IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 94-1812

ADVO, INC.,

Plaintiff-Appellant,

v.

PHILADELPHIA NEWSPAPERS, INC.,

Defendant-Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR AMICUS CURIAE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT

ANNE K. BINGAMAN
Assistant Attorney General

DIANE P. WOOD
Deputy Assistant Attorney General

CATHERINE G. O'SULLIVAN
DAVID SEIDMAN
Attorneys

U.S. Department of Justice
10th & Pennsylvania Ave. NW
Washington, DC 20530
(202) 514-4510

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STATEMENT OF INTEREST OF THE UNITED STATES

The United States is principally responsible for the enforcement of the Sherman Act, 15 U.S.C. 1 and 2. It accordingly has a strong interest in the proper interpretation of those laws. It is also concerned that procedural requirements not improperly impede antitrust litigation. This case implicates both substantive interpretation of the antitrust laws and the procedural requirements of summary judgment. Accordingly, the United States has a strong interest in its proper resolution.

STATEMENT OF ISSUES

The United States will address only one question: whether the district court erred in holding that the plaintiff failed to raise a genuine issue of material fact as to dangerous probability of achieving monopoly power in the Advertising Circulars market.

STATEMENT OF THE CASE

Nature of the case. This is a civil action for damages and injunctive relief for alleged violations of Section 2 of the Sherman Act, 15 U.S.C. 2.

Course of proceedings and disposition. The complaint was filed on June 17, 1993, in the United States District Court for the Eastern District of Pennsylvania. On June 10, 1993, the court, the Honorable Marvin J. Katz, granted summary judgment for the defendant on plaintiff's two federal antitrust claims and dismissed plaintiff's state law claims without prejudice. The court's order was entered on June 13, 1994; judgment was entered on June 15, 1994. On July 15, 1994, the court denied plaintiff's motion for reconsideration.

STATEMENT OF FACTS

1. Newspapers are the traditional means for delivering advertisements to households. Advertisements can be printed in the newspaper ("ROP") or printed separately ("preprints") and inserted into newspapers ("inserts"). As owner of the only area-wide daily newspapers in the Philadelphia area (the Inquirer and the Daily News), Philadelphia Newspapers, Inc. ("PNI") has a very

large share of the ROP business. (App. V-1649.)[1] (Other newspapers, covering much less of the area and having far lower circulations, also publish ROP advertising.) It also has a substantial insert business. (Ibid.)

Advertisements in newspapers reach only subscribers and other purchasers. Many advertisers prefer to reach all or most of the households in an area. (Op. 3-4.)[2] Advo, Inc., "the nation's largest full-service direct mail marketing company" (Op. 2), provides alternatives to newspaper delivery that reach a higher proportion of households. In the early 1980s, Advo developed "shared mail" advertising, which permits multiple advertisers to distribute their circulars in a single package. Acme supermarkets, a major advertiser in the Philadelphia area, invited Advo to initiate a shared mail program there. (App. VI-1800.) Advo did so in February 1984 (App. VI-1909), and it attracted other advertisers as well, including Super Fresh, another major supermarket chain.

In 1989, at Acme's request, Advo changed from delivering to households on weekends to delivering in mid-week. (Ibid.) Super Fresh, preferring weekend delivery, then asked another company, CBA, which specialized in hand delivery to households, to enter

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[1]Citations in this format are to a volume and page in the Joint Appendix.

[2]Citations to "Op." are to the district court's Order and Memorandum of June 10, 1994.

the Philadelphia market. (Op. 11-12; R. Op. 3 n.5.)[3] CBA did so with some success, attracting a number of advertisers in addition to Super Fresh. (Op. 12.) Advo acquired CBA in 1992, ending the competition between them. (Op. 2-3.) Advo now uses both shared mail and hand delivery.

PNI lost substantial advertising revenues to "alternate delivery" (i.e., mail and hand delivery of circulars). (Op. 6.) In 1991, it developed plans for a "total market coverage" (TMC) program which included alternate delivery to households. (Ibid.) To date, PNI's TMC program has not been particularly successful. PNI has neither turned a profit on its alternative delivery operations nor come to expect to do so any time soon. (App. IV-1331-1332.) On the other hand, PNI's share of the Advertising Circulars market, including delivery in the form of newspaper inserts and alternative delivery, is quite substantial because of PNI's insert business. (App. V-1649.)[4]

2. The central economic fact about delivering circulars to households is that, over a wide range, costs are largely independent of the number of advertisements included in a single package. For mail delivery, postage is the primary cost, and the

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[3]Citations to "R. Op." are to the district court's Order of July 15, 1994, denying Advo's motion for reconsideration.

[4]We are unable using record evidence to estimate the proportion of PNI's Advertising Circulars volume or revenues attributable to newspaper inserts rather than alternative delivery. However, projections (see App. V-1567, VII-2306, 2314) suggest that newspaper inserts contribute significantly to volume and revenues.

cost of postage is the same for any weight up to 3.3 ounces, with modest increases for each tenth of an ounce beyond that. (App. V-1604.) In effect, the first piece of advertising is expensive to deliver, but delivering additional pieces is cheap. Hand delivery has a similar cost structure.[5]

Because of this cost structure, the deliverer seeks to attract one or more "base players," advertisers who advertise frequently and regularly in all, or a large portion, of the relevant geographic area. (Op. 5.) Base players provide a revenue stream sufficient to cover a significant portion of the cost of regular deliveries in that area. With one or more base players in hand, the deliverer can seek other advertisers who may advertise less regularly or less widely, but who help to cover the remaining delivery cost and contribute to profit. Until enough advertisers are attracted, the rates charged to those initially attracted are unlikely to be profitable.

The district court found that the number of base players in the Philadelphia area is limited. (Op. 5.) There are only two, Acme and Super Fresh, "who on their own 'could support an alternate delivery program.'" (Ibid.). Both are Advo customers. Anyone seeking to become a metropolitan-wide alternate deliverer

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[5]PNI delivers advertising to houses in bags. If there is a single piece of paper in the bag, PNI must pay the costs of the bags, inserting the page in the bag, hauling the bags to delivery points, actually delivering them to the door, and verifying that they are delivered. Most of these costs vary little if at all as more pages are inserted into the bag. (App. VII-2289.)

in the area is therefore likely to try to attract these customers away from Advo.

3. In June 1993, Advo sued PNI, alleging, inter alia, violations of Section 2 of the Sherman Act, 15 U.S.C. 2.[6] In particular, count two alleged attempted monopolization of the market for "high density distribution of advertising circulars" (App. I-25-27, ¶¶42, 44, 47).[7]

Advo's claim focused on PNI pricing practices designed to attract the business of Advo's base players. Count two identifies the allegedly unlawful conduct as PNI's "predatory practice of offering free or deeply discounted ROP advertising, over which it has a dominant and monopolistic position, to Advo's principal customers linked with a low and discriminatory rate for the provision of high density distribution services for advertising circulars." (App. I-26-27.)

For the most part, PNI's rate offers have not succeeded in attracting base players away from Advo. (Op. 7-9) Advo claims, however, that it has been forced to lower its rates to the base players or to forego rate increases it had expected to impose (Op. 8-9). Consequently, Advo's profits have fallen. Moreover,

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[6]Advo also alleged tortious interference with prospective contractual relations.

[7]Count one alleged monopolization and attempted monopolization of a market that included Advertising Circulars and ROP. The court granted summary judgment for PNI on this count on the ground that Advo had not sufficiently supported the existence of the alleged product market. (Op. 14.) Count three alleged tortious interference with prospective contractual relations. We do not address either count one or count three.

Advo asserts that it will exit the market if it loses one of its two major base players to PNI, and that it may exit even without such a loss. (Op. 9; App. V-1636-1637; App. I-68.) After Advo's exit, PNI would have a very large share of the market.

The district court granted summary judgment for PNI on this attempted monopolization count. The court assumed arguendo that Advo had raised genuine issues of material fact as to two of the three elements of attempted monopolization, predatory or anticompetitive conduct, and specific intent to monopolize. Op. 15.[8] It then turned to the third element, dangerous probability of success in monopolization. The court's ultimate conclusion was that a finding of dangerous probability of success would be "sheer speculation" (Op. 24), and so the case should not be tried.

The court reasoned that there was no dangerous probability of successful monopolization because entry into the market was easy. (Op. 20-21).[9] The ability to drive out a competitor and

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[8]PNI argued that its pricing levels were not predatory, because each additional advertising circular it attracted brought its business closer to profitability. (App. IA-394.) The court did not reach this argument. But see Op. 15 n.20 (noting that there is nothing inherently predatory about basing a discount on an advertiser's total volume of business).

[9]There is some suggestion in the opinion (Op. 15-16) that the court may also have concluded that Advo had failed to raise a genuine issue of material fact as to the likelihood that it would be eliminated from the market. If the court did so find, it was unnecessary for it to determine whether there was sufficient evidence as to PNI's ability to recoup the losses attributable to predation after it drove Advo out of the market. As we read the district court's opinion, however, the court did not hold that (continued...)

achieve a monopoly market share in the short run does not necessarily establish a dangerous probability of success in monopolization because "the success of any predatory scheme depends on maintaining monopoly power long enough to recoup the predator's losses and to harvest some additional gain." Op. 20, quoting Brooke Group, Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578, 2592 (1993). In this case, the court concluded, "the nature of the Advertising Circulars market suggests that recoupment is not a dangerous probability." Op. 20-21.

The court cited evidence from the record in support of its conclusion that entry was easy. It noted that ten of the 12 suburban newspapers had entered the market, achieving a collective market share of about 13% (Op. 17-18), and that Advo's expert in an earlier case involving the Philadelphia market had concluded that entry was easy (Op. 17 n.26). CBA's entry, in the court's view, showed that "the market can successfully be entered in well under a year with the support of a single base player" (Op. 18) and that base players dissatisfied with their deliverers were willing and able to attract new entrants (Op. 16). The court also observed that the initial investment required to enter

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[9](...continued)
summary judgment was appropriate because Advo's evidence did not create a triable issue as to the likelihood of Advo exiting the market. This reading finds support in the court's order denying Advo's motion for reconsideration, in which the court did not refer to any such holding and, indeed, apparently conceded that "as a result of PNI's presence the plaintiff might exit the relevant market." (R. Op. 3.)

the market is small in relation to total market revenues (Op. 18).

The court gave little or no weight to Advo's evidence that entry was difficult. Advo contended that if PNI succeeded through predatory pricing in eliminating Advo from the Philadelphia market, other potential entrants would be deterred by fear that PNI would again engage in predation directed at them. Advo relied on evidence concerning its own decision not to reenter the Hartford, Connecticut market as supporting this "strategic entry deterrence" theory. But the court concluded that Advo had "not demonstrated a predicate for using the Hartford market experience as a predictor" of future events in Philadelphia (Op. 10 n.11; see also R. Op. 2-3), leaving only speculation, not evidence.

The court disposed of Advo's contention that the need for a reputation for reliability made entry difficult by concluding that the record showed only a need for management and selling skills, a kind of "competence" that is "a prerequisite to enter any business, not a special or significant entry barrier to this one." (Op. 19.) On reconsideration, the court repeated that answer and added that, in any event, dangerous probability must be assessed in light of other factors as well (R. Op. 5).

Finally, the court concluded that Advo's contention that changes in market conditions undercut inferences drawn from both CBA's entry and Advo's expert's conclusion in prior litigation rested on conclusory testimony unsupported by specific facts or

reasons. (Op. 12, 17 n.26; R.Op. 4.) On reconsideration, the court also said that the favorable situation that gave rise to CBA's entry would exist again if Advo exited. (R.Op. 3 n.5.)

SUMMARY OF ARGUMENT

As the district court correctly concluded, a plaintiff challenging allegedly predatory prices as attempted monopolization under Section 2 of the Sherman Act must establish not only the likelihood that the pricing will affect its rivals, but also the likelihood that it will injure competition in the market, in order to satisfy the dangerous probability of success element of the offense. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578, 2589 (1993). If the threat of entry would prevent a predator from recouping its investment in below-cost prices by maintaining prices above the competitive level after driving its rivals out of the market, there is no dangerous probability of successful monopolization.

We express no view on the question whether a jury would or should find in this case that entry or the threat of entry would prevent PNI from maintaining prices above the competitive level if it drove Advo from the market.[10] We believe that the district court erred, however, in granting summary judgment for defendant on the ground that no reasonable jury could find a dangerous probability that PNI would have the power to do so.

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[10]Nor do we express any view as to the other elements of Advo's claims.

There is record evidence pointing to the conclusion that the potential for entry would not be sufficient to prevent PNI from charging supracompetitive prices if it drove Advo out of this market. The district court failed to offer adequate reasons for rejecting that evidence, apparently assuming that entry in response to supracompetitive prices is easy in any market lacking unusual barriers to entry. The court accepted as dispositive PNI's evidence that competitive entry would occur if it attempted to raise price, even though a reasonable jury might choose to reject that evidence. In so doing, it usurped the role of the jury and exceeded its authority under Rule 56, Fed. R. Civ. P.

ARGUMENT

SUMMARY JUDGMENT WAS IMPROPERLY GRANTED BECAUSE ADVO RAISED A GENUINE ISSUE OF MATERIAL FACT AS TO DANGEROUS PROBABILITY OF RECOUPMENT

A. Standard Of Review

This Court's review of a grant of summary judgment is plenary. Fineman v. Armstrong World Industries, Inc., 980 F.2d 171, 215 (3d Cir. 1992), cert. denied, 113 S. Ct. 1285 (1993). The Court therefore applies the same standard as the district court properly applies in ruling on summary judgment.

B. A District Court May Not Resolve Disputed Factual Issues on Summary Judgment if the Nonmoving Party Presents More Than A Scintilla of Evidence

Summary judgment is properly granted only if "there is no genuine issue as to any material fact and . . . the moving party is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). It is not the judge's role to determine "the truth of the

matter," Big Apple BMW, Inc. v. BMW of North America, Inc., 974 F.2d 1358, 1363 (3d Cir. 1992) (quoting Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 249 (1986)), cert. denied, 113 S. Ct. 1262 (1993), in light of all the evidence. Rather, summary judgment must be denied "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Liberty Lobby, 477 U.S. at 248.

The district court granted summary judgment on count two because it concluded that there was no genuine issue of material fact as to dangerous probability of successful monopolization, in light of the ease of entry. That judgment cannot be sustained if Advo advanced even a "mere scintilla" of evidence (Big Apple, 974 F.2d at 1363) that the entry would not prevent PNI from maintaining prices above competitive levels if it drove Advo from the market.

If Advo met that standard, summary judgment was improper even if, in the court's view, PNI's evidence was weightier. Ibid. The evidence, and the inferences drawn from it, must be viewed in the light most favorable to Advo; if Advo's evidence contradicts PNI's, then Advo's must be taken as true. Ibid. And Advo need only demonstrate that the inferences it draws from the evidence are reasonable, not that they are the only possible inferences. Eastman Kodak Co. v. Image Technical Services, Inc., 112 S. Ct. 2072, 2083 (1992).

C. The Dispositive Issue Is Whether The Prospect Of Entry Would Likely Prevent PNI From Recouping Its Investment In Predation By Charging Supracompetitive Prices

As the district court recognized, driving rivals out of the market in the short run does not necessarily guarantee a firm the ability to monopolize because the firm may not be able to maintain prices above a competitive level. Indeed, where a predator drives out rivals by pricing below cost, consumers may reap a net benefit if the predator cannot maintain prices at a supracompetitive level long enough to recoup its losses. Thus, the Supreme Court has held that a dangerous probability that the predator will recoup its investment in below-cost pricing is a prerequisite to liability for attempted monopolization. Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 113 S. Ct. 2578, 2588 (1993).

Although many factors might inhibit a firm with a large market share from maintaining prices above competitive levels, the district court relied on only one, the prospect of entry, in granting summary judgment on count two. Entry normally leads to increased competition, which exerts downward pressure on supracompetitive prices. New entry need not actually occur to keep prices at competitive levels since incumbents may choose not to raise their prices if they believe that supracompetitive prices would attract new entrants. See, e.g., Phillip Areeda & Herbert Hovenkamp, Antitrust Law ¶917.1b at 959 (Supp. 1993); R. Op. 3 n.6.

The likelihood of entry sufficient to prevent recoupment is frequently discussed in terms of whether entry is "easy," e.g., Brooke Group, 113 S. Ct. at 2589, or difficult, and in terms of high or low barriers to entry, cf. Fruehauf Corp. v. FTC, 603 F.2d 345, 357 (2d Cir. 1979) (merger analysis). These relative and conclusory terms, however, risk obscuring the fundamental inquiry: if the alleged predator were to raise prices above otherwise prevailing levels after driving out its rivals, would entry be likely to occur on a sufficient scale and in a sufficiently timely manner to prevent the alleged predator from recouping through supracompetitive prices what it invested in the process of predation?

That inquiry necessarily focuses on market circumstances as they appear to a potential entrant, for "entry is not likely to occur unless it is profitable to the entrant." Areeda & Hovenkamp, supra, ¶917.1a at 957; cf. Op. 10 n.11 ("The entry question focuses on whether competitors will choose to enter the relevant market in the event of supracompetitive pricing by PNI"). A potential entrant obviously would consider what it would cost to enter, and in particular the sunk costs of entry, the costs that could not be recovered if entry failed. And it would consider the chances that it would attract enough business for profitable operation.

Moreover, a potential entrant would not evaluate potential profitability at the prices prevailing prior to its entry, but at the prices likely to prevail after it entered. It would take

into account any direct effect its entry would have on price by increasing total market output. It would also consider the likely price reactions of incumbent firms seeking to retain customers or to injure the entrant.[11]

If potential entrants expect that their entry would result in a substantial decrease in price, then prices well in excess of competitive levels can prevail indefinitely without attracting entry. Moreover, entry that would not drive down prices significantly is also likely not to prevent the alleged predator from recouping its costs.

D. There Is Evidence in the Record That Entry Would Not Prevent PNI From Recouping Its Investment In Predation

It is not our role, as it was not the district court's on summary judgment, to determine whether Advo or PNI ultimately has the better of the argument as to the dangerous probability of PNI successfully monopolizing the Advertising Circulars market. In our view, however, the record contains evidence that, viewed in the light most favorable to Advo, would permit a reasonable jury to find that there is a dangerous probability that entry would not prevent PNI from recouping predation-related losses.

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[11]Entry may drive prices down below long-run competitive levels. If the scale at which entry occurs is large enough, new entry will produce excess capacity which could drive prices below long-run competitive levels, at least until some capacity leaves the market. Cf. U.S. Dept. of Justice and Federal Trade Commission, Horizontal Merger Guidelines §3.3 (1992), reprinted in 4 Trade Reg. Rep. ¶13,104 at 20,573-11.

1. Entry involves substantial sunk costs.

Entry is in general less likely to occur if unsuccessful entry would be costly than if it would not be, at least when entry is risky. See, e.g., II Phillip Areeda & Donald F. Turner, Antitrust Law ¶409e (1978). The prospect of losing substantial amounts of money in the form of unrecoverable or "sunk" costs is obviously unattractive. The district court concluded that CBA's "start-up costs were approximately $3 million" (Op. 12 n.17).[12] That is plainly not so insubstantial a sum that a potential entrant would necessarily be untroubled by the prospect of losing it. To be sure, $3 million in sunk costs need not preclude entry. But it is a factor that a potential entrant, and a jury, would have to evaluate in light of the prospects for successful entry.

The district court improperly concluded otherwise, finding that $3 million in start-up costs was "not significant" when compared with annual market revenues "in excess of $100,000,000." (Op. 18.) But the comparison of costs to total market revenues

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[12]The court cited the deposition of Harold Matzner. Matzner referred not to "start-up costs" but to "operating loss." App. III-1031. Whether $3 million is correct measure of sunk cost is not entirely clear from the record, but the excess of cost over revenue during start up is properly considered sunk.

The record also contains indirect evidence of substantial sunk costs. Advo began its "Marriage Mail" program with a December 1983 contract with Acme, anticipating a Tuesday-Wednesday delivery date. In March 1984, Acme insisted on a different delivery date, hinting that otherwise it would terminate the contract. "Given its substantial investment in the region by that point, ADVO had no choice but to accede to Acme's demand and change the in-home date." (App. VI-1805.)

is inappropriate. No rational potential entrant, and no reasonable jury, would assume that a new entrant would drive all competitors from the market, leaving it with 100% of market revenues. Certainly there was no evidence compelling that assumption, and no current competitor in the market has even half of total market revenues. Moreover, profits, not revenues, attract entrants. The court, however, did not evaluate the start-up costs in light of the profits an entrant might expect.[13] It therefore had no basis for concluding that $3 million in sunk costs was insignificant in a potential entrant's decision calculus.

2. Profitable entry is difficult and risky.

In considering whether to attempt entry, a prospective entrant would consider sunk costs of entry in light of the prospect that entry would be profitable and successful. The evidence on summary judgment, considered in the light most favorable to Advo, was sufficient for a reasonable jury to conclude that profitable entry would be difficult, with substantial risk of failure.

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[13]The court's comparison of entry costs and market revenues was apparently derived from Kelco Disposal, Inc. v. Browning-Ferris Indus. of Vermont, Inc., 845 F.2d 404 (2d Cir. 1988), aff'd, 492 U.S. 257 (1989). See Op. 18 n.29. But the Kelco court did not rest on the comparison of entry costs and market revenues. It instead, based on the record, assumed a 50% market share and a 10% return on revenues, and compared the resulting return to the cost of entry. 845 F.2d at 408.

a. Without an established reputation for successful performance, it is difficult to attract the base players necessary for success.

Advo contended that the importance of reputation for reliability would make entry unlikely. Although "the weight accorded to reputational barriers to entry will vary with the circumstances of a given case," United States v. United Tote, Inc., 768 F. Supp. 1064, 1075 (D. Del. 1991), in some markets "the need for reliability is so great and the consequences of new product failure so dire that, even if the competitive nature of the market deteriorated, consumers would still be reluctant to switch to new entrants." Id. at 1076. There was sufficient evidence for a reasonable jury to conclude that this is such a market, and that entry would be difficult, with substantial risk of failure.

The key to successful entry into the relevant market is attracting base players (Op. 5) -- large, frequent advertisers who "use advertising circulars principally as 'impact' advertising to induce customers to purchase in a given week." (Op.6.) Such advertising, particularly for supermarket chains, emphasizes weekly sales. The primary service provided is timely delivery of weekly advertising circulars to homes throughout the Philadelphia area. Circulars not delivered, or not delivered in timely fashion, will not attract customers to the weekly sales. But neither the advertiser nor the delivery company's management directly observes whether the circulars are in fact delivered on

time to the targeted households. Advertisers reasonably worry that circulars might end up in a dumpster.

For this reason, delivery companies rely on elaborate systems of quality control and verification. (App. IV-1533, 1535, 1545-1548.) Short of duplicating that costly structure, however, the advertiser must rely on the delivery company's assurance that timely delivery will be made. And if the delivery company does not have a reputation for reliable and timely weekly delivery, the advertiser is likely to be reluctant to put its business at risk by contracting with that deliverer, particularly if a reliable alternative is available.

Record evidence shows that the lack of an established reputation for reliable and timely weekly delivery in the Philadelphia market makes it difficult to attract base players as clients.[14] A Super Fresh executive testified that Super Fresh went so far as to examine PNI's system of controls (App. III-921) but remained concerned about whether those controls would have stayed in place over the life of a contract and remained concerned about the quality of the potential hand delivery service (id. at 922). Super Fresh has not become a PNI customer

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[14]Evidence concerning reputational effects in Hartford also supports this analysis. Advo's poor performance in meeting delivery dates in Hartford led to client dissatisfaction and cancellations. (App. III-968, 975.) Advo saw "reestablishing credibility" as an obstacle to reentry into the Hartford market. (Ibid.) The district court held that Advo had not demonstrated a predicate for using the Hartford market experience as a predictor of the likelihood of Advo's reentering the Philadelphia market should it withdraw (Op. 10 n.11), but did not reject reliance on that experience to demonstrate the importance of reputation.

for this form of delivery. Similarly, PNI came close to attracting Pathmark as a base player in 1991, but ultimately failed to do so, because Pathmark remained wary about PNI's ability to run such a delivery program. (App. II-671, 683.)

Thus, the jury could find that a new entrant needs a reputation for reliable weekly delivery on the geographic scale a base player requires in order to attract the base players essential to an entrant's success. But it may be difficult or impossible to develop a reputation for reliability without being in the market,[15] and so potential entrants might conclude that the prospects of success did not justify the risks.

The district court explained in its original opinion that it was discounting this evidence because it amounted only to a claim that an entrant would need management and selling skills. In the court's view, "[s]uch competence is a prerequisite to enter any business, not a special or significant entry barrier to this one." (Op. 19.) This reasoning misses the point. Even if the skills necessary to performance are as readily available in this industry as in any other,[16] the entrant must persuade potential

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[15]The new entrant's problem is similar to that which led the court in United Tote to find reputational factors to impede entry. There, the court found that "the proven ability to provide reliable systems and service generally is an important factor in a racetrack's selection of a totalisator supplier." 768 F. Supp. at 1076. Thus, "most racetrack owners are reluctant to contract with a totalisator supplier that does not have a record of performance at tracks of similar or greater size." Id. at 1078.

[16]There was evidence that success in this industry required "very special people and very special talent." (App. I-127.)

customers that it will in fact perform the service reliably, despite the customer's inability to determine easily whether it is receiving the service for which it is charged.

On reconsideration, the district court added that dangerous probability of successful monopolization depends on many factors. (R.Op. 5.) That is true, and it is possible that a jury might conclude that, in light of all the evidence, Advo had failed to establish a dangerous probability of monopolization. But the factors the court listed appear unrelated to recoupment, the issue on which the court decided the case. And, in any event, the existence of other factors does not answer the point that the evidence as to the importance of reputation is evidence of the difficulty of entry.

b. Entry is likely to drive down prices, and therefore expected returns, significantly

Even if PNI were charging supracompetitive prices prior to the entry of any rival, a potential entrant would not simply assume that prices would stay at that level if it entered -- it would take into account the likely effect of its own entry (and other likely entry) on prices. In light of the evidence here, a reasonable jury might conclude that entry would reduce prices and profits significantly, making entry unlikely.

The jury could conclude from the evidence that successful entry into metropolitan-wide alternate delivery requires attracting the business of significant base players, and that base players that already use alternate delivery are the best prospects. Thus, the jury might conclude that a new entrant

would have to offer better terms than PNI in order to induce PNI's customers to switch. And since the market shows "relatively low sensitivity to just price as a determining factor in relationships" (Op. 16 n.24), a jury might well conclude that the entrant's prices would have to be substantially lower than PNI's.

Moreover, there is evidence that the bulk of the costs of alternative delivery must be incurred to serve a single customer, while additional customers add relatively little to those costs. From this the jury reasonably could conclude that the new entrant could not operate profitably with only one customer, particularly at the price necessary to attract that customer. Thus, the entrant would seek additional business by offering low (but not necessarily predatory) prices. That is essentially the strategy that Advo alleges PNI followed. (Op. 7-8.) The record supports a further conclusion that PNI, faced with an entrant seeking customers through low prices, would lower its own prices, for the loss of customers would significantly reduce PNI's revenues without significantly reducing its costs. That, after all, has been Advo's response to PNI's offers of low prices. (Op. 8-9.)[17]

Accordingly, a jury might reasonably conclude that the prices that even a successful entrant might expect to charge would be substantially below the supracompetitive prices PNI

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[17]The jury might also rely on evidence that Advo viewed its acquisition of then-competitor CBA as preventing a major price war. (Op. 21 n.32.)

might be able to charge if it had no significant rivals. The prospect of lower prices, together with the costs and risks of entry, could lead a reasonable jury to the conclusion that timely new entry on a scale necessary to prevent PNI from recouping its investment in predation would be unlikely.

c. A reasonable jury could discount the evidence on which the district court relied for its conclusion that entry would occur.

In concluding that entry was easy, the court relied heavily on two intertwined complexes of fact and speculation. First, the court observed that the "major customers or 'base players' in the Advertising Circulars market, such as the supermarkets and discounters, are highly sophisticated buyers who have significant countervailing economic power." (Op. 16) And it asserted that "the record demonstrates that when customers in the Advertising Circulars market are unhappy with one supplier they will seek and be able to acquire the services of a new supplier, even if . . . this new supplier is not presently competing in the market." (Op. 16-17).

A jury faced with this record, however, would not be forced to conclude that major customers would seek out and find alternative suppliers if PNI raised prices to supracompetitive levels. Mr. Gasparro of Super Fresh's parent company testified that his company would look for other suppliers. (App. VI-1942-1944.) But, as the district court found, "when PNI undercut Advo's price, Super Fresh chose to remain an Advo customer, despite Advo's comparatively higher price" (Op. 16 n.24).

Indeed, the court said that the market is characterized by a "relatively low sensitivity to just price as a determining factor in relationships." (Ibid.) The jury might reasonably conclude that a firm could raise its prices significantly above competitive levels without losing its base players to lower-priced entrants lacking reputations for reliable delivery.

Moreover, a single major customer would not offer sufficient business to support an entrant at a cost allowing it to charge competitive rates, because the costs of serving one customer are roughly as great as the costs of serving many. Unless several major customers jointly sponsored an entrant, its costs might force its prices higher than the supracompetitive prices prevailing before entry. The court cited no evidence even suggesting that major customers would jointly sponsor entry.

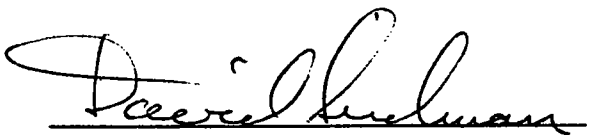
Second, the court relied on the history of entry by ten smaller newspapers and CBA. (Op. 17-18.) But nothing in the record suggests that any of the ten small newspapers now provides, has a reputation for being able to provide, or would in the future provide, alternative delivery on a wide-enough geographic scale to become a viable alternative for the major Philadelphia-area base players. This entry proves nothing about the likelihood of entry by a viable competitor for metropolitan-wide business. And as for CBA, the record supports a finding that CBA was able to enter as it did because existing competitors did not provide a service Super Fresh required (weekend delivery), and CBA was willing to provide it. (R. Op. 3 n.5.) A

reasonable jury would not be compelled to accept the CBA story as demonstrating the likelihood of successful entry if required services are being provided albeit at supracompetitive prices.[18]

CONCLUSION

The district court exceeded its authority by granting summary judgment for PNI on count two, based on its own weighing of the evidence and conclusion that entry into the Advertising Circulars market is easy. The judgment of the district court as to count two should be vacated, and the case should be remanded for further proceedings.

Respectfully submitted.



ANNE K. BINGAMAN
Assistant Attorney General

DIANE P. WOOD
Deputy Assistant Attorney General

CATHERINE G. O'SULLIVAN
DAVID SEIDMAN
Attorneys

U.S. Department of Justice
10th & Pennsylvania Ave. NW
Washington, DC 20530
(202) 514-4510

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[18]The court reasoned that were Advo to exit the market, "Acme would have no major alternate delivery company to distribute its circulars during the week" (R. Op. 3 n.5), so that market conditions would resemble those at the time CBA entered. But the record indicates that since May 1992 Advo has provided Acme with weekend, not midweek, delivery. (App. VI-1909.)

CERTIFICATION OF BAR MEMBERSHIP

Counsel for amicus United States of American are attorneys with the United States Department of Justice. As we understand the Court's rules, as federal government attorneys we are not required to be specially admitted to practice before the bar of this Court.

CERTIFICATE OF SERVICE

I certify, that on this 11th day of October, 1994, I served copies of the accompanying BRIEF FOR AMICUS CURIAE UNITED STATES OF AMERICA IN SUPPORT OF APPELLANT by hand delivery on

Margaret M. Swisler, Esq.
Howrey & Simon
1299 Pennsylvania Avenue, N.W.
Washington, D.C. 20004-2402
Counsel for Appellant, Advo, Inc.

and by Federal Express on

Robert C. Heim, Esq.
Dechert, Price & Rhoads
4000 Bell Atlantic Tower
1717 Arch Street
Philadelphia, PA. 19103-2793
Counsel for Appellee, Philadelphia Newspapers, Inc.

DAVID SEIDMAN
Attorney
Department of Justice - Main Bldg.
Antitrust Division
Appellate Section - Rm. 3224
10th & Pennsylvania Ave., N.W.
Washington, D.C. 20530
(202) 514-4510