Federal Trade Commission v. Superior Court Trial Lawyers Association

Supreme Court of the United States, 1990.
493 U.S. 411, 110 S.Ct. 768, 107 L.Ed.2d 851.

[In 1983, a group of lawyers in the District of Columbia who were members of the Superior Court Trial Lawyers Association (SCTLA) agreed not to accept appointment under the District of Columbia Criminal Justice Act to represent indigent criminal defendants in the Superior Court unless the D.C. city government agreed to increase their compensation. There was widespread agreement that compensation to court-appointed lawyers was low, but the Mayor insisted that no money was available for a fee increase.

The lawyers' refusal to accept appointment was well publicized and garnered public support for a pay raise. Within ten days, city officials agreed to come to the bargaining table, and eventually the Mayor and the SCTLA lawyers negotiated and eventually agreed to a modest fee increase.

The FTC, however, proceeding under section 5 of the FTC Act, filed a complaint against SCTLA and four of its officers for conspiring to fix prices and to conduct a boycott. The Commission eventually found a *per se* violation. On appeal, the D.C. Circuit rejected SCTLA's argument that the boycott was justified because it was designed to improve the quality of representation for indigent defendants. The Court noted, however, that boycotts historically have been used as a dramatic means of expression and that the lawyers were conveying a political message deserving of some First Amendment protection. The Court concluded that such boycotts would not violate the antitrust laws unless there was a serious risk of competitive harm. That risk, in turn, could not be assessed without a determination whether respondents possessed "significant market power." Such a finding was impossible under a *per se* rule, and accordingly, the Court of Appeals remanded the case for further proceedings on that point.

The Supreme Court reinstated the Commission's finding of a violation. It concluded that the horizontal arrangement was a "naked restraint," constricting supply in order to raise price. It distinguished *Noerr* (*infra* p. 390) on the ground that in *Noerr* it was the desired legislation that would have created the restraint on competition, while in *SCTLA*, the *means* by which respondents sought favorable legislation was itself the source of the competitive injury.]

■ STEVENS, J.... The lawyers' association argues that if its conduct would otherwise be prohibited by the Sherman Act and the Federal Trade Act, it is nonetheless protected by the First Amendment rights recognized in *NAACP v. Claiborne Hardware*, 458 U.S. 886 (1982). That case arose after black citizens boycotted white merchants in Claiborne County, Miss. The white merchants sued under state law to recover losses from the boycott. We found that the "right of the States to regulate economic activity could not justify a complete prohibition against a nonviolent, politically motivated boycott designed to force governmental and economic change and to effectuate rights guaranteed by the Constitution itself." We accordingly held

that "the nonviolent elements of petitioners' activities are entitled to the protection of the First Amendment."

The lawyers' association contends that because it, like the boycotters in *Claiborne Hardware,* sought to vindicate constitutional rights, it should enjoy a similar First Amendment protection....

The activity that the FTC order prohibits is a concerted refusal by CJA lawyers to accept any further assignments until they receive an increase in their compensation; the undenied objective of their boycott was an economic advantage for those who agreed to participate. It is true that the *Claiborne Hardware* case also involved a boycott. That boycott, however, differs in a decisive respect. Those who joined the *Claiborne Hardware* boycott sought no special advantage for themselves. They were black citizens in Port Gibson, Mississippi, who had been the victims of political, social, and economic discrimination for many years. They sought only the equal respect and equal treatment to which they were constitutionally entitled. They struggled "to change a social order that had consistently treated them as second class citizens." 458 U.S., at 912. As we observed, the campaign was not intended "to destroy legitimate competition." *Id.*, at 914. Equality and freedom are preconditions of the free market, and not commodities to be haggled over within it.

The same cannot be said of attorney's fees. As we recently pointed out, our reasoning in *Claiborne Hardware* is not applicable to a boycott conducted by business competitors who "stand to profit financially from a lessening of competition in the boycotted market." *Allied Tube Corp. v. Indian Head*....

The Court of Appeals, however, crafted a new exception to the *per se* rules, and it is this exception which provoked the FTC's petition to this Court. The Court of Appeals derived its exception from *United States v. O'Brien*, 391 U.S. 367 (1968). In that case O'Brien had burned his Selective Service registration certificate on the steps of the South Boston Courthouse. He did so before a sizable crowd and with the purpose of advocating his antiwar beliefs. We affirmed his conviction. We held that the governmental interest in regulating the "nonspeech element" of his conduct adequately justified the incidental restriction on First Amendment freedoms. Specifically, we concluded that the statute's incidental restriction on O'Brien's freedom of expression was no greater than necessary to further the Government's interest in requiring registrants to have valid certificates continually available.

However, the Court of Appeals held that, in light of *O'Brien,* the expressive component of respondents' boycott compelled courts to apply the antitrust laws "prudently and with sensitivity," 856 F.2d, at 233–234, with a "special solicitude for the First Amendment rights" of respondents. The Court of Appeals concluded that the governmental interest in prohibiting boycotts is not sufficient to justify a restriction on the communicative element of the boycott unless the FTC can prove, and not merely presume, that the boycotters have market power. Because the Court of Appeals imposed this special requirement upon the Government, it ruled that *per se*

antitrust analysis was inapplicable to boycotts having an expressive component.

There are at least two critical flaws in the Court of Appeals' antitrust analysis: it exaggerates the significance of the expressive component in respondents' boycott and it denigrates the importance of the rule of law that respondents violated. Implicit in the conclusion of the Court of Appeals are unstated assumptions that most economic boycotts do not have an expressive component, and that the categorical prohibitions against price fixing and boycotts are merely rules of "administrative convenience" that do not serve any substantial governmental interest unless the price-fixing competitors actually possess market power.

It would not much matter to the outcome of this case if these flawed assumptions were sound. *O'Brien* would offer respondents no protection even if their boycott were uniquely expressive and even if the purpose of the *per se* rules were purely that of administrative efficiency. We have recognized that the Government's interest in adhering to a uniform rule may sometimes satisfy the *O'Brien* test even if making an exception to the rule in a particular case might cause no serious damage. *United States v. Albertini*, 472 U.S. 675, 688 (1985) ("The First Amendment does not bar application of a neutral regulation that incidentally burdens speech merely because a party contends that allowing an exception in the particular case will not threaten important government interests"). The administrative efficiency interests in antitrust regulation are unusually compelling. The *per se* rules avoid "the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable." *Northern Pac. R. Co. v. United States*, 356 U.S. 1, 5 (1958). If small parties "were allowed to prove lack of market power, all parties would have that right, thus introducing the enormous complexities of market definition into every price-fixing case." R. Bork, The Antitrust Paradox 269 (1978). For these reasons, it is at least possible that the *Claiborne Hardware* doctrine, which itself rests in part upon *O'Brien*, exhausts *O'Brien's* application to the antitrust statutes.

In any event, however, we cannot accept the Court of Appeals' characterization of this boycott or the antitrust laws. Every concerted refusal to do business with a potential customer or supplier has an expressive component. At one level, the competitors must exchange their views about their objectives and the means of obtaining them. The most blatant, naked price-fixing agreement is a product of communication, but that is surely not a reason for viewing it with special solicitude. At another level, after the terms of the boycotters' demands have been agreed upon, they must be communicated to its target: "we will not do business until you do what we ask." That expressive component of the boycott conducted by these respondents is surely not unique. On the contrary, it is the hallmark of every effective boycott.

At a third level, the boycotters may communicate with third parties to enlist public support for their objectives; to the extent that the boycott is newsworthy, it will facilitate the expression of the boycotters' ideas. But this level of expression is not an element of the boycott. Publicity may be generated by any other activity that is sufficiently newsworthy. Some activities, including the boycott here, may be newsworthy precisely for the reasons that they are prohibited: the harms they produce are matters of public concern. Certainly that is no reason for removing the prohibition.

In sum, there is thus nothing unique about the "expressive component" of respondents' boycott. A rule that requires courts to apply the antitrust laws "prudently and with sensitivity" whenever an economic boycott has an "expressive component" would create a gaping hole in the fabric of those laws. Respondents' boycott thus has no special characteristics meriting an exemption from the *per se* rules of antitrust law.

Equally important is the second error implicit in respondents' claim to immunity from the *per se* rules. In its opinion, the Court of Appeals assumed that the antitrust laws permit, but do not require, the condemnation of price fixing and boycotts without proof of market power. The opinion further assumed that the *per se* rule prohibiting such activity "is only a rule of 'administrative convenience and efficiency,' not a statutory command." 856 F.2d, at 249. This statement contains two errors. The *per se* rules are, of course, the product of judicial interpretations of the Sherman Act, but the rules nevertheless have the same force and effect as any other statutory commands. Moreover, while the *per se* rule against price fixing and boycotts is indeed justified in part by "administrative convenience," the Court of Appeals erred in describing the prohibition as justified only by such concerns. The *per se* rules also reflect a long-standing judgment that the prohibited practices by their nature have "a substantial potential for impact on competition." *Jefferson Parish Hospital District*, 466 U.S., at 16....

The *per se* rules in antitrust law serve purposes analogous to *per se* restrictions upon, for example, stunt flying in congested areas or speeding. Laws prohibiting stunt flying or setting speed limits are justified by the State's interest in protecting human life and property. Perhaps most violations of such rules actually cause no harm. No doubt many experienced drivers and pilots can operate much more safely, even at prohibited speeds, than the average citizen.

If the especially skilled drivers and pilots were to paint messages on their cars, or attach streamers to their planes, their conduct would have an expressive component. High speeds and unusual maneuvers would help to draw attention to their messages. Yet the laws may nonetheless be enforced against these skilled persons without proof that their conduct was actually harmful or dangerous.

In part, the justification for these *per se* rules is rooted in administrative convenience. They are also supported, however, by the observation that every speeder and every stunt pilot poses some threat to the community. An unpredictable event may overwhelm the skills of the best driver or pilot,

even if the proposed course of action was entirely prudent when initiated. A bad driver going slowly may be more dangerous than a good driver going quickly, but a good driver who obeys the law is safer still.

So it is with boycotts and price fixing. Every such horizontal arrangement among competitors poses some threat to the free market. A small participant in the market is, obviously, less likely to cause persistent damage than a large participant. Other participants in the market may act quickly and effectively to take the small participant's place. For reasons including market inertia and information failures, however, a small conspirator may be able to impede competition over some period of time. Given an appropriate set of circumstances and some luck, the period can be long enough to inflict real injury upon particular consumers or competitors....

Of course, some boycotts and some price-fixing agreements are more pernicious than others; some are only partly successful, and some may only succeed when they are buttressed by other causative factors, such as political influence. But an assumption that, absent proof of market power, the boycott disclosed by this record was totally harmless—when overwhelming testimony demonstrated that it almost produced a crisis in the administration of criminal justice in the District and when it achieved its economic goal—is flatly inconsistent with the clear course of our antitrust jurisprudence. Conspirators need not achieve the dimensions of a monopoly, or even a degree of market power any greater than that already disclosed by this record, to warrant condemnation under the antitrust laws.

The judgment of the Court of Appeals is accordingly reversed insofar as that court held the *per se* rules inapplicable to the lawyers' boycott.[12] ...

■ [BRENNAN, J., joined by BLACKMUN and MARSHALL, JJ., dissented on grounds that an expressive boycott—*i.e.*, one that appears to operate on a political rather than economic level—ought not to be condemned under a *per se* rule. Historically, such boycotts have been essential to the "poorly financed causes of little people," who often cannot use established organizational techniques to advance their political interests.]

NOTE ON HARTFORD FIRE INSURANCE CO. v. CALIFORNIA

In 1993, the Supreme Court decided Hartford Fire Insurance Co. v. California, 509 U.S. 764 (1993). Plaintiffs (for the most part, state attorneys general) alleged that certain domestic and foreign insurance companies and re-insurance companies had violated the Sherman Act by conspiring to change commercial general insurance policies from "occurrence based" policies to "claims-made" policies and to cease underwriting certain environmental risks. At the center of their claims was an

12. In response to [the dissent], and particularly to its observation that some concerted arrangements that might be characterized as "group boycotts" may not merit *per se* condemnation, we emphasize that this case involves not only a boycott but also a horizontal price-fixing arrangement—a type of conspiracy that has been consistently analyzed as a *per se* violation for many decades....

allegation that the domestic insurers, acting with the foreign re-insurers, had agreed to boycott any company that did not abide by the new rules. Justice Scalia, writing for a five-person majority on this aspect of the case, concluded that the term "boycott" should not be so broadly construed. This was important because of the McCarran–Ferguson Act, 15 U.S.C. § 1011 *et seq.*, which exempts insurance companies from the antitrust laws to the extent that they are regulated by the states (and in this instance, arguably, by foreign governments). An exception to that exemption exists, under section 3(b) of the McCarran–Ferguson Act, 15 U.S.C. § 1013(b), for boycotts. Justice Scalia thought it important to distinguish between a "conditional boycott and a concerted agreement to seek particular terms in particular transactions." 509 U.S. at 801–02. Only the former qualified as a true boycott. Here, he wrote, it was "obviously not a 'boycott' for the reinsurers to 'refus[e] to reinsure coverages written on the ISO CGL forms until the desired changes were made,' . . . because the terms of the primary coverages are central elements of the reinsurance contract—they are *what* is reinsured." *Id.* at 806 (emphasis in original). Notwithstanding this narrow definition of boycott, the Court went on to find that there were sufficient allegations of a true conditional boycott in the complaints to survive a motion to dismiss. For example, there was an allegation that primary insurers who wrote insurance on disfavored forms would be refused all reinsurance, even for risks written on other forms. *Id.* at 810.

The dissenters, led by Justice Souter, believed that the majority had adopted an overly narrow definition of the term "boycott" as it was used in section 3(b) of the McCarran–Ferguson Act. They saw no reason to confine the concept of "boycott" to refusals to deal that are unrelated or collateral to the objective sought by those refusing to deal. Justice Souter also pointed out certain common ground between the majority and the dissenters: (1) only those refusals to deal involving the coordinated action of multiple actors fall within the scope of § 3(b); (2) a § 3(b) boycott need not involve an absolute refusal to deal; (3) such a boycott need not entail unequal treatment of the targets of the boycott and its instigators, and (4) concerted activity, while a necessary element of a § 3(b) boycott, is not by itself sufficient. The dissenters' view would have preserved far more of the complaint for further proceedings.

PROBLEM 6

INVESTIGATION AGENCY FOR KANSAS CITY BANKS

In Kansas City, all the local banks decided to eliminate duplication of effort and expense by setting up a common agency to investigate local applicants for loans to determine if they are creditworthy. Upon the request of a bank, the joint agency investigated any person or concern and circulated to all banks a resume of information supporting its conclusions as to whether the party involved was a good or bad risk under general criteria established by the local bankers' association.

The plaintiff owned a tavern in Kansas City and applied for a loan. The joint agency, however, determined that plaintiff should be disqualified because its tavern was located in a "crime-ridden" section of town and was therefore subject to constant risk of robbery. Plaintiff claimed that the refusal was racially motivated, since almost all of the establishments in the part of town designated as "crime-ridden" were patronized by African-Americans. Attempts to obtain loans from banks in nearby cities proved unavailing when the plaintiff explained why it had been refused by the Kansas City banks.