The Availability of Antitrust Treble Damages for Commodities Market Manipulation

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Recommended Citation

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THE AVAILABILITY OF ANTITRUST TREBLE DAMAGES FOR COMMODITIES MARKET MANIPULATION

Introduction

In 1976, two of the largest potato processors in the country conspired to manipulate the Maine potato futures market. They hoped that by creating the appearance of a large supply, potato prices would drop. Consistent with this theory, they purchased an enormous amount of "short" contracts, thus obligating themselves to sell millions of pounds of potatoes that they could not deliver. This created a false impression that large supplies of potatoes were available and prices fell dramatically. Ordinarily, they would have either had to offset their positions by purchasing an equal amount of "long" contracts, or make actual delivery. They did neither. The largest default in the history of commodities futures trading followed. The low prices had devastating effects on both producers and investors.

From 1979 to 1980, silver prices fluctuated drastically because of an alleged conspiracy by several large investors, led by the Hunt brothers, to corner the world silver market. A congressional investigation revealed that the episode destabilized the entire futures industry and the securities markets, disrupted industrial and commercial operations, contributed to the inflationary spiral, and potentially jeopardized the financial well-being of futures commission merchants, their parent companies, the futures exchanges, clearinghouses and banks.

The Commodity Exchange Act (CEA) expressly prohibits this commodity market price manipulation. The Sherman Act outlaws

3. Id.
4. Id.
5. Id. at 23.
6. Id. at 25.
10. See 7 U.S.C. §§ 9, 13(b), 13b (1982). The CEA contains numerous provisions designed to prevent or punish manipulation of the price of any commodity in interstate commerce or any exchange traded commodity futures contract. For instance, the Commodity Futures Trading Commission (CFTC) will not designate a board of trade as a contract market unless "the governing board thereof provides for the prevention of manipulation of prices and the cornering of any commodity by the dealers or operators upon such board." Id. § 7(d). "The Commission is authorized . . . to direct the contract market, whenever it has reason to believe that an emergency [threatened or actual market manipulations and corners] exists, to take such action as . . . is necessary to maintain or restore orderly trading in or liquidation of any futures contract . . . ." Id. § 12a(9). In
spiration to restrain trade. The Supreme Court has interpreted "restraint of trade" to include conspiracy to manipulate markets. Consequently, some activity will violate both statutes. Whether the same conduct is actionable under both statutes, however, invites question. This question is particularly important because the CEA limits recovery for violations of the Act to actual damages, while the antitrust laws provide for treble damages.

Courts have split on whether Congress intended the antitrust laws to regulate commodity market manipulation. One district court held that the "specific remedy" rule precluded application of the Sherman Act and limited plaintiffs to the CEA action. That court distinguished its analysis from implied repeal of the antitrust laws. The Second Circuit, in Strobl v. New York Mercantile Exchange, rejected this distinction, reasoning that to give effect to congressional intent in these cases, courts add

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19. Plaintiffs mischaracterize the issue as whether the 1974 amendments to the CEA impliedly repealed the antitrust laws. But the question we face is merely whether plaintiffs may pursue different remedies, one which is aimed at the precise conduct alleged to have been committed by defendants, and the other which is aimed at a universe of conduct, of which defendants' alleged acts constitute just a small set.
must allow plaintiffs to pursue their antitrust claims.\textsuperscript{21} \textit{Strobl} arose out of the manipulation of the potato futures market.\textsuperscript{22} The large-scale default on numerous delivery contracts disrupted the market,\textsuperscript{23} producing much litigation.\textsuperscript{24} In \textit{Strobl}, the plaintiff successfully pleaded both CEA antimanipulation and antitrust causes of action.\textsuperscript{25} The decision, however, concerned individual traders\textsuperscript{26} with no duty to self-regulate under the CEA; an award of antitrust damages therefore did not conflict with CEA purposes. The holding should be limited to such traders, and not applied to exchanges acting in conformity with, for example, rules approved by the Commodity Futures Trading Commission (CFTC).

This Note discusses whether parties can maintain both CEA and antitrust causes of action arising from the same conduct. Part I suggests a framework for analyzing this problem, reconciling implied repeal with the specific remedy rule. In Part II that framework will be used to determine whether Congress intended the antitrust laws to apply to commodity market manipulation. Part III examines the public policy considerations of allowing antitrust actions for commodities violations. This Note concludes that antitrust treble damages should be available in commodity market manipulation actions.

\section*{I. Developing an Analytical Framework}

The controversy over whether the antitrust laws apply in commodity market manipulation cases stems largely from confusion over implied repeal and the specific remedy rule.

\textbf{A. Implied Repeal}

When a court finds a statute repealed by implication, it refuses to allow a cause of action that would otherwise be available.\textsuperscript{27} Implied repeal

\begin{footnotesize}
\begin{itemize}
  \item \textsuperscript{21} See \textit{id.} at 30.
  \item \textsuperscript{22} \textit{Id.} at 23.
  \item \textsuperscript{23} \textit{Id.} at 24-25.
  \item \textsuperscript{25} See \textit{Strobl}, 768 F.2d at 30-31.
  \item \textsuperscript{26} See \textit{id.} at 23.
  \item \textsuperscript{27} In some cases, an act is completely repealed by another. "[W]here two acts are not in express terms repugnant, yet if the latter act covers the whole subject of the first, and embraces new provisions, plainly showing that it was intended as a substitute for the first act, it will operate as a repeal of that act." United States v. Tynen, 78 U.S. (11 Wall.) 88, 92 (1870). In other cases, the repeal is more specific. For instance, the antitrust laws have been impliedly repealed by various statutes for limited purposes, see, e.g., Terminal Warehouse Co. v. Pennsylvania R.R., 297 U.S. 500, 514-15 (1936) (Interstate Commerce Act); United States Nav. Co. v. Cunard S.S. Co., 284 U.S. 474, 483 (1932) (Shipping Act), but they have survived in general and remain applicable to most other situations where the act complained of falls within their confines. See Hughes Tool Co. v. TWA, 409 U.S. 363, 387, 389 (1973).
\end{itemize}
\end{footnotesize}
hinges on interpretation of congressional intent. A law is impliedly repealed when it defeats the purpose of a later enacted law. A strong presumption operates against finding implied repeal because statutes should be read together to give effect to the legislative policies of both. Hence, courts require clear evidence that the legislature intended the statute not to apply before they will infer its repeal. When courts find a repeal of the antitrust laws, it is because of an obvious conflict with another statute.

One kind of conflict is based on the “exclusive jurisdiction” of an administrative agency. When a party challenges the conduct of a member of a regulated industry under the antitrust laws, courts sometimes find


29. See United States v. Borden Co., 308 U.S. 188, 198-99 (1939). Thus, where the policy benefits of enforcing one law outweigh the policy costs of displacing another, the competing statutes have to be reconciled. See S.S.W., Inc. v. Air Transp. Ass’n of Am., 191 F.2d 658, 661 (D.C. Cir. 1951), cert. denied, 343 U.S. 955 (1952). Implied repeal accomplishes that. ABA Antitrust Section, Antitrust Law Developments 599, 600-02 (2d ed. 1984).


34. The conflict was described succinctly in S.S.W., Inc. v. Air Transp. Ass’n of Am., 191 F.2d 658 (D.C. Cir. 1951), cert. denied, 343 U.S. 955 (1952): “The Sherman Act . . . and related laws represent an attempt to keep the channels of competition free so that prices and services are determined by the workings of a free market.” Regulation of a specific industry, on the other hand, “evidences congressional recognition that competition can assure protection of the public interest only in an industrial setting which is conducive to a free market and can have no place in industries which are monopolies because of public grant, the exigencies of nature, or legislative preference for a particular way of doing business.” The aircraft industry, like railroads and power, is one in which Congress had decided that the public interest is best served, not by free competition, but rather by direct and uniform regulation by an “agency authorized to supervise almost every phase of the regulated company’s business.” Id. at 661 (quoting Pennsylvania Water & Power Co. v. Federal Power Comm’n, 193 F.2d 230, 234 (D.C. Cir. 1951) (footnotes omitted); see McLean Trucking Co. v. United States, 321 U.S. 67, 79-86 (1944). However, even finding substantial regulation is not sufficient to infer intent to repeal the antitrust laws with respect to every action taken within the industry. National Gerimedical Hosp. v. Blue Cross, 452 U.S. 378, 389 (1981).
that Congress intended the governing regulatory agency to have exclusive authority to oversee the conduct.\textsuperscript{35} Disputes arising from that activity should be settled with regard to the applicable statute, not the antitrust laws.\textsuperscript{36} The regulatory agencies, and not the courts, have the requisite expertise for setting standards and determining if they have been met.\textsuperscript{37} Were aggrieved parties allowed to seek judicial relief for antitrust violations "without resort in the first instance to the [appropriate] regulatory commission, the unity of the system of regulation [would break] down beyond repair."\textsuperscript{38}

A second conflict arises out of the self-regulatory nature of an industry such as commodities or securities trading.\textsuperscript{39} Self-regulation reduces competition.\textsuperscript{40} For instance, in the commodities industry, trades must be executed by registered members\textsuperscript{41} of various licensed exchanges.\textsuperscript{42} These exchanges have their own rules limiting membership\textsuperscript{43} and trading procedures.\textsuperscript{44} Thus, nonmembers cannot compete freely in the markets. When exchange rules, orders or procedures have been challenged under the antitrust laws,\textsuperscript{45} exemption has been allowed in cases in which the policies underlying self-regulation would be furthered.\textsuperscript{46}

\begin{itemize}
\item \textsuperscript{41} See 7 U.S.C. §§ 6d-6f, 6h, 6k, 6n (1982).
\item \textsuperscript{42} See id. §§ 7, 7a, 7b, 8.
\item \textsuperscript{43} See 1 P. Johnson, supra note 14, § 1.06, at 14-15.
\item \textsuperscript{44} See id. §§ 2.86-87, at 350-51.
\item \textsuperscript{45} See, e.g., Chicago Mercantile Exch. v. Deaktor, 414 U.S. 113, 113-14 (1973) (per curiam) (claims that the exchange had forced the sale of commodities futures contracts at artificial prices and had failed to exercise due care in halting manipulative conduct); Ricci v. Chicago Mercantile Exch., 409 U.S. 289, 298-99 (1973) (claim that exchange arbitrarily transferred a membership).
\item \textsuperscript{46} See Seligson v. New York Produce Exch., 378 F. Supp. 1076, 1104 (S.D.N.Y.)
\end{itemize}
Congress did not intend the industries to be completely immune from antitrust laws, however. On the contrary, the "guiding principle" for reconciling the antitrust laws with a regulatory statute is that "[r]epeal is to be regarded as implied only if necessary to make the [regulatory act] work, and even then only to the minimum extent necessary." 47

B. The Specific Remedy Rule

Overlapping statutes, as opposed to conflicting ones, 48 may be reconciled under the specific remedy rule. When a general statute is comprehensive enough to include the situation for which a provision of another statute specifically affords a remedy, courts will apply the special provision alone. 49 The general provision will apply when the specific provision does not. 50

This rule creates a logical shortcut to determining legislative intent. 51 The rule presumes that by specifically addressing a certain situation, Congress intended to create an exception to the general statute. But the rules does not apply where clear evidence shows Congress did not want the general provision displaced. 52

Implied repeal and the specific remedy rule involve opposite presumptions: Do not assume that one statute implicitly repeals another in the absence of clear legislative intent. Assume that a specific statute displaces a more general one in the absence of clear legislative intent. The primary goal of statutory interpretation—following the intent of the leg-

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48. The situation addressed in this Note is one of overlap, not conflict, because the statutory provisions in question cover the same conduct, market manipulation. See supra notes 9-14.
51. See American Medical Ass'n v. Mathews, 429 F. Supp. 1179, 1196 (N.D. Ill. 1977) ("In the case of competing and overlapping statutes, legislative intent is most reliably expressed in the statute where the attention to detail and to precision are the most manifest.").
islature resolves this contradiction. The presumptions against implied repeal and in favor of specific over general are rebuttable and should merely be "kept in mind" when interpreting legislative intent.

Close analysis of cases relying on the specific remedy rule reveals that courts do not distinguish between the rule and implied repeal. Whatever the semantic differences between the rules, their effect is the same: a law that fits certain facts will not be applied to those facts.

II. CONGRESSIONAL INTENT

When two laws cover the same activity, one more specifically than the other, congressional intent to displace the more general law will probably be found. This presumption fails where Congress expressed its intent to leave the general law intact. Congress manifested its intent that the CEA antimanipulation provision leave the antitrust laws intact with respect to private defendants.


55. To assume . . . that the mere passage of a specific statute covering an area of conduct also regulated by a more general statute limits enforcement of the general statute by carving out an exception to it, is, in effect, to accomplish a partial repeal of the general statute. Repeals by implication are not favored; effect should be given to overlapping statutes if possible.


56. See supra notes 47-50 and accompanying text.

57. See supra note 51 and accompanying text.


59. If the defendant is an exchange acting in conformity with rules approved or subject to approval by the CFTC or acting pursuant to CFTC direction or suggestion or acting in a manner later ratified by the CFTC, a different conclusion would be warranted. For example, exchange action or inaction in the face of market manipulation is an exercise of self-regulation as the exchanges are statutorily mandated to provide for the prevention of market manipulation. See 7 U.S.C. § 7(d) (1982); see also id. § 12a(9). Such decisions are immune from antitrust attack under Silver. See supra notes 39-46 and accompanying text. Because exchange rules and regulations must be submitted to and approved by the CFTC, 7 U.S.C. § 12 (1982), action in accordance with those policies must be provided antitrust immunity so that the CEA can operate effectively. Cf. Gordon v. New York Stock Exch., Inc., 422 U.S. 659, 689-90 (1975) (securities case).
A. The Legislative History

The hearings on the 1974 amendments to the CEA show that Congress wanted the antitrust laws to apply to the commodities industry. At first, the House considered giving the industry antitrust immunity. Early in the consideration of the bills, however, the legislators dropped this antitrust exemption. The House committee did not want to extend antitrust immunity beyond that already provided by Silver v. New York Stock Exchange, which they believed adequately protected the industry's ability to self-regulate. That case provided for the implied repeal of the antitrust laws when necessary to make the regulatory act work.

Thus, rather than providing immunity, its drafters tried to reconcile the CEA with the antitrust laws. The final version of the "antitrust provision" directed the CFTC to consider "the public interest to be protected by the antitrust laws and endeavor to take the least anticompetitive means of achieving the objectives and policies of the CEA." Evidence of congressional intent also comes from statements concerning the "exclusive jurisdiction" of the CFTC. The Senate committee considering the bill made it clear that the antitrust laws were to continue

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60. See H.R. 11,955, 93d Cong., 1st Sess. § 106 (1973) (adding § 17 to the CEA). Notwithstanding any other provision of law, a contract market, registered futures association established pursuant to section 15 of this Act, or person registered under the provisions of this Act who is acting pursuant to and in accordance with... any bylaw, rule, or regulation of a contract market which has been required or specifically approved by the Commission as provided in this Act, shall be exempt from the antitrust laws of the United States...

63. The Committee considering the bill was relying on statements made to it by the Justice Department during considerations of H.R. 11,955. See H.R. Rep. No. 975, 93d Cong., 2d Sess. 27-28 (1974) (citing Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963)). Any statutory exemption would be unnecessary because Supreme Court decisions already provided antitrust immunity for Commission-mandated activity, see id., and for those exchange activities approved by the Commission, so long as they are necessary to make the Act work, cf. Silver v. New York Stock Exch., 373 U.S. 341, 357 (1963) (securities case).
64. See supra text accompanying note 46.
65. Subsection (b) of § 17 was retained by the House, and certain changes were made in the Senate. For a complete discussion of the progression of the antitrust provision through Congress, see Johnson, Antitrust Under the CFTC Act: An Ounce of Prevention..., 20 Antitrust Bull. 441 (1975).
67. Id. The antitrust provision and its history are not directly relevant to this Note because violations of the CEA's antimanipulation provisions do not involve Commission-mandated or approved activity. See Pollock v. Citrus Assocs., 512 F. Supp. 711, 716 (S.D.N.Y. 1981). It does, however, shed light on the concern Congress had about the antitrust laws during consideration of the CFTCA. See Strax v. Commodity Exch., Inc., 524 F. Supp. 936, 940 (S.D.N.Y. 1981); Pollock, 512 F. Supp. at 716.
68. The CFTC was given exclusive jurisdiction over commodity transactions. See 7 U.S.C. § 2(a)(ii) (1982).
to apply to the futures trading industry. 69

The most extensive testimony concerning the antitrust laws came from Representative Peter Rodino, Chairman of the House Judiciary Committee, who stressed the close relationship that the futures industry shared with the antitrust laws. 70 He feared that the clause granting exclusive jurisdiction to the CFTC might be interpreted as stripping the district courts' antitrust jurisdiction. 71 At his urging, the final version of the exclusive jurisdiction provision protected the federal courts' antitrust jurisdiction. 72

It has been argued that because Congress had considered and rejected bills authorizing treble damages for CEA violations, 73 Congress intended

69. Senator Talmadge, Chairman of the Committee on Agriculture, said:

In establishing this Commission, it is the committee's intent to give it exclusive jurisdiction over those areas delineated in the act. This will assure that the affected entities—exchanges, traders, customers, et cetera—will not be subject to conflicting agency rulings. However, it is not the intent of the committee to exempt persons in the futures trading industry from existing laws or regulations such as the antitrust laws . . . .


The nature of commodity futures markets demonstrates the peculiar intimacy and special relationship these markets have with the fundamental national legal, economic, and social policies expressed in our antitrust laws since enactment of the Sherman Act in 1890. . . .

. . . By insuring the applicability of the antitrust laws to the commodity future industry, the purposes of these laws, "the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress," . . . will be promoted as well as protected.

. . . . [In successive years, wheat, soybeans, and corn have been subjected to anticompetitive and monopolistic practices in commodity markets that have significantly contributed to food prices charged consumers. These developments indicate the urgency of apply [sic] antitrust principles to commodity markets unequivocally . . . .

Id. at 258-59 (citation omitted) (quoting Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958)).

71. See Hearings on S. 2485, S. 2578, S. 2837, and H.R. 13113 before the Senate Agriculture and Forrestry Comm., 93d Cong., 2d Sess. 259-60 (1974). Though the exclusive jurisdiction section "saved" the jurisdictions of the Securities and Exchange Commission and other regulatory agencies, no provision had been inserted to save the antitrust jurisdictions of the federal courts. Id.


to eliminate antitrust causes of action. However, these rejections are of little relevance to whether Congress intended antitrust laws to apply to commodities market manipulation. The legislative history reveals that courts should give the antitrust laws full effect. The rejections of treble damages for CEA violations do not weaken this conclusion, and thus should not be used to imply the repeal of the antitrust laws.

B. The Failure of the Securities Exchange Act Analogy

The Securities Exchange Act of 1934 (1934 Act) prohibits stock market manipulation just as the CEA prohibits manipulation of the commodity markets. In cases in which plaintiffs have alleged violations of both the 1934 Act's manipulation provisions and the Sherman Act based on the same conduct, the antitrust claims have been dismissed, in part based on the specific remedy rule. Relying on these decisions, one court has held that since the CEA contains a similar antimanipulation provision, antitrust claims grounded in commodity market manipulation must likewise be dismissed. However, the analogy between the securities and commodities laws is flawed.

Evidence exists that Congress intended that the antitrust laws not apply to stock market manipulation. This evidence includes a clause in the 1934 Act limiting the total amount of damages that may be awarded in securities cases, the interpretation of inconsistencies between the securities acts and the antitrust laws in light of that damage limiting
and the idea that stock market manipulation schemes had never been within the coverage of the Sherman Act. This is the kind of affirmative intent necessary to impliedly repeal the antitrust laws. However, not only does no such affirmative intent to repeal exist in the commodities context, but the evidence of intent actually points towards keeping the antitrust laws intact.

The CEA contains no language resembling that found in the damage limiting provisions of the 1934 Act. The 1934 Act limits the total amount recoverable under the Act and other statutes to actual damages. Though recovery under the CEA is limited to actual damages, recovery under other statutes is not limited in the CEA. Certainly, the legislative history of the CEA's damage limiting section supports no other interpretation. If Congress had wanted the CEA to have the same limiting effect as the 1934 Act, that language could have been added to the CEA. Thus, the damage limiting provisions of the CEA and the 1934 Act must be construed differently.

The inconsistencies between the securities and antitrust laws used to dismiss antitrust claims brought with securities actions are insignificant in commodities cases. The inconsistencies only mattered in the securi-

limitations is “one year after the discovery of the facts constituting the violation and . . . three years after such violation,” 15 U.S.C. § 78i(e) (1982), while the antitrust statute of limitations is four years, 15 U.S.C. § 15b (1982).


87. See id. at 1191-92.


89. Congress' intent that this section limit awards from other statutes is certain: “This subsection reserves rights and remedies existing outside of those provided in the Act, but limits the total amount recoverable to the amount of actual damages.” H.R. Rep. No. 1383, 73d Cong., 2d Sess. (1934); see Schaefer v. First Nat'l Bank, 326 F. Supp. 1186, 1192 n.6 (N.D. Ill. 1970), aff'd in part and rev'd in part on other grounds, 509 F.2d 1287 (7th Cir. 1975), cert. denied, 425 U.S. 943 (1976) (quoting same passage).

90. Section 22 of the CEA, which establishes the statutory private right of action, lacks language limiting the recovery of “a total amount in excess of his actual damages on account of the act complained of.” See 15 U.S.C. § 78bb(a) (1982).

91. The legislative history accompanying CEA § 22 is sparse. More than anything, it appears to be at attempt to codify the private right of action found in Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Curran, 456 U.S. 353 (1982). In that case, the Supreme Court specifically refused to resolve the issue of what measure of damages would be available under the CEA’s private right of action. See id. at 395. Congress responded soon after the decision with § 22. See H.R. Cong. Rep. No. 964, 97th Cong., 2d Sess. 53, reprinted in 1982 U.S. Code Cong. & Ad. News 3871, 4071.

92. See supra note 83.


94. See Strobl v. New York Mercantile Exch., 768 F.2d 22, 30 (2d Cir.), cert. denied,
ties context because "Congress could not have intended that the damage restrictions contained in the carefully drawn prohibitions against market manipulation in the 1934 Act could be evaded and effectively nullified by the simple expedient of invoking the Sherman Act." In themselves, the inconsistencies caused no problem. It was only in conjunction with the damage-limiting provision that they became prominent; they served as evidence of legislative intent that the antitrust laws should not apply. In stark contrast with the securities laws, the CEA has no damage-limiting provision. The inconsistencies, without more, cannot work an implied repeal.

Finally, no antitrust cause of action had ever existed for schemes to manipulate the stock market. This is not true of commodities markets. In the absence of any other justification for not applying the antitrust laws, it is certain that a Sherman Act cause of action may be brought for commodity market manipulation schemes.

Thus, the analogy between the 1934 Act and the CEA for the purposes of the specific remedy rule fails. Affirmative evidence concerning the CEA, in addition to other crucial distinctions between it and the 1934 Act, shows that the same treatment for both with respect to implied repeal of the antitrust laws is inappropriate.

III. POLICY CONSIDERATIONS

In enacting the CEA, Congress was motivated by the fear of monopolization and the need to keep the markets free from artificial interference. To this extent, the antimanipulation provisions and the antitrust

AccordingtotheFederalRulesofCivilProcedure,a"partymay...statesamanyseparateclaimss...ashehasregardlessofconsistency..."Fed.R.Civ.P.8(e)(2).
97.SeeSupranotes88-90andaccompanyingtext.
100.Seesupranotes60-72andaccompanyingtextforthelegislativehistoryshowingthattheantitrustlawswere toapplytocommoditiesactivities.
101.Aresolutionwithinthefactsetsforththepurposeofthestatute:
laws harmonize.\textsuperscript{102}

The statutes' damages provisions differ because the CEA provides only for actual damages while the antitrust laws provide for treble damages.\textsuperscript{103} This greater measure of damages, however, does not conflict but merely supplements and furthers the policies of the CEA by providing an added deterrent.\textsuperscript{104} Treble damages can be a valuable weapon in the antimanipulation arsenal.\textsuperscript{105}

Transactions in commodities involving the sale thereof for future delivery as commonly conducted on boards of trade and known as "futures" are affected with a national public interest. The transactions and prices of commodities on such boards of trade are susceptible to excessive speculation and can be manipulated, controlled, cornered or squeezed, to the detriment of the producer or the consumer and the persons handling commodities and the products and byproducts thereof in interstate commerce, rendering regulation imperative for the protection of such commerce and the national public interest therein.


The laws are not completely coextensive, however. Though the antitrust laws require a conspiracy to make out a valid claim for restraint of trade, see 15 U.S.C. § 1 (1982), the CEA does not, see 7 U.S.C. § 25(a) (1982). In addition, the standards of intent differ. The antitrust laws require \textit{general} intent, and would permit a criminal conviction where the manipulator knows that the result (artificial prices) is reasonably foreseeable from his conduct. United States v. United States Gypsum Co., 438 U.S. 422, 445-46 (1978). The CEA, on the other hand, requires \textit{specific} intent. "[[I must be proven that the accused acted (or failed to act) with the purpose or conscious object of causing] an artificial price or trend. In re Indiana Farm Bureau Coop. Ass'n, Inc., [1982-84 Transfer Binder] Comm. Fut. L. Rep. (CCH) \textsuperscript{153} 21,796, at 22,283 (C.F.T.C. 1982). The Commission was not in full agreement in adopting this more rigorous standard of proof. The Enforcement Division of the CFTC, which had brought the action, argued in favor of the knowledge test, \textit{id.} at 27,282, and Commissioner Stone was particularly surprised that the antitrust standard was not adopted, \textit{id.} at 27,304-05 (Stone, Comm'r, concurring). The majority had quoted with favor passages from \textit{Gypsum}, an antitrust case, and Cargill, Inc. v. Hardin, 452 F.2d 1154 (8th Cir. 1971), \textit{cert. denied}, 406 U.S. 932 (1972), in which the Court described antitrust as a field "closely related" to commodities regulation, \textit{id.} at 1166. See \textit{Indiana Farm Bureau}, [1982-84 Transfer Binder] Comm. Fut. L. Rep. (CCH) \textit{id.} at 27,282-83. In addition, because the antitrust laws applied to commodity market manipulation cases before the passage of the CEA, the adoption of the more restrictive standard makes it appear that in passing the CEA Congress intended to weaken antimanipulation enforcement, a conclusion inconsistent with the legislative history. See \textit{id.} at 27,304-05. These divergent standards create an ironic and uncomfortable situation in which smaller damage awards are granted in cases where the defendant acted with a more culpable state of mind.

The concern with harmony stems from the issue of implied repeal. If there is a repugnancy between the two statutes, then the antitrust laws will be considered repealed. See \textit{supra} notes 28-33 and accompanying text.


\textsuperscript{105} Treble damages deter violations of the antitrust laws, see American Soc'y of
Though Congress has rejected bills authorizing treble damages for CEA violations, no recognized policy militates against such awards in commodity cases. Indeed, courts have already allowed plaintiffs to pursue claims alternate to their CEA causes of action that could provide punitive damages. In one case, the CFTC stated that an action for unfair and deceptive practices in the sale of commodities brought by the state attorney general under a state consumer protection statute was not preempted even though the state statute provided for treble damages. The Commission reasoned that the statute would not conflict with the commodities regulatory scheme because it was a "generalized prohibition upon deceptive and fraudulent activities," not an effort to regulate commodity activity.

In addition to consumer protection statutes, courts have allowed defrauded investors to plead common law fraud in the alternative to their CEA antifraud provision claims. Some innovative plaintiffs have even successfully pleaded Racketeering Influenced and Corrupt Organizations Act (RICO) violations for commodity fraud and market manipulation, and RICO provides for treble damages.

Commentators have argued, however, that it is not wise to allow RICO treble damage awards for "garden variety" fraud in commodity transactions. Even these commentators expressly distinguish market manipulation conspiracies though, arguing that market manipulation is more serious than ordinary fraud and requires more threatening deter- rents and more stringent punishment. The two recent incidents discussed in the Introduction illustrate the strength of this distinction.

The 1976 potato market manipulation produced the largest default in the history of commodities futures trading, with devastating effects on both producers and investors. The silver market failure similarly disrupted the commodities markets with rippling effects on the entire national economy.

The effects of market manipulation can be felt by everyone, from the largest multinational corporation to the smallest consumer. Potential manipulators should not be allowed to escape the deterrent effect of antitrust treble damages merely because the CEA provides a lesser deterrent. Moreover, market manipulation in general has long been considered a Sherman Act violation. These factors all point to the conclusion that the commodity markets deserve the extra protection from manipulation that the Sherman Act provides.

CONCLUSION

Where conduct violates both the CEA antimanipulation provisions and the antitrust laws, the injured party should be able to pursue recovery under both statutes. In such a case, the policies of the two statutes do not conflict, and therefore the antitrust laws are not impliedly repealed. Moreover, the two laws are clearly designed to promote and protect the same public policy: open competition unfettered by the imposition of any unnatural forces. The importance of this policy led Congress to indicate clearly that it wanted the antitrust laws to apply fully to the futures industry. This intent allows the antitrust laws to survive application of the specific remedy rule.

Even with the current trend of restricting the antitrust laws, the Sherman Act still applies to price manipulation schemes as a powerful deter-
rent. The commodities markets deserve and require this same protection.

Alan Schacter