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Trade Regulations - Group Boycott - Restraint of Trade

David J. Pleva

sarily decides whether the defendant must demonstrate his honestly industrial methods or the Government must prove the putative monopolizer's willfully predatory connivances.

In favoring the latter approach, the Supreme Court emasculates the district court's pronouncement and recedes drastically from the virtual per se position advanced in *Alcoa*. Mere monopoly power becomes neither presumptive nor essentially conclusive evidence of a Sherman section 2 violation. More importantly, *Grinnell* revitalizes the "rule of reason" as conceived in 1911 by Mr. Justice White and particularized in 1918 by Mr. Justice Brandeis.[21] With reference to "monopolizing," this concept envisions an exploration of the reasonableness of the monopolist's methods. In essence, a demonstration of willful, predatory tactics becomes an indispensible ingredient to branding the defendant monopolist as unreasonable and, consequently, offensive to the antitrust laws. Although Grinnell and its affiliates lost the instant case, the necessitated inquiry into the manners of the monopolist resuscitates, legally, the monopolist with integrity, and alleviates the paradoxical *Alcoa* doctrine by heralding willful, positive drive as the touchstone of a Sherman section 2, "monopolizing" transgression.

H. Kennedy Linge

TRADE REGULATIONS—Group Boycott—Restraint of Trade—A joint refusal to deal resulting in an exclusion of traders from the competitive market is a *per se* violation of section 1 of the Sherman Act.

United States v. General Motors Corp., 384 U.S. 127 (1966).

In a civil action brought by the United States Government, defendants, General Motors Corporation and three Chevrolet dealer associations, were held to have violated the prohibitions of section 1 of the Sherman Act.[1]

21. In Standard Oil Co. of New Jersey v. United States, 221 U.S. 1 (1911), Mr. Justice White conceptualized the "rule of reason." Briefly this concept demands an inquiry into the purpose, power and effect and requires a definite factual showing of illegality of a defendant's conduct. An eminent enumeration of the considerations involved was advanced in Chicago Board of Trade v. United States, 246 U.S. 231 (1918). In that case, Mr. Justice Brandeis, at 238, dissected and analyzed, ". . . the facts peculiar to the business to which the restraint is applied; its conditions before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts." In many areas of antitrust law, the "rule of reason" has been discarded in favor of per se or virtual per se principles; this decision may foreshadow its revival.

1. The statute reads in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several

The dealers operated in accordance with a customary uniform dealer selling agreement. There were no express customer or territorial limitations incorporated in these agreements with the exception of a provision (herein referred to as the "location clause") prohibiting the franchised dealer from establishing "a new or different location, branch sales office, branch service station, or place of business . . . without the prior written approval of General Motors."[2]

In the 1950's the franchised dealers were found to be supplying discount houses with automobiles that were being sold at alleged bargain prices.[3] The number of franchised dealers using these discounters to increase their sales and profits increased to the extent that nonparticipating dealers began to protest that they were losing sales and were obligated to service the cars sold by the discount houses. Ensuing complaints to Chevrolet's Los Angeles manager and protest letters to General Motors elicited reprimands that resulted in the eventual abandonment of all practices with the discounters on the part of the dissident dealers.[4] Defendants then proceeded to finance a policing arrangement that resulted in detection of certain transgressors who were ultimately compelled to repurchase their infractious sales.

On these facts the United States District Court concluded that the proof failed to establish a violation of section 1 of the Sherman Act.[5] The Supreme Court, in reversing, decided that it was unnecessary to consider the effect of the "location clause" under section 1 when there was present a "classic conspiracy in restraint of trade."[6] It further stated that the lower court failed to apply the correct and established standard for ascertaining the existence of a violation of this section.

In order to facilitate the analysis of the instant fact situation under section 1 of the Sherman Act, it is necessary to examine the act's two distinguishable criteria. The first criterion, "contract, combination, or conspiracy," has been a prolific source of confusion for the courts which must define these terms and decide when and how they are to be applied to sundry situations. All three terms do, however, have one thing in common which many courts look for in applying this criterion, and that is

States, or with foreign nations, is declared to be illegal. . . ." 15 U.S.C. § 1 (1964 ed.). Prior to the civil action an unsuccessful criminal action was brought against defendants wherein the court stated that the government did not sustain its burden of proof. United States v. General Motors Corp., Trade Reg. Rep. 9170, 704 (S.D. Cal. 1963).

2. 384 U.S. at 130.

3. These practices took on a variety of forms with some discounters buying cars outright from the dealers and reselling them, while others merely acted as referral services.

4. By the Spring of 1961 the discounters had successfully been eliminated from the Chevrolet market.

5. Under section 2 of the Expediting Act, 15 U.S.C. § 29 (1964 ed.), the case may go on direct appeal to the United States Supreme Court.

6. 384 U.S. at 140.

an agreement, whether it be express or implied.[7] The confusion arises when the courts must distinguish between what constitutes an agreement as opposed to unilateral or parallel action, neither of which conform to the first test. The principle of unilateral action as contrasted with collaborative action entrenched itself in Sherman Act terminology through the *Colgate* case.[8] It was there that the court unequivocally stated that a unilateral refusal to deal was permissible notwithstanding the fact that if the refusal was accomplished by agreement it would be unlawful. Later cases severely restricted what the *Colgate* court described as unilateral action,[9] and some writers even intimate that the later cases have completely emasculated the concept of unilateral action to the extent that mere acquiescence in a unilateral demand may constitute an agreement within the proscriptions of section 1 of the Sherman Act.[10] These conclusions, however, are dubious in light of some recent decisions that have seemingly revived the *Colgate* holding.[11]

The Court in the instant case relied primarily on the *Parke, Davis* holding[12] in applying the first criterion of section 1 of the Sherman Act. It emphasized that no explicit agreement was necessary when "joint collaborative action was pervasive in the initiation, execution and ful-

7. United States v. Parke, Davis & Co., 362 U.S. 29, 42 (1960); Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 685 (1962).

8. United States v. Colgate & Co., 250 U.S. 300 (1919).

9. See United States v. Parke, Davis & Co., 362 U.S. 29 (1960), wherein the Court found that defendants exceeded the scope of the *Colgate* case when they announced that they would refuse to deal with wholesalers who sold to price-cutting retailers with whom defendants had severed relations; United States v. A. Schrader's Sons, Inc., 252 U.S. 85 (1920), wherein the Court found an implied agreement to maintain prices by excluding traders who failed to adhere; United States v. Bausch & Lomb Optical Co., 321 U.S. 707 (1944), where the Court found an implied conspiracy in the enforcement of a resale price maintenance scheme by refusing to sell to non-cooperating retailers.

10. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal, supra* note 7 at 705, 706; Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847, 856 (1955); United States v. Parke, Davis & Co., 362 U.S. 29, 57 (dissenting opinion), as to the destructive effect the majority opinion has on the *Colgate* case.

11. Klein v. American Luggage Works, Inc., 325 F.2d 787 (3d Cir. 1963), *reversing* 206 F. Supp. 924 (D. Del. 1962), where the court clearly distinguished between unilateral and collaborative action in holding that a manufacturer by severing relations with a price cutting retailer, even with information supplied by another of his retailers, still proceeded naturally and unilaterally so as not to violate section 1 of the Sherman Act; Graham v. Triangle Publications, Inc., 233 F. Supp. 285 (E.D. Pa. 1964), *aff'd per curiam*, 344 F.2d 775 (3d Cir. 1965), where the court held it permissible for a publisher to refuse to sell papers to anyone having service charges on the sale at the complaints of the subscribers; discussed more fully in Fulda, *Individual Refusals to Deal: When Does Single-Firm Conduct Become Vertical Restraint?*, 30 LAW & CONTEMP. PROB. 590, 592-597 (1965) and maintaining the still present vitality of the *Colgate* holding.

12. 384 U.S. at 143.

fillment of the plan."[13] The Court also held that collaborative action had in fact been exercised horizontally between the association dealers and vertically between those associations and General Motors.[14] These findings of fact coupled with the strict application of the holding in the *Parke, Davis* case enabled the Court to readily find the necessary agreement in the instant case to conform to the first criterion of section 1 of the Sherman Act, and to reject any contention of unilateral or parallel action.

The second criterion, "restraint of trade," originally employed a "rule of reason" in its interpretation and application:[15] if the conduct was reasonable under the circumstances as having economic justification, the courts did not consider it a "restraint of trade" even though it did have an anti-competitive result. Gradually the courts began applying an illegal *per se* principle to certain types of anti-competitive conduct that were so pernicious and inimicable to the concepts of free trade and competition that reason and motive were irrelevant. The resale price maintenance cases[16] provide typical examples of such *per se* violations of section 1 of the Sherman Act as "restraints of trade."

In the instant case the Court applied a *per se* illegal approach to facts amounting to a group boycott or joint refusal to deal resulting in the exclusion of traders from the free market. For support of this *per se* classification the Court relied primarily on the *Klor's*[17] and *Fashion Guild*[18] cases, both in which the Court summarily condemned a joint refusal to deal by refusing to admit evidence as to the reasonableness of the acts.[19]

Although the status of group boycotts in similar situations is indisputably established,[20] it must further be determined whether it is the

13. *Ibid.*

14. *Id.* at 140.

15. Standard Oil Co., v. United States, 221 U.S. 1 (1911).

16. United States v. Socony Vacuum Oil Co., 310 U.S. 150 (1940); United States v. Parke, Davis & Co., 362 U.S. 29 (1960).

17. Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). In this case manufacturers and distributors of electrical appliances conspired with a major retailer, Broadway-Hale, to sell to Klor's only at unfavorable and discriminatory prices. The Court decided that this was a *per se* violation of section 1 of the Sherman Act.

18. Fashion Originator's Guild of America, Inc. v. Federal Trade Comm'n, 312 U.S. 457 (1941). In this case group action amounting to a refusal to sell to retailers who patronized style pirates was declared *per se* illegal.

19. Note that defendants in both *Klor's* and *Fashion Guild* were charged also with violations of section 2 of the Sherman Act and section 5 of the Clayton Act respectively, both dealing with monopolistic proscriptions. The significance of these monopolistic overtones in the ultimate decision of illegality, however, is negligible in light of the instant case which although devoid of any monopolistic allegations was just as readily renounced by the Court as illegal *per se*.

20. See Ruddy Brook Clothes Inc. v. British Foreign Marine Ins. Co., 195 F.2d, 86 (7th Cir. 1952) *cert. denied*, 344 U.S. 816 (1952), wherein the court held it permissible for

concept of group boycott alone that is accorded a *per se* approach or whether this concept must be combined with an anti-competitive result. The first approach would be preferred, since the Courts' disregard of the anti-competitive result is manifest in their decisions which neglect to distinguish between the different results that each group boycott might induce,[21] and merely proceed to unequivocally anathematize the means of obtaining the result—the joint refusal to deal—as so inherently offensive that by its very nature it adversely affects competition. This analysis seems especially cogent when the Court, as in the instant case, regards the anti-competitive result, a form of customer restriction which has generally been accorded justification by reason in the past[22] as illegal *per se* when associated with a group boycott. There is, however, some authority for the position that no definitive or uniform rule can be formulated to establish precisely what facts are accorded the *per se* approach in the boycott cases; and this conclusion is drawn from the ambiguous language used in the Court's decisions.[23]

Perhaps if the Court in the instant case had not declined to consider the effect of the "location clause" under section 1, it would have compared its effect to the group boycott approach and consequently explained just what aspect of the factual situation was accorded *per se* illegality. Although the validity of a "location clause" is generally accepted in light of *Borro Hall Corp. v. General Motors Corp.*,[24] in which an identical "zone of influence" agreement was upheld, it becomes questionable whether or not the clause can be validly construed to include a form of customer restriction, as would be necessary in the present case. For the purposes of discussion it will be conceded that the clause does, so the

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defendants to concertedly refuse to sell insurance to a customer and stated that such actions were subject to reasonable justification. Also Barber, *supra* note 10 at 876, suggesting that perhaps there is a *de minimus* area in which group boycotts might be considered legal.

21. In the *Klor's* case the anti-competitive effect was neither pleaded or proved since the removal of one competitor from the market had no obvious adverse effects. And in the instant case the anti-competitive result was obvious in the exclusion of many traders that possibly stimulated competition.

22. Snap-On Tools Corp. v. F.T.C., 321 F.2d 825 (7th Cir. 1963), held customer restrictions necessary to insure competition; Revlon Products Corp. v. Bernstein, 119 N.Y.S.2d 60 (Sup. Ct. N.Y. County 1953), *aff'd*, 285 App. Div. 1139, 142 N.Y.S.2d 364 (1955), allowed restrictions on jobbers only to sell to beauty parlors and schools; Fosburgh v. California & Hawaiian Sugar Refining Co., 291 Fed. 29 (9th Cir. 1923), upheld a customer restriction not allowing the purchaser to resell sugar. See generally Robinson, *Restraint on Trade and the Orderly Marketing of Goods*, 45 CORNELL L.Q. 254 (1960).

23. Rahl, *Per Se Rules and Boycotts Under the Sherman Act: Some Reflections on the Klor's Case*, 45 VA. L. REV. 1165, 1170 (1956). This writer points out that the Court in the *Klor's* case as in past boycott cases failed to explain its holding in regard to group boycotts and concluded that no definitive answer can be established from the language of the cases.

24. 124 F.2d 822 (2d Cir. 1942), *rehearing denied*, 130 F.2d 196 (2d Cir. 1942), *cert. denied*, 317 U.S. 695 (1943).

Court in deciding the validity of the "location clause" with this inclusion must examine the customer restriction as historically analyzed—in light of reason and motive[25] to determine if it constitutes a "restraint of trade." And the present Court's disregard of this conventional analysis in the group boycott examination would then confront them with a contradiction that they would be obliged to resolve. In so doing the Court would undoubtedly assert that the reason for the inconsistency is that the customer restrictions or anti-competitive results are really irrelevant since it is the group boycott itself that is *per se* illegal as a "restraint of trade."

There is, however, really nothing in the opinion of the Court that militates against the unilateral enforcement of the "location clause" as suggested by Justice Harlan in his concurring opinion.[26] For, as observed above, its validity would be predicated on the reasonableness of the customer restriction, to be determined by the motivations of General Motors apart from the vitiating group boycott analysis,[27] conceding that the "location clause" itself does not violate section 1 of the Sherman Act.[28]

The Court, in keeping with the expanding trend, applied a *per se* approach to a fact situation that patently commanded it. And, although the Court, as it is wont to do, did not delineate what precisely was its holding regarding the *per se* effect of group boycotts,[29] it will serve as precedent for future cases that may require substantiation for a *per se* declaration of illegality in fact circumstances amounting to group boycotts or joint refusals to deal without the finding or proof of an anti-competitive result.

David J. Pleva

25. See Robinson, *supra* note 22 at 268.

26. "In my opinion, however, General Motors is not precluded from enforcing the location clause by unilateral action, and I find nothing in the Court's opinion to the contrary," 384 U.S. at 149.

27. The only determination made in this case was that of defendant's motivations as induced and governed by the group action. Any independent determination would be unsupported by the evidence which reflects only that "one of the purposes behind the *concerted effort* to eliminate sales . . . was to protect franchised dealers from real or apparent price competition," 384 U.S. at 147.

28. Rifkind, *Division of Territories*, Antitrust Law Symposium, [available from Commerce Clearing House, Inc., Chicago 46, Illinois] (1953), suggesting the possible weakness of the *Borro Hall* holding.

29. See Rahl, *supra* note 23.