

F.Y.I. Roy

LAW OFFICES
KELLER AND HECKMAN

1150 17TH STREET, N.W.
SUITE 1000
WASHINGTON, D.C. 20036
(202) 956-5600

JOSEPH E. KELLER
JEROME M. HECKMAN
CHARLES M. HECKMAN
WILLIAM M. BORGHESEANI, JR.
MALCOLM D. MACARTHUR
WAYNE V. BLACH
TERRENCE D. JONES
MARTIN W. BERCOVICI
JOHN S. ELDRED
FREDERICK A. PROVORNY
CAROLE C. HARRIS
MICHAEL F. MORRONE
MARK FOX EVENS
JOHN B. DUBECK
PETER L. DE LA CRUZ
CHRISTINE A. HEAGHER
SHIRLEY S. FUJIMOTO
LAWRENCE P. HALPRIN
RALPH A. SIMMONS
PETER A. SUSSEX
C. DOUGLAS JARRETT

SHEILA A. MILLAR
MARY MARTHA MENAMARA
JOHN S. RICHARDS
MELVIN S. DROZEN
FREDERICK J. DAY, JR.
MARCI GREENSTEIN
SUSAN T. CONTI
SUSAN J. FISHER
PATRICK J. KURB
S. CRAIG TAUTFEST
DAVID M. JETT
MAUREEN A. O'CONNELL
KAREN E. EDELBERG
NINA M. BINSTEN
MARK A. SIEVERS
MARY CHAMBERS GRANDY
G. FRANKLIN KOONTZ
CATHERINE M. ROEMER
ROBERT JEFFREY CBER
RICHARD A. JAFFE

*ADMITTED IN PENNSYLVANIA ONLY
**ADMITTED IN VIRGINIA ONLY
***ADMITTED IN MARYLAND ONLY
****ADMITTED IN COLORADO ONLY

SCIENTIFIC STAFF
DANIEL S. DIXLER
DURWARD F. DODGEN
CHARLES V. BREDER
ROBERT A. MATHEWS

TELECOMMUNICATIONS
ENGINEER
CHARLES F. TURNER

TELEX
48 95531

TELECOPIER
(202) 298-7662

CABLE ADDRESS "KELMAN"

WRITER'S DIRECT DIAL NUMBER

February 29, 1988

RECEIVED
MAR 2 1988
DR. R. T. GOTTESMAN

(202) 956-5643

RECEIVED

MAR 07 1988

Sherry M. Carr

Mr. H. Patrick Toner
The Society of the Plastics
Industry, Inc.
1275 K Street, N.W.
Suite 400
Washington, D.C. 20005

Re: Indianhead v. Allied Tube and Conduit

Dear Pat:

Following up on the recent CCFS Executive Committee meeting, where we discussed the pending Supreme Court review of the Indianhead, Inc. v. Allied Tube and Conduit, Inc. decision, this letter will briefly summarize the oral argument held February 24 before the Court.

As you know, one of the principal legal issues in the case revolves around the extent to which a legal doctrine immunizing lobbying activities from antitrust liability, known as the Noerr-Pennington doctrine, applies to the actions of a private standards making body. Additional legal issues presented to the Court include the issue of whether there was adequate evidence of a substantive antitrust liability to support the initial jury verdict in the case, and whether, even if Noerr-Pennington applied, the action was subject to antitrust law as a sham.

The attorney for Allied Tube and Conduit, the appellant in the case, argued first. He focused on the fact that the jury found that Atcor had a "genuine belief" as to the safety of PVC conduit in acting to oppose code acceptance of the product. He was questioned about the extent to which various states and municipalities adopt the National Fire Protection

CTL028282

Mr. H. Patrick Toner
February 29, 1988
Page 2

KELLER AND HECKMAN

Association's National Electrical Code, and he focused on the similarities between the NFPA and legislative bodies. He received few questions from the Court.

The attorney for Carlon specifically addressed the legal issue of the applicability of Noerr-Pennington, arguing that Carlon's case was based on the commercial damages it suffered as a result of its inability to sell its product in states which did not adopt the NEC Code. This tactic was apparently designed to overcome in part the issue of legislative action. Additionally, he was questioned extensively about whether there was, in fact, a substantive antitrust violation as a result of Atcor's activities. There was some lively discussion between counsel for Carlon and Justice Scalia, who seemed quite unsympathetic to Carlon's arguments. Additionally, a number of the justices seemed troubled by imposing antitrust liability as a result of the activities of nonprofit standards-making bodies, an issue that led several justices, including Justices Blackmun and Rehnquist, to dissent in the Hydrolevel case some years ago.

While it is difficult to predict the way the Supreme Court is likely to rule in any given case, I suspect that the decision, when one is ultimately handed down, will be a rather close one. It is possible, however, that the decision will contain some language noting Atcor's "genuine" concerns about the fire safety of PVC, as there were several questions on this issue to both counsel for Atcor and counsel for Carlon. No matter how the Court ultimately rules, the decision is sure to have an impact on standards-making activities.

We will therefore let you know when an opinion is issued in this case. In the meantime, please let me know if you have any questions or comments.

Cordially yours,



Sheila A. Millar

cc: Charles E. O'Connell
Robert W. Sherman
Lewis R. Freeman, Jr.
Roger D. Bernstein
Roy T. Gottesman, Ph.D.

CTL028283