Michigan Law Review

Volume 55 | Issue 7

1957

Regulation of Business - Sherman Act - Concerted Refusals to Deal Not Illegal Per Se

Gerald D. Rapp
University of Michigan Law School

REGULATION OF BUSINESS—SHERMAN ACT—CONCERTED REFUSALS TO DEAL NOT ILLEGAL PER SE—The government sought an injunction restraining the members of an organization of independent insurance agents responsible for writing nearly 80 percent of the fire insurance in the Cleveland, Ohio, area from carrying out association regulations. Adherence to the rules was challenged as a conspiracy in restraint of trade and an attempt to monopolize in violation of sections 1 and 2 of the Sherman Act.[1] The regulations were designed to prevent the members from representing (1) mutual insurance companies, (2) branch office companies which contribute to the agents a portion of their overhead expense and, (3) insurance companies which operate branch offices and solicit or sell direct to the insured. The restrictions were enforced by threat of membership forfeiture. These rules, the government pleaded, amounted to concerted refusals to deal, i.e., boycotts, and as such were alleged to be illegal per se. The defendant contended that "the restraints imposed are reasonable in the light of the circumstances in which they operate." On motion by both parties for summary judgment, *held,* the rule of reason must be applied to determine the legality of concerted refusals to deal.[2] *United States v. Insurance Board of Cleveland,* (N.D. Ohio 1956) 144 F. Supp. 684.

The frequent condemnation by the courts of concerted refusals to deal has given rise to the suggestion that such practices are per se illegal.[3] Some Supreme Court dicta[4] appear on their face to affirm such a doctrine.

1 26 Stat. 209 (1890), 15 U.S.C. (1952) §§1-2.

2 Using this standard the court granted the government's motion for summary judgment in declaring the "direct writer rule" (3), illegal; but overruled the motions by both parties on the "expense contribution rule" (2) and the "mutual rule" (1) and retained jurisdiction for a determination on the merits.

3 See Kirkpatrick, "Commercial Boycotts as Per Se Violations of the Sherman Act," 10 GEO. WASH. L. REV. 302 at 309-313 (1942); 58 YALE L.J. 1121 at 1137 (1949). Compare LAMB AND KITTELLE, TRADE ASSOCIATION LAW AND PRACTICE §10.6 (1956).

4 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). In United States v. New Orleans Insurance Exchange, (E.D. La. 1957), 1957 CCH Trade Cas. ¶68,616, a case presenting facts very similar to those in the principal case, the court admitted that a contended status of per se illegality for boycotts has "much support from the authorities" [apparently relying upon Fashion Originators' Guild v. FTC, 312 U.S. 457 (1941) and the dicta in United States v. Columbia Steel, supra and International Salt Co. v. United States, 332 U.S. 392 (1947)]. The court, unaided by this reasoning, proceeded to find the challenged practices illegal as violations of the rule of reason. But cf. the attitude expressed by the court in Union Circulating Co. v. United States, (2d Cir. 1957), 1957 CCH Trade Cas. ¶68,637, where a distinction is drawn between boycotts illegal on their face and

These dicta seem open to question, however, since the schemes struck down in the cases supporting those statements contained either unlawful objects[5] or the employment of illegal means.[6] Notwithstanding that group refusals to deal restrain trade, courts in the past have held or indicated that justifications may protect them from illegality where aimed at combatting unlawful relationships,[7] dealing with credit transactions,[8] preventing abuse by unscrupulous dealers,[9] or improvement of trade conditions within an industry.[10] Inherent in the concerted refusal problem is the necessity for a recognition of the important differences of purpose between refusals designed to coerce or exclude third parties and those used as a method of mutual control over the parties to the agreement with only an indirect restraint on third parties.[11] The restraints in the former class represent the type which courts most quickly condemn.[12] If the above distinction is valid, it is submitted that the difficulty of identifying an illegal refusal is aggravated by the common reference to all concerted refusals to deal as "boycotts" since the unlawful connotations accompanying the term actually suggest the answer to the question to be decided.[13] Against such an antitrust background the district court's refusal to follow the Supreme Court dicta[14] does not appear inconsistent with past appli-

those which require closer scrutiny before a determination can be made (citing the principal case).

5 Eastern States Retail Lumber Dealers' Assn. v. United States, 234 U.S. 600 (1914) (object was elimination of competition); Fashion Originators' Guild v. FTC, note 4 supra (object was destruction of "style piracy" competition); Kiefer-Stewart Co. v. Seagram and Sons, 340 U.S. 211 (1951) (object was price fixing); Montague v. Lowry, 193 U.S. 38 (1904) (object was restraining non-members free access to market).

6 Associated Press v. United States, 326 U.S. 1 (1945) (use of dominant position to limit outsiders' opportunities). The cooperative practices (spying, "black lists," etc.) in Eastern States Retail Lumber Dealers' Assn. v. United States, note 5 supra, and Fashion Originators' Guild v. FTC, note 4 supra, were illicit means to accomplish an unlawful object.

7 United States v. American Livestock Commission Co., 279 U.S. 435 at 438 (1929).

8 See Swift and Co. v. United States, 196 U.S. 375 (1905). See also United States v. Cincinnati Fruit and Produce Credit Assn., (S.D. Ohio 1956) 1956 CCH Trade Cas. ¶68,248 (permitted only cash sales to delinquents). Cf. United States v. First National Pictures, 282 U.S. 44 (1930); 29 MICH. L. REV. 909 at 914 (1931).

9 See Butterick Publishing Co. v. FTC, (2d Cir. 1936) 85 F. (2d) 522 at 527.

10 See Anderson v. United States, 171 U.S. 604 (1898); Sugar Institute v. United States, 297 U.S. 553 at 597-599 (1936). Cf. Dior v. Milton, (N.Y. 1956) 1956 CCH Trade Cas. ¶68,418. But see Fashion Originators' Guild v. FTC, note 4 supra. And see Barber, "Refusals To Deal Under the Anti-Trust Laws," 103 UNIV. PA. L. REV. 847 at 874-876 (1955); and Kirkpatrick, "Commercial Boycotts as Per Se Violations of the Sherman Act," 10 GEO. WASH. L. REV. 302 at 305 (1942).

11 See Barber, "Refusals To Deal Under the Anti-Trust Laws," 103 UNIV. PA. L. REV. 847 at 872-879 (1955); Kirkpatrick, "Commercial Boycotts as Per Se Violations of the Sherman Act," 10 GEO. WASH. L. REV. 302 at 305 (1942).

12 Eastern States Retail Lumber Dealers' Assn. v. United States, note 5 supra; Fashion Originators' Guild v. FTC, note 4 supra; Millinery Creators' Guild v. FTC, 312 U.S. 469 (1941).

13 Cf. the reluctance by the members of the Attorney General's Committee to use the term "patent pool." REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 242 (1955), hereinafter cited as REPORT.

14 In principal case, at 698, the court respectfully states, "If the *dicta* are to be regarded as a prophecy of the court's adoption of the doctrine of *per se* illegality in future

cations,[15] and the rejection of a per se solution for concerted refusals seems to echo the recent Supreme Court affirmation that it "has not receded from the Rule [of Reason]" as the keynote to antitrust enforcement.[16] The "direct writer" rule in the instant case was branded unlawful because the members had restricted their freedom to contract with the purpose and effect of restraining some insurance companies from competing within the Cleveland vicinity.[17] Neither benefits received by the public nor protection of the insurance agent's expiration lists from piracy by the insurers were deemed to justify this group action. Lack of evidence and disputed questions of fact prevented further adjudication of the other rules, but the court's suggestion that the regulations would be permitted if they served lawful intra-group functions though giving rise to slight restraints on outsiders is noteworthy.[18] The presence of state insurance regulation which can serve as a restraining force on self-help measures within this particular segment of commerce relaxes the necessity of tight federal control, and is another persuasive factor for applying the rule of reason to the instant case.[19] Admitting that every concerted refusal to deal restrains some trade, this court's approach is commendable in that it recognizes the need for some degree of protection of self-regulatory trade association activities that realize substantial benefits to its members and the public,[20] and only indirectly affect outsiders. In such instances a rigid per se illegality rule would automatically condemn certain trade association activities compatible with the public interest. Preservation of the rule of reason approach for concerted refusal to deal problems would seem to be the more appealing alternative, for it reserves sufficient latitude for the curtailment of un-

boycott cases, it seems reasonable to predict that its application will be limited to cases where a combination seeks by coercion, intimidation, or threats to compel outsiders to do or refrain from doing that which the group approves or condemns. . . ."

15 That Fashion Originators' Guild v. FTC, note 4 supra, and Associated Press v. United States, note 6 supra, prominent cases with per se reputations, do not preclude justifiable concerted refusals, see 58 YALE L.J. 1138 (1949). The REPORT 132-137 sanctions a speedy finding of illegality where a concerted refusal to coerce outside parties is found without recommending an absolute *per se* approach. See also Barber, "Refusals To Deal Under Anti-Trust Laws," 103 UNIV. PA. L. REV. 847 at 879 (1955).

16 United States v. E. I. Du Pont de Nemours Co., 351 U.S. 377 at 387 (1956). See principal case at 698.

17 However, the court recognized in the instant case, at 700, that individual refusals would be lawful.

18 Principal case at 706.

19 Cf. the Fashion Originators' Guild case, note 4 supra, and the Millinery case, note 12 supra, where no similar instrument of control over industry self-help measures was present.

20 For excellent treatment of antitrust hazards connected with trade association activities, see generally LAMB AND KITTELLE, TRADE ASSOCIATION LAW AND PRACTICE (1956). For a discussion of trade association usefulness see Oppenheim, "Federal Anti-Trust Legislation: Guideposts to a Revised National Antitrust Policy," 50 MICH. L. REV. 1139 at 1171 (1952); Kirkpatrick, "Commercial Boycotts as Per Se Violations of the Sherman Act," 10 GEO. WASH. L. REV. 302 at 305, 396-405 (1942); REPORT 17. See also 32 COL. L. REV. 313 (1932); 39 YALE L.J. 884 (1930); 26 VA. L. REV. 828 (1940), for further discussion of activities connected with enforcement devices.

desirable restraints measured by the facts of the particular challenged situation and prevents a "mechanistic"[21] approach that could be used to preclude beneficial business restraints.[22]

Gerald D. Rapp

[21] That antitrust enforcement expediency should take a back seat to the basic policy of promoting competition see Oppenheim, "A New Look at Antitrust Enforcement Trends," DIST. COL. B.A.J. 111 at 120 (1950). See generally Oppenheim, "Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy," 50 MICH. L. REV. 1139 (1950) advocating a restricted use of the per se approach.

[22] See 58 YALE L.J. 1121 at 1140 (1949), suggesting that maintenance of this delicate balance between lawful and unlawful concerted refusals is a desirable alternative to illegality per se.