No. 73

In the Supreme Court of the United States

OCTOBER TERM, 1960

RADIANT BURNERS, INC., PETITIONER

v.

PEOPLES GAS LIGHT AND COKE COMPANY, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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INDEX

CITATIONS

Cases:

Cases—Continued

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STATEMENT

The complaint in this private treble damage action alleged that the respondents had conspired to restrain trade in gas appliances in violation of Section 1 of the Sherman Act, 15 U.S.C. 1, and to the injury of petitioner, Radiant Burners, Inc., a manufacturer, seller and distributor of gas conversion burners and gas furnaces for use in the heating of homes and commercial and industrial buildings (R. 4). Respondents are the American Gas Association ("AGA"), a trade association including public utility companies, manufacturers of gas appliances, and gas pipeline companies among its members; two public utility companies; six manufacturers of gas appliances; and two pipeline companies (R. 4–5).

The complaint charged that respondents, together with other unnamed members of AGA, had conspired and combined to control the manufacture, sale, use and installation of gas appliances to the detriment of petitioner. Specifically, the complaint alleged that although AGA purports to test the "utility, durability and safety" of gas appliances impartially and in the public interest, its testing program in fact is administered, and seals of approval granted, on an arbitrary and capricious basis without reference to "valid, unvarying, objective standards" (R. 6). It was further alleged that petitioner's products were not given the AGA seal of approval even though they were safer, more efficient and as durable as the burners of competing manufacturers which had been approved by AGA (R. 9–14); that respondents refused to supply gas for use in petitioner's equipment, refused or withdrew authorization or certification of dealers in gas equipment handling petitioner's products, and used various other means to discourage or make illegal the use of petitioner's products or other unapproved gas equipment (R. 7–9). As a result of this conspiracy the public was alleged to have been deprived of the asserted advantages of petitioner's products, and petitioner was alleged to have been foreclosed from markets in several states with resulting economic loss (R. 9–17.)

The district court, having previously dismissed the original complaint (R. 1–2) and amended complaint (R. 3) for failure to allege "public injury," dismissed the second amended complaint here in issue (see R. 4–17) on the same grounds (R. 24). The court of

appeals affirmed (R. 27–33), holding that the second amended complaint failed to charge a *per se* violation of the Sherman Act (R. 30); that no unreasonable restraint on competition was alleged (R. 31); that allegations of "public injury" are essential to private antitrust complaints charging a non-*per se* offense; and that the complaint here contained no such allegations (R. 31–32). In so holding the court stated (R. 32):

> The allegations of plaintiff's complaint fail to establish that there has been any appreciable lessening in the sale of conversion gas burners or gas furnaces or that the public has been deprived of a product of over-all superiority. Although plaintiff claims its burner better in safety and efficiency from certain standpoints and as durable as those approved by AGA such allegations do not establish that the factors mentioned are the only ones determinative of over-all quality or safety. * * *

THE INTEREST OF THE UNITED STATES

The principal question presented is whether, in the absence of allegations charging a *per se* offense, a private treble damage complainant must plead and show "public injury" (in terms of "such general injury to the competitive process that the public at large suffers economic harm"). The Court's determination of this question will affect public as well as private suits brought under the Sherman Act, and is of obvious concern to the United States. Further, the ruling below, if upheld, will militate against the effectiveness of private treble damage and injunctive

suits based on violation of the antitrust laws. Such suits were authorized by Congress as a means of deterring illegal restraints and monopolizations of trade, and are an important supplement to governmental enforcement of the statute.

ARGUMENT

THE COURT BELOW ERRED IN HOLDING THAT A COMPLAINANT IN A PRIVATE ANTITRUST ACTION MUST PLEAD AND SHOW "PUBLIC INJURY" IN TERMS OF SUCH GENERAL INJURY TO THE COMPETITIVE PROCESS THAT THE PUBLIC AT LARGE SUFFERS ECONOMIC HARM

The decision below is, we believe, erroneous on the facts of this case both in holding that no *per se* offense under the Sherman Act was alleged in the amended complaint and in concluding that, under the so-called public injury test, petitioner had failed to allege facts from which such injury could properly be inferred. We shall, however, limit this *amicus* brief to a discussion of the basic, underlying error in the decision below, namely, the adoption of a special "public injury" test by which all private treble damage actions under the antitrust laws are to be judged. Considered either as a matter of pleading or as an independent element of the substantive law, such a public injury concept is, we shall show, a burden upon private treble damage actions which a number of lower courts[1] have imposed without

[1] See, *e.g.*, *Shotkin* v. *General Electric Co.*, 171 F. 2d 236 (C.A. 10); *Feddersen Motors* v. *Ward*, 180 F. 2d 519 (C.A. 10); *Hudson Sales Corp.* v. *Waldrip*, 211 F. 2d 268 (C.A. 5), certiorari denied, 348 U.S. 821; *Nelligan* v. *Ford Motor Co.*, 161 F. Supp. 738 (W.D.S.C.), affirmed, 262 F. 2d 556 (C.A. 4); *Schwing Motor Co.* v. *Hudson Sales Corp.*, 138 F. Supp. 899

support in either the statute or the holdings of this Court.

1. The rule of pleading followed by the court below under which a private antitrust complaint must, as a prerequisite to a hearing on the merits, spell out facts from which injury to the public at large can be inferred, is clearly contrary to the decisions of this Court in *United States* v. *Employing Plasterers Assn.*, 347 U.S. 186, and *Radovich* v. *National Football League,* 352 U.S. 445, with respect to the pleading requirements in antitrust cases. See also *Conley* v. *Gibson,* 355 U.S. 41; *Dioguardi* v. *Durning,* 139 F. 2d 774 (C.A. 2). In *Employing Plasterers,* the district court had dismissed a government complaint because it considered the allegations to be "wholly a charge of local restraint and monopoly," and that no facts had been set forth which showed "these powerful local restraints had a sufficiently adverse effect" upon the flow of plastering materials into Illinois (347 U.S. at 188). This Court, pointing out that the complaint charged generally that the effect of these restraints was to restrain interstate commerce, held that "[w]hether these charges be called 'allegations of fact' or 'mere conclusions of the pleader' * * * they must be taken into account in deciding whether the Government is entitled to have its case tried" (*ibid.*). Rejecting the argument that it could be determined in advance that the Government could not possibly

(D. Md.), affirmed *per curiam*, 239 F. 2d 176 (C.A. 4), certiorari denied, 355 U.S. 823; *United States* v. *Bitz*, 179 F. Supp. 80 (S.D.N.Y.) reversed on other grounds (C.A. 2, August 26, 1960).

produce enough evidence to show the effect of the restraints on interstate commerce, the Court concluded (*id.* at 189) that "where a bona fide complaint is filed that charges every element necessary to recover, summary dismissal of a civil case for failure to set out evidential facts can seldom be justified."

In *Radovich* v. *National Football League,* 352 U.S. 445, the Court reversed a decision of the Ninth Circuit holding a complaint deficient, *inter alia,* because it did not allege sufficient facts to support the conclusion that defendants' conduct was "calculated to prejudice the public or unreasonably restrain interstate commerce" (*Radovich* v. *National Football League,* 231 F. 2d 620, 623 (C.A. 9)). Applying the test of whether "the claim is wholly frivolous," see *Hart* v. *B. F. Keith Vaudeville Exchange,* 262 U.S. 271, 274, the Court held (at p. 453) that "[w]hile the complaint might have been more precise in the allegations concerning the purpose and effect of the conspiracy, 'we are not prepared to say that nothing can be extracted from this bill that falls under the act of Congress * * * ' *Id.* [*Hart* v. *Keith*], at 274. See also *United States* v. *Employing Plasterers Assn.,* 347 U.S. 186 (1954)." The Court went on to add that "petitioner's claim need only be 'tested under the Sherman Act's general prohibition on unreasonable restraints of trade,' *Times Picayune Publishing Co.* v. *United States,* 345 U.S. 594, 614 (1953), and meet the requirement that petitioner has thereby suffered injury" (*ibid.*).

In so holding the Court was merely reaffirming, as to antitrust cases, the general prescription of the Federal Rules of Civil Procedure that a complaint must

merely contain "a short and plain statement of the claim showing that the pleader is entitled to relief" (F.R.C.P. 8(a)(2)), and should "be simple, concise, and direct" (F.R.C.P. 8(e)(1)). As Judge Clark stated in *Nagler* v. *Admiral Corp.*, 248 F. 2d 319, 324–326 (C.A. 2), the draftsmen of the Federal Rules expressly rejected arguments for more detailed pleadings in antitrust cases, recognizing that requirements of greater specificity in such cases had led primarily to a "vast increase in verbiage" (p. 325). And certainly no support for a restrictive application of pleading concepts can be derived from the antitrust laws themselves. For, as this Court pointed out in *Radovich, supra,* at p. 454, "Congress itself has placed the private antitrust litigant in a most favorable position through the enactment of § 5 of the Clayton Act. *Emich Motors Corp.* v. *General Motors Corp.*, 340 U.S. 558 (1951). In the face of such a policy this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress in those laws."

2. Underlying the mistaken rule of pleading applied here is the equally unwarranted assumption that though Section 4 of the Clayton Act, 15 U.S.C. 15, grants a right of action to "[a]ny person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws," he may in fact recover only if he can prove both that he has been injured by an unreasonable restraint of trade *and* that this private injury has demonstrable adverse impact in the market place upon the public at large. Thus in the present case it is not sufficient,

in the court of appeals' view, that petitioner alleged it had unfairly been driven out of the market for sales of burners in a number of states, since "[t]he allegations of plaintiff's complaint fail to establish that there has been any appreciable lessening in the sale of conversion gas burners or gas furnaces or that the public has been deprived of a product of over-all superiority" (R. 32). This appears to be exactly the same type of analysis which led the court of appeals to uphold dismissal of the complaint involved in *Klor's* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, reversing 255 F. 2d 214 (C.A. 9).

This Court in *Klor's* found that the group boycott charged there constituted a *per se* violation of Section 1 of the Sherman Act. The court below, and a number of other courts,[2] appear to accept the view that the public injury concept expressed by the Ninth Circuit in *Klor's* accordingly retains its vitality except where the particular restraint of trade alleged happens to fall within a category which has been, or may be, classified as unreasonable *per se*. The anomalous result of this line of reasoning is that private injury is enough whenever the alleged restraint is *per se* unreasonable, regardless of any demonstrable impact on the market place, but, where the restraint is of the type whose validity depends upon its reasonableness under all of the circumstances, the complainant cannot prevail (or even secure a hearing) unless he can make an independent showing of public injury.

[2] See *United States* v. *Bitz*, *supra*; *Reliable Volkswagen S. & S. Corp.* v. *World-Wide Automobile Corp.*, 182 F. Supp. 412 (D.N.J.).

The decisions of this Court reject any such artificial distinction. Ordinarily conduct which the Act prohibits has its main impact on the public at large or on a group or class of similarly circumstanced traders. But it is settled that the statutory prohibitions equally embrace conspiracies in restraint of trade or attempts to monopolize aimed at injury or destruction of a single trader. *Binderup* v. *Pathe Exchange,* 263 U.S. 291; *Lorain Journal* v. *United States,* 342 U.S. 143; *Loewe* v. *Lawlor,* 208 U.S. 274; *Duplex Printing Press Co.* v. *Deering,* 254 U.S. 443; *Bedford Cut Stone Co.* v. *Journeymen Stone Cutters Assn.,* 274 U.S. 37. Moreover, in *Klor's* itself, the Court clearly looked towards a rule applicable equally to all unreasonable restraints of trade whether of the *per se* category or not. Thus, *Apex Hosiery Co.* v. *Leader,* 310 U.S. 469, upon which the court of appeals had "relied heavily" to support its public injury test, was limited to its facts as a labor case (359 U.S. at 213, n. 7). The Sherman Act was contrasted with Section 5 of the Federal Trade Commission Act, which as a prerequisite to a complaint requires the Commission find "that a proceeding by it * * * would be to the interest of public" (pp. 211–212, n. 4). And the Court made clear that an unreasonable restraint was "not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy" (p. 213). While this statement was made in context of a restraint *per se* unreasonable, the Court did not suggest it was inapplicable to restraints unreasonable as a matter of fact rather than a matter of law. Instead,

pointing out *ibid.* that "[m]onoply can as surely thrive by the elimination of such small businessmen, one at a time, as it can by driving them out in large groups," it concluded (*id.*, pp. 213–214) that "[i]n recognition of this fact the Sherman Act has consistently been read to forbid all contracts and combinations 'which "tend to create a monopoly" ' whether 'the tendency is a creeping one' or 'one that proceeds at full gallop.' *International Salt Co.* v. *United States,* 332 U.S. 392, 396."

We do not suggest that in a non-*per se* situation the effect upon trade and commerce is not a pertinent consideration in determining whether the restraint is unreasonable and violates the antitrust laws. This Court has stressed the necessity in such cases for considering all of the relevant factors bearing upon the reasonableness of the restraint, including its nature and history, and the reason it was adopted, as well as the actual or probable extent of its anti-competitive effect. See, *e.g., Board of Trade of the City of Chicago* v. *United States,* 246 U.S. 231; *United States* v. *Columbia Steel Co.,* 334 U.S. 495, 527; *Sugar Institute, Inc.* v. *United States,* 297 U.S. 553, 600. But this does not mean that in a suit charging an unreasonable restraint in violation of the antitrust laws, the plaintiff must also allege and prove an additional element, namely, public injury. And it certainly can not mean that an action may be jettisoned before trial because the complaint does not contain allegations of fact, sufficiently persuasive to the court, showing general injury to the public as a result of the violation charged.

CONCLUSION

The "public injury" concept has no independent status either as a rule of pleading or as a substantive standard against which antitrust complaints are to be tested. The judgment of the court of appeals should be reversed.

Respectfully submitted.

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