IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 73

RADIANT BURNERS, INC.,

Petitioner,

vs.

PEOPLES GAS LIGHT AND COKE COMPANY, NATURAL GAS PIPELINE COMPANY OF AMERICA, TEXAS-ILLINOIS NATURAL GAS PIPELINE CO., CROWN STOVE WORKS, NORTHERN ILLINOIS GAS COMPANY, FLORENCE STOVE COMPANY, SELLERS ENGINEERING COMPANY, GAS APPLIANCE SERVICE, INC., AUTOGAS CORPORATION, NORGE SALES CORPORATION and AMERICAN GAS ASSOCIATION, INC.,

Respondents.

PETITIONER'S BRIEF ON THE MERITS.

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Respondents.

PETITIONER'S BRIEF ON THE MERITS.

OPINIONS BELOW.

The opinion of the Court of Appeals (R. 27-33) is reported at 273 F. 2d 196.

The memorandum opinions of the District Court (R. 1-3, 24) are not officially reported.

JURISDICTION.

The jurisdiction of this Court rests on 28 U. S. C. 1254 (1). The judgment of the Court of Appeals was entered December 3, 1959. On January 27, 1960, an order was entered by the Court of Appeals denying rehearing. (R. 34.)

STATUTES AND RULES INVOLVED.

The Statutes and Rules involved are:

(1) Section 1 of the Sherman Act, 15 U. S. C. 1, providing in pertinent part:

> "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, * * * is declared to be illegal * * *." (July 2, 1890, c. 647, §1, 26 Stat. 209, as amended July 7, 1955, c. 281, 69 Stat. 282.)

(2) Section 4 of the Clayton Act, 15 U. S. C. 15, providing in pertinent part:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States * * *, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee." (Oct. 15, 1914, c. 323, § 4, 38 Stat. 731.)

(3) Section 16 of the Clayton Act, 15 U. S. C. 26, providing in pertinent part:

> "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having jurisdiction over the parties, against threatened loss or damage by a violation of the antitrust laws * * *." (Oct. 15, 1914, c. 323, § 16, 38 Stat. 737.)

(4) Rules of Civil Procedure for the United States District Courts, Rule 8 (a) (f), providing in pertinent part:

> "(a) *Claims for Relief.* A pleading which sets forth a claim for relief * * * shall contain * * * (2) a short and plain statement of the claim showing that the pleader is entitled to relief * * *."
>
> "(f) *Construction of Pleadings.* All pleadings shall be construed so as to do substantial justice."

QUESTIONS PRESENTED.

Whether Petitioner's complaint sets forth a claim entitling it to relief when the complaint charges that

(i) A combination among Respondents and others, including Petitioner's direct competitors, has concertedly acquired and used the power to prevent the sale of products which it has not approved; and that

(ii) Such group power has been exercised through a Trade Association by persuading and coercing consumers and retailers not to buy products which the combination has not approved; and that

(iii) As a result, Petitioner, whose product has not been approved, is prevented from successfully selling its product in interstate commerce.

STATEMENT OF THE CASE.

Proceeding under Sections 4 and 16 of the Clayton Act, Petitioner-Plaintiff filed its complaint charging Respondents with violation of Section 1 of the Sherman Act. The complaint seeks injunctive relief and treble damages. The District Court dismissed Petitioner's second amended

complaint for "failure to state a cause of action,"[1] (R. 24) and the Court of Appeals for the Seventh Circuit affirmed. (R. 27-33.) Certiorari by this Court followed. (R. 34.)

The matter thus comes to this Court on a question of the sufficiency of Petitioner's complaint, and the truth of its allegations are not in issue.

Petitioner, Radiant Burners, Inc., manufactures, sells and distributes gas conversion units and furnaces used in space heating of homes and commercial and industrial facilities. These products are known as the "Radiant Burner". (R. 4.) They are manufactured in Illinois and sold in Illinois and other states. (R. 14.)

The Respondents include Manufacturers[2] who compete directly with Petitioner in the manufacture and sale of gas space heating units, and Pipelines[3] and Public Utilities[4] which, by virtue of their legal monopolies, are the only source of the gas needed to operate Petitioner's product. (R. 5.)

All of these Respondents have combined together as members of the Respondent American Gas Association (hereinafter the "AGA"), a Trade Association. The membership of the AGA includes, in addition to the other Respondents, "practically all, if not all" of the Public Utilities in the United States having franchised monopolies

1. The second amended complaint is hereinafter referred to as "the complaint." The original complaint and the first amended complaint were similarly dismissed for failure to state a cause of action. (R. 1, 3.)

2. The Manufacturer Respondents are Crown Stove Works; Florence Stove Company; Sellers Engineering Company; Gas Appliance Service, Inc.; Autogas Corporation and Norge Sales Corporation.

3. The Pipeline Respondents are Natural Gas Pipeline Company of America and Texas-Illinois Natural Gas Pipeline Co.

4. The Public Utility Respondents are Peoples Gas Light and Coke Company and Northern Illinois Gas Company.

to serve the public with gas (R. 4) and hundreds of manufacturers of gas devices. (R. 5.)

The purpose of this combination, as set forth in a statement which Respondents characterize as their "basic theme song", is "to provide consumers with safe gas appliances * * * of substantial and durable construction." (R. 8.) This is to be accomplished, the theme song states, "through voluntary national standards, *or, as we call them, requirements.*" (R. 8.) (emphasis added)

Imposition of the standards or "requirements" is to be accomplished, according to the theme song, through the AGA "Approval Plan". The AGA tests products submitted to it, and the results of such tests are evaluated by a committee which decides whether the "AGA seal of approval" will be granted. (R. 6-7.) The committee's membership includes representatives of the Manufacturer Respondents (R. 7), who are Petitioner's direct competitors. (R. 5.) The AGA, acting through this committee (which incidentally is alleged to make its determinations "arbitrarily and capriciously"[5] (R. 6)) has twice denied the seal of approval to Petitioner's Radiant Burner. (R. 9.)

Respondents' alleged purpose to provide consumers with better gas appliances through "voluntary national standards" or, as they call them, "requirements" (R. 8), does not stop with testing. Members of the combination are warned that,

> "Not only must we be familiar with the theme song [the Approval Plan], but we must all sing it in tune if we would be successful." (R. 8.)

Accordingly, considerable effort is expended to increase the prestige, significance—and indispensability (R. 7)—of the seal of approval. Speeches, publications and meetings

5. The court below attached great weight to the question of whether the determination was arbitrary; Petitioner submits that this is irrelevant. See p. 35 of this brief.

are employed to emphasize that all members of the AGA must work as a unit to exclude non-approved products from sale and use. (R. 9.)

In response, the membership of the AGA stands fast to cause the rejection of any seal-less product. It does so in a variety of ways. The Public Utility Respondents, whose first contact with potential purchasers of gas burners gives them a unique opportunity to accomplish the purposes of the combination, discourage such potential purchasers from buying non-approved products. (R. 7-8.) They refuse to afford manufacturers of non-approved products the same opportunity offered to the Manufacturer Respondents to exhibit their burners in the Public Utility offices. (R. 7-8.) If these methods are not successful, the Public Utilities refuse to furnish gas for use in non-approved products. (R. 7.) Since these Public Utility companies enjoy legal monopolies (R. 5), potential purchasers of Petitioner's product are forced to forego its use.

The Approval Plan is further implemented by pressure on retail dealers not to handle non-approved products upon pain of losing their certification as "competent and trustworthy" in the installation of gas equipment. (R. 7, 16.) False and misleading reports, suggesting that non-approved products are unsafe or unreliable or lacking in durability, are circulated. (R. 7.) Lobbying activities have been successful in securing the passage of local legislation outlawing the use of products which the committee of competitors has not approved. (R. 7, 8.)

As a result of these activities, Petitioner has been unable to successfully sell its seal-less Radiant Burner in areas in and out of the State of Illinois where Respondents effect their plan. (R. 7, 15-17.)

The product thus foreclosed is alleged to be substantially safer and more efficient than the products of the Manu-

facturer Respondents with which it competes, and at least as durable as such products. (R. 9.) This superiority is achieved by a unique design and the use of ceramic materials rather than the conventional metal. (R. 9-14.) The Radiant Burner cannot explode because ceramic, unlike metal, cannot become corroded and clogged, and because the pilot light safety system is designed so that it cannot fail. (R. 9-11.) The products of the Manufacturer Respondents, on the other hand, can and do explode with an intensity which varies from what the gas industry euphemistically terms a "puff" to a "damaging puff". (R. 10.) Utilizing the principle of radiant heating of ceramic units rather than the conventional convected heat produced by units of metal construction, the Radiant Burner consumes 50% less gas than the products of its competitors in heating the same space under equal conditions. (R. 11-13.)

Viewing these allegations, the Court of Appeals affirmed the dismissal for failure to state a cause of action. Briefly, the Seventh Circuit based affirmance on the following:

1. No *per se* violation was alleged because of the lack of a buyer-seller relationship between Petitioner and Respondents. (R. 30.)

2. The *per se* issue having been disposed of, no unreasonable restraint of trade could be found in the absence of an explicit allegation from which it could be found that AGA had arbitrarily denied approval of the Radiant Burner. (R. 31, 32.)

3. As a separate ground for the holding that no violation was alleged, the failure to allege "over-all superiority" of the Radiant Burner demonstrated that the "complaint fails to allege such injury to the public as is essential to plaintiff's right to maintain its action." (R. 31-32.)

SUMMARY OF ARGUMENT.

I.

At issue in this case is the legality of a combination among Public Utilities, Pipelines and Petitioner's competitors which has deliberately usurped to itself the power to determine who shall compete in the gas space heating industry—and has used this power to prevent Petitioner from successfully selling its product.

The competition which the Sherman Act is intended to protect cannot exist when a combination of competitors denies its existing or potential rivals the opportunity to enter or stay in the market. Fundamentally, Respondents' conduct violates the Sherman Act because they have eliminated competition by deliberately acquiring and using the power to prevent the sale of products which do not have their approval.

Actual exclusion of rivals is accomplished by withholding the "AGA seal of approval." Respondents advance, as their motive for making this seal into a license to compete, their desire to provide consumers with better gas devices. But these motives, whatever social values they serve, are irrelevant. *Fashion Originators' Guild* v. *Federal Trade Commission,* 312 U. S. 457, 467 (1941).

The AGA testing program and the methods employed to make the licensing system effective might be legal if they were only the acts of the Respondents as individuals. But when they became part of the sum of acts relied upon to effectuate the plan to limit competition, they became the combination and conspiracy in restraint of trade which the Sherman Act expressly forbids. *American Tobacco Co.* v. *United States,* 328 U. S. 781, 809 (1946).

It is conceded that the use of a Trade Association seal of approval as the basis of a plan which gives the members of the Trade Association the power to limit competition, has never been adjudged illegal. But it is the very novelty of this practice which makes it most pernicious. The public recognizes ordinary advertising appeals as the products of a profit motive. A Trade Association, however, announcing its desire to serve the public and disclaiming any profit motive, becomes irresistible. This is the disinterested expert who should know best of all—but this also is the power to control and eliminate competition on behalf of its anonymous members. However, the unique and novel nature of this restraint should not prevent this Court, acting under the broad general standards of the Sherman Act, from recognizing and adjudging it as violative of that Act.

II.

This Court has held that it is illegal *per se*, for a combination of competitors to deprive potential or existing rivals of the things they need to compete effectively. *Klors* v. *Broadway-Hale Stores*, 359 U. S. 207 (1959); *Associated Press* v. *United States*, 326 U. S. 1 (1945). This is precisely what the Respondents have done; whatever their motives may be for withholding the seal of approval, the effect of the withholding is to prevent Petitioner and others from successfully selling their products.

Respondents' violation is deeper than the conduct condemned in *Klors* and *Associated Press*. The seal of approval is not needed by Petitioner because of something inherent in the competitive structure of the industry; it is an artificial barrier to competition erected by Respondents' deliberate policies. The creation of this synthetic need, viewed against the *per se* illegality of *Klors* and *As-*

sociated Press, makes Respondents' conduct *a fortiori* illegal *per se.* Such conduct is the conduct of a monopolist, and it is therefore unlawful. *United States* v. *Griffith,* 334 U. S. 100, 107 (1948).

Even if Respondents were not to exercise their power again, the mere existence of the power radiates a tremendous potential for future harm. So long as the power exists, potential newcomers will hesitate to invest capital and effort which can be destroyed at Respondents' whim.

Respondents' conduct is inherently irreconcilable with reasonableness and is therefore illegal *per se* because it has no relationship to the normal urge to expand which is beneficial to competition and which gave rise to the rule of reason. *Standard Oil Co.* v. *United States,* 221 U. S. 1, 58 (1911). Historically the rule of reason was never applied to restraints which denied market access or excluded existing competitors, and it should not be applied to conduct which is designed only to maintain the status quo by protecting the Manufacturer Respondents from new competition.

The Court below refused to find *per se* illegality because no direct refusal to deal was alleged. Such a focus on the particular methods used to accomplish the illegal purpose was improper because the Sherman Act condemns "the result to be achieved" and not the particular means used. *American Tobacco Co.* v. *United States,* 328 U. S. 781, 809 (1946).

In any event, this Court has condemned restraints accomplished by the type of secondary pressures used by Respondents. *Loewe* v. *Lawlor,* 208 U. S. 274 (1908).

III.

As used in the rule of reason, the term "reasonableness" relates only to how much effect the restraint has on competition. Accordingly, the only relevant inquiry in measuring the restraint by the rule of reason is the extent of its anti-competitive effect. The restraint imposed by Respondents does not merely have an anticompetitive tendency to be weighed against other factors—it destroys competition entirely by denying the opportunity for rivals to enter the market.

IV.

Petitioner's complaint contains sufficient allegations of public injury. The public is injured because the restraint imposed by Respondents eliminates competition, deprives consumers of their right to buy a new and unique product and permits Respondents to monopolize the market.

In any event, a separate allegation of public injury is not a requisite of a Sherman Act complaint. The public injury rule as applied by the court below and other lower courts frustrates the aims of the Sherman Act. Fundamentally, it fails as a useful rule of law because it does not consider the cumulative effect of a number of restraints which, considered by themselves, may have no ascertainable impact on the public. It thereby permits "creeping monopoly". In addition, it prevents enforcement of the antitrust laws. Because the rule is applied on a case-to-case basis, without consistent standards to guide its application, it results in decisions which reflect the personal antitrust predilections of the judges who apply it.

V.

This is a pleading case, and accordingly the test of sufficiency of the complaint is whether "the claim is wholly frivolous" and whether anything can be "extracted • • • that falls under the Act of Congress." *Hart* v. *Keith Vaudeville Exchange*, 262 U. S. 271, 274 (1923). The complaint charges that the purpose and effect of Respondents' combination is to give them the power to dictate who can compete, and whether characterized as "allegations of fact" or "mere conclusions of the pleader," such a complaint states a cause of action. *United States* v. *Employing Plasterers Assn.*, 347 U. S. 186, 189 (1954).

ARGUMENT.

I.

INTRODUCTION.

THE THEORY SUPPORTING PETITIONER'S CLAIM FOR RELIEF AND THE FUNDAMENTAL PRINCIPLES OF THE SHERMAN ACT.

This is a pleading case, but it is not a routine problem of construction of pleadings. Respondents have demonstrated a new and subtle method of using group power to foreclose rivals from competition. The proceedings below which condoned this restraint and ignored fundamentals of antitrust policy raise important issues in the administration of the Sherman Act.

At issue in this case is the legality of a combination among Public Utilities, Pipelines and Petitioner's competitors, which has deliberately usurped to itself the power to determine who shall compete in the gas space heating industry—and has used this power to prevent Petitioner from successfully selling its product.

The competition which the Sherman Act is intended to protect[6] cannot exist when a combination of competitors denies its potential or existing rivals the opportunity to enter or stay in the market. This fundamental principle has been applied from the recorded beginnings of the com-

6. Almost every Sherman Act case decided by this Court states this to be the purpose of the Act. See also, THE REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS (1955) [hereinafter, the "ATTORNEY GENERAL'S REPORT] at p. 1, "The general objective of the antitrust laws is promotion of competition in open markets."

mon law.[7] It reflects the economic reality that competition is eliminated when competitors have the power to exclude rivals.[8]

The short of this case is that Respondents have eliminated competition by using their group power to prevent the sale of products which do not have their approval.

The influence of the public on this important segment of the economy[9] has been replaced by the absolute control of a combination which dictates what the public may buy and what it may not buy.

The comprehensive vertical combination which has achieved this power blankets every area of the gas space

7. In the year 1291 "forestalling", the common law term for restraints which denied access to the market, was condemned as a civil violation and a crime. See the case against *William Ram*, in 23 Selden Society 48. Forestalling was declared illegal in England by statute in 1266 (the Assize of Bread and Ale, 6 Hen. III) and soon thereafter in the *Statutum de forestallarii*, 1 Statutes of the Realm 203. Even the tide of *laissez faire* generated by Adam Smith, which resulted in the general repeal of statutes regarding trade, left the penalties against forestalling largely intact. See generally, Schueller, *The New Antitrust Illegality Per Se: Forestalling and Patent Misuse*, 50 Columbia L. Rev. 170, 175-179 (1950). Recognition of the principle by this Court is found in *e.g., International Salt Co.* v. *United States*, 332 U. S. 392, 396 (1947). ("It is unreasonable, *per se*, to foreclose competitors from any substantial market"); *Associated Press* v. *United States*, 326 U. S. 1, 15 (1945) ("The Sherman Act was specifically intended to prohibit independent businesses from becoming 'associates' in a common plan which is bound to reduce their competitor's opportunity to buy or sell the things in which the group compete").

8. "From the economic point of view relative freedom of opportunity for entry of new rivals is a fundamental requisite for effective competition in the long run. Without this condition, it is idle to expect effective competition." ATTORNEY GENERAL'S REPORT 326; See also Stocking, The Rule of Reason, Workable Competition and the Illegality of Trade Association Activities, 21 University of Chicago, L. Rev. 527, 537 (1954); Edwards, MAINTAINING COMPETITION 9 (1949).

9. The complaint alleges that almost 30,000,000 gas heating units were in use in the United States in 1957; that according to Respondent AGA, 78,000,000 units, including replacements, will be installed during the next ten years. (R. 5-6.)

heating industry from gas field to consumer. The Pipeline Respondents transport gas from its natural source to the Public Utility Respondents, whose legal monopolies give them absolute control over the gas essential to the operation of Petitioner's product. The Manufacturer Respondents—who would compete directly with Petitioner if they allowed Petitioner to sell its product—complete this gigantic plenary combination with their coverage of the consumer market. (R. 5.)

This massive strength takes form in the Respondent AGA—the Trade Association to which all members of the combination belong—and is literally symbolized in the AGA seal of approval. Exclusion of rivals from the market has been accomplished by the use of the combination's concerted power to make this seal a prerequisite to effective competition. The seal determines who is in and who is out; obtaining it is the difference between life and death in the industry. It is no less than a license to compete[10] and all the strength of the combination is directed toward maintaining the effectiveness of the license by preventing the sale of products which do not bear the seal. No secret conspiracy to attain and use this power is involved; the approval plan is characterized by the Respondents as their "basic theme song" and they have stated that they "must all sing it in tune" if it is to be successful. (R. 8.)

Petitioner's Claim for Relief, based on the inviolate nature of competition, rejects the two principal defenses offered by Respondents in the court below.[11] They are considered separately:

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10. Professor Handler notes that "it is clear upon reflection that agreements * * * limiting entry are tantamount to * * * the requirement of a license as a prerequisite to doing business." Handler, ANTITRUST IN PERSPECTIVE, 23 (1957).

11. It is not suggested that Respondents are bound to defenses asserted in the court below.

1. Respondents' "Good Motives" Are Irrelevant.

The interest of the public in quality goods is universal, and certainly is not confined to gas appliances. Nevertheless, a suggestion that this universal interest should be served by requiring all new products to be licensed by the present competitors in each industry would be greeted with some surprise. But this is exactly the situation which Respondents have brought about in their own segment of the economy. A committee which includes Petitioner's competitors presumes to judge the quality of all products and licenses for sale only those which they approve; the Respondents then use their concerted power to prevent the sale of unlicensed products.

Respondents' motive for engaging in this conduct is stated in their "theme song" to be only "to provide consumers with safe gas appliances of substantial and durable construction." (R. 8.) But this apparently innocent statement, read in context with the remainder of Respondents' "theme song", is suspect; they are not seeking to *"provide"* consumers with better gas appliances—they are seeking to *prevent* the sale of appliances which do not meet their "voluntary standards, or as [they] call them, requirements." (R. 8, 9.)

Whatever social values this program serves, Respondents' motives are irrelevant because under the Sherman Act competition is the basic instrument of social control; the fact that restraints on the entry of new rivals may also operate in the public interest by promoting social values other than workable and effective competition will not justify them. Handler, ANTITRUST IN PERSPECTIVE 27.

If the social value of providing consumers with substantial and durable gas burners is more important than the maintenance of competition; if gas burners are liable to explode in the crucible of competition—then it is the

function of *government* in the exercise of its police power to protect the consumer by providing regulation. Political considerations require that this power not be entrusted to a private group,[12] particularly when the members of the group may afford themselves the relative anonymity of a Trade Association. The Respondents, by their licensing system, have become, in effect, "an extra governmental agency which trenches on the power of the national legislature and violates the statute." *Addyston Pipe & Steel Co.* v. *United States,* 175 U. S. 211, 242 (1899).

Relying on these principles, this Court has consistently refused to consider the motives of defendants and the actual beneficial effects of the restraint on competition in cases involving limitations on market access. *Fashion Originators' Guild* v. *Federal Trade Commission,* 312 U. S. 457, 467 (1941).[13] In *Fashion Originators,* this Court refused to consider evidence of the actual benefit to the public of

12. "These sovereign powers of government should not be vested in private groups to be exercised for private purposes. Private control of prices would compel public regulation * * *. With the resultant permanent governmental regulation of the prices of all industry, our private enterprise system would be transmuted into an authoritarianism of either the left or the right. These were the 'rival philosophies' from which Congress had to choose when it enacted the Sherman Law. Its choice precludes either voluntary or compulsory cartels." Handler, ANTITRUST IN PERSPECTIVE 23 (1957); "Power to exclude someone from trade * * * is governing power whether exercised by public officials or by private groups. In a democracy, such powers are entrusted only to elective representatives of the governed. * * *" ATTORNEY GENERAL'S REPORT 2; "Political liberty can survive only within an effectively competitive economic system." Simons, ECONOMIC POLICY FOR A FREE SOCIETY (1948).

13. See also, *e.g., Eastern States Retail Lumber Dealers Assn.* v. *United States,* 234 U. S. 600, 613 (1914) ("The argument that the course pursued is necessary to the protection of the retail trade and promotive of the public welfare * * * is answered by the fact that Congress * * * has so legislated as to prevent resort to practices which unduly restrain competition * * *"); *Paramount Famous Lasky Corp.* v. *United States,* 282 U. S. 30, 44 (1930) ("good motives" rejected).

a restraint which denied market access to "style pirates," because the reasonableness of the restraint was no more material "than would be the reasonableness of the prices fixed by an unlawful combination." 312 U. S. at 468.

This is the core of Respondents' violation. "Reasonable" price fixing is not allowed because "those who fix reasonable prices today would perpetrate unreasonable prices tomorrow," *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, 221 (1940), and "reasonable" restraints on market access are not allowed because the combination which excludes competitors reasonably today would do so unreasonably tomorrow, when they are no longer subject to judicial supervision. *Cf. United States* v. *Trenton Potteries*, 273 U. S. 392, 397 (1927).

Economists agree:

> "It is impossible to leave private groups free to regulate without leaving them also free to exploit."—Edwards, MAINTAINING COMPETITION 25 (1949).

2. Having Conspired to Prevent the Sale of Products Which the AGA Has Not Approved, the Respondents May No Longer Assert the Legality of Their Individual Acts.

The AGA testing program and the methods employed to make the Respondents' licensing system effective, might be legal if they were only the acts of the Respondents as individuals. But when these acts became part of the sum of acts relied upon to effectuate the plan to limit competition—the AGA approval plan—they became the combination in restraint of trade which Section 1 expressly forbids. *American Tobacco Co.* v. *United States*, 328 U. S. 781, 809 (1946); *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 312 (1923).

For this reason, the AGA approval plan is significantly different than programs established by independent or-

ganizations such as the Consumers' Research Institute or the Good Housekeeping Institute. These independent organizations merely test; they do not join in conduct designed to exclude non-approved products from the market, and unlike Respondents, their membership does not include direct competitors of the manufacturers whose products they test.

Because the core of the charge in this case is a *conspiracy* to restrain trade, the Respondents who do not compete directly with Petitioner are not excused from liability. In *Klors* v. *Broadway-Hale Stores,* 359 U. S. 207 (1959) this Court held that a complaint charging a conspiracy among eleven defendants to eliminate Klor from the market stated a violation against all eleven, though only one of them competed with Klor. It would appear that inclusion of non-competitors in the combination only emphasizes the strength which it derives from a comprehensive coverage of the industry.

Mr. Justice Brandeis has stated that "the history of combinations has shown that what one may do with impunity, may have intolerable results when done by several in combination."[14] This seems to answer Respondents' protestations of individual innocence.

The Sherman Act: Its Standards of Illegality.

The fundamental principles discussed above have of course found expression in special terms and specific rules of law—particularly in the *per se* rule and the rule of reason.

In *Standard Oil Co. of New Jersey* v. *United States,* 221 U. S. 1, 60 (1911) this Court read the language of Section 1 to forbid only unreasonable restraints of trade. It was emphasized, however, that there were classes of re-

14. Goldman, THE WORDS OF JUSTICE BRANDEIS 55 (1953).

straints which from their "nature or character" were unduly restrictive and hence forbidden by both the common law and the statute; that "resort to reason was not permissible in order to allow that to be done which the statute prohibited." 221 U. S. at 58, 65. This class of restraints, characterized as "illegal *per se*," are not inconsistent with the rule of reason: conduct which is illegal *per se* gives rise to a "conclusive presumption" (221 U. S. at 65) of unreasonableness in order that it may "quickly and positively" be adjudged a violation of the Sherman Act. ATTORNEY GENERAL'S REPORT 11.

The method of approach to Section 1 problems is thus outlined by *Standard Oil.* The initial question always is whether the conduct is a restraint on trade in interstate commerce. If this question is answered affirmatively (as it must be in the instant case where the complaint alleges that Respondents prevented [restrained] Petitioner from selling its product in interstate commerce)[15] the next inquiry is whether the restraint is illegal *per se,* that is whether it should be conclusively presumed to be unreasonable. If the presumption is not made, then the reasonableness of the questioned restraint is measured by the rule of reason.

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15. While one of the grounds for dismissal given by the District Court in this case was the supposed failure of the complaint to allege a restraint on interstate commerce (R. 2, 24) its decision in this regard is plainly wrong. It is true that the business of certain of the Respondents is wholly intrastate, but as Mr. Justice Jackson put it, "If it is interstate commerce that feels the pinch, it does not matter how local the operation which applies the squeeze." *United States* v. *Women's Sportswear Mfrs. Assn.*, 336 U. S. 460 (1949). Such a "pinch" is alleged in the complaint. (R. 14-17.)

The Sherman Act: New and Novel Restraints.

The method used to restrain competition in one of the first recorded instances of judicial action against such conduct in the year 1257, was a physical attack on a rival competitor on his way to market. *The Burgess of Newcastle* v. *The Prior of Tynemouth.*[16] In seven centuries, methods of keeping a rival from the market have changed. Businessmen no longer waylay their competitors with clubs; industry and Trade Asociations have become sophisticated and well versed in the arts of restraint.

The public also has become sophisticated; it recognizes that ordinary advertising appeals arise from profit motives. A Trade Association however, announcing its desire to serve the public and disclaiming any profit motives, becomes irresistible. This is the one-man jury; the disinterested expert who should know best of all—but this also is the power to control and eliminate competition on behalf of its anonymous members. Unless such a use of group power is repudiated, it must be expected that members of every industry who feel they must control rather than compete will quickly adopt Respondents' novel technique.[17]

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16. Reported in Illingsworth, AN INQUIRY INTO THE LAWS ANCIENT AND MODERN, RESPECTING FORESTALLING, REGRATING AND ENGROSSING, at Appendix B, C (1800).

17. Commentators have noted the possibility of using a Trade Association trademark to injure competition. See *e.g.*, 1 Callman, UNFAIR COMPETITION AND TRADEMARKS 225 (1950) ("The use of trade and certification marks by Trade Associations * * * may serve to * * * exclude outsiders and deprive smaller independent competitors of the chance to compete"). This type of restraint is to be distinguished from Trade Association "product standardization" agreements which are voluntary restraints affecting outsiders only indirectly.

The influence of Trade Associations in this area should not be underestimated. A 5-year study of complaints pending before the Federal Trade Commission disclosed 38 instances in which the primary objective of the combination was the elimination of competitors. Trade Association Survey, T. N. E. C. Monograph No. 18 (1941) at p. 92.

It is conceded that the use of a Trade Association seal of approval as the basis of a plan which gives the members of the Trade Association the power to limit the entry of new competition has never been adjudged illegal.[18] But despite the amorphous nature of the novel practices which have come before it, this Court, recognizing that the Sherman Act was framed to protect "commerce from being restrained by methods, whether old or new," *Standard Oil Co. of New Jersey* v. *United States,* 221 U. S. 1, 60 (1911), has consistently expanded the conclusive presumption of unreasonableness—the *per se* rule—to "quickly and positively" strike down all restraints which inevitably produce an anti-competitive effect. *Cf.* ATTORNEY GENERAL'S REPORT 11. The unique and novel nature of the restraint which Respondents have imposed should not prevent this Court from recognizing and adjudging it as violative of the Act.

Outline of This Brief.

Petitioner's positions on the matters discussed, and others raised by the proceedings below, are considered in this brief as follows:

In Part II, Petitioner's contention that Respondents' conduct is illegal *per se;*

In Part III, Petitioner's contention that Respondents' conduct, if not illegal *per se,* is illegal when measured by the rule of reason;

In Part IV, Petitioner's contention that it is not barred by lack of public injury;

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18. However consent decrees outlawing similar practices have been entered. See United States v. Southern Pine Assn., Civ. 275, E. D. La. (1940), CCH Trade Cases 1940-1943, ¶ 56,007; United States v. Western Pine Assn., Civ. 1389-RJ, S. D. Calif. (1941), CCH Trade Cases 1940-1943 ¶ 56,107, § V; United States v. National Retail Lumber Dealers Assn., Civ. 406, D. Colo. (1942), CCH Trade Cases 1940-1943, ¶ 56,181 § III(h); United States v. National Lumber Mfrs. Assn., Civ. 11262, D. D.C. (1941), CCH Trade Cases 1940-1943, ¶ 56,123, § III(i).

Finally, in Part V, Petitioner's contention that a proper construction of the complaint emphasizes the illegality of Respondents' conduct and requires that this case be reversed and remanded for trial on the merits.

II.

THE PER SE RULE.

RESPONDENTS' CONDUCT IS ILLEGAL PER SE: EXCLUSION OF RIVALS FROM COMPETITION IS INHERENTLY IRRECONCILABLE WITH REASONABLENESS.

Whatever their motives, Respondents' concerted activities are intended to prevent consumers from buying products which the Respondent AGA has not approved, and to prevent Petitioner from selling such products. The complaint alleges such a purpose (R. 6, 7) and Respondents' "theme song" states it explicitly. (R. 8.) In any event, the effect of Respondents' conduct is to prevent the sale of all non-AGA approved products (R. 7) and their purpose may properly be inferred as a matter of law from such effect. *United States* v. *Griffith*, 334 U. S. 100, 105 (1948).

Respondents have thus substituted their combined power for the free play of the forces of competition in the gas space heating industry. A committee which includes certain of the Manufacturer Respondents determines whether a product will be approved and granted the license which permits it to be sold (R. 7), or whether approval will be denied and the product foreclosed by Respondents' combined power from competing for the Manufacturer Respondents' share of the market. Such conduct is irreconcilable with reasonableness; accordingly it should be conclusively presumed to be unreasonable and hence illegal *per se*. The validity of this conclusion is demonstrated:

by decisions of this Court holding illegal *per se*

concerted conduct which forecloses rivals from any substantial market by withholding the things they need to compete (see heading "A", *infra*);

by the fact that none of the considerations which gave rise to the rule of reason are pertinent to restraints which result in exclusion of rivals (see heading "B", *infra*);

by consideration of the irrelevance of the methods used to accomplish Respondents' illegal objective of excluding Petitioner from the market (see heading "C", *infra*).

A. It Is Illegal Per Se to Foreclose Potential Competitors From Any Substantial Market by Withholding the Things They Need to Compete.

1. The Klors and Associated Press Cases.

The fifty-year-old rule that "it is unreasonable *per se* to foreclose competitors from any substantial market,"[19] *International Salt Co.* v. *United States,* 332 U. S. 392, 396 (1947), has been particularized in two recent decisions of this Court. These decisions, *Klors* v. *Broadway-Hale Stores,* 359 U. S. 207 (1959) and *Associated Press* v. *United States,* 326 U. S. 1 (1945), hold that it is illegal *per se* to foreclose potential or existing rivals from any substantial market *by withholding the things they need to compete effectively.*

In *Klors,* the complaint alleged that the defendants had concertedly refused to sell appliances to the plaintiff. Certiorari was granted to consider the "important question" of whether

19. A comprehensive list and discussion of the cases stating this rule, beginning with *Montague* v. *Lowry,* 193 U. S. 38 (1904), is found in Kirkpatrick, *Commercial Boycotts as Per Se Violations of the Sherman Act,* 10 George Washington L. Rev. 302, 306-322 (1942).

> "a group of powerful businessmen may act in concert to deprive a single merchant, like Klor, of the goods he needs to compete effectively." 359 U. S. at 210.

This Court answered "no", and stated that Klor's allegations

> "clearly show one type of trade restraint and public harm the Sherman Act forbids." *Ibid.*

The parallel of principles to the instant case is striking: if the words "AGA seal of approval" are substituted for the word "goods" in the "important certiorari question," the *Klors* rationale becomes directly applicable to this case. The certiorari question would then ask whether

> "a group of powerful businessmen may act in concert to deprive a single merchant * * * of the *AGA seal of approval* he needs to compete effectively,"

and the same negative answer would follow.

The analogy is apt: the emphasis in the certiorari question was on what Klor "needs to compete effectively", and if Petitioner needs the AGA seal of approval to compete effectively (and it is alleged that it does, R. 7) the same emphasis produces the same result.

While *Klors* thus demonstrates Respondents' violation of the Sherman Act, the thrust of their violation is deeper than that in *Klors*. The goods which Klor was deprived of were needed by it because of the competitive structure of the retail appliance business: in order to compete effectively a dealer must be able to sell certain brands. But the seal which Petitioner was deprived of is not required by something inherent in the competitive structure; it is a wholly synthetic symbol created by Respondents to serve as an artificial barrier to competition. *Cf. United States* v. *United Shoe Machinery Corp.*, 110 F. Supp. 295, 345 (D. Mass., 1953). This artificial barrier has been created and maintained as the irreplaceable prerequisite to effective

competition in the industry by a concerted pressure program directed against consumers, retailers and government officials. Respondents refuse to deal with consumers who desire the gas essential to the operation of non-approved products (R. 7); they threaten to withdraw the certification as "competent and trustworthy" of dealers who handle such products (R. 7, 16); they discourage the purchase of all but approved products (R. 7-8); they refuse to allow exhibition of non-approved products in the public areas of the Public Utility Respondents' offices (R. 8); they lobby for laws which permit them to decide who may compete (R. 8).

In the face of these facts the decision of the court below that Respondents are innocent because they have not refused to deal with Petitioner (R. 30) is simply wrong. The anti-trust laws are concerned with economic realities, not with conceptual niceties—and the economic reality of this case is that Respondents have arrogated to themselves the power to prevent anyone from competing. Respondents' deliberate creation of this artificial barrier to competition, viewed against the illegality *per se* of *Klors*, makes their conduct *a fortiorari* illegal *per se*.

This conclusion is strengthened by *Associated Press* v. *United States*, 326 U. S. 1 (1945). This case held that a combination in which each member had the power to bar its non-member competitors was illegal *per se* because "the net effect is *seriously to limit* the opportunity for any newspaper to enter the field." 326 U. S. at 13. (emphasis added); see *id.* at 17-18. The argument that membership in the Associated Press was not an "indispensable" prerequisite of competition was rejected because "the proposed 'indispensability' test would fly in the face of the language of the Sherman Act and all of our previous interpretations of it." (326 U. S. at 18.)

The least that the complaint says about the effect of Respondents' conduct is that it "seriously limits" Petitioner's opportunity to enter the field; it thereby comes within the *Associated Press* illegality. And conservatively construed, the allegation that "It is not possible to successfully sell * * * gas equipment * * * not approved by AGA" (R. 7), leads to the conclusion that Respondents' conduct presents a violation significantly more culpable than *Associated Press.*

2. The Reasons for the Judicial Antipathy to Restraints on Market Access.

The holdings of *Klors* and *Associated Press* are not vacuous rules of law; the judicial antipathy to private combinations which acquire and use the power to exclude rivals springs from a pragmatic examination of the actual effects of the questionable conduct on business behavior and the economy at large. Most significant, perhaps, is the economic necessity for free market access if competition is to survive. This, and the proposition that the power to limit entry belongs to the government and must not be exercised by private groups, has been considered in the introductory portions of this brief. Other reasons, discussed in the context of this case, are considered below.

(a) *Respondents Monopolized the Market.* If it has not already done so, Respondents' elimination of rivals by use of their combined power will result in their achieving a monopoly. From the Economist's point of view this is so because

> "Difficulties of access * * * enhance the likelihood that the concerns that have already obtained access will engage in restrictive and coercive policies."—Edwards, MAINTAINING COMPETITION 188 (1949).

Klors recognized that by its "nature and character" such conduct has a monopolistic tendency; the thrust of that

opinion was against the type of incipient monopoly present when a powerful group of competitors use their combined power to eliminate rivals. (359 U. S. at 213.)

This principle is stated also in cases arising under Section 2 of the Sherman Act:[20] The use of monopoly power to foreclose competition is unlawful. *United States* v. *Griffith*, 334 U. S. 100, 107 (1948). By actually excluding potential competition from Petitioner (R. 7), Respondents have demonstrated the existence of their monopoly power, *American Tobacco* v. *United States*, 328 U. S. 781 (1946); ATTORNEY GENERAL'S REPORT 43, and have come within the *Griffith* rule which holds such conduct to be unlawful.

(b) *Respondents' Combination Improperly Interferes With Outsiders and Thereby Brings About the Harm the Sherman Act Forbids.* Insofar as members of Respondents' combination accept voluntary restraints on their own behavior, the restraints may appropriately be tested for reasonableness and may escape the sanctions of the Sherman Act if the effect on outsiders is sufficiently indirect. But insofar as the restraints directly affect outsiders such as Petitioner and "cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment," they are—and should be[21]—illegal *per se*. *Klors*, 359 U. S. at 212.

Respondents' interference with outsiders radiates a tremendous potential for future harm. It tends "to block the initiative which brings newcomers into a field of business." *Associated Press*, 326 U. S. at 13-14. Whether or not ex-

20. While the complaint did not specifically allege a violation of Section 2, a monopoly under Section 2 is a form of restraint of trade under Section 1. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, n. 59 (1940); *United States* v. *Griffith*, 334 U. S. 100, 106 (1948).

21. See Kirkpatrick, *op. cit. supra*, note 19 at pp. 402, 403; Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. of Penn. L. Rev. 847, 872-876 (1955).

ercised, the mere existence of such power forecloses innovation, price reduction and new technology; neither capital nor inventive effort will be expended in the hope that Respondents will abandon their private profit motives and grant their approval.[22]

In addition, Respondents' interference with outsiders runs counter to the Congressional intent expressed in the Sherman Act to protect the individual in his right to pursue the occupation of his choice, and the Congressional concern that aggregations of economic power will drive small dealers out of business and eliminate a worthy class of self-reliant citizens. See 21 *Cong. Rec.* 1768, 2564, 2569 (1890).[23]

B. The Rule of Reason Was Not Intended to Be Applied to Restraints in the Nature of Limitations on Market Access.

The restraint imposed by Respondents may escape the sanctions of the Sherman Act only if it is reasonable. But the rule of reason, which tempered the statutory injunction that *every* restraint is illegal, was not intended to measure conduct which limits market access.

The opinion in *Standard Oil* which introduced the rule of reason, 221 U. S. at 60, carefully limited its application to

22. "Generally speaking, economists support competition • • • because the goad of competition provides powerful and pervasive incentives for product innovations and product development, and for long-run cost-reduction, both through improved technology and improved management; these forces make themselves felt • • • through the pressures implicit in the fact that competitive conditions offer an open opportunity to new entrants in a particular industry. • • •" ATTORNEY GENERAL'S REPORT 317.

23. See also, reflecting this Congressional concern, *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290, 323 (1897); ("Trade or commerce • • • may • • • be badly restrained by driving out of business the small dealers and worthy men whose lives have been spent therein. • • •")

restraints in the nature of common law "engrossing", or monopolization. 221 U. S. at 52-53, 62. The common law restraint of "forestalling"—restricting market access—was pointedly omitted from the enumeration of situations where the rule of reason was applicable.[24]

Standard Oil does not hold that the rule of reason may not be applied to restraints on market access; however the opinion does both open the door and provide a rationale for such a conclusion.

According to *Standard Oil,* the rule of reason evolved from recognition that in the course of "developing trade" the normal acquisitiveness and beneficial urge for expansion which characterizes the free enterprise system results in attempts by competitors to expand their domain—and that unless competition is to be stifled, only unreasonable attempts to do so should be condemned. 221 U. S. at 58; *cf. United States* v. *Columbia Steel Co.,* 334 U. S. 495 (1948).

It is significant that a restraint of the type imposed by Respondents, which has the purpose and effect of excluding rivals, has no relation to the "normal urge" for expansion to which the rule of reason is applied. Such conduct is intended only to maintain the status quo by giving Respondents the power to safeguard the Manufacturer Respondents against outside competition—including competition from Petitioner's allegedly unique and superior product. Since the concept of reasonableness was introduced into our antitrust jurisprudence to foster competition, such a restraint, which is totally anti-competitive in effect, is irreconcilable with reasonableness and hence illegal *per se.*

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24. See Schueller, *op. cit. supra,* note 7, at p. 175.

C. The Particular Methods Used by Respondents to Achieve Their Unlawful Purpose Are Irrelevant to the Inquiry of Whether Their Conduct Is Illegal Per Se.

1. The Particular Methods Used Are Irrelevant.

The fundamental error of the opinion below was its focus on the methods used to achieve Respondents' illegal purpose. Petitioner's claim that Respondents' conduct was illegal *per se* was rejected solely on the grounds that their novel method of preventing Petitioner from selling its product did not constitute a "boycott, conspiracy to boycott or other form of *per se* violation." (R. 30.) The opinion did not consider at all that the purpose and effect of Respondents' combination was to prevent Petitioner from selling its product, and thereby limit competition.

This was error because "it is not the form of the combination or the particular means used, but the result to be achieved that the Statute condemns." *American Tobacco Co.* v. *United States*, 328 U. S. 781, 809 (1946). The total and absolute irrelevance of methods used is emphasized by the fact that Section 1 of the Sherman Act is violated by any conspiracy in restraint of trade even though the conspirators do not possess the means to accomplish their objective. *United States* v. *Socony-Vacuum Oil Co.*, 310 U. S. 150, n. 59 (1940).

In short, the opinion below offered no relevant reason for its denial of *per se* illegality. It failed to consider that the use of precedent requires application of the fundamental principles which motivated the court to reach a particular decision in the precedent case, and that this cannot be done by seizing upon irrelevant elements of the precedent case (as, *e. g.* particular methods used) and elevating them to "distinguishing factors".

2. In Any Event, Respondents' Methods Have Been Condemned by This Court.

The court below compounded its error. Even if it rejected *American Tobacco* and held that the particular methods used were relevant, it improperly distinguished *Klors* and *Fashion Originators*[25] and it failed to consider that methods involving the type of pressure used by Respondent have been involved in cases in which this Court found *per se* illegality.

The reasoning which distinguished *Klors* and *Fashion Originators* and concluded that no *per se* violation was alleged was purely deductive: The court read those cases to define "boycott" as only a direct refusal to deal by defendants who are in a buyer-seller relationship with plaintiff; finding no buyer-seller relationship in the instant case it rejected *Klors* and *Fashion Originators* and held that no *per se* violation had been alleged (R. 30).

No attempt was made to explain why Respondents' pressure on consumers and dealers to induce them not to deal with Petitioner should be treated any differently than the less subtle direct refusal to deal in *Klors* and *Fashion Originators,* when the purpose and effect of either type of behavior was the same—to exclude rivals from the market.

The court's principal eror in refusing to apply *Klors* and *Fashion Originators* was its failure to perceive that neither of these cases purported to set forth a complete and exhaustive definition of "boycott". They did not use the term definitively; they used it descriptively and merely held that under the facts presented there was a boycott. *Cf. Professional Business Men's Life Ins. Co.* v. *Bankers Life Co.,* 163 F. Supp. 274, 281 (D. Montana, 1958).

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25. Klors v. Broadway-Hale Stores, 359 U. S. 207 (1959) and Fashion Originators' Guild v. Federal Trade Commission, 312 U. S. 457 (1941).

It should be noted also that in discussing their requirement of a direct refusal to deal in order to support a *per se* violation, the court below mentioned neither the refusal of the Public Utility Respondents to deal with consumers and dealers who handle non-AGA approved products (R. 7), nor their refusal to furnish exhibiting space to Petitioner. (R. 8.) Presumably such matters were thought to be irrelevant.

The opinion below also failed to consider decisions of this Court which found *per se* illegality in cases where secondary pressures of the type here involved were used. *Loewe* v. *Lawlor*, 208 U. S. 274 (1908); *DuPlex* v. *Deering*, 254 U. S. 443 (1921), and *Bedford Cut Stone Co.* v. *Stone Cutters Assn.*, 274 U. S. 37 (1927). In these cases[26] outsiders were urged not to buy or not to handle the products of the party being boycotted (this is alleged to be one of the activities of the AGA (R. 7-8)) and the defendant unions announced that they would not supply labor to work for those who did not heed their urging (compare the refusal of the Public Utility Respondents to supply gas (R. 7)). Such conduct was illegal *per se* though there was no direct refusal to deal because it was intended to cause third parties to withhold their patronage from the plaintiff "through fear of loss or damage to themselves should they deal with it." *DuPlex*, 254 U. S. at 466.

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26. These cases are not distinguishable on the grounds that they involved labor matters. *Loewe* was expressly relied on by this Court in an important non-labor case as authority for the proposition that group pressure which eliminates competitors is illegal *per se*. *Eastern States Retail Lumber Dealers Assn.* v. *United States*, 234 U. S. 600, 611, 613 (1914). In any event, since the organization of labor is a desirable objective and should be encouraged, cases which found that unions violated the Sherman Act are *a fortiori* applicable to situations where the objective is to increase personal profit. Cf. *Klors* v. *Broadway-Hale Stores*, 359 U. S. 207, n. 7 (1959).

Respondents' methods of effectuating their plan are identical; their approach has been to convince retailers and consumers by threats, refusals to deal with them and other more peaceable but no less reprehensible means, that they will be damaged if they purchase non-approved products.[27]

It has been noted that the Sherman Act was intended to protect commerce from being restrained by methods "whether old or new."[28] It is submitted that Respondents' "new" method of restraining competition—the use of their combined power to prevent the sale of products which do not have their approval—is illegal *per se*.

III.

THE RULE OF REASON.

RESPONDENTS' CONDUCT CONSTITUTES AN UNREASONABLE RESTRAINT OF TRADE.

If the *per se* rule is not applied in this case, then inquiry into the reasonableness of Respondents' conduct must be made. The concept of reasonableness has consistently been rooted in the overriding policy of the Sherman Act to preserve and enrich competition by striking down all restraints which are actually or potentially anti-competitive in purpose or effect. Handler, ANTITRUST IN PERSPECTIVE 27; *Times-Picayune Publishing Co.* v. *United States*, 345 U. S. 594 (1953).

Accordingly, "reasonableness" is not given a broad,

27. See the factual discussion at pp. 6, 25-26 of this brief. See also, *Noerr Motor Freight* v. *Eastern Railroad Conference*, 113 F. Supp. 737 (E. D. Pa., 1953), where lobbying activities similar to those engaged in by Respondents were held violative of the statute because they were in pursuance of a conspiracy in restraint of trade.

28. See p. 22 of this brief.

generic meaning when used in the rule of reason. The term relates only to how much effect the restraint has on competition; it does not relate to the reason why the restraint was imposed.

This limited meaning of "reasonableness" excludes from consideration the motives impelling the restraint; Respondents cannot be heard to say that their restraint is reasonable because providing consumers with better gas devices is a reasonable motive.[29]

It also excludes from consideration the question of whether Respondents were justified in withholding their approval of Petitioner's product and refusing to grant their seal. This was the only question considered by the court below in its discussion of the rule of reason; it held that the lack of an allegation setting forth "the reason given (or that no reason was given) for AGA's denial of approval or that said reason was not true in fact," resulted in "a failure to show that the action of AGA has the effect of unreasonably restraining competition." (R. 31.)

From this it appears that the Seventh Circuit applies the rule of reason to determine whether a defendant has a "good reason" for excluding a competitor from the market. It is submitted that this is not exactly what Mr. Justice White had in mind in *Standard Oil.*

The Seventh Circuit has credited Respondents with the right to exclude competitors if their reasons for doing so are good. It has confused the *reason* for Respondents' refusal to approve, with the *reasonableness* of activities which exclude rivals from competing. The former does not relate to the question of how much effect the restraint had on competition and so is wholly immaterial; the latter is

29. See p. 16 of this brief.

the only relevant inquiry. Cf. *United States* v. *Trenton Potteries*, 273 U. S. 392, 396 (1927).

The effect on competition of Respondents' conduct must be evaluated in light of the principle that when a combination of competitors denies its rivals the opportunity to enter or stay in the market it eliminates competition.[30] This consideration alone makes further inquiry unnecessary. The restraint imposed by Respondents does not merely have an anti-competitive *tendency* to be weighed against other factors; Respondents have sought, acquired and utilized the power to prevent Petitioner and others from entering the market and they have thereby put an end to competition in the gas space heating industry.

It follows that Respondents' conduct constitutes an unreasonable restraint of trade and thereby violates the Sherman Act.

IV.

THE PUBLIC INJURY QUESTION.

PETITIONER'S COMPLAINT CONTAINS SUFFICIENT ALLEGATIONS OF PUBLIC INJURY. IN ANY EVENT A SEPARATE SHOWING OF PUBLIC INJURY IS NOT REQUIRED.

The court below held that in the absence of a *per se* violation, the complaint failed to allege sufficient "injury to the public." (R. 31.) The court's reliance on the public injury concept raises these problems:

A. What constitutes sufficient public injury—and does the complaint allege such injury? (See heading "A" *infra*);

B. May *any* Sherman Act complaint be dismissed solely because of lack of adequate public injury allegations? (See heading "B" *infra*).

30. See pp. 13-14 of this brief.

A. Petitioner's Complaint Contains Sufficient Allegations of Public Injury.

Petitioner's product is alleged to be safer and more efficient than the products which Respondents permit the public to buy, and at least as durable. (R. 9-17.) It would seem on reason alone that the public is injured when it is deprived of this substantially better product.

But Petitioner should not be required to convince a court—much less its competitors—that its product is superior in order to be able to sell it. Demonstration of the accuracy of this conclusion, as a matter of law, is difficult because the cases do not articulate standards useful in determining whether a particular state of facts results in injury to the public (see heading 1, *infra*). But though they do not express it, the public injury cases, considered together, do hold that concerted conduct which eliminates competition by preventing new products and new competitors from entering the market, constitutes sufficient injury to the public to support a Sherman Act complaint. (See heading 2, *infra*.)

1. The Cases Supply No Standards Useful in Determining Whether a Particular State of Facts Constitutes Sufficient Public Injury to Sustain a Complaint.

Analysis of the public injury rule is difficult.[31] The cases appear to be wholly without standards useful in proceeding from the premise that "public injury is required" to the conclusion that "this complaint does (or does not) allege a public injury."

This uncertain approach is exemplified by the opinion

31. See Hale and Hale, MARKET POWER: SIZE AND SHAPE UNDER THE SHERMAN ACT 388-391 (1958).

below.[32] It states that public injury is found when there is "general injury to the competitive processes" (R. 32), and concludes from this (without citation of authority or reason) that public injury cannot be found unless "there has been any appreciable lessening in the sale of gas conversion burners or * * * *the public has been deprived of a product of over-all superiority.*" (R. 32.) (emphasis added)

This means that the Seventh Circuit would permit a combination of competitors to destroy rivals whose products were merely "as good as" the products of the combination. Considered in the light of the purposes of the Sherman Act such a proposition seems untenable. It requires courts to determine the relative merits of competing products in order to determine "over-all superiority" and thereby to determine what products may be sold. Admittedly this would be better than allowing Petitioner's competitors to determine its right to sell, but certainly it is inconsonant with usual conceptions of the functions of courts —and with the Sherman Act precept that competition is the final arbiter of who may compete.

The opinions which apply a more definite standard have little value as precedent. For example, the Court of Appeals' decision in *Klors* v. *Broadway Hale Stores,* 255 F. 2d 214, 230 (C. A. 9, 1958), defined public injury in terms of effect on market price. But such a limited view of public injury is difficult to rationalize with the history of the antitrust laws which suggests that an immediate

32. Other opinions similarly supply no help in the search for standards useful in determining whether a particular state of facts constitutes sufficient public injury to sustain a complaint. See, *e.g. Shotkin* v. *General Electric Co.,* 171 F. 2d 236, 239 (C. A. 10, 1948); *Feddersen Motors* v. *Ward,* 180 F. 2d 519, 522 (C. A. 10, 1950). *Cf. Apex Hosiery Company* v. *Leader,* 310 U. S. 469, 501 (1940), where the difficult-to-apply test is whether the restraints "control the market to the detriment of consumers of goods."

detriment to consumers has never been a requirement of antitrust violation. Cf. *Kiefer-Stewart Co.* v. *Seagram & Sons*, 340 U. S. 211 (1951), holding that a conspiracy to fix *maximum* prices is illegal.[33]

2. Respondents' Conduct Eliminates Competition, Deprives Consumers of Their Right to Buy Petitioner's Product and Permits Respondents to Monopolize the Market, Thereby Causing Injury to the Public.

Competition cannot exist when the opportunity for rivals to enter the market is foreclosed by those already in it. If competition does not exist, the public is injured. These words, expressing the bed-rock philosophy of the Sherman Act,[34] are the short answer to the contention that Petitioner's complaint does not allege public injury; if the maintenance of competition is in the public interest, it is difficult to conceive a more serious injury to the public than its elimination.[35]

It is significant that the plaintiffs who have successfully met the public injury requirement have most often been manufacturers, or persons who rendered a unique service[36]—and that those who have failed to meet this requirement have most often been distributors.

The strongest cases on the public injury rule involve distributors. See, *e. g. Shotkin* v. *General Electric Co.*,

33. See also, *Klors* v. *Broadway-Hale Stores*, 359 U. S. 207, n. 7 ("* * * cases subsequent to *Apex* have made clear that an effect on prices is not essential to Sherman Act violation").

34. See pp. 13-14 of this brief.

35. "It is difficult to imagine how interstate trade could be more effectively restrained than by suppressing [competition]." *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 312 (1923).

36. See, e.g., National Used Car Mkt. Report v. National Auto Dealers Assn., 200 F. 2d 359, 360 (D. C. Cir., 1952); Boerstler v. American Medical Association, 16 F. R. D. 437, 444 (N. D. Ill., 1954); Noerr Motor Freight v. Eastern Railroad Conference, 113 F. Supp. 737 (E. D. Pa., 1957).

171 F. 2d 236, 239 (C. A. 10, 1948); *Feddersen Motors* v. *Ward*, 180 F. 2d 519, 522 (1950); and the Court of Appeals decision in *Klors* v. *Broadway-Hale Stores*, 255 F. 2d 214 (1958). It may be that these cases were decided on the theory that a distributor is always replaceable; that the public does not suffer when a manufacturer substitutes a third party for the plaintiff in the handling of his goods. Such a rationale is consistent with the decisions which find public injury when the plaintiff is a manufacturer or one who renders a unique service: such persons are not readily replaceable, and the public suffers because it is deprived of its right to purchase the product or service of the restrained plaintiff.

From this analysis a rational content for the public injury rule may be inferred: That public injury occurs whenever the public is deprived of the opportunity to choose any product or service. It is significant then that Petitioner's Radiant Burner is unique (R. 9-17); if Petitioner is not permitted to supply it, no one else can.

While it is not necessarily argued that *Klors* v. *Broadway-Hale Stores*, 359 U. S. 207 (1959), eliminated the public injury rule in the non-*per se* area, *Klors* does hold that a monopolistic purpose will be inferred from an attempt to eliminate even an individual competitor, and that such a purpose is sufficient to bring the monopolists' conduct within the Act's requirement of public injury. (359 U. S. at 213.) It is true that *Klors* can be distinguished mechanically since it involved a *per se* violation (and the public injury rule operates only outside the *per se* area) but *Klors* is not concerned with the niceties of a categorized scheme of law; it is concerned with the economic reality that destruction of an individual competitor has a "monopolistic tendency" which harms the public. (*Ibid.*)

It has been noted that the effect of the restraint imposed by Respondents and the effect of the restraint in

Klors is identical.[37] It follows that though Petitioner is but "a single trader"[38] its elimination by Respondents constitutes the injury to the public needed to support Petitioner's complaint.

B. A Separate Allegation of Public Injury Is Not a Requisite of a Cause of Action Based on Violation of the Sherman Act.

The discussion under heading "A" above assumed that a separate showing of public injury is requisite to a claim for relief under the Sherman Act. It is submitted however that no such separate showing is needed to sustain a Sherman Act complaint.

1. The Radovich Case Eliminated the Public Injury Rule.

While subsequent lower court decisions have not consistently agreed, it would seem that *Radovich* v. *National Football League,* 352 U. S. 445 (1957) forever eliminated the requirement of a separate showing of public injury in a Sherman Act complaint. In *Radovich,* the lower court held that the plaintiff had not stated a cause of action because he "had not grounded his claim on conduct of respondents which was 'calculated to prejudice the public * * *.'" (352 U. S. at 447.) This Court reversed, on the grounds that "Congress has, by legislative fiat, determined that such prohibited activities [unreasonable restraints of trade] are injurious to the public." 352 U. S. at 453.

This Court's intention to do away, in *Radovich,* with the public injury rule is emphasized by its reference to the fact that "Congress itself has placed the private antitrust litigant in a most favorable position through the enact-

37. See p. 25 of this brief.

38. The Congressional and Judicial concern with the competitive rights of an individual are discussed at p. 29 of this brief.

ment of § 5 of the Clayton Act,"[39] and therefore that "* * * this Court should not add requirements to burden the private litigant beyond what is specifically set forth by Congress * * *." 352 U. S. at 454.

2. The Public Injury Rule Frustrates the Aims of the Sherman Act.

Powerful arguments of law and policy support the abrogation of the public injury rule by *Radovich.*

(a) *The Public Injury Rule Can Operate to Deny Relief to a Plaintiff Who Has Been Injured by a Restraint Which Is Acknowledged To Be Unreasonable.* Analysis of the effect of the public injury rule requires an understanding of the relationship between it and the rule of reason.

The court below treated the two rules separately; it ruled against Petitioner on the alternative grounds (i) that Respondents' conduct was not unreasonable and (ii) even if it was, no public injury was alleged. (R. 31-32.) So treated, the public injury rule can operate to deny relief to a plaintiff who has been injured by a restraint of trade which is acknowledged to be unreasonable, merely because there has been no ascertainable impact on the public.

Other cases have reached the same undesirable result by combining the two rules. See, *e.g.* the Court of Appeals opinion in *Klors* v. *Broadway-Hale Stores,* 255 F. 2d 214 (C. A. 9, 1958); *United States* v. *Bitz,* 179 F. Supp. 80 (D., S.D.N.Y., 1959) *appeal pending.* In these cases public

39. This section gives substantial procedural advantages to the private claimant. Additional evidence of the Congressional intent to encourage private treble damage actions is found in § 1306 of the Internal Revenue Code of 1954 (Sept. 2, 1958, 72 Stat. 1646) which gives substantial tax benefits in connection with treble damage recoveries. Note also that § 5(b) of the Federal Trade Commission Act (Sept. 26, 1914, c. 311, 38 Stat. 717, as amended) requires that "the interest of the public" be involved before proceedings under that Act may be instituted. Congress imposed no such requirement in § 4 of the Clayton Act.

injury is treated as one of the factors to be considered in determining the reasonableness of the defendant's conduct, but it is elevated to a position of controlling and primary importance in making that determination. If no public injury is found, the test for reasonableness is over and no other factors are considered.

Since the same result is reached by either method, it is accurate to say that the public injury rule can operate to jettison a complaint even if (i) plaintiff is injured and (ii) defendant has unreasonably restrained trade. In order to obtain perspective on the rule, both of these factors are assumed to be present in this discussion.

(b) *The Public Injury Rule Evolved From a Misapplication of the Proposition That the Sherman Act Was Intended to Protect the Public.* The authority given for the pnblic injury rule invariably is that the Sherman Act was intended to protect the public.[40]

It is submitted that this proposition no more requires dismissal of a charge of unreasonable restraint of trade when an impact on the public is not alleged, than the proposition that homicide statutes are intended to protect society at large requires dismissal of a murder charge when danger to society is not alleged. The analogy is apt; in both cases the legislature determined that public injury results from the proscribed conduct. Whether an unreasonable restraint of trade or murder, "the law is its own measure of right and wrong * * * and the judgment of the courts cannot be set up against it * * *." *Standard Sanitary Mfg. Co.* v. *United States,* 226 U. S. 20, 49 (1912).

The lower courts which have applied the public injury rule, have failed to appreciate that the meaning of the proposition that "the Sherman Act was intended to pro-

40. See, e.g., Shotkin v. General Electric Co., 171 F. 2d 236, 238 (C. A. 10, 1948); Feddersen Motor v. Ward, 180 F. 2d 519, 521 (C. A. 10, 1950).

tect the public" is that Congress intended to protect the public by forbidding all unreasonable restraints of trade and that it has determined, by legislative fiat, that all such unreasonable restraints injure competition and thereby injure the public. Such misunderstanding has thus distorted this self-evident proposition into a rule which requires proof of a fact which Congress has already determined.

(c) *The Public Injury Rule Results in the Creation of Monopoly.* Fundamentally the public injury rule fails as a useful rule of law because it does not consider the cumulative effect of a number of restraints which, considered by themselves, may have no ascertainable impact on the public. Under its umbrella of immunity, the illegal profits of combination and conspiracy may be reaped so long as they are reaped slowly. The public injury rule does not take an overall view as does the rule of reason; it does not consider the percentage of the market controlled by the defendants, or the strength of remaining competition,[41] yet it transcends the rule of reason and permits the unreasonable restraint so long as the victim cannot demonstrate that the restraint on him had an impact on the public.

Where does it stop? Applied to its logical conclusion, it stops only when the restrainers have a complete monopoly. But this inevitable result of the public injury rule is its downfall, for it conflicts sharply with the principle that the Sherman Act forbids combinations which tend to create a monopoly even if "the tendency is a creeping one rather than one that proceeds at full gallop." *International Salt Co.* v. *United States,* 332 U. S. 392, 396 (1947).

(d) *The Public Injury Rule Prevents Enforcement of the Sherman Act.* Another fundamental objection to the public injury rule is that it frustrates the Sherman Act

41. Cf. Times-Picayune Pub. Co. v. United States, 345 U. S. 594, 615 (1953).

by preventing its enforcement. The additional burden on the private litigant of proving an impact on the public before he can prove the existence of an unreasonable restraint of trade—coupled with uncertainty as to what facts are sufficient to prove public injury—forces the private litigant to forego the remedy expressly given him by Section 4 of the Clayton Act. Private enforcement has a "vital role to play in aiding understaffed Government agencies to enforce antitrust prohibitions throughout the Nation." ATTORNEY GENERAL'S REPORT 380. Its abandonment, contrary to the Congressional purpose to enlist "the business public * * * as allies of the government in enforcing the antitrust laws," 51 *Cong. Rec.* 16319 (1914),[42] is not justified by the non-existent benefits of the public injury rule.

Applied to government prosecutions, as in *United States* v. *Bitz*, 179 F. Supp. 80 (D., S.D.N.Y., 1959), *appeal pending*, the public injury rule operates to severely limit the only remaining remedy against antitrust violations.[43]

(c) *The Public Injury Rule Is Used to Reflect the Personal Antitrust Predilections of the Judges Who Have Applied It.* It has been noted that the question of what constitutes a public injury is left unanswered by the courts.[44] The result is judicial chaos; the Seventh Circuit states that no public injury results unless the public is deprived of a product of "over-all superiority"; the Ninth Circuit states that no public injury results unless the price to the public is affected. In between, all manner of inconsistent rules are applied, including the ruling of a Judge of the District Court below that the Seventh Circuit opinion in this case requires a separate jury trial to consider only the question of public injury before proof of the conspiracy

42. See also note 39, *supra*.

43. See the *amicus* brief filed by the government in this case.

44. See p. 37 of this brief.

to restrain trade will be received. Miner, J., in *Parmalee Transportation Co.* v. *Keeshin*, No. 56 C 323, United States District Court for the Northern District of Illinois, Eastern Division (not officially reported).

Because of this uncertainty, the success or failure of the individual plaintiff turns on the visceral reaction of the judge who happens to hear his claim—or on his personal antitrust predilections. This Court has warned against such personal antitrust jurisprudence, *Standard Sanitary Mfg. Co.* v. *United States*, 226 U. S. 20, 49 (1912); if the lower courts are to be prevented from "setting up their own judgment against the law," *id.* at 49, the public injury rule should be emphatically and explicitly rejected.

V.

THE PLEADING QUESTION.

PROPER CONSTRUCTION OF THE PLEADINGS EMPHASIZES THE ILLEGALITY OF RESPONDENTS' CONDUCT AND REQUIRES THAT THE DECISION BELOW BE REVERSED AND REMANDED FOR TRIAL ON THE MERITS.

This is a pleading case. The court below, failing to observe that the test of sufficiency of the complaint is whether "the claim is wholly frivolous" and whether anything can be "extracted * * * that falls under the Act of Congress," *Hart* v. *Keith Vaudeville Exchange*, 262 U. S. 271, 274 (1923), denied Petitioner's right to have its case tried. It did not discuss the fact that the complaint charges that the purpose and effect of Respondents' combination is to give them the power to decide who can and who cannot sell gas space heating devices (R. 7), and that whether characterized as "allegations of fact" or "mere conclusions of the pleader," such a complaint states a claim for relief under the Sherman Act. *United States* v. *Employing Plasterers Assn.*, 347 U. S. 186, 188 (1954).

The decision of the court below, as it related to the question of the unreasonableness of Respondents' conduct, turned solely on its conclusion that the complaint did not allege that Respondents had arbitrarily withheld their approval of Petitioner's product. (R. 31.) Whether Respondents were arbitrary is irrelevant to the question of whether they violated the Sherman Act,[45] but if the complaint is properly construed so as to show that they were arbitrary[46] their true motives are demonstrated and the illegality of their conduct is emphasized.

Petitioner is only required to state a "claim for relief", and that claim must be construed "so as to do substantial justice". Rules of Civil Procedure for the United States District Courts, § 8(a)(f). This has been interpreted to mean that "summary dismissal of a civil case for failure to set out evidential facts can seldom be justified." *United States* v. *Employing Plasterers Assn.*, 347 U. S. 186, 189 (1954).

It is submitted that dismissal of this case by the courts below was not justified. Petitioner should be given the opportunity to prove its allegations.

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45. See p. 35 of this brief.

46. The court conceded that the complaint alleged that Respondents administered their tests "arbitrarily and capriciously" and that it alleged that the Radiant Burner is safer, more efficient and as durable as the products which Respondents have approved. It refused, however, to infer from these allegations that the tests administered to Petitioner's product where "arbitrary and capricious." (R. 31.) Such reasoning is difficult to fathom and more difficult to argue against. It is submitted, however, that a reasonable construction of the complaint would have "extracted" the allegation of arbitrariness which the court deemed essential. *Cf. Hart* v. *B. F. Keith Vaudeville Exchange,* 262 U. S. 271, 274 (1923).

CONCLUSION.

For the foregoing reasons the decision of the Court of Appeals should be reversed and the case remanded for trial on the merits.

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