Boston College Law Review

Volume 13
Issue 3 *Number 3*

Article 3

2-1-1972

Per Se Illegality and Concerted Refusals to Deal

Allen C. Horsley

COMMENT

PER SE ILLEGALITY AND CONCERTED REFUSALS TO DEAL

ALLEN C. HORSLEY*

The Supreme Court has always treated concerted refusals to deal and group boycotts as being per se illegal. In its early decisions[1] regarding the restraints imposed on trade by such refusals and boycotts, the Court disregarded justifications resting on the reasonableness of the restraint; however, in all of these cases, the Court either found or inferred a primary intent to curtail competition before rejecting arguments of reasonability. In more recent decisions,[2] where the facts revealed restraints that clearly curtailed a mode of competition or a competitor, the Court has found it unnecessary to discuss intent and has adopted a strict per se approach. Consequently, concerted refusals to deal have been regarded as illegal without inquiry into their reasonability or justification.[3] It is the basic contention of this comment, however, that the strict per se approach taken by the Supreme Court does not preclude the application of the rule of reason to those concerted refusals to deal or group boycotts[4] whose primary intent or major effect is not anticompetitive. Recent lower federal court decisions[5] support

* B.A., Harvard University, 1963; LL.B., University of Virginia, 1966; LL.M, George Washington University, 1971; Member of the Massachusetts Bar; Associate, Goodwin, Procter & Hoar, Boston, Massachusetts.

[1] Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914); Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457 (1941); Associated Press v. United States, 236 U.S. 1 (1945); Kiefer-Stewart Co. v. Joseph E. Seagrams & Sons, Inc., 340 U.S. 211 (1951).

[2] Klor's Inc. v. Broadway-Hale Stores, Inc. 359 U.S. 207 (1959); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961); United States v. General Motors Corp., 384 U.S. 127 (1966).

[3] Ford Motor Co. v. Webster's Auto Sales, Inc., 361 F.2d 874 (1st Cir. 1966) (substituted opinion). In *Ford Motor*, the court held that policy agreements between an auto manufacturer and its dealers not to sell new "factory" models to used car dealers were per se violative of the Sherman Act. Id. at 883. In so holding, the court stated:

> We find that the . . . [*General Motors*] . . . decision . . . [the most recent Supreme Court decision on the illegality of concerted refusals to deal] puts to rest any contention that a manufacturer, through agreements with its dealers, may seek to exclude a class of competitors from the market in the name of preserving a system of distribution.

Id. at 882.

[4] A group boycott is actually the means of effectuating a concerted refusal to deal. Because of the difficulty involved in making a significant distinction between the two, and since the Supreme Court has treated them interchangeably, this comment will do the same.

[5] Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir.) cert. denied, 396 U.S. 1062 (1970); Dalmo Sales Co. v. Tysons Corner Regional

this thesis and have limited the per se doctrine by applying the test of reasonableness to those restraints whose primary objective is arguably not anticompetitive. The comment will discuss this recent lower federal court development after an initial analysis of the more significant Supreme Court group boycott decisions.

I. The Early Development of the Supreme Court's Per Se Rule

In 1914, the Supreme Court in *Eastern States Retail Lumber Dealers' Association v. United States*[6] held to be per se illegal the circulation, among a retailers' association, of lists of "offending" wholesalers selling directly to consumers. The Court noted that the circulation of blacklists had, and was intended to have, an anticompetitive effect. As a result of the circulation, retailers would withhold their patronage from the listed wholesalers in an attempt to coerce them to curtail their retail selling.[7] The Court determined that the involuntary restriction on the trade of the wholesalers placed the practice not in the category of "agreements in aid of trade . . . which may be found not to be within the [Sherman Act]" . . . but "within the prohibited class of undue and unreasonable restraints. . . ."[8] The objective sought in circulating the lists of "offending" wholesalers was clearly and solely anticompetitive, so that once the restraining effect on competing wholesalers was demonstrated, the Court had little difficulty in categorizing the restraint as illegal per se.

Eastern States was cited by the Supreme Court in *Fashion Originators' Guild of America, Inc. v. FTC*[9] to show that the organized boycott in the latter case violated the Sherman Act. *In Fashion Originators'*, a women's garment manufacturers' association had established a scheme allegedly to protect members and society at large from the harm resulting from the copying, by competitors, of members' original designs. This scheme entailed, among other procedures, the boycotting of retailers who bought design copies at discount prices.[10] In condemn-

Shopping Center, 308 F. Supp. 988 (D.D.C.), aff'd, 429 F.2d 206 (D.C. Cir. 1970); Structural Laminates, Inc. v. Douglas Fir Plywoods Ass'n, 261 F. Supp. 154 (D.C. Ore. 1966), aff'd per curiam, 399 F.2d 155 (9th Cir.), cert. denied, 393 U.S. 1024 (1969); Roofire Alarm Co. v. Royal Indemnity Co., 202 F. Supp. 166 (E.D. Tenn. 1962), aff'd, 313 F.2d 635 (6th Cir.), cert. denied, 373 U.S. 949 (1963); United States v. Insurance Bd., 188 F. Supp. 949 (N.D. Ohio 1960).

[6] 234 U.S. 600 (1914).

[7] Id. at 609.

[8] Id. at 612-13.

[9] 312 U.S. 457 (1941).

[10] Id. at 462. In order to identify the design copiers and the retailers who bought from them, the association required the registration of designs and the inspection of plants, books and products. In addition, various disciplinary schemes were established, including heavy fines imposed on members caught dealing with copiers or their retail buyers. Id. at 462-63.

ing this refusal of association members to deal with retail buyers of the copied designs, Mr. Justice Black, speaking for a unanimous Court, stated:

> The purpose and object of this combination, its potential power, its tendency to monopoly, the coercion it could and did practice upon a rival method of competition, all brought it within the policy of the prohibition declared by the Sherman . . . [Act]. . . . Under these circumstances it was not error to refuse to hear the evidence offered, for the reasonableness of the methods pursued by the combination to accomplish its *unlawful object* is no more material than would be the reasonableness of the prices fixed by unlawful combination.[11]

In holding that the reasonableness of the boycott was not a relevant consideration, Justice Black implied that the boycott was per se illegal; yet he was careful to qualify this holding by stressing that the reasonability of the method was irrelevant when the purpose was shown to be anticompetitive. *Fashion Originators'* remained the most important group boycott case for some time. Its rule appeared to be clear enough: any group boycott intended to suppress a competitor or a mode of competition was per se violative of the Sherman Act, and could not be justified by any purported business or social benefit.

Eastern States and *Fashion Originators'* both involved attempts to coerce third parties to conform to a desirable standard of commercial conduct in order that the boycotters would be faced with less competition. The parties boycotted were being coerced to give up a voluntary trade practice through an involuntary restraint on their trading opportunity. The coercion was exercised in both cases in order to lessen competition. These decisions indicate, then, that a group boycott should be held per se illegal when it is used primarily to exclude or coerce a third party in order to curtail competition.[12]

It is submitted that these decisions do not preclude application of the rule of reason test. Rather, a concerted refusal to deal or group boycott that is *not* used primarily to coerce or exclude in order to lessen competition should be tested by the rule of reason in order to determine whether it results in an unreasonable restraint in light of its primary objective.[13] Such an approach, it is submitted, would recognize the fine yet crucial distinction between a refusal to deal used to lessen competition and one used as a method of competing. A refusal to deal with a party might not be aimed primarily at lessening competition but rather

[11] Id. at 467-68 (emphasis added).

[12] See Barber, Refusals to Deal Under the Federal Antitrust Laws, 103 U. Pa. L. Rev. 847, 875 (1955).

[13] Id. at 876.

may be the result of a business agreement as to how a joint undertaking can best be operated.

However, in *Associated Press v. United States,*[14] the Supreme Court did not recognize this distinction. Rather, it looked to the effect on competition of a concerted refusal to deal. Where that effect was marked, the Court either ignored the purpose behind the refusal or inferred an anticompetitive motive to find the refusal per se illegal. In *Associated Press,* bylaws of the Associated Press (AP) which had prohibited association members from transmitting news to nonmembers and from furnishing spontaneous news to nonmembers were held to be, on their face, unlawful restraints of trade.[15] In its opinion, the Court did not refer to the restraint occasioned by the association's bylaws either as a group boycott or as a concerted refusal to deal. However, the Supreme Court in subsequent cases[16] cited *Associated Press* to show that group boycotts were per se illegal.

The restraint in *Associated Press* differs significantly from the more frequent commercial group boycott where two or more parties in the manufacturer—wholesaler—retailer chain conspire in order to lessen competition, to exclude another party in that chain from a market, or to coerce action by that party. The Associated Press was a cooperative association engaged in gathering and distributing news. The association members' primary purpose in joining was to further their news business, not to curtail competition. Hence the restraint on the nonmember news business caused by the AP bylaws was not a purpose but rather a result of the members' accepting a limitation on their freedom to deal with nonmembers as part of an overall agreement to further their business. However, it was just this effect—the surrendering of an individual publisher's freedom to dispose of news as he saw fit—that the Supreme Court seized upon as an indication that the resulting restraint should not be tested by the rule of reason.[17]

As regards the Court's consideration of effect, *Associated Press* is consistent with both *Eastern States* and *Fashion Originators'*. In *Eastern States,* the effect of circulating a blacklist to retailers was to discourage them from dealing with the "offending" wholesalers and thereby to curtail the retailers' freedom to trade with the wholesalers. In *Fashion Originators'*, the rules of the association of garment manufacturers' were established to identify "offending" retailers so that members could stop trading with them. Despite this similarity in effect, however, the element of motive to coerce a third party to take or to

[14] 326 U.S. 1 (1945).

[15] Id. at 12.

[16] United States v. Columbia Steel Co., 334 U.S. 495, 552 (1948); Times-Picayune Publishing Co. v. United States, 345 U.S. 594, 625 (1953).

[17] 326 U.S. at 19.

avoid some action, so evident in *Eastern States* and *Fashion Originators'*, was absent in *Associated Press*. The bylaws were not aimed specifically at any one group in an attempt to induce conduct that would lessen competition. Rather, they were designed to promote the news business of the association's members. Thus the coercive intent that characterized the garment manufacturers' scheme in *Fashion Originators'* was clearly not present in *Associated Press*. The Court, however, apparently determined that while coercive intent was not evident, anticompetitive intent could be inferred from the effect the bylaws had exerted on competing publishers.[18] The effect of the bylaws was found to be so significantly anticompetitive that, despite other purported reasons for the bylaws, they were held per se illegal.

The *Associated Press* decision, then, could have been interpreted in subsequent decisions to mean that concerted refusals *having substantial anticompetitive effects* would be per se illegal. This interpretation still would have left room for application of the rule of reason to those refusals that did *not* have substantial anticompetitive effects and that may have been motivated by other than anticompetitive considerations. Furthermore, *Eastern States* and *Fashion Originators'* suggest that it is the inherently coercive nature of a group boycott which makes the combination per se illegal. Since coercion was not present in *Associated Press,* the possibility remained for application of the rule of reason to concerted refusals to deal. As applied, this would mean that a concerted refusal to deal not involving coercion and not having substantial anticompetitive effects would be examined in order to determine whether it unreasonably excluded the object of that refusal from the trade in question.

Such an approach to concerted refusals to deal, however, was apparently foreclosed by the Supreme Court on two occasions. In *United States v. Columbia Steel Co.*,[19] the Court cited *Associated Press* together with three other group boycott cases[20] to show that a concerted refusal to deal with nonmembers of an association was per se illegal. Furthermore, in *Times-Picayune Publishing Co. v. United States*,[21] the Court stated that "group boycotts, or concerted refusals to deal . . .

---

[18] Id. at 13. The Court stated:

> Inability to buy news from the largest news agency [AP], or any one of its multitude of members, can have most serious effects on the publication of competitive newspapers both those presently published and those which, but for these restrictions, might be published in the future.

Id.

[19] 334 U.S. 495 (1948).

[20] Eastern States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600 (1914); Fashion Originators' Guild of America, 312 U.S. 457 (1941); Montague & Company v. Lowry, 193 U.S. 38 (1904).

[21] 345 U.S. 594 (1953).

clearly run afoul of § 1 [of the Sherman Act] . . ."[22] and cited *Associated Press*, *Columbia Steel* and *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*,[23] for that proposition. In *Columbia Steel* and *Times-Picayune* the Court apparently attempted to foreclose the possibility of using the rule of reason approach in concerted refusal to deal-group boycott situations.

In these decisions the Court also intermingled cases with distinctly different types of restraints. *Associated Press*, with its exclusionary bylaws, was placed beside *Kiefer-Stewart*, which involved a traditional commercial group boycott aimed solely at coercing anticompetitive action. In *Kiefer-Stewart*, the Supreme Court held per se illegal a concerted refusal to deal by two liquor producers who had agreed not to sell to a wholesaler unless he consented to their maximum resale price.[24] Since the price fixing motive of this refusal to deal was clearly anticompetitive, the holding in *Kiefer-Stewart* is consistent with *Eastern States* and *Fashion Originators'*. In the latter two cases the primary motive for the defendant's actions, as noted above, was also clearly anticompetitive. However, the per se language of the Court[25] in its short opinion in *Kiefer-Stewart* dealt primarily with the illegality of *any* agreement to fix prices, not with the nature of the refusal to deal. Despite its primary emphasis on price-fixing, *Kiefer-Stewart* was cited by the Supreme Court in *Klor's, Inc. v. Broadway-Hale Stores*,[26] a landmark decision concerning group boycotts, to show that concerted refusals to deal have long been considered per se illegal.[27]

II. *Klor's* AND ITS PROGENY

The Supreme Court cases prior to *Klor's* indicated that a group boycott would be held per se illegal only after an examination of the facts showed that the boycott had or was intended to have a substantial effect on competition. In this sense, the rule could be considered a limited per se rule. The Court would disregard affirmative justifications for a group boycott only after a detrimental effect on competition had

---

[22] Id. at 625.

[23] 340 U.S. 211 (1951).

[24] Id. at 214.

[25] Id. at 213. In the only reference to per se illegality in the opinion, the Court stated:

> The Court of Appeals erred in holding that an agreement among competitors to fix maximum resale prices . . . does not violate the Sherman Act. For such agreements . . . cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment. . . . "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate . . . commerce is illegal *per se*."

[26] 359 U.S. 207 (1959).

[27] Id. at 212.

been shown. Since the existence of the group boycott itself was not considered to be per se injurious to competition, the Court had found it necessary to evaluate the purpose and effect of the restraint. *Klor's*, however, changed that approach. There the Court held that neither an injurious effect on competition nor an anticompetitive motive was essential in order to find a group boycott per se illegal.

In *Klor's* the plaintiff, a discount appliance retailer, alleged that a retailer for a department store chain in competition with him and ten appliance manufacturers and their distributors had conspired among themselves to boycott his business in violation of Section 1 of the Sherman Act.[28] The plaintiff alleged that the distributors would not sell to him or would sell to him only at discriminatory rates and that he was thereby damaged.[29] The plaintiff did not allege that the defendants had had an anticompetitive motive in boycotting him or that there had been any detrimental effect on competition, except for his injury. The sole defense proffered was that the activity had not resulted in any damage to competition and that, consequently, it was not proscribed by the Sherman Act.[30] To support this contention the defendants submitted affidavits showing that there were numerous other dealers in the immediate neighborhood selling the same appliances that the defendants had refused to sell to Klor's.[31] The district court concluded that the boycott of Klor's was a purely private quarrel not amounting to a "public wrong" proscribed by the Sherman Act.[32] The Ninth Circuit affirmed,[33] stating that the "public injury" required for a violation of the Sherman Act was not present since there was no allegation or proof either that the market had been affected or that there had been any intent or purpose to affect the market.[34] The Supreme Court, however, found the boycott per se illegal and stressed both the inherent monopolistic tendency of the boycott and the extent of the restraint on the manufacturers' and distributors' freedom to sell.[35] The Court

[28] Id. at 208.

[29] Id. at 209. The plaintiff also alleged that the boycott had seriously handicapped its ability to compete and caused a loss of profits, goodwill and requtation. Id.

[30] Id. at 210.

[31] Id. at 210-11. See Rahl, Per Se Rules and Boycotts under the Sherman Act: Some Reflections on the Klor's Case, 45 Va. L. Rev. 1165 (1959), for a thorough analysis of the *Klor's* decision.

[32] The trial court ruling was unrecorded.

[33] Klor's, Inc. v. Broadway-Hale Stores, Inc., 255 F.2d 214 (9th Cir. 1958).

[34] Id. at 230.

[35] Id. at 212-13. The Court stated:

> Group boycotts, or concerted refusals . . . to deal . . . have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in the specific circumstances . . . . [The defendants' boycott] . . . clearly has, by its "nature" and "character," a "monopolistic tendency."

Id.

held the boycott per se illegal even though the victim was only one small business whose demise would not have a substantial economic effect.[36] Affidavits showing the lack of effect of the boycott on competition were considered irrelevant.

Thus, the *Klor's* Court interpreted the per se doctrine to mean that group boycotts by their nature are injurious to competition. This interpretation is significantly different from the limited per se approach taken in *Eastern States* and in *Fashion Originators'*, where the Court had determined that affirmative justifications were irrelevant when the boycott was intented to or did substantially affect competition. *Klor's* involved a commercial group boycott whose single purpose was to exclude one retailer. The Court, however, failed to distinguish this type of boycott from a concerted refusal to deal whose objective might not be solely to exclude. The *Klor's* Court also failed to show clearly why group boycotts are so inherently injurious to competition that they foreclose consideration of any justification and why the evidence of lack of effect on competition was considered irrelevant.[37]

Soon after *Klor's* the Supreme Court decided *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*,[38] in which the plaintiff had alleged that a refusal by the American Gas Association (AGA) to approve his gas burners,[39] and a subsequent refusal by other defendants to supply gas to purchasers of his disapproved burners, constituted an illegal group boycott. Six members of the AGA, who were competitors of the plaintiff, were joined with the AGA as defendants.[40] The Seventh Circuit affirmed the district court's dismissal of the complaint on the grounds that the allegations failed to establish a per se illegal group boycott.[41] The court also noted that in the absence of a per se violation, a Sherman Act violation can be found only when there is general injury to the competitive process. Since the plaintiff failed to allege public injury, the court could not find such a violation.[42]

The Supreme Court reversed the Seventh Circuit decision, stressing that the defendants' refusal to provide gas to purchasers of the plain-

[36] 359 U.S. at 213. The Court stated in this regard that

> [m]onopoly can surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups. In recognition of this fact the Sherman Act has consistently been read to forbid all contracts and combinations "which tend to create a monopoly."

[37] See Rahl, supra note 31, at 1167, for discussion concerning this point.

[38] 364 U.S. 656 (1961).

[39] Id. at 657. The AGA tested gas burners and issued its seal of approval if the burners passed the test.

[40] Id. at 657 n.1. The other association members joined as defendants were either pipeline companies or gas distributors.

[41] Radiant Burners, Inc. v. Peoples Gas, Light and Coke Co., 273 F.2d 196, 201 (7th Cir. 1960).

[42] Id. at 200.

tiff's burners was clearly illegal, even without proof of public injury.[43] With strong reliance on the language of *Klor's*, the Court stated:

> As to these classes of restraints [which by their nature or character are unduly restrictive] . . . it . . . is not for the courts to decide whether in an individual case injury . . . occurred. . . . The alleged conspiratorial refusal to provide gas for use in plaintiff's . . . [burners] . . . clearly has, by its "nature" and "character," a "monopolistic tendency."[44]

Thus the Court in *Radiant Burners* followed the more expansive per se rule used in *Klor's* when it held that the effect of a restraint on the competitive process was immaterial to a finding of per se illegality. However, the Court noted, as it had in *Klor's* that the obvious effect of the boycott was to curtail greatly the plaintiff's ability to compete.[45] Furthermore, by emphasizing the restraint's inherent monopolistic tendency, the Court found the nexus between competition and restraint that is necessary for a Sherman Act violation.

The defendant's intent in *Radiant Burners* clearly was not to coerce a course of action that would lessen competition. If the defendant's intent was anticompetitive, it must have been to exclude the plaintiff from the market. The Court failed to discuss intent—apparently determining that anticompetitive intent could be inferred, as it had been in *Associated Press*, from the obvious result of the boycott. In failing to discuss intent, the Court avoided facing the possibility that the primary intent of the AGA may not have been anticompetitive, but may have been to further the business interests of its members. The AGA was certainly a different type of combination than that in *Klor's*. The AGA's motives in refusing to approve the plaintiff's burners, and in enforcing the standardization program with a refusal to provide gas to purchasers of the plaintiff's burners, may have been to improve the quality of gas burners being sold to the public so as to enhance their business collectively; or the motive may have been to insure that only safe gas burners were sold to the public. Yet without considering the possibility of diverse motives, without finding a primary intent to restrain, the Court struck down the restrictive method used, as it had in *Associated Press*, as being per se illegal.

In *United States v. General Motors Corp.*,[46] a recent classic refusal

---

[43] 364 U.S. at 660.

[44] Id.

[45] Id. at 659. The Court stated:

> It is obvious that [the plaintiff] . . . cannot sell its gas burners, whatever may be their virtues, if, because of the alleged conspiracy, the purchasers cannot buy gas for use in those burners.

Id.

[46] 384 U.S. 127 (1966).

to deal case,[47] the Supreme Court relied upon both *Fashion Originators'* and *Klor's* to support its finding of per se illegality. In this case, several associations of auto dealers and General Motors had conducted a joint scheme to eliminate the sale of new cars to discount outlets.[48] Part of this scheme involved General Motors' obtaining and enforcing promises from all the dealers in the area not to deal with the discounters.[49] The Court relied heavily on *Klor's* to show that concerted elimination of the discounters from the market was a per se violation of the Sherman Act,[50] and upon *Fashion Originators'* to show that certain anticompetitive practices are presumed to be illegal without inquiry into the precise harm they cause or into any possible business justification for their use.[51]

---

47 In 1963, the Supreme Court arguably further expanded the per se rule concerning group boycotts in *Silver v. N.Y. Stock Exch.*, 373 U.S. 341 (1963). In that case, despite the fact that the party refusing to deal was not in competition in the same market with the object of its refusal, and without any discussion of intent, the Supreme Court found the refusal per se illegal. Id. at 348.

In *Silver*, the New York Stock Exchange had refused to approve for the plaintiff, an over-the-counter securities dealer, a private telemeter connection with several members of the Exchange. The Exchange had denied the plaintiff's application because of his failure to disclose fully information the Exchange considered relevant to his application. *Silver v. N.Y. Stock Exch.*, 302 F.2d 714, 716 (2d Cir. 1962). After this denial, however, Exchange members remained willing to deal with the plaintiff for the purchase and sale of securities. In finding a per se violation, the Court stated that the collective denial of a service essential to the plaintiff's effective competition *with others* was sufficient to create a violation of the Sherman Act. 376 U.S. at 349 n.5.

Silver appears to be a clear departure not only from the per se rationale developed in *Eastern States* and *Fashion Originators'*, where the Court was primarily concerned with finding a coercive intent, but also from that developed in *Klor's, Radiant Burners*, and *Associated Press*, where the illegal combination was at least partially composed of members who were directly competing with the object of the refusal. In the latter cases, it was possible to infer an anticompetitive intent because those comprising the illegal combination appeared to benefit competitively vis-a-vis the object of the refusal. This was not possible in *Silver* because the Exchange and its members were not directly competing with the plaintiff, an over-the-counter securities dealer. In a fashion similar to that of the Court in *Radiant Burners*, the Court stressed the obvious curtailment in the plaintiff's business resulting from the Exchange's refusal and noted how essential the service provided by those refusing to deal was to the plaintiff's business existence. The Court's holding, however, was overshadowed by its discussion of antitrust immunity. Id. at 349-67. The defendants contended that the nature of the self-regulation imposed upon them by the Securities Exchange Act of 1934 exempted them from antitrust proscription. After a long, detailed analysis of the Exchange's powers under the Act, the Court concluded that the Exchange was not immune. Id. at 360-61.

48 384 U.S. at 137.

49 Id. at 136. In order to police these agreements not to do business with discounters, General Motors obtained information about violations from dealers and their trade associations and confronted the "violating" dealers with this information. The dealers had to repurchase the cars, sometimes at a substantial loss, and had to promise to stop such sales. Id. at 137.

50 Id. at 145.

51 Id. at 146-47. The Court further noted that the success of the joint scheme would lead to a substantial restraint upon price competition—an illegal objective when effected by a concerted effort. Id. at 147.

It is submitted, however, that the facts of *General Motors* permit the decision there to be interpreted as a *limited* rather than strict per se doctrine. The boycotting dealers were in direct competition with the discounters and sought to enhance or protect their market position by eliminating the discount outlets. Both the intent and the desired effect of the refusals to deal were clearly anticompetitive. On the basis of either the *Eastern States-Fashion Originators'* per se rationale—an intent to lessen competition—or the *Associated Press-Klor's-Radiant Burners* rationale—a detrimental effect upon competitors—the restraint in *General Motors* was properly held per se illegal.

III. Developments in the Rule of Reason Approach: the Lower Federal Court Decisions

A. *The Importance of Anticompetitive Intent*

In *Roofire Alarm Co. v. Royal Indemnity Co.*,[52] the plaintiff sought an injunction against a fire insurance company for allegedly conspiring with a testing laboratory, Underwriters Laboratories, in restraint of trade. Underwriters had refused to test Roofire's fire alarms or to publish the test results, claiming that Roofire's product failed to comply with its standards for testing.[53] The thrust of Roofire's claim was that the defendants had conspired together to set standards that would render the plaintiff's product ineligible for testing.[54] Roofire alleged that, as a result of Underwriters' refusal to test, it had been unable to advertise its product in certain media, and that its product had suffered a consequent reduction in marketability. The district court rejected Roofire's claim on two grounds. It first noted that neither the defendant insurer nor Underwriters produced or sold fire alarms or was in any other way a commercial competitor of Roofire.[55] Second, the court stated that there was no evidence showing that the setting of standards by Underwriters was for any unlawful or improper purpose.[56] The court concluded that any change in market conditions brought about by an association formed to foster high standards, lessen trade evils and encourage fair competition was not an "undue restraint" on trade.[57]

[52] 202 F. Supp. 166 (E.D. Tenn. 1962), aff'd, 313 F.2d 635 (6th Cir.), cert. denied, 373 U.S. 949 (1963).

[53] 202 F. Supp. at 167. Underwriters Laboratories, Inc. was sponsored by a national association of approximately two hundred fire insurance companies. It engaged in testing products, materials and devices as to their safety and fitness for use regarding fire, casualty and crime prevention. Underwriters received no income from the sale of products it had tested; it was supported primarily by the fees charged for conducting tests. Id. at 168.

[54] Id. at 167.

[55] Id. at 168.

[56] Id. at 169.

[57] Id.

The absence of anticompetitive intent was the crucial factor in this decision. The plaintiff was not competing with either defendant, so that anticompetitive intent could not be inferred from the defendants' actions. In stressing the importance of anticompetitive intent for a finding of illegality, the court followed the approach taken by the Supreme Court in *Eastern States* and *Fashion Originators'*. In those cases possible business justifications for the restraint had not been considered because the primary purpose behind the restraint was to hinder competition. In *Roofire,* the absence of anticompetitive intent allowed justification of the refusal to deal on the basis of the benefits derived from Underwriters' laboratory testing program.[58] The fact that the plaintiff did not compete with either defendant also distinguished *Roofire* from both *Associated Press* and *Radiant Burners.* In those cases, anticompetitive intent had been inferred from the evident effect the defendants' action had on competitors and, consequently, on the defendants' market position. In *Roofire,* the defendants' action could not obtain for them a larger share of the market even though it hampered the plaintiff's marketing program and so made it more difficult for him to compete with producers of similar products.

Roofire, then, appears to imply that in the absence of anticompetitive intent, when a refusal to deal by product *evaluators,* not competitors, has only a limited effect on the trade of the object of the refusal, the court will examine the justifications for the refusal in order to determine their reasonableness. This limited rule of reason approach was broadened in *Structural Laminates, Inc. v. Douglas Fir Plywood Association*[59] to include a refusal to deal by *competitors* of the object of that refusal.

In *Structural,* a trade association organized primarily to promote the sale of plywood[60] refused to grant its seal of approval to Structural's plywood because it did not meet certain commercial standards published by the United States Department of Commerce.[61] The plain-

---

[58] See generally Wachtel, Product Standards and Certification Programs, 13 Antitrust Bull. 1 (1968), for a discussion of the antitrust implications of a testing laboratory's refusal to test.

[59] 261 F. Supp. 154 (D.C. Ore. 1966), aff'd per curiam, 399 F.2d 155 (9th Cir.), cert. denied, 393 U.S. 1024 (1969).

[60] 261 F. Supp. at 155. The Douglas Fir Plywood Association derived its income from dues paid by members in proportion to the amount of plywood they produced. During the years relevant to the suit, the association's members manufactured approximately 85% of all domestically produced plywood. Approximately 21% of the association's four to five million dollar annual budget was spent on technical activities, including an extensive quality control program; this program called for the inspection of members' plants and the sampling of their plywood. Those members who met both the association's quality control standards and commercial standards published by the U.S. Department of Commerce were allowed use of the association's stamp and certificate. Id. at 155-56.

[61] 15 C.F.R. § 10 (1971). This section sets forth procedures by which new standards

tiff alleged that the trade association, which could propose and approve changes to these standards, used them in violation of Sections 1 and 2 of the Sherman Act to prevent the sale of its plywood.[62] The association refused to certify that Structural's plywood met the commercial standards and also refused repeated requests by the plaintiff to effect a change in these standards, despite demonstrations by the plaintiff that its product was superior in certain respects to the standardized plywood.[63]

The district court dismissed Structural's suit, holding that the association's refusals to grant plaintiff's requests for certification and for a change in standards were neither unreasonable nor made with an intent to restrain trade. The court determined that the experience of one manufacturer, Structural, in demonstrating that its product had superior qualities, was an insufficient basis upon which it should conclude that the association was obliged to reform its standards.[64] As to the reasonability of the association's actions, the court stated:

> Any system of standards pre-supposes that there are standard and non-standard items. Those who produce products which are not standard are to some extent penalized and trade is to some extent restrained. This much however is congressionally sanctioned[65] and the court is of the opinion that in the absence of a bad purpose, mistakes made in the formulation or maintenance of standards do not subject the one making the mistake to anti-trust liability.[66]

By characterizing the association's refusal to appreciate changes in the standards as a "mistake," the court eliminated the possibility of finding or inferring an intentional purpose on the defendant's part to suppress competition from Structural. Having eliminated the factor of anticompetitive intent, the court then evaluated the defendant's actions

may be recommended to the Department of Commerce, and approved or rejected by private trade organizations.

[62] 261 F. Supp. at 155. This charge was based in large part on the fact that the commercial standards in effect during the time the plaintiff attempted to gain access to the market excluded the plaintiff's plywood as being of unacceptable construction. Two years following the plaintiff's financial collapse, the commercial standards were changed, at the behest of the association, to include the plaintiff's plywood as being of acceptable construction. Id. at 156-57.

[63] Id. at 157-58. See Note, Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason, 66 Colum. L. Rev. 1486 (1966), for a comprehensive analysis of the role of the antitrust laws vis-a-vis the exclusionary practices of private organizations.

[64] Id. at 158.

[65] The court here refers to 15 U.S.C. § 272 (1964), in which the Secretary of Commerce was granted authority to develop and publish standards for materials used by the government and industry.

[66] 261 F. Supp. at 159.

in order to determine whether they had unreasonably restrained the sale of the plaintiff's plywood. Despite the per se approach taken by the Supreme Court in *Radiant Burners*, which also had involved a refusal to deal by a trade association made up of competitors of the plaintiff, the *Structural* court applied the test of reasonableness to the association's refusal to deal. This approach could possibly be justified by the fact that the defendant's actions carried the benefit of "quasi-legislative" approval.

However, in light of the per se approach taken in *Silver v. New York Stock Exchange*[67] which involved action allegedly taken pursuant to a federal statute,[68] another distinction appears warranted. The degree of restraint on the object of the refusal appears to be that distinguishing feature. The restraint in *Structural* was markedly different from that in *Radiant Burners*. In *Structural*, the effect of the association's refusal to test was to curtail the business opportunities of the plaintiff by reducing his product's marketability. However, in *Radiant Burners*, the refusal to provide gas to the plaintiff's burners would completely eliminate the plaintiff's business.

The critical importance of anticompetitive intent in the group boycott per se rationale was most recently indicated in *Dalmo Sales Co. v. Tysons Corner Regional Shopping Center*.[69] In that case, the plaintiff, a discount retailer, alleged that its exclusion from a shopping center constituted a group boycott and sought a preliminary injunction to enjoin two major department store tenants from vetoing his tenancy. The two department stores had exercised the tenant approval rights in their leases.[70] The District Court for the District of Columbia denied the injunction on the ground that there was not a substantial likelihood that the plaintiff would establish the defendant's anticompetitive intent at trial.[71] The court stated:

---

[67] 373 U.S. 341 (1963).

[68] Securities Exchange Act of 1934, § 1 et seq., as amended, 15 U.S.C. § 78a et seq. (1970). See discussion of *Silver*, note 47 *supra*.

[69] 308 F. Supp. 988 (D.D.C.), aff'd, 429 F.2d 206 (D.C. Cir. 1970). See Rowley and Donohoe, Antitrust Implications of Tenant Selection Practices in Regional Shopping Centers: *Dalmo Sales Co. v. Tysons Corner Regional Shopping Center*, 11 B.C. Ind. & Com. L. Rev. 899 (1970), for a thorough discussion of the *Dalmo Sales* decision.

[70] 308 F. Supp. at 992-93. The leases contained provisions granting the department store the power to veto any prospective tenant of Tysons Corner which was not among the 465 stores on an approved list. This list included a wide variety of stores. The plaintiff, Dalmo, was never proposed for inclusion on this list and consequently was never vetoed from it. Id. at 990-91.

[71] Id. at 995. The court also noted that the heavy financial stake in the success of the shopping center may give the developer and the department stores the right to select tenants who will contribute to the success of the center without subjecting them to the per se rule of illegality applied to group boycotts and concerted refusals to deal. Id. at 994-95.

> Where there is absence of an anticompetitive motive, or where the anticompetitive motive is not clearly demonstrable, the legality of a group boycott under the Sherman Act may very well be subject to test under the rule of reason. . . . Specifically, the rule of reason may be applicable to boycotts involving competitors where the motives for exclusion are not directly profit related.[72]

The *Dalmo Sales* court was apparently satisfied that the exclusion of Dalmo had been motivated more by a desire to enhance or maintain the overall character of the shopping center than by a desire to exclude a retailer who might offer effective competition through its discounting practices.[73]

The court was willing to overlook a possible ancillary restraint on competition in order to accomodate the defendant's business objectives, which it considered the primary reason for the exclusion. Since the effect of the veto by two competitors of Dalmo was to exclude completely Dalmo's competition in the geographical market, the holding in *Dalmo Sales* depends entirely upon the lack of a primary motive on the defendant's part to exclude Dalmo for anticompetitive purposes. Thus *Dalmo Sales* probably pushes the rule of reason approach in group boycott situations to the limits of its applicability.[74] The only significant difference between *Dalmo Sales* and *Klor's* is that the defendants in *Dalmo Sales* demonstrated an affirmative business motivation for their action whereas the defendants in *Klor's* offered no such justification.

In *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*,[75] where there was neither a lessening of effective competition nor an intent to restrain, the court properly found the per se rationale not applicable. In this case, the defendant, a distributor, had prevailed upon two liquor manufacturers to transfer exclusive distributorships in Hawaii from the plaintiff to the defendant. The plaintiff alleged that this transfer was a per se illegal group boycott.[76] He further alleged that both manufacturers knew at the time of the switch that unless both agreed to make the change, the change would be made by neither. How-

[72] Id. at 994. The District of Columbia Circuit, in affirming the district court decision, fully supported its rationale and extensively quoted the language of the district court opinion in its own decision. Dalmo Sales Co. v. Tysons Corner Regional Shopping Center, 429 F.2d 206 (D.C. Cir. 1970).

[73] 308 F. Supp. at 993-95.

[74] The Federal Trade Commission has recently issued a proposed complaint against Tysons Corner Regional Shopping Center, alleging that the leasing arrangements involved in *Dalmo Sales* are unfair methods of competition in violation of Section 5 of the Federal Trade Commission Act. 3 Trade Reg. Rep. ¶ 19,720 (1971).

[75] 416 F.2d 71 (9th Cir.), cert. denied, 396 U.S. 1062 (1970). See, Note, A Return to the Rule of Reason in Group Boycott Cases?, 42 U. Colo. L. Rev. 467 (1971).

[76] 416 F.2d at 74.

ever, there was no allegation of, nor attempt to show, an agreement whose primary purpose was either to put the plaintiff out of business, or to coerce its conduct to conform to any of the defendants' anticompetitive objectives.[77]

In affirming the district court's dismissal of the complaint, the Ninth Circuit distinguished the Supreme Court decisions involving per se illegal group boycotts by noting that in those decisions an intent to destroy a competitor, or to impair his ability to compete, or to accomplish another anticompetitive result[78] had been present. The court held that since no evidence showed that the defendants were primarily motivated by such an intent,[79] the per se group boycott theory was not applicable. The court also noted that there was neither a net reduction in the number of competitors nor a lessening of competition.

Hawaiian Oke may be read to stand for the proposition that where there is neither a primary intent to restrain trade nor any actual lessening of competition, a concerted refusal to deal will not be considered per se illegal. The fact that one distributor was substituted for another and that, therefore, there was no reduction in competition was of critical importance in *Hawaiian Oke*. The absence of an adverse effect upon competition made it easier for the court to conclude that the primary objective of the manufacturers in changing distributors had been a valid business one. Thus, while the presence or absence of anticompetitive intent is important in deciding whether a per se approach will be taken, the actual impact on competition and the nature and degree of the restraint must also be considered.

B. *The Element of Coercion*

In the commercial group boycott cases, *Eastern States Fashion Originators'* and *Klor's*, the Supreme Court had emphasized the boycotts' coercive effect on competition; but the Court's per se rationale did not depend on that emphasis because in all three cases the single object of the boycotts was clearly anticompetitive. However, in *Associated Press* and *Radiant Burners*, where the possibility of diverse motives existed, the Court's emphasis upon the adverse effect the refusal had on competition served two important functions. First, it formed the basis for an inference of anticompetitive intent and second, it highlighted the restrictive nature of the resulting restraint. It is submitted,

---

[77] Id.

[78] Id. at 77. The court cited *Kiefer-Stewart* to show that the price-fixing attempt in that case made the conditional refusal to deal per se illegal and *Continental Ore Co.* v. *Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962), to show that certain exclusionary practices will be held per se illegal because of their monopolistic effect.

[79] Id. at 78. The court noted that the manufacturers had substituted one exclusive distributor for another for perfectly legitimate business reasons. Id.

then, that when the exact nature of the intent involved is arguably not anticompetitive, it is essential for a court's per se rationale to note the unreasonable nature of the restraint effected. If a court is unable to discover any unreasonable quality in the restraint, then it may apply the rule of reason.

The foregoing approach was apparently taken by a district court in *United States v. Insurance Board.*[80] In this case, a rule of the defendant insurance trade association had excluded from the association both agencies of mutual insurance companies and agencies that represented stock and mutual companies simultaneously. Retention of membership in the association was contingent upon a member's refusing to deal with mutual insurance companies.[81] Upon leaving the association, however, a member could continue to represent those stock insurance companies which he formerly had represented. The government alleged that the rule constituted a per se illegal refusal to deal.[82]

The court held that since there was no evidence either that the mutual insurance companies had sustained a loss as a result of this rule or that there had been coercion of association members or mutual companies, the rule of reason had to be applied in order to determine whether the rule constituted an illegal restraint of trade.[83] The court stated:

> Coercive economic pressure affects the *degree of restraint* and is frequently, if not always, a distinguishing characteristic of concerted refusals to deal that are conclusively presumed to be unlawful. The presence or absence of such element, therefore, would seem clearly to be relevant to the issue whether the restraint of a concerted refusal to deal is unreasonable per se.[84]

Since the primary objective of the rule that required members to refuse representation of mutual companies was not clearly anticompetitive, the court was forced to examine the facts for anticompetitive results. Finding none, it concluded that the rule was not per se illegal.

The approach in *Insurance Board,* however, contrasts sharply with that in *Washington State Bowling Proprietors Association v. Pacific Lanes, Inc.*[85] There the court found per se illegal trade association rules which enforced boycotts of competitors of the association members. The plaintiff, a bowling establishment owner, alleged that three bowling

---

[80] 188 F. Supp. 949 (N.D. Ohio 1960).
[81] Id. at 952-53.
[82] Id. at 950.
[83] Id. at 955.
[84] Id. (emphasis added).
[85] 356 F.2d 371 (9th Cir. 1966).

proprietors' associations had conducted tournaments under an eligibility rule which made them open only to bowlers who restricted their league and tournament play to establishments whose proprietors were members of these associations.[86] The defendant associations claimed that the purpose of the eligibility rule was to eliminate cheating on scores by insuring that all professional competition was conducted pursuant to their standardized scoring procedures. Yet the obvious effect of this eligibility rule was to deprive nonassociation lanes of the lucrative professional league and tournament business. The rule coerced those bowlers who wanted to participate in the defendant association tournaments into boycotting all other tournaments. The individual bowler was coerced into choosing between member and nonmember tournaments. Here, then, was clear coercive restraint of trade. The court held that these trade abuses did not justify private regulations which restrained trade, citing *Fashion Originators'* to support its holding.[87]

Coercion such as that in *Pacific Lanes* did not exist in *Insurance Board*. The agencies in that case could continue to represent the stock insurance companies they formerly had represented even though they were no longer members of the trade association. It is submitted, then, that the existence of economic coercion resulting from an association's refusal to deal appears to be an essential prerequisite for the application of a per se rationale, especially when the purpose of the refusal is arguably not anticompetitive. In the absence of coercion, the rule of reason may be applied.

Conclusion

The per se doctrine in group boycott-concerted refusal to deal situations has recently been more specifically defined in several lower federal court decisions to require a finding either of anticompetitive intent or, in the absence of a clear showing of that intent, of a coercive or exclusionary effect upon competition. The early Supreme Court group boycott decisions had impliedly recognized these requirements yet failed to articulate them. In later decisions the Supreme Court, faced with situations having a substantial effect upon competition, disregarded possible justifications without discussing the importance of anticompetitive intent to the per se rule. The recent lower court decisions involving the possibility of diverse motives for a concerted refusal to deal have reemphasized the need to establish anticompetitive intent before holding a restraint per se illegal. When the presence of a primary intent to supress or curtail competition is difficult to discern, the existence of

[86] Id. at 374.
[87] Id. at 376.

economic coercion may make the per se rationale applicable. When both coercion and a primary anticompetitive motive are absent, however, the rule of reason may be applied to determine whether the resulting restraint is illegal.

BOSTON COLLEGE
INDUSTRIAL AND COMMERCIAL
LAW REVIEW

VOLUME XIII | FEBRUARY 1972 | NUMBER 3