) adopted new opinions which permitted medical physicians to refer patients to chiropractors, as long as the physicians were confident that the services would be performed according to accepted scientific standards. In 1979, the AMA's House of Delegates begrudgingly adopted Report UU, stating that some things chiropractors did were not without therapeutic value; but even so, it stopped short of saying that these services were based on scientific standards. In 1980, the AMA revised its Principles of Medical Ethics, eliminating Principle 3. With this gesture, the district court found, the AMA's boycott ended. 671 F.Supp. at 1477. (We discuss plaintiffs' contention that the boycott continued until 1983 in the section addressing their cross-appeal against JCAH.)

At trial, the AMA raised the so-called "patient care defense" which this court had formulated in its earlier opinion in this case. *Wilk I*, 719 F.2d at 227. That defense required the AMA generally to show that it acted because of a genuine, and reasonable, concern for scientific method in patient care and that it could not adequately satisfy this concern in a way that was less restrictive of competition. The district court rejected the defense. The court found the AMA failed to establish that throughout the relevant period (1966-1980) their concern for scientific methods in patient care had been objectively reasonable. The court also found the AMA similarly failed to show it could not adequately have satisfied its concern for scientific method in patient care in a manner less restrictive of competition than a nationwide conspiracy to eliminate a licensed profession. 671 F.Supp. at 1481-84.

The AMA settled three antitrust lawsuits in 1978, 1980, and 1986 brought by chiropractors, stipulating and agreeing that under the Judicial Council's current opinions, a medical physician could, without fear of discipline or sanction by the AMA, refer a patient to a licensed chiropractor when the physician believed that such a referral would benefit the patient. Similarly, physicians could also choose to accept or decline patients sent to them by chiropractors. The AMA also confirmed that physicians could teach at chiropractic colleges or seminars.

The AMA's present position regarding chiropractic is that it is ethical for a medical physician to professionally associate with chiropractors, if the physician believes that the association is in his patient's best interests. The district court found that the AMA had not previously communicated this position to its membership.

Based on these findings, the court held that the AMA and its members violated § 1 ***357** of the Sherman Act by unlawfully conspiring to restrain trade. According to the court, the AMA's boycott's purpose had been to eliminate chiropractic; the boycott had substantial anticompetitive effects; the boycott had no counterbalancing pro-competitive effects; and the AMA's unlawful conduct injured the plaintiffs.

Despite the fact that the district court found the conspiracy ended in 1980, it concluded that the illegal boycott's "lingering effects" still threatened plaintiffs with current injury and ordered injunctive relief. The court concluded that the boycott caused injury to chiropractors' reputations which had not been repaired, and current economic injury to chiropractors. Further, the AMA never affirmatively acknowledged that there are no impediments to professional association and cooperation between chiropractors and medical physicians, except as provided by law. Thus, chiropractors continued to suffer because the boycott's negative effects (namely, inhibiting AMA members' individual decision-making in their relationships with chiropractors) still remained. The district court believed it was important that the AMA make its members aware of the present AMA position (i.e., it is ethical for medical physicians to professionally associate with chiropractors, if the physician believes it is in the patient's best interest) to eliminate the illegal boycott's lingering effects, and ordered an injunction designed to accomplish that result. 671 F.Supp. at 1507-08 (form of injunction).

II.

A. *Noerr-Pennington Doctrine*

[1] The AMA complains that the district court relied almost entirely on AMA conduct that was protected under the Noerr-Pennington doctrine in finding that it illegally conspired to restrain trade. *Eastern Railroad Presidents' Conference v. Noerr Motor Freight Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); *United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). *See also California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). The Noerr- Pennington doctrine protects businesses and other associations when they join to petition legislative bodies, administrative agencies, or courts for actions having anticompetitive consequences. *Id. See also Wilk I*, 719 F.2d at 229. The doctrine does not, however, protect purely private action, not genuinely aimed at prompting governmental action. *See Allied Tube and Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 108 S.Ct. 1931, 100 L.Ed.2d 497 (1988).

[2] The AMA contends that its statements regarding chiropractors were either statements about chiropractic's deficiencies or bona fide opinions on matters of public interest. The district court acknowledged the AMA's claim and, to the extent that the Committee's work regarding influencing legislation on the state and federal levels or in informational activities to inform the public on the nature of chiropractic was involved, it did not consider such conduct in reaching its decision. *Wilk*, 671 F.Supp. at 1473 n. 2. But apart from the protected activity, the district court found substantial evidence of acts aimed at achieving the boycott's goals, not legislative action. *Id.* at 1473-77.

The court found that the AMA, through a resolution recommended by its Board of Trustees, and adopted by its House of Delegates, branded chiropractic "an unscientific cult." 671 F.Supp. at 1473. This implicitly invoked Principle 3's ethical proscription on professional association with chiropractors. Subsequent AMA action, *id.* at 1473-74, made clear the ethical bar on professional association (which included prohibiting medical physicians from referring patients to chiropractors, and from receiving referrals from chiropractors; providing diagnostic, laboratory, or radiology services for chiropractors; and from teaching chiropractors, or practicing together in any manner). The AMA widely circulated these documents. The court also found the Committee had regularly communicated with medical boards and associations, informing ***358** them that professional association between medical

physicians and chiropractors was unethical. 671 F.Supp. at 1473.

We disagree with the AMA that the district court "repeatedly cite[d]" AMA documents which "focus[ed] entirely on the AMA's 'vigorous educational program' and on 'the necessity to move aggressively against chiropractic in the state legislatures.' " One such document the AMA points to is an internal AMA memorandum (PX 464, Jt.App. 776-77) from the Committee to the Board of Trustees, discussing the AMA's goal of "the containment of chiropractic and, ultimately, the elimination of chiropractic." It expressly disavows any intention of using the document publicly. And while the document details some activity that was likely protected, it suggests that activity may have been done only "to minimize the chiropractic argument that the [AMA's] campaign is simply one of economics...." (Jt.App. 777). Also falling outside of the Noerr-Pennington doctrine's protection is an AMA Judicial Council opinion, holding that it was unethical for medical physicians to professionally associate with chiropractors, which was circulated to AMA members and to 56 medical specialty boards (Jt.App. 801-03). Finally, in 1973, the AMA drafted "Standard X," which incorporated the unscientific practitioners' ethical bar into the JCAH accrediting standards. At the AMA's urging, JCAH adopted Standard X.

These activities were not aimed at obtaining legislative action. They were instead aimed at medical physicians and hospitals, cautioning them that it was unethical and indeed dangerous (the obvious inference from receiving health care from an unscientific cult) to associate professionally with chiropractors. In the face of the district court's specific findings on this issue, we cannot say it erred in relying on these activities.

B. *Unreasonable Restraint of Trade*

[3][4] The central question in this case is whether the AMA's boycott constituted an unreasonable restraint of trade under § 1 of the Sherman Act. A restraint is unreasonable if it falls within the category of restraints held to be *per se* unreasonable, or if it violates what is known as the "Rule of Reason." *Federal Trade Commission v. Indiana Federation of Dentists*, 476 U.S. 447, 457-58, 106 S.Ct. 2009, 2017-18, 90 L.Ed.2d 445 (1986); *NCAA v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 103, 104 S.Ct. 2948, 2961, 82 L.Ed.2d 70 (1984); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692, 98 S.Ct. 1355, 1365, 55 L.Ed.2d 637 (1978). Restraints that are *per se* unreasonable include agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry or restraint is needed to establish their illegality. *Nat'l Society of Professional Engineers*, 435 U.S. at 692, 98 S.Ct. at 1365. Concerted refusals to deal, described as group boycotts, typically are held unlawful *per se*. *See Indiana Federation of Dentists*, 476 U.S. at 458, 106 S.Ct. at 2017; *Consolidated Metal Products, Inc. v. American Petroleum Institute*, 846 F.2d 284, 290 (5th Cir.1988). The *per se* rule avoids a burdensome inquiry into actual market conditions where the likelihood of anticompetitive effect is so obvious that the costs of determining whether the particular restraint at issue involves anticompetitive conduct is unwarranted. *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2, 15-16 n. 25, 104 S.Ct. 1551, 1559-60 n. 25, 80 L.Ed.2d 2 (1984). In contrast, the rule of reason category includes agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business involved, the particular restraint's history, and the reasons it was imposed. *Nat'l Society of Professional Engineers*, 435 U.S. at 692, 98 S.Ct. at 1365. The test of legality under the rule of reason is whether the challenged conduct promotes or suppresses competition. *Id.* at 691, 98 S.Ct. at 1365; *see also Chicago Board of Trade v. United States*, 246 U.S. 231, 238, 38 S.Ct. 242, 244, 62 L.Ed. 683 (1918). The purpose of both approaches (*per se* or rule of reason) is to decide the restraint's competitive significance.

***359** The Supreme Court historically has been slow to condemn rules adopted by professional associations as unreasonable *per se*. *Indiana Federation of Dentists*, 476 U.S. at 458, 106 S.Ct. at 2018. The Court is also reluctant to extend the *per se* rule to restraints imposed in the context of business relationships where a practice's economic impact is not immediately apparent. *Id.* Likewise, judicial inexperience with a particular arrangement cautions against extending the *per se* approach's reach insofar as judging the alleged restraint's lawfulness under the antitrust laws. *NCAA v. Board of Regents*, 468 U.S. at 100 n. 21, 104 S.Ct. at 2960 n. 21; *see also Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 294, 105 S.Ct. 2613, 2619, 86 L.Ed.2d 202 (1985); *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 344, 102 S.Ct. 2466, 2473, 73 L.Ed.2d 48 (1982); *Consolidated Metal Products*, 846 F.2d at 290. Nevertheless, the Supreme Court has not refrained from applying the *per se* approach solely on the grounds that the judiciary has little antitrust

experience in the particular industry. *See Arizona v. Maricopa County Medical Society*, 457 U.S. at 349-51, 102 S.Ct. at 2475-77 (health care industry).

[5] As a general rule, § 1 claims under the Sherman Act should be evaluated under the rule of reason unless the challenged action falls into the category of agreements which are deemed so harmful in their effect on competition so as to be conclusively presumed to be unreasonable and thus illegal without a detailed inquiry as to the precise harm they are alleged to have caused. *Northwest Wholesale Stationers*, 472 U.S. at 289-90, 105 S.Ct. at 2616-17; *Consolidated Metal Products*, 846 F.2d at 289-90. In this court's first go-round with this case, it held that the AMA's alleged boycott should be measured under the rule of reason. *Wilk I*, 719 F.2d at 221-22. We held that in the context of a learned profession, the nature and extent of the restraint's anticompetitive effect was too uncertain to warrant *per se* treatment. *Id.* at 221. Moreover, we looked to the Supreme Court's decisions involving professional associations (*e.g., Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 102 S.Ct. 2466; *Nat'l Society of Professional Engineers*, 435 U.S. 679, 98 S.Ct. 1355; and *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975)), and noted the pains the Court had taken to carve out the possibility that a practice which might violate the Sherman Act in another context might not violate the Act when a learned profession was involved. *Wilk I*, 719 F.2d at 222. Thus, we concluded, "[a] canon of medical ethics purporting, surely not frivolously, to address the importance of scientific method gives rise to questions of sufficient delicacy and novelty at least to escape *per se* treatment." *Id.*

On appeal, plaintiffs urge that we change course and apply instead the *per se* rule. Plaintiffs claim that the Supreme Court's decisions in *Indiana Federation of Dentists* and *Northwest Wholesale Stationers* undercut our prior decision to treat this case under the rule of reason. But like the district court, we decline plaintiffs' invitation to revisit this issue. The Court in *Indiana Federation of Dentists* did not itself apply a *per se* rule. Nor do we read either case as requiring us to employ the *per se* analysis on the facts of this case. And, in any event, even under the rule of reason, the boycott was unlawful. *Cf. Parts and Electric Motors, Inc. v. Sterling Electric, Inc.*, 826 F.2d 712, 720-21 (7th Cir.1987) (because jury had concluded that the challenged action--an alleged tying arrangement--had unreasonably restrained competition, and had found liability under the rule of reason, it was unnecessary to decide the case under the *per se* inquiry).

[6][7] The threshold issue in any rule of reason case is market power. *Schachar v. American Academy of Ophthalmology, Inc.*, 870 F.2d 397, 398 (7th Cir.1989); *Valley Liquors, Inc. v. Renfield Importers Ltd.*, 822 F.2d 656, 666 (7th Cir.1987) (*Valley II*). Market power is the ability to raise prices above the competitive level by restricting output. *NCAA v. Board of Regents*, 468 U.S. at 109 n. 38, 104 S.Ct. at 2964 n. 38; **360*Ball Memorial Hospital*, 784 F.2d at 1331. Whether market power exists in an appropriately defined market is a fact-bound question, and appellate courts normally defer to district court findings on that issue. *Jefferson Parish Hospital*, 466 U.S. at 42, 104 S.Ct. at 1574 (O'Connor, J., concurring). Here, the district court found the relevant market to be the provision of health care services to the American public nationwide, particularly care for the treatment of musculoskeletal problems. 671 F.Supp. at 1478. Several facts demonstrated the AMA's market power within the health care services market. AMA members constituted a substantial force in the provision of health care services in the United States and they constituted a majority of medical physicians. AMA members received a much greater portion of fees paid to medical physicians in the United States than non-AMA members. *Id.* The evidence showed that AMA members received approximately 50% of all fees paid to health care providers. Finally, according to plaintiffs' expert, the AMA enjoyed substantial market power. The district court also found there was substantial evidence that the boycott adversely affected competition, and that a showing of such adverse effects negated the need to prove in any elaborate fashion market definition and market power, relying on *Indiana Federation of Dentists*, 476 U.S. at 460-62, 106 S.Ct. at 2018-20.

The AMA first contests the district court's finding of market power. It challenges the court's reliance on market share evidence as a basis to find market power and the district court's lumping together all AMA members as a group in assessing market share as a basis for its market power finding. We are not convinced the trial court erred. The district court properly relied on the AMA membership's substantial market share in finding market power. While we cautioned against relying solely on market share as a basis for inferring market power in *Ball Memorial Hospital*, 784 F.2d at 1336, we did not rule out that approach. *Id. See also Parts and Electric Motors*, 826 F.2d at 720 n. 7; *Valley II*, 822 F.2d at 666-67. This is especially so where there are barriers to entry and no substitutes from the consumer's perspective.

Ball Memorial Hospital, 784 F.2d at 1336. Here the district court found the AMA membership was a substantial force in the American health care market, and that there were substantial barriers to the entry of new chiropractors into the field, such as substantial education requirements, 671 F.Supp. at 1479.

The district court also relied on substantial evidence of adverse effects on competition caused by the boycott to establish the AMA's market power. In *Indiana Federation of Dentists,* the Supreme Court explained that since "the purpose of the inquiries into market definition and market power is to determine whether an arrangement has the potential for genuine adverse effects on competition, 'proof of actual detrimental effects, such as reduction of output' can obviate the need for an inquiry into market power, which is but a 'surrogate for detrimental effects.' " 476 U.S. at 460-61, 106 S.Ct. at 2018-19, quoting 7 P. Areeda, *Antitrust Law* ¶ 1511, p. 429 (1986): *See also,* P. Areeda, *The Rule of Reason--A Catechism on Competition,* 55 Antitrust Law Journal 571, 577 (1986). Thus, the district court recited the boycott's anticompetitive effects:

> It is anticompetitive and it raises costs to interfere with the consumer's free choice to take the product of his liking; it is anticompetitive to prevent medical physicians from referring patients to a chiropractor; (Lynk--1427-28) it is anticompetitive to impose higher costs on chiropractors by forcing them to pay for their own x-ray equipment rather than obtaining x-rays from hospital radiology departments or radiologists in private practice; and it is anticompetitive to prevent chiropractors from improving their education in a professional setting by preventing medical physicians from teaching or lecturing to chiropractors. (Tr. 1409-22, 1424-31.)

671 F.Supp. at 1478-79. *See also Wilk I,* 719 F.2d at 214. These findings eliminated the need for an inquiry into market power.

[8] The AMA's attempts to discredit the evidence the district court relied on to find ***361** anticompetitive effects are unavailing. The record does not show, as the AMA contends, that forcing chiropractors to purchase their own x-ray equipment had no adverse effect on chiropractors. And the district court did not clearly err in finding that former Principle 3 reduced demand for chiropractic services simply because there was evidence that a patient had seen a chiropractor before and after having seen a medical physician. Moving on, the AMA argues that even if market power existed, it escapes liability under the rule of reason because former Principle 3 had overriding procompetitive effects. The AMA's argument is not unpersuasive in the abstract; but unfortunately it relies on evidence which the district court rejected as "speculative." 671 F.Supp. at 1479. Essentially, the AMA argues that the market for medical services is one where there is "information asymmetry." In other words, health care consumers almost invariably lack sufficient information needed to evaluate the quality of medical services. This increases the risk of fraud and deception on consumers by unscrupulous health care providers possibly causing what the AMA terms "market failure": consumers avoiding necessary treatment (for fear of fraud), and accepting treatment with no expectation of assured quality. The AMA's conduct, the theory goes, ensured that physicians acquired reputations for quality (in part, by not associating with unscientific cultists), and thus allowed consumers to be assured that physicians would use only scientifically valid treatments. This in effect simultaneously provided consumers with essential information and protected competition.

Getting needed information to the market is a fine goal, but the district court found that the AMA was not motivated solely by such altruistic concerns. Indeed, the court found that the AMA intended to "destroy a competitor," namely, chiropractors. It is not enough to carry the day to argue that competition should be eliminated in the name of public safety. *See Nat'l Society of Professional Engineers,* 435 U.S. 679, 98 S.Ct. 1355.

But the AMA persists in arguing that pro-competitive effects were achieved by the boycott through what its expert called "nonverbal communication." In rejecting this argument, the district court stated that the AMA's expert's

> theory is that the boycott constituted nonverbal communication which informed consumers about the differences between medical physicians and chiropractors, and that this had a pro-competitive effect. (Tr. 1411-12.) I reject this opinion as speculative. (Tr. 1434-43.) Mr. Lynk [William J. Lynk, the AMA's expert] neither conducted nor read any studies regarding the efficacy of such nonverbal communications. *Id.* He neither conducted nor read any surveys of consumer opinion to determine whether consumers were confused about the differences between medical physicians and chiropractors. (*Id.*) I saw no evidence of any such confusion during the trial. Mr. Lynk's opinion does not accord with common sense. A nationwide conspiracy intended by its participants to contain and eliminate a licensed profession cannot be justified on the basis of Mr. Lynk's personal opinion that it was pro-competitive, nonverbal communication to

consumers.
671 F.Supp. at 1479. We find the district court's reasoning compelling.

The AMA, however, argues that the district court missed the boat in rejecting Mr. Lynk's theory. The relevant question, according to the AMA, is not whether consumers would perceive any differences between physicians and chiropractors today; rather, it is whether they would ever view a physician's *referral* of a patient to a chiropractor as a physician's endorsement of the chiropractor's practices. But the AMA misses the essence of the district court's ruling. The trial court rejected the AMA's theory as speculative because Lynk neither conducted nor read any studies regarding nonverbal communications; his views were only his "personal opinion." 671 F.Supp. at 1479. In fact, Lynk testified that an empirical study could not even be performed to determine the pro-competitive effects of Principle 3. (Jt.App. at 351-52.) Thus, even if the AMA is right in ***362** asserting that the relevant inquiry is how a physician's referral would be viewed by the consumer, there was no underlying study or data to support its theory.

Moreover, Lynk's testimony did not bear out the AMA's assertions regarding the "relevant question." The AMA says that it is irrelevant to its theory whether health care consumers perceive any differences between chiropractors and medical physicians, and that Lynk's testimony went to the role of reputation and information in health care service markets. But in testifying as to the pro-competitive function of standards generally, Lynk testified that they improve consumer information by making it possible for consumers to make more informed choices "about whatit is they are getting from alternative sellers of the same or substitute products to the extent that it allows them to make better choices." (Jt.App. 343.) Lynk also testified that one of the interests served by former Principle 3 was that it would clarify the distinctions between the profession of medicine and alternative professions "that are not based on medical science but which can create the appearance that they are." (Jt.App. 351.) This seems to go precisely to the perceived differences between chiropractors and medical physicians.

In sum, we agree with the district court that the AMA's boycott constituted an unreasonable restraint of trade under § 1 of the Sherman Act under the rule of reason. Therefore, the district court's findings that the AMA's boycott was anticompetitive, and was not counter-balanced by any pro- competitive effects were not erroneous. *Nat'l Society of Professional Engineers*, 435 U.S. at 691, 98 S.Ct. at 1365.

C. *Patient Care Defense*

In the AMA's first appeal, we modified the rule of reason to allow the AMA to justify its boycott of chiropractors if it could show that it was motivated by a concern for "patient care." *Wilk I*, 719 F.2d at 227. We were persuaded that measuring former Principle 3's reasonableness required a more flexible approach than the traditional rule of reason inquiry provided. *Id.* at 226- 27. Thus, we explained that if plaintiffs met their burden of persuasion on remand by showing that former Principle 3 and the implementing conduct had restricted competition rather than promoting it, the burden of persuasion would shift to the defendants to show:

> (1) that they genuinely entertained a concern for what they perceive as scientific method in the care of each person with whom they have entered into a doctor-patient relationship; (2) that this concern is objectively reasonable; (3) that this concern has been the dominant motivating factor in defendants' promulgation of Principle 3 and in the conduct intended to implement it; and (4) that this concern for scientific method in patient care could not have been adequately satisfied in a manner less restrictive of competition.

Id. at 227.

In this appeal, plaintiffs ask us to reconsider the patient care defense, urging that three subsequent Supreme Court decisions have implicitly rejected it; *see Patrick v. Burget*, 486 U.S. 94, 104-05, 108 S.Ct. 1658, 1665, 100 L.Ed.2d 83 (1988); *Indiana Federation of Dentists*, 476 U.S. at 458-60, 106 S.Ct. at 2017-19; and *Jefferson Parish Hospital Dist. No. 2*, 466 U.S. at 25 n. 41, 104 S.Ct. at 1565 n. 41. While these decisions may cast doubt on the patient care defense's continuing vitality, they did not address the specific issue of whether the patient care defense on the facts in this case would be allowed. While we acknowledge that there has been some academic criticism of the defense (*see* Kissam, *Antitrust Boycott Doctrine*, 69 Iowa L.Rev. 1165, 1214-16 (1984); Havighurst, *Doctors and Hospitals: An Antitrust Perspective on Traditional Relationships*, 1984 Duke L.J. 1071, 1103 n. 101 (1984)), we need not revisit the issue because the district court's finding that the AMA did not satisfy its burden of persuasion under the defense was not clearly erroneous.

The district court held that the AMA failed to meet the defense's second and fourth elements: that its

concern for scientific method in patient care was objectively reasonable, and that the concern for scientific *363 method in patient care could not have been satisfied adequately in a manner less restrictive of competition, respectively. While only those two rulings are at issue, it is useful to summarize the district court's treatment of the entire defense.

Although doubting the AMA's genuineness regarding its concern for scientific method in patient care, the district court concluded that the AMA established that element. While it was attacking chiropractic as unscientific, the AMA simultaneously was attacking other unscientific methods of disease treatment (e.g., the Krebiozen treatment of cancer), and, as the district court noted, the existence of medical standards or guidelines against unscientific practice was relatively common. 671 F.Supp. at 1481. The court, however, found that the AMA failed to carry its burden of persuasion as to whether its concern for scientific method in patient care was objectively reasonable.

The court acknowledged that during the period that the Committee on Quackery was operating, there was plenty of material supporting the belief that all chiropractic was unscientific. But, according to the court (and this is unchallenged), at the same time, there was evidence before the Committee that chiropractic was effective, indeed more effective than the medical profession, in treating certain kinds of problems, such as back injuries. The Committee was also aware, the court found, that some medical physicians believed chiropractic could be effective and that chiropractors were better trained to deal with musculoskeletal problems than most medical physicians. Moreover, the AMA's own evidence suggested that at some point during its lengthy boycott, there was no longer an objectively reasonable concern that would support a boycott of the entire chiropractic profession. Also important was the fact that "it was very clear" that the Committee's members did not have open minds to pro-chiropractic arguments or evidence. 671 F.Supp. at 1481-83.

Next, the court found that the AMA met its burden in establishing that its concern about scientific method was the dominant motivating factor for promulgating former Principle 3, and in the conduct undertaken and intended to implement it. 671 F.Supp. at 1483. But even so, the court acknowledged there was evidence showing that the AMA was motivated by economic concerns, as well.

Finally, the court concluded that the AMA failed to meet its burden in demonstrating that its concern for scientific method in patient care could not have been satisfied adequately in a manner less restrictive of competition. The court stated that the AMA had presented no evidence of other methods of achieving their objectives such as public education or any other less restrictive approach. 671 F.Supp. at 1483.

[9] The AMA attacks the district court's findings as to the second element (concern for scientific method as objectively reasonable), claiming that the court rewrote the element to require the AMA to show its concern with chiropractic (rather than with scientific patient care) was objectively reasonable. *Wilk*, 671 F.Supp. at 1481. We disagree. The AMA's claim in passing that the court "misconceiv[ed]" the defense is barely explained in one of its 67 footnotes; but in any event, we think the district court was true to the defense and adequately supported its holding with several key factual determinations. It recited the evidence directly at odds with the AMA's belief that all chiropractic was unscientific. 671 F.Supp. at 1481-83. The AMA does not challenge the district court's findings, so those findings must stand. Beyond that, the AMA reads this element too rigidly. The issue here is whether its concern for scientific method in the care of patients was objectively reasonable. In the context of this particular case, then, the question is whether that concern justified a boycott of chiropractic. Based on the undisputed facts, it did not.

The AMA's challenge to the fourth element (concern for scientific method in patient care could not have been adequately satisfied in a manner less restrictive of competition) is equally unpersuasive. The AMA completely fails to offer any evidence to support its burden. Instead, it argues *364 that its former guideline had at most a *de minimis* effect on chiropractors' costs, and thus could not be treated as an attempt to contain and eliminate the entire chiropractic profession. This, however, ignores the fact that the AMA's self-proclaimed and described "mission" was to contain, and ultimately eliminate chiropractic. (Jt.App. 776.) The AMA participated in a nationwide boycott and conspiracy designed to contain and eliminate a profession that was licensed in all fifty states at the time the Committee on Quackery was disbanded. As the district court held, it is "a difficult task" to argue that this was "the only way to satisfy the AMA's concern for the use of scientific method in patient care." 671 F.Supp. at 1483. Furthermore, we reject the AMA's attempts to minimize the effect its boycott had on competition. The district court found the boycott had several anticompetitive effects, such as raising costs by

interfering with consumers' free choice, which are unrefuted. 671 F.Supp. at 1478-79, 1480. [FN2]

> FN2. The AMA's assertion that former Principle 3 operated to prevent the "free-riding" that would have occurred if physicians had referred patients to chiropractors misses the mark. Apparently, the AMA believes that if physicians were forced to refer patients to chiropractors, chiropractors would benefit (the "free ride") from the physicians' reputation for providing quality medical service, without necessarily deserving that reputation themselves. But neither this court nor the district court would require the AMA to endorse chiropractic, nor do we mandate that there be referrals. We simply speak to the restraint on professional association, and say that physicians, hospitals, and other institutions must be free to make their own uncoerced decisions on whether to professionally associate with chiropractors. We do not compel medical physicians to praise or sponsor chiropractors' work. *See Schachar v. American Academy of Ophthalmology*, 870 F.2d 397, 399 (7th Cir.1989). We do not even require "cooperation or friendliness." *Id.* We also note that the AMA apparently misconceives the role of the free-riding analysis in antitrust law. *See Premier Electrical Construction Co. v. National Electrical Contractors Ass'n Inc.*, 814 F.2d 358, 368-70 (7th Cir.1987) (explaining the concept).

D. *Antitrust Injury*

[10] To seek an injunction under § 16 of the Clayton Act, a private plaintiff must allege "threatened loss or damage 'of the type the antitrust laws were designed to prevent and that flows from that which makes defendants' acts unlawful.' " *Cargill Inc. v. Monfort of Colorado Inc.*, 479 U.S. 104, 113, 107 S.Ct. 484, 491, 93 L.Ed.2d 427 (1986) (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489, 97 S.Ct. 690, 697, 50 L.Ed.2d 701 (1977)). Here, the district court concluded that plaintiffs had shown the kind of injury the antitrust laws were designed to prevent. 671 F.Supp. at 1479-80. Plaintiff's economic expert (Stano) compared chiropractors' incomes with podiatrists' and optometrists' incomes (comparable limited license practitioners) over the relevant period of time and concluded that chiropractors' incomes had been lower than both. This Styno viewed as consistent with plaintiffs' boycott theory. He also concluded that a jump in chiropractors' incomes during the 1978-1980 period was consistent with the acknowledged lessening of the boycott by the AMA during that time. Lynk, the AMA's economic expert, though he faulted the data plaintiffs' expert relied upon, agreed that if he were to compare chiropractors' incomes to comparable groups, he also would include podiatrists and optometrists (although he stated he would seek further explanations for differences between the groups' incomes). In the district court's view, further support for plaintiffs' theory of harm was the "very strong evidence of a pervasive, nationwide, effective conspiracy which by its very nature would have affected the demand curve for chiropractic services and adversely affected the income of chiropractors." 671 F.Supp. at 1480. Finally, the district court added, there was evidence of injury to reputation suffered by chiropractors. (Both economic experts, according to the court, believed that injury to reputation would constitute an anticompetitive effect of the boycott.)

The AMA argues that plaintiffs failed to establish an antitrust injury. Essentially the argument goes somewhat like this. This case is not a class action; rather, it involves only the four named plaintiffs. The only harm here would have been to ***365** "scientific" chiropractors. Because, according to the AMA (but not the district court), plaintiffs were not and are not "scientific practitioners," they could not have suffered any injury from former Principle 3. If any chiropractors could establish antitrust injury, it would be those who have "renounced the theory of sublaxations and limit their practices to conservative physical therapy modalities." The AMA's argument thus hinges on its lengthy assertion that the four plaintiffs are "unscientific practitioners." The problem with this approach, however, is that the district court did not agree with the AMA that the plaintiffs were "unscientific" practitioners. Although the court acknowledged that there was some evidence that the plaintiffs did not use common methods in treating common symptoms, and that the treatment of patients appeared to be undertaken on an ad hoc rather than on a scientific basis, it did not go so far as the AMA believes, and establish or find that the plaintiffs in this case were "unscientific practitioners." Indeed, it expressly held that no one involved in the case, including the plaintiffs, believed that chiropractic treatment should be used for treatment of diseases such as cancer, diabetes, heart disease, high blood pressure, and infections. 671 F.Supp. at 1482. Regardless, neither the district

court, nor this court is equipped to determine whether chiropractic is "scientific" or not. So the AMA's argument must fail in any event. We see the AMA's argument here as yet another invitation to tackle the question of whether chiropractic is "either good or bad, efficacious or deleterious, quackery or science." 671 F.Supp. at 1481. The district court repeatedly stated it was not deciding whether chiropractic was scientific. 671 F.Supp. 1482 n. 8, 1482-83, 1506-07. Yet both sides (below it was plaintiffs, 671 F.Supp. at 1482; here, it is the AMA) continue to color their arguments with how they view their own, or the other side's, profession. Like the district court, we do not see our task as deciding whether or not chiropractic is scientific.

The AMA also quibbles with the evidence of antitrust injury. The district court rejected the same arguments. 671 F.Supp. at 1480. We too are unpersuaded. The AMA offers no good reason why we should accept its expert's opinion over that of the plaintiffs', and we decline to do so. But beyond that, the district court relied on more than just plaintiffs' expert in determining there was an antitrust injury. It also relied on the evidence of the "pervasive, nationwide, effective conspiracy which by its very nature would have affected the demand curve for chiropractic services and therefore adversely affected income of chiropractors." 671 F.Supp. at 1480. (Further, we also note that the AMA is far too generous in its characterization of plaintiffs' expert's "concession" that the AMA's conduct was "lawful and pro-competitive.")

The evidence established that all chiropractors' incomes were lower than those of comparable limited license practitioners. And the evidence was that all chiropractors suffered an injury to their reputation. 671 F.Supp. at 1480. Indeed, the district court found that the individual plaintiffs suffered rejections and lost opportunities and that "the individual plaintiffs have been personally harmed, and continue to be personally threatened, by a lack of association with members of the AMA caused by the boycott and the lingering effects of the boycott." 671 F.Supp. at 1486. Moreover, the court stated that "[t]he activities of the AMA undoubtedly have injured the reputation of chiropractors generally. This kind of injury more likely than not was sustained by the four plaintiffs." *Id.* This directly refutes the AMA's contention that there was nothing but a showing of "classwide injury." [FN3]

FN3. The AMA cites *United States v. Borden Co.*, 347 U.S. 514, 74 S.Ct. 703, 98 L.Ed. 903 (1954), for the proposition that a showing of classwide injury is insufficient to support injunctive relief for an individual plaintiff. While that might be true, *Borden* does not say so. There, the Supreme Court held that in light of the differences in the interests sought to be vindicated by the government and by private litigants in actions under the Clayton Act, the government was not precluded from obtaining injunctive relief against price discrimination simply because, in an earlier private action, a decree enjoined the conduct in question. At any rate, the trial court here relied on more than evidence of "classwide injury" in finding that these four plaintiffs were injured by the AMA's unlawful boycott.

***366** III.
Entitlement To Injunctive Relief

Section 16 of the Clayton Act provides that:

> Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief ... against threatened loss or damage by a violation of the antitrust laws ... 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....

15 U.S.C. § 26. Although the district court concluded that the AMA's boycott ended in 1980 (when former Principle 3 was eliminated), it held that an injunction nevertheless was necessary in this case.

The trial court concluded there were lingering effects of the AMA's conspiracy; that the AMA never acknowledged the lawlessness of its past conduct, and in fact continued to maintain that it had always been in compliance with the antitrust laws; that the AMA had never affirmatively stated that it was ethical for medical physicians to professionally associate with chiropractors; that the AMA had never publicly stated to its members the admissions made in the trial court about chiropractic's improved nature, despite the fact that the AMA currently claims that it made changes in its policy in recognition of chiropractic's change and improvement; that the AMA never publicly retracted articles such as "The Right and Duty of Hospitals to Deny Chiropractor Access to Hospitals"; that a medical physician had to read very carefully the current AMA Judicial Council opinions to realize that there had been a change in the treatment of chiropractors; and, finally, that the

AMA's systematic, long-term wrongdoing and long-term intent to destroy chiropractic "suggest[ed]" that an injunction was appropriate. 671 F.Supp. at 1488. The court believed that it was important to make AMA members aware of the AMA's present position--that it is ethical for medical physicians to professionally associate with chiropractors, if the physician believes it is in his patient's best interest--to eliminate the unlawful boycott's lingering effects. The injunction, then, is to "assure that the AMA does not interfere with the right of a physician, hospital or other institution to make an individual decision on the question of professional association." 671 F.Supp. at 1507.

The injunction requires the AMA to arrange publication of the district court's order in the *Journal of the American Medical Association,* mail the order to each of the AMA's members, and revise the current opinions of the AMA's Council on Judicial and Ethical Affairs (formerly the Judicial Council) so that it states the AMA's present position on chiropractic in a separate provision, with a heading and index references referring to chiropractors. 671 F.Supp. at 1507-08.

[11] The AMA correctly points out that the district court wrongly placed the burden of proof on the AMA in deciding whether injunctive relief was appropriate in this case. But the AMA does not argue how, if at all, the court's error prejudiced it. We do not think the AMA was prejudiced.

The district court treated the AMA's argument in this respect as an argument that the claim for injunction was moot instead of an argument that no injunctive relief was necessary. Although these concepts are similar, they are analytically distinct, and a court could find that a case is not moot yet deny injunctive relief. *See United States v. Concentrated Phosphate Export Association, Inc.,* 393 U.S. 199, 203, 89 S.Ct. 361, 364, 21 L.Ed.2d 344 (1968); *U.S. v. W.T. Grant,* 345 U.S. 629, at 633, 73 S.Ct. 894, at 898, 97 L.Ed. 1303 (1953); *TRW, Inc. v. Federal Trade Commission,* 647 F.2d 942, 953-54 (9th Cir.1981); *SCM Corporation v. Federal Trade Commission,* 565 F.2d 807, 812 (2d Cir.1977). There are practical differences between the ***367** concepts, as well. The mootness burden is a heavy one, and the *defendant* must show that there is no reasonable expectation that the wrong will be repeated. By contrast, the burden for showing whether injunctive relief is necessary is on the *moving party;* here plaintiffs. The district court wrongly placed the burden of persuasion on the AMA. 671 F.Supp. at 1484. But no matter which party bore the burden on this issue, the district court's ultimate findings leave no doubt that injunctive relief was appropriate.

A party moving for an injunction must show some cognizable danger of recurrent violation, that is, something more than the mere possibility which serves to keep the case alive. *W.T. Grant,* 345 U.S. at 633, 73 S.Ct. at 898. "To be considered are the bona fides of the expressed intent to comply, the effectiveness of the discontinuance and, in some cases, the character of the past violations." *Id.* Courts require "clear proof" that an unlawful practice has been abandoned, and must guard against attempts to avoid injunctive relief "by protestations of repentance and reform, especially when abandonment seems timed to anticipate suit, and there is a probability of resumption." *U.S. v. Oregon State Medical Society,* 343 U.S. 326 at 333, 72 S.Ct. 690, at 695, 96 L.Ed. 978 (1952). These issues are committed to the trial court's discretion. *Id.* 345 U.S. at 634, 73 S.Ct. at 898; *see also U.S. v. Concentrated Phosphate,* 393 U.S. at 203-04, 89 S.Ct. at 364. Thus, we will not substitute our judgment for the district court's. The question is not how we would rule if we were addressing the question in the first instance. Rather, the question is whether the district court's decision was reasonable. *See United States v. United States Currency in the Amount of $103,387.27,* 863 F.2d 555, 561 (7th Cir.1988).

[12] We believe the court's decision was reasonable. It found a cognizable danger of recurrent violations, was unimpressed with the AMA's expressed intent to comply with antitrust laws, was unpersuaded by the effectiveness of the AMA's discontinuance of its boycott, and properly considered the systematic and long-term nature of the boycott. *W.T. Grant,* 345 U.S. at 633, 73 S.Ct. at 897.

The AMA characterizes many of its challenges to the district court's decision to order an injunction as attacks on the court's findings of fact. Thus, for example, the AMA argues that the district court "erroneously found a risk of recurrence." But the facts are relatively undisputed. The AMA is really challenging the district court's decision that those facts supported an injunction.

In this regard, the district court found that the AMA's behavior in connection with the 1983 revision of the JCAH accreditation standards for hospitals indicated the AMA's likelihood of returning to its old (anti-chiropractic) ways. (The facts surrounding the 1983 revisions are set out more fully in section IV below, in connection with plaintiffs' cross appeal against JCAH.) The AMA's original position toward those

standards was favorable to chiropractors in that it supported the JCAH position that each hospital be permitted to decide for itself, under applicable state law, which licensed health care providers would be allowed hospital privileges and membership on the medical staff. However, after an outcry from its membership the AMA was forced to change its original position to satisfy its constituents, namely, medical physicians; it thus sought to have JCAH approve a more restrictive accreditation standard which would ensure medical and osteopathic physicians control of the medical staff and patient care in hospitals. 671 F.Supp. at 1476, 1488. This incident led the trial court to conclude that the AMA's "present assurances [were] good only until the next chiropractic battle." *Id.* at 1488.

The facts surrounding the 1983 JCAH revisions are not in dispute. Even so, the AMA terms the district court's reliance on this incident as "baffling." Thus, it contends that even under the district court's injunction order it will still be allowed to urge restrictions on chiropractors before recognized accrediting bodies, and that its conduct regarding the JCAH standards would be consistent with that mandate. The AMA also argues that the district ***368** court's conclusion that the JCAH's 1983 revision was reasonable, indeed proper, validates the AMA's call to action to ensure medical and osteopathic physician control of medical staff and patient care. We disagree.

While the AMA, under the district court's order, may in the future be free to urge restrictions or take positions with respect to chiropractic, the AMA's action with respect to the 1983 JCAH revisions must be viewed in the context in which it occurred. It came on the heels of a lengthy illegal boycott of chiropractors. And although the AMA believed the JCAH's initial standards were consistent with the then current antitrust legal climate, it was unable to maintain its position in the face of a barrage of criticism from its members. 671 F.Supp. at 1476-77. That coupled with the fact that the district court found the AMA even through the date of trial continued to respond to requests for information on chiropractic by sending out anti-chiropractic literature, *id.*, was enough for the district court properly to conclude that there was evidence that suggests a possible return to the AMA's former policies. Finally, the JCAH's action in 1983, although found reasonable and proper, is wholly distinct from the AMA's action. JCAH was an independent body, motivated by completely different concerns. Thus, while the AMA was attempting to contain and eliminate competitors (i.e., chiropractic), JCAH was acting only to assure that responsibility for patient care in acute care hospitals remained in the hands of medical and osteopathic physicians, the only practitioners who could perform that acute care.

In challenging the need for an injunction, the AMA also contends that it is legally bound by settlements in three separate chiropractic antitrust lawsuits to the position that chiropractors are licensed limited practitioners and that no form of professional association with chiropractors is unethical. These settlements, according to the AMA, eliminate any threat that the boycott will recur. Again, we disagree. Although the settlements may be some evidence militating against the likelihood of recurrence, it is not so strong as to reverse the district court's determination. The trial court considered this evidence, 671 F.Supp. at 1487-88, but found it was outweighed by other evidence (recited above in connection with the JCAH 1983 revisions) of a risk of a return to the AMA's former policies. *Id.* at 1488. Notably, the district court found it relevant that in all of the settlements, there was no admission of liability.

The AMA additionally argues that the permanence of its post-1977 guidelines (and hence the unlikelihood of a return to its old ways) is emphasized by the "fact" that they were undertaken entirely independently of this lawsuit. However, the district court never found this "fact"; and the district court could properly be skeptical of the AMA's "protestations of repentance and reform," *Oregon State Medical Society*, 343 U.S. at 333, 72 S.Ct. at 696, especially since the AMA's change of position occurred not too long after this suit was filed in 1976.

Another factor supporting the injunction is that the AMA still vigorously maintains that its boycott activity was lawful, and has never acknowledged its past conduct's lawlessness. This coupled with the AMA's begrudging statement on professional association with chiropractors was sufficient for the district court to doubt (1) the AMA's intent to comply with the antitrust laws in the future absent an injunction, and (2) the effectiveness of the discontinuation of its illegal conduct. Importantly, the district court found that even as of the trial date, the AMA continued to respond to requests for information on chiropractic by sending outdated anti-chiropractic literature. Further, none of the AMA's policies contain any affirmative statement that the boycott is over. An example of the AMA's begrudging and ineffective removal of the ethical bar to professional association is Opinion 3.01 of its Judicial Council. The AMA cites Opinion 3.01 as

evidence that its revised guideline has eliminated the prior guidelines on chiropractic, and removed any negative references to specific licensed limited practitioners. But as the district court noted, Opinion 3.01 is entitled "Nonscientific *369 Practitioners." [FN4] Thus, the AMA member still must look under the heading "Nonscientific Practitioners" to discover that it is now permissible to associate with chiropractors. Any beneficial effect of Opinion 3.01 likely is lost because it is buried in a category almost certain to conjure up the ethical prohibitions of the past.

> FN4. In 1980, the AMA adopted a new set of "Principles of Medical Ethics" that replaced the former "Principles" that had been in place since 1957. The 1980 "Principles" provide in part:
>
> **3.00 OPINIONS ON INTERPROFESSIONAL RELATIONS**
>
> **3.01. NONSCIENTIFIC PRACTITIONERS.** It is wrong to engage in or to aid and abet in treatment which has no scientific basis and is dangerous, is calculated to deceive the patient by giving him false hope, or which may cause the patient to delay in seeking proper care until his condition becomes irreversible.
>
> Physicians should also be mindful of state laws which prohibit a physician from aiding and abetting an unlicensed person in the practice of medicine, aiding or abetting a person with a limited license in providing services beyond the scope of his license, or undertaking the joint medical treatment of patients under the foregoing circumstances.
>
> A physician is otherwise free to accept or decline to serve anyone who seeks his services, regardless of who has recommended that the individual see the physician.
>
> **3.02 OPTOMETRY.** It is not unethical for an ophthalmologist to employ an optometrist as ancillary personnel to assist him provided the optometrist is identified to patients as an optometrist. A physician may send his patient to a qualified and ethical optometrist for optometric services. The physician would be ethically remiss, of course, if before doing so he did not insure that there was an absence of any medical reason for his patient's complaint, and he would be equally remiss if he sent a patient without having made a medical evaluation of the patient's condition. Physicians may teach in recognized schools of optometry for the purpose of improving the quality of optometric education. The scope of this teaching may embrace subjects within the legitimate scope of optometry which are designed to prepare students to engage in optometry within the limits prescribed by law.
>
> (Jt.App. 1416.) Compare the treatment of optometrists and chiropractors. One has to look in the category of "nonscientific practitioners" to learn that it is ethical to associate with chiropractors. But there is a separate section devoted to optometrists, about whom the AMA at one time had some very negative things to say. 671 F.Supp. at 1487.

Yet another factor supporting an injunction is what the district court termed the boycott's "lingering effects." The court found not only that plaintiffs had been personally harmed by the boycott, but that they continued to be personally harmed and threatened by a lack of association with members of the AMA as a result of the boycott and its lingering effects. 671 F.Supp. at 1486. The boycott, while it was in full bloom, "more likely than not affected individual decision-making by AMA members and other medical physicians in their relationship with chiropractors;" and until AMA members learn that the AMA's policies in fact have changed, AMA members' decision-making with respect to professional association with chiropractors will continue to be affected, according to the trial court. The evidence amply supported this conclusion. It is based not only on the lengthy and successful boycott, but on the begrudging nature of the AMA's more recent and lawful changes.

The district court also found a continuing injury to chiropractors' reputation as a result of the boycott. Because the AMA has never made any attempt to publicly repair that damage, the court found that chiropractors will continue to suffer injury to reputation from the boycott. 671 F.Supp. at 1486-87. The AMA's publication of its changes and its settlements were not enough, in the eyes of the district court, to overcome these harmful effects. The AMA has not convinced us that the district court was wrong in this assessment.

The AMA's strongest challenge comes to the district court's findings with respect to the lingering effects on chiropractors' incomes. The court found that the injury to chiropractors' incomes threatened to

continue through the date of trial. 671 F.Supp. at 1487. For this it relied on plaintiffs' expert's analysis regarding chiropractic income levels through 1986. (Jt.App. 57.) The court found this continuing harm existed, even though plaintiffs' expert's last data point showed that chiropractors' income in 1984 exceeded that of podiatrists and optometrists--the comparable professions. 671 F.Supp. at 1487. The *370 court did not, however, "find," as the AMA contends, that chiropractors' incomes had actually increased in 1984; rather, it only acknowledged the expert's data in this regard. *Id.* Obviously, given its finding regarding 1986 income levels (i.e., that chiropractors' incomes continued to suffer), the court was more persuaded by the expert's income projections into 1986 regarding the lagging of chiropractors' income, than by the 1984 data. The AMA's assertion that there is no basis for the district court to rely on the projection of chiropractors' income is baseless. There was testimony that chiropractors' incomes would still have suffered in 1986 as a result of the boycott. (Jt.App. 57.) But even without the lingering effects on chiropractors' income, there still remain the effects on professional association and reputation, which by themselves may be sufficient to show continuing harm from the boycott.

In sum, even though the district court wrongly allocated the burden of proof in deciding whether injunctive relief was necessary, its ultimate findings regarding the risk of a return to the unlawful policies, the effectiveness of the AMA's discontinuance or voluntary cessation, and the character of the past violations, without question satisfy the proper standard. *W.T. Grant,* 345 U.S. at 633, 73 S.Ct. at 897. None of the objections the AMA raises on appeal undercuts the district court's decision to grant an injunction. That the AMA feels an injunction is not necessary (or for that matter, that even we may have felt the same had we considered the case as an original matter), is not the appropriate test. That call was for the district court to make. *Id.* Because the district court did not abuse its discretion, we uphold its decision to award injunctive relief. [FN5]

FN5. Based on the language in section 16 that equitable relief is available "when and under the same conditions and principles as injunctive relief ... is granted by courts of equity....," the AMA makes a passing argument, buried in two of its 67 footnotes (two footnotes, incidentally, that are separated by seven pages of text) that the district court erred by not requiring the plaintiffs to meet all the requirements for an injunction that traditional equity jurisprudence imposes. The AMA does not bother to say what those traditional equitable requirements are, in the case of a permanent injunction, except to say that the plaintiffs had to show they had no adequate remedy at law. Nor does the AMA cite any cases concerning the propriety of a permanent injunction under § 16.

The Supreme Court has stated § 16 invokes "traditional equitable principles." *Zenith Radio Corp. v. Hazeltine Research, Inc.,* 395 U.S. 100, 130, 89 S.Ct. 1562, 1580, 23 L.Ed.2d 129 (1969); see also *Roland Machinery Co. v. Dresser Industries, Inc.,* 749 F.2d 380, 386 (7th Cir.1984). Scholarly comment has echoed this theme. *E.g.,* 2 P. Areeda and D. Turner, *Antitrust Law* § 312d (1978); Easterbrook and Fischel, *Antitrust Suits by Targets of Tender Offers,* 80 Mich.L.Rev. 1155, 1168- 69 (1982). Section 16's language indicates that traditional equity principles should apply. But while it is true that the district court stated that the plaintiffs did not have to meet all the traditional equitable requirements for an injunction, we are not convinced that this misstatement affected the court's analysis. The important point is that equitable relief is discretionary, and not automatically available to an injured plaintiff. See Areeda & Turner, *supra,* § 312d at 39. The district court did exercise discretion and did not automatically grant the plaintiffs an injunction. The court carefully weighed the AMA's conduct, the likelihood it would recur, the harm it caused and might in the future cause, and we believe, implicitly in all this, the relative hardships to the parties of granting an injunction. *See* 671 F.Supp. at 1484-88.

It is true that the district court did not specifically find that the plaintiffs had no adequate remedy at law. The AMA baldly asserts that damages would have been adequate, but does not mention how. At any rate, at this stage in the case, we are not inclined to reverse the district court's careful decision based on an underdeveloped argument that the AMA did not even deem worthy of including under a separate heading in the text of its brief.

Anticipating this negative (for it) result, the AMA makes a last-ditch perfunctory argument. It attacks

the injunction, arguing that it is unnecessarily overbroad, purports to award classwide relief in a case that was never certified as a class action, and "implicate[s] the AMA's rights under the First Amendment." None of these arguments are convincing.

[13] True enough, as the AMA observes, an injunction in a private antitrust suit should award a plaintiff injunctive relief "only to the extent necessary to protect it from future damage likely to occur if the defendant continues the unlawful antitrust conduct." *371 *Ohio-Sealy Mattress Manufacturing Co. v. Sealy, Inc.*, 669 F.2d 490, 495 (7th Cir.1982). But beyond this general principle, the AMA does not make any genuine argument that the injunction is overbroad. Instead, it simply asserts that the primary beneficiaries of the district court's order, insofar as it requires the order to be mailed to every AMA member, that it be published in the *Journal of the American Medical Association,* and that the AMA revise a national ethical publication, are the some 30,000 chiropractors in the nation as a whole who were not parties to this case. Doubtless, these other chiropractors may benefit from the mass mailing and publication required by the district court's order. But this does not necessarily make the injunction overbroad.

The AMA's suggestion that the publications and mailings should have been limited to the four communities in which the individual plaintiffs practiced unnecessarily limits the relief, and ignores the public interest served by private antitrust suits. Such suits can effectively open competition to a market that was previously closed by illegal restraints. *National Society of Professional Engineers,* 435 U.S. at 698, 98 S.Ct. at 1368; *see also International Salt Co. v. United States,* 332 U.S. 392, 401, 68 S.Ct. 12, 17, 92 L.Ed. 20 (1947). Relief here is provided not only to the plaintiff chiropractors, but also in a sense to all consumers of health care services. Ensuring that medical physicians and hospitals are free to professionally associate with chiropractors (e.g., by the publication and mailing of the order to AMA members), likely will eliminate such anticompetitive effects of the boycott as interfering with consumers' free choice in choosing a product (health care provider) of their liking. In this way competition is served by the injunction. In short, the injunction, as designed by Judge Getzendanner, reasonably attempts to eliminate the consequences of the AMA's boycott, and we will not disturb it. *National Society of Professional Engineers,* 435 U.S. at 698, 98 S.Ct. at 1368. [FN6]

FN6. For the same reason, we do not view the district court's injunction as improperly awarding classwide relief where no class was certified. The AMA's argument in this regard is just a rephrasing of its argument that the injunction is overbroad.

Finally, we reject the AMA's hint ("argument" seems too generous when the AMA's claim comprises but one paragraph of a 77-page brief, *Max M. v. New Trier High School District No. 203,* 859 F.2d 1297, 1300 (7th Cir.1988)) that the district court's order somehow infringes on the AMA's First Amendment rights. We think the injunction as written is sufficiently tailored to avoid constitutional objection. As the Supreme Court has stated:

> [w]hile the resulting order may curtail the exercise of liberties that the [defendants] might enjoy, that is a necessary and, in cases such as this, unavoidable consequence of the violation.... The First Amendment does not 'make it ... impossible ever to enforce laws against agreements in restraint of trade....' *Giboney v. Empire Storage and Ice Co.*, 336 U.S. 490, 502 [69 S.Ct. 684, 691, 93 L.Ed. 834 (1949)]. In fashioning a remedy, the District Court may, of course, consider the fact that its injunction may impinge upon rights that would otherwise be constitutionally protected, but those protections do not prevent it from remedying the antitrust violations.

National Society of Professional Engineers, 435 U.S. at 697-98, 98 S.Ct. at 1368-69. That the injunction requires the AMA to publicize and mail copies of the order to AMA members, among other things, does not render it unconstitutional. The district court's form of injunction and method of ensuring its publication (and thus its efficacy) was a reasonable attempt at eliminating the consequences of the AMA's lengthy, systematic, successful, and unlawful boycott.

IV.
Plaintiffs' Cross-Appeal

Plaintiffs filed a cross-appeal challenging the judgments for defendants JCAH and ACP. With respect to JCAH, plaintiffs advance two separate theories of liability. First, they allege that JCAH unlawfully *372 conspired with the AMA and participated in the AMA's boycott of chiropractors. Second, plaintiffs contend that JCAH, as a membership trade association, acted as a conspiracy each time it promulgated industry standards, and thus violated the antitrust laws in its own right. As to the

latter theory of liability, plaintiffs assert that they raised it before the trial court, but that the court never ruled on it. JCAH does not contest this summarization of the events in the district court, and we accept it. Plaintiffs' theory against ACP also is two-fold. They first contend that ACP also participated in the AMA's boycott. Second, they charge that ACP is a member of the "continuing conspiracy that is the JCAH." None of plaintiffs' arguments are persuasive.

Following the first trial in this case, JCAH and ACP appealed the denial of their motions for a directed verdict. We affirmed the denial of those motions, explaining that the evidence was sufficient to permit, but not require, a jury (or, as it turned out, the trial court) to conclude that the defendants JCAH and ACP knew that concerted action in a scheme was contemplated and invited, and that both acquiesced and participated in that scheme. *Wilk I,* 719 F.2d at 233. This would have permitted a finding of liability, we reasoned, citing *Theatre Enterprises Inc. v. Paramount Film Distributing Corp.,* 346 U.S. 537, 540, 74 S.Ct. 257, 259, 98 L.Ed. 273 (1954); *Interstate Circuit Inc. v. United States,* 306 U.S. 208, 226-27, 59 S.Ct. 467, 474-75, 83 L.Ed. 610 (1939).

Following *Wilk I,* the Supreme Court decided two cases, which the district court in the second trial held clarified and limited the cases relied upon in *Wilk I.* These cases were *Monsanto v. Spray-Rite Service Corp.,* 465 U.S. 752, 104 S.Ct. 1464, 79 L.Ed.2d 775 (1984), and *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986). In *Monsanto,* the Court held that, to survive a summary judgment motion, an antitrust plaintiff needed evidence tending to "exclude the possibility" that the alleged conspirators were acting independently, *id.* 465 U.S. at 764, 104 S.Ct. at 1471, and that the plaintiff must present "direct or circumstantial evidence that reasonably tends to prove" that the alleged conspirators " 'had a conscious commitment to a common scheme designed to achieve an unlawful objective.' " *Id.,* quoting *Edward J. Sweeney & Sons v. Texaco, Inc.,* 637 F.2d 105, 111 (3d Cir.1980), *cert. denied,* 451 U.S. 911, 101 S.Ct. 1981, 68 L.Ed.2d 300 (1981). *Matsushita* reaffirmed that holding. There, the Court stated "conduct that is as consistent with permissible competition as with illegal conspiracy does not, without more, support an inference of conspiracy." 475 U.S. at 597 n. 21, 106 S.Ct. at 1361 n. 21.

Applying *Monsanto* and *Matsushita,* the district court analyzed plaintiffs' claims to determine whether or not each defendant's own conduct showed membership in the AMA's conspiracy. 671 F.Supp. at 1489. [FN7] We review each defendant separately. Again, because the district court adequately set forth the facts, we only summarize them here.

> FN7. The district court also held that even if JCAH were acting independently of the AMA boycott, its members (e.g., the AMA) were not responsible for the actions of JCAH. 671 F.Supp. at 1491-92. On appeal, plaintiffs tell us that this was unnecessary, and actually confused their asserted theory that JCAH was an unlawful conspiracy in its own right. Thus, we do not pass on the propriety of the district court's ruling in this regard.

A. *JCAH*

JCAH is a not-for-profit corporation established for the purpose of setting standards and conducting health care accreditation programs in conjunction with those standards. JCAH's members include the AMA, ACP, the American College of Surgeons, the American Hospital Association, and the American Dental Association. It is governed by a board of commissioners. Twenty-one commissioners are appointed by the various members, who then appoint one public commissioner. The AMA is one of JCAH's two "dominant members" (this characterization being based solely on the number of commissioners each member is allotted).

***373** Participation by hospitals in the JCAH's accreditation program was voluntary. Nevertheless, accreditation was important to a hospital and "loss of accreditation would be devastating." *Id.* at 1490. Since before 1958, JCAH had standards providing that hospital medical staffs were to be limited to fully licensed physicians (this was liberalized in 1970 to include dentists). *Id.*

In 1964, JCAH's director stated, in a national newsletter, that JCAH viewed chiropractors as cultists, and that hospitals that encouraged such cultists to use their facilities in any way would "very probably be severely criticized and lose [their] accreditation." Despite the similarity of this statement to later AMA efforts, the district court found there was no direct evidence that JCAH was acting in concert with the AMA with regard to this statement or its distribution; thus, it concluded this action was independent.

In 1970, JCAH completed a revision of its standards and published an accreditation manual for hospitals. The manual included "Standard X" (which was drafted by the AMA). Standard X provided that the governing board of each hospital had to assure that medical staff members practiced in an ethical manner. The accreditation manual included a source reference to the AMA's Principles. The district court found that the uncontradicted testimony was that JCAH's board of commissioners never discussed the subject of chiropractic in connection with the accreditation manual. It further found that no chiropractor participated in the accreditation manual's revision process despite the opportunity to participate. *Id.* Based on these findings, the court concluded there was no evidence that JCAH adopted Standard X in connection with chiropractors or to further the AMA's boycott. And while JCAH letters responding to inquiries from hospitals about the role of chiropractors throughout the 1970s did indicate that JCAH would withdraw accreditation of a hospital that had chiropractors on its medical staff or that granted privileges to chiropractors, the district court found these letters were completely consistent with the then-existing accreditation standards, and were "not convincing evidence that JCAH had joined the conspiracy against chiropractors." *Id.*

Finally, in 1977, JCAH revised its standards to provide that medical staff membership was to be limited "unless otherwise provided by law" to fully licensed physicians and dentists. References to the AMA's Principles were deleted. So from 1977 on, JCAH's position on chiropractors was that, as limited licensed practitioners, they could be included on medical staffs, if permitted under local law. In 1980, JCAH amended the accreditation manual by deleting Standard X.

Based on these findings, the district court found that all JCAH undertook all action from 1964 through 1980 independently of the AMA boycott. Further support for its conclusion was the fact that JCAH's standards were largely consistent with federal law. *Id.*

Likewise, the district court found that the 1983 revisions of the JCAH standards were independent of the AMA boycott, and that the 1983 revisions were not evidence that the conspiracy against chiropractors continued into 1983. Ultimately, JCAH standards were liberalized regarding admission to medical staffs and allowance of hospital privileges to limited licensed practitioners, including chiropractors. But the standard also required that each accredited hospital's medical staff have an executive committee, the majority of which had to be medical and osteopathic physicians. (This, according to plaintiffs, is evidence that the conspiracy against chiropractors continued into 1983.)

In 1983 the AMA participated in the JCAH standards revision process. That process began in 1982 with recommendations from JCAH staff and the JCAH standard-survey procedures committee. The early recommendations were that each hospital be permitted to decide for itself, under applicable state law, which licensed health care providers would be allowed hospital privileges and medical staff membership. After initially supporting this approach, AMA members and other medical societies ***374** which wanted to ensure medical and osteopathic physician control of the medical staff and patient care in hospitals criticized the AMA. Feeling the heat of their members' criticism, the AMA changed its position and supported revisions which would ensure such control. In late 1983, JCAH adopted new standards which included the mandatory, medical physician-dominated executive committee concept.

According to the district court, the evidence supported the conclusion that JCAH members were acting to ensure that the responsibility for patient care in acute care hospitals remained in the hands of medical and osteopathic physicians, and that this was an appropriate goal for JCAH. Patients in acute care hospitals are generally the very sick or in need of surgery. They are patients who require treatment with drugs or surgery--i.e., treatment by fully licensed physicians (that chiropractors may not perform). This led the court to conclude that "[t]he evidence supports no conclusion other than that patient care in acute care hospitals, and the medical staffs of acute care hospitals, ought to be under the control of fully licensed physicians rather than limited licensed practitioners. I am persuaded that the JCAH members were not acting to prevent chiropractors from being admitted to hospitals or obtaining hospital privileges." 671 F.Supp. at 1493. [FN8]

FN8. The court went on to observe that under current JCAH standards, hospitals could grant chiropractors medical staff membership, clinical privileges, admission privileges, and access to diagnostic services without fearing loss of JCAH accreditation. Authority for making individual medical staff appointments now rests with the individual hospital's governing board.

Because the court found that JCAH's acts before the 1983 revisions were independent of the AMA boycott, and that the 1983 revisions were not evidence that the conspiracy against chiropractors continued into 1983, it concluded that plaintiffs failed to prove that JCAH was a member of the conspiracy. *Id.* at 1494.

1. JCAH as Conspiracy

[14][15] Plaintiffs' first theory on appeal is that JCAH, as a trade association, "acts as a conspiracy or combination every time it promulgates industry standards [which unreasonably restrain competition]." But a trade association is not, just because it involves collective action by competitors, a "walking conspiracy." *Consolidated Metal Products, Inc.*, 846 F.2d at 293- 94. There is no evidence that JCAH's accreditation program "is merely a ploy to obscure a conspiracy" against chiropractors. *Id.* at 294. And plaintiffs' arguments for a separate antitrust violation with respect to JCAH standing alone are unpersuasive.

The most serious problem with plaintiffs' theory is that they did not prove any actual or threatened antitrust injury directly traceable to the alleged antitrust violation which would be redressed by the issuance of an injunction against JCAH. *See Cargill, Inc. v. Monfort of Colorado Inc.*, 479 U.S. at 122, 107 S.Ct. at 495. Thus, even if this particular claim was not expressly addressed by the district court, plaintiffs' claim still must fail. In support of their contention that they suffered actual injury, plaintiffs offer "evidence" of examples of when each plaintiff was denied privileges or medical staff membership at certain hospitals. But after thoroughly reviewing the record, we conclude these examples do not show any connection to JCAH or its Standard X. (Jt.App. 13-14; 15-17; 89-100; 181; 182-87; 190-91; 380-81; 420; 672-81; 773-74; 851; and 934-35.) Because we find no antitrust injury occurred as a result of the 1970 Standard X, we necessarily conclude that there was no continuing JCAH boycott as a result of the revisions in 1983. [FN9]

> FN9. Plaintiffs claim, for the first time in their reply brief, that the 1983 standards themselves violate the antitrust laws. The district court, however, stated that plaintiffs were not claiming that the 1983 JCAH standards violated the antitrust laws. 671 F.Supp. at 1492. Whether they did or did not raise the issue in the district court, there is no question that the plaintiffs' initial appellate brief did not raise this issue. Rather, plaintiffs argued that "The JCAH 1983 Revisions Continue [d] The Boycott." In this regard they stated, "only one conclusion is possible: the JCAH M.D. domination standard *perpetuates* the boycott" (emphasis added). We think it plain that plaintiffs made their claim that the 1983 revisions themselves were unlawful for the first time on reply. We thus will not address the argument. *See Gold v. Wolpert*, 876 F.2d 1327, 1331 n. 6 (7th Cir.1989).

***375** 2. JCAH as Member of the AMA Boycott

[16] Plaintiffs' second theory of antitrust liability against JCAH contends that JCAH was a member of the AMA's boycott. In this regard, plaintiffs contend that JCAH knew the AMA boycott was contemplated and that it acquiesced and participated in that scheme. As stated above, the *Monsanto* and *Matsushita* cases hold that to establish liability under this theory, there must be evidence that at least tends to exclude the possibility that the alleged conspirators were acting independently, rather than pursuant to " 'conscious commitment to a common scheme designed to achieve an unlawful objective'," *Monsanto*, 465 U.S. at 764, 104 S.Ct. at 1471, quoting *Edward J. Sweeney & Sons*, 637 F.2d at 111. Plaintiffs, however, argue that *Monsanto* and *Matsushita* are inapplicable to this case because here we are dealing with a horizontal combination, and because there is "direct evidence" of a conspiracy in this case. We agree with the district court, however, that this case should be governed under the standards set forth in *Monsanto* and *Matsushita*. We have stated before, "[t]he actual label placed on the conspiracy is a 'pedantic distinction,' as the Monsanto standard applies regardless of which label is attached." *Valley II*, 822 F.2d at 660 n. 5. And plaintiffs point to no "direct evidence" of the conspiracy.

At best, plaintiffs make only a perfunctory argument that JCAH knowingly adhered to and participated in the AMA's unlawful boycott. Nowhere do they attempt to show just how the district court made erroneous findings of fact. Rather, they point to the fact that JCAH adopted Standard X (after being manipulated by the AMA in doing so) to establish JCAH's participation in the boycott. But the district court found that JCAH's board of commissioners never discussed the subject of chiropractic, and that the subject was never raised in connection with the

1970 revisions of the accreditation manual. It also found that no chiropractor participated in the revision process despite having an "extensive opportunity" to do so. Thus, the court held "[t]here was no evidence that JCAH adopted Standard X in connection with chiropractors or in furtherance of the AMA boycott." 671 F.Supp. at 1490. Plaintiffs' urgings to the contrary are nothing but a bald invitation to substitute our judgment for the district court's. Consistent with our prior treatment of this issue in *Wilk I*, 719 F.2d at 233, the evidence may have been sufficient to find that JCAH participated in the conspiracy, but it did not require such a finding. The district court was entirely within its right to find no conspiracy between JCAH and the AMA.

As evidence of JCAH's participation in the conspiracy, plaintiffs also point to the district court's finding that JCAH cooperated with the AMA in connection with the distribution of an article titled "The Right and Duty of Hospitals to Exclude Chiropractors from Hospitals." Apparently, they believe this carries the day in establishing JCAH's participation in the boycott. We disagree. As the district court found, the JCAH's use of the cited article was in connection with inquiries from hospitals about the role of chiropractors in hospitals. 671 F.Supp. at 1490. The court also found that the JCAH letters were "completely consistent with the then-existing accreditation standards." *Id.* We thus agree with the district court that this was "not convincing evidence" that JCAH participated or joined in the AMA's conspiracy against chiropractors. *Id. Cf. Monsanto*, 465 U.S. at 762, 104 S.Ct. at 1470 (communication about prices and marketing strategy does not alone show that distributors are not making independent pricing decisions). [FN10]

FN10. Plaintiffs make one additional claim. This case, they tell us, fits neatly within the framework of *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 102 S.Ct. 1935, 72 L.Ed.2d 330 (1982). They assert that because the trial court found the AMA manipulated the JCAH and caused it to adopt Standard X (as well as circulating the AMA's "Right and Duty of Hospitals to Exclude Chiropractors"), that JCAH was liable because it allowed itself to be manipulated and used as a mechanism through which the AMA enforced its anti-competitive scheme. Plaintiffs cite *Hydrolevel* in the portion of their argument dealing with JCAH's alleged knowing adherence and participation in the AMA's boycott. But *Hydrolevel* does not address the conscious parallelism issue. *Hydrolevel* speaks of an association's liability in its own right, not as a member of another's unlawful conspiracy. We thus believe *Hydrolevel* is inapplicable to this case.

***376** B. *ACP*

The analysis and outcome would be much the same for ACP as for JCAH, at least so far as its alleged participation in the AMA's boycott is concerned. ACP's alleged membership or participation in the AMA's unlawful boycott, for example, is also judged under the *Matsushita* and *Monsanto* standards. Here, though, we must digress briefly to address a problem with plaintiffs' argument. Their claims in this respect seem at best to be confused. In their opening brief, they refer to the ACP's participation in "the boycott," and argue that the district court's finding that the ACP did not participate in any boycott of chiropractors is clearly erroneous. The district court's findings in this regard concern whether or not ACP was a member of or participated in the AMA's conspiracy. 671 F.Supp. at 1471, 1489, 1494-96. It is obvious from the district court's opinion, and from plaintiffs' opening brief, that "the boycott" referred to is the *AMA's* unlawful boycott. But in their reply brief, plaintiffs say it is "irrelevant" whether or not ACP conspired with the AMA. In other words, they are arguing that the district court's finding that ACP was not a member of the AMA's boycott, 671 F.Supp. at 1494-96, is not at issue on this appeal. We will take them at their word; that issue is now foreclosed against them.

Apparently, then, plaintiffs are claiming, as they did with JCAH, that the ACP as a membership association engaged in concerted activity through various acts. That is, the ACP is liable under § 1 of the Sherman Act in its own right. Plaintiffs also present a second theory of liability: that the ACP, as a member of the JCAH, is liable for the unlawful acts of that organization because it knowingly participated in and ratified those acts.

1. ACP as a Conspiracy

[17] There is no evidence that ACP itself engaged in an unlawful boycott of chiropractors. Plaintiffs point to the ACP's bylaws which provided that the purpose of the ACP included "preserving the history and perpetuating the best tradition of medicine and medical ethics." Because of the fact that many of the

ACP's members were also AMA members, plaintiffs argue that this veiled reference to ethics somehow furthered an ACP boycott. But the ACP never adopted the AMA's Principles (including former Principle 3), and never required its members to subscribe to those principles. 671 F.Supp. at 1494. Also, the ACP never had a code of ethics. In 1984 it published the American College of Physicians Ethics Manual. But this was not a code or set of regulations. Rather, it was an effort to address major contemporary issues confronting all physicians and merely attempted to stimulate debate on medical ethics. The manual stated nothing about chiropractic or about what remedies are or are not "scientific." Indeed, as the district court found, the manual appears to leave the individual physician free to make his own judgment as to the kinds of treatment he should participate in and in his relations with other licensed health practitioners. 671 F.Supp. at 1494.

The plaintiffs rely on two additional documents to establish an ACP boycott. The first grew out of a September 1978 meeting of the ACP's board of governors. (The board of governors was not the ACP's policymaking body.) The Board at that meeting accepted a report by an ad hoc committee appointed to suggest what might be done to promote the ACP's policy toward chiropractic. According to the district court, the minutes of that meeting reflect that:

> The committee agreed unanimously that ACP should be concerned about and oppose any action which would include chiropractic among the scientifically- based modes of medical care and which would *377 give chiropractors direct access to the diagnostic facilities of hospitals.

671 F.Supp. at 1495. Plaintiffs also point to a resolution adopted by the board of governors which provided, among other things:

> (2) the governors should remain alert to efforts of chiropractors to gain access to radiographic and clinical laboratory diagnostic facilities in their regions and keep ACP headquarters informed of such developments;
>
> * * * * * *
>
> (8) the governors should alert colleagues in other disciplines to the efforts of chiropractors to gain access to radiographic and clinical pathology diagnostic facilities; and
>
> (9) the governors and the college members in their regions should discuss these matters with their county and state medical societies and with their representatives to the house of delegates of the AMA.

671 F.Supp. at 1495-96.

Although the district court found that many parts of the resolution related to matters protected under the Noerr-Pennington doctrine, not everything included was protected. (This is not at issue on appeal.) What is important is that the district court found that the resolution contained no call for the participation of ACP or its members in the AMA's boycott against chiropractors, "or [in the] ACP's own boycott." 671 F.Supp. at 1496. Continuing, the court explained "[m]oreover, the resolution was never implemented ... and there is no evidence that ACP members were called upon to cooperate in effectuating ACP's 'policy' on chiropractic." *Id.* Plaintiffs do not show how the district court's findings are clearly erroneous; rather, they just interpret the document differently. It is well established by now, however, that we do not substitute our view of the facts for the district court's on appeal. After reviewing the evidence, we are not left with the "definite and firm conviction" that the district court made a mistake in interpreting this evidence. *Anderson v. City of Bessemer City*, 470 U.S. 564, 573, 105 S.Ct. 1504, 1511, 84 L.Ed.2d 518 (1985).

Plaintiffs also point to a joint document in which the ACP participated, titled "Status Report on Chiropractic Lawsuits" to establish an ACP conspiracy. The report was distributed to ACP members. It does contain an admission that Principle 3 forbade association with chiropractors. But, as the district court explained, this admission was irrelevant as to ACP which had not adopted the AMA's Principles, and which did not have a medical ethic similar to Principle 3. We agree. Again, plaintiffs just offer their different interpretation of the document, which has never been enough to carry the day when reviewing a district court's factual determinations. We see no error. [FN11]

> FN11. Plaintiffs also argue that the district court erroneously "excluded evidence [which] proves ACP's knowing intent to exclude chiropractors." (Plaintiff's reply br. at 23.) What plaintiffs are getting at is that certain evidence was held by the district court to be protected under the Noerr-Pennington doctrine. The first involved a letter written to a governmental agency (the National Institute of Neurological Diseases and Strokes (NINDS)) in connection with a government project (the study of chiropractic). Plaintiffs claim this was not protected under the Noerr-Pennington doctrine because blind copies were sent to

the AMA's Committee on Quackery and other medical societies. They ignore the fact, however, that the district court made an alternative holding with respect to this letter. It stated that even if the letter was not protected, it was obvious that it expressed only the author's own opinion as to what action the ACP's board of regents (its policymaking body) might take in the future, and that it was not the act of the ACP endorsing the AMA chiropractic policy statement. The court also found there was no evidence that ACP had knowledge of the activities of the Committee on Quackery. Thus, we do not need to address whether or not this document was protected under the Noerr-Pennington doctrine, as the alternative ground is both sound and unchallenged. Plaintiffs make two perfunctory and undeveloped contentions with regard to "exclusion" of "boycott activity." But neither of these amounts to an "argument" under Fed.R.App.P. 28(a)(4). Thus, we will consider neither.

2. ACP Participation in JCAH's Conspiracy

Finally, plaintiffs contend that ACP is a member of "the continuing conspiracy that *378 is the JCAH." But since we have held JCAH did not violate the antitrust laws, ACP could not be liable for participating in JCAH's acts. Thus, plaintiffs' theory that ACP is liable for participating in JCAH's conspiracy fails.

V.
Conclusion

We affirm the district court's finding that the AMA violated § 1 of the Sherman Act by conducting an illegal boycott of chiropractors, and the district court's decision to grant an injunction against the AMA. In finding liability, the court did not improperly rely on evidence of conduct protected by the Noerr-Pennington doctrine. The district court's factual findings supported its finding that the AMA's boycott was illegal under the rule of reason, and those findings were not clearly erroneous. The district court also did not clearly err in finding that the AMA did not meet its burden of proving its patient care defense, and in finding that the AMA's boycott caused the plaintiffs past injury and the threat of future injury. The court did not abuse its discretion in imposing an injunction on the AMA. The court's factual findings supported its exercise of equitable discretion, and the injunction was not overbroad.

We also affirm the district court's findings that JCAH and ACP did not participate in the AMA's boycott, or in any other way violate § 1 in their activities concerning chiropractors. The plaintiffs' theory that JCAH itself conspired by setting standards fails because the plaintiffs failed to prove that the JCAH's actions caused them any actual or threatened injury. The court's finding that JCAH did not participate in the AMA's conspiracy was not clearly erroneous. The plaintiffs have waived any contention that ACP participated in the AMA's conspiracy by claiming that any such participation was "irrelevant." The district court did not clearly err by finding that ACP did not conduct its own conspiracy, and since JCAH did not violate § 1, ACP could not be liable for participating in JCAH's actions.

The district court's decision is

AFFIRMED.

895 F.2d 352, 58 USLW 2505, 1990-1 Trade Cases P 68,917

END OF DOCUMENT

DECLARATION OF SERVICE BY MAIL

I, the undersigned, declare:

1. That declarant is and was, at all times herein mentioned, a citizen of the United States and a resident of the county of Los Angeles, over the age of 18 years, and not a party to or interest in the within action; that declarant's business address is 3460 Wilshire Boulevard, 8th Floor, Los Angeles California 90010.

2. That on May 7, 2004, declarant served the **APPENDIX OF NON-CALIFORNIA AUTHORITY IN SUPPORT OF RESPONDENT TRADE ASSOCIATIONS' RESPONSE BRIEF** by depositing a true copy thereof in a United States mailbox at Los Angeles, California in a sealed envelope with postage thereon fully prepaid and addressed to the parties listed on the attached Service List.

3. That there is a regular communication by mail between the place of mailing and the places so addressed

I declare under penalty of perjury that the foregoing is true and correct. Executed this 7th day of May, 2004, at Los Angeles, California.

Malissa Garcia

MALISSA GARCIA

FIREARMS CASES
Judicial Council Coordination Proceeding No. 4095
People et al. v. Arcadia Machine & Tool, Inc. et al.
California Appellate Courts, First Appellate District, Case Number A103211

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