

PROVING INJURY TO COMPETITION IN PRIVATE ANTITRUST SUITS PROVOKED BY CONCERTED REFUSALS TO DEAL*

To win a private antitrust suit, the individual competitor who brings one must demonstrate that his injury was occasioned by an injury to competition.¹ A similar rule applies when the Government sues on account of harm to a competitor,² but injury to competition is then more readily established, for federal agencies ordinarily contest only those practices which are felt throughout a given market.³ A private claimant, on the other hand, is tempted to assert that an injury to him is of itself sufficiently harmful to competition to violate the antitrust statutes; should the assertion stand, he would come within section 4 of the Clayton Act, which provides that "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" may recover treble damages from the person violating the laws.⁴ The

*Klor's, Inc. v. Broadway-Hale Stores, Inc., 255 F.2d 214 (9th Cir. 1958), *affirming* 1956 Trade Cas. 72048 (N.D. Cal.), *rev'd*, 27 U.S.L. WEEK 4253 (U.S. April 6, 1959) (see Editors' Note p. 963 *infra*).

1. Compare *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 242-43 (1948) (plaintiff successful), *with Apex Hosiery Co. v. Leader*, 310 U.S. 469, 510-11 (1940) (plaintiff unsuccessful).

2. See *FTC v. Gratz*, 253 U.S. 421 (1920).

3. See *ATT'Y GEN. NAT'L COMM. ANTITRUST REP.* 349 (1955); Argument of United States as amicus curiae, *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 27 U.S.L. WEEK 3240 (1959) (U.S. 1958 Term, No. 76).

4. 38 Stat. 731 (1914), 15 U.S.C. § 15 (1952). See also Clayton Act § 16, 38 Stat. 737 (1914), 15 U.S.C. § 26 (1952) (providing for private injunctive relief).

The "antitrust laws" referred to in § 4 of the Clayton Act include the Sherman Act § 1, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (Supp. V, 1958), which makes illegal "every contract, combination . . . or conspiracy, in restraint of trade"; Sherman Act § 2, 26 Stat. 209 (1890), as amended, 15 U.S.C. § 2 (Supp. V, 1958), outlawing monopolies, attempts to monopolize, and conspiracies and combinations to monopolize; Clayton Act § 2, 38 Stat. 730 (1914), 15 U.S.C. § 13 (1952), forbidding price discrimination; and Clayton Act § 3, 38 Stat. 731 (1914), 15 U.S.C. § 14 (1952), forbidding sales or contracts conditioned upon an agreement not to use or deal in the "commodities of a competitor . . . where the effect of such lease, sale, or contract . . . may be to substantially lessen competition" Section 5 of the Federal Trade Commission Act, 38 Stat. 719 (1914), 15 U.S.C. § 45 (1952), condemning "unfair methods of competition," may not be enforced by a suit under § 4 of the Clayton Act. *Samson Crane Co. v. Union Nat. Sales, Inc.*, 87 F. Supp. 218 (D. Mass. 1949), *aff'd per curiam*, 180 F.2d 896 (1st Cir. 1950).

"The statute [§ 4 of the Clayton Act] does not confine its protection to consumers, or to purchasers, or to competitors, or to sellers. . . . The Act is comprehensive in its terms and coverage, protecting all who are made victims of the forbidden practices by whomever they may be perpetrated." *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 236 (1948).

See generally Loevinger, *Private Action—The Strongest Pillar of Antitrust*, 3 ANTITRUST BULL. 167 (1958); Comment, 46 CALIF. L. REV. 447 (1958). For the view that the granting of multiple damages should be made discretionary with the district courts, see *ATT'Y GEN. NAT'L COMM. ANTITRUST REP.* 378-79 (1955).

courts, however, have long been hostile to claims which would turn this section into a vehicle for redressing tortious business practices.⁵ At one time, a section 4 complaint was considered defective if it failed to allege "public injury" in addition to private loss.⁶ Although this formalism is no longer a prerequisite to a treble-damage suit, the courts continue to view antitrust legislation as designed exclusively to protect markets from "undue limitations on competitive conditions"—and not as a safeguard against individual, economic loss.⁷ Private recovery follows only upon a showing that damage to the plaintiff proximately resulted from such statutory infractions as price-fixing,⁸ tying agreements,⁹ and unreasonable restrictions on market entry.¹⁰ Also open to attack are attempts at monopolization¹¹ and restraints tending to modify the competitive characteristics of a market.¹²

One business practice which frequently provokes private antitrust action is denying a trader access to his customers or suppliers. When such denial results from the independent, unilateral action of individual customers or sup-

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5. The main purpose of those laws was to protect the public from monopolies and restraint of trade, and the private right of action for treble damages was incidental and subordinate to that main purpose. . . .

Public injury alone justifying the threefold increase in damages and being an indispensable constituent of a claim for violation of the antitrust laws, a general allegation of such injury is not sufficient.

Kinnear-Weed Corp. v. Humble Oil & Ref. Co., 214 F.2d 891, 893-94 (5th Cir. 1954), *cert. denied*, 348 U.S. 912 (1955).

A trader who fails in his attempt to state an antitrust violation may still be able to maintain a tort action. See *Mackey v. Sears, Roebuck & Co.*, 237 F.2d 869 (7th Cir. 1956), *petition for cert. dismissed per stipulation*, 355 U.S. 865 (1957). *But see* note 75 *infra*.

For a broader concept of the role of private suits, see ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 378 (1955); Argument of United States as amicus curiae, *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 27 U.S.L. WEEK 3240 (1959) (U.S. 1958 Term, No. 76).

6. See *Ruddy Brook Clothes, Inc. v. British & Foreign Marine Ins. Co.*, 195 F.2d 86, 89 (7th Cir.), *cert. denied*, 344 U.S. 816 (1952) ("There is no allegation . . . that the public has been damaged or injured . . ."); *Feddersen Motors, Inc. v. Ward*, 180 F.2d 519 (10th Cir. 1950); *Abouaf v. J. D. & A. B. Spreckles Co.*, 26 F. Supp. 830 (N.D. Cal. 1939).

7. *Radovich v. National Football League*, 352 U.S. 445, 453 (1957), *reversing* 231 F.2d 620 (9th Cir. 1956) ("The test as to sufficiency . . . is whether 'the claim is wholly frivolous.'"); *New Home Appliance Center, Inc. v. Thompson*, 250 F.2d 881 (10th Cir. 1957); see *Nagler v. Admiral Corp.*, 248 F.2d 319 (2d Cir. 1957); *Encore Stores, Inc. v. May Dep't Stores Co.*, 164 F. Supp. 82 (S.D. Cal. 1958).

8. *E.g.*, *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219 (1948).

9. *E.g.*, *Emich Motors Corp. v. General Motors Corp.*, 340 U.S. 558 (1951).

10. *E.g.*, *American Fed'n of Tobacco Growers, Inc. v. Neal*, 183 F.2d 869 (4th Cir. 1950).

11. *E.g.*, *Gamco, Inc. v. Providence Fruit & Produce Bldg.*, 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952).

12. *E.g.*, *Standard Fashion Co. v. Magrane-Houston Co.*, 258 U.S. 346 (1922). See generally ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 5-42, 115-223 (1955).

pliers, the antitrust laws generally countenance the consequences on the theory that a single entrepreneur, acting alone, may fashion his business relationships as he sees fit.¹³ When, however, a refusal to deal is undertaken by a group of competitors acting in concert to coerce a trader, the courts are quick to outlaw the refusal.¹⁴ Supreme Court dictum has categorized boycotts of this type as

13. See, e.g., *Great Atl. & Pac. Tea Co. v. Cream of Wheat Co.*, 227 Fed. 46 (2d Cir. 1915); *Arthur v. Kraft-Phenix Cheese Corp.*, 26 F. Supp. 824 (D. Md. 1937), *id.* at 826 (D. Md. 1938). See generally *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919) ("[T]he act does not restrict the long recognized right of [a] trader . . . freely to exercise his own independent discretion as to parties with whom he will deal. And, of course, he may announce in advance the circumstances under which he will refuse to sell."); *United States v. Park, Davis & Co.*, 164 F. Supp. 827, 829 (D.D.C. 1958), *prob. juris. noted*, 27 U.S.L. WEEK 3226 (U.S. Feb. 23, 1959) (Defendant manufacturer suggested resale prices and requested wholesalers not to sell to other than licensed druggists: "Clearly, the actions of defendant were properly unilateral and sanctioned by law [The *Colgate*] doctrine continues to be law."); HALE & HALE, *MARKET POWER: SIZE AND SHAPE UNDER THE SHERMAN ACT* §§ 2.20-21 (1958); Seitz, *Exclusive Arrangements and Refusal To Deal Problems*, 11 VAND. L. REV. 85 (1957); Barber, *Refusals To Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847 (1955); ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 132-49 (1955); Comment, *Refusals To Sell and Public Control of Competition*, 58 YALE L.J. 1121 (1949).

Even an individual, unilateral refusal to deal is forbidden, however, if its purpose is to attain a goal forbidden by the antitrust laws. Thus, a trader may not refuse to deal in order to further a price-fixing scheme. *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922); see *United States v. A. Schrader's Son, Inc.*, 252 U.S. 85 (1920). Nor may he refuse to deal in an attempt to secure or maintain monopoly power over a market. *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927); see *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951); *Gamco, Inc. v. Providence Fruit & Produce Bldg.*, 194 F.2d 484 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952).

But the antitrust laws do not prevent a trader from arbitrarily or irrationally refusing to deal:

Before the Sherman Act it was the law that a trader might reject the offer of a proposing buyer, for any reason that appealed to him; it might be because he did not like the other's business methods, or because he had some personal difference with him, political, racial, or social. That was purely his own affair, with which nobody else had any concern. Neither the Sherman Act, nor any decision of the Supreme Court construing the same, nor the Clayton Act, has changed the law in this particular.

Great Atl. & Pac. Tea Co. v. Cream of Wheat Co., *supra* at 49; *accord*, *Arthur v. Kraft-Phenix Cheese Corp.*, *supra*.

In contrast, a public utility is required to serve from available production all potential purchasers willing to meet the stated price. See HALE & HALE, *op. cit. supra* § 2.21; PROSSER, *TORTS* 480 (2d ed. 1955); 4 RESTATEMENT, *TORTS* § 763 (1939).

14. Absent concertedness, the refusals would probably be unobjectionable. *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951); *Binderup v. Pathe Exchange, Inc.*, 263 U.S. 291 (1923); see *Charles A. Ramsay Co. v. Associated Bill Posters*, 260 U.S. 501 (1923); *Montague & Co. v. Lowry*, 193 U.S. 38 (1904).

Concerted refusals have also been attacked by the Government. The leading case is *Fashion Originators' Guild of America [FOGA] v. FTC*, 312 U.S. 457 (1941), *affirming* 114 F.2d 80 (2d Cir. 1940). FOGA was an association of textile- and dress-pattern designers and manufacturers who "while continuing to compete with one another in many respects,

illegal per se,¹⁵ and decisional law condemns them with little examination of their purpose or anticompetitive effects.¹⁶ At a minimum, concerted refusals to deal are prima facie illegal and can be justified only if intended to achieve ends unconnected with antitrust policy.¹⁷ This antipathy toward group boy-

combined among themselves to combat and, if possible, destroy all competition from the sale of garments which are copies of their 'original creations.' " 312 U.S. at 461. FOGA's method was to boycott all retail outlets who sold dresses which were "pirated" copies of Guild patterns, and to refuse to sell textiles to garment manufacturers who also used "pirated" textile and dress designs. The FTC presented no evidence that FOGA tactics limited production, fixed prices, or reduced quality; nonetheless, the combination was found to be a violation of §§ 1-2 of the Sherman Act and § 3 of the Clayton Act. "It is . . . unlawful to exclude from the market any of those who supply it—assuming that there is no independent reason by virtue of their conduct to justify their exclusion—and it is no excuse for doing so that their exclusion will result in benefits to consumers, or to the producers who remain." 114 F.2d at 85. The circuit court attached no importance to the fact that FOGA supplied only a bit more than a third of the dress market. The Supreme Court catalogued the ways FOGA violated the Sherman Act as (1) narrowing outlets for buying and selling; (2) subjecting nonconforming buyers to a boycott; (3) preventing individual marketing decisions by requiring disclosure of business records to the Guild; and (4) acting as an extra-governmental regulatory agency. The Court cited *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914), as controlling. That decision held the Sherman Act violated when association members agreed not to deal with wholesalers who also sold directly to the public. *Accord*, *Wholesale Dry Goods Institute v. FTC*, 139 F.2d 230 (2d Cir. 1943), *cert. denied*, 321 U.S. 770 (1944), *affirming* 34 F.T.C. 177 (1941); *United States v. Waltham Watch Co.*, 47 F. Supp. 524 (S.D.N.Y. 1942). *Contra*, *Ruddy Brook Clothes, Inc. v. British & Foreign Marine Ins. Co.*, 103 F. Supp. 290 (N.D. Ill. 1951), *aff'd*, 195 F.2d 86 (7th Cir.), *cert. denied*, 344 U.S. 816 (1952); *Abouaf v. J. D. & A. B. Spreckels Co.*, 26 F. Supp. 830 (N.D. Cal. 1939) (local grocer alleged wholesalers agreed not to sell to him; held, no substantial effect on interstate commerce or on competition in the retail grocery market). Although one case, *United States v. Insurance Bd.*, 144 F. Supp. 684 (N.D. Ohio 1956), and some recent commentary, Notes, 71 HARV. L. REV. 1531 (1958), 51 NW. U.L. REV. 628 (1956), support the *Abouaf* "effect" test, the general view is that concerted refusals which exclude others from the market are illegal regardless of their total market effect, Kirkpatrick, *Commercial Boycotts as Per Se Violations of the Sherman Act* (pts. 1-2), 10 GEO. WASH. L. REV. 302, 387 (1942); Barber, *supra* note 13, at 880; ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 137 (1955).

15. *Times-Picayune Publishing Co. v. United States*, 345 U.S. 594, 625 (1953); *United States v. Columbia Steel Co.*, 334 U.S. 495, 522 (1948).

16. See *Fashion Originators' Guild of America v. FTC*, 114 F.2d 80 (2d Cir. 1940), *aff'd*, 312 U.S. 457 (1941), discussed note 14 *supra*; *Wholesale Dry Goods Institute, Inc. v. FTC*, 139 F.2d 230 (2d Cir. 1943), *cert. denied*, 321 U.S. 770 (1944) ("such a combination is unlawful no matter how pressing may be the evils which it is designed to correct"); *Montague & Co. v. Lowry*, 193 U.S. 38 (1904) (tile association controlled only 1% of the tile trade in the market area). *But see* *Ruddy Brook Clothes, Inc. v. British & Foreign Marine Ins. Co.*, 195 F.2d 86 (7th Cir.), *cert. denied*, 344 U.S. 816 (1952) ("The [effect of the] restraint asserted was . . . as a lighted match to the temperature of all outdoors."). See generally Seitz, *supra* note 13, at 101; Barber, *supra* note 13, at 875; Kirkpatrick, *supra* note 14, at 311-13, 342.

17. See *FOGA v. FTC*, *supra* note 16, at 84, 312 U.S. at 465, discussed note 14 *supra*; *United States v. Waltham Watch Co.*, 47 F. Supp. 524, 531 (S.D.N.Y. 1942); *Ruddy Brook Clothes, Inc. v. British & Foreign Marine Ins. Co.*, *supra* note 16 (insurance companies may combine to refuse to deal with known firebug); 41 COLUM. L. REV. 941 (1941) (possible

cotts springs in part from the view that antitrust legislation seeks to promote free access to markets,¹⁸ and in part from the conclusion that any effective boycott, by artificially controlling market structure, tends to usurp governmental functions¹⁹ or to create a monopoly for the boycotting parties.²⁰ In virtually all of the reported cases, additional elements may also have influenced the decisions. Typically, the boycotting group wielded substantial market power, and the persons harmed constituted either a large group of producers whose output, if restricted, would affect prices, or an open-end class of competitors who had refused or might refuse to comply with the boycotters' demands.²¹ Thus, until recently, the courts had not passed on a concerted refusal to deal directed against a single trader so small that his elimination would not in itself affect market price.

A group boycott against a single trader may well underlie the section 4 case of *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, now before the federal courts.²² Plaintiff Klor's is a small retail outlet in the Mission District of San Francisco; defendant Broadway-Hale owns a chain of department stores one of which

justifications might include bad credit, conscious misrepresentation, or prevention of breach of contract with another). See generally LAMB & KITTELLE, *TRADE ASSOCIATION LAW AND PRACTICE* §§ 10.1-11 (1956) (discussion of means of eliminating trade abuses and "unfair" competition).

18. See *FOGA v. FTC*, *supra* note 16, at 85, 312 U.S. at 465; *Binderup v. Pathe Exchange, Inc.*, 263 U.S. 291 (1923); *International Salt Co. v. United States*, 322 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 groups compete.").

19. See *FOGA v. FTC*, *supra* note 16, at 85, 312 U.S. at 465.

20. See *Montague & Co. v. Lowry*, 193 U.S. 38, 46 (1904); *FOGA v. FTC*, *supra* note 16, at 85, 312 U.S. at 468.

The monopoly analysis is circular, for an effective boycott tends both to create a monopoly and to suggest—by evidencing an ability to reduce competition—the existence of *present* monopoly power. See *American Tobacco Co. v. United States*, 328 U.S. 781, 811 (1946). *United States v. Associated Press*, 52 F. Supp. 362, 369 (S.D.N.Y. 1943), *aff'd*, 326 U.S. 1 (1945), classified both *FOGA* and *Montague* as monopoly cases, but then inexplicably stated it to be only "arguable" that a boycott is always illegal. See generally *HALE & HALE, op. cit. supra* note 13, § 2.21.

21. See, *e.g.*, *FOGA v. FTC*, *supra* note 16 (many competitors); *Montague & Co. v. Lowry*, *supra* note 20 (open-end class); *Binderup v. Pathe Exchange, Inc.*, 263 U.S. 291 (1923) (same); *New Home Appliance Center, Inc. v. Thompson*, 250 F.2d 881 (10th Cir. 1957) (same).

But see two cases decided on the pleadings: *Professional & Business Men's Life Ins. Co. v. Bankers Life Co.*, 163 F. Supp. 274 (D. Mont. 1958) (allegation of attempted secondary boycott against small local insurance company held to state a cause of action); *Ruddy Brook Clothes, Inc. v. British & Foreign Marine Ins. Co.*, 103 F. Supp. 290 (N.D. Ill. 1951), *aff'd*, 195 F.2d 86 (7th Cir.), *cert. denied*, 344 U.S. 816 (1952) (dismissing complaint on *de minimis* grounds).

22. 255 F.2d 214 (9th Cir. 1958), *affirming* 1956 Trade Cas. 72048 (N.D. Cal.), *rev'd*, 27 U.S.L. WEEK 4253 (U.S. April 6, 1959) (see Editors' Note p. 963 *infra*).

adjoins Klor's.²³ The complaint alleged that Broadway-Hale had induced the other defendants—ten leading radio, television and appliance manufacturers and their regional distributors—not to sell their products to Klor's.²⁴ According to a further allegation, Broadway-Hale purchases such a great volume of these products that it enjoys sufficient oligopsonistic power to cause the manufacturers to boycott Klor's on pain of losing Broadway-Hale's business.²⁵ Without denying these allegations, the defendants moved for summary judgment upon affidavits showing that Klor's could still satisfy its requirements by buying from other manufacturers;²⁶ that many hundreds of retail dealers sell appliances in the San Francisco area;²⁷ and that, in the Mission District alone, over fifty retail outlets carry the products of the defendant manufacturers.²⁸

The district court, in granting summary judgment for defendants, characterized the complaint as evidencing "purely a private quarrel" which does not give rise to a cause of action under the antitrust laws.²⁹ On appeal, the Ninth Circuit affirmed. It reasoned that treble-damage actions serve to implement antitrust policy, and that, while an allegation of "public injury" is no longer vital to a private complaint, "the purpose of the antitrust statutes is to protect the 'public' from the harm which follows from concerted or monopolistic conduct designed to acquire control of a market, usually competitive, to which the public must ultimately resort"³⁰ Turning to the alleged unlawful restraint, the court

23. Broadway-Hale has at least three stores in San Francisco, Record, p. 91, and numerous Los Angeles, Sacramento and San Jose outlets, as evidenced by its telephone directory listings.

24. Record, pp. 5-10. The defendant manufacturers are Admiral Corp., Emerson Radio & Phonograph Corp., General Electric Co., Olympic Radio & Television, Inc., Philco Corp., Radio Corp. of America, Rheem Mfg. Co., Tappan Stove Co., Whirlpool-Seeger Corp., and Zenith Radio Corp.

25. *Id.* at 11-12. The complaint alleged that Broadway-Hale's "monopoly buying power" was the source of the boycott. *Id.* at 11.

26. *Id.* at 25-27. Among the alternative brands alleged to remain open to Klor's were Amana, Bendix, Frigidaire, Hotpoint, Kelvinator, Magnavox, Maytag, Motorola, Norge, and Westinghouse.

27. *Id.* at 29-43 (15 pages from San Francisco classified telephone directory).

28. *Id.* at 45-125 (affidavits of defendant manufacturers' agents enumerating their individual outlets in the Mission District and/or San Francisco, and acknowledging that they had not sold to Klor's); Brief for Appellees, map facing p. 8 (showing location of TV and appliance stores in Mission District).

29. 1956 Trade Cas. 72048 (N.D. Cal.).

30. 255 F.2d 214, 231 (9th Cir. 1958). The opinion was by Judge Stanley N. Barnes, former head of the Antitrust Division of the Department of Justice, and cochairman of the committee which produced the *ATT'Y GEN. NAT'L COMM. ANTITRUST REP.* (1955). The court had to distinguish *Radovich v. National Football League*, 352 U.S. 445 (1957), discussed note 7 *supra*, in which the Antitrust Division, then under Assistant Attorney General Barnes, had supported the petitioner's argument that his complaint, not containing any specific allegation of public injury, was sufficient. The principal case was distinguished because it involved a motion for summary judgment, not a motion to dismiss as in *Radovich*. The Justice Department, appearing as amicus for the plaintiff in argument before the Supreme Court in *Klor's* argued that Judge Barnes had misapplied the antitrust law

held that the refusals to deal were not per se illegal because the defendants neither attempted to secure monopoly power nor sought to control prices.³¹ The court further ruled that a boycott could not be deemed to restrain trade unreasonably absent a "charge or proof that by any act of defendants the price, quantity, or quality [of goods] offered the public was affected."³² And the large number of substitute retail outlets available to consumers indicated that "there has been no conduct by which the 'public' could conceivably suffer injury."³³

However the applicable substantive law be construed, this case seems unripe for summary judgment. Plaintiff's appeal was from such a judgment entered solely upon the complaint and defendants' affidavits.³⁴ Since the defendants had moved for summary judgment, they had the burden of showing "beyond the slightest doubt" that no dispute existed over any relevant fact necessary to resolve the issues raised by the complaint.³⁵ Moreover, the complaint should have been liberally construed, and all reasonable inferences of fact should have been drawn, in plaintiff's favor.³⁶ Although somewhat ambiguous, the complaint

involved and had thus erred on the procedural point raised. 27 U.S.L. WEEK 3240 (1959) (U.S. 1958 Term, No. 76).

31. See 255 F.2d at 233-34.

32. *Id.* at 230; see *id.* at 234.

33. *Id.* at 235. The court of appeals relied heavily on *Apex Hosiery Co. v. Leader*, 310 U.S. 469 (1940). In *Apex*, an employer brought a treble-damage antitrust suit against a labor union which had engaged in a sitdown strike. The employer argued that the strike restrained trade by preventing previously manufactured Apex products from being shipped in interstate commerce. Holding the Sherman Act inapplicable, the Court, after discussing the origins of the Sherman Act and the meaning of "restraint of trade," concluded:

The end sought was the prevention of restraints to free competition . . . 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.

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Restraints on competition or on the course of trade in the merchandising of articles moving in interstate commerce is not enough, unless the restraint is shown to have or is intended to have an effect upon prices in the market or otherwise to deprive purchasers or consumers of the advantages which they derive from free competition.

310 U.S. at 493, 500-01. The *Apex* Court's insistence on an actual anticompetitive effect in the market—as opposed to an adverse effect upon the injured manufacturer—apparently stemmed from a desire to distinguish earlier cases which had subjected labor union activity to Sherman Act strictures.

34. 255 F.2d at 219-20; Record, pp. 3-12, 45-125.

35. See *Sartor v. Arkansas Natural Gas Corp.*, 321 U.S. 620 (1944); *Lane Bryant v. Maternity Lane, Ltd.*, 173 F.2d 559, 562 (9th Cir. 1949); *Doehler Metal Furniture Co. v. United States*, 149 F.2d 130, 135 (2d Cir. 1945) ("slightest doubt" test).

36. See 6 MOORE, FEDERAL PRACTICE ¶¶ 56.15[1], [3] (2d ed. 1953). The complaint must show "facts, not conclusions of law." *Dickheiser v. Pennsylvania R.R.*, 5 F.R.D. 5 (E.D. Pa. 1946), *aff'd per curiam*, 155 F.2d 266 (3d Cir. 1946), *cert. denied*, 329 U.S. 808 (1947). And the party opposing the motion for summary judgment must point out what opposing evidence or issues are presented. *Radio City Music Hall Corp. v. United States*, 135 F.2d 715 (2d Cir. 1943).

did allege that the defendants, acting "in collaboration," had conspired "together, and each with the other" to prevent Klor's from obtaining the defendant manufacturers' products.³⁷ Favorably construed, this allegation asserts that Klor's was the victim of an illegal group boycott.³⁸ The defendants' affidavits neither contradicted this allegation nor provided sufficient facts to answer the questions which the Ninth Circuit opinion postulates as decisive on the boycott issue: What percentage of the pertinent retail supply do the manufacturing defendants control? How strong is the competition among the remaining retailers? Did the manufacturing defendants cut off Klor's for legitimate business reasons, or for the purpose of influencing prices or gaining monopoly?³⁹ The manufacturers set forth by affidavit the number of their local outlets; Broadway-Hale, the number of alternative brands available to Klor's and the number of retailers in the local appliance market.⁴⁰ These statistics alone do not provide a "beyond-the-slightest-doubt" basis for answering the circuit court's questions in the defendants' favor.⁴¹ Accordingly, the case should be remanded for further proceedings.

If a concerted refusal to deal is shown on remand but (as the Ninth Circuit says) is not illegal per se,⁴² then Klor's, to prove a violation of the antitrust laws,⁴³ must establish two facts. First, that it met with the concerted refusal on account of its competitive practices. And, second, that the boycott operates to intimidate other small dealers in the San Francisco market and to inhibit them in the formulation of their own retailing policies.⁴⁴ On the first point, Klor's can apparently show that it had been boycotted because it would not adhere to the manufacturers' suggested retail prices.⁴⁵ On the second, plaintiff might attempt to prove that many retailers cannot attract customers and remain in business without having access to some or most of the defendant manufacturers' products, and that small outlets, fearing the Klor's treatment, will therefore be under pressure to obey the pricing and marketing dictates of Broadway-Hale

37. Record, pp. 9, 12.

38. See *Professional & Business Men's Life Ins. Co. v. Bankers Life Co.*, 163 F. Supp. 274 (D. Mont. 1958) (complaint alleging that defendants tried to "induce public not to use plaintiff" sufficient to state a secondary boycott, which the court considered a per se violation of the Sherman Act; no allegation of "public injury" necessary; *Klor's* distinguished as summary judgment action).

39. 255 F.2d at 230.

40. Record, pp. 25-125.

41. See *Northern Pac. Ry. v. United States*, 356 U.S. 1, 19-20 (1958) (dissenting opinion). Purpose to monopolize is certainly one question not resolved by the defendants' affidavits. This issue requires a trial in order to permit cross-examination and make demeanor evidence available. See *Arnstein v. Porter*, 154 F.2d 464, 471 (2d Cir. 1946).

42. 255 F.2d at 233-34.

43. That is, in the Ninth Circuit's language, to prove "public injury." *Id.* at 231.

44. See Barber, *supra* note 13, at 875, 880; Kirkpatrick, *supra* note 14, at 305, 392; ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 137 (1955).

45. Letter from Irvin Goldstein, Attorney for Klor's, Inc., to the *Yale Law Journal*, Feb. 5, 1959, on file in Yale Law Library.

and the defendant manufacturers.⁴⁶ Such a psychological restraint could exist even though the defendants did not have the power (or even the inclination) to eliminate enough offending dealers to affect price directly. Rare is the appliance dealer who, standing alone, can prevent his major suppliers, acting in concert, from ruining him.⁴⁷ Once the defendants had exhibited the power to cripple or exclude a trader, they might be expected to utilize that power to the same end again. True, if the manufacturers were motivated by nonbusiness objectives, that is, if the reasons for cutting Klor's off were irrational ones, then other retailers would not be induced to alter their competitive practices. And the antitrust laws would then have no reason to operate, for they are designed to promote competitive markets, not to assure the injured trader a tort remedy.⁴⁸ Still, it approaches the irrational to impute irrational motives to executives charged with the direction of vast corporate investments. Given evidence that a concerted boycott is intended to achieve an economic goal like resale price maintenance, a defense resting on nonbusiness policy should ordinarily be rejected.⁴⁹

A more difficult evidentiary problem faces Klor's on remand—that of proving the combination or conspiracy which, according to the complaint, existed among the defendant manufacturers. Absent a showing that a number of firms on the same horizontal level acted in concert, plaintiff would probably be unable to establish an illegal boycott as defined in the cases.⁵⁰

46. See Mund, *The Right To Buy—and Its Denial to Small Business*, S. Doc. No. 32, 85th Cong., 1st Sess. 95-103 (1957).

47. See *id.* at 56-58, 95-96. Coercive pressure would be minimal, however, if the suppliers were not acting in concert and alternative brands remained available, see note 59 *infra*, or if the boycotters did not control a significant portion of the supply. The portion of supply controlled by the defendants in turn depends on how the applicable product market is defined. In the principal case, if the market for all appliances is the proper one, then the relevant test would measure all the defendants' output against that of all competing brands. This is a plausible approach, since the defendants by and large produce a full line of appliances. Record, pp. 25-27. General Electric, for example, competes with RCA and Emerson in radios and television, with Admiral and Philco in refrigerators, with Rheem and Tappan in stoves, and with Whirlpool in dryers and washers. If the market is defined in terms of individual products, the following data would be pertinent: *Defendants producing: Radios and television*—Admiral, Emerson, General Electric, Olympic, Philco, RCA, and Zenith; *Refrigerators*—Admiral, General Electric, and Philco; *Stoves*—Admiral, General Electric, Rheem, and Tappan; *Clothes washers and dryers*—General Electric and Whirlpool.

48. See *Mackey v. Sears, Roebuck & Co.*, 237 F.2d 869 (7th Cir. 1956), *petition for cert. dismissed per stipulation*, 355 U.S. 865 (1957). For possible torts and remedies, see 1 HARPER & JAMES, TORTS §§ 6.6, 6.13 (1956); PROSSER, TORTS 720-60 (2d ed. 1955). Absent a finding of either personal malice or monopoly intent, neither the manufacturers' refusals to deal nor Broadway-Hale's inducement or coercion of their refusals would appear to constitute an actionable tort. See 4 RESTATEMENT, TORTS §§ 765-68 and accompanying comments (1939); note 75 *infra*.

49. See *Fashion Originators' Guild of America v. FTC*, 114 F.2d 80 (2d Cir. 1940), *aff'd*, 312 U.S. 457 (1941), discussed note 14 *supra*; *United States v. Waltham Watch Co.*, 47 F. Supp. 524 (S.D.N.Y. 1942).

50. See *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 214 (1951) ("Seagram and Calvert acting individually perhaps might have refused to deal with petition-

For this reason, Klor's would have to introduce evidence to support the inference that the simultaneous refusals to deal resulted not from coincidental individual decisions but from joint action.⁵¹ The principal reason for assuming that the refusals were triggered by an agreement is that the plaintiff's suppliers compete with each other for profits which are geared to volume of sales.⁵² Were but one manufacturer to discontinue serving an outlet supplied by many, that manufacturer would in effect forfeit his volume of sales to his competitors.⁵³ A joint refusal, on the other hand, precludes competitive disadvantage. Nevertheless, the manufacturer defendants in *Klor's* may not have acted in concert. Each of them individually may have been interested in preserving the profit margins of his retail outlets at a level higher than that which perfect, short-run competition would achieve, even though his total volume of sales might suffer, for high retail profits are essential to the maintenance of a stable distributional network.⁵⁴ Since appliances are

er or with any or all of the Indiana wholesalers. But the Sherman Act makes it an offense for respondents to agree among themselves to stop selling to particular customers.); *Nelson Radio & Supply Co. v. Motorola, Inc.*, 200 F.2d 911 (5th Cir. 1952), *cert. denied*, 345 U.S. 925 (1953) (unilateral refusal to deal legal; "intracorporate conspiracy" of managerial personnel not basis of Sherman Act violation).

Compare *Binderup v. Pathe Exchange, Inc.*, 263 U.S. 291, 312 (1923) ("the illegality consists, not in the separate action of each, but in the conspiracy and combination of all"), with *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md.), *aff'd per curiam*, 239 F.2d 176 (4th Cir. 1956), *cert. denied*, 355 U.S. 823 (1957) (no violation for manufacturer unilaterally to refuse to continue dealer franchise at behest of other dealer who thereby gained exclusive area franchise), and *Packard Motor Car Co. v. Webster Motor Car Co.*, 243 F.2d 418 (D.C. Cir.), *cert. denied*, 355 U.S. 822 (1957), *reversing* 135 F. Supp. 4 (D.D.C. 1955) (same).

51. See *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600 (1914). "It is elementary . . . that conspiracies are seldom capable of proof by direct testimony and may be inferred from the things actually done, and when [as] in this case . . . the names of wholesalers . . . were periodically reported to the other members . . . the conspiracy . . . may be readily inferred." *Id.* at 612. The proof of contemporaneous identical action—so-called "conscious parallelism"—has been held to establish a conspiracy if it can be shown that each defendant knew what the others were doing and if the defendants offer no evidence indicating that their activities were based upon individual, independent decisions. See *FTC v. Cement Institute*, 333 U.S. 683 (1948) (complex, nation-wide basing-point system so unlikely to evolve without collaboration that conspiracy inferred); *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939) ("acceptance by competitors, without previous agreement, of an invitation to participate in a plan . . . is sufficient to establish an unlawful conspiracy"). *But see* *Theatre Enterprises, Inc. v. Paramount Film Distrib. Corp.*, 346 U.S. 537, 541 (1954) (affirming jury refusal to find conspiracy despite extensive evidence of parallel action; "'conscious parallelism' has not yet read conspiracy out of the Sherman Act"). See generally ATT'Y GEN. NAT'L COMM. ANTI-TRUST REP. 36-42 (1955).

52. See *Bus. Week*, Feb. 7, 1959, p. 56.

53. See *HALE & HALE, MARKET POWER: SIZE AND SHAPE UNDER THE SHERMAN ACT* § 2.21 (1958); *Mund, supra* note 46, at 30, 42.

54. See *id.* at 56-59. California permits the "fair trading" of brand name goods, *CAL. BUS. & PROF. CODE* §§ 16900-05 (1954), but the defendant manufacturers in the *Klor's* case did not use this device to sustain their outlets' profit-margins. When interviewed, one of

promotion-elastic⁵⁵ and their reputation largely dependent upon dealer service, a manufacturer may often seek to avoid cutthroat competition among his retail outlets. If, for example, Klor's had reduced its prices to the point that it could not undertake a normal amount of distributive advertising and servicing, each of its suppliers may have immediately and independently decided to eliminate it. By themselves, coincidental decisions of this sort do not constitute an illegal boycott.⁵⁶

Should the plaintiff be unable to prove a horizontal conspiracy among the defendant manufacturers, it might still succeed against Broadway-Hale by showing that the chain store had separately induced each manufacturer to agree not to deal with Klor's. Broadway-Hale's power to exact such agreements would presumably depend on its ability to shift with relative ease from one supplier to another, and on its suppliers' inability to replace it as an effective sales, promotional, and service outlet.⁵⁷ A series of independent, vertical agreements thus induced would create a "wedge-shaped" combination posing the same threat of competitive restraint as would a combination or conspiracy among the manufacturers themselves.⁵⁸ Furthermore (again as in the case of a horizontal boycott) the demonstrated reach of Broadway-Hale's oligopsonistic power might serve to restrain the competitive practices of other retailers—even if Broadway-Hale lacks the capacity to eliminate enough other outlets either to affect price directly or to gain a monopoly.⁵⁹

the defendant manufacturers who has never utilized the fair-trade laws stated that none of the defendants has used them.

55. See GALBRAITH, *THE AFFLUENT SOCIETY* 155-58 (1958)

56. See *Binderup v. Pathe Exchange, Inc.*, 263 U.S. 291, 312 (1923) ("each of the distributors, acting separately, could have refused to furnish films to the exhibitor without becoming amenable to the provisions of the [Sherman] act"). For the position that refusals to sell have no place in the free market, see *Mund*, *supra* note 46, at 97-99.

57. See BURNS, NEAL & WATSON, *MODERN ECONOMICS* 290 (2d ed. 1953). The book discusses the power that can be exerted by a volume buyer upon suppliers of goods and services who need it as an outlet, and who are competing with each other for this outlet. Such power is denominated "oligopsonistic" or "monopsonistic." The simplest example is that of a single-company town in which the company can hire labor at low wages because it is the sole market buyer. A number of volume buyers can individually exert oligopsonistic power against competitive suppliers of varying sizes.

58. See *United States v. Waltham Watch Co.*, 47 F. Supp. 524 (S.D.N.Y. 1942) (oligopolist organizing refusal to deal through independent agreements with distributors on the next lower competitive level; this pyramid-shaped combination poses same threat as horizontal agreement among distributors). A wedge-shaped combination is closely analogous to a secondary boycott: the "exercise [of] coercive pressure upon . . . [the plaintiff's] customers, actual or prospective, in order to cause them to withhold patronage." *Duplex Printing Press Co. v. Deering*, 254 U.S. 443, 466 (1921). Compare *Binderup v. Pathe Exchange, Inc.*, 263 U.S. 291 (1923) (local film distributors' association had national suppliers cut off nonconforming local distributor and exhibitor).

59. See notes 44, 46-47 *supra* and accompanying text. This wedge-shaped combination is to be distinguished from the combinations at issue in the dealer-franchise cases. In a typical dealer-franchise case, a dealer induces a *single* supplier to discontinue dealing with a rival dealer. Hence, no horizontal, multiple refusal to deal occurs and the element of

But the Ninth Circuit did not consider the alleged restraint's effect on the competitive nature of the market. Rather, it discussed the distinction between public and private injury, then defined "public injury" solely in terms of a direct effect upon the price of consumer goods.⁶⁰ The court thereby placed a needless barrier in the path of private antitrust actions. More realistically, an antitrust violation should be found whenever a market is so overcast by the shadow of some vertical or horizontal combination, or by a cloud of monopoly power, that independent, competitive decision-making is restrained.⁶¹ The courts should allow any trader in such a market to bring a treble-damage action against the looming combination or monopoly if it injured him, for trade has been effectively restrained even in the absence of a demonstrable impact on an ascertainable "public."⁶²

In refusing to remand the *Klor's* case for evidence of the boycott's effect on San Francisco retailers, the Ninth Circuit maintained that combinations of competitors which injure traders but do not affect market price are exempt from Sherman Act coverage.⁶³ But antitrust policy, postulated on free competition,⁶⁴ marks all coalitions of competitors as suspect.⁶⁵ And when com-

concertedness, be it actual or constructive, is lacking. See, e.g., *Shotkin v. General Elec. Co.*, 171 F.2d 236 (10th Cir. 1948); *Schwing Motor Co. v. Hudson Sales Corp.*, 138 F. Supp. 899 (D. Md.), *aff'd per curiam*, 239 F.2d 176 (4th Cir. 1956), *cert. denied*, 355 U.S. 823 (1957); *Kessler, Automobile Dealer Franchises; Vertical Integration by Contract*, 66 YALE L.J. 1135, 1165-67 (1957).

Courts deciding the franchise cases have assumed that the excluded merchant can enter into a new alliance with a competing manufacturer, so that the competitive nature of the market is but slightly affected, if at all. This "alternative source of supply" assumption has both been questioned, *HALE & HALE, op. cit. supra* note 53, § 2.20, at 58 n.2, § 10.10, at 391, and rejected, see *Mund, supra* note 46, at 97-98 *et passim*.

60. 255 F.2d at 230.

61. See *HALE & HALE, op. cit. supra* note 53, § 10.10.

62. See *Mandeville Island Farms, Inc. v. American Crystal Sugar Co.*, 334 U.S. 219, 235-43 (1948).

63. 255 F.2d at 230; *Accord*, *Ruddy Brook Clothes v. British & Foreign Marine Ins. Co.*, 103 F. Supp. 290 (N.D. Ill. 1951), *aff'd*, 195 F.2d 86 (7th Cir.), *cert. denied*, 344 U.S. 816 (1952); *Abouaf v. J. D. & A. B. Spreckels Co.*, 26 F. Supp. 830 (N.D. Cal. 1939). *But see* *New Home Appliance Center, Inc. v. Thompson*, 250 F.2d 881 (10th Cir. 1957).

64. The Sherman Act was designed to be a competitive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conducive to the preservation of our democratic political and social institutions.

Northern Pac. Ry. v. United States, 356 U.S. 1, 4 (1958); see *ATT'Y GEN. NAT'L COMM. ANTITRUST REP.* 317 (1955).

65. See *LAMB & KITTELLE, TRADE ASSOCIATION LAW AND PRACTICE* 15 (1956) (innocent trade association practices run the risk of being misconstrued as restrictive practices). Compare *1 SMITH, THE WEALTH OF NATIONS* 117 (Everyman ed. 1910) ("People of the same trade seldom meet together, even for merriment and diversion,

petitors undertake a joint boycott in order to coerce or eliminate a third party, they pursue an unfair method of competition in order to achieve an anti-competitive advantage.⁶⁶ Although the Sherman Act focuses on unreasonable restraints of trade rather than unfair methods of competition, the two are not wholly separable,⁶⁷ for the act reflects in part congressional concern that aggregations of economic power will drive small dealers out of business and eliminate a worthy class of self-reliant citizens.⁶⁸ A similar affinity for the individual trader may be found in judicial interpretations of the act.⁶⁹ The courts early declared that it makes affirmatively illegal those contracts which were unenforceable at common law⁷⁰—that is, those which restrain trade but are not “ancillary to the main purpose of a lawful contract, and necessary to protect the covenantee in the enjoyment of the legitimate fruits of the contract.”⁷¹ Among the contracts which could not be so justified were those instituting group boycotts.⁷² Certainly, boycotters who pursue a common policy of exclusion may no longer invoke the doctrine which permits the individual entrepreneur to choose his own customers.⁷³ Moreover, modern decisions indicate that the Sherman Act forbids any jointly undertaken predatory practices which foreclose individual traders from the market place.⁷⁴

but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.”).

66. *Wholesale Dry Goods Institute, Inc. v. FTC*, 139 F.2d 230 (2d Cir. 1943), *cert. denied*, 321 U.S. 770 (1944), *affirming* 34 F.T.C. 177 (1941) (boycott by wholesalers of manufacturers who sold to retail chain outlets at same price as to wholesalers held to constitute unfair method of competition, Federal Trade Commission Act § 5, 38 Stat. 719 (1914), 15 U.S.C. § 45 (1952)); see ATT'Y GEN. NAT'L COMM. ANTITRUST REP. 137 (1955); Barber, *Refusals To Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847, 875 (1955).

67. See, *e.g.*, *FTC v. Motion Picture Adv. Serv. Co.*, 344 U.S. 392, 395 (1953) (the defendants' scheme “sewed up a market so tightly [that it] . . . falls within the prohibitions of the Sherman Act and is therefore an ‘unfair method of competition’ within the meaning of . . . the Federal Trade Commission Act”); *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441 (1922) (same).

68. See 21 CONG. REC. 1768, 2564, 2569 (1890).

69. See, *e.g.*, *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 323-26 (1897), quoted in *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457, 467 (1941); *Standard Oil Co. v. United States*, 337 U.S. 293, 315 (1949) (dissenting opinion of Douglas, J.); *cf. Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 376-77 (1933); *American Column & Lumber Co., v. United States*, 257 U.S. 377, 417-18 (1921) (dissenting opinion of Brandeis, J.).

70. *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 278-79 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899); see *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 497-98 (1940).

71. *United States v. Addyston Pipe & Steel Co.*, *supra* note 70, at 282; see *id.* at 286, 289, 291-94; *Northern Sec. Co. v. United States*, 193 U.S. 197, 404 (1904) (dissenting opinion of Holmes, J.).

72. See, *e.g.*, *Mogul S.S. Co. v. McGregor, Gow & Co.*, [1892] A.C. 25, 46, 58 (1891).

73. See *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 214 (1951).

74. See *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457, 465 (1941).

Hence, the Court might prohibit coercive group boycotts irrespective of any demonstrable harm to competition. This prohibition could proceed from the hypothesis that concerted refusals to deal, by wreaking severe, anticompetitive harm on individual competitors,⁷⁵ make injury to competition intolerably likely,⁷⁶ especially if the boycotters wield oligopolistic power.⁷⁷

affirming 114 F.2d 80, 85 (2d Cir. 1940); *Binderup v. Pathe Exchange, Inc.*, 263 U.S. 291, 312 (1923); *Gamco, Inc. v. Providence Fruit & Produce Bldg.*, 194 F.2d 484, 486-87 (1st Cir.), *cert. denied*, 344 U.S. 817 (1952); *William Goldman Theatres, Inc. v. Loew's, Inc.*, 150 F.2d 738, 743 (3d Cir. 1945), *aff'd per curiam on rehearing*, 164 F.2d 1021 (3d Cir.), *cert. denied*, 334 U.S. 811 (1948) ("The purpose of the anti-trust laws—an intentment to secure equality of opportunity—is thwarted if group-power is utilized to eliminate a competitor who is equipped to compete.").

The right of traders not to be foreclosed from the market is made even more explicit in cases involving individual refusals to deal by individuals who hold substantial market power. See, *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").

75. If conspirators boycott a trader not out of malice or spite but in order to enhance their own competitive position, their interference with the trader's business expectations ordinarily is not an actionable tort. 4 RESTATEMENT, TORTS § 765 (1939). California generally follows the *Restatement* position. See *Imperial Ice Co. v. Rossier*, 18 Cal. 2d 33, 112 P.2d 631 (1941); *Masoni v. Board of Trade*, 119 Cal. App. 2d 738, 260 P.2d 205 (Dist. Ct. App. 1953). If the boycott is a combination in restraint of trade under California statute, CAL. BUS. & PROF. CODE §§ 16700-58 (1954), it constitutes an actionable interference with business relations, *Speegle v. Board of Fire Underwriters*, 29 Cal. 2d 34, 172 P.2d 867 (1946). In the principal case, absent personal animosity, *Guillory v. Godfrey*, 134 Cal. App. 2d 628, 286 P.2d 474 (Dist. Ct. App. 1955) (intimidation and coercion of customers because plaintiff hired Negro), or fraud or misrepresentation, *Finney v. Lockhart*, 35 Cal. 2d 161, 217 P.2d 19 (1950) (defendant dogfood dealer spread rumors that plaintiff-competitor was using diseased horse-meat), *Broadway-Hale's* inducing the defendant manufacturers' refusals to sell in order to get Klor's business would not constitute tortious conduct, see *Katz v. Kapper*, 7 Cal. App. 2d 1, 44 P.2d 1060 (Dist. Ct. App. 1935); 4 RESTATEMENT, TORTS § 768 (1939) (competitor privileged to induce refusals to deal in attempting to garner others' business).

Hence, absent antitrust protection, the trader will have no redress. In the principal case, Klor's would have little chance of recovery against Broadway-Hale and the defendant manufacturers in a suit under the state antitrust laws, CAL. BUS. & PROF. CODE §§ 16700-58 (1954). See *Milton v. Hudson Sales Corp.*, 152 Cal. App. 2d 418, 313 P.2d 936 (Dist. Ct. App. 1957) (plaintiff's competitors allegedly combined and induced Hudson to cancel plaintiff's franchise and to refuse to sell plaintiff any more cars; held, no cause of action). Compare *Alexander's Dep't Stores, Inc. v. Ohrbach's, Inc.*, 266 App. Div. 535, 42 N.Y.S.2d 703, *appeal dismissed*, 291 N.Y. 707, 52 N.E.2d 595 (1943), in which Alexander's brought suit under the New York antitrust law, N.Y. GEN. BUS. LAW § 340, alleging that Ohrbach's had induced two affiliated dress manufacturers to refuse to sell any goods to Alexander's during the latter's price war with Ohrbach's. It was admitted that a multitude of other lines were available to the plaintiff, who did not allege either monopoly intent, price-fixing, or boycott, but only that the manufacturers' goods were widely advertised, were of the best quality, and were necessary to maintain customer goodwill. The court reversed the trial court's verdict for the defendants, 180 Misc. 18, 40 N.Y.S.2d 631 (Sup. Ct. 1943), and entered a decree for the plaintiff, stating:

This is not a case of a manufacturer freely refusing to sell his products to a particular retailer. Nor is it the case of a manufacturer giving one retailer

A concerted refusal to deal, then, whether in the form of a direct or "wedge-shaped" combination, might be considered a per se violation of the Sherman Act regardless of perceptible market effect. Rational businessmen will not attempt such a combination unless they believe that they are able to gain that more-than-competitive advantage which antitrust policy would forbid.⁷⁸ Thus, proof that defendant businessmen participated in a plan to coerce a private plaintiff through a boycott could be held sufficient to establish a treble-damage claim, for the participants in the plan are themselves the best judges of whether they have the power to achieve their goal.

a so-called "exclusive" on merely one fabric, style or garment. On the contrary, we think the evidence shows that Ohrbach, using its superior economic buying power, finally prevailed upon the defendant manufacturers to refuse to sell to Alexander, not merely one line of fabric, but any merchandise whatever, and that the object and effect of such arrangement were to destroy Alexander as a competitor of Ohrbach in defendants' products which Alexander had been selling for years.

266 App. Div. at 538, 42 N.Y.S.2d at 706. New York does not allow punitive or multiple damages, however, Alexander's Dep't Stores, Inc. v. Ohrbach's, Inc., 269 App. Div. 321, 56 N.Y.S.2d 173 (1945), while California provides double damages in private antitrust actions, CAL. BUS. & PROF. CODE § 16750 (1954).

76. See Kirkpatrick, *Commercial Boycotts as Per Se Violations of the Sherman Act*, 10 GEO. WASH. L. REV. 387, 392-93, 405 (1942); Mund, *supra* note 46, at 29-59.

77. When oligopoly power is sufficiently great, the oligopolists might even be deemed under a common-law duty to serve all would-be customers on identical terms. See *id.* at 3-6 (doctrine of "public calling"); note 13 *supra* (duty of public utility).

78. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940); HALE & HALE, *op. cit.* *supra* note 53, § 2.21; Kirkpatrick, *supra* note 76, at 392.

EDITORS' NOTE: On April 6, 1959, the Supreme Court reversed the Ninth Circuit's decision and remanded the principal case to the district court for trial. The Court ruled that the Klor's complaint alleged a boycott which, if proved, "is not to be tolerated merely because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy." 27 U.S.L. WEEK 4253, 4254 (U.S. April 6, 1959).