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Antitrust Laws - Concerted Refusals to Deal - Public Injury

Jerome S. Traum S.Ed.
University of Michigan Law School

ANTITRUST LAWS—CONCERTED REFUSALS TO DEAL—PUBLIC INJURY—Petitioner, Klor's, Inc., a retail electrical appliance store, brought a treble damage action against Broadway-Hale, a department store chain, and against ten appliance manufacturers, alleging conspiracy to restrain and monopolize commerce in violation of sections 1 and 2 of the Sherman Act. The complaint charged essentially that Broadway-Hale, which operated a store next door to Klor's, had been able by virtue of its great buying power to induce a concerted refusal to deal on the part of major appliance manufacturers, so that they would sell to Klor's only on highly unfavorable terms if at all. Respondents submitted affidavits which showed that hundreds of appliance dealers flourished in the area in which Klor's was located, dealing in the branded merchandise which Klor's could not obtain from respondent manufacturers. The district court granted respondents' motion for summary judgment, holding that no public injury was present, and describing the controversy as a "purely private quarrel." The Court of Appeals for the Ninth Circuit affirmed. On certiorari to the United States Supreme Court, *held,* reversed and remanded for trial.[1] Since group boycotts are within that class of restraints which from their very nature and character are unduly restrictive, Congress has determined its own criteria of public injury as to them. Thus petitioner has stated a cause of action. *Klor's, Inc. v. Broadway-Hale Stores, Inc.,* 359 U.S. 207 (1959).

Although Supreme Court dictum has often characterized concerted refusals to deal as unreasonable per se,[2] the fact that cases relied upon to support that view have involved improper purposes or effects[3] which would lead to condemnation under a rule of reason approach had left open the possibility that such an approach was not precluded in group boycott cases.[4] The principal case, with its broad malediction of concerted refusals

[1] Justice Harlan concurred on the ground that respondents' affidavits did not necessarily constitute a defense irrespective of what petitioner may be able to prove at the trial.

[2] See United States v. Columbia Steel Co., 334 U.S. 495 at 522 (1948); Times-Picayune Publishing Co. v. United States, 345 U.S. 594 at 625 (1953).

[3] See, e.g., Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211 (1951) (price fixing); Eastern States Retail Lumber Dealers' Assn. v. United States, 234 U.S. 600 (1914) (elimination of competition); Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941) (elimination of competition).

[4] United States v. Insurance Board of Cleveland, (N.D. Ohio 1956) 144 F. Supp. 684 at 698: "In none of the cited cases was the decision of the Supreme Court based upon

to deal, would seem to put to rest all doubts concerning the classification of group boycotts as per se violations of the antitrust laws.[5] The Court makes no reference to limitations which would except self-restricting, noncoercive refusals to deal (e.g., reasonable rules among members of trading boards or exchanges) from the operation of the per se rule, a possible indication that such suggested limitations[6] will not be applied. Justifications for group refusals to deal such as prevention of illegal relationships,[7] credit regulation,[8] and elimination of trade abuses[9] may not be totally without force, but their applicability in the unreasonable per se setting will have to be tested in future cases. Since a violation of the Sherman Act necessarily is injurious to the public,[10] classification of group boycotts as unreasonable per se frees the plaintiff in a private action based upon such practices from the requirement of establishing that degree of public injury which is an element of any antitrust violation.

On remand, Klor's will be presented with the evidentiary problem of proving conspiracy on the part of the respondent manufacturers. Unless the contemporaneous similar action of the manufacturers can circumstantially create an inference of conspiracy beyond mere "conscious parallelism,"[11]

the application of the principle that all boycotts are illegal *per se*. Having foreborne the declaration of such a principle in cases where group refusals to deal were directly in issue, it is unreasonable to suppose that the court intended to announce such a principle in cases where the issue was not presented." Note, 55 MICH. L. REV. 1035 (1957). *Accord,* United States v. New Orleans Ins. Exchange, (E.D. La. 1957) 148 F. Supp. 915, affd. per curiam 355 U.S. 22 (1957).

5 The Court distinguished individual refusals to deal and exclusive distributorship contracts from the agreement alleged in the principal case. Cf. United States v. Colgate & Co., 250 U.S. 300 (1919).

6 See REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS (1955): ". . . group action *coercing outside parties* is deemed an undue restraint of trade, and whatever its purpose, is likely to fall as unreasonable per se." (Italics added.) See also comment, 51 N.W. UNIV. L. REV. 628 (1956).

7 See United States v. American Livestock Commission Co., 279 U.S. 435 (1929).

8 See Swift and Co. v. United States, 196 U.S. 375 (1905). See also, note, 41 COL. L. REV. 941 (1941). Cf. Ruddy Brook Clothes, Inc. v. British & Foreign Marine Ins. Co., (7th Cir. 1952) 195 F. (2d) 86, cert. den. 344 U.S. 816 (1952).

9 See Butterick Pub. Co. v. FTC, (2d Cir. 1936) 85 F. (2d) 522 at 527. See, generally, LAMB AND KITTELLE, TRADE ASSOCIATION LAW AND PRACTICE c. 10 (1956).

10 "Congress has, by legislative fiat, determined that such prohibited activities are injurious to the public and has provided sanctions allowing private enforcement of the antitrust laws by an aggrieved party. These laws protect the victims of forbidden practices as well as the public. . . . In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws." Radovich v. National Football League, 352 U.S. 445 at 453-454 (1957).

11 "It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. . . . Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act." Interstate Circuit, Inc. v. United States, 306 U.S. 208, 227 (1939). See note, 64 YALE L.J. 581 (1955).

the problem of proving an agreement is likely to be a difficult one. While uniform behavior is certainly relevant evidence of agreement, it is now clear that more is necessary to establish conspiracy under the antitrust laws.[12] If Klor's is unable to prove conspiracy, it would seem at first glance that its only remedy against Broadway-Hale would be in a tort action for interference with business relationships.[13] However, it is at least arguable that Broadway-Hale had a predatory purpose which was effectuated through sales contracts entered into with the manufacturers on condition that appliances be withheld from Klor's. In that event, a "contract in restraint of trade" would be present.[14] It should be noted, however, that if Klor's is to prevail under this theory, it will be necessary for it to show public injury. Unlike the situation involving an unreasonable per se violation, where public injury will be deemed to have been determined by Congress, proof of a violation in the normal case must include the component of injury to competition.[15] Such injury might be found in the deterrent effect which Klor's fate, if unredressed, will have upon other small dealers.[16] The potentiality of such competitive restraint resulting from Broadway-Hale's action is as great as would be that resulting from a conspiracy among the manufacturers, and it would seem anomalous to deny Klor's recovery in the event that conspiracy could not be proved.

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[12] Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537 at 541 (1954): ". . . 'conscious parallelism' has not yet read conspiracy out of the Sherman Act entirely." Cf. REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 36-42 (1955).

[13] See, e.g., Delz v. Winfree, 80 Tex. 400, 16 S.W. 111 (1891), where plaintiff butcher was held to have a cause of action against cattle dealers who boycotted him and induced a third person to refuse to sell him supplies.

[14] In FTC v. Raymond Bros.-Clark Co., 263 U.S. 565 (1924), it was held that a wholesale dealer in groceries had the right unilaterally to refuse to buy from a grocery manufacturer unless the manufacturer ceased making direct sales to a competitor whose primary business was operation of a retail chain. The principal case might be differentiated on the ground that Raymond Bros.-Clark Co. was furthering a proper business interest (preservation of customer classifications), whereas there was no apparent legitimate business purpose being served by Broadway-Hale's course of action.

[15] Cf. Radovich v. National Football League, note 10 supra.

[16] See note, 68 YALE L.J. 949 at 956 (1959).