Commodity Futures Archive - Selected materials, In the Matter of Indiana Farm Bureau Cooperative Association, Inc., U.S. Commodity Futures Trading Commission, ¶21,796, (Dec. 17, 1982)

Click to open document in a browser

In the Matter of Indiana Farm Bureau Cooperative Association, Inc.

¶21,796. U.S. Commodity Futures Trading Commission. No. 75-14.December 17, 1982. Initial Decision in full text.

Manipulation: Futures Contracts: Price..– To prove the manipulation of a futures contract under Section 6(b) and 6(c) of the Commodity Exchange Act it must be shown that the accused acted or failed to act with the purpose or conscious object of causing or effecting a price or price trend in the market that does not reflect the legitimate forces of supply and demand.
See ¶10,025, "Liabilities—Prohibitions" division, Volume 1.
Manipulation: Futures Contracts: Price: Trading Activity..– Manipulation of the price of corn futures contract during a congested market could not be inferred from respondent's trading activities since respondent's long position was established as a hedge on which it took delivery in order to meet its legitimate commercial commitments, and the deliverable supply of corn was sufficient to permit the shorts to cover their positions without purchasing futures from respondent. Thus, the price reflected the legitimate forces of supply and demand.
See ¶10,065, "Liabilities—Prohibitions" division, Volume 1.

This enforcement proceeding was instituted on December 11, 1974, with the issuance of a “Complaint and Notice of Hearing” (“complaint”) by the United States Department of Agriculture. The complaint charges that respondents Indiana Farm Bureau Cooperative Association, Inc. (“Indiana Farm”) and Louis M. Johnston (“Johnston”) [1] attempted to manipulate and did manipulate the price of the July 1973 corn future contract on the Chicago Board of Trade in violation of §§6(b) and 6(c) of the Commodity Exchange Act, as amended, 7 U.S.C. §§9 and 13b (the “Act”). Specifically, the complaint alleges that respondents manipulated the market by conducting a “squeeze” on July 20, 1973, the last day of trading on the July corn contract. After extensive discovery, evidentiary hearings were held in November 1976, February and March 1977, and April, May and June 1978. Exhaustive post hearing briefs were filed by both sides. On December 12, 1979, Administrative Law Judge Arthur L. Shipe filed a ninety-two page Initial Decision (“I.D.”) wherein he ruled that the Division of Enforcement (“Division”) had failed to prove that respondents had attempted to manipulate or had manipulated the July 1973 corn contract.

The Administrative Law Judge made extensive findings of fact (I.D. at pp. 4-48) and conducted a thorough analysis of the evidence in his discussion of the law and facts (I.D. at pp. 49-92). The judge's findings of fact are not in dispute and upon review of the entire record, the Commission finds them to be fully supported by the evidence. Although the judge's legal analysis of the evidence and conclusions of law are disputed by the parties, it is unnecessary for purposes of this opinion's discussion of the law to restate the facts in full detail. The following summary, as contained in the Administrative Law Judge's initial decision, accurately presents the operative facts and basic issues:

> The July 1973 corn futures contract expired on July 20, 1973 at about 12:00 noon. On July 19, 1973, the CBOT Board of Directors voted to remove the 10-cent maximum daily limit on price fluctuation for the final day of trading in the contract. The midpoint of the closing range in the contract was 259 1/2 [cents per bushel] on July 19th. The settlement price on July 20th was 380, though trades had occurred at 390 before the session closed. The contract did not reach 300 until approximately 11:24 a.m.
>
> It is contended that the sharpness of the increase resulted in artificial prices and that these prices are attributable to the trading activity of respondents. Respondents held a long position of 4,705,000 bushels

> in the contract at the opening of trading on July 20th, and stood for delivery of 2,010,000 bushels upon expiration of the contract. They liquidated approximately 500,000 bushels at prices of 370 to 390 in the last 20 minutes of trading.
>
> On July 20, 1973, reported corn stocks in deliverable position in Chicago were 12,107,000 bushels, of which 4,511,000 bushels were reported to be deliverable. The Division of Enforcement (DE) claims, however, that only 511,000 bushels were in fact available for delivery.
>
> During the summer of 1973, there was a heavy movement of export grain to, among other countries the Soviet Union, resulting in a shortage of transportation and elevator facilities used for shipping grain. Additionally, quality problems with the corn crop of 1972-1973 developed in some areas of production. DE [Division of Enforcement] contends that the demand of respondents for delivery in these circumstances produced the alleged artificial prices, and thus constituted manipulation within the meaning of Sections 6(b) and 6(c) of the Act (7 U.S.C. §§9 and 13b).
>
> Respondents assert that DE has failed to prove that the price of the July 1973 corn futures contract was artificial on July 20, 1973, or that the respondents caused the price rise that occurred on that day, or that the respondents intended that their actions would cause an artificial price. They further dispute DE's contention that there was an insufficient supply of corn available to satisfy delivery requirements on the futures contract. (I.D. at 2-3.)

Judge Shipe concluded:

> In final summary, as the foregoing discussion has shown, prices in the CBOT 1973 corn futures contract reached artificial levels on July 20, 1973. DE's claim that the standing for delivery by respondents was the legal cause of these artificial prices rests largely on DE's further claim that the bulk of the reportable deliverable supply was unavailable for delivery on the futures market. The evidence offered to support the latter contention consists mainly of data on the heavy corn export movements at the time. There were, however, cash transfers of ownership of corn throughout the period and futures deliveries were, in fact, made. Indeed, there were more deliveries made at prices under 300, which DE concedes were nonartificial prices, than DE claims were available for delivery. Thus, heavy export movements of corn are not proof that corn was unavailable for delivery on the futures market. At bottom, DE's claim is that the futures market cannot work where supply and demand are unusual. This cannot be concluded even on the basis of the events in issue here.
>
> DE argues that the entry by respondents of scaled-up spread orders during July 1973 reflects an intention to manipulate the market. However, as shown, the entry of these orders was entirely consistent with the theory of hedging now embraced by DE. DE also lays heavy emphasis on the liquidation orders entered by respondents in the last twenty minutes of trading. The circumstances in which these orders were entered belie DE's contention that they reflected an intent, formed earlier in July, to manipulate the market.
>
> The remainder of DE's claims are clearly makeweight, and without merit. Accordingly, the following conclusions are entered.
>
> ***Conclusions of Fact and Law***
>
> 1. The prices in the CBOT July 1973 corn futures contract reached artificial levels on July 20, 1973. It is not possible to state precisely at what price this occurred.
> 2. The trading of respondents was not a culpable or legal cause of the prices that were reached in that contract on July 20.
> 3. Respondents did not attempt or intend to cause the prices that were reached, and could not reasonably have foreseen that such prices would be reached because of their activity. (I.D. at 91-92.)

The Division of Enforcement has appealed these conclusions, arguing both by brief and at oral argument on May 21, 1982, that respondents did, indeed, manipulate the July option of this corn contract. The Division of Enforcement contends that respondents manipulated the congested market existing in the final half-hour of

trading on July 20, 1973, by standing for delivery on four times what the Division views as the deliverable supply of corn and by "squeezing" prostrate shorts, who had no recourse to the cash market, into paying artificial prices to offset their contracts.

II. *Manipulation and Attempted Manipulation*

In order to consider and resolve the arguments raised, it is important to clarify at the outset the meaning the Commission attaches to various material terms. Neither manipulation nor attempted manipulation is defined in the Commodity Exchange Act. That task has fallen to case-by-case judicial development. The federal courts and judicial decisions of the Department of Agriculture have looked to the common understanding of manipulation in determining the essential elements of the offense. For example, in *Cargill, Inc. v. Hardin,* 452 F.2d 1154, 1163 (8th Cir. 1971), *cert. denied,* 406 U.S. 932 (1972), the Eighth Circuit adopted the basic definition accepted by the Seventh Circuit in an earlier case:

> The Commodity Exchange Act itself does not define "manipulation", and definitions from other sources are of a most general nature. One of the few judicial definitions is to be found in *General Foods Corporation v. Brannan,* 170 F.2d 220, 231 (7th Cir. 1948), where the court said:
>
> "We are favored with numerous definitions of the word 'manipulation.' Perhaps as good as any is one of the definitions which appears in the government's brief, wherein it is defined as 'the creation of an artificial price by planned action, whether by one man or a group of men.'"

In *Volkart Brothers, Inc. v. Freeman,* 311 F.2d 52, 58 (5th Cir. 1962), the court adopted the often cited definition of manipulation given by Arthur R. Marsh, a former president of the New York Cotton Exchange, in a hearing before a Senate subcommittee in 1928:

> Manipulation, Mr. Chairman, is any and every operation or transaction or practice, the purpose of which is not primarily to facilitate the movement of the commodity at prices freely responsive to the forces of supply and demand; but, on the contrary, is calculated to produce a price distortion of any kind in any market either in itself or in its relation to other markets. If a firm is engaged in manipulation it will be found using devices by which the prices of contracts for some one month in some one market may be higher than they would be if only the forces of supply and demand were operative…. Any and every operation, transaction, device, employed to produce those abnormalities of price relationship in the futures markets, is manipulation.

In a 1971 Department of Agriculture decision, *In re David Henner, 30* A.D. 1151 (1971), the Judicial Officer approved of this definition as being "consistent with the common understanding of the term." *Id.* at 1224 (footnote and citations omitted).

In the only manipulation case heretofore decided by this Commission, *In re Hohenberg Brothers,* [1975-1977 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,271 (February 18, 1977) (*"Hohenberg"*), the Commission, addressed manipulation in terms that have yielded some differing interpretations, as is apparent in this case. Among other things, the Commission explained that the intent requirement, which is the same for a manipulation and an attempted manipulation, is "the performance of an act or conduct which was intended to effect an artificial price." *Id.* [2] We adhere to this general descripton, but recognize that some refinement is in order.

Since intent is the essence of manipulation, we turn then to analyze more specifically the level of intent, or the state of mind, which must be found in order to support a finding of manipulation under the Commodity Exchange Act. The complaint in this case charges that respondents acted "for the purpose and with the intent of causing prices in the July 1973 corn future which were arbitrary and artificial…." (Complaint ¶14). [3] This is the classic formulation of a charge requiring proof of "specific intent" as that term is generally understood in the criminal law. [4] While the charging terms of its complaint and its subsequent proffer indicated that it would introduce evidence of purposeful conduct, the Division of Enforcement later argued to the Administrative Law Judge that a less stringent standard of "general intent" was sufficient to meet the manipulative intent requirement. The

Division argued "… it is sufficient, for purposes of manipulative intent, that the necesssary consequence of their action was an unlawful result" (Division of Enforcement's Post Hearing Brief and Conclusions of Law at 40). The Administrative Law Judge apparently reviewed the evidence in light of general intent and a negligence type standard, see I.D. at pp. 56-58, and concluded that "[r]espondents did not attempt or intend to cause the prices that were reached, and could not reasonably have foreseen that such prices would be reached because of their activity." (I.D. at 92.)

In its brief to the Commission on appeal, the Division adopted Judge Shipe's "reasonable forseeability" alternative formulation of intent, arguing that "intentional conduct which results in a manipulated price where that result was reasonably foreseeable, as a standard, protects the innocent while permitting the Commission to relieve more effectively 'burdens on interstate commerce caused by manipulation and market control'" (Brief for Division at 91). At oral argument, however, counsel for the Division abandoned the "reasonably forseeable" argument (Transcript of Oral Argument at 138-139), and argued in favor of its original "general intent" standard which counsel defined as knowledge "that the likely effect of [respondents'] action would be to cause a futures price that would not accurately reflect the basic forces of supply and demand" (*Id.* at 4; *see also* 26-27, 133-140).

Respondents counter that the negligence concept of "reasonable forseeability" cannot be the standard for manipulative intent, and regardless of whether specific intent or general intent is required, the Division's proof of intent was lacking under either standard (Brief for Respondents at 91-107). At oral argument, counsel for respondents maintained, as he had below, that specific intent is the level of intent required to prove manipulation (Transcript of Oral Argument at 62, 109).

Upon review of the relevant federal caselaw and prior administrative decisions, [5] we conclude, consistent with this Commission's opinion in *In re Hohenberg Brothers, supra,* that the requisite level of *mens rea* required to prove manipulation or attempted manipulation under the Commodity Exchange Act is that of "specific intent," or as that term is also commonly understood to mean today, "purposeful conduct." [6] *See United States v. United States Gypsum Co., supra* n. 2,438 U.S. at 445.

In *Hohenberg, supra,* the Commission reviewed the law of manipulative intent in the context of an alleged attempted short-side manipulation. We define intent in terms of purposeful conduct and applied that standard to the evidence presented:

> *Intent:*
>
> As recognized by the court in *Great Western Food Distributors, supra,* 201 F.2d at 479, the intent of the parties is a determinative element of a punishable manipulation. Intent is a subjective factor and since it is impossible to discover an attempted manipulator's state of mind, intent must of necessity be inferred from the objective facts and may, of course, be inferred by a person's actions and the totality of the circumsmtances.

*****

> We discern no difference in the intent required to accomplish a manipulation and that required by an attempted manipulation which is simply the performance of an act or conduct which was intended to effect an artificial price. *Id.* at 21,477 (footnote omitted). [7]

In so defining manipulative intent, the Commission adhered to the long line of federal court decisions and judicial opinions of the Department of Agriculture, cited *supra,* which have held that specific intent to create an "artificial" or "distorted" price is a *sine qua non* of manipulation. [8] For example in *Volkart Brothers, Inc. v. Freeman, supra,* 311 F.2d at 58 the Fifth Circuit concluded: "there must be a purpose to create prices not responsive to the forces of supply and demand; the conduct must be 'calculated to produce a price distortion.'" In *Cargill, Inc. v. Hardin, supra,* 452 F.2d at 1163, the Eighth Circuit quoted with approval the definition of manipulation used by the

Seventh Circuit in *General Foods Corporation v. Brannan, supra,* 'the creation of an artificial price by planned action, whether by one man or a group of men.'" [9]

We are unable to discern any justification for a weakening of the manipulative intent standard which does not wreak havoc with the market place. It is the intent of the parties which separates otherwise lawful business conduct from unlawful manipulative activity. This being so, a clear line between lawful and unlawful activity is required in order to ensure that innocent trading activity not be regarded with the advantage of hindsight as unlawful manipulation. Many years ago, the Seventh Circuit observed in *General Foods Corp. v. Brannan, supra,* 170 F.2d at 231, that "self-preservation has oftentimes been referred to as the first law of nature, and we suppose it applies to traders as well as others. We see no reason why the seller respondents as well as General Foods and Metcalf should not under the circumstances make an effort to protect their own interests." Similarly this Commission recognized in *Hohenberg, supra* at 21,478, that "[e]ven though respondents' activities may have involved a 'profit motive,' absent a finding of manipulative intent, trading with the purpose of obtaining the best price for one's [commodity] … does not constitute, in itself, a violation of the Commodity Exchange Act." Thus, market participants have a right to trade in their own best interests without regard to the positions of others as long as their trading activity does not have as its purpose the creation of "artificial" or "distorted" prices. Indeed, it is this very motivation which gives lifeblood to the forces of supply and demand, and makes the price discovery function of the marketplace viable. Moreover, since the self-interest of every market participant plays a legitimate part in the price setting process, it is not enough to prove simply that the accused intended to influence price.

Accordingly, we hold that in order to prove the intent element of a manipulation or attempted manipulation of a futures contract price under §§6(b) and 6(c) of the Commodity Exchange Act, as amended, it must be proven that the accused acted (or failed to act) with the purpose or conscious object of causing or effecting a price or price trend in the market that did not reflect the legitimate forces of supply and demand influencing futures prices in the particular market at the time of the alleged manipulative activity. Since proof of intent will most often be circumstantial in nature, manipulative intent must normally be shown inferentially from the conduct of the accused. But once it is demonstrated that the alleged manipulator sought, by act or omission, to move the market away from the equilibrium or efficient price—the price which reflects the market forces of supply and demand—the mental element of manipulation may be inferred. [10] Further, while knowledge of relevent market conditions is probative of intent, it is not necessary to prove that the accused knew to any particular degree of certainty that his actions would create an artificial price. It is enough to present evidence from which it may reasonably be inferred that the accused "consciously desire[d] that result, whatever the likelihood of that result happening from his conduct." *See United States v. United States Gypsum Co., supra,* 438 U.S. at 445.

The intent question here must be analyzed in the context of an alleged manipulative squeeze. The term "squeeze," like manipulation, is undefined in the Act. However, the market condition giving rise to the term is a well-known phenomenon affecting the futures markets. An oft cited definition of "squeeze" is that offered by Senator Pope during debate on enactment of the Commodity Exchange Act:

> Squeeze (congestion): These are terms used to designate a condition in maturing futures where sellers (hedgers or speculators), having waited too long to close their trades, find there are no new sellers from whom they can buy, deliverable stocks are low, and it is too late to procure the actual commodity elsewhere to settle by delivery. Under such circumstances and though the market is not cornered in the ordinary sense, traders who are long hold out for an arbitrary price. 80 Cong. Rec. 8089 (1928).

Baer & Saxon, *Commodity Exchanges and Futures Trading,* (1949) explains: "A squeeze is a relatively small corner ocurring in deliveries for some one month or some one grade. Some—or, in fact, most—squeezes are inevitable on both the physical and the exchange markets and are not the result of illegal manipulation." *Volkart, supra,* 311 F.2d at 59. In its Report on the Grain Trade (1926) the Federal Trade Commission stated:

> A 'squeeze' suggests a much milder situation than a corner. It means that there is too large a line of short sales out and that the short sellers have been somewhat obstinate in carrying their trades into the delivery month, or possibly that the various long interests are unduly or unexpectedly obstinate in reducing their

> lines during the delivery month. A squeeze does not imply one long holder nor conspiracy among the long interests to enhance the price. A large long interest may exist which has not been built up for manipulative or even speculative purposes, but as a hedge, and may be a hedge on which the buyer expects to take delivery to meet cash grain committments. 7 FTC Report, pp. 284-285.

When, then, does it become unlawful to profit from a congested futures market? Or stated another way, when has unlawful intent to "squeeze" shorts during a period of congestion been proven? A significant problem in analyzing the caselaw and the briefs in this case is the inconsistent use of the term "squeeze." The caselaw and the arguments of the parties here appear to use the term "squeeze" sometimes simply to describe the condition of "congestion" and at others to describe the unlawful act of manipulation itself. We read the first sentence of Senator Pope's definition, *supra,* to describe a congested futures market generally; the second sentence to define what may turn such market congestion into an unlawful manipulation, i.e., a "squeeze," if manipulative intent is present. *See* The Report of the Federal Trade Commission on the Grain Trade (1926), at pages 243-244. For the sake of consistency, we shall hereinafter refer to the situation or "condition" in maturing futures described by Senator Pope's first definitional sentence as "congestion." We shall refer to the profiting from such congestion—Senator Pope's second sentence—as a "squeeze." This reading is consistent with the general principle that the essence of manipulative activity is "the creation [or attempted creation] of an artificial price by planned action," *Cargill, supra* 452 F.2d at 1163. Holding out for high prices is normally rational and lawful market behavior. *See Hohenberg, supra* at p.21,478; *Volkart, supra,* 311 F.2d at 58-59; *General Foods, supra,* 170F.2d at 231. Such activity only becomes unlawful when it is accompanied by manipulative intent as generally manifested by conduct other than simply seeking the best price in a pit in which there may be supply shortages. The Seventh Circuit stated in *Great Western Food Distributors v. Brannan, supra,* n.5, 201 F.2d at 479.

> ***** the intent of the parties during their trading is a determinative element of a punishable corner. Unintentional corners can develop, 7 F.T.C. Report on the Grain Trade 243 (1926), and should not carry the pain of forfeiture of trading privileges.

As the Fifth Circuit observed in *Volkart, supra:*

> Certainly the term "manipulate" means more than the charging of what some may consider to be unreasonably high prices. Otherwise, there would be grave doubt as to the constitutionality of the statutes.
>
> As Mr. Marsh's testimony indicates, there must be a purpose to create prices not responsive to the forces of supply and demand; the conduct must be "calculated to produce a price distortion." There may be a squeeze not planned or intentionally brought about by the petitioners. Such a squeeze should not result in their being punished. 311 F.2d at 58-59. (Footnote omitted.)

Because intent must generally be inferred from conduct, we emphasize, as we said in *Hohenberg,* that seeking the best price for one's commodity is a legitimate, indeed critical, price-creating force in the futures markets that in-and-of-itself cannot be the basis for an inference of manipulative intent. It is imperative that each side of the market seek the best price in order for price discovery to occur and that "best" price is, of necessity, at the expense of the other side. This pricing process works in delivery markets only because a person with open positions—if dissatisfied that the price bid or offered to liquidate an open position reflects the value of the underlying commodity at that point in time—can make or force delivery of the actual product. Squeezes in general and manipulative squeezes in particular are possible only when the delivery option disappears and its tempering effect is lost. Thus, the adequacy of "deliverable supply," as distinguished from supply generally, [11] and the role of market participants in the supply scenario is of great significance in any analysis. For instance, where there is evidence that the deliverable supply was intentionally and significantly reduced by a market participant, the seeking of "unreasonably high prices," which otherwise would be lawful conduct, becomes susceptible to an inference that the true purpose of the activities of the accused is to create prices not responsive to the forces of supply and demand. For example, in *Cargill, supra,* and *G.H. Miller & Co. v. United States, supra,* the longs intentionally created the conditions which led to congestion in the delivery month

by intentionally acquiring control or market dominance over the cash market (delivery) and the futures market (offset) for a particular commodity, and thereafter by virtue of their dominance were able to liquidate the long futures position at prices that would not otherwise have been reached under normal pressures of supply and demand. These manipulative squeezes were possible because, by assuring that the deliverable supply was inadequate to enable liquidation of the contracts through delivery, the longs assured that at least some shorts would either have to default or pay whatever price was dictated by the longs.

The acquisition of market dominance is the hallmark of a long manipulative squeeze. For without the ability to force shorts to deal with him either in the cash or futures market, the manipulator is not able to successfully dictate prices because a short may buy grain from other sources and deliver against his committments. *See, e.g., Cargill, supra,* 452 F.2d at 1164-67; *Great Western, supra,* n.5, 201 F.2d at 478-479. Where a trader builds up a cornering or near cornering interest in the cash market and a large long interest in the futures market, he has "laid the base for a squeeze," *Cargill, supra,* 452 F.2d at 1172, and subsequent trading activity must be scrutinized carefully. The intentional acquisition of market dominance, while it may be lawful in and of itself, is compelling evidence of manipulative intent where that dominance is subsequently used to "squeeze" shorts into offsetting contracts with the manipulator at prices considerably above the market. Thus, where the intentional acquisition of market dominance is coupled with a subsequent "squeeze" of shorts who are forced to deal with the accused, it may be inferred that the charging of high prices was done with the purpose of causing a price and reaping a profit beyond that which the legitimate forces of supply and demand would otherwise have allowed.

On the other hand, where a long does not intentionally create the conditions for a squeeze, and a congested futures market arises from other causes, often a "natural" corner or low deliverable supply, manipulative intent may not be inferred where a long does not exaccerbate the congestion itself, [12] but simply seeks the best price from the existing situation. *See Volkart, supra,* 311 F.2d at 58-59. [13]

III. *The Instant Case*

Turning to the evidence presented, we conclude, consistent with the Administrative Law Judge's determination, that there was insufficient evidence to prove that respondents acted with the conscious object or purpose of causing an artificial or distorted price. The respondents did not lay the base for a squeeze and it has not been demonstrated that they took any action with the intent to effect an artificial price. Indeed, in exercise of our expertise, we conclude that no basis for a squeeze existed nor was any illegitimate factor present in the pricing aggregate in the instant case.

Judge Shipe, who had the advantage of observing the demeanor of the witnesses, including respondent Johnston, concluded that "[r]espondents did not attempt or intend to cause the prices that were reached…." He so found based upon an exhaustive review of the evidence, wherein he generally refused to accept the adverse manipulative inferences sought to be drawn by the Division and generally accepted as credible respondent Johnston's testimony as to why he took the positions he took, traded when he did, and stood for delivery as he did. See I.D at 65-91. [14] We have examined the evidence and have found no reason to disturb these findings of fact or question the Administrative Law Judge's ultimate conclusion of law that there was no manipulative intent proven. [15]

The Division does not contend, and there is no evidence from which to conclude, that respondents were responsible for the market congestion which occurred on the last day of trading or that they exaccerbated it. The evidence demonstrates that any relative overall cash corn shortfall that did occur in the Chicago area was the product of a "natural" corner, due to transportation shortages, heavy export shipments and quality problems. *See* I.D. at pp. 7-14. Apparently, a number of shorts who had made no delivery preparations stayed in the market speculating on the imposition of federal export controls on corn which had been threatened in June by the Department of Commerce and which would have brought prices down. This threat was not lifted until after the close of trading on July 18, and perhaps the uniqueness of this particular market situation is attributable to the confluence of these factors. *See* I.D. at pp. 14-15; 70 n. 5.

In the absence of evidence that respondents were responsible for the market congestion, it cannot be inferred that respondents' trading activity, consistent with their hedging program and commercial commitments, was intended to produce an artificial price. Standing for delivery as they did was respondents' contractual right and was motivated by pre-existing commercial needs and the uncertainty of prices in the inactive cash market. Unlike Cargill, Indiana Farm Bureau did not deplete the local cash commodity late in the delivery month; did not establish a large long speculative position at a time it knew it held virtually all of the cash commodity; and did not increase its long position on the last day of trading. Nor did it liquidate a dominant speculative long position at prices already seven to eight cents over the market price. Indiana Farm's export contracts were entered into in January and April, 1973 and its long position was established as a hedge on which it expected to, and did, take delivery in order to meet its legitimate commercial commitments. Upon taking delivery, respondents, in fact, used virtually all corn received to fill existing contractual commitments. See I.D. at 87-88. No manipulative intent may be inferred from such activity which, moreover, was specifically cited by the FTC Grain Report as legitimate nonmanipulative activity during a congested market.

We also note in this regard the irresponsible market behavior of the shorts here. A serious contributing factor to squeezes in general and to the congestion that occurred in the instant case is the behavior of shorts who remain in the futures market during the delivery month without having made any delivery preparations. Consistent with the views expressed in *Volkart, supra,* 311 F.2d at 60, the testimony of numerous trade witnesses in this case and the findings of the Administrative LAW Judge (I.D. at 69-72), we find that it is irresponsible market behavior for shorts to enter the delivery month, especially where low cash supplies are evident, without making adequate delivery preparations.

The decision to deliver or offset in the trading pit is one of time, price, distance and convenience. The fact that local supply of a commodity is scarce does not relieve the shorts from their obligation to honor their contractual commitment to deliver. A short who, for whatever reason, enters the delivery month unprepared or unable to deliver runs the risk that he will have to offset at the long's price. Where a long has not intentionally created or exploited a congested situation, the long has a contractual right to stand for delivery or exact whatever price for its long position which a short is willing to pay in order to avoid having to make delivery.

We also wish to emphasize that historical price comparisons of the type relied upon by the courts in *Cargill* and *G.H. Miller* are of limited probative value here because of the unique combination of circumstances which led to the price rise in the corn pit on July 20, 1973. [16] The tight corn supply and Indiana Farm's standing for delivery were legitimate forces of supply and demand which caused futures prices to rise. The panic bidding of shorts who were totally unprepared to deliver caused the most dramatic spurt in prices. The threat of government export controls similar to those imposed on soybeans undoubtedly led to the large open short position late in the delivery month. When that possibility was removed after the close on July 18, shorts in no position to fulfill their delivery obligations bid the price up the limit on July 19 and beyond on July 20. While the resultant $1.20 price rise was the largest one day price rise ever recorded for corn, it must be remembered that the daily price limit had been removed allowing for such an unprecedented rise. Against the backdrop of an inert cash market, comparison of the futures price and nominal cash quotations is of little value in assessing the true economic value of corn in Chicago on July 20. In *Cargill,* the cash market was relevant to a determination of price. In the instant case, the pricing of corn was in the trading pit due to the inert cash market. Thus, given the unique market and economic forces of supply and demand operating on the July 1973 corn futures contract, while the prices reached on July 20 were high, we do not agree with the Administrative Law Judge who found that the price was artificial. To the contrary, based upon market factors we have noted, we conclude that the price trend on July 20 was indeed reflective of the legitimate forces of supply and demand.

Finally, while there may have been, overall, relatively less corn available than usual, we agree with Judge Shipe that there was adequate deliverable supply of corn in the cash market to allow responsible shorts to obtain corn to fulfill their delivery commitments without having to deal with respondents, thereby precluding a successful squeeze of the corn market by any market participant.

Excluding corn "committed" to export sales, the Division calculated deliverable supply of corn available in Chicago on July 20, 1973, at what it describes as "non-artificial" prices, at no more than 511,000 bushels. (*See* Division's Proposed Findings of Fact at 61-66 and Brief in support at pages 13-24.) Judge Shipe rejected the Division's calculation essentially on the basis that there was no evidence to show that respondents either knew or could have known how much corn was "committed" to export sales. Judge Shipe calculated the deliverable supply to be at a minimum, 4,616,000 bushels, *see* I.D. at 59-66, and concluded from the combined cash supply and respondents futures positions that respondents did not have the requisite market dominance at the time the Division alleged prices to have become artificial (11:24 a.m.) to be able to "squeeze" the shorts. *See* I.D. at 58-59, 64-65.

The Division argues on appeal: "Judge Shipe injects absolute uncertainty into its determination, making it a factor of a trader's subjective appraisal. Deliverable supply, on the contrary, is an objective fact to be determined by looking at the terms of the futures contract and the economics of compliance with them." [Brief for Division at 63 (citation omitted).]

Respondents argue that the deliverable supply of corn was at all times sufficient to permit the shorts to cover their positions without purchasing futures from respondents (Brief at 110-119). They dispute the Division's position that deliverable supply is "an objective fact," contending, as the Administrative Law Judge found, that deliverable supply is determined on the basis of what information is known by or reasonably available to the accused. *Id.* at 119-123.

The complaint in this case (Paragraph 10) charged that respondents *new* that there was an insufficient supply of deliverable grade corn in deliverable position on July 20 to allow shorts to satisfy their contracts except by purchasing corn futures from respondents. Judge Shipe concluded, and we agree, that there is no evidence that respondents had knowledge of "committed" corn stocks and, further, that in fact there was an adequate supply of deliverable corn in Chicago at the time, because the corn excluded by the Division was not irrevocably committed. [17] While we agree with the Division that the basic calculation of deliverable supply may be accomplished without regard to what is known by the accused, it is the deliverable supply known to the accused which must be looked to in determining whether respondent's purchase of contracts is susceptible to an inference of manipulative intent. Manipulative intent may be inferred, for example, "through the purchase of long contracts in excess of *known* deliverable supply…." *Great Western Foods v. Brannan, supra,* 210 F.2d at 478-479 (emphasis added), as in *Cargill,* where the accused knew it had a virtual corner on the existing deliverable supply. *See Cargill, supra,* 452 F.2d at 1159, 1170. Conversely, no such unlawful intent may be presumed where a long purchases contracts in quantity generally consistent with published reports of available stocks. Since there is no evidence that the corn supply was in fact irrevocably committed to commercial contracts, such corn was "available" to shorts and cannot be excluded from the deliverable supply. [18]

Accordingly IT IS HEREBY ORDERED that the decision of the Administrative Law Judge is AFFIRMED and the complaint is DISMISSED.

Chairman Johnson, concurring:

This appeal affords the Commission an opportunity to clarify its prior ruling in *Hohenberg Bros. Company et al.,* [1975-1977 Transfer Binder] Comm. Fut. Law Rep. (CCH), ¶20,271 (February 18, 1977) regarding the standard of "intent" applicable in futures price manipulation cases brought under sections 6(b) and 6(c) of the Commodity Exchange Act [7 U.S.C. §§9 and 13b], and to elaborate upon the meaning of certain other legal elements, such as price artificiality, required to be established in such cases. This matter has also provided the Commission an opportunity to comment [1] on the rights and obligations of futures buyers (longs) in the market when, due to a natural market congestion, futures sellers (shorts) are impeded or foreclosed from delivering the underlying commodity in satisfaction of their contractual obligations.

I subscribe to the majority's legal conclusion that the intent standard for manipulation under the Act, as articulated in the case law, is "specific intent." In cases of the nature alleged here, I would define such intent as the conscious object or purpose to override the basic forces of supply and demand in the market by seizing

control of prices and, in a successful manipulation, with the effect that prices do not accurately reflect those forces. [2] A mere showing that the respondents acted or failed to act under circumstances where an impact on market prices was likely or even certain to occur is not sufficient. Where an accomplished manipulation is alleged, it must be established by direct or circumstantial evidence that the respondents successfully sought to dictate prices and that the prices resulting from that undertaking were abnormal or artificial. [3]

I further subscribe to the legal conclusion below, affirmed by the majority, that the presence of significant market forces in the July corn futures contract on July 20, 1973 that were beyond respondents' control militate against a finding that respondents were the legal or culpable cause of the prices reached on that date. Accordingly, I would not disturb the order below dismissing the complaint, except to correct the inappropriate intent standard applied in the initial decision.

However, I am unable to join with the majority in its conclusion that July 1973 corn futures prices were not artificial on July 20. I believe that the factors cited by the majority as part of the basic or, in its words, the "legitimate" supply/demand equation at the time in question are broader than those recognized in the judicial precedents, and that Judge Shipe was correct in his finding of price artificiality when only supply/demand factors applied in previous cases are considered.

In addition, I do not agree with the majority's resolution of the apparent conflict between *Volkart Bros., Inc. v. Freeman,* 311 F.2d 52 (5th Cir. 1962), and *Cargill Inc. v. Hardin,* 452 F.2d 1154 (8th Cir. 1971), concerning the rights and duties of longs in the futures market when forces or events beyond their control create a market congestion that interferes with the ability of shorts to deliver the commodity in satisfaction of their contractual obligations. I would seek to strike a balance between the valid premise of *Volkart* that the obligations of a futures contract must be enforceable even under adverse economic conditions, and the equally valid concern of *Cargill* that raw market power should not rule the day under such circumstances. Only a balancing of these interests, in my view, can assure that the contract's terms are honored by both parties, that a relationship is maintained between cash prices and futures prices during delivery periods, and that orderly markets are achieved. Because the majority has chosen to deal differently with this issue, I must demur.

1. *Price Artificiality.*

In cases alleging an accomplished futures price manipulation, it must be proven that the price registered in the futures market was "artificial," that is, that the price deviated notably from the level reflecting the basic forces of supply and demand. *Cargill, Inc. v. Hardin,* 452 F.2d 1154, 1167-70 (8th Cir. 1971). *Great Western Food Distributors, Inc. v. Brannan,* 201 F.2d 476, 482-83 (7th Cir. 1953). This issue does not go to the culpability of any person, but merely relates the examined price to other relevant economic data.

In *Cargill,* the court of appeals considered a variety of comparative data introduced in evidence: historical prices of the same futures contract in previous years; current and past spread relationships between that contract and other futures in the same commodity; the price of the suspect contract as compared to futures in the same commodity traded contemporaneously on other markets; and cash prices of the underlying commodity in other periods as well as when the alleged manipulation occurred. [4]

While the *Cargill* decision considered futures prices in its analysis of price artificiality, it appears that those statistics were relied upon only when they were believed to reflect the basic forces of supply and demand for the commodity in the periods and locations examined. This assessment is confirmed by the fact that the court rejected one proffered statistic—wheat futures prices in May 1958—because the Department of Agriculture had found in an earlier investigation that those prices, though not manipulated, were "artificial." 452 F.2d at 1167-68. Thus, unique forces at work in the futures market at the time served to disqualify those prices for comparative purposes. Rather, the "supply" and "demand" forces deemed relevant appear to have been simply those operative in the various *cash* markets examined, as reflected in contemporaneous or past cash prices, or in other futures contracts performing compatibly with cash market forces. This is supported by the court's finding that prices of May 1963 wheat futures were artificial:

> The finding that the futures price was artificially high and did not reflect basic supply and demand factors *for cash wheat* is supported by the weight of the evidence. 452 F.2d at 1169 (emphasis added). [5]

The majority opinion, however, does not relate price artificiality solely to the forces of supply and demand in the cash corn market. Instead, it incorporated within the supply/demand equation certain additional factors that influenced futures prices on July 20, 1973 but evidently had a lesser if any effect on contemporaneous cash corn prices. It cites, for example, the Government announcement on July 18, 1973 that previously threatened export controls on corn would not be implemented; the behavior of large shorts in the July contract during the final days of trading; [6] and the removal by the Chicago Board of Trade of daily price limits for July corn on July 20. If these influences affected July corn futures prices, but had no comparable impact on cash market prices for corn during that period, [7] my reading of *Cargill* is that those factors are not relevant to the narrow issue whether futures prices on July 20 reached artificial levels. [8]

Upon review of the findings below, I am satisfied that Judge Shipe was correct in his ruling that July corn futures prices on July 20, 1973 became abnormal or artificial. The unprecedented one-day rise in those prices, up roughly $1.20 per bushel, is itself a strong suggestion that the futures price on July 20 was abnormal. And it appears that no similar movement in cash corn prices at Chicago occurred on that date or within a reasonable time thereafter. [9] On July 20, the critical date, the respondents themselves bid for physical corn in Chicago at $2.65 per bushel, which was $1.25 less than the highest price attained by July futures on that date (I.D. Finding #23). [10] Similarly, two other major commercial firms—Cargill and Continental Grain—bid under $2.67 that day for physical corn in Chicago (I.D. Finding #23). [11] Cash corn quotations by the Department of Agriculture on July 20 were also under $2.67 per bushel (I.D. Finding #19), [12] while USDA's Agriculture Stabilization and Conservation Service quoted Chicago cash corn on that date only slightly higher, at $2.703/8 (I.D.Finding #21). [13] While these prices may have been nominal, [14] it is unlikely that the experts at USDA would have underestimated the true value of corn in Chicago by nearly one-third on July 20. The record in this case also shows that, on the days of July following the final trading session, no commercial firm buying corn at Chicago for its own use paid more than $2.91that date or during the remainder of the month [15] and, thus, were not a part of the o not appear to have had a similar impact in the cash trade on that date or during the remainder of the month [16] and, thus, were not a part of the supply/demand equation for cash corn during that period.

This is not to suggest, however, that the special influences on July corn futures prices near the end of trading lack relevancy to the merits of this case. They are pertinent to determining *why* prices became artificial on that date. Or, stated differently, those influences should be considered in deciding whether it was the respondents, or other factors, that "caused" prices to become artificial. See *Cargill,* 452 F.2d at 1169. And, as the majority correctly observes, the presence of various significant factors beyond respondents' control militate against a finding that respondents were the legal or culpable cause of the artificial prices reached on July 20.

2. *Manipulative Squeezes.*

In his opinion below, Judge Shipe made brief reference to an apparent conflict between the rulings of *Volkart Bros., Inc. v Freeman,* 311 F.2d 52 (5th Cir. 1962) and the *Cargill* case, *supra,* although he did not express a view on the matter. [17] Stated simply, the question on which *Volkart* and *Cargill* are said to differ is whether a long in the futures market during a shortage of deliverable cash supplies that was not intentionally contrived by the long as part of a planned "squeeze," can lawfully exact as high a price as possible when offsetting positions with a short who finds delivery either difficult or impossible. Natural market congestion can occur without any effort on the part of the longs to create the shortage of cash supplies. For example, the court in *Cargill* noted that a scarcity might be occasioned by low crop production or the inadvertent destruction of exisiting supplies. 452 F.2d at 1162. Some commentators have read *Volkart* as saying that longs are free to demand the highest possible prices from shorts under these circumstances, [18] whereas the *Cargill* decision assailed such conduct.

A major concern of the court of appeals in *Volkart* was that futures contracts, which create a duty upon shorts to deliver the commodity, would cease to be legally binding if shorts were assured by law that their breach of that duty would carry no economic sanctions. 311 F.2d at 59-60. Specifically, the *Volkart* court found that shorts in that case had foreclosed themselves from delivery by neglecting to make preparations to acquire the necessary cotton, even though such preparations were possible and could have been completed as late as the day preceding the end of futures trading. The court appears to have held that, under such circumstances, the shorts should not be wholly immunized from the economic consequences of their dereliction of duty under the contract. It has been inferred from that premise (although I disagree, as discussed *infra*) that, under *Volkart,* shorts must expect to pay during offset in the futures market whatever prices the longs can successfully exact. This analysis was roundly criticized in the *Cargill* case. 452 F.2d at 1172-73.

In my view, both decisions address valid concerns. A futures contract is indeed a legally binding instrument, and breaches should not be excused without the other party's voluntary consent. At the same time, such a breach should not have unlimited consequences for the short. Recognizing the duty of shorts while avoiding undue exploitation of their plight, in my opinion, should be the objective of the Act. The majority opinion does not undertake to strike such a balance.

The majority adopts a position similar to the broadest reading of the *Volkart* case. My colleagues hold that, where a long has not laid the base for a “squeeze” by intentionally creating a supply shortage, [19] and has not exacerbated the market congestion during a natural scarcity such as by further depleting cash supplies or increasing his futures position, the long is free to exact as high a price as possible from shorts who find delivery impossible. I cannot reconcile that view with the teaching of either *Cargill* or *Volkart,* with the premise that a relationship between futures prices and cash prices should exist in delivery months, or with the traditional aim of the Commission and of the contract markets to maintain orderly futures trading.

The majority states that its opinion conforms with the *Cargill* case. That decision is construed as finding that Cargill intentionally laid the base for the “squeeze” by its sales of wheat in the cash market during May of 1963. And yet, the court raised no question concerning the propriety of Cargill's cash sales. On the contrary, it held that Cargill's major sale of Chicago wheat to the Spanish Government during the period was “a good economic sale, which we may concede” and was “completely legal.” 452 F.2d at 1171-72. There is no finding in *Cargill,* as I read it, that the cash market activities of that firm were designed or intended to further a plan by Cargill to dictate artificial prices in the futures market. [20] And the principle enunciated in *Cargill* does not appear to depend upon proof of any such purpose:

> Many squeezes do not involve intentional manipulation of futures prices, but are casued by various natural market forces, such as unusual weather conditions which have caused abnormally low crop production or inadvertent destruction of a substantial volume of the commodity itself. However, given a shortage of deliverable supplies *for whatever reason,* the futures price can be manipulated by an intentional squeeze where a long acquires contracts substantially in excess of the deliverable supply and so dominates the futures market—i.e., has substantial control of the major portion of the contracts—that he can force the shorts to pay his dictated and artificially high prices in order to settle their contracts. 452 F.2d at 1162 (emphasis added).

Similarly, the *Cargill* case provides only the most limited support for the majority's view that, during a natural market congestion, the prohibitions of the Act apply only if a long exacerbates the existing congestion, such as by further depleting cash supplies or increasing the size of the long futures position held prior to that congestion. Cargill began accumulating a long speculative position in May 1963 wheat futures on April 15, 1963. Most of its long captionposition—1,225,000 bushels—was acquired by April 19, 1963, before the Spanish Government offered to buy large quantities of wheat. *In re Cargill, Inc. et al.,* 29 A.D. 877, 889 (1970). Cargill increased its long holdings to 1,510,000 bushels by the end of April, still well before the Spanish sale was consummated. *Ibid.* That position reached 1,930,000 bushels by May 15, 1963, when Cargill's negotiations for the Spanish sale were in full swing before its offers were accepted. 452 F.2d at 1159. On May 18, the Spanish Government agreed to buy Cargill's wheat. *Ibid.* On May 20, Cargill sold 40,000 bushels of May wheat futures. Cargill bought 100,000

bushels of futures on May 21, the final trading day. *Id.* at 1160. These transactions resulted in a long futures position of 1,990,000 bushels, 60,000 bushels or 3% more than was held by Cargill before the sales to Spain were completed. These events provide scant evidence that Cargill's moderate increase in its futures position following the Spanish sale was intended to or did exacerbate the market congestion that manifested itself on May 20 and 21, 1963.

As for *Volkart, supra,* the court of appeals appears to have addressed a far narrower issue than the majority reaches in this case. There, the decision of the USDA's Judicial Officer was evidently read to mean that longs who offset with shorts during a natural market congestion must do so at or about the same futures price that would have prevailed if the shorts had been able to deliver the commodity. The court correctly observed that such a rule would effectively nullify the shorts' contractual duty to make delivery by immunizing them from any economic consequences for their breach. Stated differently, this rule would leave longs without a remedy under the contract. But *Volkart* did not specifically address or decide whether under those circumstances, longs may retaliate to the full extent of their market power. At best, *Volkart* rejected as contrary to the terms of the futures contract the concept that shorts are to be totally excused for their failure to make delivery as promised, but it did not necessarily hold that the recourse of the longs under these circumstances is unlimited. [21]

The majority concludes that "Where a long has not intentionally created or exploited a congested situation, the long has a contractual right to stand for delivery or exact whatever price for its long position which a short is willing to pay in order to avoid having to make delivery" (p. 21). This would be a highly theoretical statement of the short's situation in speaking of the short's "willingness" to pay high offset prices and of his decision to "avoid" delivery if, in fact, the delivery alternative simply did not exist. But a more serious concern, in my view, is the majority's declaration that a long has the "contractual right" to exact the highest possible offset prices from the shorts during a natural market congestion. I can find no such contractual right.

A short who cannot deliver the commodity has effectively defaulted on his obligation and agreement to schieve that capability. This default exists as of the moment when delivery is no longer feasible, whether or not the long has yet made a demand for the commodity. Under those circumstances, however, exchange rules recognize two distinct alternatives for the short: to offset in the market with the longs, or to not offset and be declared in default by the sponsoring contract market. While both *Volkart* and *Cargill* recognize offset, neither appears to have focused clearly on the latter alternative of formal default.

Incorporated into the terms of every futures contract are all rules of the sponsoring contract market that bear upon the rights and duties of the parties. *Daniel v. Board of Trade of the City of Chicago,* 164 F.2d 815, 818 (7th Cir. 1947); *Cargill, Inc. v. Board of Trade of the City of Chicago,* 164 F.2d 820, 822-23 (7th Cir. 1947); *Cargill, Inc. v. Hardin,* 452 F.2d 1154, 1156 (8th Cir. 1971); *Case & Co., Inc. v. Board of Trade of the City of Chicago,* 523 F.2d 355, 358 (7th Cir. 1975). Among those rules are provisions governing the consequences of a default on the futures contract. [22] Typically, those provisions contemplate the payment of penalties and/or damages by the defaulter to the opposite party. In *Volkart,* for example, exchange rules prescribed a 1/4 cent per pound penalty plus actual damages incurred. See note 21, *supra.* These rules represent, in effect, an agreement between the long and short concerning the appropriate economic consequences of a default and are an integral part of the futures contract.

Consulting the actual terms of the futures contract, therefore, leads me to the conclusion that the resolution of delivery breachs—defaults—has not been left to raw market power, but is governed by a remedial system [23] established by contract market rules. The contractual rights of the long are found within that system. [24] The exaction of premiums by longs during offset that exceed the compensatory amount to which they would be entitled on default is not the recourse contemplated for breach of contract in exchange rules and is thus inconsistent with the contract's provisions governing that contingency. Accordingly, I cannot join in the majority's view that it is the "contractual right" of longs to demand as high an offset price as possible from the shorts during periods of natural market congestion.

The majority opinion also raises concerns for traditional market surveillance. Contract markets have a duty under section 5(d) of the Act [7 U.S.C. §7(d)] to provide for the prevention of manipulation, and this responsibility has been recognized to include a diligent effort to maintain orderly markets. *Miller v. New York Produce Exchange,* 550 F.2d 762, 766 (2d Cir. 1977); *Case & Co., Inc. v. Board of Trade of the City of Chicago,* 523 F.2d 355, 362 (7th Cir. 1975). [25] Natural supply shortages, accompanied by substantial long positions in the market, are not uncommon, and they have always warranted special vigilance. The exchanges frequently notify large traders of their overriding responsibility to the marketplace under these circumstances and, in the main, traders act to avoid a major market disturbance. [26] The Commission encourages this procedure and follows a similar course. Under the majority's formulation, however, longs who do not intentionally create or exacerbate the market congestion might feel free to demand as high an offset price from shorts as possible. Should that attitude emerge, it may prove difficult for the Commission or for the contract markets, during natural market congestions, to credibly implore traders to maintain an orderly market in the face of a momentary bargaining advantage. [27] For this reason as well, I depart from the majority's assessment of this issue.

Commissioner Stone, concurring:

There is an asymmetry in the development of administrative law. When a government agency reads its enabling statute expansively in the exercise of its judicial duties, the courts are available to check excessive zeal. When an agency's judicial decisions contract its traditional powers, there is no appeal. And, unlike the explanations associated with rulemaking proceedings, the language of judicial opinion has a precedential force which may discourage agency staff from easily raising the issues for subsequent consideration by the same agency. The Enforcement Division of the Commodity Futures Trading Commission can neither appeal the Commission's decisions nor initiate new actions without the Commission's permission. The majority's reasoning in the matter now before the Commission is of special concern in this regard. One can only hope that the sharp division of the Commission will be duly noted by the Enforcement Division and future Commissions.

The ultimate disposition of the matter is not at issue. The Admministrative Law Judge and all five Commissioners concur that the respondents can not be held causally responsible for the abrupt price increases which occurred during the liquidation of the July 1973 corn futures contract on the Chicago Board of Trade. Causality, though, is only one of the three essential elements that comprise a futures manipulation under the Commodity Exchange Act. [1] The majority's pronouncements with respect to the other two elements, artificial price and intent, represent a departure from a tradition and a body of case law protecting the integrity of futures market pricing.

The case before the Commission involves an alleged manipulative squeeze in an expiring futures contract. Precedential value is limited accordingly. It is important that neither the majority opinion nor the concurring opinions in this case be read as necessarily dispositive of matters in which cash market manipulation, illicit control of deferred prices, or manipulation by means other than a squeezing of the shorts has been alleged. Each such situation has its own pecularities, and none have been examined here. Still, the matter before us is of great significance. The manipulative squeeze is generally regarded as the most tempting and historically common form of futures manipulation. The Commodity Exchange Act is severely damaged when its ability to deter and punish the manipulative squeeze is weakened.

BACKGROUND

The elimination of price manipulation has been judicially described as the very purpose of commodity market regulation. [2] Long before there arose the parallel statutory goals of customer protection and systemic solvency assurance, Congress expressed its desire for a market free from the threat of manipulation. Dozens of legislative proposals were spawned by the futures markets manipulations at the end of the last century and these eventually culminated in the passing of the Grain Futures Act of 1922. [3] Price manipulation was referred to in the legislative history of that Act as an “overshadowing evil that must be eliminated.” [4] The purpose clause

of the present Commodity Exchange Act gives the same central focus to the prevention of the "sudden or unreasonable fluctuations in prices" which may result from manipulations. [5]

Concern about the pricing integrity of futures markets stems from their economic nature as well as their history. A heightened susceptability to price manipulation follows necessarily from the characteristics that distinguish futures markets from the underlying cash markets. Futures markets are useful in ways that cash markets are less so largely because of their standardization. Standardization permits a greater flow of information into a centralized marketplace; it leads to greatly enhanced liquidity; and it reduces transaction costs that necessarily accompany personally negotiated contracts. Standardization, however, has never been an unmixed blessing. Narrowing of contract terms raises the risks of market congestion, which in turn can set the stage for manipulation. Restrictions with respect to deliverable product, therefore, give rise to countervailing rules designed to minimize the danger of price distortion through manipulative activity. Holbrook Working, the dean of futures market economists, has written that their "special regulations and conventions, more restrictive than those applied to any other class of commodity transactions …" actually define the existence of futures markets. [6]

Futures markets do not narrow their participation to match delivery restrictions. On the contrary, they seek to broaden participation as an aid to price discovery and liquidity. It is normal and expected in futures markets that open interest may be many times larger than the deliverable supply. Well over ninety percent of short obligations are settled by the establishment of offsetting long positions rather than by delivery. [7] Offset by shorts, however, can not occur without cooperation from the longs or entry by new shorts. It has been recognized for at least a hundred years that, when imperfect competition offers market power to large longs and conditions of shortage makes delivery infeasible for the short, a short must either default or offset at an arbitrary price set by the longs. [8] Classic corners and squeezes are ordinarily of this variety, and the exchanges have long been aware of their obligation to lessen their incidence. [9]

A futures market in which shorts were too often called on to deliver would lose much of its short interest. A futures market which permitted too easy a substitution with respect to the timing, location or grade of of deliveries would lose much of its long interest. The task confronting the regulatory and self-regulatory authorities is generally seen as one of preventing squeezes and other forms of manipulation without unduly altering the configuration of the markets.

A classic squeeze can always be countered with a default, but it is seldom attractive for a short to consider this option. To protect their own reputations and interests, contract markets set very harsh penalties for default. Provision is typically made for stiff minimum damages, with additional monetary penalties to be assessed at the discretion of exchange authorities. [10] A defaulting member may also be subject to suspension or expulsion from the exchange as well as diminished status in the trade. [11] Most futures traders will be willing to pay a substantial premium for the right to offset their futures contracts rather than face default. The premiums a squeezed short will assent to may easily rise to levels in excess of the contract damages for which the responsible party in a cash default would be liable under most circumstances.

Even where delivery can be effected to frustrate a squeeze, it is not always desirable. The costs of transporting and storing commodities for no commercial reason other than to make a forced delivery on a futures contract are a deadweight loss to the economy. Diversion of commodities from the efficient stream of commerce undermines the economic purpose of futures trading. [12] The systemic cost of uneconomic delivery is just as real as the cost of price distortion. It must be a primary purpose of manipulation law to prevent distortion of futures prices from the underlying forces of supply and demand in the cash market without resort to uneconomic delivery.

The harm that accompanies the extraction of a futures premium unreflective of cash market economics transcends the immediate parties. The Commodity Exchange Act explicitly notes that futures prices are widely disseminated for use "as a basis for determining the prices to the producer and the consumer" and that futures

trading is used as a “means of hedging against possible loss through fluctuation in price.” [13] Both of these functions depend upon an economic relationship between cash and futures prices. Writing just prior to the passage of the 1936 Act, one observer declared that in the absence of a “necessary and continuing relationship between cash and futures prices there would be no economic justification whatsoever for futures trading.” [14] The Act, in a similar spirit, premises the national interest in futures market operations specifically on their useful economic purposes in hedging and price discovery. [15]

Quotation of futures prices have long been understood to play a price discovery role for the cash markets. Justice Holmes, writing for the Supreme Court in 1904 in *Board of Trade v. Christie,* characterized these quotes as “of utmost importance to the business world, and not least to farmers.” [16] The futures prices under scrutiny in that case were called the basis for world cash prices. A 1976 Commission staff survey indicated that among commercial handlers of grain, over fifty percent of the export elevators, terminal elevators and feedlots often bought or sold by reference to futures prices. [17] In the words of an even more recent author: “The world's agricultural chain rattles when the Board in Chicago posts its prices.” [18]

The role of futures markets in this respect is correctly described as one, not of *making* prices for the world, but of *discovering* prices by reflecting otherwise obscured forces of cash market supply and demand. [19] Consistent with this view, Holbrook Working has described futures and cash prices as being “determined as a single market,” the underlying supply and demand market for the actual commodity. [20] Price discovery is weakened to the extent, if any, that futures markets become unhinged from cash markets and futures prices come under the influence of factors unique to the futures market and not reflective of cash market supply and demand conditions.

The hedging function likewise depends on an economic relationship between futures and cash prices. The Chicago Board of Trade's Commodity Trading Manual explains this principle clearly in these words: “The fundamental reason that hedging cash positions with futures positions is an effective means of protection is that cash and futures prices have a tendency to move in concert with each other and maintain essentially predictable relationships in situations of fairly normal supply and demand. This parallel price movement manifests itself because both the cash and futures markets are governed and influenced by the same price making factors.” [21]

Hedging is disrupted when futures prices are squeezed or otherwise manipulated away from their normal relationship to cash prices. A farmer, for example, who is not in a position to make futures market delivery may still hedge his growing corn crop by going short futures as long as he can count on continuation of the historical relationship between the local price he will actually get for his crop and the futures price. When the futures market is functioning properly, the farmer-hedger retains a quantity risk with respect to crop size and a normal amount of basis risk but he has transferred to others most of his market price risk. If special circumstances in the futures market, however, should cause the futures price to rise abnormally relative to the country elevator price, the proceeds from the farmer's cash sale will be exceeded by his losses on the short futures position and the hedge will be destroyed at a potentially devastating cost to the farmer. The farmer who is indirectly hedged through a grain elevator or a cooperative is only one step removed from the same danger. A futures market operating to determine prices separately and apart from the forces of supply and demand in the underlying cash market will claim the hedger as its victim.

Regulators and self-regulators have long sought to assure that futures and cash markets will maintain their fundamental relationship. Price discovery can usefully occur only when the price being discovered is the true supply and demand price in the underlying cash market. Hedging for commercial users whose product is out of location or otherwise undeliverable is economically feasible only when cash and futures markets are moved by the same forces. It is possible to imagine a futures market governed by its own supply and demand forces, internalizing the possibility of an occasional squeeze. The majority decision may be read as tolerant of this concept. Such a market, however, would be of little use for price discovery or hedging. It would discover only its own equilibrium price and would serve the hedging needs of only those in position to deliver. This is most

emphatically not the market that has been envisioned by the Congress, the exchanges, the regulatory scheme or the courts.

The job of preventing price distortion is performed today by regulatory and self-regulatory rules operating before the fact and by threats of private lawsuits and disciplinary proceedings operating after the fact. Both elements are essential. Position limits before the facts, for example, play an extremely useful role in curbing speculative excess, but the Act does not provide the regulators with comparable authority for such a rigid approach with respect to hedgers. [22] While it might be possible to eliminate manipulation through heightened regulation alone, most would find the approach undesirable. Futures traders, and especially hedgers, have substantial freedom to pursue their competitive interests under present rules. A regulatory scheme that fully excluded the possibility of manipulation would necessarily curtail such commercial freedom and change the fundamental nature of the markets. The Act envisions a careful balance between preventative regulation and remedial judicial action. To weaken the latter, as the majority proposes, would strengthen the need for the former.

The purpose of the Act was not to change the basic configuration of commercial trade in commodity futures. Nor was it to establish commodity futures contracts as separate but equal economic goods, independent of their underlying product markets. The appropriate definition of manipulation under the Commodity Exchange Act must be that which best protects the functions of accurate price discovery and useful hedging through the maintenance of an economic relationship between derivative futures market prices and fundamental cash market prices.

Artificial Price

Price artificiality is an essential ingredient of a completed manipulation. It is not, however, sufficient to establish a violation of the Act. Artificiality can easily arise absent causation by an identifiable individual or group with manipulative intent. It is like a new cadaver at the morgue, a trigger for further inquiry but not in itself the proof of an offense. As the most objective of the three ingredients of a manipulation and the one wherein is found the damage, artificiality is the logical starting point for the analysis of any specific case.

The test for artificiality should be workable, direct, and conceptually distinct from the questions of intent or causality that will require evaluation at a larger stage of each case. Artificial price must not be equated to a murdered cadaver lest the analytical task become so conclusory and so circular as to deny an entry point.

It is well established in the law of manipulation that an artifical price is one which does not reflect the forces of supply and demand. [23] This is more an axiom than a test since neither supply schedules nor demand schedules have tangible manifestations in a marketplace. Prices and quantities can be observed in a market, but forces resist observation. A test subject to documentation and evidence is required if the concept of price artificiality is to have judicial meaning.

The majority decision, a departure from the case law on artificiality, seeks its grounding in the economic concepts of market efficiency and equilibrium. At one point artificiality is equated with movement away from an “equilibrium or efficient” price. (Maj. at 12) A review of the economic writing on efficiency casts doubt on the applicability of that notion here. Economic efficiency is generally descriptive of an optimal allocation of resources in an economic system. [24] Economic efficiency is a goal rather than an acomplishment of any particular system and proximity to economic efficiency eludes unambiguous measurement either prospectively or retrospectively. We would place an entirely unreasonable and judicially unprecedented burden on an administrative tribunal if, in order to render a manipulation decision, it were required to find that the suspect prices were harmful to national resource allocation.

Efficiency is defined somewhat differently in financial literature. A financial market is called efficient to the extent that its prices are those which would prevail if every investor had possession of all relevant market information. [25] A market would become less efficient in this sense if invaded by false rumors, but it would be drawn toward financial efficiency by any scoundrel who, having arranged the fire bombing of his competitor's grain storage, placed his orders long to enjoy the impending shortage. Financial efficiency looks only to the distribution of

information and never to its content. A test so narrowly based would exonerate virtually everyone except false rumor manipulators and can not possibly be appropriate to the task at hand.

A similar dilemma emerges when equilibrium theory is used to formulate a new concept of artificiality. The majority describes an artificial price as a "non-equilibrium" price. The trouble is that all market prices are necessarily equilibrium responses to the various forces operating on them. So the majority standard is modified to distinguish between "forces of supply and demand bearing on a particular market [which] … are all legitimate" and a "factor which is not legitimate." (Maj. at 7). The concept of relative legitimacy in supply and demand forces takes one quickly beyond economics. Legitimacy, of course, can not be objectively observed. It apparently rests on a value judgment to be made after the fact. The fire-bombing scoundrel would presumably be found to have introduced an "illegitimate" force into the market, while the beneficiary of a natural congestion is explicitly invited under this formulation to extract a premium. Legitimacy is more properly a statement about intentions than about prices. To equate an artificial price with an illegitimate price is to resort prematurely to an analysis of mental culpability. The element of intent would come not just to enter the artificial price question, but in fact to dominate any such analysis.

If all market forces which contribute to shaping a price are defined to be part of legitimate supply and demand, there obviously can be no such thing as an artificial price. To make the identification of illegitimate market forces a prerequisite for a finding of artificial price is an insufficient improvement. Legitimacy with respect to supply and demand is undefined in law and in economics, unless the sole question is whether the forces were put in motion by an illegal act. And this could not be the case, for if it were, price artificiality could be found to exist only after another crime on the part of the alleged manipulator had been proven.

The traditional test of price artificiality is neither so circular nor so fraught with perils of logic. The case law takes a simpler approach, equating artificiality with departures from normal pricing relationships. When cash market distortion is not suspected, an abnormal deviation of futures prices from cash prices is taken as an indication of artificiality in the futures market. When a particular futures price is suspect and others are not, a deviation of the suspect price from its normal relationship with other futures prices would also be useful evidence. A finding of artificiality under this standard is neither difficult nor grave. It merely signals an unusual and potentially harmful situation in which it is appropriate to look for an individual or group who may have intentionally caused the unusual price relationship.

Price artificiality in December 1947 egg futures was found by the Seventh Circuit Court of Appeals in *Great Western Food Distributors, Inc., v. Brannan* on the basis that there were "abnormally high refrigerator egg and future prices in relation to (a) the price of January 1948 futures and (b) fresh eggs in December 1947." [26] *Volkart Brothers, Inc., v. Freeman,* a manipulation decision by the Fifth Circuit Court of Appeals, uses the terms abnormal and artificial interchangeably. [27] It also cites the well known Marsh definition of a manipulation, which refers to a "price distortion of any kind in any market either in itself or in relation to other markets." [28] *Cargill, Inc. v. Hardin* offers an extensive analysis of futures price artificiality by the Eighth Circuit Court of Appeals and endorses the use of four tests by the Government: whether price movements on the suspect days were comparable to movements in the past, whether spread movements on the suspect days were comparable to movements in prior years, whether the relationship between the Chicago futures price and the Kansas City futures price was out of line by historical standards, and whether the futures price bore a proper relationship to the prices in the cash market. The court concludes that, on the basis of the evidence presented, the price was "abnormal" and thus artificially high. [29]

The straightforward case law approach may not be the only route to establishing artificiality, but it does meet the requirement of workability and it permits analytical separation of the three elements of proof. It has a sound economic foundation as well. When the cash market price is reliably reflecting fundamental supply and demand, it follows directly from abnormal price divergence that harm will come to innocent hedgers and those who rely on futures prices to discover cash prices. The appropriate conclusion from abnormality is that there exists the

likelihood of an economic harm which Congress has taken steps to prevent. From there, the search for causality and intent may begin.

In the instant case, prices were shown to be artificial. The price increase on July 20 was said to be the largest one day price rise ever recorded for corn futures. (Initial Decision (I.D.) at 51). Spreads rose to unprecedented levels within the futures market. And no commensurate movement occurred in the cash market for corn, even in Chicago. The majority's assertion that the price was “reflective of the legitimate forces of supply and demand” at the time follows from its novel theory that all forces contributing to an observed price, including those lent by an alleged manipulator, are components of supply and demand absent a showing of illegitimacy. (Maj. at 22). The Administrative Law Judge, on the other hand, observed that there can exist “artificiality of price, apart from culpable activity” under current law. (I.D. at 52). Careful examination of the evidence led him to conclude that “prices in the CBOT 1973 corn futures contract reached artificial levels on July 20, 1973.” (I.D. at 92). Chairman Johnson, who reaches the same conclusion in his concurring opinion, offers a thorough and entirely persuasive review of the issue. There is no need for replication of the factual analysis here. This finding of the Administrative Law Judge should have been affirmed.

Causality

Once it has been established that an artificial price prevailed in the market, inquiry naturally turns to whether causality can be ascribed to any identifiable trader or group of traders. There is no completed manipulation charge to be brought if artificiality resulted from faulty contract specifications, suddenly chaotic cash market conditions, government action or other factors beyond any potential respondent's control.

Courts have long recognized the need to demonstrate a causal link as a matter of legal logic, but explicit treatment of this element in manipulation cases was first given in plain language by the *Cargill* court. The Eighth Circuit found May 1963 wheat prices artificial, then turned to “whether the artificially high price was caused by Cargill.” [30] In a case of this nature, the ultimate question to be decided under this heading is whether there existed a predominant relationship between the behavior of the respondent and the movement of prices toward artificial levels. Cases have generally looked to market power, conduct and the interplay of exogenous forces for the clues.

Market power, sometimes called dominance or capacity, is essential to the traditional squeeze or corner. [31] Perfectly competitive markets are inhabited only by pricetakers and never by pricemakers; but no one expects actual commodity markets to be perfectly competitive. Capacity to affect price is thus a matter of degree. Futures regulators have often looked to the size of a participant's position in relation to both open interest and deliverable stocks as a measure of market power. [32]

Action on the part of an alleged manipulator is similarly scrutinized. Since causal links are almost always established circumstantially, a close time sequence or an operational connection between specific conduct on the part of a dominant market participant and the movement of price towards artificiality is given considerable weight. [33] The test here is necessarily mechanical rather than motivational; questions of mental state, purpose and knowledge require a separate and more complex examination under the heading of intent.

A respondent is not the cause of artificial prices if some factor exogenous to the relationship between respondent's behavior and market price movement can be shown to have played the dominant role. Although the majority opinion introduces an analysis of exogenous forces into its explanations for finding neither artificial price nor intent, a clearer methodology for analyzing manipulation cases treats such considerations just once. Only causality is truly affected by the presence of outside influences on price.

Numerous factors, of course, can influence prices and it is the nature of markets to reflect them. For an outside force to be of relevance in examining causality, it must be shown to have had a special impact on the suspect price. An exogenous force raised as a defense in a typical futures manipulation case must have caused the subject futures price to become artificial in relation to the forces of supply and demand in the cash market.

The Administrative Law Judge and the Commission both exonerate Indiana Farm Bureau (IFB) on causality grounds. The judge was not convinced that Indiana Farm Bureau ever had the capacity to dominate price, having rejected as much too low the Enforcement Division's estimate of deliverable stocks. (I.D. at 59-65). He was also highly critical of the largest shorts, who remained in the market until the last day of trading without having made any provision to secure corn for delivery. (I.D. at 69-70). His reasoning follows that of the court in *Volkart,* where it was found the unusually high prices for expiring cotton futures were caused largely by a failure on the part of short traders to arrange certification of otherwise deliverable cotton. [34] (I.D. at 71-2). The Commission concurs both with respect to deliverable supply and the behavior of the shorts.

The principal weakness in the Enforcement Division's analysis of deliverable stocks is its binary treatment of availability. It regards corn warehoused in delivery locations as either irrevocably committed or available. (I.D. at 59-61). Not surprisingly, it finds that stocks of corn uncommitted to export or other uses were low. The proper direction of the inquiry would have been toward availability at various levels of increasing price. The Division did not demonstrate that stocks unavailable at earlier prices were also inaccessible to the market at the higher prices prevailing between the market's opening on July 20 and the time artificial price levels were reached. Although the majority opinion may overstate the situation when it refers to the tightness as a “natural” corner, the majority is on sound footing when it calls attention to the lack of testimony from any short that corn was not obtainable in Chicago on July 20. The apparent apathy on the part of the largest short in seeking corn for delivery, and thus testing the elasticity of available corn supplies to higher prices, makes the Division's case a difficult one to prove. (I.D. at 69-70).

The market's movement prior to the receipt of Indiana Farm Bureau's stepped-up liquidation orders also casts doubt on respondent's dominance. At the opening on July 20, IFB was merely one of three very large longs and held less than 30% of the open interest. (I.D. at 33). The first price explosion, which took July corn to around $3.00 per bushel, occurred without active participation by the respondent. (I.D. at 31). Although IFB had placed large sell orders in the $3.00 range, no evidence was presented that these orders were disclosed or otherwise influenced price prior to their execution.

By the time price moved over $3.00, Indiana Farm Bureau had a much larger share of the open interest but it had liquidated almost half of its long position. (I.D. at 30-2). The sharpest price spike began when IFB's position was roughly midway between the deliverable stock estimate put forth by the Enforcement Division and that found by the Administrative Law Judge. (I.D. at 32). IFB had no orders in the pit during this second price explosion and was presumably holding for a delivery the largest shorts were not preparing to arrange. (I.D. at 32).

The step-up orders placed by IFB during the last half hour of trading can be more convincingly argued to have had a casual effect. It was as those orders were executed that prices took their final upward jump to the $3.90 high for the day. (I.D. at 32). The record on this score, however, is incomplete in light of the market's earlier and undeniable momentum. The reckless behavior of the dominant short, moreover, holding a four million bushel position and no deliverable corn in what seems to have been a gamble on the government's rumored announcement of new export controls, is an unusually compelling example of an exogenous influence on price movements. (I.D. at 34, 69-70). Although foolishness on the part of the shorts would never justify a manipulative squeeze, obvious vulnerability on the short side could attempt even a disparate collection of independent small longs to require a substantial premium for offset. The regulators and self-regulators share the responsibility of clearing the market at non-artificial levels in situations of this kind.

Indiana Farm Bureau may have caused some of the price rise on July 20, but other forces were working as well. The record does not untangle from IFB's impact the influence of the shorts, the influence of the twenty six orders from other longs filled at prices above $3.70, or the uncertainties of a deliverable supply which went untested. There is little of a precedential nature to be said about causality under the unique circumstances of July 20. The Commission simply lacks proof that Indiana Farm Bureau was the predominant cause of the artificial futures price found to have prevailed that morning.

Intent

The third and final element necessary to establish a manipulation violation is intent. Artificial prices, or even artificial prices traceable to the actions of an identified party, may occur from time to time without there having been a manipulation. Where price distortion is innocently caused, the case law does not provide support for a charge of manipulation on the basis of a strict liability doctrine.

There is no universal standard for culpable intent. Intent in criminal law has been described by the Supreme Court as an "elastic and ambiguous" concept defined by the context in which it is to be applied. [35] The Commodity Exchange Act and its legislative history provide scant help in assessing the mental state required to sustain a manipulation charge. One must look for guidance in the case law, both under the Act and with respect to similar offenses.

Courts have drawn a distinction in recent years between standards of intent which look to the defendant's knowledge of the likely consequences of actions and those which look to the defendant's purpose. Common law has traditionally distinguished between general intent and specific intent with roughly the same notion in mind. In the case now before the Commission, the majority has emphatically adopted a specific intent approach and equated this with a requirement that purpose be shown. Specifically, the majority asserts that "it must be proven that the accused acted (or failed to act) with the purpose or conscious object of causing or effecting a price or price trend in the market that did not reflect the legitimate forces of supply and demand influencing futures prices in the particular markets at the time of the alleged manipulative activity." Since the final phrases of this standard are drawn directly from the majority's definition of artificial price, the standard can be rephrased without violence to its content as requiring proof that the accused had "the purpose or conscious object of causing or effecting an artificial price or price trend."

The distinction between general and specific intent has been described by the Supreme Court as ambiguous and the "source of a good deal of confusion." [36] One reason for this is that specific and general intent are generally taken to apply to overall states of mind, whereas in reality a human decision may have manifold dimensions. The modern differentiation between knowledge and purpose lends itself more readily to examination of component elements in reconstructing a defendant's state of mind. If we are to look at the applicability of a general or specific intent concept with respect to manipulation law, it is useful to begin with a reduction of the requisite *mens rea* into two components: state of mind as to control of price and state of mind as to resultant price relationships.

A trader may take or hold a potentially dominant futures position with *knowledge* that it will yield control over the level or direction of prices and with *knowledge* that the likely result of this action will be artificiality of prices. Another trader might take the same position with the *purpose* of exercising control over the level or direction of prices and *knowledge* that the likely result will be artificiality of prices. A third trader might take this position with the *purpose* of exercising control over prices and the *purpose* of causing artificiality of prices.

An allegation of manipulation against the first of these traders could be sustained only under a general intent theory. For sake of example, imagine the following uncontested facts: (a) an artificial futures price has been observed and causality has been attributed to a particular trader; (b) the trader had taken a dominant long position with the sincere but mistaken view that fundamental economic forces would soon raise prices; (c) the trader, by benefit of many years' experience, *knew* the position to be so large that, under the circumstances of the market in question, the position would force futures prices upward even if the bullish initial assessment of the fundamentals proved wrong; and (d) the trader had been genuinely indifferent as to whether profit arose from correct fundamental judgment or an artificial price dictated by the massive position holdings. These facts would not support a finding that the respondent's actions during the time of the incorrect fundamental assessment were premised on either a purpose to control prices or a purpose to render them artificial. Whether such behavior is permissible under the Commodity Exchange Act is at the heart of the general intent issue.

The second hypothetical trader, possessing a mixture of purpose and knowledge, lies in a domain where the common law intent concepts become especially esoteric and confusing. An illustrative example may be simply constructed with these facts: (a) artificial price and causality have been established; (b) the trader, operating in an illiquid market, had decided to preselect a futures price for reasons external to the market, such as sheltering income from taxation; (c) the trader had received cooperation from a trading partner and had purposely taken the

futures price to an arbitrary, non-competitive level; and (d) although the trader *knew* the selected futures price would almost certainly be artificial with respect to other prices, the trader was absolutely indifferent to the cash market or basis relationships. Purpose to control prices is evident here, but purpose to render prices artificial is not. Charges could be sustained under a specific intent test whose focus was purpose to control the level or direction of prices but not under a test which required purpose to render prices artificial.

The third trader, having both a purpose to control prices and a purpose to render them artificial, is the classic specific intent respondent. Of the three potential respondents discussed in this analysis, only this last will find no comfort in the complexities of the debate over an intent standard.

The majority opinion suggests that case law is a definitive bar to the general intent test. The majority's selection of quotations and citations appears to support that conclusion. A more complete reading, however, reveals inconclusive and sometimes contradictory statements on the subject of intent. No court has rejected, or even reviewed, a general intent manipulation finding. [37] The safest conclusion from the case law is that the courts, never having had a general intent manipulation case to review, have never thoroughly considered the issue. Before precluding the possibility of bringing a general intent case at some time in the future, the Commission should more carefully consider the law and public policy questions involved.

The Supreme Court, in *United States v. U.S. Gypsum Corp.,* approvingly quotes the view that a person "intends a result of his act under two quite different circumstances: (1) when he consciously desires that result, whatever the likelihood of that result happening from his conduct; and (2) when he knows that the result is practically certain to follow from his conduct, whatever his desire may be as a result." [38] This is merely a recognition of the impenetrability of human psychology. There is no real distinction to be drawn between an action purposely taken with knowledge of its results and an action taken with conscious purpose or desire.

Antitrust law, as shown in *Gypsum,* goes farther in that it would permit a criminal conviction under the knowledge test even where the consequences of the offending action were forseeable to less than a practical certainty. [39] In business matters normally involving consideration of the desired results and a weighing of costs, benefits and risks, the *Gypsum* Court concludes that "a requirement of the proof not only of this knowledge of likely effects but also of a conscious desire to bring them to fruition … would be unnecessarily cumulative and unduly burdensome." [40]

The majority cites the *Gypsum* decision for its discussion of the difference between general and specific' intent but apparently rejects the comparability of *Gypsum* to manipulation law on this point. The reasoning is unstated and the rejection of antitrust precedent here is most puzzling. The *Cargill* court described antitrust as a "closely related field" and analyzed the concept of relevant market in antitrust cases as a guide to the definition of supply under manipulation law. [41] Moreover, since antitrust law applied to manipulation cases prior to the passage of more specific provisions in the Commodity Exchange Act, a rejection of comparability in favor of a more restrictive reading implies that it was the intent of Congress to weaken the enforcement remedies available for manipulation cases by its passage of the Act. [42] This runs counter to the wording of the Act and an extensive legislative history.

The Commission's *In re Hohenberg Brothers* opinion, which refers to purposeful conduct at one point, defines elsewhere an intent standard simply requiring "conduct intentionally engaged in resulting in an artificial price." [43] If the conduct referred to is the taking of a massive position, a general intent standard would be consistent with this phrasing. Commentators have noted this lack of clarity in *Hohenberg.* [44] The *Cargill* case also talks of "conduct … intentionally engaged in which has resulted in" an artificial price. [45] Again, this might be read to cover a trader who purposely takes a large position with knowledge that he or she will acquire control of prices and that prices will consequently become artificial. Only *Volkart* endorses the majority view throughout and that case has been criticized by the later *Cargill* court as not representing "a clearly defined line of cases establishing a definitive standard of acceptable conduct under the statute prohibiting manipulation. [46]

That a general intent case can be brought under criminal antitrust law is well established. Judge Learned Hand put it well when he stated that while a "monopolist must have both the power and the intent to monopolize, … to read the passage as demanding 'a specific intent' makes nonsense of it, for no monopolist monopolizes unconscious of what he is doing." [47] The same thought should apply to at least those futures traders for whom knowledge of the likely consequences of their positions has been demonstrated. It should apply, moreover, in a criminal manipulation context. Any difference between the criminal standard and the administrative standard applicable here should operate to reduce the burden on the Enforcement Division rather than aggravate it. [48]

The majority's discussion of general intent in the context of completed manipulation is for the most part gratuitous. Since the majority found no artificial price and no causality, it had no need to analyze the appropriate standard of intent in completed manipulation cases. The facts, moreover, and the conditions of undemonstrated causality are logically difficult to reconcile with a general intent accusation. The majority also reminds us that the complaint against Indiana Farm Bureau charged specific rather than general intent. The Division of Enforcement raised the general intent standard only after the Administrative Law Judge had completed his hearing. Although the Judge spoke of general intent in his initial decision, the distinction he drew between general and specific intent was in no way essential to his logic in exonerating Indiana Farm Bureau. (I.D. at 56-8).

The issue of whether a general intent case can be brought under the Act must remain open. Should a case arise which fits the general intent pattern, I would encourage the Division of Enforcement and the Commission to take a fresh look at the matter in the context of specific facts.

The Commission unanimously reads the Commodity Exchange Act to permit findings of manipulation based on proof of specific intent. There is less agreement on the precise meaning of specific intent. The majority apparently holds that there must be proven both a desire to exercise control over prices and a desire to render prices artificial. Incorporated in this standard of specific intent is the majority's definition of artificiality, resting on prices or price trends "effected by a factor which is not legitimate." The majority opinion can additionally be interpreted as requiring that unlawful intent be characteristic of the respondent's mental state when dominance was first acquired or congestion enhanced. Each of these restrictions may invite behavior threatening to the integrity of the marketplace.

The failure to separate a desire for control from a desire for artificiality is a license to dominate futures prices whenever the ultimate goal is other than an artificial price. It leaves the distant months in many contracts, where artificiality evades simple identification, virtually unprotected from arbitrary use of market power. The equation of a purpose to render prices artificial with purpose to introduce an illegitimate supply or demand factor brings in thorny issues of motive, perhaps even permitting a defense that the market was controlled for the sake of good rather than evil ends. One might imagine, for instance, a producer group or foreign government using futures market power to "correct" a price level which is perceived to have arisen from conspiracy to deprive its constituents for their rightful due.

The legal basis for the majority's standard is less than robust. Greater reliance is placed on the *Hohenberg* opinion and the *Volkart* decision than they can rightly bear in this regard. The *Hohenberg* opinion ambiguously presents two different intent standards. [49] *Volkart* was not only criticized by the *Cargill* court for deviating from established case law by its "substantial disagreements with both *Great Western Distributors v. Brannan,* 201 F.2d 476 (7th Cir. 1953) and *G. H. Miller & Co. v. United States,* 260 F.2d 286 (7th Cir. 1958)," but the subsequent court concluded that "if the Volkart decision is to be interpreted as prohibiting regulation of manipulative squeezes, it is not in line with the Commodity Exchange Act…" [50]

The passage taken by the majority from *General Foods Corporation v. Brannan* speaks of "the creation of an artificial price by planned action." [51] This could mean what the majority asserts, although if the planned action referred to is the seizing of control over price it represents an excellent expression of the opposing point of view. The *Cargill* court was not so approving of this language as has been suggested. Rather, it refers to it merely as "one of the few judicial definitions to be found." [52] That court makes no attempt to resolve the intricate issue of

exactly what had to be planned. Its basis for upholding the finding against Cargill was merely that respondent had "intentionally caused" the situation precipitating the case. [53] Intentional causation is circularly consistent with all of the proposed standards of manipulative intent.

Just as a less convoluted standard of artificiality resolves some problems in the majority's approach to that issue, so a more direct standard of specific intent will better serve the law of manipulation. The specific intent to manipulate, as proscribed by the Commodity Exchange Act, should encompass all situations in which the respondent purposely took control over the level or direction of futures prices, whether with a desire to render them artificial or with the knowledge that artificiality was a likely consequence.

The premeditation inherent to the majority's intent standard is troubling in that it would seem to make lawful an important form of manipulative squeeze. The majority explicitly welcomes the holder of a dominant position to seek "the best price from the existing situation" where the trader "does not intentionally create the conditions for a squeeze, or a congested futures market arises from other causes." The extraction by a dominant long of a premium from the shorts is presumably sanctioned unless "once the congested situation becomes known to him, the long exacerbates the situation by, for example, intentionally decreasing the cash supply or increasing his long position in the futures market." (Maj. at 17, n. 12).

This approach runs contrary to many years of marketplace and regulatory tradition. It contravenes the 1926 Federal Trade Commission Report on which the majority relies. That report had asserted: "The long interest, no matter how built up, that allows itself to be tempted into exploiting the situation (congestion) in a way to involve acute disturbance of the market becomes a cornering interest." [54] It would seem to hold harmless the long who enters an unrealisticially large cash forward contract, hedges it with a long futures position, and then remains in the market to extract a squeeze premium once delivery is seen to be impossible. It would seem to encourage the routine entry of massive spread orders by traders hoping that a natural congestion will develop and the near month will go off at an unusual premium to the deferred month.

Holbrook Working wrote nearly fifty years ago on how such squeezes can occur in the wheat market as follows: "… purchases of May wheat made as part of plan for squeezing the market may be accompanied or shortly followed by sales of later deliveries, perhaps July. These sales of the later futures would not only provide an assured means of disposing of such deliveries on May contracts as may have to be accepted, but leave the 'squeezer' indifferent to the development of bearish price influences which may wholly offset the bullish effects of his operations in May wheat. With a corner or squeeze thus hedged, he need be in nowise concerned with the actual changes in price of May wheat, since his profits depend merely on his ability to force a widening of the spread between May and July wheat of which he can take advantage." [55] While the majority might find such a plan unlawful if conceived from the start as a device for making prices artificial, a trader holding such positions in numerous markets merely waiting to see if other forces would bring dominance to his doorstep could apparently do so with impunity.

The market has long acknowledged a duty on the part of large participants to reduce near month positions as they begin to take on undue price influence. The surveillance budgets of regulators and self-regulators alike are largely devoted to avoiding the extraction of premiums over cash prices in congested markets. It is a dramatic break from the past if the Commission majority now thinks it legal to extract a substantial premium so long as this was not the original purpose of the dominant player at the time the congestion was initiated.

Lest the wrong impression be created, it is worthwhile to note some useful aspects of the majority opinion as well as those fit for criticism. The majority does accept the long established precedent that intent to manipulate can be inferred from the entirety of the respondent's knowledge and actions. The majority does not take issue with an important observation of the Administrative Law Judge, drawn from the *Hohenberg* case, that trading "consonant with prudent business practice is not in itself sufficient to refute the allegation of attempted manipulation." (I.D. at 57). The majority notes that the requisite intent may be manifest in inaction of the defendant as well as action. One may also infer from the majority opinion that the intent to create an artificial price need not have been the sole objective of the alleged manipulation or the only possible outcome of the actions under scrutiny.

The majority may also be credited with having developed a reasonable intent standard for attempted manipulation. Despite the Commission's unsupported assertion in *Hohenberg* and restatement here that the intent standards for completed and attempted manipulations are identical, the criminal law has long recognized that a higher standard of intent may be required for attempted violations than completed offenses. [56] This is particularly so when the actions characterizing the attempt are not in themselves exceedingly menacing to society. It is reasonable to require that charges of attempted manipulation be supported by evidence of heightened mental culpability as well as behavior constituting a real threat to market integrity. [57] When heightened mental culpability must be inferred, it may often be necessary to demonstrate a level of planning similar to that envisioned by the majority. While the majority's flirtation with standards of vicious calculation and nefarious means in completed manipulation cases is wholly inappropriate, the result may approximate the right test in cases of unsuccessful attempt.

An analysis of the final few minutes of the respondent's trading provides a particularly instructive example of how a meaningful standard of intent can be applied. At the close of trading on July 19, respondents had established a long position in the July delivery month of over 4.8 million bushels of corn. (I.D. at 30). Only one morning of trading remained. (I.D. at 2, 16). Although the Enforcement Division has contended that an adverse inference should be drawn from IFB's very holding of this position, it has not been shown that the position was dominant in relation to the overall July 19 open interest of more than 17 million bushels. (I.D. at 58, 65). Nor has it been successfully demonstrated that this position was excessive by comparison to estimated deliverable stocks of Chicago corn. Similarly, the unexecuted spread orders of IFB between July 11 and July 17 do not by themselves signal manipulative intent. The spread orders involved only a small fraction of a nearly 50 million bushel open interest at that time, and the most damning interpretation one could give to them is that they were intended to test the susceptibility of the market to later and larger orders. (I.D. at 58, 77).

It is IFB's trading before the noon close on July 20 that merits exacting attention. The record below indicates that shortly after 11:30 a.m. on July 20, the floor manager and trader for the commission firm used by IFB telephoned respondent Johnston from the floor to inform him of an unusual situation. (I.D. at 32, 84-5). Prices had exploded upward in a matter of minutes, there were no sell orders in the pit, and liquidation was faltering. Johnston gave instructions to sell a total of 490 thousand bushels at stepped-up prices of $3.70, $3.75, $3.80, $3.85 and $3.90. (I.D. at 32, 85). These five orders were executed beginning at 11:38 a.m. July corn quickly reached a high of $3.90, and only five thousand bushels of Johnston's order at $3.90 remained unsold. (I.D. at 32, 85).

Johnston explained at the hearing that his purpose in entering the sell orders was to help the market liquidate. (I.D. at 85). This does not address the issue of price. With 30 years of experience in both futures and cash trading, Johnston surely knew that orders priced closer to the cash market would be at least as useful in helping the liquidation. He was fully cognizant of the pressure the situation imposed on the shorts and their presumed desire to avoid a default. By the time the sell orders were placed by IFB, respondent's share of the total long interest had risen to over 60%. (I.D. at 58). It was too late for the shorts to safely acquire cash corn; as one expert witness for the respondents testified, it would not be known for a day or two whether high prices would bring out more product. [58] The shorts were effectively signalling their weakness by frantically bidding up the price. It is hard to see step-up orders under these conditions as not having a purpose to dictate an upward price or price trend or, alternatively, to force default. The latter, Johnston agreed, he did not expect. [59]

Knowledge that prices as high as those reached on July 20 were artificial was readily available to the respondents. IFB, despite its large long futures position, was net short on July 20 because of large export commitments and, consequently, it was bidding for export quality corn in the Chicago cash market both before and after July 20. (I.D. at 26). On Thursday, July 19, respondent bid $2.42 for Chicago cash corn of deliverable quality. (I.D. at 13). The next day—the same day it was asking $3.70 to $3.90 in the pit—its cash bid was $2.65. (I.D. at 13, 32). The following Monday, July 23, its initial Chicago cash bid was $2.67, and it acquired 360,000 bushels of Chicago corn at $2.76. (I.D. at 13). Both IFB and the seller of this corn apparently valued it at about a dollar under IFB's offset price the previous Friday.

IFB's futures market operations also lend support to an inference of knowledge concerning artificiality. Prior to the step-up orders, IFB had reduced its July corn position on the morning of July 20 by 2.25 million bushels. (I.D. at 30-2). Respondent Johnston had entered four spread orders at 9:15 a.m. before the opening of trading to offset July corn futures and purchase a like amount in the September contract. All of these orders sought premiums of less than fifty six cents for July over September, which had closed on July 19 at $2.36 7/8 and was restricted by a ten cent daily price limit. (I.D. at 31). The implied maximum July price for those orders was about $3.03. Johnston later reduced this spread premium by approximately two and a half cents. (I.D. at 31). Consistent with this assessment, IFB just before 10:00 a.m. entered an order to sell 150,000 bushels of July corn at $3.00. (I.D. at 31).

Both the spread orders and the outright orders remained in the market until filled between 11:26 a.m. and 11:33 a.m. (I.D. at 31). When respondent Johnston altered his offering prices that morning after receiving a telephone call from the floor, it seems plain that he did so on learning of his futures market strength rather than any reassessment of fundamental supply and demand conditions in the cash markets. This view is confirmed if we accept the veracity of Enforcement Division interview notes which show respondent Johnston subsequently stating that he would take delivery of only a minimum of corn at $3.80 because “a minute or two later corn would be worth a dollar a bushel less.” (I.D. at 89).

Were causality to have been found in this case, these would be persuasive considerations in an evaluation of intent. Without a finding of causality, the respondents must be adjudicated not guilty of *completed* manipulation whatever may be the indicia of intent. And, if the appropriate test of *attempted* manipulation under the Commodity Exchange Act incorporates the burden of demonstrating planning or other indicia of heightened mental culpability on the part of the respondent that count can not be sustained by the facts presented here.

While the ultimate disposition of the manipulation case against Indiana Farm Bureau is accepted by the entire Commission, the matter is in fact a much closer call than the majority opinion would indicate. The debate over price artificiality and intent has gone on for many years, and it will presumably continue. Prospective holders of dominant futures positions would be well advised to keep their offsetting orders squarely within the price bounds prescribed by the supply and demand conditions in the underlying cash markets.

Footnotes

1 Respondent Indiana Farm is a regional agricultural cooperative. Respondent Johnston has been the manager of the Grain Division of Indiana Farm since 1962.

2 In order to prove a successful manipulation, it is necessary to demonstrate that the accused caused an "artificial" price. An "artificial" or "distorted" price is a price which does not reflect the market or economic forces of supply and demand operating upon the price of the particular contract under scrutiny. It is, in economic language, a non-equilibrium price.

Commodities are priced in an aggregate market via transactions that reflect place, transportation, and convenience costs and even time of delivery. The futures market is a market within that larger market and is often referred to as a derivative market. A futures transactions or positions which normally take place at a later time in the physical market, but a futures transaction is no less a part of the aggregate market structure or pricing system that is any other cash transaction. Futures transactions add a time dimension to the pricing of the physical. Thus, we cannot separate futures transactions from the aggregate commodity market.

As the delivery time draws near, not only do the cash and futures prices converge, but the *markets* converge by virtue of the delivery mechanism. Depending on what else is going on in other segments of the aggregate market, the futures market may well define the aggregate market. If trading in the physical market is thin, in terms of quantity, quality or volume, the futures market may be *the market.* The traders in the pit are buying and selling the commodity.

Thus, to determine whether an artificial price has occurred, one must look at the aggregate forces of supply and demand and search for those factors which are extraneous to the pricing system, are not a legitimate part of the economic pricing of the commodity, or are extrinsic to that commodity market. When the aggregate forces of supply and demand bearing on a particular market are all legitimate, it follows that the price will not be artificial. On the other hand, when a price is effected by a factor which is not legitimate, the resulting price is necessarily artificial. Thus, the focus should not be as much on the ultimate price, as on the nature of the factors causing it.

3 The Division later made the following "offer of proof" to the Administrative Law Judge prior to the hearing:

Complainant will offer documentary and general and expert testimony evidence establishing Respondents' market activity during the period in question and that Respondents *acted for the purpose and with the intent of causing,* and did cause, the price of the July 1973 corn future to be abnormally and artificially high on July 20, 1973. [Pre-hearing Memorandum of November 25, 1975 at p. 9 (emphasis added)].

4 In *United States v. United Gypsum Co.,* 438 U.S. 422, 445 (1978), the Supreme Court discussed the difference between "general" and "specific" intent:

The element of intent in the criminal law has traditionally been viewed as a bifurcated concept embracing either the specific requirement of purpose or the more general one of knowledge or awareness.

It is now generally accepted that a person who acts (or omits to act) intends a result of his act (or omission) under two quite different circumstances: (1) when he consciously desires that result, whatever the likelihood of that result happening from his conduct; and (2) when he knows that the result is practically certain to follow from his conduct, whatever his desire may be as to that result. W. LaFave & A. Scott, *Criminal Law* 196 (1972).

See also United States v. Bailey, 444 U.S. 394, 404 (1980).

5 *See, e.g., Cargill, Inc. v. Hardin, supra, aff'g In re Cargill, Incorporated,* 29 A.D. 880 (1970); *Volkart Brothers, Inc. v. Freeman, supra, rev'g In re Volkart Brothers, Inc.,* 20 A.D. 306 (1961); *G.H. Miller & Co. v. United States,* 260 F.2d 286 (7th Cir. 1958) *cert. denied,* 359 U.S. 907 (1959) *aff'g In re G.H. Miller & Co.,* 15 A.D. 1015 (1956); *Great Western Food Distributors, Inc. v. Brannan,* 201 F.2d 476 (7th Cir. 1953), *cert. denied,* 345 U.S. 997 (1953), *aff'g In re Great Western Food Distributors, Inc.,* 10 A.D. 783 (1951); *General Foods Corp. v. Brannan,* 170 F.2d 220 (7th Cir. 1948), *rev'g In re General Foods Corporation,* 6 A.D. 288 (1947); *In re David Henner,* 20 A.D. 1151 (1971).

6 *Accord,* Wolff, *Comparative Federal Regulation of the Commodity Exchanges and National Security Exchanges,* 38 Geo. Wash. L. Rev. 223, 235 (1969) ("… market activity creating prices not responsive to the natural forces of supply and demand, accompanied by the specific intent so to affect prices, constitutes [commodity] manipulation…"); 1 A. Bromberg & L. Lowenfels, *Securities Fraud & Commodities Fraud,* §4.6 at pp. 82.336-82.337 (1975 Supp.).

7 Applying the specific intent standard to the facts the Commission concluded that "it is not clear nor inferable from the record before us, … that respondents intended their conduct to depress artificially the price of the December 1971 cotton future to a level not reflecting the basic forces of supply and demand." *Id.* at p. 21,478.

8 These are among the most common shorthand terms used in the caselaw to describe prices that do not reflect the basic forces of supply and demand. See n. 2, *supra.*

9 In *In re General Foods Corp.,* 6 A.D. 288, 310 (1947), the Judicial Officer of the Department of Agriculture had held that

to hold a person responsible for a [manipulative] violation some intent must be shown either by the mere doing of a prohibited act or by the more exacting standard of a specific intent equivalent to the *mens rea*

of criminal law. However questionable or undesirable, the holding of a large supply of rye by General Foods was not in itself prohibited, nor was its failure to liquidate the stock or part of it in such a way as to make rye available to elevators or other speculative interests.

10 Market participants are constantly entering and leaving a market based on their assessment of whether the relevant commodity is overpriced or underpriced. The aggregate of these participants' actions is the essence of supply and demand and each can contribute to the equilibrium pricing of a commodity. Some may be acting on good information or foresight and others may be acting on incorrect information or perceptions. As some turn out to be more "right" than others, prices will move in a manner which is more reflective of those who acted with good foresight. It should be noted that even in markets that are generally thought to be competitive, there are often lags in the dissemination of new information, making market participants price setters in the short-run dynamic process, even though they may be price takers in the long run.

11 *See* Section III, at pp. 22-24

12 Seeking the optimum price from the futures market (risking, of course, the possibility of delivery) is not unlawful. Manipulative intent may be inferred, however, where, once the congested situation becomes known to him, the long exacerbates the situation by, for example, intentionally decreasing the cash supply or increasing his long position in the futures market.

13 *Cargill* is not to the contrary. That case did not consider the natural congestion problem because there was ample evidence from which to conclude that the accused "laid the base for a squeeze," 452 F.2d at 1172, by acquiring effective control of all the cash crop and 62% of the long interest in order subsequently to liquidate its entire long position at prices it purposely caused to become artificial in the last fifteen minutes of trading. While *Volkart* and *Cargill* disagree with respect to the obligation of shorts to exercise due diligence in making reasonable delivery preparations, they do agree that there must be evidence from which to conclude that the accused both intentionally acquired the ability to conduct a squeeze and thereafter exercised that ability to cause "artificial" prices. The difference in results in these cases was a function of the facts. The Eighth Circuit concluded that Cargill was guilty because "the squeeze was intentionally brought about and exploited by Cargill." 452 F.2d at 1172. The Fifth Circuit concluded that Volkart Brothers were not: "[I]t must appear not only that they profited from a squeeze, but that they intentionally brought about the squeeze by planned action." 311 F.2d at 59.

14 As the Commission recognized in *Hohenberg, supra,* at 21,477:

It is important to note that in a case such as the case at bar, where we are asked to infer an intent to manipulate the price of a future contract from the facts and circumstances, the credibility of the witnesses is an important factor. The court observed in *Great Western Food Distributors, supra,* that the credibility and demeanor of the witnesses is "[o]ften the 'most telling part' of the evidence."

15 The Administrative Law Judge absolved respondents of having had any manipulative intent under standards of general intent and "reasonable forseeability." While these standards should not have been utilized, the failure of the evidence to pass muster under these less stringent tests serves to underscore the absence of manipulative intent.

16 Indeed, it may be of more benefit to look to related contemporaneous markets. For example, the General Accounting Office noted in a 1975 report that there were record high pices in many agricultural contracts in 1973 as the result of unprecedented demand and diminished supplies. U.S.G.A.O. Report to the Congress, "Improvements Needed in Regulation of Commodity Futures Trading" (June 24, 1975). To analyze only one of these markets without reference to the situation in the others operates to distort any understanding of the economic forces at work.

17 Since there was adequate deliverable corn in Chicago itself during July, we need not determine the extent to which supplies outside of the local market or the percentage of ungraded supply which could reasonably be brought up to contract specifications were "available" We do, however, agree with the

view expressed in *Volkart, supra,* that, by entering into a contract to deliver, shorts must exercise due diligence to acquire or render supplies deliverable as they have contracted to do.

18 We note in this regard that there was no testimony from any short, unlike *G.H. Miller & Co., supra,* 260 F.2d at 289, that corn was not in fact obtainable in Chicago or its environs. Indeed, some shorts did make delivery. That shorts with no delivery capacity chose to bid up the price rather than seek cash corn is not evidence of manipulative activity on the part of longs.

One final word is in order with respect to deliverable supply and the actions of the contract market in this case. There is no evidence that either the exchange or Commodity Exchange Authority ever expressed any concern to respondents over the size of their long position. Apparently concerned over the large open interest at the close of trading on July 19, the exchange chose to remove the daily price limits. Under the circumstances present here, and in light of the Exchange's practice in the past of "jawboning" respondents in the face of perceived market congestion, we infer that the Exchange had no concern that the deliverable supply was so inadequate that a manipulation was possible. However, we take this opportunity to remind designated contract markets of their statutory obligation to provide for the prevention of manipulation pursuant to Section 5(d) of the Commodity Exchange Act, and of their powers to take emergency action to increase the deliverable supply or other appropriate action whenever market congestion occurs and thereby make the prospect of manipulative action more remote. See Section 1.41(a)(4)(f) of the Commission's Regulations, 17 C.F.R. §1.41(a)(4)(f).

1 In this case, the Division of Enforcement contended that deliverable supplies of cash corn were insufficient to satisfy the delivery needs of shorts, forcing them to seek offset of their open July 1973 corn futures contracts with longs at artificial prices. Respondents asserted that deliverable supplies were ample to meet any delivery needs of the shorts or, in the alternative, that the shorts acted irresponsibly and to their own detriment by carrying large July corn positions into the final trading session if deliverable supplies were inadequate. Judge Shipe concluded that sufficient cash corn existed at the time in question to meet the shorts' delivery needs, [1977-1980 Transfer Binder] Comm. Fut. L. Rep. ¶20,964 pp. 23,862-63 (1979), and the majority affirms that finding. Since a natural market congestion was found not to have existed, the discussion contained in this concurring opinion and elsewhere regarding the longs' rights and duties under such circumstances is not essential to the determination of this matter.

2 I do not read the precedents as requiring proof of positive knowledge on the accused's part that the price attained would be in fact artificial. The decided cases make abundantly clear that determining whether the resulting price was artificial frequently requires analysis of extensive economic data, often with the assistance of expert testimony, which may not have been within the possession or knowledge of the accused at the time when the decision to control prices was made. Moreover, to premise manipulative intent on the accused's actual knowledge that the resulting price would be artificial serves only to reward those who seize control of prices, exercise that control effectively, but remain ignorant of or indifferent to the relationship between the resulting price and the underlying supply/demand forces. Rather, the intent to cause price artificiality can be inferred from all of the surrounding circumstances and, in my view, it would be reasonable to infer that a person who deliberately seizes control of prices does so in order to substitute his own will in place of the basic forces of supply and demand, and thus can be presumed to have intended any artificial price that is caused by that conduct.

3 The pattern of trading by respondents during the last few trading days of the July corn contract could support an inference that they sought to test their market power. Repeatedly, rspondents placed liquidating orders at spread prices significantly higher than those present in the market. [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH) ¶20,964, pp. 23,850-51 (1979) (I.D. Findings ##68-77). And, near the end of trading on July 20, respondents placed "step up" orders ranging as high as 20 cents above the prevailing futures price. *Id.* at 23,851-52 (I.D. Finding #78). Judge Shipe did not draw an inference of manipulative intent from this conduct. Deference to the trier of facts is generally appropriate when the inferences to be drawn from the evidence depend heavily on the credibility of witnesses. *Great Western Food Distributors, Inc. v. Brannan,* 201 F.2d 476, 479-80 (7th Cir. 1953). Here, the majority has

deferred to Judge Shipe's assessment, but I find it unnecessary to reach the issue since the evidence is insufficient to establish another essential element of the offense, namely, that respondents' conduct "caused" prices to be artificial, as discussed in the next textual paragraph.

4 In *Cargill,* the Government also introduced an analytical study by USDA purporting to establish the "average economic value" of cash wheat in Chicago during May 1963. 452 F.2d at 1168. It is unclear, however, whether the court of appeals relied to any significant degree on this analysis, since the Government also presented evidence as to actual cash prices and quotations.

5 See also 452 F.2d at 1171: "The extraordinary price fluctuations of the futures market on May 20 and 21, 1963, on the Chicago Board of Trade were the largest in recent history and had very little relationship to basic supply and demand factors on No. 2 soft red winter wheat." And compare section 8a(9) of the Act [7 U.S.C. §12a(9)], defining the Commission's market emergency powers, which refers to "the forces of supply and demand *for such commodity*" (emphasis added).

6 It may remain forever a mystery why the largest short in the expiring July 1973 corn futures contract, Sumitomo Shoji America, Inc., elected to offset its positions on July 20 at rapidly rising futures prices rather than to procure cash corn and make delivery. Judge Shipe and the Commission's majority find that corn supplies in Chicago were adequate for that purpose. The hazy record on this subject suggests, however, that Sumitomo's large short position may have been placed by a company subordinate without authority from his superiors (T. 649-54). If so, the subordinate may have been reluctant to highlight his actions by making large purchases of cash corn for the company's account at that time. This is conjecture, of course, and no definitive conclusion can be reached from the record.

7 In some instances, of course, a party may gain control over both the cash and futures markets. See, e.g., *Peto v. Howell,* 101 F.2d 353 (7th Cir. 1938); and *G.H. Miller & Co. v. United States,* 260 F.2d 286 (7th Cir. 1958). Under such circumstances, a similar price distortion in both markets may be achieved. Thus, the mere fact that both contemporaneous markets behave in a parallel manner is not conclusive proof of price normality.

In other instances, the cash market may be dominated, and its price controlled, by certain interests while the futures market is operating in a freer and more competitive way. Under these cicumstances, futures prices may reflect the commodity's value more accurately than the cash market. There is no suggestion in the present case, however, that the cash market for corn in July 1973 was under any such influence.

8 The majority's decision also poses an intellectual dilemma. On the one hand, if *all* influences in the futures market are absorbed into the supply/demand equation, it would follow logically and almost automatically that no futures price could be considered artificial, even if it deviated dramatically from other prices for the same commodity. As the presiding officer stated in *Volkart Bros., Inc., et al.,* CEA Docket No. 82, at pp. 26-27: "The intimation by intervenor New York Cotton Exchange that supply and demand for *futures* contracts as distinguished from actual cotton should be considered legitimate price-making factors for futures prices is patently lacking in merit. Such a position would justify as valid corners, squeezes and all kinds of manipulation both up and down" (court's emphasis). The majority does not go so far but, if less than all futures market influences are to be included, we should provide clearer guidance in identifying what the majority classifies as "illegitimate" factors, an arduous task that has not been undertaken here.

9 Whether Chicago cash prices would have risen to July futures levels on or after July 20 if Sumitomo had sought cash corn for delivery is problematical. It would not have been necessary for Sumitomo to satisfy all of its cash needs on July 20 since deliveries could be made on any business day during the remainder of that month. Thus, while an effort by Sumitomo to acquire cash corn on or after July 20 might have caused cash prices to strengthen, it is by no means certain that those prices would have approached the level reached in the futures market on the final trading day. The record discloses, in fact, that another commercial firm, CPC International, Inc., acquired 600,000 bushels of delivery grade corn at Chicago on July 31, 1973 at $2.78 per bushel. See note 10, *infra,* at p.23,844 (I.D. Finding #24). The

quantity purchased by CPC approximated the average daily amount that Sumitomo would have had to acquire between July 20 and the end of the month if it had chosen to make delivery on its entire short futures position. While not conclusive on the issue, this evidence suggests that the cash market was capable of handling transactions of this magnitude at prices well below the July 20 futures price.

10 [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH), ¶20,964, pp. 23,843-44 (1979).

11 *Ibid.*

12 *Id.* at p.23,842.

13 *Id.* at p.23,843.

14 The *Cargill* decision recognized that it is frequently difficult to gauge the true value of a cash commodity. 452 F.2d at 1168. In that case, the parties introduced largely nominal cash price quotations for wheat during a period when actual cash sales in Chicago were relatively infrequent. However, the discrepancy between nominal cash quotations and closing futures prices in the *Cargill* case was quite modest compared with the instant proceeding. See 452 F.2d at 1168, n. 13. Here, the deviation of roughly $1.20, or 30%, cannot be fully explained by any possible uncertainty over the true value of cash corn.

Moreover, it is not a sufficient answer that the bids made for Chicago cash corn on July 20, 1973 may not have been a serious attempt to acquire supplies. At best, it would simply establish that demand for cash corn was weak on that date. If so, the nominal prices reported by USDA may well have reflected the real demand, or the lack thereof, for cash corn on that day.

15 Indeed, on the first business day after trading in July corn ended, respondents acquired 360,000 bushels of corn at Chicago for $2.76. See note 10, *supra,* at p. 23,844 (I.D. Finding #24).

16 After the expiration of trading in July futures, the prices of September 1973 corn futures rose significantly. However, the highest settlement price of the September future during July was $2.88 per bushel on July 31, and peaked on August 14 at $3.47-3/4. See note 10, *supra,* at pp. 23,842-43 (I.D. Finding #19). Thus, despite the rise, September futures never approached the highest price of the July contract on July 20, 1973.

17 [1977-1980 Transfer Binder] Comm. Fut. L. Rep. (CCH), ¶20,964, p.23,865, n.6. Judge Shipe found that supplies of cash corn in Chicago were adequate to meet the delivery needs of the shorts. *Id.* at p.23,863.

18 See Note, *The Delivery Requirement: An Illusory Bar to Regulation of Manipulation in Commodity Exchanges,* 73 Yale L.J. 171 (1963).

19 The majority in the present case appears to distinguish between cash market transactions that deplete supplies but are conducted in the normal course of business, and transactions designed to reduce deliverable supplies for the purpose of laying the base for a planned "squeeze" of shorts in the futures market. The former, evidently, would not infer manipulative intent, while the latter would. Under the majority's hypothesis, this distinction would appear to be essential since, if all cash market activities that decreased supplies were made suspect, participation in the futures market could actually interfere with, rather than aid, the commerce in cash commodities.

20 See also 452 F.2d at 1171: "The cash market in Chicago was to a limited degree cornered due to the depletion of local supplies. This small corner however does not appear to have been manipulated but came about normally from accelerated liquidation of the old wheat crop."

21 It appears that the court in *Volkart* may not have confronted a fact situation where the highest possible prices were demanded by the respondents. There, a total of 5,000 bales of October 1957 cotton futures on the New York and New Orleans exchanges were liquidated by Volkart on the final trading day at prices viewed as artificial. Of that amount, the greater part—roughly 70% was liquidated at about three-tenths of a cent per pound above the previous session's closing price. The remaining position was liquidated as high as nearly nine-tenths of a cent above the previous close. *In re Volkart Bros., Inc.,* CEA Docket No. 82, at pp. 12, 27 (1961). Had Volkart refused to offset its positions with shorts, and had a formal delivery default resulted, exchange rules provided that Volkart would receive one-quarter cent per

pound in penalties as well as any actual damages incurred by it due to the delivery breach. 311 F.2d at 57. Thus, the preponderance of Volkart's position was liquidated at a premium over the previous close that was not appreciably more than the penalty (exclusive of damages) that it would have been entitled to if, instead of offsetting with shorts, it had stood for delivery and a formal default had occurred.

22 Such rules are generally subject to prior review and approval by the Commission under section 5a(12) of the Act [7 U.S.C. §7a(12)] and Regulation 1.41(b) [17 C.F.R. §1.41(b)].

23 The remedial provisions of default rules are those designed to compensate the injured party for losses resulting from the breach of contract, whether denominated as penalties or as damages. Other features found in some default rules, such as the right of the contract market to take disciplinary action against the defaulting party, do not relate to the rights of the contracting parties vis-a-vis each other and therefore are not remedial within the meaning of this discussion.

24 This is not to suggest that longs are required by law to force a formal default by shorts whenever it becomes evident that the latter are unable to make delivery. While that option is available to longs under the terms of the contract, offset in the market with shorts is not foreclosed. However, offset at prices that generate significantly more than what the longs could reasonably expect to receive in compensation if offset had been refused and formal default had resulted cannot, in my view, be reconciled with the contractual agreement between the parties.

25 See also section 8a(6) of the Act, 7 U.S.C. §12a(6), authorizing the Commission to share data with contract markets whenever any transaction or market operation "disrupts or tends to disrupt any market." Thus, the self-regulatory role of the contract markets clearly includes a duty to be attentive to market disruptions of every kind.

26 See section 8a(9) of the Act [7 U.S.C. §12a(9)], which relates a major market disturbance to a variety of events (of which manipulation is only one) which prevent the market "from accurately reflecting the forces of supply and demand for such commodity."

27 It is true, of course, that the Commission will retain the power of persuasion that accompanies its right to declare a market emergency under section 8a(9) if the requisite preconditions for such a declaration exist. But where, as in this case, it is concluded that a long has the right to seek the highest possible offset price during a natural market congestion, unless he has created or exascerbated that condition, and that the resulting price cannot be viewed as artificial, it is unclear whether the Commission would have grounds under section 8a(9) to invoke or threaten to invoke a market emergency.

1 Commodity Exchange Act, 7 U.S.C. §1 *et seq.* Causality, which is viewed here as a single element, has been divided elsewhere into two separate elements: dominance or ability to influence prices, and exercise of such capacity. P. Johnson, *Commodities Regulation,* Little, Brown & Co., Boston, §5.05, 5.21 (1982). This opinion treats these as sub-elements of an overall causality analysis.

2 "The present act, which is amendatory of the Grain Futures Act …, is of the same general character as that directed to the same general purpose; to wit, to remove burdens on interstate commerce caused by manipulation and market control." *Board of Trade of Kansas City v. Milligan,* 90 F.2d 855, 857 (8th Cir. 1937).

3 Grain Futures Act of 1922, Pub. L. No. 67-331, 42 Stat. 988, Sep. 21, 1922.

4 Remarks of Representative Purnell, Cong. Rec., 67 Cong. 1st Sess. p. 1317.

5 7 U.S.C. §5.

6 H. Working, "Futures Trading and Hedging," *American Economic Review,* Vol. LXIII, p. 314 (1953).

7 T. Hieronymous, *Economics of Futures Trading,* Commodity Research Bureau, p. 39 (1971).

8 *See* I Taylor, *History of the Board of Trade of the City of Chicago,* p. 370 (1917). *See* also *United States v. Patten,* 226 U.S. 525, 539-40 (1913).

9 *Great Western Food Distributors v. Brannan,* 201 F.2d 476, 478-479 (7th Cir.) *cert. denied* 345 U.S. 997 (1953). *Cargill, Inc., v. Hardin,* 452 F.2d 1154 (7th Cir.) *cert. denied,* 406 U.S. 932 (1972). See

also *History of the Board of Trade of the City of Chicago, supra,* note 8, for exchange efforts to curtail cornering in 1867.

10 *Volkart Brothers, Inc., v. Freeman,* 311 F.2d 52, 57 (5th Cir. 1962). For example, *See* Chicago Mercantile Exchange Rules 715, 724, 737B.

11 *Volkart Brothers, supra* 311 F.2d at 57. For example, *See* Chicago Mercantile Exchange Rules 132, 432(f), 430 and Chicago Board of Trade Rule 278.

12 In *Peto v. Howell,* 101 F.2d 353 (7th Cir. 1938), the court noted that a corner on corn had disrupted the normal flow of commerce. "The proof was that this corn would normally go to the other markets, but because of the tightness of the market brought about by the defendant, came to Chicago. This diversion was clearly an interference with the current of interstate commerce…" Similarly, in *Cargill, Inc., v. Hardin,* 452 F.2d 1154, 1173, (8th Cir. 1971); *cert. denied* 406 U.S. 932 (1972) the court put it most succintly. "[W]e have been shown no good reasons why the futures price should reflect the cost of bringing in a higher price and grade of wheat for which there is no demand in the local area. It is this price which was artificial and therefore useless to the trade and nation." *See* also *Chicago Board of Trade v. Olsen,* 262 U.S.1, 39 (1923) noting that manipulations "exert a vicious influence and … disturb the normal flow of actual consignments."

13 7 U.S.C. §5.

14 G. Hoffman, *Future Trading Upon Organized Commodity Markets,* University of Pennsylvania Press, p. 249 (1932).

15 7 U.S.C. §5.

16 *Board of Trade v. Christie,* 198 U.S. 236, 249 *(1904).*

17 "Grain Pricing," Economic Bulletin No. 1, published by and on file with the Economics Division, Commodity Futures Trading Commission, Washington, D.C., p. 17 (Sept. 1977).

18 R. Gilmore, *A Poor Harvest,* Longman, New York, p. 18 (1982).

19 *See* Report of the CFTC Advisory Committee on the Economic Role of Contract Markets, published by and on file with the Commodity Futures Trading Commission, Washington, D.C., p. 6 (July 17, 1976).

20 H. Working, "Theory of the Inverse Carrying Charge in Futures Markets," 30 *Journal Farm Economics* 1, 4 (1948).

21 *Commodity Trading Manual,* published by the Board of Trade of the City of Chicago p. 68 (1976).

22 §4a(2) of the Act, 7 U.S.C. §6a(2), provides Commission authority to fix position and trading limits but *bona fide* hedgers are expressly exempted from such limits by §4a(3), 7 U.S.C. §6(a)(3).

23 *Cargill, Inc., v. Hardin, supra,* 452 F.2d at 1163; *Volkart Brothers v. Freeman,* 311 F.2d 52, 58 (5th Cir. 1962).

24 *See,* for example, M. Henderson and R. Quandt, *Microeconomic Theory,* McGraw Hill, New York, p. 225 (1971).

25 For a description of financial efficiency, see R. Verrecchia, "Consensus Beliefs, Information Acquisition, and Market Information Efficiency," *American Economic Review,* Volume 70, Number 5, December, 874 (1980).

26 *Great Western, supra,* 201 F.2d at 483.

27 *Volkart, supra,* 311 F. 2d at 57-8.

28 *Volkart, supra,* 311 F.2d at 58, restated in the majority opinion at 5.

29 *Cargill, supra,* 452 F.2d at 1167-70.

30 *Cargill, supra,* 452 F.2d at 1169.

31 *Cargill, supra,* 452 F.2d at 1164. Also see P. Johnson, *Commodities Regulation, supra,* §5.11.

32 One commentator has reduced these factors to a formula. A. Bromberg & L. Lowenfels, *Securities Fraud and Commodities Fraud,* §4.6 at p. 82.330 (1975 Supp.). Commission and exchange surveillance efforts focus closely on deliverable supply, open interest and position size as contracts near expiration.

33 See *Cargill, supra,* 452 F.2d at 1169-70 (analysis of Cargill's last minute actions in liquidating its position).

34 *Volkart, supra,* 321 F.2d at 59-60.

35 *United States v. Bailey,* 444 U.S. 394, 404 (1980).

36 *Bailey, supra.* "At common law, crimes generally were classified as requiring either "general intent" or "specific intent." This venerable distinction, however, has been the source of a good deal of confusion. As one treatise explained:

'Sometimes 'general intent' is used in the same way as 'criminal intent' to mean the general notion of mens rea, while specific intent is taken to mean the mental state required for a particular crime. Or, 'general intent' may be used to encompass all forms of the mental state requirement, while 'specific intent' is limited to the one mental state of intent. Another possibility is that 'general intent' will be used to characterize an intent to do something on an undetermined occasion, and 'specific intent' to denote an intent to do that thing at a particular time and place.' W. LaFave & A. Scott, *Handbook on Criminal Law,* Section 28, pp. 201-202 (1972) (footnotes omitted).

This ambiguity has led to a movement away from the traditional dichotomy of intent and toward an alternate analysis of *mens rea.*" 44 U.S. at 403.

37 The judicial officer in *In re General Foods Corp.,* 6A.D.288, 304 (1947) found that respondents' "purpose" was to support price. Similarly, see *In re G.H. Miller & Co.,* 15 A.D. 1015, 1036 (1956); *In re Great Western Distributors, Inc.,* 10 A.D. 783, 806 (1951); *In re Volkart Brothers, Inc.,* 20 A.D. 306, 327 (1961); *In re Cargill, Inc.,* 29 A.D. 880, 910 (1970); *In re David G. Henner,* 30 A.D. 1151, 1174(1971).

38 *United States v. United States Gypsum Co.,* 438 U.S. 422, 445 (1978).

39 *Gypsum, supra,* 438 U.S. at 445-6.

40 *Gypsum, supra,* 438 U.S. at 445-6.

41 *Cargill, supra,* 452 F.2d at 1166. *See* also 1, A. Bromberg & L. Lowenfels, *Securities Fraud & Commodities Fraud, supra,* at p. 82.324. Manipulation has been described by Johnson in a seminar discussion as a "very, very closely related, if not a twin, of the antitrust concept of monopoly." *Economic Evidence in Manipulation Cases,* Chicago Board of Trade Research on Speculation—Seminar Report, p. 116 (1981).

42 *United States v. Patten,* 226 U.S. 525, 543 (1913) upheld a finding that a futures market corner in cotton violated the Sherman Antitrust Act absent allegation of specific intent. (Cited with approval by *United States v. Griffith,* 334 U.S. 100, 108 (1947)). Similarly *Peto v. Howell,* 101 F.2d 353 (7th Cir. 1938), upheld a finding that cornering of a corn futures market constituted a violation of the Sherman Act.

43 [1975-1977 Transfer Binder] COMM. FUT. L. REP. (CCH) ¶20,271 at p. 21,477 (February 18, 1977).

44 P. Johnson, *Commodities Regulation, supra,* Section 5.24.

45 *Cargill, supra,* 452 F.2d at 1163.

46 *Cargill, supra,* 452 F.2d at 1173.

47 *United States v. Aluminum Co. of America,* 148 F.2d 416,432 (2d Cir. 1945).

48 *Cf. Gypsum, supra* 438 U.S. at 436-7, note 13. (Analysis of higher intent standard for criminal antitrust violation as compared with civil violation).

49 See text accompanying notes 42-44, *supra.*

50 *Cargill, supra,* 452 F.2d at 1173.

51 *General Foods Corp. v. Brannan,* 170 F.2d 220 (7th Cir. 1948).

52 *Cargill, supra,* 452 F.2d at 1163.

53 *Cargill, supra,* 452 F.2d at 1170-72.

54 VII *Report on The Grain Trade, Effects of Future Trading,* Federal Trade Commission, p. 244 (1926).

55 H. Working, "Price Relations Between May and New Crop Wheat Futures at Chicago since 1885." *Wheat Studies,* Vol. X, No. 5, p. 184 (February 1934).

56 *See* W. LaFave and A. Scott, *Criminal Law,* p. 428-429. *See* also *Merritt v. Commonwealth,* 164 Va. 653, 660, 180 S.E. 395, 398 (1935), holding conviction for attempt to commit murder requires specific intent to kill; Smith *Two Problems in Criminal Attempts,* 70 Harv. L. Rev., 422, 429 (1957). Also *See* Model Penal Code Section 5.01, Comment (Tent. Draft No. 10, 1960); Cf. *United States v. Griffith,* 334 U.S. 100, 105 (1948); *United States v. Aluminum Co. of America,* 148 F.2d 416, 432 (1945).

In the related area of civil antitrust law, the Supreme Court has held that proof of attempted monopolization under Section 2 of the Sherman Antitrust Act requires a specific intent, while completed monopolization may be proved by general intent. *Times Picayune Publishing Co. v. United States,* 345 U.S. 574, 624 (1953).

57 Antitrust law has long recognized the need for proof of a "dangerous probability" of the proscribed results. *Swift and Co. v. United States,* 196 U.S. 375, 396 (1905). *Lorain Journal Co. v. United States,* 342 U.S. 143, 153 (1952). *See, United States v. Griffith, supra,* 334 U.S. at 1056. *See generally,* Cooper, "Attempts and Monopolization: A Mildly Expansionary Answer to the Prophylactic Riddle of Section Two," 72 *Michigan Law Review* 373 (1974). *See* also L. Sullivan, *Antitrust,* p. 134 (1977).

58 Testimony of respondent's expert witness Christopher Parrot. (Tr. at 3878).

59 Respondent Johnston's testimony. (Tr. at 1928).