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Why Coercion Should be a Defense in Section 1 Cases Involving Vertical Agreements

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Comments

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I. INTRODUCTION

In recent years, antitrust analysis has shifted from historical reasons for wanting to stop agreements in restraint of trade, such as promotion of individual competition, to a more economic based analysis which focuses on efficiency and output.[1] This change in analysis has impacted how coercion is viewed in antitrust analysis. Traditionally, courts looked at whether a party had been coerced to determine if there was a violation of the Sherman Act.[2] In section 1 cases,[3] where the emphasis is on whether there is an agreement, courts have used evidence of coercion to find an agreement between the parties even when one of the

1. Jean Wegman Burns, *The New Role of Coercion in Antitrust Law*, 60 FORDAM L. REV. 379, 379 (1991).

2. 15 U.S.C. § 1 (1973).

3. Section 1 refers to the first section of the Sherman Antitrust statute that states: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (1973).

parties did not agree to the combination.[4] The importance of coercion has been minimized in many areas of antitrust analysis,[5] but some authors[6] have argued that determining the existence of an agreement is crucial in a section 1 case that involves a vertical agreement.[7]

The first section of this Article discusses the historical precedents which led to the strict rule that courts apply to coercion cases involving vertical agreements.[8] The first thing that will be examined is how early courts dealt with coercion in this context and how they applied their rule to various situations. The general rule in cases involving vertical agreements is that one who was coerced into an act by threats of force, either economic or other, has no defense to a section 1 violation.[9] The key factor to examine throughout this Article is the role that the alleged coercing party played in the case. In many instances, it is this party who is the focus of the court's attention.[10] It is the coercing party who is the target of the antitrust laws rather than the coerced party.

The second section of this Article deals with how various courts have analyzed the coercion issue in section 1 cases. The courts have stuck fairly rigidly to the rule that coercion cannot be used as a defense in a section 1 case involving a vertical agreement. However, the rule seems to take leave of its designed purpose in *MCM Partners, Inc. v. Andrews-Bartlett & Associates, Inc.*[11] This case involved a defendant who was coerced by a third party (the coercing party) into refusing to deal with the plaintiff.[12] It is a dramatic example of how the intended result of the rule fails in some situations. The case illustrates that where a defendant is being coerced into an action and is only acting out of self-preservation, the rule provides no relief. In fact, in this case, the coercing party was not even a party to the litigation.[13] This section examines the background for the rule that the court in *MCM Partners* relied on in finding that coercion could not be used as a defense.

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4. *See, e.g.*, Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968).

5. *See* Burns, *supra* note 1, at 405-14.

6. *See, e.g.*, AREEDA & TURNER, ANTITRUST LAW (1994); *see also* Burns, supra note 1, at 84.

7. *See* Burns, *supra* note 1, at 405-14.

8. A vertical agreement is one between a manufacturer and a retailer, for example, as opposed to a horizontal agreement which would be between two manufacturers.

9. "[A]cquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one." United States v. Paramount Pictures, Inc., 334 U.S. 131, 161 (1948).

10. *See Paramount Pictures*, 334 U.S. at 131; Albrecht v. Herald Co., 390 U.S. 145 (1968).

11. 62 F.3d 967 (7th Cir. 1995).

12. *Id.* at 972.

13. *Id.* at 971.

The third section of this Article deals with possible solutions to the problems which are associated with how the rule is applied to section 1 cases involving vertical agreements. The first step will be to determine if the change should be made by the legislature or the judiciary. The judiciary seems best suited to change the rule, because the change will be small and will probably be characterized as an exception. The second step will involve determining the scope of the exception. In this step, alternatives will be discussed including whether the exception will be an affirmative defense, or whether the plaintiff will have the duty to show that the exception does not apply. The third step will be to discuss other options if courts do not wish to make an exception. These options include providing a cause of action against the alleged coercing party after the coerced party has been found guilty of a violation under section 1. Finally, there is the question of the penalties that are imposed as a result of a violation of section 1. The penalty is treble damages,[14] so in effect the party who was forced into acting is held accountable for the coercing party's malicious act. A solution would be to impose damages that reflect the actual loss of the plaintiff in cases involving vertical agreements where a defendant was coerced into the agreement or combination.

The conclusion of this Article will explain how the solutions presented in section 4 are consistent with the traditional goals and policies of the antitrust statutes. Factors that will be discussed are: (1) How the intent of the defendant is important in determining whether there has been a violation of the statute, and (2) Whether the goals of efficiency and output will be aided by an absolute ban on the use of coercion as a defense in a section 1 case involving a vertical agreement or combination. The result will be that an exception to the application of the coercion rule in cases like *MCM Partners*[15] is necessary. None of the goals or policies of the antitrust statutes are met by punishing the coerced party for acts they did not voluntarily commit. If the courts refuse to make an exception, the courts should look at the punishment imposed—treble damages—to determine if it really deters parties who feel they have no other choice but to violate the statutes.

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14. *See* American Soc'y of Mechanical Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 574 (1982).

15. 62 F.3d 967 (7th Cir. 1995).

II. HISTORICAL SOURCES OF THE COERCION RULE

This section traces the origin of the coercion rule.[16] First, the Supreme Court cases that created and developed the rule will be examined, followed by circuit court cases which have expanded and interpreted the rule, and finally a few district court cases.

A. *The Supreme Court*

The Supreme Court first established the rule that coercion could not be a defense in a section 1 case involving a vertical agreement or combination in *United States v. Paramount Pictures, Inc.*[17] This case marks the first time the Court examined the issue of coercion as a defense. The Court held:

> There is some suggestion . . . that large exhibitors with whom the defendants dealt fathered the illegal practices and forced them onto the defendants. But . . . that circumstance if true does not help the defendants. For acquiescence in an illegal scheme is as much a violation of the Sherman Act as the creation and promotion of one.[18]

This rule is the lynch pin that all of the other cases hold on to regarding the use of coercion in a section 1 case involving a vertical agreement or combination. Every case in this area either cites to this holding or bases its holding on *Paramount Pictures*.[19] The Court's holding in *Paramount Pictures* focused on defendants who were far from innocent, as evidenced by the facts of the case. For instance, the major defendants entered into an agreement with the Department of Justice in 1940 that gave the defendants three years to come into compliance.[20] The defendants did not comply, and the government initiated the action.[21] The defendants in this case were large corporations engaged in the business of producing movies.[22] They clearly were in a position to resist any threats or coercion. In addition, the complaint itself contained both section 1 and section 2 claims against the defendants.[23] The allegations included price fixing and other practices that were designed to control the film

16. *See supra* note 9.
17. 334 U.S. 131 (1948).
18. *Id.* at 161.
19. *See* Albrecht v. Herald Co., 390 U.S. 145 (1968); Perma Life Mufflers, Inc. v. International Parts Corp., 392 U.S. 134 (1968).
20. *Paramount Pictures*, 334 U.S. at 141 n.3.
21. *Id.*
22. *Id.* at 140.
23. *Id.* at 141.

industry.[24] The Court was presented with a defendant who could refuse to acquiesce to the coercion applied by another party, unlike the defendants in *MCM Partners*.

The next Supreme Court case to take up the issue was *Albrecht v. Herald Co.*,[25] where a newspaper carrier sued a newspaper for conspiring with two other companies to take the carrier's customers away.[26] The defendant newspaper, the alleged coercing party, was the only party that was sued.[27] The two parties that carried out the plan, the coerced parties, were not involved.[28] The Court stated in a footnote that the carrier could have claimed a combination between it and the newspaper when it finally adopted the prices the newspaper wanted it to charge.[29] This theory was based on *United States v. Parke Davis & Co.*[30] The theory was that a conspiracy had been created merely because the carrier acquiesced to the newspaper's demands.[31] Here again, the Court was not presented with a defendant who was coerced into action and unable to resist the coercion.

The Supreme Court again considered the issue of coercion in *Perma Life Mufflers, Inc. v. International Parts Corp.*[32] This case involved the establishment of a combination between two parties through unwilling acquiescence of business demands.[33] International was a large national muffler distributor and had created the trade name Midas.[34] International set up franchises throughout the country and allowed them to use the Midas trade name as long as they followed the terms of their franchise agreements.[35] When the plaintiff, Perma Life, a local distributor, broke one of the conditions of its franchise agreement, International canceled the agreement.[36] Perma Life sued, claiming a section 1 violation.[37] The Court cited to *Albrecht v. Herald Co.*,[38] and found that the plaintiff's acquiescence to International's demands was the basis of the agreement. "Each petitioner can clearly charge a

24. *Id.*
25. 390 U.S. 145 (1968).
26. *Id.* at 147-48.
27. *Id.* at 148.
28. *Id.*
29. *Id.* at 150 n.6.
30. 362 U.S. 29 (1960).
31. *Albrecht*, 390 U.S. at 150.
32. 392 U.S. 134 (1968).
33. *Id.* at 142.
34. *Id.* at 136-37.
35. *Id.*
36. *Id.* at 137.
37. *Id.*
38. 390 U.S. 145 (1968).

combination between Midas and himself, as of the day he unwillingly complied with the restrictive franchise agreements."[39] This case, like *Albrecht*, was based on the use of coercion to establish an agreement when the person or party being coerced is initiating the suit and the alleged coercer is the target of the suit. This case can be distinguished, because there was a franchise agreement and Perma Life did agree to a business relationship with International, even if part of the agreement was enforced through coercion. Perma Life was not a defendant, and the franchise agreement shows that it voluntarily entered into business relations with International.

The Supreme Court cases discussed above show a tendency by the Court to address the coercion issue in limited circumstances. In fact, two of the three cases, *Albrecht* and *Perma Life*, deal with situations where coercion is used not as a defense, but to prove the existence of a conspiracy, combination or agreement. In contrast to the circuit courts and the district courts, the Supreme Court's use of coercion in its analysis has been limited to specific instances where coercion is used by the party who was coerced in order to show a violation, or it is used as a defense when the parties are charged with numerous violations and would have a hard time showing that they were coerced into their actions.

B. The Circuit Courts

The first major decision in the circuit courts was *Flintkote Co. v. Lysfjord*.[40] This case involved an acoustic tile supplier who was accused of aiding and participating in a conspiracy to cut the plaintiff off from the supply of acoustic tile.[41] The Court, citing *Paramount Pictures*,[42] held that "[b]ecause one is coerced by economic threats to participate in or aid and abet an illegal scheme does not excuse the actor."[43] The gist of the plaintiff's allegations was that Flintkote was being pressured by members of the existing conspiracy not to sell to the plaintiff and these threats caused Flintkote to refuse to deal with the plaintiff.[44] This case is an example of how the circuit courts have

39. *Perma Life*, 392 U.S. at 142.
40. 246 F.2d 368 (9th Cir. 1957).
41. *Id.* at 372.
42. 334 U.S. 131 (1948).
43. *Flintkote*, 246 F.2d at 375.
44. *Id.*

broadened the holding of *Paramount Pictures*.[45] The facts of this case support a finding that, like the defendants in *Paramount*, Flintkote was not an innocent party. Flintkote clearly gained from its involvement in the conspiracy.[46] It had a choice, unlike a totally innocent party, of whether to participate or not. Flintkote even claimed as a defense that it supplied others who were not part of the conspiracy.[47] The court in *Flintkote* expanded the coercion rule in vertical agreement cases by allowing a party who was not the coercer to be held liable. While *Flintkote* expanded the holding of *Paramount Pictures* in some respects, it was tailored to its own narrow fact situation and did not give a blanket statement on the use of coercion as a defense. However, subsequent cases treated the holding as a blanket rule which disallowed the use of coercion as a defense in a section 1 case.

A prime example of this is *Calnetics Corp. v. Volkswagen of America, Inc.*[48] The major allegations of the plaintiff, an independent manufacturer of automobile air conditioning units, was that Volkswagen, by purchasing a company that manufactures automobile air conditioners,[49] violated section 7 of the Clayton Act[50] and section 1 of the Sherman Act. The plaintiff alleged that through purchasing the company, Volkswagen could coerce its dealers and distributors to buy the air conditioners from their company and cut out any of the independent manufacturers like Calnetics.[51] The coerced party in this case was the independent distributor of Volkswagen's cars.[52] The court held: "The involuntary nature of one's participation in a conspiracy to monopolize is no defense. An antitrust conspirator can be liable for damages even though he participates only under coercion."[53] The court found that the innocent party, the distributor, was guilty of a section 1 violation because of its acquiescence to Volkswagen's demands to deal with its own manufacturer.[54] The alleged coercer, Volkswagen, should have

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45. It broadened the scope by using the term "economic threats." This encompasses a large variety of conduct by a defendant which was not addressed in *Paramount Pictures*.

46. 246 F.2d at 375. It appears from the record that the illegal scheme was an allocation plan; by participating, the defendant was assured of getting its share of the business from its customers, who were part of the conspiracy, because they were guaranteed work.

47. *Id.* at 373.

48. 532 F.2d 674 (9th Cir. 1976).

49. *Id.* at 679-80.

50. 15 U.S.C. § 18 (1973).

51. 532 F.2d at 679-80.

52. *Id.* at 682.

53. *Id.*

54. *Id.*

been the target of the law suit. Again, this holding expands even further the narrow holding of *Paramount Pictures* and the other cases in this area. The court relied on another circuit court case, *Flintkote Co. v. Lysfjord*,[55] and a district court case, *Otto Milk Co. v. United Dairy Farmers Cooperative Ass'n*,[56] rather than *Paramount Pictures*.

These two cases represent the dominant trend in the circuit courts regarding the coercion issue in section 1 cases involving vertical agreements. Both of these cases have taken the holdings in the Supreme Court cases and expanded them dramatically to include parties that no Supreme Court case considered. This has had a trickle-down effect with regard to the district courts. They, in turn, have interpreted the circuit courts' opinions to be broad restrictions on the use of any kind of coercion analysis with regard to a defense of a section 1 violation.

C. *The District Court Cases*

The first example of a district court case that uses the circuit courts' expanded version of the coercion rule is *Otto Milk Co.*[57] This case involved a milk company that was the subject of a forced boycott by a milk association.[58] The court held that the plaintiff milk company could use the coercion applied by the defendants, the milk association, against the retail store owners as evidence of a conspiracy in violation of section 1.[59] *Otto Milk* follows the rule of *Flintkote*. This case was decided before *Calnetics*, so the court did not follow the absolute ban on the use of coercion as a defense. However, it is worth noting that the suit was not brought by the milk company against the coerced party. Instead, the suit targeted the alleged coercer, the dairy association.[60] So, while endorsing the view that coercion cannot be used as a defense, the court was not faced with a situation where the coerced party was being sued.

In *Linseman v. World Hockey Ass'n*,[61] the plaintiff, a nineteen-year-old hockey player, brought suit against the association because he was not allowed to play in the hockey league run by the association. The league had a rule that required all players to be at least twenty years

55. 246 F.2d 368 (9th Cir. 1957).
56. 261 F. Supp. 381 (W.D. Penn. 1966).
57. *Id.*
58. *Id.* at 383.
59. *Id.* at 385.
60. *Id.*
61. 439 F. Supp. 1315 (D. Conn. 1977).

old.[62] One of the defenses the association asserted was that it was coerced into this action. The association claimed that if it did not observe the rule, the result would be a boycott by foreign teams that it had scheduled to play.[63] The court, citing *Otto Milk*, *Calnetics*, *Paramount*, and *Flintkote* rejected this argument.[64] *Linseman* represents the extension of the coercion rule to a party who is the subject of coercion rather than the alleged coercer. The facts in this case are very similar to *Paramount Pictures*, in that the defendant was not completely innocent. The defendant was in a position to either reject or accept the rule requiring players to be at least twenty years of age.

The district court in *Oltz v. St. Peter's Community Hospital*[65] extended the coercion rule to apply to cases where a conspiracy is used to create an exclusive contract. This case involved a suit brought by a nurse anesthetist against a hospital for submitting to anesthesiologists who threatened to quit or leave the hospital if they did not receive an exclusive contract with the hospital.[66] The court did not address the legitimate business reasons that the hospital might have had for terminating the agreement with the nurses and giving the doctors an exclusive contract. Even if the hospital did bow to the coercion of the group of doctors, it had the community's best interest in mind.[67] The health and welfare of the community should be regarded as a legitimate business factor. This case again presents a situation where the alleged coercers, the doctors, were not the defendants. Unlike the others, this case occurs in an area of commerce where the courts have allowed a great deal of latitude in making decisions that impact trade, because of the nature of the business.[68] However, the rule was applied in this case and coercion was not allowed as a defense.

These three cases represent the district courts' expansion of the coercion rule. The rule formed in *Paramount Pictures* has been expanded to encompass a large number of defendants that the Court never intended to be reached by the rule. The circuit courts expanded it to include cases that involved suits against parties who were coerced into joining a conspiracy. The district courts then followed suit and applied the coercion rule almost uniformly to bar any defendant from

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62. *Id.* at 1317.
63. *Id.* at 1321-22.
64. *Id.* at 1322.
65. 656 F. Supp. 760 (D. Mont. 1987).
66. *Id.* at 761.
67. The court did not address this concern anywhere in the opinion.
68. *See, e.g.*, Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332 (1982) (utilizing a different standard because the health care industry was involved.).

raising coercion as a defense to a section 1 violation involving a vertical agreement. This includes cases involving the health care industry, an industry that has received added protection in other areas of antitrust law.

III. THE PROBLEM WITH THE COERCION RULE

The coercion rule, as adopted by the Supreme Court in *Paramount Pictures* and expanded upon by later decisions, denies to the defendant in a section 1 case involving a vertical agreement or combination, the defense that he or she was forced into an action in violation of the antitrust laws.[69] The rule does not take into consideration the innocent party alluded to above.[70] This party has no choice; he or she must comply with the coercer's threats. The innocent party, for example, sees on the one hand, the possible antitrust violation resulting in liability. On the other hand, he or she sees the certainty that financial or personal ruin will result from not following the coercer's demands. There is no beneficial reason for holding this party liable for antitrust violations. However, the courts should continue to use coercion as evidence of a conspiracy where the defendant is the coercer and not the innocent party. The Seventh Circuit Court of Appeals in *MCM Partners, Inc. v. Andrews-Bartlett & Associates, Inc.*,[71] dealt with a situation where there were innocent parties who really had no choice. However, the court refused to allow them to use coercion as a defense.[72]

In *MCM Partners*, a rental equipment company brought suit against two buyers for refusing to deal and for being part of a conspiracy to keep them out of a lucrative exhibition hall in Chicago. MCM Partners had contracted with the defendants to provide all of the rental equipment, such as forklifts and moving equipment, at the exhibition hall. OG Service corporation was also in the business of renting forklifts and moving equipment. In the original complaint, MCM named the defendants and OG, alleging that the three had entered into a conspiracy to restrain trade at the exhibition hall. OG approached both of the defendant buyers and informed them that if they did not drop MCM and agree to purchase their forklift and moving services from OG, they could expect trouble with the union, among other things. The two defendants then agreed to comply with OG's demands. The result was that MCM was cut out of the lucrative market of the exhibition hall. This suit then

69. *See* discussion *supra* part II.
70. *Id.*
71. 62 F.3d 967 (7th Cir. 1995).
72. *Id.* at 973.

followed.[73] One of the more interesting facts is that this situation represents coercion by a seller against a buyer, where there is no vertical integration.[74] This distinguishes the case from situations like *Parke Davis*,[75] where a seller refused to deal with one of its subsidiaries. In this case, there is no evidence in the record to suggest that the two defendants were connected to OG in any way.

The Seventh Circuit looked at almost all of the cases where a defendant tried to use coercion as a defense.[76] The court started with *Paramount Pictures* and went through several other Supreme Court cases, as well as several circuit and district court cases. The court concluded that the weight of the authority did not support the use of coercion as a defense in a section 1 case involving a vertical agreement.[77] The court concluded instead that in all section 1 cases involving vertical agreements or combinations, coercion could not be used as a defense.[78] However, the court failed to look at the specific fact situation of the defendants in this case who had no choice but to comply with OG's demands.

The court should have looked at the defendants' situation instead of relying on precedent and establishing an absolute ban on the use of coercion as a defense in all vertical agreement or combination cases. The facts show that OG and its principal were not legitimate businessmen engaged in ordinary business activity.[79] There was evidence to suggest that the threats employed by OG and its principal were not only monetary, but also involved the complete interruption of the defendants' businesses.[80] Another important factor the court did not consider was that these transactions were at arms length. This was not a case of the defendants being disciplined for failing to carry out OG's policies or requirements. Instead, this situation was more akin to an extortion by OG to get the defendants to drop MCM. This case is distinguishable from any of the cases that the court cited to support its decision. Most of the cases on which the court relied did not involve businessmen who were using threats of union strikes. Finally, the court did not look to see if the defendants' actions could have been the result of a legitimate business decision based upon the unique factors present in this case.

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73. *Id.* at 970-71.
74. *Id.* at 970.
75. 362 U.S. 29 (1960).
76. *MCM Partners*, 62 F.3d at 973-74.
77. *Id.* at 973.
78. *Id.*
79. *Id.* at 970. The record indicates that both Andrews-Bartlett and FDC were under pressure from local union leaders to drop MCM. *Id.*
80. *Id.*

The court treated the relevant market as the exhibition hall, but the threats that OG made were such that they would have influenced the defendants' business activities throughout the city and not just at the exhibition hall.

MCM Partners represents the best example of the problems and dangers attendant to the adoption of an absolute ban on the use of coercion in a section 1 case involving a vertical agreement or combination. There are situations when a defendant is being coerced in such a way that no reasonable person would refuse to acquiesce. In situations like these, punishing the defendant does not further the policy goals of antitrust legislation. If no reasonable person would refuse to participate because of the coercion, what possible deterrent effect could be served by holding the defendant liable? The real target of the antitrust laws is the coercer, or would-be coercer. Traditional antitrust analysis focused on intent, and in this case, the defendants clearly did not have malicious intent. In fact, by first contracting with the plaintiff, the defendants showed that their intentions were not to work with OG at the exhibition hall.[81] The defendants' best interest was not to deal with OG because to do so would create a monopoly for OG at the exhibition hall. All of these considerations illustrate the problems with adhering to an absolute rule. Professors Areeda and Turner also point out the inequities in holding a defendant who was coerced into his or her action liable for damages under the antitrust laws.[82] Courts should take a more objective approach to deciding when coercion can be used as a defense in a case involving vertical agreements.

IV. POSSIBLE SOLUTIONS TO THE COERCION RULE

In solving the problems associated with an absolute ban on the use of coercion as a defense in a section 1 case, the courts will need to take the lead. The legislature has shown very little initiative in carving out any exceptions to the Sherman Act.[83]

The first step would be to determine the scope of a possible exception. In addressing this issue, a good standard for the courts to adopt would be to allow the defense if no reasonable person would have refused the pressures applied. The burden should be on the defendant to prove that

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81. *Id.*

82. *See* AREEDA & TURNER, *supra* note 6, at ¶ 1408. Professors Areeda and Turner propose a balancing test and suggest several factors courts should consider before holding an innocent third party liable.

83. This is evident because Congress has made few, if any, changes to the Sherman Act since its enactment.

the coercion applied was so oppressive that no reasonable person would refuse to acquiesce to the pressure. This approach would insure that the truly innocent defendant, who was coerced into joining the conspiracy, would not be punished. It would solve the problems alluded to earlier and remain true to the policy goals of antitrust laws—the deterrence and punishment of coercers and would-be coercers. If the courts do not adopt this standard for the coercion defense, other solutions need to be analyzed to minimize the injustice to the innocent party.

The courts could also allow the coerced party an action against the alleged coercer, when the plaintiff does not sue the coercer and interpleader is not available. This would enable the coerced defendant to seek indemnification or contribution against the party who was the real cause of the plaintiff's loss. This action would accrue upon the entering of a judgment against the defendant.

Another possible solution, if the courts do not adopt an exception, would be to focus on the damages assessed and give some relief to the defendant. Because the reason for imposing treble damages is to deter others from similar conduct, if a party satisfies the reasonableness test above, deterrence could not be achieved and treble damages would be unreasonable. The same test could be used to determine whether treble damages are warranted. The judge would instruct the jury that if they found that a reasonable person in the defendant's place would have acquiesced to the coercion, only actual damages should be awarded.

The best result would be for the courts to allow defendants to raise the defense and carry the burden of showing that any reasonable person in their shoes would have acted the same way. This would provide protection for the truly innocent party. If the courts refuse to adopt this approach, then something needs to be done for defendants who can satisfy the reasonableness test set out above. It is an injustice to force a party to pay treble damages when any reasonable person would have acted the same way under the circumstances.

V. CONCLUSION

The courts have distilled an absolute ban on the use of coercion as a defense by a section 1 defendant involving a vertical agreement. This absolute ban is the result of several decisions which have continually expanded the limitations on the use of the defense.[84] This ban clearly presents problems to the defendant who cannot refuse the coercer's demands. When the defendant's situation is one where a reasonable

84. *See* discussion *supra* part II.

person would acquiesce, the courts should allow that defendant to raise coercion as a defense. Even if the courts refuse to allow the coerced party to escape liability completely, they should provide some way to mitigate the losses. This could be through indemnification by the coercer or through using the same test, but applying it only to damages. In any event, there is definitely a need for judicial action in this area.

CHAD PLUMLEY