Michigan Law Review

Volume 60 | Issue 2

1961

Antiturst Law-Exemptions for Regulated Industries - Applicability of the Antitrust Laws to Stock Exchanges

Peter D. Byrnes S.Ed.
University of Michigan Law School

ANTITRUST LAW — EXEMPTIONS FOR REGULATED INDUSTRIES — APPLICABILITY OF THE ANTITRUST LAWS TO STOCK EXCHANGES—Defendant, the New York Stock Exchange, directed its members to discontinue their direct private wire connections with plaintiffs who were non-member brokers.[1]

[1] The defendant relied on Article III, § 6 of the NEW YORK STOCK EXCHANGE CONSTITUTION, which provides that the Board of Governors of the Exchange "shall have supervision over all matters relating to the collection, dissemination and use of questions and of reports of prices on the Exchange and shall have power to approve or disapprove any application for ticker service to any non-member, or any wire, wireless or other connection between any office of the Exchange, member firm and any non-member, and

These private wire connections were utilized primarily for facilitating transactions in the over-the-counter market.[2] Repeated requests by plaintiffs for reinstatement were ignored, and the defendant refused to apprise the plaintiffs of the reasons for its action. Plaintiffs then brought suit, seeking damages and injunctive relief pursuant to sections 4 and 16 of the Clayton Act.[3] Maintaining that defendant's conduct violated section 1 of the Sherman Act,[4] plaintiffs moved for summary judgment.[5] *Held*, motion granted.[6] Defendant does not enjoy an exemption from the antitrust laws. The conduct of it and its members constituted a concerted refusal to deal, which is a per se violation of the Sherman Act.[7] *Silver v. New York Stock Exchange*, 196 F. Supp. 209 (S.D.N.Y. 1961).

This appears to be the first time that a stock exchange has been held liable under the antitrust laws,[8] although the problem of the applicability of these laws to the so-called regulated industries is not a new question. The cases reveal that the fact of governmental regulation, no matter how comprehensive, is insufficient to free the members of that industry from the application of the antitrust laws[9] unless Congress has provided an express statutory exemption.[10] Several such exemptions have been created in areas where Congress has decided that free competition can be harmful

may require the discontinuance of any such service or connection." NEW YORK STOCK EXCHANGE: CONSTITUTION AND RULES 1056 (CCH Reprint 1960). See also rules 355(e), 356, *id.* at 3611.

2 "Under the Securities Exchange Act of 1934, the over-the-counter markets are deemed to include all transactions in securities which take place otherwise than upon a national securities exchange." H.R. REP. No. 2307, 75th Cong., 3d Sess. 2 (1938); S. REP. No. 1455, 75th Cong., 3d Sess. 2 (1938).

3 38 Stat. 730, 737 (1914), 15 U.S.C. §§ 15, 26 (1958).

4 26 Stat. 209 (1890), 15 U.S.C. § 1 (1958).

5 FED. R. CIV. P. 56(a), (c).

6 The motion was granted only as to defendant's conduct in ordering withdrawal of the private wire connections. The court did not pass on the legality of defendant's action in cutting off the stock ticker service to plaintiffs, and the question of whether defendant and its members constitute a single trader, thereby relieving them of liability for a conspiracy under the "single trader" doctrine was reserved for argument at the trial. Principal case at 228-29.

7 The court reaffirms the view that "group action coercing outside parties is deemed an undue restraint of trade and, whatever its purpose, is likely to fall as unreasonable *per se*." ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 133 (1955). For a discussion of the law of refusals to deal, see Handler, *Recent Developments in Antitrust Law: 1958-1959*, 59 COLUM. L. REV. 843, 862 (1959); Oppenheim, *Selected Antitrust Developments*, 17 A.B.A. REP. 45-56 (1960); 57 MICH. L. REV. 1244 (1959).

8 N.Y. Times, May 22, 1961, p. 1, col. 5. See Westwood & Howard, *Self-Government in the Securities Business*, 17 LAW & CONTEMP. PROB. 518, 519 (1952).

9 See McLean Trucking Co. v. United States, 321 U.S. 67 (1944); United States v. Borden Co., 308 U.S. 188 (1939); 101 U. PA. L. REV. 678 (1953).

10 See Pennsylvania Water & Power Co. v. Consolidated Gas, Elec. Light & Power Co., 184 F.2d 552, 560 (4th Cir.), *cert. denied*, 340 U.S. 906 (1950). See also Note, 64 HARV. L. REV. 1154 (1951); Note, 28 IND. L.J. 194 (1953).

to the general public or detrimental to the industry itself.[11] They sometimes encompass all matters subject to the jurisdiction of a particular regulatory agency,[12] but more commonly the exceptions relate to specified activities which require initial agency approval in each individual case.[13]

The general purpose of Congress in enacting the Securities Exchange Act of 1934[14] was to facilitate an orderly securities business through the cooperative efforts of the Securities and Exchange Commission and the exchanges in the listed securities market,[15] and the SEC and the dealers themselves in the over-the-counter market.[16] To effectuate that part of the plan dealing with listed securities, the stock exchanges were empowered to promulgate rules and regulations governing the use of their facilities and the conduct of their members.[17] However, an exchange's activity pursuant to any rule or regulation adopted under this power must comply with the antitrust laws since the Securities Exchange Act of 1934 contains no express exemption for an organized stock exchange;[18] and the courts have been unwilling to recognize any implied exemptions.[19] The holding of the principal case is further strengthened by the fact that while the exchanges are authorized to police their *members* in the *listed* securities market, the conduct of defendant and its members amounted to a disciplining of a *non-member* in the *over-the-counter* market. Although defendant's

11 Problems often arise concerning the scope of such exemptions. See, *e.g.*, Maryland & Va. Milk Producers Ass'n v. United States, 362 U.S. 458 (1960).

12 *E.g.*, § 16 of the Clayton Act expressly precludes private parties from bringing antitrust actions to enjoin "any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission." 38 Stat. 737 (1914), 15 U.S.C. § 26 (1958).

13 *E.g.*, the Federal Maritime Board may approve and thus exempt agreements between carriers fixing rates or "controlling, regulating, preventing or destroying competition," 39 Stat. 733 (1916), 46 U.S.C. § 814 (1958); the Federal Communications Commission may approve telegraph mergers which then "shall be lawful," 57 Stat. 5 (1943), 47 U.S.C. § 222(b) (1) (1958). See generally H.R. Doc. No. 599, 81st Cong., 2d Sess. 29 (1950).

14 48 Stat. 881 (1934), 15 U.S.C. § 78 (1958).

15 "It is hoped that the effect of the bill will be to give to the well-managed exchanges that power necessary to enable them to effect themselves needed reforms and that the occasion for direct action by the Commission will not arise." H.R. REP. No. 1383, 73d Cong., 2d Sess. 15 (1934). See also Avery v. Moffatt, 187 Misc. 576, 592, 55 N.Y.S.2d 215 (Sup. Ct. N.Y. 1945).

16 S. REP. No. 1455, 75th Cong., 2d Sess. 3, 4 (1938); H.R. REP. No. 2307, 75th Cong., 3d Sess. 4, 5 (1938). See generally LOSS, SECURITIES REGULATION 762 (1951).

17 48 Stat. 885 (1934), 15 U.S.C. § 78(f) (1958).

18 The defendant concedes that there is neither an express exemption nor an implied over-all blanket exemption under the act. Principal case at 217.

19 See, *e.g.*, United States v. Morgan, 118 F. Supp. 621, 697 (S.D.N.Y. 1953), where Medina, J. stated: "It must be borne in mind that this whole statutory scheme was worked out with the greatest care by members of the Congress thoroughly aware of antitrust problems . . . . They intended no exemption to the Sherman Act; and it is hardly probable that they would inadvertently accomplish such a result."

rules included provisions empowering it to take the action it did,[20] defendant could not extend its supervisory powers beyond those contemplated by Congress merely because those rules were accepted by the SEC without protest. Moreover, non-members are not afforded the same procedural safeguards for processing grievances which the exchange guarantees to its members;[21] thus, coupled with the defendant's seemingly unjustifiable action was the notable reluctance of the court to strip the plaintiffs of all right to redress before a judicial body.[22]

Although the decision in the principal case appears sound, it reveals potential difficulties arising from the fact that stock exchanges, even though they have not been granted an express exemption, have been vested with the responsibility of policing all transactions in listed securities. Illustratively, if plaintiffs had dealt with the exchange's members only in listed securities and if the exchange, upon learning of deceptive practices on the part of the plaintiffs, ordered its members to discontinue private wire connections with the plaintiffs, it would appear that defendant's order could not be carried out without subjecting it to a suit for an antitrust violation. This strange result seems to follow from the holding of the principal case that there are no exemptions from the antitrust laws for an organized stock exchange, and that all concerted refusals to deal with an outside party are condemned as being per se violations of the Sherman Act. The congressional policy favoring competition thus comes into direct conflict with the congressional desire to have effective securities regulation. Although there is no legislative indication as to which policy should prevail in situations similar to the one suggested, it appears that in such cases it will be necessary to subordinate the policy of competition in order to enable the exchanges to regulate successfully the listed securities market.[23] Whether this subordination should be achieved by legislative action, by judicial creation of either a limited implied exemption from the antitrust laws or a limited exception to the per se illegality doctrine of concerted refusals to deal, or by some other means, is arguable; that it should be achieved, however, is clear.

Peter D. Byrnes, S.Ed.

20 Rules 355(e), 356, NEW YORK STOCK EXCHANGE: CONSTITUTION AND RULES 3611 (CCH Reprint 1960).

21 NEW YORK STOCK EXCHANGE CONSTITUTION, art. XXIV, § 14, *id.* at 1089. Such procedural safeguards are especially necessary in view of the monopoly position held by the exchange with respect to the trading of listed securities.

22 This latter position was founded on the somewhat doubtful proposition that there was no possibility of plaintiffs airing their grievances before the SEC. The mere fact that no statutory procedure had been established would not automatically bar the plaintiffs from a hearing before the SEC.

23 There is also a need for more affirmative regulation by the SEC in order to close the gap that exists between the regulation of the listed securities business by the exchanges and the regulation of the over-the-counter business by the SEC. The close interrelationship of these two markets calls for coextensive as well as separate regulation.