

COMMENT

A RE-EXAMINATION OF IN PARI DELICTO UNDER THE ANTITRUST LAWS

The private antitrust action¹ has long been considered the cornerstone of antitrust enforcement. Congress, the courts, and commentators have frequently recognized the vital role this suit plays in promoting competition.² Designed to obviate the need for a vastly expanded federal enforcement agency,³ the private action, which provides plaintiffs with treble damages, supplements the deterrent effect of government actions thereby encouraging compliance with the antitrust laws.⁴ Moreover, because private litigants are less hesitant than governmental authorities to bring suit against local or short-lived conduct or against behavior falling short of flagrant violation, private actions often reveal violations that otherwise would go undiscovered.⁵

Since such a high premium is placed on private antitrust suits, few affirmative defenses are allowed. One frequently invoked defense adopted from the common law is *in pari delicto*⁶, which allows a defendant to defeat a plaintiff's action for relief by proof that the plaintiff himself was a party or an accomplice to the complained of illegal combination or conspiracy.⁷

¹ 15 U.S.C. § 15 (1970) provides that:

[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover three-fold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee.

² See, e.g., *Lawlor v. National Screen Serv. Corp.*, 349 U.S. 322, 329 (1955); *Olympic Ref. Co. v. Carter*, 332 F.2d 260, 264 (9th Cir.), cert. denied, 379 U.S. 900 (1964); Loevinger, *Private Action—the Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167, 168 (1958); Comment, *Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit*, 61 YALE L.J. 1010 (1952); 110 CONG. REC. 3139-41 (1964) (remarks of Sen. Humphrey).

Although commentators have disagreed on the question of whether the antitrust laws should be concerned with objectives other than the promotion of efficiency, compare Bork, *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7 (1966) with Elzinga, *The Goals of Antitrust: Other Than Competition and Efficiency, What Else Counts?*, 125 U. Pa. L. Rev. 119 (1977), the Supreme Court has recently indicated that antitrust analysis, at least under the Sherman Act, should be restricted to economics. See *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 97 S. Ct. 2549 (1977).

³ See Loevinger, *Private Action—the Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167, 168 (1958).

⁴ See C. KAYSER & D. TURNER, ANTITRUST POLICY 257 (1959).

⁵ *Id.*

⁶ *In pari delicto* literally means "of equal fault." *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 135 (1968).

⁷ Besides *in pari delicto*, other important affirmative defenses in antitrust litigation are the statute of limitations and "passing on." The statutes of limitations defense bars any action initiated four years after the complained-of conduct. 15 U.S.C. § 15(b) (1970). More difficult to establish than the statute of limitations defense, the "passing on" defense requires the defendant to show not only that the plaintiff increased his price in response to and in the amount of the defendant's overcharge, but also that plaintiff's margin of profit and total sales did not decline. See *Hanover Shoe, Inc. v. United Shoe Machinery Corp.*, 392 U.S. 481 (1968).

Related to the *in pari delicto* defense, although factually different, is the defense of unclean hands. In contrast to *in pari delicto*, which results only where the parties participated in the same illegal act, unclean hands bars recovery when a plaintiff has violated the antitrust laws in a matter unrelated to the defendant's conduct. Courts, however, occasionally have used the terms interchangeably. Compare *Moore v. Mead Serv. Co.*, 184 F.2d 338, 340 (10th Cir.

Underlying this defense are both the judicial policy against unjust enrichment⁸ and the principle that a plaintiff "has no right to complain of the effect of the actions of which he had a part in bringing about."⁹

For the past twenty-five years, however, courts have been reluctant to allow the defense to prevail, since its application substantially dilutes the antitrust laws' function of discouraging anticompetitive conduct.¹⁰ The Supreme Court's 1968 decision in *Perma Life Mufflers, Inc. v. International Parts Corp.*¹¹ was the culmination of this judicial hostility to in pari delicto. In *Perma Life* the Court purported to abolish the in pari delicto defense in federal antitrust actions.¹² Yet, the decision failed to indicate clearly whether in pari delicto was to be inapplicable in all cases. Indeed, the opinion of the Court expressly left open the possibility that antitrust plaintiffs might be barred from recovery where their conduct demonstrated "complete involvement and participation" in the challenged anticompetitive scheme.¹³

Since *Perma Life*, lower courts have continued to grapple with the in pari delicto defense. Although some courts have suggested that *Perma Life* completely abolished the in pari delicto defense,¹⁴ most have held that some form of a fault defense still exists.¹⁵ Among those courts permitting the defense, varying degrees of plaintiff participation have been used to define in pari delicto. While these various approaches appear straightforward, they are potentially difficult to apply and they lack uniformity. Most importantly, they fail to honor fully the purpose of the antitrust laws—maximizing consumer satisfaction by promoting competition. Thus, since courts follow no consistent approach in applying the defense, in pari delicto remains today what one commentator termed it twenty years ago—"the unknown quantity in private antitrust suits."¹⁶

This comment will first chart the history of the in pari delicto defense under the antitrust laws prior to the Supreme Court's decision in *Perma Life*. The *Perma Life* decision and the various approaches to the application of the defense it has engendered then will be analyzed. Finally, it will be submitted that the in pari delicto defense should be abolished except in very rare circumstances, since any more permissive approach effectively lessens competition—a result antithetical to the purpose of the antitrust laws.

1950) (using in pari delicto to mean unclean hands), with *International Tel. & Tel. Corp. v. General Tel. & Elec. Corp.*, 296 F.Supp. 920, 927 (D.Hawaii 1969) (using unclean hands to mean in pari delicto).

⁸ See *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 154 (1968) (Harlan, J., dissenting in part).

⁹ *Davidson v. Kansas City Star Co.*, 202 F.Supp. 613, 616 (W.D. Mo. 1962).

¹⁰ Cf. *Kiefer-Stewart Co. v. Joseph F. Seagram & Sons, Inc.*, 340 U.S. 211 (1951) (abolishing the unclean hands defense in antitrust actions). See text at notes 26-48 *infra* for a discussion of hostility to the in pari delicto defense prior to the Supreme Court's opinion in *Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134 (1968).

¹¹ 392 U.S. 134 (1968).

¹² *Id.* at 140.

¹³ *Id.*

¹⁴ See text at notes 82-88 *infra*.

¹⁵ See text at notes 89-115 *infra*.

¹⁶ Bushby, *The Unknown Quantity in Private Antitrust Suits—The Defense of In Pari Delicto*, 42 VA. L. REV. 785 (1955).

IN PARI DELICTO

I. THE RISE AND FALL — AND RESURRECTION — OF IN PARI DELICTO

A. Lower Court Law

At common law the doctrine of in pari delicto denied relief to a plaintiff who "voluntarily acceded to, fostered and profited" from the practice of which he complained.¹⁷ Although the Sherman Act and its legislative history provided no basis for the availability of the defense in antitrust actions,¹⁸ the federal courts generally embraced the defense¹⁹ following its initial appearance in a 1900 district court case.²⁰ Providing the rationale for

¹⁷ J.O. VON KALINOWSKI, 16N BUSINESS ORGANIZATIONS: *Antitrust Laws and Trade Regulations* § 109.02 (1977 ed.). See *Williams v. Hedley*, 8 East 378, 381-82, 103 Eng. Rep. 388, 389 (1807). Common law courts found in pari delicto a flexible concept. Some jurisdictions interpreted the doctrine to mean only that one who participated in an illegal activity could not recover from his fellow wrongdoers for injuries resulting from their joint endeavor. See *Hall v. Corcoran*, 107 Mass. 251, 259-60 (1871). Other courts applied the defense more broadly to bar recovery on a showing that the plaintiff was guilty of unlawful conduct that was merely connected to his loss. *Whelden v. Chappel*, 8 R.I. 230, 233 (1865).

¹⁸ At the same time that the ultimately-enacted Sherman bill was pending in Congress, two bills had been introduced which authorized as a defense the plaintiff's violation of the antitrust laws in contract actions for the purchase price of goods sold. S. Doc. No. 147, 57th Cong., 2d Sess. (1903). Also under congressional consideration were proposals which would have stripped federal courts of jurisdiction to enforce rights arising out of transactions in violation of the antitrust act. *Id.* See Comment, *Limiting the Unclean Hands and In Pari Delicto Defenses in Antitrust Suits: An Additional Justification*, 54 NW. U.L. REV. 456, 456 n.2 (1959). In addition, some state antitrust statutes in operation at the time the Sherman Act was enacted allowed a defense based on the plaintiff's own violations of state antitrust laws. See, e.g., ILL. ANN. STAT. ch. 121½, § 306 (Smith-Hurd 1959) (repealed 1965). Bushby, *The Unknown Quantity in Private Antitrust Suits—the Defense of In Pari Delicto*, 42 VA. L. REV. 785, 787 (1955). From congressional rejection of all the above approaches, a rejection of in pari delicto might be inferred. Rendering this interpretation less dispositive, however, is the fact that when section 7 of the Sherman Act was recast as section 4 of the Clayton Act the in pari delicto defense had been recognized in the courts for 14 years. That no statutory amendment was made could indicate a congressional ratification of the defense or a legislative belief that the defense was available notwithstanding any express statutory grant. *Id.* at 788. In sum, the legislative history provides no definitive answer to the question whether the defense is to be considered in private antitrust suits.

¹⁹ See, e.g., *Bishop v. American Preservers Co.*, 105 Fed. 845 (N.D. Ill. 1900); *Bluefields S.S. Co. v. United Fruit Co.*, 243 Fed. 1 (3d Cir. 1917); *Eastman Kodak Co. v. Blackmore*, 277 Fed. 694 (2d Cir. 1921); *Tilden v. Quaker Oats Co.*, 1 F.2d 160 (7th Cir. 1924); *Morny v. Western Union Tel. Co.*, 40 F. Supp. 193 (S.D.N.Y. 1940); *Mid-West Theatres Co. v. Co-Operative Theatres of Michigan, Inc.*, 43 F.Supp. 216 (E.D. Mich. 1941); *Northwestern Oil Co. v. Socony-Vacuum Oil Co.*, 138 F.2d 967 (7th Cir. 1943) (dictum), *cert. denied*, 321 U.S. 792 (1944); *Allgair v. Glenmore Distilleries Co.*, 91 F. Supp. 93 (S.D.N.Y. 1950); *Pennsylvania Water & Power Co. v. Consolidated Gas Elec. Light & Power Co.*, 209 F.2d 131 (4th Cir. 1953), *cert. denied*, 347 U.S. 960 (1954); *Singer v. A. Hollander & Son, Inc.*, 202 F.2d 55 (3d Cir. 1953); *National Transformer Corp. v. France Mfg. Co.*, 215 F.2d 343 (6th Cir. 1954); *Affiliated Music Enterprises, Inc. v. Sesac, Inc.*, 17 F.R.D. 509 (S.D.N.Y. 1955); *Louisiana Petroleum Retail Dealers, Inc. v. Texas Co.*, 148 F. Supp. 334 (W.D. La. 1956); *H. & A. Selmer, Inc. v. Musical Instrument Exch. Inc.*, 154 F. Supp. 697 (S.D.N.Y. 1957).

²⁰ *Bishop v. American Preservers Co.*, 105 Fed. 845 (N.D. Ill. 1900). In *Bishop*, the plaintiff entered into an agreement conveying his preserve manufacturing business to the defendant as part of a trust formed in an attempt "to purchase and control the entire manufacture of preserves in the United States." After the conveyance, Bishop continued to operate the business in his own name. A disagreement arose, however, and the defendant took possession of plaintiff's plant by replevin. Thereupon, plaintiff's antitrust counter-suit was dismissed, in part because "plaintiff was himself a party to the illegal combination." *Id.* at 846.

these courts' solicitude toward the doctrine was the believed inequity which would result in permitting a wrongdoer to recover treble damages for illegal behavior in which he participated or where his damages stemmed from his own involvement in the unlawful scheme.²¹ Judicial animus to the defense's anticompetitive effect, however, steadily mounted following this early acceptance.²² Prior to the Supreme Court's half-hearted abolition of *in pari delicto* in *Perma Life*, the federal courts were attempting to delineate the permissible parameters of the defense.

In many cases the public policy favoring private suits was not deemed sufficiently substantial to bar recognition of the *in pari delicto* defense. Accordingly, the doctrine was widely accepted where the plaintiff was a *co-initiator* of an illegal scheme.²³ Whatever damage that befell the plaintiff in such instances was considered to spring directly from his own actions.²⁴ Similarly, involvement in an illegal scheme, even though falling short of co-initiation, could be fatal to the plaintiff's suit if he participated without having been coerced in the same illegal act of which he complained.²⁵ In sum, courts initially applied the *in pari delicto* defense where the plaintiff dealt with the defendant on illegal terms, even where otherwise the plaintiff might have been foreclosed from dealing with the defendant altogether.

However, where the plaintiff showed that his participation in an antitrust violation was dictated by forces of economic coercion, or where a plaintiff prior to initiation of suit had renounced his wrongful participation in an antitrust offense, the judicial concern for the equity between the parties, the rationale underlying the defense, engendered exceptions to the doctrine. Hence, if a plaintiff's only source of supply was through an illegal contract with the defendant,²⁶ or if failure to deal with the defendant would cause the plaintiff to lose his investment in a going enterprise,²⁷ the

²¹ See Comment, *In Pari Delicto and Consent as Defenses in Private Antitrust Suits*, 78 HARV. L. REV. 1241, 1242 (1965).

²² See text at notes 26-32 *infra*.

²³ In one case of this type, two utility companies entered into an illegal agreement in restraint of trade under which each agreed not to construct new facilities without the other's consent. When the plaintiff sought to build additional facilities, the defendant refused to grant its permission, and ultimately the plaintiff was required to go to court to have the contract declared illegal and unenforceable. *Pennsylvania Water & Power Co. v. Consolidated Gas Elec. & Power Co.*, 186 F.2d 934, 937 (4th Cir. 1951). The plaintiff then sued for treble damages based upon lost profits and the increased construction costs caused by the delay. Noting the plaintiff's part in the formation of the agreement, the court denied relief on the basis of *in pari delicto*. 209 F.2d 131, 134 (4th Cir. 1953), *cert. denied*, 347 U.S. 960 (1954). See also *Gaines v. Carrollton Tobacco Bd. of Trade*, 386 F.2d 757, 759 (6th Cir. 1967).

²⁴ *Pennsylvania Water & Power Co. v. Consolidated Gas Elec. Light & Power Co.*, 209 F.2d 131, 135 (4th Cir. 1953), *cert. denied*, 347 U.S. 960 (1954).

²⁵ See, e.g., *Crest Auto Supplies, Inc. v. Ero Mfg. Co.*, 360 F.2d 896, 899-901 (7th Cir. 1966); *Bales v. Kansas City Star Co.*, 336 F.2d 439, 444 (8th Cir. 1964); *Kershaw v. Kershaw Mfg. Co.*, 209 F. Supp. 447, 454 (M.D. Ala. 1962), *aff'd*, 327 F.2d 1002 (5th Cir. 1964); *Lehmann Trading Corp. v. J. & H. Stolow Inc.*, 184 F. Supp. 21 (S.D.N.Y. 1960).

²⁶ See, e.g., *Mandeville Island Farms v. American Crystal Sugar*, 334 U.S. 219, 242-43 (1948); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359, 377 (1927); *Peter v. Western Newspaper Union*, 200 F.2d 867, 870 (5th Cir. 1953); *Banana Distrib., Inc. v. United Fruit Co.*, 162 F. Supp. 32, 37 (S.D.N.Y. 1958).

²⁷ See *Ring v. Spina*, 148 F.2d 647, 652-53 (2d Cir. 1945).

plaintiff's participation in an antitrust violation would be excused for purposes of allowing suit against the coercing defendant. Similarly, courts generally permitted a plaintiff to sue his co-conspirators and recover damages for injury incurred after his withdrawal from the challenged antitrust conspiracy. In the leading case of *Victor Talking Machine Co. v. Kemeny*,²⁸ the plaintiff, a licensed retail dealer of Victor talking machines and accessories, violated the resale price maintenance terms of his contract with the manufacturer. When Victor terminated the dealership, the plaintiff successfully brought suit on the basis of the defendant's having induced other distributors and dealers to refrain from filling plaintiff's orders for Victor products.²⁹ Viewing the plaintiff more as victim than as participant in an antitrust violation, the Third Circuit approved lower court jury instructions stipulating that "it [made] very little difference what may have transpired before" the termination of the contract.³⁰

Significantly, the judicial decision not to invoke in pari delicto in each of these sets of circumstances suffered from the absence of a clearly expressed rationale. Although reference was occasionally made to the "overriding statutory policy of the Sherman Act,"³¹ the purpose of the exceptions developed in the lower courts seemed more attributable to a judicial desire to temper the otherwise harsh result of barring a less culpable injured plaintiff from any form of civil compensation.³²

B. *Fault Defenses From Kiefer-Stewart to Perma Life*

The Supreme Court subsequently rendered academic this lower court deficiency of rationale in creating exceptions to the in pari delicto defense. In two important antitrust decisions, the Court introduced an approach to fault defenses in antitrust actions which held as its central focus the effectuation of the antitrust laws' function in promoting competition. However, neither of these decisions directly addressed the general applicability of the in pari delicto defense.

In the first of these cases, *Kiefer-Stewart Co. v. Joseph E. Seagram and Sons, Inc.*,³³ the Court completely abolished the "unclean hands" defense in antitrust damage actions.³⁴ Kiefer-Stewart had sought treble damages alleging that the Seagrams and Calvert corporations had conspired to sell liquor only to Indiana wholesalers who agreed to resell at prices fixed by the two distilleries. Seagrams and Calvert defended by producing evidence de-

²⁸ 271 Fed. 810 (3d Cir. 1921).

²⁹ *Id.* at 218. See also *Connecticut Importing Co. v. Frankfort Distilleries, Inc.*, 101 F.2d 79, 81 (2d Cir. 1939).

³⁰ *Victor Talking Mach. Co. v. Kemeny*, 271 Fed. 810, 818 (3d Cir. 1921).

³¹ *Johnson v. Joseph Schlitz Brewing Co.*, 33 F. Supp. 176, 179 (E.D. Tenn. 1940) *aff'd*, 123 F.2d 1016 (6th Cir. 1941). See also *Connecticut Importing Co. v. Frankfort Distilleries*, 101 F.2d 79, 81 (2d Cir. 1939).

³² See *Ring v. Spina*, 148 F.2d 647, 653 (2d Cir. 1945).

³³ 340 U.S. 211 (1951).

³⁴ *Id.* at 214-15. For the distinction between in pari delicto and unclean hands, see note 7, *supra*.

signed to show that Kiefer-Stewart itself had agreed with other Indiana wholesalers to set their own liquor prices.³⁵ The Court, however, ruled that a plaintiff in an antitrust suit could not be barred from recovering damages by proof that he had engaged in a conspiracy to commit some unrelated antitrust violation.³⁶ If the allegations of plaintiff's illegal conduct were meritorious, the Court suggested, the plaintiff could be held responsible in appropriate proceedings brought against them by the government or by injured third parties.³⁷ Although unexpressed in *Kiefer-Stewart*, the Court apparently recognized that, absent future suit by a government or some injured third party, if a defendant's unclean hands defense were accepted, both parties would be free to continue their illegal activities, much to the detriment of the public interest.³⁸ Thus, in light of the importance of the Sherman Act's proscription against resale price maintenance³⁹ and group boycotts,⁴⁰ the Court concluded that "the alleged illegal conduct of

³⁵ 340 U.S. at 212-14.

³⁶ *Id.* at 214-15.

³⁷ *Id.* at 214.

³⁸ See *Trebuhs Realty Co., Inc. v. News Syndicate Co., Inc.*, 107 F. Supp. 595, 598-601 (S.D.N.Y. 1952) (applying *Kiefer-Stewart* to a claim for injunctive relief). Since *Kiefer-Stewart* was decided in the context of a damage action, it is unclear whether the unclean hands defense had been abolished in equity. One view suggests that an injunction should be denied where its issuance might enhance a violating plaintiff's illegal position. See Comment, *Antitrust Enforcement by Private Parties: Analysis of Developments in the Treble Damage Suit*, 61 YALE L.J. 1010, 1029-30 (1952). The *Trebuhs* court, however, rejected this argument. Since the plaintiff in an injunctive action ordinarily reaps no windfall benefit and since the plaintiff's action causes the defendant's anticompetitive behavior to cease, the court herein deemed the defense to have less merit in injunctive claims than where a plaintiff was seeking treble damages. 107 F. Supp. at 600-01. See text at notes 116-29 *infra*.

Also unclear is whether *Kiefer-Stewart* fully abolished the "unclean hands" defense in the situation where an antitrust plaintiff seeks to recover damages for injury to an intrinsically illegal business operation. See *Maltz v. Sax*, 134 F.2d 2, 3-5 (7th Cir.), *cert. denied*, 319 U.S. 772 (1943) (manufacture and sale of gambling devices not protected by Sherman Act). It can be safely assumed that Congress did not intend the antitrust laws to protect competition in proscribed markets. Thus, to allow suit in such instances would not be necessary in order to advance the policy of the antitrust laws.

³⁹ See *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911).

⁴⁰ *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 242-43 (1948). See *Fashion Originators' Guild of America v. Federal Trade Commission*, 312 U.S. 457 (1941).

In *Mandeville Island Farms*, California sugar beet refiners, who constituted the only available market for sugar beets grown in their locality, agreed among themselves that their price to the growers with whom they ordinarily contracted to grow beets should be based on the average net returns of all, rather than the separate return of each purchasing refiner. 334 U.S. 219, 222-26. As a consequence, a grower who contracted with the refiner having the largest net return received less for his beets than he otherwise would have realized. *Id.* The Supreme Court, in reversing the Ninth Circuit's dismissal of the action for absence of interstate commerce jurisdiction, considered the defendant's allegation that the plaintiff grower actually benefited by the cartel's pricing scheme. Without referring to cases where the plaintiff himself was involved in anticompetitive activity, the court suggested that the purpose of the antitrust laws in promoting competition should not be diluted by barring suit on the basis of plaintiff's incidental benefit from the complained of conduct.

[The] test of the legality and immunity of such a combination, in view of the statute's policy, is not that some others than the members of the combination, have profited by its operation. It is rather whether the statute's policy has been violated in a manner to produce the general consequences it forbids for the public and the special consequences for particular individuals essential to the recovery of treble damages.

Id. at 243.

[Kiefer-Stewart] ... could not legalize the unlawful combination by [Seagram & Sons] nor immunize them against liability to those then injured."⁴¹ More generally, such unqualified language signalled an apparent Court belief that the congressional opposition to restraints of trade was not to be weakened by judicial dilution of the antitrust remedies.

In a second important case, *Simpson v. Union Oil Co.*,⁴² the Court gave implicit recognition to the "coercion" exception to the in pari delicto defense. *Simpson* involved a suit by an operator of a leased gasoline station against his lessor-supplier. The operator initially had acquiesced in the supplier's mandatory resale price terms.⁴³ When the plaintiff subsequently sold gasoline below the fixed price in order to meet competition, the defendant oil company retaliated by refusing both to renew plaintiff's lease and to supply him with further gasoline.⁴⁴ The Court held that the defendant's conduct constituted illegal resale price maintenance.⁴⁵ In so holding, the Court did not expressly address the general propriety of the in pari delicto defense; but by allowing the plaintiff's suit to lie, the Court in effect ratified the "coercion" exception to the doctrine. Indicative of its approval of the "coercion" exception was the Court's description of the relationship between the parties in *Simpson* as one where "dealers are coercively laced into an arrangement under which their supplier is able to impose non-competitive prices on thousands of persons whose prices otherwise might be competitive."⁴⁶ Thus, the Court concluded that any complicity in the illegal pricing scheme that might be ascribed to the plaintiff's initial acquiescence was overshadowed by the disparate bargaining position between the parties.⁴⁷

Nevertheless, *Simpson* was not a clear articulation of the "coercion" exception. Consequently, it left unresolved the standard by which courts were to determine whether plaintiffs had no economic alternative other than to deal with defendants on the latter's illegal terms.⁴⁸ Thus, *Simpson*, while consistent with *Kiefer-Stewart* in advancing the Court's antipathy toward fault defenses in private antitrust litigation, accomplished little in the way of clarifying the general applicability of in pari delicto in antitrust suits.

In *Perma Life Mufflers, Inc. v. International Parts Corp.*,⁴⁹ the Court finally confronted in pari delicto directly. In a majority opinion which expressed both a rejection of the idea that common law defenses are proper in light of the statutory policy in favor of competition, and an affirmation of the validity of the "coercion" exception to the in pari delicto defense, the Court affirmed its rulings in *Kiefer-Stewart* and *Simpson*.⁵⁰ However, more so

⁴¹ 340 U.S. at 214.

⁴² 377 U.S. 13 (1964).

⁴³ *Id.* at 14-15.

⁴⁴ *Id.* at 15.

⁴⁵ *Id.* at 24.

⁴⁶ *Id.* at 21.

⁴⁷ *Id.*

⁴⁸ In several lower court cases prior to *Simpson*, alternatives available to the plaintiff had been seen as insufficiently undesirable to allow the court to conclude that the plaintiff had been compelled to deal with the defendant. See, e.g., *Davidson v. Kansas City Star Co.*, 202 F. Supp. 613, 620 (W.D. Mo. 1962); *Allgair v. Glenmore Distilleries Co., Inc.*, 91 F. Supp. 93, 97 (S.D.N.Y. 1950).

⁴⁹ 392 U.S. 134 (1968).

⁵⁰ See text at notes 54-66 *infra*.

than in the preceding cases, the opinion in *Perma Life* produced marked divisions among members of the Court. Although seven members of the Court concurred in the result of the case, only five justices joined in the Court's opinion which stressed that the interest in promoting competition should take precedence over any concern for the unjust enrichment of unworthy plaintiffs. A minority of the Court would have reversed this priority of concerns.⁵¹ Moreover, even among members of the majority there was no firm acceptance of a broad principle forever banishing in *pari delicto* from private antitrust litigation.⁵²

The *Perma Life* plaintiffs were franchisees who operated "Midas Muffler Shops" under franchise agreements with defendants, Midas Inc. and International Parts Corp. The plaintiffs profited as franchisees and sought to obtain additional franchises, but objected to terms of the franchise agreement which barred the purchase of outside supplies, forbade sales outside a designated area or of products other than those of the defendants, and fixed resale prices. After the defendants refused to eliminate these unlawful restrictions in the franchise agreement, the franchisees, some of whom had cancelled their old agreements, initiated an action seeking treble damages.⁵³ In reversing the Seventh Circuit's judgment upholding application of in *pari delicto*,⁵⁴ the Court, in an opinion delivered by Justice Black, initially observed the absence of a statutory justification for the defense.⁵⁵ More significantly, the Court emphasized the "inappropriateness" of applying "common law barriers to relief" to private suits endowed with public purposes.⁵⁶ Citing *Kiefer-Stewart* and *Simpson*, the Court flatly rejected the claim that unworthy antitrust plaintiffs should be denied recovery:

The plaintiff who reaps the reward of treble damages may be no less morally reprehensible than the defendant, but the law encourages his suit to further the overriding public policy in favor of competition. A more fastidious regard for the relative moral worth of the parties would only result in seriously undermining the usefulness of the private action as a bulwark of antitrust enforcement. And permitting the plaintiff to recover a windfall gain does not encourage continued violations by those in his position since they remain fully subject to civil and criminal penalties for their own illegal conduct.⁵⁷

In light of this "overriding policy in favor of competition," the Court held that the common law notion of in *pari delicto* was not to be recognized as a defense in antitrust suits.⁵⁸ Yet, in later language the Court

⁵¹ See text at note 67 *infra*.

⁵² See text at notes 68-74 *infra*.

⁵³ 392 U.S. at 135, 137.

⁵⁴ 376 F.2d 692, 699 (7th Cir. 1967). The court of appeals noted that each plaintiff had enthusiastically sought its Midas franchise with knowledge of the restrictive provisions and that plaintiffs had all made large profits and had sought additional dealerships. Under these circumstances, the court indicated, "it would be difficult to visualize a case more appropriate for in *pari delicto*." *Id.*

⁵⁵ 392 U.S. at 138.

⁵⁶ *Id.*

⁵⁷ *Id.* at 139 (citation omitted).

⁵⁸ *Id.* at 140.

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effectively admitted that the case could have been decided without a holding which totally abolished the defense. The decision of the court of appeals was reversible, the Court stated, because an *in pari delicto* defense could not be maintained where a plaintiff only "[has] participated to the extent of utilizing illegal arrangements formulated and carried out by others."⁵⁹ By this standard, the *Perma Life* plaintiffs escaped any legal blame because "their participation was not voluntary in any meaningful sense,"⁶⁰ since, in the Court's view, the plaintiffs accepted most of the restrictive requirements only as a necessary condition to obtaining an attractive business opportunity.⁶¹ Thus, stated otherwise, the Court could have decided in the plaintiffs' favor simply by applying the "coercion" exception to the *in pari delicto* doctrine.

In addition to its evident misgivings concerning total abolition of the defense, the Court limited the damages available to an *in pari delicto* plaintiff by indicating that whatever "beneficial byproducts" accrue to a plaintiff from an anticompetitive conspiracy should be used to offset the plaintiff's damages.⁶² This damage approach was viewed as a substitute for a general inquiry that would scrutinize an illegal agreement in a clause-by-clause fashion to determine which restraints operated to the plaintiff's advantage.⁶³

Consequently, despite the *Perma Life* Court's firm assertion that common law defenses should play no role in private antitrust suits, the majority opinion itself—by suggesting a damage-offset rule⁶⁴—proposed an inquiry into the relative fault of the plaintiff. More importantly, the Court, in summarily dismissing the defendants' claim that the franchisees actually supported the illegal agreement from the start,⁶⁵ expressly left open the question of whether "truly complete involvement and participation in a monopolistic scheme could ever be a basis, wholly apart from the idea of *in pari delicto*, for barring a plaintiff's cause of action"⁶⁶

Nevertheless, the Court's opinion clearly established that the common law defense of *in pari delicto* was not to operate—at least by that name—in antitrust damage actions. The majority opinion, however, left for the determination of the lower courts whether a plaintiff's complicity in an antitrust violation could ever be so egregious as to overcome the statutory policy favoring the bringing of suit.

A minority of the Court disagreed with this reasoning. For these Justices, subordination of the public interest favoring competition was war-

⁵⁹ *Id.* at 139.

⁶⁰ *Id.*

⁶¹ *Id.* at 139-40. The Court observed that several of the clauses were disadvantageous to the franchisees and that they had consistently objected to them. *Id.*

⁶² *Id.* at 140.

⁶³ See *id.* at 148-53 (Marshall, J., concurring in the result). Under the approach rejected by the Court, damages would be appropriate only for injuries resulting from clauses not included for the plaintiff's benefit. See text at 150-152 *infra*.

⁶⁴ 392 U.S. at 140. See text at 149-51 *infra*.

⁶⁵ 392 U.S. at 140-41. The Court pointed to record evidence disclosing numerous instances where franchisees sought to purchase goods from other sources of supply. A typical response from the defendant-franchisor was that non-compliance with any terms of the franchise agreement was "heresy" or, as one Midas official expressed it, "grounds for divorce." *Id.* at 141.

⁶⁶ *Id.* at 140.

ranted where to do otherwise would provide a windfall for a plaintiff implicated in unlawful conduct. Unlike the majority view expressed by Justice Black, the approach advocated by Justices Fortas, Marshall, Harlan, and Stewart, as indicated in three separate opinions, embraced a balancing test which, in varying degrees, weighted the interest in doing equity between the parties more heavily than the interest in promoting competition.⁶⁷

Against this background stood the mediating opinion of Justice White. While Justice White was nominally a member of the majority, having expressly joined in the opinion of the Court, his opinion reflected a substantial compromise of principle from Justice Black's essentially firm position eschewing common law barriers to antitrust enforcement. For purposes of divining the meaning of *Perma Life*, though, Justice White's opinion might be the more important statement. Justice White's opinion, when coupled with those of the four Justices in the minority, may be considered the fifth of a majority willing to deny a plaintiff recovery where the plaintiff and defendant are at equal fault, even though his opinion, taken together with the views of Chief Justice Warren, Justices Black, Brennan and Douglas constituted a majority willing to abolish the doctrine by name.

Beginning from the same premise as did Justice Black, that the historic concept of *in pari delicto* was a burden upon the efficient administration of the antitrust laws,⁶⁸ Justice White stopped far short of suggesting that the entire doctrine be abolished. In contrast to Justice Black, who had declined to decide whether "complete participation" could constitute a defense, Justice White openly supported barring recovery, "where plaintiff and defendant bear substantially equal responsibility for injury resulting to one of them."⁶⁹ In reaching this conclusion, Justice White examined the deterrent effect of potential antitrust liability upon three hypothetical cases. In one case, where a distributor sues a supplier for losses attributable to the supplier's resale price maintenance program, Justice White stated that the deterrent aims of the antitrust laws would be served by permitting suit, since it would discourage holders of market power and leverage from coercively engaging in illegal conduct.⁷⁰ Conversely, in a second case, where a

⁶⁷ Justice Harlan, for example, advocated retention of the defense on moral grounds alone. The majority's purported abolition of the doctrine, he suggested cynically, amounted to "sanction[ing] a kind of antitrust enforcement that rests upon a principle of well-compensated dishonor among thieves." *Id.* at 154 (Harlan, J. dissenting in part). In contrast, Justice Marshall, concurring in the result, indicated that any added deterrence to violations of the antitrust laws that would be engendered by the Court's holding was more than overshadowed by the "new incentive" to commit such violations when potential conspirators can recover from their associates any losses attributable to the scheme. *Id.* at 151 (Marshall, J., concurring in the result).

⁶⁸ See text at notes 56-57 *supra*.

⁶⁹ 392 U.S. at 146 (White, J., concurring). Relevant proof in this context Justice White indicated, would consist of

facts as to the relative responsibility for originating, negotiating, and implementing the scheme; evidence as to who might reasonably have been expected to benefit from the provision or conduct making the scheme illegal . . . ; proof of whether one party attempted to terminate the arrangement and encountered resistance or counter-measures from the other; facts showing who ultimately profited or suffered from the arrangement.

Id. at 146-47.

⁷⁰ *Id.* at 145. See *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927).

distributor sells less of a supplier's product because of a restriction imposed by the supplier, Justice White found "no reason based on the deterrent purposes of § 4 to permit [the supplier's] recovery."⁷¹ Likewise, in a third case, where two competitors fix prices which, in turn, work to their mutual detriment in the market, Justice White would deny recovery. To do otherwise, he indicated, could be a "counter deterrent," which "by assuring . . . illegal profits if the agreement in restraint of trade succeeds, and treble damages if it fails . . . may encourage what the Act was designed to prevent."⁷² On the basis of the reasoning in these hypothetical cases, Justice White impliedly advanced the notion that the degree of a plaintiff's responsibility in an antitrust conspiracy is an accurate measure of his market power. As a corollary, he also seemed to suggest that the antitrust laws were intended to deter chiefly, if not exclusively, the anti-competitive practices of those possessing leverage in the market.⁷³ Thus, by finding a correlation between the degree of fault—the minority's concern—and the degree of deterrence from potential antitrust liability—the chief consideration of the majority—Justice White was able to bring together the division of opinion on the Court.⁷⁴

What emerged from *Perma Life*, therefore, was a wounded—but surviving—in pari delicto defense. If there were to be no in pari delicto defense in antitrust suits after *Perma Life*, there apparently was to be a defense based on Justice White's concurring opinion and those of the *Perma Life* minority, which very much resembled the old "equal fault" doctrine.⁷⁵ Unlike the official majority in *Perma Life*, which had declined so to rule, this reconstituted majority answered in the affirmative the question of whether a "total and complete participation" defense could exist independently of the prior notions of in pari delicto.

II. IN PARI DELICTO AFTER *PERMA LIFE*

A. Damage Actions

The lower federal courts since *Perma Life* have engaged in an uneasy search for the accurate interpretation of the *Perma Life* decision. While courts appear to hold uniformly that a plaintiff will not be barred from seeking treble damages where he is merely the incidental beneficiary of a restrictive clause in an otherwise injurious scheme,⁷⁶ Justice Black's implied

⁷¹ 392 U.S. at 145 (White, J., concurring).

⁷² *Id.* at 146.

⁷³ See text at notes 71-72 *supra*.

⁷⁴ In a fifth opinion Justice Fortas, concurring only in the result, adopted a position most similar to that of Justice White. Unlike Justice White, however, Justice Fortas advocated a standard that focused simply on the relative degree of fault of the parties, without any reference to the deterrent effect of disallowing the defense in any given case. See 392 U.S. at 147 (Fortas, J., concurring in the result).

⁷⁵ See Handler, *Through the Antitrust Looking Glass*, 57 CAL. L. REV. 182, 201 (1969); Millstein, *Current Status of Affirmative Defenses, Including the Passing-On Defense, In Pari Delicto, and Statutes of Limitations*, 38 ANTITRUST L.J. 111, 115 (1968).

⁷⁶ See, e.g., *Greene v. General Foods Corp.*, 517 F.2d 635 (5th Cir. 1975); *El Saito, S.A. v. P.S.G. Co.*, 444 F.2d 477 (9th Cir.), cert. denied, 404 U.S. 940 (1971); *Sahm v. V-1 Oil Co.*, 402 F.2d 69 (10th Cir. 1968); *Kane v. Martin Paint Stores*, 1976-1 Trade Cas. ¶ 60,743 (S.D.N.Y. 1976); *American Motor Inns, Inc. v. Holiday Inns, Inc.*, 365 F. Supp. 1073 (D.N.J. 1973), *aff'd*, 521 F.2d 1230 (3d Cir. 1975).

suggestion that an antitrust defense based on plaintiff's fault could exist "wholly apart" from in pari delicto⁷⁷ has not provoked a consistent response. A limited number of courts have read Justice Black's *Perma Life* opinion to signal the end of the defense's viability in antitrust suits.⁷⁸ The overwhelming majority of courts that have ruled on in pari delicto since *Perma Life*, however, have expressed a willingness to permit in pari delicto defenses where the plaintiff has been shown, in Justice White's words, to have borne "substantial equal responsibility" for the complained of illegal activity.⁷⁹ Notwithstanding this trend to allow some form of a revised in pari delicto defense, courts are by no means uniform in the tests which they have chosen to implement the principle. While the majority view requires equal participation at the formation of an anticompetitive conspiracy,⁸⁰ some courts have adopted more flexible standards which demand lesser amounts of culpability.⁸¹

Only one court has expressly declared *Perma Life* to stand for the total rejection of a "fault" defense in antitrust suits. In *Morton v. National Dairy Products Corp.*⁸² the United States District Court for the Eastern District of Pennsylvania bluntly stated that the in pari delicto defense "has been completely negated by the Supreme Court in *Perma Life* . . ."⁸³ A few other courts have expressed doubt as to whether the defense is at all applicable. For example, in *Greene v. General Foods Corp.*⁸⁴ the Fifth Circuit easily dismissed a claim of in pari delicto because the court found a "great disparity" between plaintiff and defendant in terms of antitrust culpability and benefits conferred by the complained of scheme.⁸⁵ In reaching this result, the court "seriously question[ed]" whether in pari delicto was still viable after *Perma Life*.⁸⁶ However, for two reasons, *Greene* and cases employing similar language should not be read to preclude further application of an in pari delicto defense by these courts. First, such language is often only

⁷⁷ See text at note 65 *supra*.

⁷⁸ *Morton v. National Dairy Prod. Corp.*, 287 F. Supp. 753 (E.D. Pa. 1968). See *Greene v. General Foods Corp.*, 517 F.2d 635 (5th Cir. 1975); *Schokbeton Prd. Corp. v. Exposaic Indus., Inc.*, 308 F. Supp. 1366 (N.D. Ga. 1969).

⁷⁹ See, e.g., *Javelin Corp. v. Uniroyal, Inc.*, 546 F.2d 276 (9th Cir. 1976), *cert. denied*, 97 S. Ct. 2651 (1977); *Dreibus v. Wilson*, 529 F.2d 170 (9th Cir. 1975); *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3 (4th Cir. 1971); *Premier Electrical Const. Co. v. Miller-Davis Co.*, 422 F.2d 1132 (7th Cir.), *cert. denied*, 400 U.S. 828 (1970); *Midway Enterprises Inc. v. Petroleum Marketing Corp.*, 375 F. Supp. 1339 (D. Md. 1974); *Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp.*, 58 F.R.D. 357 (S.D.N.Y. 1973).

⁸⁰ See, e.g., *Premier Electrical Const. Co. v. Miller-Davis Co.*, 422 F.2d 1132 (7th Cir.), *cert. denied*, 400 U.S. 828 (1970); *South-East Coal Co. v. Consolidation Coal Co.*, 434 F.2d 767 (6th Cir. 1970).

⁸¹ See, e.g., *Dreibus v. Wilson*, 529 F.2d 170 (9th Cir. 1975); *Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp.*, 58 F.R.D. 357 (S.D.N.Y. 1973).

⁸² 287 F.Supp. 753 (E.D. Pa. 1968). *Morton* involved certain charges of monopolization and price discrimination by a Pennsylvania milk producer against a large national milk distributor. *Id.* at 754.

⁸³ *Id.* at 765. Since the defendants prevailed on the merits, this interpretation of *Perma Life* was never appealed.

⁸⁴ 517 F.2d 635, 646-47 (5th Cir. 1975).

⁸⁵ *Id.* at 647.

⁸⁶ *Id.*

⁸⁷ See *id.*

dicta.⁸⁷ Second, since *Perma Life* should be read to bar suit by "complete and total participation" plaintiffs,⁸⁸ behavior more egregious than that found in cases such as *Greene* may constitute an in pari delicto barrier even in these courts.

In contrast to those courts which have claimed or suggested that in pari delicto is completely abolished, most courts' rulings on the defense have been guided by Justice White's formulation of "substantial equal responsibility."⁸⁹ In perhaps the leading case since *Perma Life*, *Premier Electrical Construction Co. v. Miller-Davis Co.*,⁹⁰ the Seventh Circuit considered the antitrust claim of a disappointed electrical subcontractor who alleged that a general contractor and a competitor-subcontractor conspired to induce the latter's competitors to submit artificially inflated bids for a large government project to the general contractor's competitors.⁹¹ Reversing the district court's summary invocation of in pari delicto against the plaintiff, which had submitted such artificially inflated bids,⁹² the Seventh Circuit interpreted *Perma Life* to hold "only that plaintiffs who do not bear equal responsibility for creating and establishing an illegal scheme, or who are required by economic pressures to accept such an agreement, should not be barred from recovery simply because they are participants."⁹³ Conversely, the court impliedly held that if the plaintiff bears equal responsibility for creating the illegal scheme and has not been coerced by economic pressure to accept such an agreement, participation in the scheme may be an affirmative defense.⁹⁴

Tests similar to that adopted in *Premier Electrical* have been adopted in the Fourth⁹⁵ and Sixth⁹⁶ Circuits. However, the Fourth Circuit's opinion in *Columbia Nitrogen Corp. v. Royster Co.*⁹⁷ needlessly clouds the rule the court was seemingly attempting to set forth. In *Columbia Nitrogen* the court examined an in pari delicto defense alleged in response to an antitrust claim based upon reciprocal dealing practices.⁹⁸ The court interpreted

⁸⁷ See text at note 75 *supra*.

⁸⁸ 392 U.S. at 146 (White, J., concurring). See text at notes 68-69 *supra*.

⁸⁹ 422 F.2d 1132 (7th Cir.), *cert. denied*, 400 U.S. 828 (1970).

⁹⁰ *Id.* at 1134-35. The defendant in *Premier Electrical* was a general contractor who had requested bids from several electrical subcontractors, including Premier, in preparation of his bid on a project. *Id.* at 1134. The day before sealed bids were to be opened by the general contractor, plaintiff and defendant allegedly agreed that Premier would get the tentative offer if it would submit higher bids to the general contractor's competitors. *Id.* at 1135. Plaintiff complied with the inflated bid scheme, but was denied the subcontract after the defendant was awarded the general contract. *Id.* Thereupon, Premier brought suit alleging that the general contractor and the electrical subcontractor which eventually got the job had conspired to induce the subcontractor's competitors to submit artificially inflated bids to the general contractor's competitors. *Id.*

⁹¹ 292 F.Supp. 213, 218-19 (N.D. Ill. 1968). The district court, solely on the basis of allegations in the pleadings, concluded that "Premier was an originating, moving, active and aggressive party to the illegal bid-rigging scheme." *Id.* at 219.

⁹² *Premier Electrical*, 422 F.2d at 1138.

⁹³ See *General Beverage Sales Co.-Oshkosh v. East Side Winery*, 396 F. Supp. 590, 593 (E.D. Wis. 1975).

⁹⁴ *Columbia Nitrogen Corp. v. Royster Co.*, 451 F.2d 3, 15-16 (4th Cir. 1971).

⁹⁵ *South-East Coal Co. v. Consolidation Coal Co.*, 434 F.2d 767, 784 (6th Cir. 1970).

⁹⁶ 451 F.2d 3 (4th Cir. 1971).

⁹⁷ *Id.* at 13. Royster executed a three-year contract for the sale of phosphate to Columbia. *Id.* at 7. Prior to this contract, Royster had been a major purchaser of nitrogen from Columbia, but Columbia had never been a significant purchaser of any product from Royster. *Id.*

Perma Life to "teach that when parties of substantially equal economic strength mutually participate in the formulation and execution of the scheme and bear equal responsibility for the consequent restraint of trade, each is barred from seeking treble damages from the other."⁹⁹ While it appears from the context of the opinion that the court was saying no more than did the *Premier Electrical* court, the "equal economic strength" language used in *Columbia Nitrogen* potentially is susceptible of misinterpretation. Read by itself the language suggests a prerequisite for invoking the defense based principally on the nature of past dealings between the parties or on their relative financial size. Despite the fact that subsequent language in the opinion strongly indicates that the Fourth Circuit meant to adopt the *Premier Electrical* standard,¹⁰⁰ the use of this ambiguous expression may make the *in pari delicto* test troublesome to apply in the Fourth Circuit.

A variation of the *Premier Electrical* approach, allowing the defense only in more limited circumstances, recently has been adopted by the Ninth Circuit. In *Javelin Corp. v. Uniroyal Inc.*,¹⁰¹ the court declared that an *in pari delicto* defense in an antitrust suit lies only where the plaintiff is shown to be indispensable in the creation of the complained of conspiracy.¹⁰² *Javelin* involved suit by a wholesale tire distributor who sought treble damages against a tire purchasing cartel, from which it had been expelled for failure to fulfill its sales quota.¹⁰³ The district court granted summary judgment for the defendants since *Javelin* was *in pari delicto* in the alleged illegal territorial allocation and tying arrangement.¹⁰⁴ In reversing this decision, the Ninth Circuit emphasized that the policy behind *Perma Life* mandated that only in "rare" circumstances should a plaintiff be denied recovery in a private antitrust suit on account of his own illicit participation.¹⁰⁵ These circumstances, the court continued, were to be limited "to where a plaintiff participated in the formation of the conspiracy."¹⁰⁶ Furthermore, the court in interpreting Justice White's concurring opinion, expressed a second qualification for the defense, holding it to bar only those plaintiffs who *but for* their participation could have halted the conspiracy's creation.¹⁰⁷

Shortly after the execution of the phosphate sales contract, however, the market price of phosphate dropped substantially below the contracted price. *Id.* *Columbia*, thereupon, refused to take further delivery, and Royster sued for contract damages. *Id.* at 13. Based upon past reciprocal dealing practices, *Columbia* lodged an antitrust counterclaim. *Id.*

⁹⁹ *Id.* at 15-16 (emphasis added).

¹⁰⁰ *See id.* at 16.

¹⁰¹ 546 F.2d 276 (9th Cir. 1976), cert. denied, 97 S. Ct. 2651 (1977).

¹⁰² *Id.* at 279.

¹⁰³ *Id.* at 277-78. Founded in 1967, *Javelin* initially was capitalized poorly and thus sought membership in a purchasing group in order to market an identifiable brand of tires. After joining Tire Brands, Inc., and becoming a Uniroyal distributor, *Javelin* was assigned an exclusive marketing area. Owing to its unique marketing procedure, *Javelin* showed unusual profits and it soon marketed three brands of tires of its own. Decreasingly dependent on the Uniroyal brand, *Javelin* was expelled from Tire Brands in 1972 for failure to maintain an acceptable level of quota sales. In 1973 *Javelin* brought suit alleging several antitrust violations, including a horizontal conspiracy to allocate exclusive territories. *Id.*

¹⁰⁴ *Id.* at 278.

¹⁰⁵ *Id.* at 279.

¹⁰⁶ *Id.* (emphasis added).

¹⁰⁷ *Id.* at 279-80 n. 3. The *Javelin* court stated: "In adopting this standard, we agree with Justice White, concurring in *Perma Life*, that the problem of who is entitled to recover is one of degree of responsibility posing 'the issue of causation in particularized form.'" *Id.*

For the *Javelin* defense to operate, therefore, a plaintiff must have been an indispensable party who was present at the formation of the illegal scheme. Hence, the plaintiff in *Javelin*, which entered the cartel five years after its creation, was not barred by its own fault from seeking antitrust relief.¹⁰⁸ Significantly, the court indicated that it would remain "a question of fact for the jury" to determine if founding members of the conspiracy would themselves be barred from suit on the basis of this additional "but for" test.¹⁰⁹ This statement represents an admission of the possibility of permitting suit among founding conspiracy members where, because of their numbers, responsibility becomes difficult to ascertain. It thus dramatizes a limitation in Justice White's articulated approach. If the objective of his notion of in pari delicto is to bar suit where plaintiffs have engaged in "truly complete participation in a monopolistic scheme," then to allow suit by active joint conspirators only because none was indispensable to the enterprise is an anomalous result. The implication of this outcome is that "complete participants" in an antitrust conspiracy can immunize themselves from an in pari delicto defense by numerically fortifying their conspiracy.

Rather than move in the direction of greater restriction of the in pari delicto defense, as did the *Javelin* court, several other courts have extended *Premier Electrical* in the opposite direction by adopting standards authorizing use of the defense where plaintiffs' conduct is less than "equal participation at the conspiracy's creation." For example, the United States District Court for the Southern District of New York has stated that to establish the in pari delicto defense defendants need demonstrate only that "plaintiffs' participation in the conspiracy reached the same degree of involvement and culpability as that of defendants and that plaintiffs, deliberately and of their own volition, actively supported the illegal scheme for their own self-interest."¹¹⁰ Under this standard, which evidently finds maintaining an illegal conspiracy just as odious as creating one, the *Javelin* plaintiffs would have been barred from suit. Another liberal approach to the in pari delicto defense was taken in *Dreibus v. Wilson*,¹¹¹ where a different panel of Ninth Circuit judges than that which decided *Javelin* approved a lower court's interpretation of *Perma Life* stipulating that merely "a high degree of involvement" in the illegal act could warrant invoking the defense.¹¹² Since the *Dreibus* court failed to clarify what constitutes a sufficiently "high degree of involvement," it is problematic just how little involvement might be required before the defense would apply.¹¹³

¹⁰⁸ *Id.* at 280.

¹⁰⁹ *Id.* at 279-80.

¹¹⁰ *Skouras Theatres Corp. v. Radio-Keith-Orpheum Corp.*, 58 F.R.D. 357, 360 (S.D.N.Y. 1973).

¹¹¹ 529 F.2d 170 (9th Cir. 1970).

¹¹² *Id.* at 174.

¹¹³ In addition, the district court in *Dreibus* appears to have erroneously applied its own in pari delicto test, producing a result which might be read as a nullification of the rule which permits co-conspirators to recover after withdrawing from the conspiracy. See *Victor Talking Mach. Co. v. Kemeny*, 271 Fed. 810 (3d Cir. 1921) and text at notes 29-30 *supra*. Both plaintiff and defendant in *Dreibus* were 50 percent stockholders of a joint venture corporation which had profited under an exclusive distributorship of Italian velvet for use in manufacturing furniture. 529 F.2d at 171. Following a dispute between the parties, the plaintiff sued, alleging that the defendant had caused the joint venture firm's exclusive contract to lapse for

In sum, the *Perma Life* progeny in the federal courts have produced several different standards to effectuate barring damage recovery for "total and complete" in pari delicto plaintiffs in antitrust suits. However, it is submitted that Justice White's "substantial equal fault" formulation is the accurate representation of the Court's position on the doctrine,¹¹⁴ and, accordingly, *Perma Life* should be read to permit the defense only where it can be shown that the plaintiff voluntarily participated in the illegal scheme from the outset and was equally responsible for carrying out its objectives.¹¹⁵ In this regard, the *Premier Electrical* test, which applies to plaintiffs that have played an equal part in the creation and functioning of a complained of antitrust conspiracy, appears to be the most accurate reflection of the narrow view of in pari delicto that evidently would have been sanctioned by a majority of the Court. Moreover, in light of what seems the correct reading of *Perma Life*, the *Javelin* "but for" test, which would bar from suit only indispensable conspirators, appears overly constrictive. Likewise, the standard approved in *Dreibus*—a "high degree of involvement"—is also undesirable as it might potentially be applied to deny recovery to more plaintiffs than those contemplated by the *Perma Life* Court.

B. Actions for Injunctive Relief

As is the case with courts of law, equity courts continue to disagree on the availability of a fault defense in actions for injunctive relief under the antitrust laws.¹¹⁶ Since neither *Keifer-Stewart* nor *Perma Life* involved plain-

the purpose of recapturing the exclusive—and illegal—contract for itself. *Id.* at 171-72. Once having re-established the distributorship, the defendant allegedly barred the joint venture corporation from obtaining any further supply of Italian velvet. *Id.* On the basis of the plaintiffs' involvement in the establishment of the original exclusive, and monopolistic, distributorship, the district court held that the plaintiff was barred from recovering damages for business losses occurring after the termination of its participation. *Id.* at 174.

The *Dreibus* decision may be explained in part by the form in which the suit was brought. Since the plaintiff sued as a stockholder in the joint venture corporation seeking damages for its lost profits, it clearly was vulnerable to the traditional in pari delicto defense that operates where a plaintiff seeks to protect intrinsically illegal activity, see *Maltz v. Sax*, 134 F.2d 2, 5 (7th Cir.), cert. denied, 319 U.S. 772 (1943); see note 39 *supra*, in this case a monopoly in the velvet market. Although the district court did not articulate expressly an "intrinsically illegal activity" theory of the defense, it probably was mindful of the capacity in which the plaintiff sued. However, at the time of suit the plaintiff was no longer a monopolist. Thus, in ruling as it did, the court evidently ignored the well-established principle that allows a co-conspirator to recover damages occurring after his withdrawal from the illegal activity. See *Victor Talking Mach. Co. v. Kameny*, 271 Fed. 810 (3d Cir. 1921).

¹¹⁴ See text at note 75 *supra*. The concurring opinion of Justice White, when combined with the views of the *Perma Life* minority, provides compelling authority for the existence of a "complete participation" defense. Moreover, Justice White's opinion is the only authority that speaks directly to the question left unanswered in the majority opinion in *Perma Life*. Justices Fortas, Marshall, and Harlan's opinions provide less guidance, because these justices, unlike Justice White, declined to join the Court's rejection of the common law version of antitrust in pari delicto.

¹¹⁵ See J.O. VON KALINOWSKI, 16N BUSINESS ORGANIZATIONS: *Antitrust Laws and Trade Regulation* § 109.02 (1977 ed.).

¹¹⁶ 15 U.S.C. § 26 (1970), provides that:

Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, as against threatened loss or damage by a violation of the anti-

tiffs seeking injunctive relief, courts have questioned the applicability of these decisions to such actions. In *Columbia Pictures Industries Inc. v. American Broadcasting Co., Inc.*,¹¹⁷ independent film producers and distributors sought a temporary injunction against ABC's exhibition of its own "made for television" films, which were attacked as illegal "self-dealing" under the antitrust laws.¹¹⁸ The Second Circuit denied the injunction, finding that the movie companies' unrelated practice of "block booking"¹¹⁹ constituted a form of unclean hands.¹²⁰ The court expressly distinguished *Perma Life*, reasoning that the public policy question involved in the issuance of temporary injunctions, even in antitrust cases, was whether the public interest would be served by condemnation in advance of trial, not whether the complained-of conduct restrained competition.¹²¹ In a sharp dissent, Judge Lumbard argued that the allegation of block booking should carry "no weight" against *Perma Life's* instructions regarding the "inappropriateness of invoking broad common law barriers" to private relief that serves an important public purpose.¹²² This case, the dissent suggested, should be decided solely on the basis of the merits of plaintiffs' antitrust allegations.¹²³

Judge Lumbard's concerns were similarly and more fully expressed by the United States District Court for the Northern District of Illinois in *Skil Corp. v. Black & Decker Manufacturing Co.*¹²⁴ The *Skil Corp.* court found the defense inapplicable in antitrust injunctive actions¹²⁵ because the strong public interest in terminating anticompetitive conduct made "any incidental benefit to the plaintiff" a "worthwhile price" to pay for antitrust enforcement.¹²⁶ By refusing to recognize the defense where only an injunction is sought, the court indicated that the public would be protected from anti-

trust 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, and upon the execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue . . .

¹¹⁷ 501 F.2d 894 (2d Cir. 1974).

¹¹⁸ *Id.* at 895-96. ABC's exhibition of its own films, it was alleged, eliminated the need to buy outside films, thus depriving the movie producers of a principal market for feature films. Plaintiffs also asserted a first amendment claim, arguing that the public interest demanded that "the widest possible dissemination from diverse and antagonistic sources" be made available on television. *Id.* at 896.

¹¹⁹ "Block booking" required ABC to license feature films in groups which included low quality films as well as more desirable ones. *Id.* at 898-99.

¹²⁰ *Id.*

¹²¹ *Id.* at 899. For other cases suggesting continued vitality of a "fault defense" in private antitrust actions seeking equitable relief see *Singer v. A. Hollander & Son, Inc.*, 202 F.2d 55, 60 (3d Cir. 1953); *Heldman v. United States Lawn Tennis Assoc.*, 354 F. Supp. 1241, 1249 (S.D.N.Y. 1973); *Graham v. Triangle Publications, Inc.*, 233 F. Supp. 825, 832 (E.D. Pa. 1964); *Louisiana Petroleum Retail Dealers, Inc. v. Texas Co.*, 148 F. Supp. 334, 337 (W.D. La. 1956).

¹²² 501 F.2d at 901-02 (Lumbard, J., dissenting).

¹²³ *Id.*

¹²⁴ 351 F. Supp. 65 (N.D. Ill. 1972). The *Skil Corp.* court was asked to enjoin the defendant's alleged price discrimination, tying, and other anticompetitive conduct. The defendant, in turn, challenged this motion by contending that the plaintiff had sought to involve it in a conspiracy to fix prices. *Id.* at 66.

¹²⁵ *Id.*

¹²⁶ *Id.*

competitive conduct with no danger, as arguably present in damage actions,¹²⁷ that businessmen would be encouraged to enter anticompetitive conspiracies.¹²⁸

It is submitted that the *Skil Corp.* holding is the sounder approach to apply in antitrust injunctive actions. Such an approach satisfies both of the concerns expressed in the *Perma Life* opinions—discouraging anticompetitive conduct and preventing unjust enrichment. A conspirator's knowledge that he later may be able to enjoin the illegal conspiracy in which he participates, where he otherwise would be barred by a fault defense, would probably play no part in a potential conspirator's decision to collude. Further, by disclosing the conspiracy he risks his own exposure and liability without the offset of treble damages. Thus, the abolition of a fault defense in antitrust actions for injunctive relief facilitates enforcement of the antitrust laws without the possible deleterious side-effect of providing "compensated dishonor among thieves."¹²⁹

With respect to both damage and injunctive actions under the antitrust laws, the trend is to recognize in *pari delicto* defenses only in limited circumstances. By paying special attention to Justice White's concurring opinion in *Perma Life*, courts have attempted to accommodate the two policies of providing effective antitrust enforcement and of avoiding judicial sanctioning of unjust enrichment. This attempted accommodation, however, has weakened the deterrent force of the antitrust laws. It has produced a variety of "equal fault" standards which variously require extensive adjudication, yield inequitable results, or are vague in application. The net result of this development, it is submitted, is the discouragement of private suit due to the unnecessary injection of complication and uncertainty into antitrust litigation.

III. A PROPOSAL: GENERAL ABOLITION OF IN PARI DELICTO FROM PRIVATE ANTITRUST SUITS

Given the confusion surrounding the present status of the in *pari delicto* defense, now is the time for Congress or the Supreme Court to reconsider its availability in private antitrust actions.¹³⁰ If the purpose of section 4 of the Clayton Act¹³¹—promoting competition—is to be honored, in *pari delicto* should be abolished completely from all private antitrust actions except those where the public interest in discouraging anticompetitive behavior is absent. Such an abolition would have a number of salutary effects. Most importantly, removal of in *pari delicto* from the corpus of anti-

¹²⁷ See text at note 71 *supra*, and notes 36-37 *infra*.

¹²⁸ 351 F. Supp. at 66. See Comment, *Unclean Hands—The Effect of Plaintiff's Antitrust Violations in Antitrust Actions*, 113 U. PA. L. REV. 1071, 1086-89 (1965); see also *Magna Pictures Corp. v. Paramount Pictures Corp.*, 265 F. Supp. 144, 149 (C.D. Cal. 1967); *Hawaiian Tuna Packers, Ltd. v. International Longshoremen's & Warehousemen's Union*, 72 F. Supp. 562, 567 (D. Hawaii 1947).

¹²⁹ See *Perma Life*, 392 U.S. at 154 (Harlan, J., dissenting in part).

¹³⁰ Reconsideration of in *pari delicto* under the antitrust laws seemingly would be within the scope of the Presidential Commission on the Antitrust Laws, which will sit during 1978. Among the Commission's major tasks will be to review existing antitrust immunities and exemptions, as well as to consider means to expedite lengthy antitrust cases. N.Y. Times, Oct. 13, 1977, § D, at 3, col. 1.

¹³¹ See text at notes 1-5 *supra*.

trust law would increase the cost of anticompetitive conduct and thereby reduce the willingness of any firm or person to participate in an antitrust violation. In addition, this reform would eliminate the diverse tests now being applied to implement the defense, preclude forum shopping, and end the current uncertainty with respect to damages in cases where in pari delicto is rejected.

The guidelines enunciated in Justice White's concurring opinion¹³² presently bar lower federal courts from adopting a more sweeping rejection of in pari delicto than that set forth by the *Perma Life* court. In attempting to harmonize deterrence considerations with those relating to the equities between the parties,¹³³ however, Justice White grounded his arguments on a questionable economic base. Although chiefly concerned with avoiding unjust enrichment problems, Justice White premised permissible invocation of in pari delicto on his economic belief that in certain kinds of cases the possibility of suit would either fail to deter or, in fact, encourage anticompetitive behavior.

Justice White argued that where a small distributor accedes to a manufacturer's poorly conceived price fixing agreement, with the result of reducing the latter's sales, suit by the manufacturer against the cooperating distributor should be barred.¹³⁴ He characterized this kind of arrangement as one where "[the distributor] was unwilling to enter the illegal scheme, was motivated principally by what he thought was economic necessity—the need to avoid losing business by being unable to offer a major product line—and would have been only marginally deterred by the prospect of antitrust liability."¹³⁵ To the contrary, however, such a small businessman would be most vulnerable to the threat of paying treble damages. Since he can least afford the expense of such a judgment, the mere possibility of recovery against him should chill his acquiescence in any illegal scheme.¹³⁶ Moreover, by creating such a deterrent, small businessmen generally would abstain from engaging in such illegal conduct, thereby substantially eliminating the ability of a large supplier or manufacturer to sponsor antitrust violations.

Justice White would also permit the invocation of in pari delicto to bar suit between the parties where two competitors engage in an illegal conspiracy, to the detriment of one but not of the other. In this situation, he contended, permitting recovery could encourage unlawful combinations "by assuring . . . illegal profits if the agreement in restraint of trade succeeds, and treble damages if it fails . . ."¹³⁷ From an economic perspective, however, this proposition is questionable. Although it may be argued that the possibility of such reward discourages businessmen from seeking substitutes or finding ways of avoiding damages,¹³⁸ the more plausible view is

¹³² See text at notes 68-74 *supra*.

¹³³ *Id.*

¹³⁴ 392 U.S. at 145 (White, J., concurring).

¹³⁵ *Id.* at 145-146.

¹³⁶ See text at notes 139-41 *infra*.

¹³⁷ 392 U.S. at 146 (White, J., concurring).

¹³⁸ See Breit & Elzinga, *Antitrust Enforcement and Economic Efficiency: The Uneasy Case for Treble Damages*, 17 J.L. & ECON. 329, 335 (1974); Comment, *Unclean Hands—The Effect of Plaintiff's Antitrust Violations in Antitrust Actions*, 113 U. PA. L. REV. 1071, 1082 (1965). Several courts have denied damages where to allow their award was believed to act as an incentive to incur

that the abolition of *in pari delicto* in such cases makes cartel formation riskier and, thus, less likely to occur.¹³⁹

As rational profit maximizers, potential conspirators figure into the cost of their conduct the probability of successful antitrust enforcement and consequent damages.¹⁴⁰ When those closest to the conspiracy are not barred from recovery, the probability of getting caught, and hence the cost of engaging in anticompetitive conduct, is necessarily increased.¹⁴¹ Compounding the risk of unlawful collusion is the fact that once disclosed in court, a defendant's action may render him liable to further civil action or possible government prosecution. Moreover, the recent *parens patriae* amendment to the antitrust laws,¹⁴² allowing state attorneys general to bring actions on behalf of the consumers in their states, reinforces the deterrent effect of antitrust disclosure by increasing the likelihood of suit.¹⁴³

To an extent, abolition of *in pari delicto* also can be squared with the minority view in *Perma Life* that desired courts to avoid becoming parties to the distribution of "compensated dishonor among thieves."¹⁴⁴ It should be remembered that even in the most egregious cases of "complete involvement," indeed especially so, the plaintiff who is implicated in illegal activity risks losing whatever recovery he may obtain in court by the possibility of later suit by consumers or by government prosecution. Since the government does not shoulder the financial burden for private enforcement, and

them. See, e.g., *American Can Co. v. Russelville Canning Co.*, 191 F.2d 38, 55 (8th Cir. 1951); *Sun Cosmetic Shoppe v. Elizabeth Arden Sales Corp.*, 178 F.2d 150, 153 (2d Cir. 1949) (L. Hand, J.).

¹³⁹ See R. POSNER, *ECONOMIC ANALYSIS OF LAW* § 25.2, at 360 (1973); Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1968).

Unfortunately, it is doubtful whether policymakers will ever have access to empirical data which will indicate conclusively if the availability of the *in pari delicto* defense actually encourages or discourages participation in anticompetitive conspiracies. Deterrence studies are difficult, if not impossible, to perform with scientific accuracy. See Wheeler, *Antitrust Treble Damage Actions—Do They Work?*, 61 CALIF. L. REV. 1319, 1320 (1973).

¹⁴⁰ See Becker, *Crime and Punishment: An Economic Approach*, 76 J. POL. ECON. 169 (1969).

¹⁴¹ See Loevinger, *Private Action—the Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167, 167 (1959).

Voluntary compliance as a matter of conscience must always be regarded as the broadest base for the effectiveness of any law. However, in the field of competitive business—which is the area of concern for antitrust—the conscientious businessman who desires to observe the law may be forced by competition of the less scrupulous to disregard it unless there is effective and reasonably certain enforcement. For this, as well as for other reasons, the degree of voluntary compliance with a law depends to a large extent on expectation of vigorous and certain enforcement action.

¹⁴² 15 U.S.C.A. §15C (Supp. 1977).

¹⁴³ A problem beyond the scope of this comment is the unfortunate fact that disclosure of the basis of antitrust settlements is too often withheld from public view. Since consumers bear the brunt of anticompetitive conduct through the payment of higher prices, the antitrust laws should be more cognizant of the public's inability to pierce the veil of corporate commerce to see questionable business practices. See Comment, *Wrongs Without Remedy: The Concept of Parens Patriae Suits for Treble Damages under the Antitrust Laws*, 43 S. CAL. L. REV. 570 (1970). A suggested approach might be to require public disclosure of settled antitrust cases. Since a subsequent consumer damage award could be staggering, the antitrust laws' deterrent effect would be additionally increased. See also Blair, *The Sherman Act and the Incentive to Collude*, 17 ANTITRUST BULL. 433, 435 (1972); Stigler, *A Theory of Oligopoly*, 72 J. POL. ECON. 44 (1965).

¹⁴⁴ See Note, *Rethinking In Pari Delicto: An Antitrust Policy Analysis*, 3 FLA. ST. L. REV. 360, 374 (1975).

the co-conspirators pay the damages, the public is a third-party beneficiary of the suit through the deterrent effect it creates. This fact should discount substantially any moral hostility felt by the court in awarding damages to an antitrust offender. Moreover, since public policy is the basis for the judicial animus towards unjust enrichment, it is not inconsistent for the in pari delicto defense to be abolished, as the defense's abrogation serves to implement the predominant statutory policy of promoting competition. In other areas of the law the defenses of in pari delicto and unclean hands have abated where a greater public good would be promoted.¹⁴⁵

In addition to enhancing the deterrent power of the antitrust laws by making cartel formation potentially costlier,¹⁴⁶ abolition of in pari delicto would have the beneficial effects of standardizing the diverse tests presently being applied and of relieving uncertainty with respect to damages in cases where in pari delicto is rejected. In light of Justice Black's perfunctory treatment of the evidentiary requirements for proving a coercive bargaining situation¹⁴⁷ and his failure to describe more specifically what constitutes complete participation in a monopolistic scheme,¹⁴⁸ it is not surprising that the courts interpret *Perma Life* with substantial variation. But the uncertainty surrounding these terms clouds the deterrent effect of the law by providing potential avenues of escape for antitrust defendants. To this extent, the likelihood of anticompetitive conduct is probably increased by retention of the defense.

Furthermore, due to these uncertain standards and their variation from court to court, it is probable that antitrust litigation is needlessly prolonged and that antitrust plaintiffs and defendants shop for the most favorable forum. Both of these effects undercut the deterrent force of the antitrust laws and burden the judicial system. By adopting a single uniform national standard—abolishing the defense except in certain easily-identifiable situations—the policy of the antitrust laws, promoting competition, which formed the primary concern of even the *Perma Life* court,¹⁴⁹ would best be advanced.

In addition, abolition of in pari delicto would enable Congress or the Court to end any uncertainty attending the proper measure of damages in cases where in pari delicto is raised but not sustained. In *Perma Life*, Justice Black noted that "the possible beneficial byproducts of a restriction from a plaintiff's point of view" could be considered in computing damages where the plaintiff was not barred from suit.¹⁵⁰ Interpretations of this language, however, may result in discouraging suit, since it is not clear whether this standard was meant to imply that gains from one restrictive provision can offset losses attributable to another, that damages are to be weighed against

¹⁴⁵ See Comment, *Limiting the Unclean Hands and In Pari Delicto Defenses in Antitrust Suits: An Additional Justification*, 54 NW. U. L. REV. 456, 462-64 (1959).

¹⁴⁶ See text at notes 139-41 *supra*.

¹⁴⁷ Justice Black gave no hint whether the existence of even one restrictive provision which did not favor the plaintiff, such as a restriction on dealing in the goods of a competitor, could provide the basis for a conclusion of coercion. See 392 U.S. at 140-41.

¹⁴⁸ *Id.* at 140. See text at notes 150-52 *infra*.

¹⁴⁹ 392 U.S. at 139. See text at notes 56-57 *supra*.

¹⁵⁰ 392 U.S. at 140 (1968). See *Kestenbaum v. Falstaff Brewing Corp.*, 514 F.2d 690, 695 (5th Cir. 1975).

a comparison of profits with and without the illegal scheme,¹⁵¹ or simply that there are no damages available where there is no injury shown.¹⁵² If either of the first two interpretations is followed, the Supreme Court's attempt to avoid awarding a windfall may result in deterring suit, and thereby, in preventing public disclosure of the entire anticompetitive scheme. By unequivocally adopting the third interpretation, that there are no damages available where no injury is shown, the purposes of the antitrust laws would be served best, because a plaintiff would not be discouraged from suit by the possibility that his recovery would be reduced by the amount of his gains under the anticompetitive scheme.

Any abolition of *in pari delicto*, however, should be qualified by two exceptions. First, where a plaintiff seeks to protect his own illegal activity,¹⁵³ *in pari delicto* should remain viable. The antitrust laws are not concerned with promoting competition where the ultimate economic transactions are unlawful.¹⁵⁴ Secondly, an *in pari delicto* plaintiff should not be allowed to bring suit against an antitrust defendant on the basis of a final judgment or decree rendered in a civil or criminal proceeding brought by the United States.¹⁵⁵ To allow such recoveries would serve no additional disclosure function, while at the same time the recoveries could reduce the resources available for distribution to worthier plaintiffs.

CONCLUSION

Although the Supreme Court in its 1968 *Perma Life* decision purported to abolish the defense of *in pari delicto* in private antitrust actions, few courts have suggested that the defense has no vitality whatsoever. Most courts have indicated a willingness to bar antitrust recovery at least to plaintiffs who are shown to have been "truly complete participants" in an anticompetitive conspiracy.

No court, however, has been able to advance a satisfactory rationale for denying recovery to such plaintiffs, when such results almost certainly derogate from the policy of promoting competition. It is submitted that the rule that would best implement the antitrust policy of discouraging anti-

¹⁵¹ See Note, 82 HARV. L. REV. 260, 265-66 (1968).

¹⁵² See *Perma Life*, 392 U.S. at 152 (Marshall, J., concurring in the result). For a discussion of the existence of "no damage" antitrust violations see generally Areeda, *Antitrust Violations Without Damage Recoveries*, 89 HARV. L. REV. 1127, 1138-39 (1976).

¹⁵³ See *Maltz v. Sax*, 134 F.2d 2 (7th Cir.), cert. denied, 319 U.S. 772 (1943). See note 39 *supra*.

¹⁵⁴ It is not contemplated, of course, that an antitrust plaintiff would be barred on the basis of unrelated evidence indicating non-compliance with state licensing or regulatory law. See, e.g., *Semke v. Enid Automobile Dealers Ass'n*, 456 F.2d 1361 (10th Cir. 1972); *Health Corp. of America, Inc. v. New Jersey Dental Ass'n*, 1977-1 Trade Cas. ¶ 61,232 (D.N.J. 1977). Only where the economic activity is intrinsically illegal would the plaintiff be barred from anti-trust suit.

¹⁵⁵ Section 5(a) of the Clayton Act, 15 U.S.C. § 16(a) (1970), provides that such a judgment

shall be prima facie evidence against such defendant in any action or proceeding brought by any other party against such defendant under said laws or by the United States under Section 15(a) . . . as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto. . . .

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competitive conspiracies would be the abolition of in pari delicto in all cases except those in which the plaintiff seeks to protect his own illegal activity or where he attempts to reap the benefit of a prior government antitrust judgment. Such an approach would have the beneficial effect of increasing the probability that an antitrust violator will become subject to antitrust penalties. Concomitantly, this added deterrence factor should discourage the formation of illegal cartels and conspiracies, thereby ensuring that fewer antitrust violations occur.¹⁵⁶

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¹⁵⁶The in pari delicto defense also has been the subject of controversy under federal securities laws. While some courts have adopted the defense, *see, e.g.*, *Kuehnert v. Texstar Corp.*, 412 F.2d 700 (5th Cir. 1969); *Lantz v. Wedbush, Noble, Cooke, Inc.*, 418 F. Supp. 653 (D. Alas. 1976), at least one commentator has attacked this development as undercutting the objectives of the securities laws. *See* Comment, *In Pari Delicto as a Bar to Tippee's Recovery Under Rule 10b-5: The Concept of "Public Interest" in Trade Regulation Compared*, 11 B.C. IND. & COM. L. REV. 257 (1970).