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2005 Decisions

Opinions of the United  
States Court of Appeals  
for the Third Circuit

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12-1-2005

## Howard Hess Dental v. Dentsply Intl Inc

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PRECEDENTIAL

UNITED STATES COURT OF APPEALS  
FOR THE THIRD CIRCUIT

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No. 04-1979

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HOWARD HESS DENTAL LABORATORIES INCORPORATED;  
PHILIP GUTTIEREZ, \*d/b/a Dentures Plus, on behalf  
of themselves and all other similarly situated,  
Appellants

v.

DENTSPLY INTERNATIONAL, INC.

\*Amended per Clerk's Order dated 4/30/04

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No. 04-1980

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JERSEY DENTAL LABORATORIES, f/k/a Howard Hess Dental  
Laboratories Incorporated; PHILIP GUTTIEREZ, \*d/b/a  
Dentures Plus, on behalf of themselves and all others  
similarly situated,  
Appellants

v.

DENTSPLY INTERNATIONAL, INC.; A. LEVENTHAL & SONS, INC.;  
ACCUBITE DENTAL LAB, INC.; ADDIUM DENTAL PRODUCTS;  
ARNOLD DENTAL SUPPLY COMPANY;  
ATLANTA DENTAL SUPPLY COMPANY;  
BENCO DENTAL COMPANY; BURKHART DENTAL SUPPLY COMPANY;  
DARBY DENTAL LABORATORY SUPPLY CO., INC.; DENTAL SUPPLIES  
AND EQUIPMENT, INC.; EDENTALDIRECT.COM, INC., as successor to  
Crutcher Dental, Inc.; HENDON DENTAL SUPPLY, INC.;  
HENRY SCHEIN, INC., and its affiliates including, without  
limitation, Zahn Dental Co., Inc.; IOWA DENTAL SUPPLY CO.;  
JAHN DENTAL SUPPLY COMPANY; JB DENTAL SUPPLY CO., INC.;

JOHNSON & LUND CO., INC.; KENTUCKY DENTAL SUPPLY COMPANY, INC.  
a/k/a KDSC Liquidation Corp.; MARCUS DENTAL SUPPLY CO;  
MIDWAY DENTAL SUPPLY INC.; MOHAWK DENTAL CO., INC.; NASHVILLE  
DENTAL, INC.; NOWAK DENTAL SUPPLIES, INC.; PATTERSON DENTAL  
COMPANY, its subsidiaries, predecessors, successors, assigns,  
affiliates and related companies; PEARSON DENTAL SUPPLIES, INC.;  
RYKER DENTAL OF KENTUCKY, INC.; THOMPSON DENTAL COMPANY

\*Amended per Clerk's Order dated 4/30/04

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On Appeal from the United States District Court  
for the District of Delaware  
(D.C. Civil Action Nos. 99-cv-00255 / 01-cv-00267)  
District Judge: Honorable Sue L. Robinson

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Argued April 7, 2005

Before: BARRY, AMBRO and GREENBERG, Circuit Judges

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Counsel for Appellees

**ORDER AMENDING PUBLISHED OPINION**

AMBRO, *Circuit Judge*

IT IS NOW ORDERED that the published Opinion in the above case filed September 21, 2005, be amended as follows:

On page 5, line 3 of the paragraph, replace “*Internationl*” with “*International*”.

On page 14, last two lines of the full paragraph, (1) replace “n.11, n.12” with “nn.11–12” and (2) replace “n.23, n.27” with “nn.23, 27”.

On page 17, line 4–5 of the full paragraph, replace “497 U.S.” with “*Id.*”

On page 19, line 8 from the bottom of the page, (1) insert “*of Louisville, Ky.*” after “*Ass’n*” and before “*v. Stewart*” and (2) replace “*Enter.*” with “*Enters.*”.

On page 20, line 11 of the full paragraph, replace “for damages would” with “for damages could”.

On page 23, line 4 of the “When antitrust violators . . .” paragraph, replace “in two ways” with “in two forms”.

On page 24, line 3, replace “770–772” with “770–72”.

On page 25, line 9, insert a “2” before “Phillip” and after “*See*”.

On page 25, lines 6–7 of the “A court might . . .” paragraph, replace this text:

(observing that even if the “pass-on [defense] were permitted . . . [and] the defendant show[ed] that

with this text:

(observing that even if the pass-on defense were permitted and “the defendant show[ed] that

On page 26, line 19, insert a “2” before “Areeda” and an “*et al.*” after “Areeda”, making the text read thus: “2 Areeda *et al.*, *supra*”.

On page 27, last line, replace the single quotation marks around “lost” with double quotation marks.

On page 27, last line, begin a new block-quote paragraph and indent before “. . . [Because]”.

On page 28, line 1, replace the “[ ]” with an ellipsis “. . .”.

On page 29, line 14, replace “*Id. at*” with “Harrison, *supra*, at”.

On page 29, line 15, delete “498”.

On page 29, line 19, insert a “2” before “Areeda” and an “*et al.*” after “Areeda”, making the text read thus: “2 Areeda *et al., supra*”.

On page 30, line 3, reverse “that” and “(1)” so that the text reads “implying (1) that past”.

On page 32, line 1 of the block quote, indent within the block quote before “*Illinois Brick*”.

On page 32, line 6 of the block quote, start a new block-quote paragraph and indent before “. . . The court simply”.

On page 32, line 8 of the block quote, replace “fixing the price” with “fixing that price”.

On page 33, line 10, insert a “2” before “Areeda” and an “*et al.*” after “Areeda”, making the text read thus: “2 Areeda *et al., supra*”.

On page 33, line 10, insert “(footnote omitted)” after “369–70” and before “.”.

On page 33, line 4 of the “In fact, a recent . . .” paragraph, insert a “2” before “Areeda” and an “*et al.*” after “Areeda”, making the text read thus: “2 Areeda *et al., supra*”.

On page 33, footnote 9, line 1, delete the comma between “Areeda” and “*et al.*”.

On page 34, footnote 10, line 3, insert a “2” before “Areeda” and an “*et al.*” after “Areeda”, making the text read thus: “2 Areeda *et al., supra*”.

On page 35, line 1, insert a “2” before “Areeda” and an “*et al.*” after

“Areeda”, making the text read thus: “2 Areeda *et al.*, *supra*”.

On page 37, footnote 12, line 4, insert a hyphen between “price” and “fixing”.

On page 38, lines 12–13, change the heading to a question reading “Why do we adopt a “limited” general co-conspirator exception?”.

On page 38, second line from the bottom, replace “), or” with “)—or”.

On page 42, footnote 15, second paragraph, line 7, insert a comma after “*i.e.*”.

On page 44, line 5 of the “We hold that . . .” paragraph, replace “where” with “whether”.

On page 44, footnote 16, line 1, insert a comma after “explained that”.

On page 45, line 9 of the “Further, every Court . . .” paragraph, insert “5th Cir.” between “(“ and “1975)”.

On page 46, last line, delete the single quotation marks around “private attorneys general”.

On page 47, line 7, insert “internal” between “citation and” and “quotation marks”.

On page 47, footnote 18, line 1, insert a “2” before “Areeda” and an “*et al.*” after “Areeda”, making the text read thus: “2 Areeda *et al.*, *supra*”.

By the Court,

/s/ Thomas L. Ambro, Circuit Judge

Dated: December 1, 2005

CMD/cc: Thomas A. Dubb, Esq.  
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