IN THE

Supreme Court of the United States

OCTOBER TERM, 1960.

No. 73

RADIANT BURNERS, INC.,
Petitioner,

vs.

THE PEOPLES GAS LIGHT AND COKE COMPANY, ET AL.,
Respondents.

BRIEF FOR RESPONDENTS.

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THE GUNTHORP-WARREN PRINTING COMPANY, CHICAGO

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STATEMENT.

Petitioner, a manufacturer of gas furnaces and gas conversion burners, commenced this action by filing a complaint against the American Gas Association (AGA), an incorporated association of persons connected with the gas industry, and several of its thousands of members, including two local public utilities which distribute natural gas to consumers in the metropolitan area of Chicago, two of the interstate pipeline companies from which the utilities purchase gas, and several manufacturers of gas burning appliances, some of which are alleged to be in competition with petitioner (R. 4, 5). Petitioner's second amended

complaint (hereinafter referred to as the complaint), the sufficiency of which is now before the Court, was predicated upon an alleged violation of Section 1 of the Sherman Act[1] (R. 4). It was dismissed by the District Court as insufficient to state a claim upon which relief can be granted for the reason, among others, that it did not allege an injury to the public resulting from the alleged conspiracy among respondents[2] (R. 24). On appeal, the Court of Appeals for the Seventh Circuit affirmed (R. 33).

In brief, the relevant allegations of the complaint are as follows:

The line of commerce in which the restraint allegedly occurred is the manufacture and sale of "gas conversion burners and gas furnaces * * * for space heating of homes, commercial and industrial places of business" (R. 4). The complaint reveals that during the past 30 years this industry has undergone a rapid growth (R. 5) and that during the next 14 years a phenomenal increase in the number of units to be manufactured and sold is contemplated (R. 6). At the present time there are "hundreds of manufacturers" which are "scattered throughout at least thirty states" engaged in the relevant line of commerce (R. 5, 6).

The complaint indicates that substantially all members of the gas industry—not merely manufacturers of gas burning appliances, but local distribution companies, interstate pipeline companies and "thousands of individuals"—are members of the respondent American Gas Association (R. 4-5). AGA engages in a variety of activities of interest to the gas industry (R. 6). One of these activities is the operation of laboratories in Cleveland and Los Angeles, where tests are conducted which purport to determine the safety, durability, and utility of gas burning

1. 26 Stat. 209, as amended, 15 U. S. C. § 1.

2. Petitioner's original complaint and first amended complaint were dismissed on the same grounds (R. 1-3).

equipment. AGA affixes its seal of approval on gas equipment which it has determined has passed these tests (R. 6).

Petitioner twice submitted its product to AGA, but was unable to obtain the seal of approval (R. 9). In consequence of its inability to obtain the AGA seal of approval, petitioner allegedly encountered difficulty in marketing its product (R. 7). A variety of explanations are offered for this difficulty, including the enactment of ordinances prohibiting the installation of gas burning devices which are not approved by AGA or "equal" to appliances which have received such approval, the refusal of unspecified local distributors "to provide gas for use in plaintiff's Radiant Burner," and the promotion of AGA-approved products by local distributors (R. 7-9, 15-17).

QUESTIONS PRESENTED.

1. Whether the Sherman Act proscribes conduct which does not injure the public by depriving it of competitive conditions.

2. Whether the complaint alleges that respondents' conduct has injured the public by interfering with the competitive process.

3. Whether the complaint states a claim under the Sherman Act in the absence of allegations that respondents have caused injury to the competitive process.

4. Whether factual allegations as to the actual effect on petitioner of respondents' acts can be used to characterize those acts as *per se* unreasonable, without regard to the nature and character of the acts.

SUMMARY OF ARGUMENT.

The Sherman Act's unequivocal declaration that "Every contract, combination * * * or conspiracy, in restraint of trade or commerce * * * is declared to be illegal * * *" was tempered by this Court's holding that only "unreasonable" restraints violated the Act. The concept of unreasonableness was founded on a determination of the congressional intent to interdict only those acts which prejudice the public interest by unduly interfering with the maintenance of competitive conditions.

Petitioner, as well as *amici curiae,* seek to extend the Sherman Act beyond this traditional limitation. That Act, in their view, was designed for the protection of every trader who imagines himself placed at a competitive disadvantage. The mechanism for this effort is to characterize the opinion of the Court of Appeals in this case as having established a novel and additional requirement for Sherman Act complaints—a showing of injury to the public separate and apart from any allegations of unreasonable restraint. No such distinction was drawn by the Court of Appeals. That Court, in emphasizing the need for a showing of "such general injury to the competitive process that the public at large suffers economic harm," was only restating the traditional basis for the rule of reason.

Petitioner's effort to show the irrelevance of injury to the public depends on its ability to separate that requirement from the rule of reason. However, since the rule of reason has consistently been defined in terms of injury to the public, petitioner's attack is actually an effort to change the content of the rule of reason itself. Neither the cases applying the rule of reason nor the allocation of functions between the states and the federal government made by

Congress in enacting the Sherman Act provide any basis for taking from the rule of reason its basic requirement of a demonstration of general injury to the competitive process.

Petitioner's complaint is insufficient to state a claim, as the courts below held, precisely because it does not allege that the activities of respondents of which it complains affected or were intended to affect competitive conditions in the industry. The Government, as *amicus curiae,* urges that this defect is not fatal, contending that even if injury to the public is an element of the offense proscribed by the Sherman Act, it need not be alleged. This novel argument, rejected by case law and commentators, flatly disregards the requirement of Rule 8(a) of the Federal Rules of Civil Procedure that a complaint contain "a short and plain statement of the claim showing that the pleader is entitled to relief."

There are some types of conduct which, under *Standard Oil Co.* v. *United States,* 221 U. S. 1, by their very nature and character must be presumed to cause injury to competitive conditions. As to such conduct, no allegations of injury to the public are required. To bring itself under this doctrine of restraints *per se* unreasonable, petitioner characterizes the AGA testing program as a mere effort to maintain the *status quo* in the gas burner industry. The effect of this program, petitioner asserts, is to deny it access to the market place. Such a denial is said to be one of the types of acts *per se* unreasonable. But the manner of reasoning petitioner employs to reach this conclusion is wholly inconsistent with the rationale of *per se* restraints. To reach its conclusion, petitioner relies upon the effect on it of respondents' activities instead of upon the nature and character of those activities. To conclude that an effect, rather than the acts producing that effect, is *per se* illegal would be to strike down an endless

number of legitimate business transactions which may have the incidental effect of which petitioner complains. This Court has never adopted such a manner of reasoning. Instead, it has always determined *per se* illegality by reference to the nature and chararcter of the acts complained of. Petitioner's necessary reference to the effect of respondents' acts, rather than to their nature and character, demonstrates that no *per se* restraint is present in this case.

ARGUMENT.

I. THE SHERMAN ACT PROSCRIBES ONLY CONDUCT WHICH INJURES THE PUBLIC BY DEPRIVING IT OF COMPETITIVE CONDITIONS.

A single issue dominates this case, namely, whether the Sherman Act's prohibition of "Every contract, combination * * * or conspiracy in restraint of trade or commerce among the several States * * *" interdicts conduct which does not cause "such general injury to the competitive process that the public at large suffers economic harm." (Opinion of the Court of Appeals, R. 32.)[3] The argument of petitioner and *amici curiae* upon this issue constitutes the most serious attack upon the "rule of reason" which has occurred since its formulation in the *Standard Oil* case.[4] Far more is at stake, consequently, than the propriety of the practices allegedly engaged in by respondents. The issue of whether injury to the public constitutes an element of the offense proscribed by the Sherman Act cuts across the statute and affects not only the economic life of the nation, but the distribution of power between the states and the federal government.

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3. Petitioner expressly conceded this issue in the Court of Appeals (Appellant's Brief, p. 12), as noted in Respondents' Brief in Opposition to Petition for Certiorari (p. 3) and Parmelee Transportation Company's Motion for Leave to File a Brief as Amicus Curiae (p. 5).

"Only in exceptional cases will this Court review a question not raised in the court below." *Lawn* v. *United States*, 355 U. S. 339, 362, n. 16. Although neither petitioner nor *amici curiae* have suggested any reason why the Court should depart from this well-established rule in the present case, respondents have addressed themselves to the issue because of the Court's order granting Parmelee's motion and because the brief for the United States deals solely with this issue.

4. *Standard Oil Co.* v. *United States*, 221 U. S. 1.

Neither the petitioner nor *amici curiae,* it is true, expressly challenge the rule of reason. Their arguments have been cast in more appealing terms. Each suggests that the court below and other lower federal courts have erred by treating "public injury" as an element of the offense proscribed by the Sherman Act which is separate from and in addition to the element of "unreasonableness." Thus, each argues that the doctrine "can operate to jettison a complaint even if (i) plaintiff is injured and (ii) defendant has unreasonably restrained trade."[5] This argument involves a misconception of both the "public injury" doctrine and the "rule of reason." For nearly fifty years this Court has consistently interpreted the Sherman Act as rendering unlawful only those agreements or practices which injure the public by restraining trade in a manner inconsistent with the maintenance of competitive conditions. It is precisely this, and nothing more, which is determinative of "reasonableness." "Public injury" and the "rule of reason" are not, consequently, separate concepts but merely different formulations of the same concept.

The effort of petitioner and *amici curiae* to bring within the penal provisions of the Sherman Act conduct which does not cause "such general injury to the competitive process that the public at large suffers economic harm" bears strong resemblance to the position taken by the Government fifty years ago in the *Standard Oil* case. In that case the Government argued that the Court was bound to apply the all-encompassing language of the Sherman Act literally and that "its text leaves no room for the exercise of judgment, but simply imposes the plain duty of applying its prohibitions to every case within its literal language." 221 U. S. at 63. Although this view was

5. Petitioner's Brief, p. 43. See also Government's Brief, p. 7 and Parmelee's Motion for Leave to File a Brief, p. 4.

strongly supported by language in prior opinions, it was flatly rejected by the Court, which held that the Act must be construed and applied not literally but in "the light of reason" to

> "determine whether a particular act is embraced within the statutory classes, and whether if the act is within such classes its nature or effect causes it to be a restraint of trade within the intendment of the act." 221 U. S. at 63.

Rejection of the Government's mechanical approach to the construction of the Act and the determination to apply the Act in "the light of reason" to cases within its intendment imposed upon the Court the necessity of articulating a standard "for the purpose of determining whether the prohibitions contained in the statute had or had not in any given case been violated." 221 U. S. at 60. It is this standard which has been challenged by petitioner and *amici curiae*. For the Court held that because

> "injury to the public by the prevention of an undue restraint on, or the monopolization of trade or commerce is the foundation upon which the prohibitions of the statute rest * * *" 221 U. S. at 78,

the Act had condemned only

> "contracts or acts which were unreasonably restrictive of competitive conditions * * *" 221 U. S. at 58.

See also *United States* v. *American Tobacco Co.*, 221 U. S. 106, 179.

Two years later, Mr. Justice Holmes writing for the Court in *Nash* v. *United States*, 229 U. S. 373, 376, referred to the *Standard Oil* and *American Tobacco* cases as establishing

> "that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade."

The standard by which the courts were to be guided in applying the Sherman Act was made even more explicit in *Wilder Mfg. Co.* v. *Corn Products Co.*, 236 U. S. 165, 174, by the Court's adherence to the converse of the proposition which had been established in its prior decisions:

> "founded upon broad conceptions of public policy, the prohibitions of the statute were enacted to prevent not the mere injury to an individual * * * but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented, and hence not only the prohibitions of the statute but the remedies which it provided were co-extensive with such conceptions."

Subsequent decisions have not departed from this view. They have served only to reinforce the conclusion, now accepted as the very foundation of the Sherman Act, that it is to be applied to achieve "the serious purpose with which it was framed," protection of the public by suppression of "real interferences with the free flow of commerce among the states * * *" *Industrial Ass'n* v. *United States*, 268 U. S. 64, 84.

The purpose of the Act to protect the public by maintenance of "competitive conditions," *Standard Oil Co.* v. *United States, supra*, at 58, and its limitation to this purpose, has been emphasized in a number of decisions of this Court. Thus, in *Chicago Board of Trade* v. *United States*, 246 U. S. 231, the Court refused to condemn as unreasonable a rule of the Board of Trade requiring its members to purchase grain, during hours when the Board was not in session, at the price established at the close of the previous session. Foremost among the reasons for its decision was the fact that the rule applied

> "to only a small part of the grain shipped to Chicago and to that only during a part of the business day and does not apply at all to grain shipped to other markets [and hence] the rule had no appreciable effect on gen-

> eral market prices; nor did it materially affect the total volume of grain coming to Chicago." 246 U. S. at 240.

Similarly, in *Appalachian Coals, Inc.* v. *United States*, 288 U. S. 344, the Court reversed a judgment condemning the use of a common sales agent by competing producers partly because "the developed and potential capacity of other producers will afford effective competition." 288 U. S. at 376.

Significantly, in both *Board of Trade* and *Appalachian Coals* the challenged practices might well have produced injury to an individual trader. In neither case, however, did the Court consider this factor as relevant to its determination of whether the challenged practices were reasonable. The primary factor determinative of reasonableness, the Court made clear in each instance, was whether the restraint upon trade was inconsistent with the maintenance of competitive conditions in the industry. And, in each case the Court refused to condemn the challenged practice as unreasonable—and hence unlawful—precisely because it did not stifle competition in the industry. The restraint would not, in other words, injure the public by depriving it of the benefits of competition.

These principles were again applied in *Radovich* v. *National Football League*, 352 U. S. 445. In that case the plaintiff, a professional football player, alleged that he had been black-listed by the defendants, the National Football League, and its members and affiliates, because of his previous employment by a rival league. The black-listing of the plaintiff, the complaint alleged, was incidental to a conspiracy by the defendants to monopolize professional football. "It was part of the conspiracy to boycott the All-America Conference [the rival league by which plaintiff had been employed] and its players with a view to its destruction and thus strengthen the monopolistic position

of the National Football League." The complaint thus alleged not merely an interference with the private right of petitioner to engage in his chosen profession, but a conspiracy to monopolize the entire industry by eliminating competition from the sole existing competitor. In reversing dismissal of the complaint, the Court rejected the notion that any injury to the public other than that flowing from an unreasonable restraint of trade must be alleged. Simultaneously, it reaffirmed that the complaint must be "tested under the Sherman Act's general prohibition on unreasonable restraints of trade * * *" 352 U. S. at 453, a requirement to which it gave content by quoting the following passage from *Apex Hosiery Company* v. *Leader*, 310 U. S. 469, 493:

> "The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, *all of which had come to be regarded as a special form of public injury.*" (Emphasis by the Court.)

Consequently, *Radovich* does not, as petitioner and *amici curiae* contend, represent a departure from prior decisions and dispense with the necessity of alleging or proving injury to the public in private antitrust actions.

Each of the decisions discussed above, and numerous others,[6] establish that the Sherman Act is violated only by restraints which injure the public by depriving it of competitive conditions in any line of commerce. Injury to the public, therefore, far from being a separate requirement is the very essence of unreasonableness.

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6. E.g. *Mandeville Farms, Inc.* v. *American Crystal Sugar Co.*, 334 U. S. 219, 243, in which the court held that treble damages may be recovered under the Sherman Act only if "the statute's policy has been violated in a manner to produce the general consequences it forbids for the public and the special consequences for particular individuals * * *" which it was intended to prevent.

In *Standard Oil* the Court recognized that there were certain agreements or practices which, because of their "nature and character" created "a conclusive presumption which brought them within the statute * * *" 221 U. S. at 65. Such restraints, commonly referred to as *per se* unreasonable, differ from restraints whose illegality is dependent upon their unreasonableness precisely in that they are "illegal without elaborate inquiry as to the precise harm that they have caused * * *" *Northern Pac. R. Co.* v. *United States*, 356 U. S. 1, 5.

The recent decision of this Court in *Klor's* v. *Broadway-Hale Stores*, 359 U. S. 207, upon which petitioner and *amici curiae* rely so heavily, was based upon just this distinction between practices which are *per se* unreasonable and those whose legality depends upon whether or not they are reasonable in the circumstances. Klor's, it will be recalled, was a local retailer of household appliances which was allegedly the victim of a concerted refusal to deal by a number of manufacturers and distributors. The Court held that the complaint stated a claim under the Sherman Act even though the undisputed facts revealed that there had been no injury to the public by lessening of competition. Far from representing a departure from the rule of reason, however, the Court's decision in *Klor's* constituted a reaffirmation of the rule. The Court was careful to point out that the plaintiff had alleged a concert of action among the defendants of a type which prior decisions had branded *per se* unreasonable. Consequently, the complaint was sufficient even though the public had not been injured, for

> "As to these classes of restraints, the Court noted [in *Standard Oil*], Congress had determined its own criteria of public harm and it was not for the courts to decide whether in an individual case injury had actually occurred." 359 U. S. at 211.

In so holding, the Court merely applied, as its opinion

indicates, the concept of *per se* unreasonableness formulated in *Standard Oil* and consistently adhered to during the past half century. Significantly, however, by contrasting with the situation before it those "agreements whose validity [depends] on the surrounding circumstances," the Court reaffirmed the obligation of "the courts to decide whether in an individual case injury had actually occurred" in all cases in which an agreement or practice which is not *per se* unreasonable is involved.[7] 359 U. S. at 211.

Petitioner's reliance in this context upon the truism that "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, represents futile question-begging. The error of this argument, as the Court stated in *Standard Oil,* "lies in assuming the matter to be decided." 221 U. S. at 63. Of course the courts cannot hold that an unreasonable restraint of trade is not to be condemned because its consequences in a particular situation are beneficial. *Cf. Fashion Originators' Guild* v. *Federal Trade Comm'n.,* 312 U. S. 457. The question, however, is not whether an unreasonable restraint shall go uncondemned because it does not injure the public, but whether a restraint is unreasonable, within the meaning of the Sherman Act, if it does not "cause such general injury to the competitive process that the public at large suffers economic harm."

Similarly, petitioner's argument that the public injury doctrine should be abandoned because it is merely an expression of the courts' "personal antitrust predilections," Petitioner's Brief, pp. 45-46, evinces a misunderstanding

7. The continuing vitality of the public injury doctrine, in the non-*per se* area in which it is properly applicable, has been recognized both by the lower courts and commentators. See, e.g., *Rogers* v. *Douglas Tobacco Bd. of Trade,* 266 F. 2d 636 (5 Cir.); Handler *Recent Developments in Antitrust Law: 1958-1959,* 59 Col. L. Rev. 843 (1959).

not only of the rule of reason but, in a wider context, of the very process of judging. Unless a statute is self-defining, clarity which even petitioner does not claim for the Sherman Act, some standard must be employed by the courts to determine whether it has been violated. Beginning with its decision in *Standard Oil* this Court has repeated time and time again that the standard for determining whether or not the Sherman Act has been violated is whether the challenged practices frustrate the Congressional purpose to achieve and maintain competitive conditions in interstate commerce. This, and no more, is the rule of reason. As stated by a leading authority on the antitrust laws:

> "those restraints which have traditionally been regarded as unlawful *per se* have been so classified because of their inherent capacity to injure the public. * * * But apart from these classic instances of intrinsically anti-competitive practices, public injury—that is, a substantial interference with competition in the relevant market—must be demonstrated as a matter of fact. This is just another way of saying that the rule of reason comes into play whenever the restraint falls outside the *per se* category. Unless the public is likely to be injured through a deprivation of the fruits of a competitive order, the restraint is not unreasonable." Handler, Recent Antitrust Developments, The Record of the Ass'n of the Bar of the City of New York 426 (1958).

II. THE COMPLAINT IN FAILING TO SHOW INJURY TO THE COMPETITIVE PROCESS FAILS TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED.

Judged in accordance with the foregoing standards the complaint is insufficient as a matter of law.

In the Court of Appeals petitioner argued that its complaint adequately set forth injury to the public by alleging that the public had been deprived of a superior product.

(Appellant's Brief, pp. 14-15).[8] Viewed against this background, it is apparent that those passages in the opinion of the Court of Appeals which point out the failure of the complaint to allege "that the public has been deprived of a product of over-all superiority," represent not that Court's view of the requirements of the public injury doctrine, but a rejection of petitioner's assertion that the complaint does allege the superiority of its product over those presently available on the market.[9] Petitioner's criticism of the Court of Appeals opinion and its related effort to discredit the entire public injury doctrine because of these passages is, therefore, wholly without warrant.

The adequacy of the complaint to allege injury to the public, as petitioner now appears to recognize, is not dependent upon whether its product is superior to appliances now on the market but upon whether it alleges that the public has been deprived of competition in the relevant line of commerce.[10] Construed in the light most favorable to

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8. The structure of the complaint and the petition for a writ of certiorari also indicate that prior to its present brief, petitioner's position had been that the public was injured by an inability to obtain a superior product. See paragraph 8 of the Complaint (R. 9-14) and Petition for Writ of Certiorari, p. 14.

9. The correctness of the Court of Appeals' conclusion is apparent from an examination of paragraph 8 of the complaint (R. 9-14). Petitioner has not alleged the over-all superiority of its product; it has alleged that the Radiant Burner is better than competing products because of certain specified characteristics. Without pausing to consider the engineering soundness of the principles alleged in paragraph 8, it is obvious that a host of other factors, of which the complaint makes no mention, must be considered to determine the safety, durability and efficiency of a gas appliance. As stated by the Court of Appeals, "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" (R. 32).

10. On this point also, therefore, the petitioner urges upon this Court as a ground for reversal, an argument not presented in the Court of Appeals.

petitioner, however, the complaint is wholly devoid of allegations tending to show any diminution of "the play of * * * contending forces" which is the very essence of competition. *United States* v. *American Oil Co.*, 262 U. S. 371, 388. It alleges, at most, that respondents have been guilty of interference with petitioner's business relationships. Such conduct is perhaps a tort under state law, Prosser, Torts 745-60 (1955), but under the circumstances alleged in the complaint it is not a violation of the Sherman Act.

The complaint contains not the slightest indication that the activities of respondents of which petitioner complains have had the slightest effect on competitive conditions in the industry or that they were intended to have any such effect. Indeed, it suggests quite the contrary, for it reveals that "hundreds of manufacturers * * * scattered throughout at least thirty states" are engaged in competition for a rapidly growing market (R. 5-6). And, since the complaint does not charge that the testing program and related activities had the purpose or effect of restricting entry (other than of petitioner) into the industry, it may be assumed also that the public has not been deprived of the benefit of that stimulus to competition which results from free access to the market. There is, moreover, not even a hint in the complaint that the activities of respondents of which petitioner complains are part of a scheme to fix prices, restrict production, divide markets, or similar anti-competitive purposes. In short, the complaint charges nothing other than conduct injurious to petitioner. The public interest in the maintenance of effective competition, so far as the complaint reveals, has not been affected in the slightest degree.

Perhaps in recognition of the complaint's insufficiencies in this regard, the Government urges that even if injury to the public is an element of the offense proscribed by the

Sherman Act, it need not be alleged in the complaint. This novel argument, in total disregard of the requirement of Rule 8(a) of the Federal Rules of Civil Procedure that the complaint must contain "a short and plain statement of the claim showing that the pleader is entitled to relief," is without support in any decision of this Court and has been flatly rejected by commentators. As stated by Professor Moore (2 Moore's Federal Practice 1653) in his discussion of Rule 8(a):

> "The pleading still must state a 'cause of action' in the sense that it must show 'that the pleader is entitled to relief'; it is not enough to indicate merely that the plaintiff has a grievance, but sufficient detail must be given so that the defendant, and the court, can obtain a fair idea of what the plaintiff is complaining, and can see that there is some legal basis for recovery."

Such a requirement is of particular necessity in cases in the federal courts under their "federal question" jurisdiction. The power of the district court to consider petitioner's alleged grievance against respondents was dependent upon whether that grievance was cognizable under federal law, and in particular the Sherman Act. If the determination of whether petitioner has a claim against respondents is, as we believe, dependent upon whether there has been "general injury to the competitive process," it is inconceivable that the complaint should be considered sufficient in the absence of allegations to that effect.

Neither *Radovich*[11] nor *Employing Plasterers*,[12] upon which the Government rely to establish its argument, suggest a contrary conclusion. In *Employing Plasterers* the complaint had been dismissed by the district court, even though an effect on interstate commerce had been alleged in conclusory terms, because "there was no allegation of

11. *Radovich* v. *National Football League*, 352 U. S. 445.

12. *United States* v. *Employing Plasterers Ass'n*, 347 U. S. 186.

fact'' showing an interference with interstate commerce. Reversal was predicated upon the ground that under the Federal Rules ''allegations of fact'' as distinguished from ''conclusions of the pleader'' are unnecessary:

> ''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.'' 347 U. S. at 189.

The Court was careful to note that the complaint before it included ''every essential to show a violation of the Sherman Act.'' *Ibid.* Far from supporting the Government's argument, therefore, *Employing Plasterers* requires its rejection.

The same is true of the decision in *Radovich.* In that case, as we have noted previously, the Court, in reversing dismissal of the complaint, rejected the notion that any injury to the public other than that flowing from an unreasonable restraint of trade must be alleged. But, simultaneously, it reaffirmed that a complaint must be ''tested under the Sherman Act's general prohibition on unreasonable restraints of trade * * *'' 352 U. S. at 453.

In combination, *Employing Plasterers* and *Radovich* establish that a complaint must allege ''every essential to show a violation of the Sherman Act'' and that one of those essentials is the ''unreasonableness'' of the restraint. It is because of its failure to meet those requirements that the complaint in the instant case is insufficient.

III. PROMOTION OF THE PUBLIC INTEREST BY MAINTENANCE OF EFFECTIVE COMPETITIVE CONDITIONS AND NOT THE PROTECTION OF PRIVATE RIGHTS IS THE PURPOSE OF THE SHERMAN ACT

The underlying issue in this case is whether the Sherman Act shall continue to be applied in accordance with ''the serious purpose with which it was framed,'' *Industrial Ass'n* v. *United States,* 268 U. S. 64, 84, or whether it

shall be converted into a federal code of commercial torts. The importance of this issue is manifest. Determination of whether the Sherman Act is violated by conduct which does not cause "such general injury to the economic process that the public at large suffers economic harm" constitutes, in large measure, a determination of the respective functions of the state and federal governments with respect to the regulation of commerce.

Congress can, no doubt, in the exercise of its plenary authority over interstate commerce, provide machinery for the vindication of purely private rights. But, "due regard for the presuppositions of our embracing federal system, including the principle of diffusion of power * * *" *San Diego Unions* v. *Garmon*, 359 U. S. 236, 243, imposes upon this Court the duty of avoiding the extension of federal power into areas of traditionally local concern in the absence of a clear indication of contrary Congressional purpose. *Cf. Arroyo* v. *United States*, 359 U. S. 419.

One of the underlying functions of the rule of reason is to limit application of the Sherman Act to matters of public concern. Significantly, rejection of the literal interpretation of the Sherman Act which had been urged by the Government in the *Standard Oil* case was based in part upon the fact that such an interpretation would have "caused any act done * * * anywhere in the whole field of human activity to be illegal if in restraint of trade * * *" 221 U. S. at 60. The Act was, however, not intended to reach so far. Its purpose was to eliminate from interstate commerce those restraints of trade "which injuriously affect the interest of the United States. * * *" 21 Cong. Rec. 2456. Not the protection of individual rights, but promotion of the public welfare by maintenance of effective competitive conditions was the great end which Congress sought to achieve.

The intent of Congress to limit the federal government's

role in the protection of commerce to the elimination of restraints which have an impact upon the public is further demonstrated by the requirement in the Federal Trade Commission Act that the Commission find "that a proceeding by it * * * would be to the interest of the public" before it issues a complaint for unfair competition.[13] 38 Stat. 719, as amended, 15 U. S. C. § 45(b). In *Federal Trade Commission* v. *Klesner,* 280 U. S. 19, this Court, through Mr. Justice Brandeis, set aside an order by the Commission requiring the respondent to cease and desist from using, in connection with the operation of his business, the name of a competing business. The order was unjustified, the Court held, because even though the respondent's competitor may have been injured, there was no indication that respondent's unfair competition had produced an effect on the market injurious to the public. The Court noted that action by the Commission would be justified if "the unfair method employed" injured the public by threatening "the existence of present or potential competition," but "the mere fact that it is to the interest of the community that private rights shall be respected is not enough to support a finding of public interest." 280 U. S. at 28. The public interest in the vindication of private rights is adequately protected by state law.

The Sherman Act, of course, differs from the Federal Trade Commission Act in providing a private remedy, but the difference is one of procedure rather than substance, for the private enforcement provisions of the former are merely "the means chosen" to "enlist 'the business public * * * as allies of the Government in enforcing the anti-

13. In *Klor's,* at p. 211, n. 4, the Court observed that "the Sherman Act should be contrasted with [this requirement] of the Federal Trade Commission Act * * *" The context in which the observation occurs clearly indicates that the required contrast is with agreements or practices which are *per se* unreasonable under the Sherman Act.

trust laws' * * *" Report of the Attorney General's National Committee to Study the Antitrust Laws 378 (1955). Private actions, as the Government points out in its brief (p. 4) are merely a "supplement to governmental enforcement of the statute." The procedural variations in the two statutes cannot, however, obscure the fact that the "rule of reason" and the "public interest" requirement of the Federal Trade Commission Act have traditionally served the same purpose, the limitation of the two statutes to situations where the public is adversely affected. The protection which each affords to private persons is merely incidental to this central purpose. *Federal Trade Commission* v. *Klesner*, 280 U. S. 19, 27; *Wilder Mfg. Co.* v. *Corn Products Co.*, 236 U. S. 165, 174.

These principles have been consistently adhered to by this Court for nearly a half-century. To depart from them now would not only cast into oblivion an enormous bulk of reported decisions but, by making of the Sherman Act merely another statute for the vindication of private rights, materially alter the distribution of power intended by Congress between the states and the federal government. Almost every commercial tort may be said to involve some "restraint" upon commerce. Commercial bribery, disparagement of a competitor's product, enticement of a competitor's employees and numerous other acts may divert business from one trader to another. The resulting injury is not to the public but to a single individual. Heretofore, it is the states which have provided remedies for such wrongs and, even more important, have determined whether or not the challenged conduct is wrongful. In the absence of Congressional determination that federal regulation of such matters is necessary in the public interest, due regard for *stare decisis* and our federal system requires that this Court reject petitioner's effort to bring them under the Sherman Act.

IV. THE COMPLAINT DOES NOT STATE A PER SE VIOLATION OF THE SHERMAN ACT.

Faced with its failure to show "general injury to the competitive process," petitioner has attempted to reinterpret the *per se* doctrine to fit its complaint. If it could accomplish this aim, the complaint would state a cause of action, since under *Klors* v. *Broadway-Hale Stores*, 359 U. S. 207, injury to the public is conclusively presumed once a *per se* violation of the Sherman Act is shown.

To show the similarity of this cause with *Klors*, petitioner analogizes the refusal to grant the seal of approval to the refusal to sell goods struck down in *Klors*. We submit that the analogy simply does not fit. Goods are the things of commercial competition; without them commerce does not exist. The seal of approval, however, is not a thing of commerce. Unless more is shown, a court could not find an effect, much less a restraint, on competition from the mere inability to obtain the seal. As petitioner seems to realize, it is only by alleging that denial of the seal affected its competitive status that it can state any kind of Sherman Act violation. Once reliance is placed upon effect, however, it is apparent that a *per se* restraint is not stated.[14]

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14. Petitioner also argues that historically the rule of reason was never intended to apply to a restraint "which has the purpose and effect of excluding rivals * * *" and "is intended only to maintain the status quo * * *" (Petitioner's Brief, pp. 29-30.) Therefore, petitioner urges, this must be a *per se* restraint. But if proof of actual purpose or intent is a means of establishing a *per se* offense, proof of a contrary purpose or intent would be a means of showing the absence of a *per se* restraint. Neither is permitted in an actual *per se* case. The very meaning of *per se* is that illegality follows without regard to the reasons why the act was performed.

Petitioner's assertion of an intent only to maintain the status quo would thus justify respondents' proof that satisfactory performance of gas appliances is important to all segments of the gas industry since public reaction to appliance failures tends to reduce the mar-

The difficulty with petitioner's argument is that it attempts to shift the *per se* doctrine away from its traditional rationale. Application of the *per se* test has always depended on the *nature* of the restraint, not on its *effects*. Once an analysis of effect on competition is made, the case becomes, almost by definition, a non-*per se* case. *United States* v. *Trenton Potteries*, 273 U. S. 392, for example, held a price fixing agreement *per se* unreasonable because the Court, as a matter of logic and law, was able to say that price fixing comprised an unreasonable restraint. This conclusive presumption was imposed even though the defendants offered to prove that, in fact, no effect on competition had occurred. 273 U. S. at 397. In so holding, the court was applying the reasoning of *Standard Oil* v. *United States*, 221 U. S. 58, 65:

> "That is to say, the cases but decided that the *nature and character of the contracts, creating as they did a conclusive presumption which brought them within the statute*, such result was not to be disregarded by the substitution of a judicial appreciation of what the law ought to be * * *" (Emphasis added.)

Petitioner seeks to shift this basic logic of the *per se* cases, and to make *per se* unreasonable any arrangement, irrespective of its "nature and character," which has the effect of foreclosing a trader from any substantial market. The crux of petitioner's argument is a quotation from *International Salt Co.* v. *United States*, 332 U. S. 392, 396: "It is unreasonable, *per se*, to foreclose competitors from any substantial market." Respondents cannot agree that *International Salt* represents a shift from prior decisions defining *per se* restraints. The case concerned Interna-

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ket both for gas appliances and for the fuel itself. Self-imposed restrictions as to manufacturing standards and materials have thus played an important part in the growth in public acceptance of gas fueled appliances. We agree with petitioner that respondents' actual purpose and intent is relevant to the case. But it is relevant on the issue of reasonableness, not the issue of *per se* illegality.

tional Salt Company's practice of forcing lessors of its patented salt dispensing machines to purchase from it all of the salt to be used in the machines. This tying together of separate products, attacked under both Section 1 of the Sherman Act and Section 3 of the Clayton Act, was found *per se* unreasonable. But the nature of the restraint involved, the tying of salt to its patented salt dispensing machines, and not the effect of foreclosure, was the basis of decision in *International Salt.* As the Court has since said, in *Standard Oil Co.* v. *United States,* 337 U. S. 293, 306:

> "In the usual case only the prospect of reducing competition would persuade a seller to adopt such a contract and only his control of the supply of the tying device, whether conferred by patent monopoly or otherwise obtained, could induce a buyer to enter one."

The dicta in *International Salt* reveals the extent to which the nature, rather than the effect, of the restraint controlled the decision. The Court stated that a lease provision predicated on legitimate standards of quality for salt to be used in the machines would not have been illegal. The vice of International Salt Company's clause was that competitors were "shut out of the market by a provision that limits it, not in terms of quality, but in terms of a particular vendor. Rules for use of leased machinery must not be disguised restraints of free competition, though they may set reasonable standards which all suppliers must meet." 332 U. S. at 398. Rules relating to quality, of course, would still have been restrictive from the viewpoint of any seller of salt who did not meet them. But this kind of foreclosure, the Court indicated, would not have been *per se* illegal. The difference can only be justified by reference to the "nature and character" of the acts involved.

That *International Salt* does not stand for the bald prop-

osition that foreclosure from the market leads to *per se* illegality was firmly established in *United States* v. *Columbia Steel Co.*, 334 U. S. 495. The United States there sought to enjoin United States Steel Corporation's purchase of Consolidated Steel Corporation. Consolidated Steel engaged in structural and plate fabrication; it purchased from others the rolled steel used in its fabrication operations. United States Steel was a major seller of rolled steel. The Government's contention was that the purchase of Consolidated would foreclose all competitors of United States Steel from supplying any of Consolidated's requirements for rolled steel. "Such an arrangement, it is claimed, excludes other producers of rolled steel products from the Consolidated market and constitutes an illegal restraint *per se* to which the rule of reason is inapplicable." *United States* v. *Columbia Steel Co.*, 334 U. S. 495, 519. The Government's contention was rejected by the Court:

> "The legality of the acquisition by United States Steel * * * depends not merely upon the fact of that acquired control but also upon many other factors. Exclusive dealings for rolled steel between Consolidated and United States Steel, brought about by vertical integration or otherwise, are not illegal, at any rate until the effect of such control is to unreasonably restrict the opportunities of competitors to market their product." 334 U. S. at 524.

The fact of foreclosure thus was not sufficient to prevent application of the rule of reason.

Nor can *per se* illegality be established by petitioner's reference to *Associated Press* v. *United States*, 326 U. S. 1. That case held AP's By-Laws, which effectively granted any member of the AP the right to bar a competitor from membership in AP, violative of Section 1 of the Sherman Act. Membership in AP was a prerequisite to obtaining

any of the news distributed by it, and to obtaining news directly from any of AP's twelve hundred members.

Factually, the case bears no resemblance to the case at bar. AP's By-Laws were specifically designed to discriminate against potential competitors of present members. Applicants for membership who would not be competitive with any present member could be elected by the Board of Directors. But the Board had no power at all if the applicant would be competitive with an old member. Unless the old member consented, such an applicant was subject to an onerous assessment of dues and had to obtain the approval of a majority of all AP members. This virtual veto power, vested only in competitors of an applicant, was the crucial feature of the arrangement. The District Court's decree, specifically approved by the Court, dealt principally with this point. It provided:

> "that nothing in the decree should prevent the adoption by the Associated Press of new or amended By-Laws 'which will restrict admission, provided that members in the same city and in the same "field" (morning, evening or Sunday), as an applicant * * * shall not have power to impose, or dispense with, any conditions upon his admission * * *' " 326 U. S. at 21.

No similar power, obviously intended to restrict competition, is exercised by AGA or any of its members.

Associated Press v. *United States* is also inapposite as a matter of legal analysis. The Court's opinion does not consider whether the restraint involved was *per se* illegal. The Court had the benefit of, and utilized, specific findings of the District Court as to the market position of AP and its members, 326 U. S. at p. 9, n. 4; p. 11, n. 7; the specific anti-competitive intent of the By-Law provisions, 326 U. S. at p. 11, n. 7; and the effects on competition of a denial of membership, 326 U. S. at p. 12, n. 8. These findings as to the unreasonable effects on commerce of the restraint

far exceed those required in a *per se* case. The case thus cannot be used to establish *per se* illegality here.

The Court in *Associated Press* could have found that the contractual inability of AP's twelve hundred members to sell their own spot news to any non-member amounted to a concerted refusal to sell, and was thus *per se* illegal. That refusal was not, however, the primary thrust of the restraint: the ability to purchase the consolidated AP report was much more important to potential competitors than the ability to purchase spot news from individual newspapers. In voiding restrictions on access to that report, the Court chose to deal with a more complex issue than a simple refusal to sell and to apply an analysis more comprehensive than that required in a simple refusal to sell case.

Petitioner's complaint similarly contains allegations concerning the refusal to deal with those who purchase Radiant Burners (R. 7). That refusal is not, however, the focus of petitioner's grievance. Radiant Burners' alleged difficulties have a broader scope; they result from its initial inability to secure the AGA seal of approval. Thus here, as in *Associated Press*, the economic activity with which the complaint is really concerned is the whole complex of allegations contained in the complaint, rather than any of its allegations taken separately.

We conclude then that petitioner cannot establish that the difficulty it allegedly faces in marketing its product amounts to a *per se* violation of Section 1 of the Sherman Act. Petitioner's concept of market foreclosure is alien to the very definition of a *per se* restraint. Market foreclosure results from a wide variety of acts, ranging from a simple contract to sell goods to the complete monopoliza-

tion of a market. To change from emphasis on the nature of the act to emphasis on its effect would be to expand the *per se* doctrine to cover every act within the scope of Section 1 of the Sherman Act.

CONCLUSION.

For the reasons stated above, the judgment of the Court of Appeals should be affirmed.[15]

Respectfully submitted,

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15. In the lower courts, the manufacturer and pipeline company defendants urged dismissal on the further ground that the only allegation connecting them with the alleged offense was that they were members of AGA, and that this alone, without any allegations that they had engaged in or had knowledge of illegal acts, was insufficient to support a claim against them under Section 1 of the Sherman Act. The Conrt of Appeals, in affirming dismissal of the complaint for failure to show injury to the public, did not find it necessary to reach this alternative ground. Consequently, if this Court reverses the decision of the Court of Appeals, the cause should be remanded to that court for disposition of the alternative ground.