ORAL ARGUMENT – 11/09/04
03-0737
COCA COLA V. HARMAN BOTTLING CO.

JACOBSON: I will present our argument. The petitioners did not violate the Texas Anti Trust laws. Mr. Beane will argue the other points raised in our briefs.

It's important to keep the agreements in this case in perspective. CMAs are not exclusive dealing agreements. Every retailer stocks Pepsi and other competing soft drink brands. Even in cases, not like this one, where large numbers of retailers agree not to carry any competing products at all, most anti trust claims fail because substantial foreclosure has not been shown. Here we are dealing with agreements that involve no exclusive dealing, just exclusive displays and advertising.

Many decisions have addressed the legality of these types of promotional agreements: The Grooma(?) case, the Louisa(?) case, the beverage management case, RJR. Every single one of those decisions has flatly rejected claims that the agreements violated the antitrust laws.

HECHT: The respondent says these are different because of the terms of the agreements. The CA was persuaded by that. Do you think these kinds of agreements could have an anti-competitive effect?

JACOBSON: All agreements are different. Each of the CMAs in this case was different one to the other. The degree of exclusivity in these agreements is no different than those in the other cases. For example, in the Bayou _____ case, the defendant also a Coke, Dr. Pepper bottler with 75 to 80% of the market provided free service for coolers in stores if the coolers were stocked exclusively with Coke products. That's a good deal more restrictive than any of the CMA provisions at issue in this case. The Louisa(?) case similarly involved very, very similar agreements to those at issue here. In that case by a Pepsi bottler with again 70% plus show of the market.

HECHT: But I suppose if you had one of these agreements and you could trace a anti-competitive effect, whether it be harmed or can sue merger preclusion in the marketplace back to the agreement, they could give rise to _____?

JACOBSON: That's correct. We are not arguing that these agreements are legal per se.

HECHT: And I suppose they could also be used to create or maintain a monopoly.

JACOBSON: And we do not deny that. We are simply saying that the hurdle to prove such illegality is necessary and appropriately a high one. Because at the end of the day what these agreements are, are agreements by Coke to discount its prices and to provide financial benefits to

retailers in return for promotional benefits. And we do not want to discourage that type of pro-competitive activity. It lowers prices to consumers. So the hurdle to demonstrate that this sort of agreement violates the Texas Antitrust laws, is necessarily an appropriately a high one. And it clearly was not met in this case.

There are two ways to demonstrate that a CMA might violate the antitrust laws. One, by showing substantial foreclosure of a very large percentage of the relevant market. Absolutely no evidence here of foreclosure whatsoever. Plaintiffs never even tried to demonstrate what percentage of the market was even affected by these agreements. Zero evidence of foreclosure.

HECHT: Is the evidence that Wal Mart and other markets where the terms are different, evidence that conditions there in that store in this area and other stores in other markets, is that some evidence of a foreclosure in this case?

JACOBSON: No. It is not evidence of foreclosure at all. There are retailers in this case who declined to take Coke CMAs who signed up with Pepsi instead. There is the Wal Mart evidence they took no CMAs in this market, although they regularly do take CMAs in some other markets, and some other product ones. The fact that a store makes this decision to accept or reject a CMA is evidence of nothing.

What the plaintiffs would need to show is that a measurable percentage of the market was foreclosed. Absolutely, didn't even try to demonstrate that here. Or, and this is normally much more difficult proof, demonstrate that there was a direct adverse effect on consumers in the market as a whole. Meaning higher prices in the market as a whole, reduced output in the market as a whole, or reduced quality in the market as a whole. And again, there was no effort to demonstrate this in the courts below.

O'NEILL: What about the requirement in some of the CMAs that no competitors' product could be priced lower than Coke. Doesn't that on its face ____ consumers by keeping prices at a certain level?

JACOBSON: It doesn't. And agreements having precisely that clause were upheld on summary judgment in the Louisa(?) case. And those provisions are rare. But the fundamental point is that there is nothing in the fact that such agreements existed that demonstrated that crisis in the market as a whole increased. It's true that on the featured package in those stores, Coke had to be one, two, or as much as three price points lower on that featured package than competing brands. But nothing would stand in the way of a consumer going across the street getting the competing brand at a lower price.

O'NEILL: But at that particular store then, you would agree that it harms consumers on a per store basis? You're just quibbling with the territory.

JACOBSON: I'm quibbling with more than that. The effect needs to be on the market. The

fact that a consumer in one store pays a higher price is not close to evidence of a market effect.

O'NEILL: Let's say that 60% of the stores had this term in it. I realize that they don't, or 70% had this particular term in it, and no one can be priced below cut products. Would that be a different case?

JACOBSON: If there were evidence that the effect, and there was nothing close to that here, was to cause prices on average or in general in the marketplace to increase, that would be an adverse effect on the competition. But plaintiffs never attempted such proof. They tried to just focus on individual vignettes on 20 oz. beverages, flavored beverages, grape, root beer, orange; provisions like this that affect a particular product at a particular period of time. They never met or came close to trying to meet their fundamental burden of proof, which is to demonstrate that the market as a whole was affected. That is the fundamental flaw...

SMITH: How many markets were involved in this case?

JACOBSON: The plaintiffs say that each of their individual RC territories was a relevant, geographic market. It's our position that that argument is invalid as a matter of law. It defines a geographic market on the basis of 5% of the sales in the market, those being of RC brands that ignores the sales of Coca Cola. It ignores the sales of Pepsi Cola. The market as a whole is not defined appropriately by the plaintiffs in the case.

SMITH: Like the jury charge. Did you separate out the market areas and get jury questions on each market, or was it all lumped together and the jury just heard these snippets from different markets and answered one question about the whole case?

JACOBSON: The jury was appropriately charged on the standards for defining a relevant geographic market. But in fact, the liability determinations were made on the basis of lumping together. There were determinations for damages for each of the particular plaintiffs. But the liability - everything was lumped together. That's one of the vices of the entire case.

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BEANE: I represent the petitioner, Coca Cola Enterprises. I'm going to be addressing two issues. First, the lack of legally sufficient evidence to support an award of damages; and second, the application in this case of the Texas Free Enterprise Antitrust Act to out of state _____. We will rely on our brief with respect to the other issues.

HECHT: There is a provision, there's a sentence kind of peculiarly placed in the statute that says that the legislature intended to exercise its power to the full extent permitted under the US and Texas constitutions. Why doesn't that trump the sort of vague purpose clause at the beginning of the statute?

BEANE: For two reasons. If you look at the purpose paragraph, that paragraph goes further and says this act shall be construed to accomplish this purpose. So it is more than just a purpose. It is a legislative statement that the legislature wants the act mandatory, shall be construed to accomplish this purpose.

I think as a statutory interpretation principle, the court tries to give effect to each provision of the statute, and I think the provision I just mentioned is the one that governs in this situation.

HECHT: The briefs don't really deal with this very much. Do you think there are constitutional limitations apart from the effect on interstate commerce of how far the state statute can go in regulating anti-competitive behavior?

BEANE: I think there are constitutional limitations on how far a statute could go. I would submit that the legislature did not cross that line in this situation. Because the legislature very clearly states and this court observed in the Caller Times case, that the purpose of the statute is to protect Texas consumers. And in this case we sort of have a somewhat unusual situation maybe. The effects of these promotional agreements are felt within the confines of a grocery store or convenience store. And that's where the displays occur, that's where the shelf space occurs, that's where the promotional activity occurs. And what takes place in a grocery store or convenience store in Oklahoma, Arkansas and Louisiana, and we have 29 counties and parishes in those three states that are implicated here. We only have 11 Texas counties. Twenty-nine of those in this case but the effect in those out of state stores is totally separable from the effect in a Texas stores.

BRISTER: Do those states all have similar statutes?

BEANE: They do have antitrust statutes.

BRISTER: I suppose it's your position that the sales in each state would be governed by the antitrust statutes of those states?

BEANE: That is correct. And specifically our position is that in this case the Texas act was held to apply to those out of state territories. And our position is, that's erroneous.

BRISTER: Did your client move to apply the law of those states?

BEANE: No. Our position was, and still is, that the law of the State of Texas does not apply in those territories. Period.

HECHT: The Texas Blue Sky Law prohibits the Texas seller from selling an unregistered security in New York. Why can't its antitrust law prohibit anti-competitive behavior by a Texas business, or someone operating in Texas, in a neighboring state or somewhere else?

BEANE: Two reasons. First, the statutory language limits its scope and application by its focus on Texas consumers. And I submit, you know somebody who buys a soft drink in a convenience store in Northwest Arkansas is not a Texas consumer. And that's the very facts that we have in this case. What happened here, we have been enjoined from having our Arkansas employees go to a local store in Arkansas and negotiate an agreement that has an effect only in Arkansas. The second reason, if the court deals with any constitutional issues, I think it's a statutory interpretation issue that the court is trying to look at and not get into constitutional infirmities. But in the circumstance we have here, what the TC has done and the CA has upheld is said here is Texas competition policy. We're going to apply it to conduct and particularly effects that take place totally out of state.

HECHT: CCE does business in Texas but it's not a Texas company. And it does business in a whole lot of other places.

BEANE: It does. Absolutely. We have cited four cases by other courts dealing with their state statutes, state antitrust statutes. Every court looks at the effects, the location of the effect of the conduct. And I would commend the court the Florida case. Florida conduct affects outside the State of Florida, the Florida court says, the Florida act does not apply.

O'NEILL: So what would be the result if we were to agree with you? If you look at the market for purposes of foreclosure, and that market has to be defined beyond the borders of the state, you would say you look at the three state region to prove market foreclosure, but then you only apply the injunction within the borders of Texas? What's the relevance of the market determination vis a vis the scope of the injunction?

BEANE: Let me approach it this way. As Mr. Jacobson said, it's been the plaintiff's position that the geographic area that they contract to distribute RC products in, is a separate geographic area. That's their theory in this case. We have three of those that are totally outside the state of Texas.

HECHT: And none are totally inside?

BEANE: One is totally inside, and then we have two that are cross-border.

O'NEILL: How would you define the market that you believe they have to prove was foreclosed?

BEANE: We would define the market as much broader than the _____ area that's been thrown around in this case. For the simple fact that the evidence in the case is undisputed, that certain retailers have to go as far as Dallas or San Antonio to get product that could be in the relevant market. So our definition of the relevant market is substantially different than the plaintiffs.

O'NEILL: So your definition of the market would be what?

BEANE: It's a regional geographic market whose boundaries at least go to Dallas and to San Antonio.

O'NEILL: And would it include the Arkansas/Louisiana region?

BEANE: Yes they would.

O'NEILL: So you think that the market for purposes of measuring foreclosure is much broader than the one here. So the court has to look at that, but then in fashioning the injunction it can only apply to Texas?

BEANE: I don't think the court has to look at what the defendants say the market is. I think all the court has to look at is where the out of state territories are located, regardless of a geographic market, and look and see that the act was applied for both damages and injunctive relief.

O'NEILL: I understand that. But I'm trying to figure out what you think would be a proper way to try a case like this. And you say larger region to prove market foreclosure, but the injunction can only go within the borders of Texas.

BEANE: That's right.

O'NEILL: So you can prove anti-competitive or foreclosure of a much larger market but your injunction can only affect this piece?

BEANE: That's true. And there's nothing to prevent the plaintiffs from utilizing the laws of other states, or the federal antitrust laws if the Texas antitrust act doesn't reach a particular area.

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RESPONDENT

HARRIS: This is not a case about the illegality of CMAs that are commonly used in the market. The CMAs at issue here were only used in this market where Coke had the number one and number two brands of Coke and Dr. Pepper.

O'NEILL: If we were to determine that market foreclosure was a key piece of this type of claim, do you lose?

HARRIS: No. And that moves me to the monopoly claim. This case was tried as a monopoly claim case. We have not heard one word about monopoly today. Substantial foreclosure is not an element of either an attempt to monopolize or a conspiracy to monopolize.

OWEN: But as charged to the jury, you had to show that it harmed overall competition

in the relevant market. And to me the briefs cites anecdotal incidents. Where is your evidence of overall competition?

HARRIS: The harm to the market is both in higher prices being charged as well as reduced consumer choice.

OWEN: Again, you cite here, here, here. But where is your - like the big picture kind of prices were higher overall for these periods of time and this market the percentage is the - again, you cite at least what looks like anecdotal evidence that's spotted.

HARRIS: There is evidence cited in our brief by Coca Cola that over a several year period, that while their volume went down, their prices went up. There is testimony by the bottlers that after the CMAs were signed prices went up. We have terms of the CMA that require higher prices. We heard about a Coke product happened to be one or two or three prices points lower. Each one of those is a dime. That's saying a Coke product has to be up to .30 cents lower than an RC product regardless of the wholesale price.

HECHT: The brief says that only applied in 1% of the cases. So it didn't really have a market effect.

HARRIS: I think that was on the exclusive flavor agreements, and that's where they are playing with the numbers. They want to take the exclusive flavor agreements in convenience stores and then look the overall market. But when you look at convenience stores, it was about 7% of sales that had kicked our products totally out of it. And that's just one of the terms. It's the whole list of terms. It starts with the CMAs, all of them were 42 to 52 weeks.

OWEN: So what's the overall impact? I thought your brief was talking about .30 cent difference was just in some convenience stores in Paris, Texas, and it wasn't. Where is the evidence that this was pervasive in the market and what was the substantial impact on the market?

HARRIS: That was in the entire Paris market for a 2 year period. It was in 4 chains entirely: the Easy Mart chain, the Circle K chain, the Winn Dixie chain, and the Total Petroleum chain. And that's one of the pieces. That's where that had the most effect in those markets. But some of the other things were over the entire market.

OWEN: But where is the evidence that says the other markets?

HARRIS: For that particular item, that's the only evidence is in those markets. But the other items are in all the CMA agreements like the exclusive ads. That affected every market. It affected every store that had a CMA. Because all the CMAs were a 42 to 52 week period, and the exclusive ads for more than was running the ad in the newspaper. It dealt with outside of store advertising, like banners at convenience stores.

The SC in Tampa Electric only requires a showing of a substantial share of the relevant market restrained.

OWEN: So what is the share? How do you quantify it, a substantial share unless you put some sort of parameters on it?

HARRIS: I don't believe we are required to put a particular number on it. That is the fact issue for the jury: whether this is a substantial share of the market that was foreclosed? That's the fact issue that went to the jury. That's the fact issue the jury determined based on all these CMA provisions. The ones that required - that we couldn't even put a shelf topper, you couldn't even put anything at the point of sale showing that our products had a lower price. That foreclosed competition. That was in everyone of the CMAs.

HECHT: You seem to say at one point that substantial foreclosure or actual harm to consumers must be shown for restraint of trade at least, and to at least a lesser extent perhaps monopolization, and then your position is a much lesser or maybe not at all or attempt to monopolize.

HARRIS: And conspiracy not at all on those two claims.

HECHT: But later you say that harm to competitors results in harm to competition. And maybe that's enough to show liability, but then you wouldn't have to show substantial foreclosure. I'm unclear about your position on substantial foreclosure.

HARRIS: You're exactly right. We have to show substantial foreclosure for restraint of trade, which is §1 of the Sherman act, under the Texas act. For an actual monopolization claim, there is a lesser requirement of substantial foreclosure but it's still there. For an attempt to monopolize as well as conspiracy to monopolize, there is no requirement of substantial foreclosure. Because in both of those cases the elements are different and you don't have the actual monopolization. That's the restraint and that is the substantial foreclosure that takes place.

The 5th circuit in 2000, the Jostins(?) case talks about attempted monopolization, and sets out how the elements are different. It says where someone has the power to do it, but yet the monopolization hasn't actually exerted its efforts on the market.

SMITH: If your claim is attempted monopolization, how does that go to your damages in the sense that - it seems like they just attempted and they haven't harmed you yet. They are just on their way to getting a monopoly. How does that dovetail with - I guess this case was tried with all these theories and then you got what damages number. How did the jury figure out what the appropriate damages were?

HARRIS: The jury looked at the impact on sales by the conduct in the market through the CMAs and looked at all that conduct together.

SMITH: So attempted means more than it seems - they accomplished something.

HARRIS: Under the antitrust cases that's right. You can still get damages because then you look at the harm that's actually happened to you without a showing of the market-wide analysis of the harm. That's why you don't have the requirements of substantial foreclosure. It can harm you without having that effect on the overall market.

WAINWRIGHT: How does petitioner's assertion that the CMAs were terminable on short notice without penalty affect your argument if other competitors could come in and offer better terms, better conditions, and the retailers could freely terminate and change. How does that undermine, or does it undermine in your opinion your monopoly under the restraint of trade argument?

HARRIS: It affects it in that that is one factor to be considered under the rule of reason. It should also be noted that many of the CMAs here were 2 years or longer. Many of them didn't have the termination provisions. Well that argument isn't eve applicable to a large number of the CMAs. But the most important thing is, on this evidence CMAs were not being terminated. There is evidence of one convenience store chain that terminated a CMA. Coke retaliated. Coke started charging that chain the full wholesale price when it was the only store in the market being charged that price. Another store, Brookshires chain in Atlanta, wanted a less stringent CMA. What did it get? It got higher prices. Coke raised its prices at the point that Brookshires had to sell 2 liter Coke for $2.37 a 2 liter, when at the same time they were selling Pepsi for .99 cents. That's just one factor to take into account in the overall analysis. But the most important thing is here, it wasn't happening because Coke was exerting its monopoly power with the 75 to 80% control of the market and making retailers do things they wouldn't have done by free choice. That's one of the things a monopolist can do in the market. And the record has testimony of several of the retailers that said no. We would have liked to have a CMA with lesser weeks like they do in other markets. We don't want these exclusives. But we can't not have the CMA with Coke, because they have the number 1 and number 2 brand, and we can't be competitive with others in the markets.

O'NEILL: Approximately how many of the CMAs were 52 weeks in duration?

HARRIS: I can't break it down on exactly how many were 52, but all of them were between 42 and 52. And then you take out the - there are some weeks that in the trade they just don't advertise. There are 3 to 4 weeks that for whatever reason they just don't put ads out, so you even have to take the 42 weeks and move it up. And there is evidence in the record that Pepsi and its CMA programs wouldn't even try to go in with a 6 week CMA. They want at least 16 weeks or so. So even though it may have been as little as 42 weeks, that's still foreclosed any other competitor coming in with a meaningful CMA program.

SMITH: We got some amicus briefs that focused on comity and constitutional problems. Were those issues raised in the TC or the CA?

HARRIS: There was nothing along those lines raised in the CA. And those were raised on the issue of the extra territorial application of the act.

SMITH: So what's your view about when this court should address those?

HARRIS: This court should not address it because it's not before the court. And that is the bound of the Texas Antitrust Act. As J. Hecht said in 15.25(b), there's that second sentence. And it says that the act will only be limited by the bounds of the Texas constitution and the constitution of the US.

BRISTER: But that's what choice of law issues go to. The balance between the states and one state telling another state what to do. If the anti-competitor ____ is in Oklahoma, why should we apply the Texas statute? Just because the person that made the decision is standing in Texas when they decided if the entire harm - in a fraud case a consumer fraud case or a regular fraud case, choice of law principles clearly say where you are defrauded, where you were misled. But you're saying the antitrust laws are different?

HARRIS: That's right here because you have to look at the reach of the act. And the legislature has made it clear, the reach of this act will be as far as the constitution allows.

BRISTER: The statute nowhere says this applies to sales outside of Texas.

HARRIS: It does not say that expressly but it does contemplate...

BRISTER: So you're saying because the constitution might allow it, therefore, it was the legislature's intent to do it. They certainly didn't say that did they?

HARRIS: They did not say that it would apply out of state directly. But at the same time, the act does say that it's no defense under the act that it involves interstate commerce. And it does say that the bounds are going to be the constitution. That issue has not been raised here.

BRISTER: If we were to say this is illegal conduct under our statute, and then Oklahoma says no, it's just fine in the Oklahoma counties. What are we going to do? Shall we flip a coin or have a gun fight like they did on the stuff and land out in El Paso? How are we going to settle this if Oklahoma says it's fine and we say it's not. It is after all their state outside our boundaries.

HARRIS: They should have brought forth evidence of what Oklahoma law was, and they never did that.

BRISTER: So you're argument that it's okay to apply outside the state is because they never asked for the application of Oklahoma law?

HARRIS: They never proved that it was any different. And if there is no evidence it's

any different, we presume it's the same. This case was submitted under Texas law. There was no objection to the jury charge as to the application of Texas law at the charge conference. And because of that, we have to presume it's the same. Otherwise there's no harm analysis. We don't know what Oklahoma law is. We don't know what Louisiana law is. Because that evidence wasn't presented at the TC.

JEFFERSON: J. Owen was asking about what the evidence of the substantial share was. And you said well there's enough for the jury to make a determination. But shouldn't we have some idea of the entire pie in order to review the jury's finding? And it sounds like you haven't, and I haven't looked at the record yet, but there's not a level of specificity that would give us the basis for making that determination.

HARRIS: Where you have these many markets and all these factors, I think that's where it has to be determined on a very factual intensive basis, looking at all the different factors, all the elements of the CMAs, and whether that had an impact on a substantial share. And that's the exact phrase used by the US SC. A substantial share of the relevant market. And very often these cases it's not quantified. Two of the most significant antitrust cases in the last several years are the Conwood case, which is cited in the briefs, and _____ Pages case. Both of those cases, there was a finding of antitrust violations under the Sherman act. Both of those cases were affirmed by the federal CAs. Both of those cases were cert denied. In neither is there any evidence of a percentage number of foreclosure. It's just not required under the antitrust laws. That's the fact issue determining a substantial share, and the jury has to weigh all that evidence together and to see if this had an impact on the substantial share of the market.

SMITH: It's one thing to prove up your case and get your damages. But in this case you tripled those damages. Is there any Texas case law on the level of an intent that's required to triple those damages?

HARRIS: The test under the Texas act is willful and flagrant. Under the federal act there's an automatic trebling. But you do have to have an additional finding under the Texas act.

SMITH: And there are 9-10 markets in this case?

HARRIS: There are five different bottlers with their geographic markets. So roughly the five markets together collectively to ____ regions.

SMITH: It seems like - what evidence did you have that Coca Cola, I guess would know that what they were doing was a violation of antitrust laws and each market or for each bottler, or was it just - it seemed to what I read in the brief was just a few, a couple of instances where somebody unidentified is what the brief said. It said that they shouldn't be doing this kind of thing. Is that all you have? It just seems like a tough burden to show that.

HARRIS: Some of the evidence is market wide. Some of it is not. Things like targeting

Seven Up. Coke decided it wanted Sprite to be the number one brand in the Lemon/Lime flavor, and it went out and specifically targeted Seven Up. And there is evidence in the record, evidence that's cited in our brief about things they did to go out, to try to get the Seven up shelf space reduced to try to increase Sprite in the market. There's evidence that one of bottlers continued to have good sales with flavors, and Coke had meetings where they specifically talked about targeting him and his flavor sales through exclusive flavor agreements and the like in his area to try to put him out of business.

HECHT: That's okay though isn't it?

HARRIS: Not for a monopolist to go in and use these exclusive agreements whenever - again they got the power to make retailers do things that a retailer wouldn't normally do. Sometimes a monopolist can't do things that an ordinary competitor could do. That's been clearly recognized by the cases, because you don't have the same checks and balances in the market. The monopolist has such a share of the market, that it can exert that force and do things like buy out shelf space. The bottlers took over after Coke released the rights to Sunkist to Welch's, to A&W Root Beer. What did Coke do? Coke said get those out of the store. We want to put Barks Root Beer on the shelf, which has no market share. We want to put Minute Maid flavors on the shelfs. A monopolist can do that because they would say we've got Coke, we've got Dr. Pepper, we've got 80% of this market. We want our flavors in your store. And that's exactly how they got those flavors in. Through the use of these CMAs, they bought that shelf space when it didn't exist and put the number one selling brand and each of those three flavors off the shelf. That is harm to competition, that reduced consumer choice. The evidence in the record also shows there's harm to competition, a rise in prices.

The easy way to look at what happened without the CMAs is to go look at Wal Mart. In Wal Mart, the bottlers did just fine in competition. They held their sales. They held their shelf space. They could introduce new products. They could get all their products on the shelf. They couldn't do this against these CMAs because of the anti-competitive effects. But they could do that at Wal Mart where they had a level playing field. They didn't have to deal with that. That is evidence of the harm to the market caused by these anti-competitor CMAs.

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REBUTTAL

BEANE: I would commend to the court an exhibit. It is CCE ex. 409. It is a colored map of the territories in issue in this case. The plaintiff's claim is that each separate colored territory is a separate geographic market. Each of those is separate. That's their claim. That's their theory. It always has been. It still is.

With respect to your question J. O'Neill. An individual store is not a market. We just heard a discussion about Wal Mart. Wal Mart is not a market. A group of convenience stores, or a group of grocery stores is not a market. And the fundamental problem in this case with the plaintiff's proof is what they have is evidence of an agreement in Green in one year affecting a

couple of stores. And then a couple of years later evidence of another agreement in Blue affecting a couple of stores. They present it to the jury and stand in front of the court and say, that's evidence of foreclosure.

What that is, is that's evidence of agreements. It's not evidence of foreclosure.

O'NEILL: Well of course they say they don't need evidence of foreclosure when they take a monopoly claim. Do you disagree with that?

BEANE: They are simply wrong. And I would tell the court that the ____ case, or the Reynolds case, the Louisa(?) case, all of which deal with promotional agreements in the soft drink industry or other consumer products, all had monopoly claims in them. All of those cases found that the challenge agreements did not violate the antitrust laws. The jury was charged in this case specifically one of the elements of attempt to monopolize is predatory or anti-competitive conduct. With respect to conspiracy to monopolize, the jury was charged that what has to happen is something more than conduct of a business that is part of the normal competitive process. So the element of engaging in something that substantially impacts competition was specifically in the jury charge in this case. And unobjected to. The case law says they have to show foreclosure in monopoly cases. The jury charge reflected that.

OWEN: Do you agree that you have monopoly power in some of these markets?

BEANE: The issue of monopoly power is not before the court. We don't believe we have monopoly power. This is a very unusual situation. And I will admit it. My client purchased a series of local bottlers. Each of those bottlers was distributing Coke and Dr. Pepper at the time of the purchase. So we bought in to this share. What is unusual about this is, as the plaintiff's economist admitted, Pepsi Cola is in the market with a share of 14 or 15%, and the economist specifically testified that Pepsi Cola has the power to restrain prices that the defendants might charge. It's very unusual when you have a party with this market share, where I can stand before the court and say, we don't have monopoly power. But that is the reason I feel comfortable in saying it.