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Antitrust—Clayton Act—Stock Exchange Held Liable under Antitrust Laws.— Silver v. New York Stock Exchange

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mergers per se, although such a proscription would be a necessary conclusion if the test of anti-competitive effects were one of speculation and possibility. The existing test of reasonable probability recognizes that section 7 is not concerned with possibilities. If the government has not met its burden of showing the reasonable probability of a substantial lessening of competition, the conglomerate merger should not be enjoined on the basis of speculative claims. Should investigation into post-acquisition factors indicate that the proscribed effects exist or will likely exist in the future, divestiture would be an adequate remedy.[24] To grant the motion for injunction would be to substitute what are at best mere ephemeral possibilities for reasonable probabilities.

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Antitrust—Clayton Act—Stock Exchange Held Liable under Antitrust Laws.—*Silver v. New York Stock Exchange.*[1]—The New York Stock Exchange directed certain of its member firms to terminate private wire connections with the petitioners who were registered broker-dealers[2] in over-the-counter municipal bonds, without assigning any reason therefor or giving the petitioners notice or an opportunity to be heard. The ensuing inability to receive instantaneous market quotations caused a sharp drop in petitioner's business. In consequence thereof, a suit was brought in the United States District Court for the Southern District of New York[3] alleging that the arbitrary action of the Exchange constituted a conspiracy in violation of Sections 1 and 2 of the Sherman Act[4] thereby entitling petitioners to treble damages and injunctive relief.[5] The district court held that antitrust laws applied to the Exchange and granted partial summary judgment, permanently enjoining it from interfering with private wire connections between its members and the petitioner.[6] On appeal the Second Circuit reversed, hold-

24 Supra note 20.

1 373 U.S. 341 (1963).

2 They were registered with the SEC as broker/dealers pursuant to the Securities Exchange Act of 1934, 48 Stat. 881 (1934), 15 U.S.C. § 780(b) (1958). They were also members of the National Association of Security Dealers, but were not members of the New York Stock Exchange.

3 Silver v. New York Stock Exchange, 196 F. Supp. 209 (S.D.N.Y. 1961).

4 26 Stat. 209 (1890), 15 U.S.C. 1, 2 (1958). Petitioners alleged two additional causes of action which sounded in tort, based upon allegations that the Exchange tortiously induced its members to breach contracts for wire connections with petitioners and also that the Exchange caused petitioners intentional and wrongful harm without reasonable cause..

5 These forms of relief are provided by the Clayton Act, 38 Stat. 730 (1914), 15 U.S.C. 15, 26 (1958).

6 Supra note 3. The district court rejected the Exchange's contention that the scheme of the Act of 1934 was complete regulation and control of all matters relating to securities transactions and that as a registered Exchange it was therefore part of a regulated industry exempt from the antitrust laws, at least as to all the rules filed with the SEC. See note 11, infra.

ing the Exchange exempt from the restrictions of the Sherman Act.[7] After granting certiorari, the Supreme Court reversed the court of appeals. HELD: the Securities Exchange Act of 1934[8] did not give the Exchange a total exemption from antitrust laws and the Exchange, by denial of notice and opportunity to be heard, had "plainly exceeded the scope of its authority under the Securities Exchange Act to engage in self-regulation. . . ."[9]

The Exchange rule of self-regulation, here under scrutiny, is contained in Article III, Section 6 and Article XIV, Section 17 of the Constitution of the New York Stock Exchange and in Rules 355 and 356 of the New York Stock Exchange. This provides, in substance, that the Exchange shall have power to govern wire services between members and non-members of the Exchange, including the power to terminate such service at any time.[10] These self-regulatory rules of conduct were adopted pursuant to the mandate of the Securities Exchange Act of 1934.[11] The constitutional provisions and rules relating to private wire connections were conceded by the Court to fall within the scope of the self-regulatory provisions of the 1934 Act.[12]

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[7] Silver v. New York Stock Exchange, 302 F. 2d 714 (2d Cir. 1962). The court stated at 720 that:

> The statute [Securities Exchange Act of 1934] gives the Commission and the Exchange disciplinary powers over members of the Exchange with respect to their transactions in over-the-counter securities and that the policy of the statute requires that the Exchange exercise these powers fully. In the exercise of such powers the Exchange is not subject to the restrictions of the Sherman Act.

[8] Securities Exchange Act of 1934, 48 Stat. 881 (1934), as amended, 15 U.S.C. § 78, et seq. (1958).

[9] Supra note 1, at 365.

[10] The Constitution of the New York Stock Exchange, Article III, § 6 provides that the Exchange "shall have power to approve or disapprove any application for . . . wire (service) . . . or other connection between any office of any member of the Exchange . . . and any non-member, and may require the discontinuance of any such service or connection." Article XIV, § 17 provides that the Exchange may order a member to sever any business connection which might cause the interest or good repute of the Exchange to suffer. New York Stock Exchange Rule 355 provides that no member may establish or maintain wire service with any non-member without prior consent of the Exchange and that the Exchange may require discontinuance of such service at any time. Rule 356 provides that the Exchange may require discontinuance of any means of communication whatsoever which has a terminus in the office of a member.

[11] 48 Stat. 881 (1934), as amended, 15 U.S.C. § 78 (1958). 15 U.S.C. § 78e places a duty on Exchanges to register with the SEC. 15 U.S.C. § 78f(a)(3) decrees that registration could not be granted unless the Exchange submitted copies of its rules to the SEC. 15 U.S.C. § 78f(b) states that the registration could not be granted unless the rules of the Exchange included a provision for expulsion, suspension, or disciplining of a member for conduct at a proceeding not inconsistent with just and equitable principles of trade. 15 U.S.C. § 78f(d) decreed that the rules must be just and adequate to insure fair dealing and to protect investors. 15 U.S.C. § 78s(b) authorizes the SEC to order changes in the Exchange's rules respecting a variety of subjects specifically enumerated therein.

[12] Supra note 1, at 355-56.

> The Exchange's constitutional provision and rules relating to private wire connections are unquestionably part of this fulfillment of the [§ 78f(b) and § 78f(d)] duties, for such wires between members and non-members facilitate trading in and exchange of information about unlisted securities, and such contact with an unreliable non-member not only may further his business undesirably,

The Court emphatically indicated this by specifically rejecting the holding of the district court that the Exchange rules were not sanctioned by the statutory duty of self-policing.[13] The Court also pointed out that it was unavoidable for such rules to be enforced without affecting non-members of the Exchange.[14] However, the Supreme Court went on to state that the action of the Exchange was clearly a violation of the Sherman Act unless justified by reference to the Securities Exchange Act, and then proceeded to hold that the latter Act "affords no justification for anti-competitive collective action taken *without according fair procedures*."[15] Thus, unless the restrictive practice is performed pursuant to the Securities Exchange Act, it violates the Sherman Act. This was clearly indicated when the Court carefully pointed out that it was not the antitrust laws which imposed the requirement of notice and hearing, but rather by failing to afford petitioners these safe-guards "the Exchange [had] plainly exceeded the scope of its authority under the Securities Exchange Act to engage in self-regulation."[16] Since the Exchange could not justify its action under the Securities Exchange Act, it had "therefore violated Section 1 of the Sherman Act. . . ."[17]

The application of antitrust law to statutorily regulated industries is not a novel concept.[18] The problem faced by the courts when confronted with this issue is one of determining the extent to which the regulatory legislation carves out either an express or implied exemption from antitrust prohibitions. The Supreme Court long ago established the policy that "repeals by implication are not favored."[19] In the case under discussion it was necessary for the Exchange, in order to gain immunity from antitrust law via the Securities Exchange Act, to demonstrate a clear and "positive repugnancy between the provisions of [the Sherman Act and Securities Exchange Act] . . . ; and even then the old law is repealed by implication only *pro tanto* to the extent of the repugnancy."[20] There is no language in the Securities Exchange Act expressly exempting it from any other law, but there is present an implied immunity in that the Exchange is commanded to promulgate and enforce restrictive rules. The Court recognized this, but found it not applicable in the *Silver* case. The Court was motivated by the lack of substantive "due

but may injure the members or the members' customers on whose behalf the contact is made and ultimately imperil the future status of the Exchange by sapping public confidence.

[13] Supra note 1, at 356.

[14] Ibid.

[15] Supra note 1, at 364. The "fair procedures" referred to are notice and hearing.

[16] Supra note 1, at 365.

[17] Ibid.

[18] See Hale & Hale, Competition or Control VI: Application of Antitrust Laws to Regulated Industries, 111 U. Pa. L. Rev. 46 (1962). The authors give an excellent treatment of the evolution of antitrust application to regulated industries.

[19] General Motors Acceptance Corp. v. United States, 286 U.S. 49, 61-62 (1932); United States v. Tynem, 78 U.S. (11 Wall) 88, 92 (1870); Henderson's Tobacco v. United States, 78 U.S. (11 Wall) 652, 657 (1870). This policy is summed up clearly in United States v. Borden Co., 308 U.S. 188, 198 (1939). The Court states: "It is a cardinal principle of construction that repeals by implication are not favored. When there are two acts upon the same subject, the rule is to give effect to both, if possible."

[20] United States v. Borden Co., 308 U.S. 188, 199 (1939).

process" afforded to petitioner which was concededly absent in the application of its rules by the Exchange.[21] The majority opinion establishes the proposition that notwithstanding the statutory propriety of the rules, if they are enforced under totally unjustifiable circumstances, the Exchange will suffer the loss of antitrust immunity.

In handling this question of immunity, the precise issue of the availability to the petitioner of SEC intervention was not directly considered. It was treated in a footnote[22] wherein the Court indicated that the SEC may be assumed to have the power under the Securities Exchange Act of 1934 to direct the Exchange to adopt a general rule providing a hearing and attendant procedures to non-members.[23] In a brief filed as amicus curiae, the Solicitor General of the United States stated that

> While neither the Securities Exchange Act nor the Commission's [SEC] rules of practice specifically authorize the filing of a complaint with the agency by a person adversely affected by a rule of an exchange, the Commission would ordinarily entertain such a complaint if it made substantial allegations.[24]

Thus, the rather interesting issue of "Primary Jurisdiction"[25] was indirectly alluded to but not specifically treated. Could the expertise of the SEC be asserted to occupy the area of resolution of anti-competitive effects of Exchange rules on the securities industry? The SEC itself has recognized that "one of the declared purposes" of the Act (Securities Exchange Act of 1934) is the "fostering" of competition among exchanges and between exchanges and the over-the-counter market, "a purpose which is closely related to the public policy" of antitrust laws.[26] It must be pointed out,

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[21] The petitioners were given no notice, no hearing nor any reason for the Exchange action despite repeated requests for the latter two and repeated offerings to come forward and rebut any allegations as to their reputation, integrity and financial standing. Supra note 1, at 361.

[22] Supra note 1, at 364 n.16.

[23] Supra note 1, at 355-56.

[24] Brief for the United States as Amicus Curiae at 17 n.11.

[25] The doctrine of "Primary Jurisdiction" arose in Texas & Pacific Ry. Co. v. Abilene Cotton Oil Co., 204 U.S. 426 (1907). It is a rule concerned with establishing the proper relationships between the courts and administrative agencies, and is frequently used by the courts for the resolution of controversies requiring an expertise which a particular agency possesses. Referral is made to the agency for the "primary" determination of the issue. E.g. United States v. W. Pac. Ry. Co., 352 U.S. 59 (1956); Far East Conf. v. United States, 342 U.S. 570 (1952). See also, Schwartz, Competition in Regulated Industries, 67 Harv. L. Rev. 436 (1954).

[26] In the Matter of the Rules of the New York Stock Exchange, 10 S.E.C. 270, 286-87 (1941). See also, Hale & Hale, supra note 18, at 48, 50:

> The doctrine [Primary Jurisdiction] has often been used by courts to dispose of antitrust litigation when the subject matter appeared to lie within the peculiar responsibility of a regulatory agency. Frequently the courts have utilized the doctrine to afford regulated business an implied exemption from antitrust control.
>
> . . .
>
> It does not necessarily follow that antitrust principles will not be applied to these cases which are transferred to the regulatory agencies. The administrative agency itself may be under a duty to apply antitrust standards.

Exchange to have deprived petitioner of "fair procedures," thus impliedly placing a duty on exchanges to observe due process requirements.

In addition to injunctive relief, a strong position could be urged that petitioner is entitled to damages for breach of the Exchange's duty to afford due process to an aggrieved party.[32] Further, there are available the common law remedies for tortious interference with contractual relations and wrongful harm without reasonable cause, both of which were included in petitioner's original declaration.[33]

The above alternatives are all predicated upon the assumption that the Exchange's rule falls within the scope of its statutory duty of self-regulation. There are other remedies available but it is submitted that antitrust law and its severe treble damage sanctions is not properly included therein.

JOSEPH J. REARDON

Bankruptcy—Equity vs. State Law in Bankruptcy Courts.—*In the Matter of Harold Laskin, Bankrupt.*[1]—Laskin, prior to filing a voluntary petition in bankruptcy, executed a promissory note on which he signed the name of the corporation of which he was president and his own name.[2] There was no indication that Laskin's signature appeared in a representative capacity. The payee subsequently filed a proof of claim and was listed among scheduled claims, and, upon allegations of fraud, objected to bankrupt's discharge. Bankrupt filed exceptions to these objections and received permission to delete the payee from the list of creditors on the grounds that the payee was a creditor of the corporation only, not of Laskin personally. Upon a hearing on the status of the payee the referee found, on the basis of parol evidence, that at the time of the execution of the note it was intended that Laskin sign only in a representative capacity, and, hence, that the payee was not his creditor and lacked standing to object to the discharge. The district court reversed[3] holding that the controlling law was the Pennsylvania Uniform Commercial Code. Parol evidence was inadmissible to show Laskin's representative capacity.[4] The Circuit Court of Appeals reversed. HELD:

[32] See note 29 supra.

[33] Supra note 4.

[1] 316 F.2d 70 (3d Cir. 1963).

[2] Laskin Bros. of Phila. Inc. Harold Laskin. For a discussion of the signature rule under the UCC and examples thereof see Willier and Hart, Forms and Procedures Under The Uniform Commercial Code ¶ 32.07 (1963). See also Uniform Commercial Code § 3-403(3) (1962 ed.).

[3] 204 F. Supp. 106 (E.D. Pa. 1963). See annot., 4 B.C. Ind. & Com. L. Rev. 108 (1963).

[4] "An authorized representative who signs his own name to an instrument is also personally obligated unless the instrument names the person represented and shows the signature is made in a representative capacity." Pa. Stat. tit. 12A § 3-403 (1953). An amendment to the Code which allows parol evidence to show the representative capacity as between the immediate parties was in effect in Pennsylvania at the time of the court's decision. Uniform Commercial Code § 3-403 (1958). The former provisions were in effect, however, at the date of the note's execution.