ANTITRUST LAW: SUPREME COURT HOLDS UNREASONABLE SECURITIES EXCHANGE REGULATION OF NONMEMBER TO BE VIOLATION OF SHERMAN ACT

THE modern securities exchange has attributes of both the governmental agency and private enterprise. This character is the product of a regulatory scheme based on a policy of delegating the detailed regulation to those actually engaged in the securities industry.[1] Although founded on substantial considerations,[2] the duty of self-regulation may often conflict with policies advanced by antitrust legislation.[3] The practical and conceptual difficulties of resolving such a conflict are illustrated by *Silver v. New York Stock Exch.*[4]

Government regulation is basically imposed by two statutes: the Securities Exchange Act of 1934[5] imposes a duty of self-regulation on exchanges, while the Maloney Act of 1938[6] provides for regulation

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[1] See generally Westwood & Howard, *Self-Government in the Securities Business*, 17 LAW & CONTEMP. PROB. 518 (1952).

[2] The fundamental regulatory policy is the maintenance of public confidence in the securities industry. Silver v. New York Stock Exch., 373 U.S. 341, 349-52, 355 (1963). "Extensive reliance on self-regulation rests on two principal premises; first, it provides an alternative to a much more pervasive direct regulation by the Government, which would be expensive to the taxpayers and burdensome to the industry, and it also provides a more sensitive and effective device for regulation in the area of unethical as distinct from illegal conduct." S. REP. No. 379, 88th Cong., 1st Sess. 24 (1963). See also S. REP. No. 792, 73d Cong., 2d Sess. 13; H. R. REP. No. 1383, 73d Cong., 2d Sess. 15 (1934).

[3] Antitrust legislation is designed to foster competition. On the other hand, as competition in industries such as electrical power distribution would result in economic waste, the public interest is best protected by statutory monopoly. Where limited competition is approved, an exemption from antitrust laws is necessary. For example, persons affected by orders of the Civil Aeronautics Board are relieved from application of antitrust laws, insofar as necessary to conform to the order. 72 Stat. 770 (1958), 49 U.S.C. § 1385 (1958). Resolution of the regulated industry-antitrust conflict requires a determination of the extent to which competition should be sacrificed to achieve the policies advanced by regulation. See generally Schwartz, *Legal Restriction of Competition in the Regulated Industries: An Abdication of Judicial Responsibility*, 67 HARV. L. REV. 436 (1954); Comment, 58 COLUM. L. REV. 673 (1958).

[4] 373 U.S. 341 (1963).

[5] 48 Stat. 881 (1934), as amended, 15 U.S.C. § 78 (1958). This act requires securities exchanges to register with the Securities Exchange Commission. As a prerequisite to registration, an exchange must submit and agree to enforce acceptable rules governing the conduct of its members. Although the SEC oversees the self-regulation of the exchanges, the NYSE rules do not provide for SEC review of Exchange disciplinary actions. See 2 LOSS, SECURITIES REGULATION 1165-1275 (1961).

[6] 52 Stat. 1070 (1938), 15 U.S.C. § 78*o*-3 (1958). The scope of self-regulation in the securities industry was broadened siguificantly by the Maloney Act. The significant difference in the manner of regulation as compared to the Securities Act of 1934 is

of dealers in the over-the-counter market. The scope of the statutes is not self-evident, however, as complex interrelationships have developed between exchange members and over-the-counter dealers. New York Stock Exchange rules, by specifically prescribing conduct to be followed by its members when dealing with non-members, attempt to clarify the respective rights of parties. The Exchange, acting in accordance with these rules,[7] granted non-member Silver tentative approval for a direct wire[8] connection between his offices and those of several Exchange members. When the Exchange's customary investigation revealed several questionable facets of Silver's background, the tentative approval was withdrawn. There was no hearing nor were the reasons for the Exchange's action communicated to Silver.

As neither NYSE rules nor Securities Exchange Commission procedure provided administrative relief, Silver sought relief in the courts.[9] Reasoning that the Securities Exchange Act did not extend to non-members and that there was no implied exemption from antitrust laws for dealings with non-members, the district court[10] found

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that the Maloney Act provides for review by the Securities Exchange Commission of disciplinary actions taken by the dealers associations, 52 Stat. 1070 (1938), 15 U.S.C. § 78*o*-3 (h) (1958), and contains an exemption from antitrust legislation. 52 Stat. 1070 (1938), 15 U.S.C. § 78*o*-3 (n) (1958). See generally Westwood & Howard, *supra* note 1, at 526; Loss, *op. cit. supra* note 5, at 1277-1392.

[7] The Exchange acted pursuant to article III, § 6 of its constitution and Exchange rules 355, 356 and 358. Silver v. New York Stock Exch., 196 F. Supp. 209, 213 (S.D.N.Y. 1961). After the district court decision the Exchange suspended rule 355, making it clear that rules providing for discontinuance of any means of communication applied only to communication facilities between offices of the same member firm. Loss, *op. cit. supra* note 5 (Supp. 1962, at 39).

[8] A direct wire provides connection with other traders in the over-the-counter market by a flip of the switch. Offers to buy and sell can thereby be communicated within a matter of seconds. Although the same information can be obtained by conventional telephone service, the direct wire is faster. See Silver v. New York Stock Exch., *supra* note 7, at 223-24.

[9] The policy of first allowing the agency to consider the case is known as the doctrine of primary jurisdiction. See 3 DAVIS, ADMINISTRATIVE LAW ¶¶ 19.01-.09 (1958); Comment, 38 N.Y.U.L. REV. 593, 594 n.4 (1963).

As the question of primary jurisdiction was left open in *Silver*, 373 U.S. at 358 n.12, it remains uncertain whether the possibility of relief from either the NYSE or the SEC would preclude judicial consideration of a similar case. In Pan Am. World Airways, Inc. v. United States, 371 U.S. 296 (1963), the Court held that the Civil Aeronautics Board had *exclusive* primary jurisdiction concerning approval of mergers. In view of the broad interpretation which the Court is apparently willing to give statutes conferring jurisdiction upon the various administrative agencies, the Court, in cases similar to *Silver*, would probably require a plaintiff to exhaust existing administrative remedies before resorting to the judiciary.

[10] Silver v. New York Stock Exch., 196 F. Supp. 209 (S.D.N.Y. 1961). The district

the withdrawal by the Exchange to be a per se[11] violation of section 1 of the Sherman Act.[12] The Court of Appeals[13] reversed on the theory that the scope of the duties imposed on exchanges by the Securities Exchange Act did extend to non-members and furthermore, that exemption from antitrust laws was implied as essential to effective self-regulation.[14] The Supreme Court, rejecting the reasoning of the lower courts, held that the solution lay in reconciling "the operation of both statutory schemes rather than holding one completely ousted."[15] Although holding the per se doctrine inapplicable, the Court nevertheless found an antitrust violation. Applying the Rule of Reason,[16] the Court found that the Exchange's

court granted a summary judgment enjoining the Exchange from prohibiting operation of private wire connections between plaintiff's offices and defendant's member firms. The District Court also concluded that the Exchange was liable for treble damages under the Clayton Act, 38 Stat. 731 (1914), as amended, 15 U.S.C. § 15 (1958), such damages to be determined at trial.

[11] Although the Sherman Act has been interpreted to proscribe only unreasonable restraints of trade, "there are certain agreements or practices which, because of their pernicious effect on competition and lack of any redeeming virtue, are conclusively presumed to be unreasonable and, therefore, illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Northern Pac. Ry. v. United States, 356 U.S. 1, 5 (1958). See, *e.g.*, United States v. Parke, Davis & Co., 362 U.S. 29 (1960) (price fixing); Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959) (group boycott); United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940) (price fixing). See generally Loevinger, *The Rule of Reason in Antitrust Law*, 7 PRAC. LAW., Nov. 1961, pp. 17, 19-21; Montague, *Per Se Illegality and the Rule of Reason*, 12 A.B.A. ANTITRUST SECT. 69 (1958).

[12] 26 Stat. 209 (1890), as amended, 15 U.S.C. § 1 (1958).

[13] Silver v. New York Stock Exch., 302 F.2d 714 (2d Cir. 1962).

[14] It is a basic doctrine that repeal of antitrust laws by implication is not favored. See, *e.g.*, California v. FPC, 369 U.S. 482, 485 (1962); Georgia v. Pennsylvania R.R., 324 U.S. 439, 456-57 (1945); United States v. Borden Co., 308 U.S. 188 (1939). See also ATT'Y. GEN. NAT'L COMM. ANTITRUST REP. 261-62 (1955).

[15] 373 U.S. at 357. "When there are two acts on the same subject, the rule is to give effect to both, if possible." United States v. Borden Co., 308 U.S. 188, 198 (1939). *Accord*, General Motors Acceptance Corp. v. United States, 286 U.S. 49, 61-62 (1932); Henderson's Tobacco, 78 U.S. (11 Wall.) 652, 657 (1870); United States v. Tynen, 78 U.S. (11 Wall.) 88, 92 (1870).

[16] The Sherman Act was interpreted in early decisions as proscribing all combinations which restrained trade. However in Standard Oil Co. v. United States, 221 U.S. 1 (1911) the Court held that only actions which unreasonably restrained trade were illegal. "The Rule of Reason opens the way to reliance upon a broad range of discretion in weighing the evidence of defenses of justification compatible with the purposes of the antitrust statutes. The Rule of Reason operates through a process of inclusion and exclusion in a case-by-case consideration of all the facts. The per se illegality doctrine operates by converting predetermined single fact categories into fixed rules of Law." Oppenheim, *Federal Antitrust Legislation: Guideposts to a Revised National Antitrust Policy*, 50 MICH. L. REV. 1139, 1151-52 (1952). See also Adams, *"The Rule of Reason": Workable Competition or Workable Monopoly?* 63 YALE L.J. 348 (1954).

action could not be justified as a valid exercise of its regulatory duty and was, therefore, a violation of the Sherman Act.[17]

Recent precedent holding concerted refusals to deal illegal per se under the Sherman Act posed the initial problem for the Court.[18] As action of the Exchange is necessarily that of a group, the dealings with Silver were particularly susceptible to the Sherman Act proscriptions of group boycotts. Yet, to hold, as did the district court, that the conduct was "extrinsically unreasonable"[19] not only proscribes inquiry into the complex policy factors involved but goes far to frustrate the ability of exchanges to effectuate regulation.[20]

The Court stated that the Exchange's conduct "would, had it occurred in a context free from federal regulation, constitute a per se violation . . . ."[21] This language would appear to be indicative of

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[17] 373 U.S. at 361-67.

[18] Concerted refusals to deal (group boycotts) were first held illegal per se in Fashion Originator's Guild v. FTC, 312 U.S. 457 (1941). Subsequent cases strengthened the doctrine's applicability to fact situations similar to that in *Silver*. *E.g.*, Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co., 364 U.S. 656 (1961); Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959). Although strict adherence to the per se doctrine does not allow any consideration of the reasonableness of the boycott, in many cases group boycotts were found to be reasonable after examination of the respective policies involved. *E.g.*, Molinas v. National Basketball Ass'n, 190 F. Supp. 241 (S.D.N.Y. 1961) (league suspension of professional basketball player not unreasonable); United States v. Morgan, 118 F. Supp. 621, 689 (S.D.N.Y. 1953) (group action by investment bankers not unreasonable).

As to the favor which the courts have shown for the per se doctrine, one writer has said: "The steady advance of the per se doctrine, if continued, threatens to dilute the Rule of Reason to the point where it will be so limited in scope as to apply only in exceptional cases. . . . While there are still some areas in which the Rule of Reason is applied, there is an unmistakable danger that [the Rule of Reason will be reduced] to a ghostly hue without corporeal substance." Oppenheim, *supra* note 16, at 1156.

On the other hand, it has been urged that the per se doctrine is preferable as it adds certainty to the law. Schwartz, *The Schwartz Dissent*, 1 ANTITRUST BULL. 37 (1955.)

[19] Silver v. New York Stock Exch., 196 F. Supp. 209, 224 (S.D.N.Y. 1961).

[20] At present, over-the-counter dealers are primarily regulated by the Maloney Act, *supra* note 6. However, if an exchange subject to SEC review can reasonably refuse to deal with an erring non-member, the SEC has an additional means through which non-members can be regulated. Note, 71 YALE L.J. 748, 756 (1962). Per se liability would conclusively presume that exchanges could not reasonably refuse to deal with non-members, for under the per se doctrine, the refusal to deal is itself unlawful and underlying reasons are not examined. Silver v. New York Stock Exch., 196 F. Supp. 209, 224-25 (S.D.N.Y. 1961). See also Oppenheim, *supra* note 16, at 1151; Barber, *Refusals to Deal Under the Federal Antitrust Laws*, 103 U. PA. L. REV. 847, 875 (1955).

By declining to apply the per se doctrine, the Court preserved this mode of regulation and, by requiring fair dealings with non-members under penalty of antitrust liability, minimized the possibility of misuse of the powers given the Exchange.

[21] 373 U.S. at 347.

a desire to preserve application of the per se doctrine in future cases involving defendants subject to less extensive government regulation. If the court's inquiry reveals no potential conflict with the basic regulatory scheme, the per se rule should be applied as in the ordinary commercial context. For instance, government regulation which provides limited rate controls would not, in most instances, be a basis for avoiding the per se rule where the defendant has conspired to fix prices.[22] In cases such as *Silver,* however, the imposition of per se liability would upset the basic regulatory pattern.[23]

Since there was no conclusive presumption of liability for the withdrawal of the wire service, the Court turned to problems of possible exemption from antitrust legislation and reasonableness of the Exchange's action. The Court recognized an implied exemption from antitrust laws, restricted, however, to "particular instances of exchange self-regnlation which fall within the scope and purposes of the Securities Exchange Act. . . ."[24] Accordingly, the Court reasoned that the denial of a hearing to Silver was such an unreasonable practice as not to advance the purposes of the act and hence, was not within the scope of the exemption.[25] The Court then declined to inquire into the merits of the Exchange's justification for the initial withdrawal of the wire service.[26] Thus, antitrust laws were used to remedy this defect in procedural safeguards.

As *Silver* illustrates, the broad scope of antitrust legislation makes it easily adaptable to remedy varied grievances.[27] It may be benefi-

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[22] In Pennsylvania Water & Power Co. v. Consolidated Gas, Elec. Light & Power Co. 184 F.2d 552 (4th Cir. 1950), the court rejected the argument that the per se rule could not be applied because the defendant was subject to regulation. Antitrust liability would not interfere with regulation as the Federal Power Commission could only prevent unreasonable and discriminatory pricing of electric power sold in interstate commerce. 41 Stat. 1073 (1920), 16 U.S.C. § 813 (1958).

[23] See note 20 *supra.*

[24] 373 U.S. at 361.

[25] 373 U.S. at 365.

[26] In declining to inquire into the substantive justification for the initial withdrawal of the wire service, the Court cited several cases for the proposition that "substantive inquiry after the fact cannot possibly succeed in accurately ascertaining retrospectively what the outcome would have been had the procedural safeguards been afforded in the first instance." 373 U.S. at 365 n.18. For discussion of cases on this point, see Annot., 21 A.L.R. 2d 1402, 1444 (1952).

The existence of a conspiracy to boycott Silver is not an automatic basis for treble damages. The damages must be proven to have been a direct and proximate result of the defendant's actions. See, *e.g.,* Buckeye Powder Co. v. E. I. DuPont de Nemours Powder Co., 248 U.S. 55 (1918); Virtue v. Creamery Package Mfg. Co., 227 U.S. 8 (1913); Royster Drive-in-Theaters, Inc. v. American Broadcasting-Paramount Theaters, Inc., 268 F.2d 246 (2d Cir.), *cert. denied,* 361 U.S. 885 (1959).

[27] In Duplex Printing Co. v. Deering, 254 U.S. 443 (1921), the Supreme Court

cial for a plaintiff to frame a traditional grievance as an antitrust violation in order to obtain injunctive relief[28] and possibly treble damages.[29] Moreover, as antitrust pleadings would be based on a federal statute, a plaintiff otherwise deprived of federal jurisdiction may have a basis for bringing his suit into the federal court.[30] Also, antitrust pleadings might afford the plaintiff an easier burden of proof, particularly where the per se doctrine is applicable.[31]

The immediate benefit of using antitrust laws to remedy the grievance in the instant case might be overshadowed, however, to the extent that the threat of treble damages inhibits the Exchange from strictly exercising its disciplinary duty. On the other hand, the Exchange might avoid liability in similar cases by adopting, through amendment of the Exchange rules, a hearing and review procedure similar to that included in the Maloney Act.[32] Such an amendment with pervasive review by the SEC, could add certainty to the Ex-

extended antitrust laws to labor problems by holding that picketing by non-employee union members violated the Sherman Act. Although § 20 of the Clayton Act, 38 Stat. 738 (1914), 29 U.S.C. § 52 (1958), restricted injunctive relief in labor disputes between employer and employee, the Court gave the statute a narrow interpretation in allowing relief. Congressional dissatisfaction was expressed through the Norris-LaGuardia Act § 1, 47 Stat. 70 (1932), as amended, 29 U.S.C. § 101 (1958), which proscribed future application of injunctive remedies under antitrust laws in all labor disputes.

Similarly, in McCann v. New York Stock Exch., 107 F.2d 908 (2d Cir. 1939), the plaintiff sought recovery under the Sherman Act although his grievance was in substance a defamation claim. Tacitly recognizing the collateral problems resulting from the proposed application of the antitrust laws, Learned Hand, J., affirming a judgment for the defendant, stated that the antitrust allegations were "out of place" in view of the nature of the grievance. *Id.* at 912 (dictum). Thus, although the result of the Exchange's action was to injure the plaintiff's business, the court considered the case on its merits, as a defamation claim, and held that dissemination of the truth about the plaintiff was not a basis for antitrust liability.

[28] There are specific provisions in the antitrust laws affording injunctive relief. 26 Stat. 209 (1890), as amended, 15 U.S.C. § 4 (1958); 38 Stat. 736, 737 (1890), as amended, 15 U.S.C. §§ 25-26 (1958).

Although there are several instances in which a plaintiff may be able to obtain injunctive relief in any court, the statutory injunctive relief provided by the antitrust laws obviates the necessity of a plaintiff's showing lack of adequate remedy at law.

[29] Under the Clayton Act, § 4, 38 Stat. 731 (1914), 15 U.S.C. § 15 (1958), treble damages can be recovered for antitrust violations.

[30] "The district courts shall have . . . jurisdiction . . . wherein the matter in controversy . . . arises under . . . the . . . laws . . . of the United States." 62 Stat. 930 (1948), as amended, 28 U.S.C. § 1331 (a) (1958). Moreover where a cause of action is based *solely* on antitrust laws, the federal courts have exclusive jurisdiction. See, *e.g.*, Caraway v. Ford Motor Co., 144 F. Supp. 295 (W.D. Mo. 1956); Southern States Oil Co. v. Standard Oil Co., 26 F. Supp. 633 (E.D.S.C. 1939).

[31] See note 11 *supra.*

[32] Section 19 (b) of the Securities Exchange Act, 48 Stat. 898 (1934), 15 U.S.C. § 78s (b) (1958), provides that the Securities Exchange Commission may make changes in the rules of an exchange. The Maloney Act requires notice and hearings in all disciplinary proceedings. 52 Stat. 1070 (1938), 15 U.S.C. § 78o-3 (b) (9) (1958).

change's disciplinary actions, as administrative decisions supported by substantial evidence will not be judicially reversed.[33] Adoption of a non-member hearing rule, however, without more, would not *guarantee* insulation from antitrust liability, for the Court expressly left open the question of liability where there was a provision for a hearing and administrative appeal.

In addition, such an amendment itself presents practical problems as the Exchange would lack both full subpoena power and the protection of a privilege against defamation claims.[34] The lack of adequate subpoena power would obviously hinder both the Exchange and the accused in presenting witnesses. Moreover, the lack of privilege might well inhibit witnesses who could otherwise willingly testify. The resulting inability of the Exchange to produce substantial proof of offenses would frustrate the policy of delegated regulation. Neither could the Exchange safely refuse to give a hearing in anticipation of introducing such evidence in an antitrust action, for under the *Silver* doctrine, the court may decline to consider even the most overwhelming evidence.[35] Thus it seems clear that if exchange regulation of non-members is to continue with any degree of effectiveness, further legislation is needed. Although the vesting of adequate privilege and subpoena power in the Exchange is subject to the objection that it would place excessive and essentially governmental power in private hands, provision for SEC control and review power would prevent abuse. On the other hand, to place the primary authority over such disputes in the SEC rather than in the Exchange would frustrate the legislative policy that regulation should be delegated to the exchanges.[36]

[33] The decisions of administrative agencies are subject to judicial review according to the Administrative Procedure Act § 10. 60 Stat. 243 (1946), 5 U.S.C. § 1009 (1958). Section 10(e) of the act precludes judicial reversal of agency findings unless they are supported by substantial evidence. See, *e.g.*, Universal Camera Corp. v. NLRB, 340 U.S. 474 (1951); 4 DAVIS, ADMINISTRATIVE LAW, ¶¶ 29.02-.04 (1958). Strictly speaking, exchanges are not administrative agencies. Only action involving SEC discretion could be said to be a decision of an administrative agency. However, even without SEC discretion, the administrative role of the NYSE would appear to be sufficiently analogous to warrant application of the substantial evidence rule.

[34] Subpoena powers are reserved to the SEC by § 21(b) of the Securities Exchange Act, 48 Stat. 899 (1934), as amended, 15 U.S.C. § 78u (b) (1958). The Court recognized that the Exchange would have only a qualified privilege, but suggested that defamation liability could be minimized by confining the hearing to parties to the dispute and necessary witnesses, 373 U.S. at 362 n.14.

[35] 373 U.S. at 365. See note 26 *supra*.

[36] See note 2 *supra*.