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ARTICLES

THE APPLICATION OF SHERMAN ACT ANTIBOYCOTT LAW TO INDUSTRY SELF-REGULATION: AN ANALYSIS INTEGRATING NONBOYCOTT SHERMAN ACT PRINCIPLES

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Entry into and competition within professions and many industries is commonly restricted by private regulation among competitors. These restrictions are often effectuated, without direct government participation, through rules, procedures, or standards established by trade or

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1. In 1979, the Department of Justice announced that "guild-like public and private regulation" characterizes a significant part of our otherwise free enterprise system. Remarks by John Shenefield, Assistant Attorney General, Antitrust Division, Local Action and Professional Activities: Increased Antitrust Scrutiny, 1979 Bond Attorneys Workshop, in Chicago (Oct. 11, 1979) (copy on file with Southern California Law Review). Shenefield said that since "economic competition, not public or private regulation, is the most efficient form of economic organization," antitrust principles would be applied in areas of our economy where for many years they have been given little attention. Id. at 2.

professional organizations. Sometimes, however, the restrictions are made through less formalized concerted decisionmaking procedures by persons potentially in competition with new entrants. Such privately imposed restraints on competition have recently been the focus of an increasing number of private treble damages actions under section 1 of the Sherman Act. In these cases, the plaintiffs have alleged that the defendants were engaged in illegal boycotts, and that the defendants had no valid antitrust defense. The resolution of these cases by the generally Sullivan and Wiley, Recent Antitrust Developments: Defining the Scope of Exemptions, Expanding Coverage, and Refining the Rule of Reason, 27 U.C.L.A. L. REV. 265 (1979).

The state action exemption was first articulated in Parker v. Brown, 317 U.S. 341 (1942), a New Deal era case concerning the commerce clause. In Midcal Aluminum, supra, the Court refused to excuse the resale price maintenance of wine even when authorized by a California statute. The Court held that there are two standards that must be satisfied for state action antitrust immunity: the challenged restraint must be "clearly articulated and affirmatively expressed as state policy," and that policy must be "actively supervised" by the state itself. 445 U.S. at 105 (quoting City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1977)).

Governmental regulation of entry takes various forms, of course, such as the professional licensing of doctors and lawyers, the exclusive franchising of airport and ballpark concessions, and the "public necessity" certification of public utilities. For a recent definitive description of the latter form of entry regulation, see Jones, Origins of the Certificate of Public Convenience and Necessity: Developments in the States, 1870-1920, 79 COLUM. L. REV. 426 (1979). See generally T. Morgan, CASES AND MATERIALS ON ECONOMIC REGULATION OF BUSINESS 51-212 (1976).

3. The Supreme Court held as early as 1943 that the federal antitrust laws apply to professions. American Medical Ass'n v. United States, 317 U.S. 519 (1943).

4. See, e.g., Surety Title Ins. Agency, Inc. v. Virginia State Bar, 431 F. Supp. 298 (E.D. Va. 1977), vacated, 571 F.2d 205 (4th Cir. 1978). See also United States v. Allen County Ind. Bar Ass'n, Inc. [1980-81] TRADE REG. REP. (CCH) ¶ 63,595 (consent decree). In Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975), the Supreme Court held that defendant's advisory legal fee schedule for services relating to residential real estate transactions, when combined with an enforcement mechanism against noncomplying attorneys, was clearly illegal as a classic form of price-fixing. In Goldfarb, the Court held that when a lawyer examines a real estate title for a client, the lawyer provides "a service; the exchange of such a service for money is 'commerce' in the most common usage of that word." Id. at 787. The Court did not find a congressional intent to grant immunity to professionals, but it did discuss potential distinctions between professions and other business activities.

The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today. Id. at 788 n.17.

5. 15 U.S.C. § 1 (1976) ("Every contract, combination . . . , or conspiracy, in restraint of trade . . . is declared to be illegal.").

6. There are several defenses to claims of illegal boycott. For example, the Noerr-Pennington doctrine generally gives first amendment protection to private activities designed to create or effect changes in law. See Oppenheim, Antitrust Immunity for Joint Efforts to Influence Adjudication Before Administrative Agencies and Courts—From Noerr-Pennington to Trucking Unlim-
appellate courts suggests the existence of substantial confusion concerning the application of antitrust boycott law as developed by the Supreme Court. This confusion has engendered protracted litigation.\(^7\) The ambiguity with respect to antitrust boycott law has been underscored by several recent nonboycott Sherman Act decisions by the Court.\(^8\)

This Article first identifies the apparent sources of disagreement among the courts concerning the rules and elements of boycott law, particularly when applied to industry or professional self-regulation conducted for arguably non-anticompetitive purposes. Next, the Article discusses the rationale employed by the Supreme Court in boycott decisions and the attempted application of this rationale in a number of representative lower court decisions. Finally, this Article suggests that, contrary to some recent writing on the subject, the doctrine of per se...
illegality, when appropriately invoked, has remained essentially unchanged. Therefore, lower courts should apply the per se doctrine to various forms of private regulatory activity undertaken without governmental approval.

I. INITIAL PROBLEMS OF CHARACTERIZATION

A. BACKGROUND

After initially construing section 1 of the Sherman Act\(^9\) literally to prohibit "[e]very contract . . . in restraint of trade,"\(^{10}\) the Supreme Court eventually settled on the Rule of Reason mode of analysis for section 1.\(^{11}\) The Rule of Reason condemns restraints that are more restrictive than reasonably necessary to promote a procompetitive objective.\(^{12}\) Thus, the Rule of Reason requires the court to analyze the ambiguous motives underlying the conduct complained of, and the economic effects thereof, to determine whether the conduct is primarily anticompetitive or procompetitive.\(^{13}\) To eliminate this burdensome aspect of an antitrust case, the Supreme Court subsequently determined that certain conduct is so inherently anticompetitive that it is per se unreasonable.\(^{14}\) The application of the per se rule precludes any argument that the defendant's conduct is procompetitive or otherwise justified.

Perhaps the most significant development in antitrust law during

10. See, e.g., United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 312 (1897) (emphasis in original).
14. One of the most often cited descriptions of the per se rule was written by Justice Black in Northern Pac. Ry. Co. v. United States, 356 U.S. 1 (1958).

However, 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. This principle of per se unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids 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—an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves are price fixing, division of markets, group boycotts, and tying arrangements.

Id. at 5 (citations omitted).
the last fifty years has been the extension of the per se category of offenses under section 1. The per se rule has been extended to prohibit concerted refusals to deal, also known as group boycotts. Several nonboycott decisions by the Court during the past five years, however, have generated new questions concerning the appropriateness of the per se rule.

Moreover, the Supreme Court's 1978 holding in *United States v. United States Gypsum Co.*, that the defendant's intent is to some degree a separate element in a criminal antitrust case has proven to be the recent focus of additional controversy.

15. United States v. General Motors Corp., 384 U.S. 127, 146 (1966) ("[W]here businessmen concert their activities in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct."); Silver v. New York Stock Exch., 373 U.S. 341, 347 (1963) ("[R]emoval of the wires by collective action of the Exchange and its members would, had it occurred in a context free from other federal regulation, constitute a *per se* violation of § 1 of the Sherman Act."); Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656, 659-60 (1961) (per curiam) ("The conspiratorial refusal to provide gas for use in the plaintiff's Radiant Burner[s] [because they] are not approved by AGA therefore falls within one of the 'classes of restraints which from their 'nature or character' [are] unduly restrictive, and hence forbidden by both the common law and the statute.'"); Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207, 212 (1959) ("Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category.") (citations omitted); Associated Press v. United States, 326 U.S. 1, 27-28 (1945) ("[W]e have here arrangements whereby members of the Associated Press bind one another from selling local news to non-members . . . [These] agreements to curtail the supply . . . are in violation of the area of free enterprise which the Sherman Law was designed to protect."); Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457, 468 (1941) ("[I]t was not error to refuse to hear the evidence offered, for the reasonableness of the methods pursued by the combination to accomplish its unlawful object is no more material than would be the reasonableness of the prices fixed.").

16. See note 8 supra.


18. The Court held that "the criminal offenses defined by the Sherman Act should be construed as including intent as an element." *Id.* at 443 (citation omitted). On the other hand, the Court added that proof of the intent element can be met by evidence that defendants had knowledge of the likely anticompetitive effects of their conduct; this need not include proof of a "conscious desire" by defendants to violate the law. *Id.* at 446. Moreover, the Court observed that the holding that presumptions of intent were disapproved was not intended to "change" the rule that a civil violation may be proven without a showing of intent. *Id.* at 436.

The Third Circuit Court of Appeals, in United States v. Gillen, 599 F.2d 541, *cert. denied*, 444 U.S. 866 (1979), a criminal Sherman Act case decided after *Gypsum*, narrowly construed the *Gypsum* requirement of proof of intent as not applying at all in per se cases, where "no inquiry has to be made on the issue of intent beyond proof that one joined or formed the conspiracy." *Id.* at 545. Perhaps quite understandably, the Gillen court thus effectively disavowed the Gypsum reasoning; the defendants in *Gypsum* had been charged with price-fixing. The Justice Department appears to have taken a position concurring with the Third Circuit. An antitrust official announced in October, 1980, that the criminal intent requirements of *Gypsum* would have no practical effect on the prosecution of per se criminal cases. Remarks of Anthony V. Nanni, Chief, Trial Section, Antitrust Division, The Per Se Rule: A Prosecutor's View, Fourth Annual Review of Antitrust Law Developments, BNA Education Systems, in Washington, D.C. 5-6 (Oct. 6, 1980) (copy on file with Southern California Law Review).

19. See *Collins, Anticompetitive Intent and Refusals to Deal Under Section One of the Sherman*
of whether "intent," "mens rea," or "anticompetitive purpose" is a necessary element of a section 1 offense\textsuperscript{20} that the plaintiff must plead and prove has become intertwined with the separate principle of per se illegality.\textsuperscript{21} Thus, the decisions of trial judges, often manifested in jury instructions, as to whether a particular charge is subject to the per se rule, has taken an increased importance.\textsuperscript{22}

In no context have these two basic Sherman Act issues—the relevance of defendant's intent and the applicability of the per se rule—caused greater confusion than in cases involving allegations of illegal boycott.\textsuperscript{23} As indicated above, boycott cases arise most often as attempts by competitors to adopt or enforce uniform regulations or stan-


\textsuperscript{20} See Model Penal Code \S 2.02 (Proposed Official Draft 1962). For a discussion of criminal culpability, see Gypsum, 438 U.S. at 441-46. See also United States v. Foley, 598 F.2d 1323 (4th Cir. 1979), cert. denied, 444 U.S. 1043 (1980); United States v. Continental Group, Inc., 603 F.2d 444, 461-62, (3rd Cir. 1979), cert. denied, 444 U.S. 1032 (1980) (holding, like Gillen, that the government need not prove that Sherman Act felony defendants specifically intended to violate the law). That the government need not prove specific intent had been the accepted rule at least since United States v. Patten, 226 U.S. 525, 543 (1913). In United States v. Nu-Phonics, Inc., 433 F. Supp. 1006 (E.D. Mich. 1977), however, the court held that in felony prosecutions under the Sherman Act, the government must show that the defendants had an anticompetitive objective. For a similar view, see Note, Mens Rea and Felony Violations Under the Sherman Act, 11 Loy. U.L.J. 161, 176 (1979) (arguing that courts should require the government to prove specific intent in felony prosecutions under the Sherman Act).

\textsuperscript{21} See Bauer, Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Re-examination, 79 Colum. L. Rev. 685 (1979); Garvey, supra note 19; Note, Antitrust Treatment of Competitive Torts: An Argument for a Rule of Per Se Legality Under the Sherman Act, 58 Tex. L. Rev. 415 (1980). The Third Circuit in United States v. Gillen, 599 F.2d 541, cert. denied, 444 U.S. 866 (1979), would apparently require jury instructions and defense evidence on intent in a non-per se case but would not do so in a per se case. \textit{See note 18 supra.} Thus a determination of whether the pleading alleges a per se offense must precede and be exclusive of considerations of defendants' intent.

For a somewhat critical and subjective review of the per se rule under the Burger Court, see Redlich, \textit{The Burger Court and the Per Se Rule,} 44 Alb. L. Rev. 1, 45-56 (1979).

\textsuperscript{22} For example, the treble damages plaintiffs in Catalano, Inc. v. Target Sales, Inc., 605 F.2d 1097 (9th Cir. 1979), rev'd, 446 U.S. 643 (1980), thought that such a decision was sufficiently important to seek a preliminary ruling on whether the per se rule should apply. When the court ruled against them, they filed an interlocutory appeal on that issue alone. 605 F.2d at 1097. \textit{See also United States v. Realty Multi-List, Inc.,} 629 F.2d 1351, 1361-65 (5th Cir. 1980).

\textsuperscript{23} There has been an abundance of writing on group boycotts. See L. Sullivan, \textit{Handbook of the Law of Antitrust} 229-65 (1977). According to Professor Sullivan, "[T]here is more confusion about the scope and operation of the per se rule against group boycotts than in reference to any other aspect of the per se doctrine." \textit{Id.} at 229-30. \textit{See also} Barber, \textit{Refusals to Deal Under the Federal Antitrust Laws,} 103 U. Pa. L. Rev. 847 (1955); Bauer, supra note 21; Kirkpatrick, \textit{Commercial Boycotts as Per Se Violations of the Sherman Act,} 10 Geo. Wash. L. Rev. 387 (1942); McCormick, \textit{Group Boycotts: Per Se or Not Per Se, That is the Question,} 1 Seton Hall L. Rev. 703 (1976); Woolley, \textit{Is a Boycott a Per Se Violation of the Antitrust Laws?,} 27 Rutgers Univ. L. Rev. 773 (1974); Note, \textit{A Re-examination of the Boycott Per Se Rule in Antitrust Laws,} 86 Yale L. J. 1041 (1976).
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standards having exclusionary potential without the participation of government. In deciding boycott cases over the years, the Supreme Court has held that boycotts are so plainly and unreasonably anticompetitive that they are per se illegal. Thus, defendants are precluded from attempting to explain or justify their conduct or its purpose. Simultaneously, however, many lower courts have proven remarkably resourceful in creating apparent exceptions to the Supreme Court case law and have thereby refused to apply the per se rule. This is often accomplished by invoking an economic utility rationale.

The confusion in antitrust jurisprudence about boycotts and the per se rule has resulted in suggestions that the Supreme Court should


24. For a collection and analysis of such cases, see Hoffman, Industry-Wide Codes, Advertising, Seals of Approval and Standards: As Participated in by the Trade Association, 13 Antitrust Bull. 595 (1968). Allegedly innocuous conduct of this nature has been known for many years to have deleterious effects on the economy.

The standardization of products, terms of contracts, and price lists and differentials, though frequently advantageous to buyers and sellers alike, is also subject to abuse. Standardization of products contributes to convenience and lessens waste. But it may limit competition in quality, restrict the consumer's range of choice, and by eliminating the sale of cheaper grades, compel him to buy a better and a more expensive product than the one that he desires. Standardization of the terms of contracts saves time, prevents misunderstanding, and affords a common basis for the comparison of prices. If limited to such matters as allowable variations in the quality of goods delivered, the time when title passes, and the method to be employed in the settlement of disputes, it does not restrain competition. But a trade may go on to establish common credit terms, create uniform customer classifications, eliminate or standardize discounts, forbid free deals, limit guarantees, restrict the return of merchandise, minimize allowances on trade-ins, fix handling charges, forbid freight absorption, discourage long-term contracts, and agree upon a common policy with respect to guarantees against price declines.

L. Schwartz, Free Enterprise and Economic Organization 501-02 (1972) (footnote omitted). The boycott issue arises, of course, when a competitor's failure or refusal to comply with the accepted standards results in his inability to compete.

25. See note 15 supra. As the Court held in Klor's Inc. v. Broadway-Hale Stores, Inc., 359 U.S. 207 (1959), group boycotts or concerted refusals to deal have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they "fixed or regulated prices, parcelled out or limited production, or brought about a deterioration in quality." Even when they operated to lower prices or temporarily to stimulate competition they were banned. For, as this Court said in Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, "such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment."

Id. at 212 (citations omitted).

26. See Note, A Return to the Rule of Reason in Group Boycott Cases, 42 U. Colo. L. Rev. 467 (1971). For example, in Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970), an agreement between competing suppliers to substitute distributors was held not to violate the Sherman Act. The court concluded that the elimination of the existing distributor in favor of another was not done for anticompetitive reasons but, rather, because of dissatisfaction with performance.
modify the law.\textsuperscript{27} At the heart of the confusion is the ambiguity concerning the use of the terms "boycott" and "intent." Two questions in particular require a more explicit response by the Court. First, what conduct is appropriately characterized as a "boycott" for antitrust purposes?\textsuperscript{28} Second, what degree or nature of "anticompetitive intent," if any, must a plaintiff prove in a civil action under the Sherman Act?\textsuperscript{29} A substantial part of the disagreement concerning boycott law is illusory: notwithstanding divergent terminology, a basic common sense consensus exists concerning the proper application of section 1 to all

\textsuperscript{27} See Bauer, supra note 21; Woolley, supra note 23. It has been argued that the wholesale denial to all professional groups of the right to propose and enforce ethical guidelines where no anticompetitive intent or otherwise unreasonable restraint is involved is undesirable on policy grounds; it removes from such groups the means and incentive to improve their profession. Similarly, a declaration that the promulgation of industry product performance and safety standards is per se illegal would prevent manufacturers, who perhaps are the ones who best understand the products' characteristics, uses, and dangers, from instituting any set of standards. One commentator has suggested an analysis of boycotts which weighs the intent, the effect of the restraint, the market power, and, to a limited extent, the relationship of the parties. See Bauer, supra note 21, at 705-17.

\textsuperscript{28} The issue of whether an intent to further nonstatutory social policy should be a defense under the antitrust laws, precluding the boycott characterization, has been debated in the context of industry self-regulation involving refusals to buy or sell. See Bird, Sherman Act Limitations on Noncommercial Concerted Refusals to Deal, 1970 DUKE L.J. 247; Note, Trade Association Exclusionary Practices: An Affirmative Role for the Rule of Reason, 66 COLUM. L. REV. 1986 (1966). Bird's thesis is that the slight social benefits that can accrue from a case-by-case analysis of group boycotts is outweighed by the cost to the judicial system of giving up the per se rule, particularly where the justifications are based on an ill-defined social policy. He would permit a defense based on furtherance of statutory policy or on a "necessary cooperation" rationale. Both defenses would be limited by the imposition of a "least restrictive means" and a "procedural fairness" inquiry. Bird, supra, at 291-92. The Columbia Law Review Note argues in favor of justifications based on social policy, a position apparently rejected by the Court in National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978). See also Coons, Non-Commercial Purpose as a Sherman Act Defense, 56 NW. U.L. REV. 705 (1962).

\textsuperscript{29} See note 18 supra; Collin, note 19 supra. The recent decision of Missouri v. NOW, 620 F.2d 1301 (8th Cir. 1980), contains a lengthy discussion of the legislative history and purpose of the Sherman Act. Although the decision was not based upon such a rationale, 620 F.2d at 1315 n.16, the majority opinion states that "we perceive a more accurate phrasing of Congress' concern to be not the elimination of boycotts, but elimination of boycotts used by a competitor against a competitor (or against a supplier, customer, etc.) in the business of competing." Id. at 1310. The majority concluded that Supreme Court case law had indicated that the "activities that were meant to be covered are competitive activities by competitors with some self-enhancement motivation." Id. at 1309. That conclusion, however, fails to accord with the clear view of the Court. For example, if the oil companies combined to raise prices of heating oil to "persuade" Congress to pass legislation to promote energy efficiency, the goal arguably would be noncommercial, but the methods used would clearly be per se illegal. See, e.g., Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457 (1941); United States v. Socony Vacuum Oil Co., 310 U.S. 150 (1940). Moreover, if the defendants in NOW had been in a competitive relationship with Missouri's convention facilities providers, their conduct presumably would have been viewed differently by the court even if the primary goals were allegedly political.
leged boycotts, at least in the context of industry self-regulation.\textsuperscript{30} The disagreement that exists may be primarily a function of mischaracterization of the law by litigating attorneys coupled with careless drafting by the courts.\textsuperscript{31} Nevertheless, a central issue remains in dispute: May competitors engage in private concerted action, for allegedly non-anticompetitive purposes, if the foreseeable effect of their action is an exclusionary foreclosure of commercial outlets?

B. WHAT IS A “BOYCOTT” FOR ANTITRUST PURPOSES?

The term “boycott” obviously has a general application and usage: “to withhold, wholly or in part, social or business intercourse from, as an expression of disapproval or means of coercion.”\textsuperscript{32} In Sherman Act litigation, the Supreme Court has applied the term to concerted refusals among competitors to deal with a “target” business which is or could be a competitor of at least one of the conspirators.\textsuperscript{33} In many cases in

\textsuperscript{30} The Fifth Circuit decision in E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm., 467 F.2d 178 (5th Cir. 1972), cert. denied, 409 U.S. 1109 (1973), summarized the major cases dealing with antitrust boycotts:

Cases applying \textit{per se} illegality to collective refusals to deal fall into roughly three categories. The first group, exemplified by Eastern States Retail Lumber Dealers Assoc. v. United States, 234 U.S. 600, 34 S.Ct. 951, 58 L.Ed. 1490 (1914), have [sic] involved horizontal combinations among traders at one level of distribution, whose purpose was to exclude direct competitors from the market. . . .

Klor’s, Inc. v. Broadway-Hale Stores, 359 U.S. 207, 79 S.Ct. 705, 3 L.Ed.2d 741 (1959), illustrates a second category of group boycott cases, involving vertical combinations among traders at different marketing levels, designed to exclude from the market direct competitors of some members of the combination.

Unlike these first two categories, the third group of cases has concerned combinations designed to influence coercively the trade practices of boycott victims, rather than to eliminate them as competitors. The leading case in the area is Fashion Originators Guild of America v. Federal Trade Comm'n, 312 U.S. 457, 61 S.Ct. 703, 85 L.Ed. 949 (1941), in which a group of “original” designers refused to sell their creations to retailers who purchased and sold copies of the original designs. In holding this refusal to deal illegal \textit{per se}, the Court declared that even though the object of the boycott was to prevent the retailers from dealing with manufacturers of the copies and thereby eliminate “style piracy,” the coercion practiced indirectly on a rival method of competition precluded application of the rule of reason. . . .

In all these cases, the touchstone of \textit{per se} illegality has been the purpose and effect of the arrangement in question. . . . We conclude that resort to the \textit{per se} rule is justified only when the presence of exclusionary or coercive conduct warrants the view that the arrangement in question is a “naked restraint of trade.”

\textsuperscript{31} See, e.g., 2 E. KINTNER, FEDERAL ANTITRUST LAW 76-9 to 76-15 (1980).

\textsuperscript{32} WEBSTER’S NEW INTERNATIONAL DICTIONARY 321 (unabr. 2d ed. 1959). As the court noted in Missouri v. NOW, 620 F.2d 1301 (8th Cir. 1980):

[The term boycott was derived from a method of retaliation used against a land agent, Captain Boycott, who paid starvation wages to tenants and then evicted those who protested these wages. Tenants rallied the support of Boycott's servants, herders and drivers, and all agreed to cease relations with the Boycott family.]

\textsuperscript{33} Id. at 1304 n.5. See E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm., 467 F.2d 178 (5th Cir. 1972). See also United States v. General Motors Corp., 384 U.S.
which an illegal boycott is alleged, the defendants' conduct ultimately has been adjudged permissible. Often the basis for this result has been a determination by the court that the conduct was improperly characterized—the conduct was not exclusionary in purpose or effect. Moreover, additional decisions suggest that, notwithstanding the encompassing language of section 1, the Sherman Act was intended by Congress to prohibit only economically-motivated behavior. If the Sherman Act is limited in accord with this perceived legislative purpose, it should not be applied to “noneconomic” or “noncommercial” boycotts. While the Supreme Court has applied its antiboycott law to allegedly “noncommercial” conduct, the Court has never held a concerted refusal to deal to be illegal when the conduct in question was noneconomic. Thus, the Supreme Court has interpreted “boycott” to mean a concerted refusal to deal engaged in by competitors or by businesses with an existing commercial relationship, for economic or commercial motives, which has the foreseeable effect of excluding a competitor or potential competitor from competition. Once a court determines that the facts as alleged constitute a boycott, then, as with price-fixing, the per se rule should apply.


36. These terms are defined in Bird, Sherman Act Limitations on Noncommercial Concerted Refusals to Deal, 1970 Duke L.J. 247:

A group's purpose will be considered commercial if the objective is profit, and the group is composed entirely of businessmen. A group's purpose is economic if the objective is the advancement of the group's economic self-interest and is not a commercial purpose as defined above. A group's purpose is noneconomic if it has "no substantial content of material self-interest."

Id. at 249 (emphasis in original). Professor Coons earlier had established this framework in Coons, Non-Commercial Purpose as a Sherman Act Defense, 56 NW. U.L. REV. 705, 708 (1962).

37. See Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1960). But see Apex Hosiery Co. v. Leader, 310 U.S. 469, 506 (1940) ("the objective of the restraint in the boycott case . . . was thought to be immaterial. . . .").

38. Among some lower courts there is a growing view that conduct should not be characterized as a boycott and subject to per se condemnation unless there is a clear anticompetitive motive involving coercive activities. See, e.g., De Filippo v. Ford Motor Co., 316 F.2d 1313, 1317-18 (3d Cir.), cert. denied, 423 U.S. 912 (1975); Beltronics, Inc. v. Eberline Instrument Corp., 509 F.2d 1316, 1320 (10th Cir. 1974), cert. denied, 421 U.S. 1000 (1975); Worthen Bank & Trust Co. v. National BankAmericard, Inc., 485 F.2d 119, 124-25 (8th Cir. 1973), cert. denied, 415 U.S. 918 (1974). Such a view has never been adopted by the Supreme Court.
From that perspective it will be helpful to isolate the variety of contexts which have given rise to the application of boycott law. Many forms of concerted industry-wide regulation may be theoretically classified as exclusionary practices or as refusals to deal. Some of these activities clearly fit into the boycott definition; other activities, however, do not involve obviously illegal agreements to eliminate a competitor’s supplies or customers. This second group of self-regulatory activities often provides the raw material for legal confusion when the activities are characterized by a plaintiff as a boycott.

1. Direct Agreements Not to Buy or Sell

The traditional boycott is a formal or informal agreement among competitors to restrict the trade of competitors or potential competitors. Thus, the parties to the agreement obtain a competitive advantage. The agreement to not buy or sell may be contained expressly in the bylaws of a trade or professional association. The formation and enforcement of these bylaws which prohibit members from dealing with potential competitors is one type of boycott.

Silver v. New York Stock Exchange39 is an example of a group boycott created by association bylaws. In Silver, certain members of the New York Stock Exchange provided direct wire communication to the floor of the exchange for nonmember brokers. The governing body of the association passed a rule which prohibited members from providing this service. In adherence to this rule, members refused to deal with or provide necessary wire service for nonmembers. The Supreme Court held this conduct per se illegal because of its blatant anticompetitive impact on the excluded brokers.40

Associated Press v. United States41 involved a similar boycott effected by means of bylaws. In Associated Press, the defendant association had a bylaw which required members to sell their news only to the association. The Supreme Court, as in Silver, indicated that this activity was per se illegal.42 The association’s bylaws limited those to whom

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40. Id. at 347. "It is plain, to begin with, that removal of the wires by collective action of the Exchange and its members would, had it occurred in a context free from other federal regulation, constitute a per se violation of § 1 of the Sherman Act." Id. The Court in Silver went on to hold that the removal of the telephone wire connections violated the Securities Exchange Act because no notice was given before the removal. Id. at 361.
41. 326 U.S. 1 (1945).
42. Id. at 12. The Fifth Circuit in United States v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1980) suggests that Associated Press did not actually involve a boycott because the Court’s remedy did not require the defendant’s members to deal with nonmembers. 629 F.2d at
members could sell their news, and, thus, nonmembers were excluded from obtaining a necessary product. This was, therefore, a classic antitrust boycott conducted by horizontal competitors. On at least one occasion, however, the Supreme Court has applied the per se rule to a boycott which was not exclusively horizontal. In *Klor's, Inc. v. Broadway-Hale Stores, Inc.* Broadway-Hale and a group of appliance distributors entered into an agreement to restrict the supply of appliances to Klor's, a competitor of Broadway-Hale. The Supreme Court characterized this conduct as a boycott and held it per se illegal.

2. Blacklists by Industry Groups

Another type of boycott activity involves a concerted response to the conduct or qualifications of particular competitors that are deemed detrimental by an industry group or association. A blacklist promulgated by an industry association or group of competitors can have severe anticompetitive consequences for the target, even when the motive for the blacklist is primarily noncompetitive. When a blacklist causes competitors to stop dealing with the blacklisted party, the Supreme Court has held the practice per se illegal as a boycott. In other words, the per se rule has been extended to situations where the boycott is not primarily for anticompetitive purposes.

*Eastern States Retail Lumber Dealers' Association v. United States* is a typical example of a boycott by blacklist. In *Eastern States*, the defendant was an association of retailers whose members circulated a list of wholesale lumber dealers who also sold to retail customers. The premise for the blacklist was that the listed dealers were competing unfairly. Retail lumber dealers who received the list then

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1366 n.30. It is, however, more accurate to acknowledge that a boycott, or concerted refusal to deal, clearly was present in *Associated Press* and involved the combination of two practices: the defendant's restrictive membership policy and its refusal to deal with nonmembers.

43. In antitrust jurisprudence, horizontal refers to the relationship of the parties involved. A horizontal relationship indicates that the parties are competitors or in some way on the same level of distribution. A horizontal restraint on trade usually involves a group of competitors foreclosing the opportunities of another competitor or potential competitor. Thus, the remaining competitors keep a larger share of the market to themselves. A vertical relationship indicates that the parties are in a buyer-seller relationship or on different levels of the distribution chain. A vertical restraint involves restraints placed by the seller on the buyer (or vice versa).

44. 359 U.S. 207 (1959).

45. *Id.* at 210-12. The Court held that group boycotts were "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." *Id.* at 213. It is important to note, however, that agreements restricting trade or dealings with third parties have not been subjected to per se analysis where at least one party to the agreement is not in a horizontal relationship with the target of the agreement.

46. 234 U.S. 600 (1913).
refused to make their lumber purchases from the blacklisted wholesalers. The Supreme Court characterized this conduct as an illegal group boycott.47

Similarly, in Webb v. Utah Tour Brokers Association,48 the defendant tour brokers circulated a blacklist of travel agents who would not follow certain procedures promulgated by the defendant association. The brokers who received the blacklist refused to deal with the listed travel agents. The Tenth Circuit Court of Appeals held that this blacklisting activity constituted a boycott.49 Blacklisting, by any name, thus falls within the group of activities which are characterized as boycotts.

3. Sanctions of Members by Associations

Another related type of conduct which has been treated as a boycott is the imposition of sanctions by members of an industry group upon other members of the group. Often the sanction is so severe that it has an exclusionary effect, particularly if the sanction is a suspension of membership. While this conduct focuses on targets who are already members of the group, rather than upon outsiders as with blacklists, the results of the two practices can be identical: exclusion of a competitor. For example, in Blalock v. Ladies Professional Golf Association,50 the defendant, an association composed of competing tournament golfers, suspended the plaintiff, Jane Blalock, from tournament play for alleged misconduct. The effect of this suspension by the defendant association was the same as a blacklist; other members of the association collectively refused to play in tournaments with Blalock, thus excluding her from tournament play. The district court classified this suspension as an antitrust boycott.51

Other internal sanctions may or may not constitute per se illegal boycotts, depending upon the exclusionary effect upon the sanctioned member. For example, a fine imposed upon an association member would generally not be viewed as a per se illegal boycott. When a membership in a group or association is essential to success in a business, however, suspension or preclusion of a competitor's membership is a per se illegal boycott under antitrust laws.52

47. Id. at 611-14.
48. 568 F.2d 670 (10th Cir. 1977).
49. Id. at 675-76.
51. Id. at 1268.
52. See Marjorie Webster Junior College, Inc. v. Middle States Ass'n of Colleges & Secon-
4. The Establishment of Product or Professional Standards

The above categories of conduct are relatively clearly characterized as boycotts. Several other categories of self-regulatory conduct, however, often produce similar results, but may not involve refusals to deal by the defendants. One such category is the promulgation of industry-wide product standards by associations of industry members. Before this conduct can be classified as a boycott, however, an intended refusal to deal and consequent exclusionary impact must be found. A primary factual distinction is that in unambiguous boycott activity such as blacklisting, it is the parties to the agreement who refuse to deal with the target; where industry standards are set which serve to eliminate a party from effective competition, the refusal to deal is accomplished indirectly by the target’s customers who are not parties to the agreement.

For example, in Structural Laminates, Inc. v. Douglas Fir Plywood Association,53 the defendant was an association of plywood manufacturers which promulgated a set of standards for plywood products. If these standards were complied with, a manufacturer was permitted to stamp his products with the industry seal of approval. The trial court found that the plywood market was very sensitive to the existence of the seal.54 The plaintiff, a noncomplying producer, claimed its business was damaged by the association’s refusal to permit it to use the seal.

The foreseeable effect of the conduct in Structural Laminates was similar to the exclusionary effect of blacklisting or other direct refusals to deal. Both actions involve concerted activity by parties on the same level in the distribution chain; both actions coerce cooperation from

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53. 261 F.2d 154 (D. Ore. 1966), aff'd per curiam, 399 F.2d 155 (9th Cir. 1968), cert. denied, 393 U.S. 1024 (1969).
54. 261 F. Supp. at 156.

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The increasing importance of private associations in the affairs of individuals and organizations has led to substantial expansion of judicial control over “The Internal Affairs of Associations not for Profit.” Where membership in, or certification by, such an association is a virtual prerequisite to the practice of a given profession, courts have scrutinized the standards and procedures employed by the association notwithstanding their recognition of the fact that professional societies possess a specialized competence in evaluating the qualifications of an individual to engage in professional activities. The standards set must be reasonable, applied with an even hand, and not in conflict with the public policy of the jurisdiction. Even where less than complete exclusion from practice is involved, deprivation of substantial economic or professional advantages will often be sufficient to warrant judicial action.

noncomplying third parties by using exclusionary penalties. Promulga-
tion of industry standards by competitors often prevents effective com-
petition by cost- and price-cutters who offer the public the choice of
paying less for a presumably lower quality, but substitutable product.
Similar conduct has been classified as a boycott. 55

C. THE RELEVANCE OF INTENT IN A PER SE SECTION 1 CASE

In the Gypsum case, the Supreme Court specifically applied traditional
criminal law and due process principles to a criminal antitrust case,
holding that defendant's intent or purpose was to some degree a rele-
vant element of a section 1 offense. 56 Thus, the Court suggested a non-
statutory distinction between criminal and civil cases, noting that its
holding would not apply to civil cases. 57 Intent, however, has always
been relevant in a section 1 case, even if not as a separate element of
the offense. The question of intent is inherent in determining the exist-
ence of an agreement. 58

Moreover, the question of intent has been particularly relevant in
analysing concerted action to determine whether or not the per se rule
should apply. Thus, for example, in Maple Flooring Manufacturers
Ass'n v. United States, 59 the Supreme Court held that because the evi-
dence demonstrated that the defendants intended only to exchange cur-
rent price information, their conduct was not illegal even though it had
the ultimate effect of stabilizing prices: it was not a price-fixing agree-
ment. By contrast, in Sugar Institute, Inc. v. United States, 60 the Court

Structural Laminates, however, the courts concluded that the standards were "reasonable" and
thus upheld defendant's certification program. 261 F. Supp. at 161; 399 F.2d at 156. See generally
Note, Trade Association Exclusionary Practices: An Affirmative Role For the Rule of Reason, 66

It is the necessity or desirability of collective action which gives rise to trade associa-
tions. Thus, these groups may adopt programs to standardize and simplify product lines,
to certify merchandise, or to regulate the activities of members through the imposition of
restraints upon participation in group activities. Because the members of a trade associa-
tion often are competing business units, the programs adopted by such a group fre-
quently impede the competitive struggle. If they restrain competition unreasonably, they
may fall within the prohibitions of the federal antitrust laws. Standardization and certi-
fication projects—not enmeshed in price fixing schemes or enforced through coercive
means—have usually survived such attack.

Id. at 1486 (emphasis added) (footnotes omitted).

56. 438 U.S. at 434-46. See notes 17-31 and accompanying text supra.
57. 438 U.S. at 436. See note 18 supra.
58. See Turner, The Definition of Agreement Under the Sherman Act: Conscious Parallelism
and Refusals to Deal, 75 HARv. L. REV. 655 (1962).
60. 297 U.S. 553 (1936).
held that an agreement to exchange information on a reciprocal basis was not unreasonable, but when the evidence proved that the defendants intended to secure adherence to price schedules, the agreement was illegal. The agreement was, in effect, to fix prices, and no defense would support such an agreement. In the middle ground is United States v. Container Corp. in which a price exchange agreement was not characterized as price-fixing even though the evidence demonstrated that the defendants reasonably foresaw the primarily anticompetitive effect of their conduct. Although not per se illegal, the arrangement was nevertheless condemned. In each of the three cases, the Court took a different approach toward reviewing the evidence and determining the legality of the conduct, based primarily upon allegations and evidence of the defendants' intent.

Intent is also important in all other per se categories because it determines the scope of the relevant case law and the limits of relevant trial evidence. Of course, as a general matter, antitrust litigation begins with a complaint drafted by the plaintiff's attorney or a criminal indictment. The decision to characterize the defendant's conduct as a "boycott," thereby invoking the per se rule, is made initially by an advocate who is seeking a determination of defendant's liability. Perhaps

61. The Court observed:

[While the collection and dissemination of trade statistics are in themselves permissible and may be a useful adjunct of fair commerce, a combination to gather and supply information as part of a plan to impose unwarrantable restrictions, as, for example, to curtail production and raise prices, has been condemned.

Id. at 599-600.


63. Id. at 337. Justice Fortas, in his concurring opinion, specifically noted that he did not understand the Court's opinion to hold that the exchange of specific information among sellers as to prices charged to individual customers, pursuant to mutual arrangement, is a per se violation of the Sherman Act.

...[B]ut a practice such as that here involved, which is adopted for the purpose of arriving at a determination of prices to be quoted to individual customers, inevitably suggests the probability that it so materially interfered with the operation of the price mechanism of the marketplace as to bring it within the condemnation of this Court's decisions.

393 U.S. at 338-39 (emphasis added). In Gypsum, involving a very similar exchange of price information, the government alleged and proved that defendants' intent or purpose was to fix or stabilize prices on a concerted basis. 438 U.S. at 464-65.

64. In National Soc'y of Professional Eng'rs v. United States, 435 U.S. 679 (1978), for example, the defendant introduced numerous volumes of deposition testimony, reports, and statistical data purporting to prove that the society's bylaw prohibiting competitive bidding was promulgated to promote safety in the industry. The district court never considered the evidence, and its decision to disregard such an asserted justification was upheld by the Supreme Court. 435 U.S. at 686, 698. Similarly, the plaintiff's position in Klor's that he need not introduce market share evidence because such evidence is irrelevant in a per se case was affirmed by the Supreme Court. 359 U.S. at 210. See note 45 supra.
this is a primary source of confusion in boycott law. Boycotts are per se illegal according to the Supreme Court because they are plainly unreasonable. Thus, a complaint alleging boycott is in effect accusing the defendants of conduct which, if proven, has no defense. The plaintiff need only demonstrate to the factfinder that the alleged conduct did in fact occur—that such an agreement was entered into. No further issue is relevant. On the other hand, a complaint alleging a single manufacturer's refusal to deal with a retailer or an agreement merely to exchange price information does not invoke the per se rule. Proof by the plaintiffs that defendants engaged in this behavior does not demonstrate that a violation of law has occurred. The plaintiff must also convince the court that the conduct or agreement was unreasonable. In other words, a plaintiff's attorney has two choices when drafting a complaint under section 1 of the Sherman Act. He may invoke the per se rule by alleging that the defendants have agreed to fix prices or to conduct a boycott. In that case, the greatest difficulty will be convincing the trier of fact that the conduct falls into a category of conduct covered by the per se rule. The plaintiff's other choice is to allege that defendants have agreed to do only what direct evidence will demonstrate, such as exchange price information or establish industry standards with exclusionary potential. In that case he may have no trouble proving the facts as alleged to the factfinder, but he may have substantial difficulty in convincing the courts that such conduct is unreasonable.


67. Proof of an agreement can be entirely circumstantial, but should be sufficient to demonstrate knowing conduct by each member of the combination directed toward a common end. Interstate Circuit, Inc. v. United States, 306 U.S. 208, 227 (1939). See also Triangle Conduit & Cable Co. v. FTC, 168 F.2d 175 (7th Cir. 1948), aff'd, 336 U.S. 956 (1949).

68. The reasonableness of challenged conduct is generally considered a question of law for the court. See L. Sullivan, supra note 23, at 174, 186-89; United States v. Realty Multi-List, Inc. 629 F.2d 1351, 1374-89 (5th Cir. 1980).

69. A complaint may alternatively allege per se and non-per se theories in separate counts.

70. As noted above, many lower courts in recent years require proof in a Rule of Reason case that the challenged combination had a specifically anticompetitive goal. See cases cited at note 38 supra; E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Comm., 467 F.2d 178 (5th Cir. 1978), cert. denied, 409 U.S. 1109 (1973); Bridge Corp. of Am. v. American Contract Bridge League, 428 F.2d 1365, 1369-70 (9th Cir. 1970), cert. denied, 401 U.S. 940 (1971); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd., 416 F.2d 71, 76-80 (9th Cir. 1969), cert. denied, 396 U.S. 1062 (1970); Las Vegas Sun, Inc. v. Summa Corp., [1977] 2 Trade Cas. ¶ 61,556, at 72,212 (D. Nev. 1977); Ackerman-Chillingsworth v. Pacific Elec. Contractors Ass'n, 405 F.
Thus, the initial characterization of defendants' conduct in the complaint—sometimes merely the characterization of defendants' intent—often has the effect of determining the size and nature of the subsequent trial and the legal standards to be applied. Perhaps in recognition of this, the Supreme Court has recently been reevaluating when the per se classification should be applied.

D. The Supreme Court's Most Recent Treatment of the Per Se Rule

During the last three years the Supreme Court has reconsidered the applicability and purpose of the per se rule in several nonboycott cases: it first suggested a softening of the per se rule, then vacillated, and finally reaffirmed the broad sweep of the per se rule to appropriate categories of conduct. In *Continental T.V., Inc. v. GTE Sylvania,* the Court overruled *United States v. Arnold, Schwinn & Co.,* and held that vertical allocations of exclusive selling territories were no longer per se illegal. This softening of the per se rule appeared to be at once circumvented and amplified in *National Society of Professional Engineers v. United States.* In that case, the Court expressly refused to hear the defendants' argument that their restraint could be justified by the promotion of safety. The Court, however, suggested that the per se rule should be applied on a case-by-case basis, rather than a category-by-category basis—thus facilitating analysis at the appellate level, but not simplifying the trial court's task. Finally, the Court, in *Catalano, Inc. v. Target Sales, Inc.*, reaffirmed the validity of applying the per

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73. Id. at 381.
75. Id. at 693-94.
76. 446 U.S. 643 (1980).
To analyze the effect of these cases on industry self-regulation, a brief synopsis of the three cases is necessary.

In *Sylvania*, the well-known television manufacturer restricted the locations where retailers could sell the television sets it manufactured. After considerable maneuvering by both Sylvania and one of its retailers, Continental, the validity of the location clause was tested in federal court. When the case reached the Supreme Court, the issue presented was whether to apply the per se rule established in *Schwinn*. Justice Powell, writing for a majority of five, first reviewed Justice Black's classic description of the per se rule in *Northern Pacific Railway Co. v. United States*. Justice Black had referred to boycotts as an example of those restraints so inherently anticompetitive that they should be per se illegal without a case-by-case analysis of actual effect on competi-

tors that have an impact on price are *per se* violations of the Sherman Act or even unreasonable restraints." 441 U.S. at 23. The holding, however, is probably limited to the unique fact situation presented by *Broadcast Music*.


79. *Sylvania*, prompted by a poor sales record, adopted a marketing strategy in 1962 whereby it would sell the televisions it manufactured only through a small, select group of retailers. Pursuant to this strategy, Sylvania granted a limited number of dealerships in any given area; the dealers could sell Sylvania's product only from assigned locations, but there was no restriction on the sale of competitor's products. *Sylvania* could increase the number of dealers in a given area. In 1965 Sylvania granted a dealership in San Francisco to Young Brothers, an established San Francisco television retailer. Continental, another San Francisco dealer, protested in vain and then cancelled an order it had placed with Sylvania. Sylvania then refused Continental's request for a dealership in Sacramento, whereupon Continental announced its intention to move its stock of Sylvania merchandise to a new retail store in Sacramento. Next, Sylvania's credit department reduced Continental's credit line from $300,000 to $50,000, thereby prompting Continental to withhold payments owed to Maguire, the finance company that financed Sylvania's dealers' inventory. Maguire filed suit in federal court seeking the withheld payments; Continental counterclaimed against *Sylvania* and Maguire. 433 U.S. at 38-40.

80. Chief Justice Burger and Justices Stewart, Blackmun, and Stevens joined in the majority opinion.

The Court qualified its reference to *Northern Pacific* as follows:

*Per se* rules thus require the Court to make broad generalizations about the social utility of particular commercial practices. The probability that anticompetitive consequences will result from a practice and the severity of those consequences must be balanced against its procompetitive consequences. Cases that do not fit the generalization may arise but a *per se* rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them. Once established, *per se* rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system of the more complex rule-of-reason trials, but those advantages are not sufficient in themselves to justify the creation of *per se* rules. If it were otherwise, all of antitrust law would be reduced to *per se* rules, thus introducing an unintended and undesirable rigidity in the law.

The Court then considered the peculiar aspects of restrictions on selling locations, strongly emphasizing the inherent complexity of a vertical territorial allocation. Such a restraint could simultaneously reduce intrabrand competition and stimulate interbrand competition. While the rest of the Court's opinion focused on the economic realities of vertical territorial allocations, the Court also emphasized the fundamental issue: "Competitive economies have social and political as well as economic advantages . . . but an antitrust policy divorced from market considerations would lack any objective benchmarks." *Schwinn* was thus overruled.

The view expressed in *Sylvania* that antitrust law must concern itself with economic competition rather than with social and political goals was amplified in *Professional Engineers*. In that case, the government brought a civil action against the National Society of Professional Engineers (NSPE) to nullify the association's canon of ethics which prohibited competitive bidding by members. Canon 11(c) provided that only one member at a time could negotiate with a prospective client, and members were not allowed to provide any prospective client with price information which would allow price shopping. The primary issue before the Supreme Court was whether NSPE could jus-

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82. *Id.* at 5. See note 14 supra.
83. 433 U.S. at 50 n.16 (citations omitted).
84. *Id.* at 51-59.
85. *Id.* at 53 n.21 (citation omitted).
86. *Id.* at 58.
87. 435 U.S. 679.
88. *Id.* at 683 n.3.
tify its restraints by arguing that the restraints were necessary for public safety.89

The Court held that protecting public safety was no defense.90 The Court, however, did not indicate whether this was so because the per se rule admits of no reasonableness defense or because the Rule of Reason admits of no defense based on noneconomic social policy. At one point Justice Stevens used language that sounded like per se treatment: "On its face, this agreement restrains trade within the meaning of Section 1 of the Sherman Act."91 Nevertheless, this statement is inconsistent with the Court's subsequent discussion of the safety defense. In addition, a per se holding generally is at odds with the Court's discussion, albeit brief, of the economic effects of the restraint.92

Professional Engineers confirmed the principle implicit in a number of prior decisions that nonstatutory social policy is not relevant under the antitrust laws when analyzing the effects of an alleged restraint. Professional Engineers also suggested an approach to the per se rule which at first glance seems anomalous. As noted above, the Court indicated an intention to apply the per se rule on a case-by-case basis. Such an approach is a refinement of the Northern Pacific definition of per se illegality. Under Northern Pacific the Court would decide whether to apply the per se rule depending on the general characterization of a given restraint;93 Professional Engineers seems to suggest, however, that per se treatment might be inappropriate even when the restraint fits one of those general characterizations.

Catalano94 is the Court's most recent section 1 decision. In Catalano, the Court unanimously put to rest the idea that it had eliminated the per se rule.95 At the suggestion of the Justice Department, the Court took the unusual step of summarily reversing a lower court decision. The Court of Appeals had held that the Rule of Reason and not the per se rule should apply to a case involving an agreement among

89. Id. at 681-86. The National Society of Professional Engineers' public safety argument was that canon 11(c) would eliminate price shopping and thereby eliminate the possibility of bargaining for a reduction of quality.
90. Id. at 696.
91. Id. at 693. (emphasis added).
92. Id. at 693-94.
93. See note 14 supra.
94. 446 U.S. 643.
95. The court quoted that portion of its decision in Broadcast Music which recognized the continuing validity of the per se rule as a rule which conclusively presumes that certain practices are illegal "without further examination under the rule of reason." 446 U.S. at 646 (quoting 441 U.S. at 7-8).
beer wholesalers to discontinue selling on credit to retailers. The Supreme Court relied primarily on *United States v. Socony-Vacuum Oil Co.*, noting that *Socony* had "held agreements to be unlawful per se that had substantially less direct impact on price than the agreement alleged in this case." The Court reaffirmed the *Northern Pacific* explanation of the purpose of the per se rule.

The Court then characterized its holding in *Professional Engineers* as an application of the per se rule and, as in *Professional Engineers*, rejected without serious consideration defendants' argument that the long-run effect of the challenged conduct would be to reduce prices to the consumer and remove barriers to potential entrants. Finally, the Court held that the "informing function of the agreement, the increased price visibility," could not justify the restraint on the individual wholesaler's freedom to select his own prices and terms of sale.

In summary, the combined effect of *Sylvania* and *Professional Engineers* was to cast doubt on any categorical condemnation of a restraint of trade by extension of the per se rule. In the context of a boycott resulting from industry self-regulation, however, the two cases provide little support for an argument against the continued application of the per se rule. Safety and other social policies not supported by legislation seem to have been rejected both as defenses in a Rule of Reason case and as arguments against the use of the per se rule. It does appear, however, that the *Sylvania* and *Professional Engineers* cases demonstrate an increased willingness by the Court to disavow the per se framework where either the whole genre of restraints is arguably procompetitive or where the conduct challenged is not intentionally or foreseeably anticompetitive. *Catalano*, of course, represents a reaffirmation of the utility of the per se rule to broad categories of conduct which have been established to be plainly anticompetitive—including boycotts.

96. The Court of Appeals in a split decision had refused to apply the per se rule on the ground that the challenged credit elimination agreement was not price-fixing. 605 F.2d 1097, 1100, (9th Cir. 1979), rev'd, 446 U.S. 643, 644-45 (1980).

97. In particular, the court quoted from the very broad language of *Socony-Vacuum* that, "'the machinery employed by a combination for price-fixing is immaterial . . . ."' *Id.* at 647 (quoting *Socony-Vacuum*, 310 U.S. at 223).

98. *Id.* at 647.

99. *Id.* at 646-47. *See note 14 and accompanying text supra.*

100. The Court held that, "when a particular concerted activity entails an obvious risk of anticompetitive impact with no apparent potentially redeeming value, the fact that a practice may turn out to be harmless in a particular set of circumstances will not prevent its being declared unlawful per se." 446 U.S. at 649.

101. *Id.*
II. THE DEVELOPMENT OF ANTITRUST PRINCIPLES RELEVANT TO BOYCOTT ACTIVITY

As described above, although the Supreme Court in Sylvania and Professional Engineers suggested that the per se rule may be invoked on a case-by-case basis, rather than a category-by-category basis, the Court also held in Professional Engineers and Catalano that only defenses based on procompetitive effects would defeat application of the per se rule to a nonprice horizontal restraint. It is arguable that the bright line between per se and non-per se offenses reaffirmed in Catalano applies only to price-fixing. This section of the Article summarizes Supreme Court boycott decisions and then applies the analysis employed in those decisions to lower court cases that have been litigated under boycott theory.

A. THE SUPREME COURT'S TREATMENT OF BOYCOTTS

The first major Supreme Court decision involving a boycott was Eastern States Retail Lumber Dealers Association v. United States. In Eastern States, the members of the defendant association of retailers blacklisted certain wholesalers who sold directly to retail customers. The wholesalers were thus competing with the retailers. The Court held that an individual retailer may unilaterally refuse to deal with a wholesaler without fear of consequences under section 1. A collective refusal to deal, however, had a foreseeably exclusionary impact and could not be defended on the ground that the wholesaler had been competing "unfairly." 1

1. FOGA and Cement Manufacturers: Boycott as Sanction for Unfair Conduct by Other Members of the Industry

The Supreme Court's per se prohibition against boycotts is usually thought to have begun in Fashion Originators' Guild of America, Inc. v.

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102. Such a suggestion may have been contradicted in Catalano, 446 U.S. 643, and California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97 (1980), at least for combinations involving some "machinery" that can stabilize prices.

103. 234 U.S. 600 (1914). Prior to Eastern States, the Court in Standard Sanitary Mfg. Co. v. United States, 226 U.S. 20 (1912), had declared illegal an agreement among manufacturers and distributors of enamelware to sell only to parties to the agreement. The Court stated that the Sherman Act cannot "be evaded by good motives. . . . [T]he judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of the parties." Id. at 49. The first Supreme Court decision addressing the legality under the Sherman Act of a group boycott was Montague & Co. v. Lowry, 193 U.S. 38 (1904), holding that an agreement among wholesalers and manufacturers not to sell to nonmembers of their association was illegal.

104. Id. at 611.

105. Id. at 614.
The Fashion Originators’ Guild of America, Inc. was an association of merchants in the textile and women’s garment industries; its members included designers, manufacturers, sellers, and distributors of garments; and manufacturers, converters, and dyers of textiles. The members utilized FOGA to maintain a system for registering garment designs and adjudicating claims of design theft; their purpose was to boycott those who dealt in garments made from pirated designs. The Court noted that the association consisted of approximately twelve thousand retailers, most of whom were coerced into joining by manufacturers who threatened to refuse to sell to retailers who would not cooperate.

In addition, FOGA engaged in other anticompetitive conduct:

[T]he combination prohibits its members from participating in retail advertising; regulates the discount they may allow; prohibits their selling at retail; cooperates with local guilds in regulating days upon which special sales shall be held; prohibits its members from selling women’s garments to persons who conduct businesses in residences, residential quarters, hotels or apartment houses; and denies the benefits of membership to retailers who participate with dress manufacturers in promoting fashion shows unless the merchandise used is actually purchased and delivered.

FOGA and its members were sued by the FTC under section 5 of the Federal Trade Commission Act for engaging in unfair methods of competition. After determining that the defendants’ practices violated the Act, the Court also found that the “combination [was] in its entirety well within the inhibition of the policies declared by the Sherman Act itself”:

[It] narrows the outlets to which garment and textile manufacturers can sell and the sources from which retailers can buy; subjects all retailers and manufacturers who decline to comply with the Guild’s program to an organized boycott; takes away the freedom of action of members by requiring each to reveal to the Guild the intimate details of their individual affairs; and has both as its necessary tendency and as its purpose and effect the direct suppression of competition from the sale of unregistered textiles and copies of designs. In addition to all this, the combination is in reality an extra-governmen-

106. 312 U.S. 457 (1941).
107. Id. at 461-62. “In 1936, they sold in the United States more than 38% of all women’s garments wholesaling at $6.75 and up, and more than 60% of those at $10.75 and above.” Id.
108. Id. at 463.
110. 312 U.S. at 465 (emphasis added).
tal agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus "trenches upon the power of the national legislature and violates the statute." 111

One important element of the FOGA Court's rationale is that the defendants had established an "extra-governmental agency," which established rules for restraining trade and adjudicated alleged violations of those rules. The Court did not clearly articulate why such a private, quasi-governmental agency was unlawful. It simply observed that such an organization "trenches upon the power of the national legislature." 112 This was arguably an indication by the Court of its intolerance for industry self-regulatory schemes of any kind.

The Court also established FOGA as a landmark case when it rejected the defendants' claim that their conduct was reasonable in that it was necessary to prevent design theft. 113 The Court stated that the prevention of design theft, even if proven to be tortious, "would not justify petitioners in combining together to regulate and restrain interstate commerce in violation of federal law." 114 By rejecting this proffered justification, the Court arguably was adopting a per se rule for boycotts.

Several factors tend to vitiate the per se implications of the holding in FOGA. 115 Most important, when the Court stated that the prevention of design copying "would not justify" the combination, it might

111. Id. (citations omitted).
112. One commentator has argued that private government is not harmful unless it has power, distinguishing a powerful, coercive association from a voluntary one having incidental effects on outsiders. Bird, supra note 28, at 259-60. This statement is objectionable for at least two reasons. First, there is no meaningful way to distinguish a coercive group from a voluntary one and it would be fruitless to attempt to define "incidental effects." Second, private government is as potentially objectionable when it is powerful as when it is not, because in most cases it seeks to expand power and thereby inhibit or control the free marketplace.
113. 312 U.S. at 468.
114. Id.
115. The case was brought by the FTC under § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 (1976), which has standards more flexible than those of the Clayton and Sherman Acts. In fact, the Court actually discussed the boycott in the context of policies, not of the specific prohibitions of the Sherman Act.

Second, many anticompetitive acts were present in FOGA in addition to the boycott. The aggregated activity certainly would have been more harmful to competition than the boycott alone, and it is unclear whether the defendants' evidence of reasonableness would have been excluded where there was no such aggregation of anticompetitive conduct. In particular, the Court pointed out that one of the many restraints involved was the regulation of discounts—i.e., prices.

A third factor that weakens the per se holding in FOGA is the Court's emphasis on the defendants' power. Power has been thought irrelevant in section 1 cases. See, e.g., United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940). The Court in FOGA failed to explain the significance of defendants' power.
have simply meant that such a justification was of little significance in the face of the many anticompetitive practices undertaken by the defendants. Indeed, sixteen years earlier in *Cement Manufacturers Protective Association v. United States*, the Supreme Court had adopted a position somewhat inconsistent with a per se approach. In *Cement Manufacturers*, the Court had allowed the defendant manufacturers to prove that their refusal to deal with certain customers was justified by the need to prevent their customers from defrauding them in the performance of requirements contracts. It is true that the conduct in *Cement Manufacturers* was far less restrictive than the conduct involved in *FOGA*. In addition, unlike the targets in *Eastern States*, the targets of the boycott in *Cement Manufacturers* did not compete directly with the defendant, so there was no obvious anticompetitive intent involved. The basic issue, however, was the same—whether the defendants could submit evidence that their conduct was competitively justified. It is tempting to argue that *FOGA* turned on the fact that the defendants had other less restrictive options available, but *Cement Manufacturers* could be similarly characterized. Thus, a primary distinction between the decisions was that in *FOGA*, some of the targets were competitors of the owners of the designs and in *Cement Manufacturers* they were customers of the cement sellers: the relationship between defendants and targets in *FOGA* was essentially horizontal and the relationship in *Cement Manufacturers* essentially vertical. The Supreme Court has never applied the per se illegal boycott approach to situations where none of the defendants competed with the target.

*Cement Manufacturers* was decided in 1925, two years before the Supreme Court first developed the per se approach in *United States v. Trenton Potteries Co.* Both *Cement Manufacturers* and *Trenton* were written by Justice Stone. In *Trenton* lie was very careful to limit his rationale for the per se rule to price-fixing:

The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. . . . [W]e should hesitate to adopt a construction making the difference between legal and illegal conduct in the field of business relations de-

117. Id. at 604.
118. 273 U.S. 392 (1927).
pend upon so uncertain a test as whether prices are unreasonable 119

Justice Stone gave no indication that he thought price-fixing so inherently unreasonable as to never be justifiable; he only seemed unwilling to let the courts be the arbiters of the reasonableness of prices. In FOGA the Court also gave no indication that group boycotts are inherently anticompetitive. This latter characterization was not long in developing, however.


FOGA is distinguishable from most contemporary boycott cases because technically it did not involve the Sherman Act and because defendants had engaged in additional nonboycott activities plainly subject to the per se rule. In 1945 the Supreme Court decided Associated Press v. United States 120 and appeared to extend Sherman Act boycott law to conduct arguably not motivated by an intent to chill competition. 121 The combination challenged in Associated Press was an association of more than twelve hundred newspapers which had adopted bylaws restricting new membership to noncompetitor newspapers. The purpose of the association was to facilitate the origination and dissemination of news to its members. One bylaw prohibited the sale or dissemination of news by the Association or its members to nonmember newspapers and this bylaw was the basis of the boycott allegation. The defendants contended that, on balance, the restrictive bylaws were necessary to promote the joint venture and were not intended to be exclusionary, since nonmembers had alternative access to the same news. 122

The Court rejected the asserted justifications and held that the

119. Id. at 397-98.
120. 326 U.S. 1 (1945).
121. There is some uncertainty whether Associated Press actually involved a traditional boycott, since the particularly anticompetitive aspect of defendant's conduct was not so much its refusal to allow the sale of news to nonmembers as its restrictive membership policies. Nevertheless, the parallel practices—the refusal to sell news to nonmembers and the refusal to allow competing newspapers to become members—must be viewed together: the restrictive membership policies would not have been significantly anticompetitive without the corresponding refusal to deal with nonmembers, and vice versa. Clearly, the Court viewed defendant's practices as a boycott: "The restraints on trade in news here were no less than those held to fall within the ban of the Sherman Act with reference to combinations to restrain trade outlets in the sale of tiles, or enameled ironware, or lumber, or women's clothes . . . ." 326 U.S. at 18-19 (citations omitted).
122. Id. at 18.
“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 . . . .”123 The Court thus reaffirmed the view expressed in FOGA that private self-regulatory commercial activities are contrary to public policy. Moreover, the Court rejected the argument that plainly anticompetitive intent must be demonstrated; the foreseeable exclusionary effect of the agreement not to sell to competitors was sufficient. The Court thus expressly rejected both business necessity and the absence of monopoly power as defenses to a potentially exclusionary concerted refusal to deal.124

Interestingly, however, the Court did not expressly apply the per se rule, perhaps because the Court was affirming a lower court opinion which had rejected per se analysis. The lower court had explicitly held the Rule of Reason applicable, distinguishing the Associated Press arrangement from the one involved in FOGA.125 In Justice Black’s majority opinion, however, the per se rule was implicitly resurrected; that is evident from the other opinions filed in the case.

3. Klor’s: The Irrelevance of Anticompetitive Effect on the Market

The Supreme Court’s next boycott case, Klor’s, Inc. v. Broadway-Hale Stores, Inc.,126 answered some of the questions left open by FOGA,127 but it created some additional problems. The plaintiff, Klor’s, operated a retail store in San Francisco next to one of the stores of the defendant Broadway-Hale. The stores competed in the sale of household appliances. In its complaint, the plaintiff alleged that Broadway-Hale, using its “monopolistic” buying power,” conspired with the other defendants—manufacturers and distributors of appliances. The thrust of the alleged conspiracy was that the manufacturers and distributors, at Broadway-Hale’s urging, would not sell to Klor’s or would sell only at

123. Id. at 15.
124. Id. at 14, 17-18. The Court also expressly reaffirmed the principle in FOGA that private regulatory activity suggestive of an “extra-governmental agency” was inconsistent with the Sherman Act. Id. at 19.
127. The Klor’s case did at least resolve three questions left open after FOGA. First, the per se rule is clearly not some bastardized rule to be used only by the FTC. Id. at 208. Second, as in FOGA, there was a strong element of power on the part of the combined defendants, but plaintiff did not demonstrate any public injury or market control by defendants. Id. at 210-11. Finally, the Court also rejected the notion that a group boycott is per se illegal only if it involves price-fixing: “They have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they ‘fixed or regulated prices . . . .’” Id. at 212.
INDUSTRY SELF-REGULATION

The Supreme Court relied on *Standard Oil Co. v. United States* for the proposition that some restraints of trade "which from their 'nature or character' [are] unduly restrictive [are] . . . forbidden." The Court further stated that "[g]roup boycotts, or concerted refusals by traders to deal with other traders, have been held to be in the forbidden category."

Unlike *Associated Press*, the Court in *Klor's* reversed decisions by the lower courts in favor of the defendants. The primary basis for summary judgment in the lower courts was evidence of substantial competition in the retail appliance market and the existence of hundreds of retail competitors and other appliance manufacturers that were not alleged to be involved in the boycott. The lower court concluded that the Sherman Act was not violated because there was no evidence of a market-wide impact on price and thus no public injury. The courts distinguished conduct which excludes a single competitor in a large market from conduct by businesses with concerted market power which excludes competition generally. In effect, the lower courts were applying a Rule of Reason test to defendants' conduct.

The Supreme Court, in reversing, expressly rejected a Rule of Reason approach to boycott activity and held that, since "group boycotts" are per se illegal, "[t]hey have not been saved by allegations that they were reasonable in the specific circumstances, nor by a failure to show that they 'fixed or regulated prices, parcelled out or limited production or brought about deterioration in quality.'"

The Court in *Klor's* also purported to distinguish two familiar fact patterns: (1) the case of a single trader refusing to deal with another; and (2) an agreement between a manufacturer and dealer to establish an exclusive distributorship. Those two fact-patterns were different

128. *Id.* at 209.
129. 221 U.S. 1 (1911).
130. 359 U.S. at 211 (citing 211 U.S. at 58, 65).
131. *Id.* at 212.
132. *Id.* at 210.
134. *Id.* (quoting FOGr, 312 U.S. 457, 466, 467-68).
136. 359 U.S. at 212. The Second Circuit recently addressed the problem of applying the per se rule to an agreement between a manufacturer and one of its present customers to establish a buyer-seller arrangement that excluded another present customer. In *Oreck Corp. v. Whirlpool Corp.*, 579 F.2d 126 (2d Cir. 1978) (en banc), *aff'd* 563 F.2d 54 (2d Cir. 1977), *cert. denied*, 439 U.S. 946 (1979), both the panel and *en banc* majority concluded that the per se rule should not be
from the facts in Klor's because the agreement in Klor's ran between "a wide combination, consisting of manufacturers, distributors and a retailer." If the Court thought the presence of the retailer in the conspiracy determinative, however, then the case is not meaningfully distinguishable from the exclusive distributorship situation. On the other hand, if the Court found the presence of a horizontal conspiracy determinative, it was simply elevating form over substance and the case was not sufficiently distinguishable from Cement Manufacturers. Actually, Justice Black followed the approach to the per se rule that he had taken only one year earlier in Northern Pacific Railway Co. v. United States. In doing so, however, he apparently rejected the original rationale for per se illegality proffered by Justice Stone in Trenton. The Northern Pacific theory was that certain conduct was so inherently anticompetitive that it should always be illegal. This theory was utilized in Klor's even though the Court had never given a defendant in a vertically imposed boycott case the benefit of a Rule of Reason analysis. It is clear that a boycott of a competitor has great potential for exclusionary effect, but as was held in Sylvania, vertically imposed restraints may present a potential for procompetitive effects.

4. Radiant Burners: The Irrelevance of Non-Anticompetitive Purpose

Two years after Klor's the Supreme Court decided Radiant Burners, Inc. v. Peoples Gas Light & Coke Co. In Radiant Burners, one of the applied on the facts of Oreck, and left open little possibility for per se condemnation even where the facts more clearly established an anticompetitive intent. See also Fray Chevrolet Sales, Inc. v. GM Corp., 536 F.2d 683 (6th Cir. 1976); Burdett Sound, Inc. v. Altec Corp., 515 F.2d 1245 (5th Cir. 1975); Ark Dental Supply Co. v. Caniton Corp., 461 F.2d 1093 (3d Cir. 1972) (per curiam); Alpha Distrib. Co., Inc. v. Jack Daniel Distillery, 454 F.2d 442 (9th Cir. 1972), cert. denied, 419 U.S. 842 (1974); Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke and Liquors, Ltd., 416 F.2d 71 (9th Cir. 1969); Ace Beer Distrib., Inc. v. Kohn, Inc., 318 F.2d 283 (6th Cir. 1963); Packard Motor Car Co. v. Webster Motor Car Co., 243 F.2d 418 (D.C. Cir. 1957); Schwing Motor Co. v. Hudson Sales Corp., 138 F. Supp. 899 (D. Md. 1956), aff'd, 239 F.2d 176 (4th Cir. 1956).

More recently the Third Circuit raised the possibility that an agreement between a manufacturer and one of its customers to terminate another customer could be per se illegal where the defendant-customer is motivated by a desire to reduce price competition. See Cernuto, Inc. v. United Cabinet Corp., 595 F.2d 164 (3rd Cir. 1979).

137. 359 U.S. at 213.
138. 268 U.S. 588.
139. 356 U.S. 1. See note 14 supra.
140. 273 U.S. 392. See text accompanying notes 118-19 supra.
141. See, e.g., Posner, Exclusionary Practices and the Antitrust Laws, 41 U. CHI. L. REV. 506 (1969). "The conclusion is that where a boycott is designed to exclude competition, it should be prima facie unlawful." Id. at 534.
142. See text accompanying notes 71-86 supra.
143. 364 U.S. 656 (1961) (per curiam).
defendants, American Gas Association (AGA), operated laboratories to test the safety, utility, and durability of gas burners; it awarded its seal of approval to burners meeting its standards.\textsuperscript{144} The plaintiff alleged that the standards were not objective, but rather were influenced by other defendants who were plaintiff's competitors, and that its burner had twice been rejected although it was as safe as the ones approved.\textsuperscript{145} The result, according to the plaintiff, was exclusion of plaintiff's burners from the market because no one would buy unapproved burners.\textsuperscript{146} The district court granted the defendants' motion to dismiss for failure to state a claim,\textsuperscript{147} and the Seventh Circuit Court of Appeals affirmed on the ground the plaintiff had failed to allege public injury.\textsuperscript{148} The Supreme Court reversed, in a per curiam opinion which relied heavily on \textit{Klor's}.\textsuperscript{149}

The opinion in \textit{Radiant Burners} is lacking in substantive analysis. The precise holding was simply that the lower courts had erred in dismissing the plaintiff's complaint. The Seventh Circuit Court of Appeals' error was apparently two-fold. First, the Court of Appeals held the activity of the defendants was not per se illegal, and second, it held that to state a cause of action under the Rule of Reason the plaintiff must allege public injury.\textsuperscript{150} The Supreme Court first rejected the notion that this was not a per se case, describing the elements of a per se cause of action as "a violation and in appropriate treble damage actions that plaintiff was damaged thereby . . . ."\textsuperscript{151}

The Court's only discussion of boycotts was less than lucid:

\textit{We think the decision of the Court of Appeals does not accord with our recent decision in \textit{Klor's, Inc. v. Broadway-Hale Stores}. The allegation in the complaint that "AGA and its Utility members, including Peoples and Northern, effectuate the plan and purpose of the unlawful combination and conspiracy . . . by . . . refusing to provide gas for use in the plaintiff's Radiant Burner[s]" because they "are not approved by AGA" clearly shows "one type of trade restraint and public harm the Sherman Act forbids. . . ." It is obvious that petitioner cannot sell its gas burners, whatever may be their virtues, if, because of the alleged conspiracy, the purchasers cannot buy}

\textsuperscript{144} Id. at 658.
\textsuperscript{145} Id.
\textsuperscript{146} Id.
\textsuperscript{147} Id. at 658-59.
\textsuperscript{148} Id.; 273 F.2d 196, 200 (7th Cir. 1959).
\textsuperscript{149} 364 U.S. at 659-60.
\textsuperscript{150} 273 F.2d 196, 199-200 (7th Cir. 1959), rev'd, 364 U.S. at 659-60.
\textsuperscript{151} 364 U.S. at 660.
gas for use in those burners.  
In this treatment of the AGA's standard, the Court implicitly rejected any defense based on defendants' performing a socially useful function unrelated to competition. As we have seen, the Court in Professional Engineers and Catalano subsequently reaffirmed such a strict application of the per se rule. The defendants' conduct placed them within the per se rule of FOGA and Klor's because the defendants engaged in a conspiracy with a competitor of the victim; one member of the combination refused to sell gas for use in plaintiff's products; and the conspiracy excluded the victim from the market.

5. General Motors: The Most Recent Group Boycott Case

In United States v. General Motors Corp., several Los Angeles area retailers of Chevrolet automobiles manufactured by General Motors (GM) were engaged in sales relationships with retail discounters. A number of other Chevrolet dealers in Los Angeles complained to GM that these arrangements with discounters were depriving them of customers and making them responsible for doing warranty work under Chevrolet's new car warranty. GM quickly "persuaded" the offending dealers to cease doing business with the discounters. 

The government first proceeded against GM and three associations of Chevrolet dealers in a criminal suit and, after all the defendants were acquitted, the government pursued a civil case.  

The Court's description of the conduct set the tone for the opinion: We have here a classic conspiracy in restraint of trade: joint, collaborative action by dealers, the appellate associations, and General Motors to eliminate a class of competitors by terminating business dealings between them and a minority of Chevrolet dealers and to deprive franchised dealers of their freedom to deal through discounters if they so choose. Relying heavily on Klor's, the Court acknowledged that boycotts are among those restraints that are so unduly restrictive that they cannot be saved by any allegation of reasonableness. As in Klor's, however, the Court failed to thoroughly explain this view of boycotts. In particular, the Court did not indicate any limitation upon the boycott charac-

152. Id. at 659 (citations omitted).
153. See text accompanying notes 87-101 supra.
155. Id. at 136.
156. Id. at 138.
157. Id. at 140.
158. Id. at 145-46.
terization and thus did not indicate, for example, whether a refusal solely among suppliers to deal with price cutting retailers would be covered by the per se rule.


In *Silver v. New York Stock Exchange*, the Court expressly invoked the procedural fairness test as a threshold inquiry for regulatory activity having the effect of a boycott. The plaintiffs in *Silver* were registered securities brokers-dealers and members of the National Association of Securities Dealers. The plaintiffs were not members of the New York Stock Exchange (NYSE). Because of the need in the securities trading industry for instantaneous communications, the plaintiffs obtained private wire connections with several NYSE members. When the members sought NYSE approval, it temporarily granted approval, but afterwards withdrew the approval without giving plaintiffs notice or an opportunity to present arguments against the withdrawal.

The district court granted the plaintiffs' motion for summary judgment, but the Second Circuit Court of Appeals reversed, holding that the NYSE's activity was exempt from the antitrust laws because it was exercising a power it was permitted to exercise by the Securities Exchange Act. The Supreme Court saw the main issue before it as one of antitrust exemption, but after stating the issue the Court went on to declare: "It is plain, to begin with, that removal of the wires by collective action of the Exchange and its members would, had it occurred in a context free from other federal regulation, constitute a per se violation of Section 1 of the Sherman Act." Another statement in *Silver*, however, has given lower courts ammunition in their battle against a per se boycott rule: "Hence, absent any justification derived from the policy of another statute or otherwise the Exchange acted in violation of the Sherman Act." Although this statement has been construed by some courts to establish an exception to the per se boycott

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160. *Id.* at 344.
161. *Id.* at 346; 302 F.2d 714, 716 (2d Cir. 1962).
162. "The fundamental issue confronting us is whether the Securities Exchange Act has created a duty of exchange self-regulation so pervasive as to constitute an implied repealer of our antitrust laws, thereby exempting the Exchange from liability in this and similar cases." 373 U.S. at 347.
163. *Id.*
164. *Id.* at 348-49 (emphasis added).
rule where noneconomic social policy calls for industry self-regulation, \(^{165}\) the Supreme Court itself may have implicitly rejected the "or otherwise" language in *United States v. National Association of Securities Dealers, Inc.* \(^{166}\)

After deciding the exemption issue against the defendant, the *Silver* Court noted that the Rule of Reason is "flexible enough to permit the Exchange sufficient breathing space within which to carry out the mandate of the Securities Exchange Act." \(^{167}\) The Court emphasized the lack of procedural safeguards accorded the plaintiff, noting that no policy of securities regulation would be furthered by a denial of notice and opportunity to be heard. Indeed, the Court noted that the statutory policy of self-policing in securities regulation is endangered when an exchange exercises its power without procedural safeguards. \(^{168}\) In *Silver*, the procedural fairness test was applied, apparently as an aspect of a Rule of Reason inquiry, but other courts have applied the test as a threshold inquiry to determine whether to apply the Rule of Reason in nonfederally regulated contexts. \(^{169}\) The *Silver* principle of procedural fairness for statutorily-created systems of self-regulation has been imported wholesale into cases involving self-regulatory schemes that are privately established. \(^{170}\)

**B. RECENT BOYCOTT DECISIONS BY THE LOWER COURTS**

Although some federal courts apply the per se rule when faced with self-regulatory concerted refusals to deal, \(^{171}\) other federal courts have

\(^{165}\) *See* notes 235-49 and accompanying text *infra*.

\(^{166}\) In *United States v. National Ass'n of Sec. Dealers, Inc.*, 422 U.S. 694 (1975), the Supreme Court stated that:

The agreements questioned by the United States restrict the terms under which the appellee underwriters and broker-dealers may trade in shares of mutual funds. Such restrictions, effecting resale price maintenance and concerted refusals to deal, normally would constitute *per se* violations of §1 of the Sherman Act. *See, e.g.*, *Klor's* [and *FOGA*]. Here, however, *Congress has made a judgment* that these restrictions on competition might be necessitated by the unique problems of the mutual-fund industry, and has vested in the SEC final authority to determine whether and to what extent they should be tolerated "in the interests of the holders of all the outstanding securities" of mutual funds. *Id.* at 729 (emphasis added) (citations omitted). The use of the emphasized language without the "or otherwise" language may be an implicit rejection of that phrase.

\(^{167}\) 373 U.S. at 360.

\(^{168}\) *Id.* at 364.

\(^{169}\) *See* notes 236-49 and accompanying text *infra*.


been willing to deviate from this standard and to accept proffered defenses outside the scope of the rule.\textsuperscript{172} Thus the lower courts appear to have created several “exceptions” to the Supreme Court’s per se rule as applied to alleged antitrust boycotts. Many of the issues raised in these lower court decisions have never been expressly addressed by the Supreme Court. The Court’s recent nonboycott decisions in \textit{Gypsum},\textsuperscript{173} \textit{Sylvania},\textsuperscript{174} \textit{Professional Engineers},\textsuperscript{175} and \textit{Catalano},\textsuperscript{176} however, are instructive and they indicate that a closer review of lower court treatment of boycott defenses is necessary in their light.

1. \textbf{Self-Regulatory Conduct Promoting Safety or Other Nonanticompetitive Policy}

A number of the most recent boycott cases to reach appellate courts involve conduct engaged in for reasons having nothing to do with competition: conduct intended to promote safety or a particular moral or political cause. The Supreme Court has never responded unequivocally to the argument that proof of a noncommercial purpose can constitute a defense in a civil action otherwise implicating the per se rule.\textsuperscript{177} This noncommercial purpose argument arose in \textit{Neeld v. National Hockey League},\textsuperscript{178} in which a one-eyed hockey player challenged a league bylaw which excluded players with vision below a certain level. The one-eyed player claimed the bylaw was a concerted refusal to deal or group boycott. The league defended the bylaw on the ground that it was designed to promote safe play rather than for anticompetitive purposes. The Ninth Circuit Court of Appeals refused to apply the per se rule. The court noted that the primary purpose of the rule was safety, not destruction of competition and, furthermore, that the rule had an effect on competition that was “at most \textit{de minimis}.” Consequently, the court concluded that “the record amply supports the reasonableness of the by-law.”\textsuperscript{179}
This rationale would appear to conflict with the Supreme Court's treatment of boycott cases. The purpose behind the per se rule is to obviate the necessity for analysing the effects of certain types of concerted action when the court has determined that the nature of the restraint renders it illegal under the Sherman Act. Furthermore, while permitting the defendants to avoid the per se rule, the appellate court also permitted the defendants to raise justifications for the restraint based upon "social welfare" (i.e., safety). This seems to conflict with indications in Professional Engineers, \textsuperscript{180} that only effects on competition may be considered under the Rule of Reason. \textsuperscript{181}

Another recent example of a decision that does not invoke the per se rule for boycotts is \textit{American Federation of Television and Radio Artists v. National Association of Broadcasters}. \textsuperscript{182} In that case, the National Association of Broadcasters, a group of owners and operators of radio and television stations, adopted a bylaw that prohibited hosts of children's shows from delivering commercials immediately before, during, or after the shows on which they performed. The union to which the hosts belonged challenged the bylaw under section 1 of the Sherman Act. While it is unclear from the opinion whether or not the plaintiff union characterized the restraint as a boycott, the district court, in effect, applied boycott analysis. \textsuperscript{183} In its opinion, the court cited several cases involving concerted refusals to deal, but nevertheless upheld the bylaw. \textsuperscript{184} As in \textit{Neeld}, the alleged conspirators were not competitors of the victims of the bylaw:

A more recent case represents, perhaps, the classic situation invoking the noneconomic purpose defense. In \textit{Eliason Corp v. National Sanitation Foundation}, \textsuperscript{185} a manufacturer of walk-in refrigerators challenged the testing programs of an independent nonprofit organization which had been established to promote research and develop quality standards for health and sanitation products. Also named as

\begin{itemize}
  \item \textsuperscript{180} 435 U.S. 679; \textit{see} notes 87-94 and accompanying text \textit{supra}.
  \item \textsuperscript{181} "The Society. . . invokes the Rule of Reason, arguing that its restraint on price competition ultimately inures to the public benefit by preventing production of inferior work and by insuring ethical behavior. . . [T]his Court has never accepted such an argument." 435 U.S. at 693-94. \"[T]he inquiry is confined to a consideration of impact on competitive conditions.\" \textit{Id.} at 690. \textit{See} Bauer, \textit{Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination}, 79 \textit{COLUM. L. REV.} 685, 701-02 (1979).
  \item \textsuperscript{182} 407 F. Supp. 900 (S.D.N.Y. 1976).
  \item \textsuperscript{183} \textit{Id.} at 902.
  \item \textsuperscript{184} The Court cited Deesen v. Professional Golfers' Ass'n, 358 F.2d 165 (9th Cir. 1966) and Molinas v. National Basketball Ass'n, 190 F. Supp. 241 (S.D.N.Y. 1961).
  \item \textsuperscript{185} 614 F.2d 126 (6th Cir. 1980), \textit{cert. denied}, 101 S. Ct. 89 (1981).
\end{itemize}
defendants were a number of competitors of the plaintiff who apparently supported but did not control the foundation.\textsuperscript{186}

The plaintiff in *Eliason* argued that the grant of a seal of approval to those products which met the foundation’s standards and the refusal to approve his product amounted to an illegal boycott.\textsuperscript{187} The Sixth Circuit Court of Appeals flatly rejected the contention, holding:

Where the alleged boycott arises from standard-making or even industry self-regulation, the plaintiff must show either that it was barred from obtaining approval of its products on a discriminatory basis from its competitors, or that the conduct as a whole was manifestly anticompetitive and unreasonable. There is no evidence of discrimination or exclusion in this case.\textsuperscript{188}

If the court had stopped at that point, its opinion would have been unobjectionable. The “discrimination” concept employed by the court\textsuperscript{189} could simply refer to differential treatment of competitors by manufacturers.

Unfortunately, the court did not end its discussion at that point. The trial court had found that the foundation’s standards promoted uniformity in health requirements that products are required to meet in different jurisdictions. This uniformity helps promote nationwide competition and enables manufacturers who elect to comply with NSF standards to be reasonably sure they will not have to modify their product in order to meet the different requirements of many jurisdictions.\textsuperscript{190}

The Court of Appeals uncritically accepted that finding, holding that the “fixation of a seal of approval on the product or the listing of the product in a widely distributed publication only further assures the procompetitive goal of nationwide acceptance of the product. These are all legitimate means of promoting NSFTL’s testing service.”\textsuperscript{191} The court’s opinion can be reasonably interpreted as saying that the defendants’ conduct (1) eliminates competition from lower priced but substitutable products; (2) eliminates consumer choice with respect to a

\textsuperscript{186} *Id.* at 127.
\textsuperscript{187} *Id.*
\textsuperscript{188} *Id.* at 129 (footnote omitted).
\textsuperscript{189} The court cited *Silver*, 373 U.S. 341; *Radiant Burners*, 364 U.S. 656; and *Associated Press*, 326 U.S. 1. 614 F.2d at 129.
\textsuperscript{190} 614 F.2d at 129.
\textsuperscript{191} *Id.* at 130 (footnote omitted). The court noted, however, that it did “not intend to foreclose the possibility that some standards may be so unreasonable in content that their net effect injures competition even though some policies of uniformity are served. This is not the case here.” *Id.* at 130 n.6.
potentially broad selection of products; and (3) facilitates the creation and maintenance of a private guild of manufacturers. In essence, the court's conclusion so interpreted reinforces plaintiff's contention that its competitors benefited from the foundation's testing. The plaintiff had argued that the testing program gave its competitors an unfair competitive advantage over smaller manufacturers of functionally equivalent products while creating entry barriers for potentially innovative new products. The purported explication of the "pro-competitive" effect of the testing programs completely undercuts the court's finding that the foundations are "independent organizations and are not dominated or controlled by manufacturers of any one product. They are not in direct competition with the plaintiff..." In reality, it would appear that the foundations were created and maintained by larger manufacturers, including plaintiff's competitors, to eliminate the need to innovate and to curtail competition from price-cutters like the plaintiff. In fact, it may well be that the "many states" which require manufacturers to meet certain product standards created those standards only in response to the foundations' activities. Thus, the court's concept of competition is somewhat novel and totally at odds with the principles underlying *Associated Press* and *FOGA*. Since the defendants themselves did not engage in a refusal to deal, however, the decision does not conflict with any explicit per se holding by the Supreme Court.

2. The Existence of the Industry Requires Self-Regulation

In a few industries the very nature of the industry's product may require some degree of cooperation among competitors to create the market. Recognizing this economic phenomenon, the lower courts have frequently held that such a restraint is procompetitive and should be analyzed under the Rule of Reason. This view, where supported by the facts, is consistent with the *Sylvania* approach to the per se rule. The courts have sometimes failed to impose the fairness requirement that was suggested in *Radiant Burners* and mandated in *Silver*, but have employed a more appropriate analysis that inquires whether the restraint is the least restrictive possible.

192. *Id.* at 130. See generally L. SCHWARTZ, *supra* note 24.

193. See notes 106-25 and accompanying text *supra*.

In *Worthen Bank & Trust Co. v. National BankAmericard, Inc.*\(^{195}\), the plaintiff complained that, as an issuer of BankAmericard bank cards, it was prohibited by a BankAmericard bylaw from simultaneously acting as an issuer for BankAmericard's primary competitor, Master Charge. For the purposes of plaintiff's motion for summary judgment, the parties stipulated: that both the purpose and effect of the bylaw was to promote competition between the two major card systems; that plaintiff's real interest was in acquiring a local monopoly in the bank card industry; and that BankAmericard's product—the bank card—is incapable of being produced without the joint efforts of all the banks in the BankAmericard system.\(^{196}\) The Eighth Circuit Court of Appeals offered several reasons for not applying the per se rule, one of which was the necessity for joint effort in order to create the market.\(^{197}\)

The court distinguished *Klor's* and *FOGA*: In each of these cases there was a lack of an economic justification, in terms of the need to join together to produce the product being sold. In this case, as conceded by Worthen, it would be impossible for any of the member banks, acting alone, to issue a national bank credit card. It can only be done by a nationwide combination of banks. The facts that in this case there is an economic justification for the existence of [BankAmericard] in terms of productive capacity... together with the fact that in the cited cases there was a lack of *any* redeeming virtue, leads us to the conclusion that these cases are not controlling here.\(^{198}\)

The court also attempted to distinguish two Supreme Court cases dealing with similar joint ventures, *United States v. Topco Assoc.*\(^{199}\) and *United States v. Sealy, Inc.*\(^{200}\) In both cases the defendants had agreed to territorial allocations incident to their otherwise arguably lawful joint ventures. In *Topco*, the defendants argued that the territorial restraint was necessary to get members to participate in the joint venture.\(^{201}\) The *Worthen* court distinguished *Topco* and *Sealy*, however, "since the association of the members [in *Topco* and *Sealy*] was not..."

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195. 485 F.2d 119 (8th Cir. 1973).
196. *Id.* at 127-29.
197. *Id.* at 130.
198. *Id.* at 127 (footnote omitted) (citation omitted) (emphasis in original).
199. 405 U.S. 596 (1972).
201. 405 U.S. at 603-04. In *Topco* the defendants attempted to defend on the grounds that the horizontal allocation of territories was procompetitive. *Id.* The application of a per se rule to such a restraint may ultimately be reappraised by the Burger Court in light of *Sylvania* and *Professional Engineers*. The *Sylvania* Court, however, cited *Topco* with approval. 433 U.S. at 57 n.27, 58 n.28.
required by industry structure in terms of the ability to produce the product as is the case here."

The *Worthen* court held that, when assessing the legality of an alleged boycott, a court must make a threshold inquiry into whether cooperation is necessary for the existence of the market. The court thereby suggests either that the per se rule allows procompetitive defenses, or that such a valid defense pretermits application of the rule, as in *Sylvania*.

There is, however, a problem with *Worthen*'s handling of the inquiry. Although joint effort is essential to the existence of the bank card product, the court failed to mention any particularized need for the bylaw’s prohibition against an issuer’s participation in another bank card system. It was not the generalized joint effort on the part of banks that Worthen complained of, but rather the particular joint agreement—the restriction on participation in other bank card systems. If the defendant could allege and adduce the need for this particular restrictive bylaw, it might reasonably avoid per se liability under the rubric of “necessary cooperation.” The *Worthen* court’s rationale is troublesome because it could be extended to permit BankAmericard members to engage in the most egregious violations of section 1 while forcing complaining parties to show that the conduct was unlawful under the Rule of Reason.

A second rationale proffered by the *Worthen* court for its unwillingness to apply the per se rule derives from the court’s view that Worthen was not a competitor of BankAmericard or the other members of the BankAmericard system. In other words, the plaintiff was

202. 485 F.2d at 128 (emphasis in original).

203. The Fifth Circuit essentially adopted the same approach in United States v. Realty Multi-List, Inc., 629 F.2d 1351 (5th Cir. 1980), suggesting that the generalized benefits of a multiple listing service saved particular exclusionary practices from per se condemnation. As a practical matter, such a defense has been repeatedly rejected by the Supreme Court, as in the *Socony-Vacuum* case. See note 25 supra.

It is arguable that under *Sylvania*, where the defendant alleges some procompetitive justification for conduct that is not obviously exclusionary, the court should make an inquiry into the reasonableness of the conduct to ascertain whether the particular procompetitive restraint employed is the least restrictive one capable of accomplishing the procompetitive goal. The result of this inquiry would determine whether the court should apply the per se rule or the Rule of Reason. Even if the defendant alleges a procompetitive justification, the court should deny the defendant the benefit of a Rule of Reason analysis if the defendant cannot demonstrate that the restraint is the least restrictive necessary.

204. See 485 F.2d at 129-30. Although the BankAmericard system is effectively a cooperative association of banking members, the association itself was asserting its own procompetitive justifications for membership restrictions in the credit card market—an area of competition plainly
not in a horizontal relationship with the defendants.

The competitive relationship of parties involved in boycott activity is a significant factor in the case law. The formalistic inquiry into the existence of a horizontal conspiracy made by the Supreme Court in \textit{Klor's} is not always of substantive value. On the other hand, while the relationship between the several conspirators is not always significant in a boycott case, the relationship between them and the victim(s) is arguably more important. Thus, the crucial question to be asked is whether the victim is a competitor of the conspirators, not whether the conspirators are competitors of one another. If plaintiffs can establish boycott activity and a horizontal relationship between themselves and the defendants, the defendants should not be permitted to demonstrate that their restraint is the least restrictive possible for accomplishing their allegedly procompetitive goal.\footnote{severable from the commercial banking market in general. The plaintiff was a de facto competitor of defendant's members in the extention of consumer credit but not in the development of a credit card system, which existed in its own market.}

\footnote{205. \textit{See} notes 130-42 and accompanying text \textit{supra}. Other cases use language that more explicitly confuses these two inquiries. \textit{E.g.}, \textit{Smith v. Pro Football, Inc.}, 593 F.2d 1173 (D.C. Cir. 1979), involved an attack on the National Football League (NFL) player draft which restricted the freedom of professional football players to play for whichever team made them the best offer. The player draft operated to prevent a professional football player from earning a living unless he signed a contract to play for the team that "drafted" him. The court stated: The draft differs from the classic ground boycott . . . in that the NFL clubs have not combined to exclude competitors or potential competitors from their level of the market. Smith was never seeking to "compete" with the NFL clubs, and their refusal to deal with him has resulted in no decrease in the competition for providing football entertainment to the public. The draft, indeed, is designed not to insulate the NFL from competition, but to improve the entertainment product by enhancing its teams' competitive equality. \textit{Id.} at 1179 (footnotes omitted). The reasoning used in \textit{Smith} disregards the fact that the teams in leagues such as the NFL, even though \textit{not} competitors with respect to the sale of a product (in light of the NFL's internal market allocation rules), \textit{are} competitors with respect to the purchase of player services, and a failure by an NFL member club to comply with the player draft rule could result in the boycott of that club by other league members. Furthermore, by signing standard player contracts offered as a result of the draft, the NFL players could be said to be participating in the combination, as in \textit{FOGA}. The \textit{Smith} court did engage in the least restrictive alternative analysis, although only in a Rule of Reason analysis. \textit{Smith} appears to have anticipated \textit{Broadcast Music}'s suggested case-by-case determination whether to apply the per se rule with its statement that "the courts have had too little experience with this type of restraint, and know too little of the economic and business stuff from which it issues, confidently to declare it illegal without undertaking the analysis enjoined by the rule of reason." \textit{Id.} at 1182 (footnotes omitted).}

\textit{A similar boycott was involved in Molinas v. National Basketball Ass'n}, 190 F. Supp. 241 (S.D.N.Y. 1961). Pursuant to both a league rule and a contract, the plaintiff in \textit{Molinas} was excluded from participation in the NBA on the grounds that he had gambled on games he played in. The court upheld the league's action, describing the rule as necessary for the survival of the league. \textit{Id.} at 244. This was essentially the argument made by the courts in \textit{Worthen} and \textit{Smith}: a restraint should be allowed if necessary to the existence of a product. The particular rule attacked in \textit{Molinas} probably was peculiarly essential to the existence of the professional basketball "product"; if spectators expected players to be on the take they would be less likely to "buy" the
A series of cases from the Ninth Circuit illustrates an important aspect of the argument that the nature of an industry may necessitate the imposition of various restraints. A seminal case in permitting a professional sports industry group to regulate itself to promote competition was *Deesen v. Professional Golfers' Association*.206 In *Deesen*, the plaintiff alleged that the Professional Golfers' Association (PGA) and several individuals had excluded him from participation in PGA-sanctioned tournaments by means of PGA rules governing eligibility. Deesen challenged both the purpose of the eligibility restrictions and their allegedly discretionary and nonuniform application.207 The court responded to Deesen's attack on the purpose of the restriction in language that is arguably consistent with the rationales of *Professional Engineers* and *Sylvania*: “[The] purpose is to insure that professional golf tournaments are not bogged down with great numbers of players of inferior ability. The purpose is thus not to destroy competition but to foster it by maintaining a high quality of competition.”208

Only three weeks before the *Deesen* decision, a different Ninth Circuit panel decided a similar case, *Washington State Bowling Proprietors Association v. Pacific Lanes, Inc.*209 *Washington State Bowling Proprietor's Association (WSBPA)* reached a result directly opposite from the result in *Deesen*.210 The two cases can be reconciled only by applying the least restrictive alternative inquiry that was suggested in connection with *Worthen* and the procedural fairness test that was mentioned in connection with *Silver* and *Radiant Burners*.211

“product.” The court, however, failed to inquire into the degree of necessity for the suspension and even gave some indication that it would not require any showing of particularized necessity even in cases involving less serious player misconduct. “Every league or association must have some reasonable governing rules, and these rules must necessarily include disciplinary provisions.” *Id.* at 243-44. This statement is entirely inconsistent with *Professional Engineers*’ prohibition against noneconomic justifications as well as with the least restrictive alternative threshold test.

206. 358 F.2d 165 (9th Cir. 1966).
207. *Id.* at 166-68.
208. *Id.* at 170.
209. 356 F.2d 371 (9th Cir. 1966).
210. Rehearing was denied in *Deesen*, 358 F.2d at 165, and in *WSBPA*, 356 F.2d at 371.
211. See notes 159-70, 195-205 supra. Another Ninth Circuit case that illustrates the need for this limitation on the case-by-case procompetitive justification is *United States v. Hilton Hotels Corp.*, 467 F.2d 1000 (9th Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973). There, the defendants, operators and suppliers of hotels, formed an association to attract conventions to their area. The hotel owners agreed to give preference to those suppliers who contributed money for conventions. The restraint was arguably procompetitive, because it facilitated competition against other convention cities. The restraint, however, also had a coercive effect on suppliers because they had to pay the hotel association to receive the largesse of the hotels' business. Thus, the restraint was clearly not the least restrictive possible.
The complaint in *WSBPA* alleged, in part, that the defendant bowling proprietor associations and their members had conspired to restrain the trade of nonmember proprietors by sanctioning tournaments only in those bowling establishments which restricted tournament participants to bowlers who were members of a bowling proprietor’s association. In holding the boycott per se illegal, the court stated:

Presumably [the requested] instructions would have indicated that the restrictions were designed to promote the sport of bowling rather than to constitute a boycott. . . . Even assuming that abuses in the sport existed, it has been established since the case of *Fashion Originators’ Guild of America v. Federal Trade Commission*, that such circumstances do not justify a private association passing regulations to deal with the problem when their effect is to restrain or regulate interstate commerce.

*WSBPA* thus challenged the defendants’ purpose and its failure to show a particularized necessity for the restraint.

A reconciliation of *Deesen* and *WSBPA* requires the limited inquiry, discussed in *Worthen*, into the particularized necessity of the restraint. In *WSBPA*, the court simply stated that the defendants had not shown any relationship between the restraint and their desire to prevent cheating. The *Deesen* court, in effect, responded to the least restrictive alternative issue to answer the plaintiffs’ allegations that the restraint was applied in a discretionary and nonuniform manner.

The two inquiries each provide a quick check on the integrity of the defendants’ procompetitive justification by requiring that the restraint either be the least restrictive possible or arrived at in a procedurally fair manner.

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212. 356 F.2d at 374.
213. *Id.* at 376 (citations omitted).
214. In addition, a more recent Ninth Circuit case allowed the American Contract Bridge League (ACBL) to withdraw its sanction from bridge tournaments which used a new computerized scoring system that had not been approved by the ACBL. *Bridge Corp. of Am. v. American Contract Bridge League, Inc.*, 428 F.2d 1365 (9th Cir. 1970), *cert. denied*, 401 U.S. 940 (1971). The court, made up of none of the judges on either the *Deesen* or *WSBPA* panels, upheld the exclusion of the inventor of the new scoring system on the grounds that the purpose was to promote competition. The court stated, “The ACBL did not refuse to sanction any tournament scored by a computer but set forth reasonable conditions. . . .” *Id.* at 1370. This statement seems to be a vague attempt to satisfy either the least restrictive alternative test, the procedural fairness test, or both.
215. By imposing a requirement upon defendants that they not act arbitrarily, a court seemingly defers to the defendants’ determination of whether the restraint was necessary. The court then would review the defendants’ decision only for defects in the procedures used to reach the decision. This approach is an abbreviated substitute for the least restrictive alternative test. There
3. The Private Regulation of Unfair Trade Practices

In several cases, defendants have tried to justify their agreements to exclude a competitor by arguing that their conduct was necessary to prevent unfair or illegal trade practices. This defense was presented in *FOGA*, where the defendants claimed they were trying to prevent the victims of their boycott from stealing dress designs.\(^{216}\) The Court in *FOGA* held that the prevention of a tort "would not justify"\(^{217}\) the defendants' boycott. In addition, the Court broadly condemned the use of private government to accomplish regulation already provided by public government.\(^{218}\)

A Ninth Circuit case, *Oregon Restaurant and Beverage Association v. United States*,\(^ {219}\) provides another interesting example of a defense based on the prevention of illegal or unfair practices. In *Oregon Restaurant*, an Oregon law authorized licensed beer wholesalers to sell not only to licensed retailers, but also directly to social organizations.\(^ {220}\) Upon discovering that the wholesalers were overreaching the limits of the law in their direct sales to consumers, the retailers agreed not to buy from wholesalers who made direct sales. The retailers did not differentiate between legal and illegal direct sales; all wholesalers who made direct sales were boycotted. The court thought this was a matter of "prime importance": "[S]ince it was their intent to stop all [direct] selling, their conduct was violative notwithstanding the fact that some of the [direct] sales [of the wholesalers] were illegal."\(^ {221}\) Apparently, the court viewed the restraint in *Oregon Restaurant* as overbroad. This analysis, however, begs a more significant question: whether the prevention of illegal conduct by the defendant, even if accomplished in the least restrictive manner, is a justification for a restraint of trade. *Professional Engineers* would seem to say no. Only justifications based on the promotion of competition are acceptable under *Professional Engineers*.\(^ {222}\) Moreover, the defendants in *Oregon Restaurant* would have

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\(^{216}\) 312 U.S. 457.
\(^{217}\) Id. at 468.
\(^{218}\) Id.
\(^{219}\) 429 F.2d 516 (9th Cir. 1970).
\(^{220}\) OR. REV. STAT. § 471.240 (repealed 1973).
\(^{221}\) 429 F.2d at 517.
\(^{222}\) See text accompanying notes 89-93 supra.
probably lost even under a Rule of Reason analysis because they, in effect, allocated customers among themselves in addition to their boycott.\footnote{See text accompanying notes 66-70 supra.}

The prevention of unfair conduct has also been proffered as a justification for a boycott. In \textit{Florists' Nationwide Telephone Delivery Network—America's Phone-Order Florists, Inc. v. Florists' Telegraph Delivery Association (FNTDN)}\footnote{371 F.2d 263 (7th Cir.), \textit{cert. denied}, 387 U.S. 909 (1967).} the Seventh Circuit Court of Appeals held that the defendant was entitled to instructions on such a defense. In that case, the plaintiff filed an antitrust action against Florists’ Telegraph Delivery Association (FTD), a nationwide network of florists who exchange intercity orders for flowers. Florists’ Nationwide Telephone Delivery Network (FNTDN) alleged that FTD conspired with its members to cause florists to refrain from doing business with FNTDN. Specifically, the plaintiff challenged several rules promulgated by FTD. One FTD rule prevented FTD members, who were also FNTDN members, from advertising their affiliation with FNTDN. Another rule prevented FTD members from listing their names in FNTDN’s membership directory.\footnote{Id. at 265-67.} The Seventh Circuit Court of Appeals allowed FTD to raise the defense that it was preventing the illegal and unfair acts of FNTDN. The court cited two cases\footnote{Union Leader Corp. v. Newspapers of New Eng., Inc., 284 F.2d 582 (1st Cir. 1960), \textit{cert. denied}, 365 U.S. 833 (1961) (an attempted monopolization case); Times-Picayune Publishing Co. v. United States, 345 U.S. 594 (1953) (a tying case).} for the proposition that offsetting another’s “illegal” acts is relevant to the question of the defendant’s purpose, but neither case was a boycott case, and both are quite old. Apparently the court thought that anticompetitive conduct designed to prevent illegal acts is not proscribed by the antitrust laws; that principle, however, is directly contradicted by \textit{Professional Engineers}.\footnote{See text accompanying notes 88-92 supra.} Moreover, the court in \textit{FNTDN} failed to demonstrate that the plaintiff’s trade practices were illegal.

A recent decision by the Fifth Circuit Court of Appeals involving a somewhat similar fact pattern rejected plaintiff’s boycott claim. In \textit{Blackburn v. Crum \& Forster}\footnote{611 F.2d 102 (5th Cir.), \textit{cert. denied}, 447 U.S. 906 (1980).} the plaintiffs were independent insurance agents. They challenged the refusal by the defendant insurance companies to continue doing business with the plaintiff or to sell errors and omissions insurance to plaintiffs. The defendants argued that the
sole reason for the termination of plaintiff's contract was a poor risk history and actual or constructive fraud. The plaintiffs, however, contended that the defendants had terminated them because they were doing substantial business with the defendants' competitors and the defendants wished to "make an example" of the plaintiffs that would deter other independent agents from dealing with competing insurance companies.229

The Fifth Circuit Court of Appeals affirmed a summary judgment in favor of the defendants, notwithstanding the existence of dispute regarding "many issues of material fact."230 The court affirmed because "resolution of those issues . . . is not for a federal forum" and because of the supposed "paucity" of significant probative evidence of group boycott, even when viewed in the light most favorable to plaintiffs.231 In so holding, however, the court could not contradict the facts that defendants had agreed neither to place insurance through the plaintiffs nor to sell them errors and omissions insurance. The court also acknowledged that related companies and their holding company, such as defendants, can be held to have unlawfully conspired in violation of the Sherman Act.232 It would seem, therefore, that plaintiffs had alleged a combination in restraint of trade with potentially severe consequences sufficient to invoke the Klor's rationale and entitle them to a trial.

The Fifth Circuit distinguished Klor's and Silver on the ground that the Supreme Court's application of the per se rule in boycott cases has occurred only where the "plaintiff, the excluded party, is on the same competitive level with one member of the conspiracy."233 Since the per se rule is inapplicable, the court stated that plaintiffs must prove the defendants acted with an anticompetitive motive; and that the plaintiffs had failed to submit such proof. Thus, the defendants' version of their purpose as combating fraud was accepted.234 The court,

229. 611 F.2d at 103-04.
230. Id. at 105.
231. Id. The suggestion that a federal antitrust court should not become involved in controversies that primarily involve common law disputes arose earlier in Hayes v. Solomon, 597 F.2d 958, 972-73 (5th Cir. 1979), where the court similarly rejected a private antitrust claim that arose over a contract dispute. The court stated: "We simply conclude that the underlying claim which plaintiffs established is not the type of injury that the federal antitrust laws were intended to forestall." 597 F.2d at 973 (citing Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 488 (1977)).
232. 611 F.2d at 104.
233. Id.
234. Id. at 105.
however, had insufficient grounds to rule that the plaintiffs should be precluded from attempting to prove an anticompetitive motive at trial. At any rate, the Blackburn decision seems disturbingly antagonistic to private Sherman Act actions and protective of private collaborative conduct.

4. Due Process Considerations in Private Self-Regulation

Another group of cases involving some characteristics of the other categories deserves independent discussion. As previously discussed, the Supreme Court in Silver left open the possibility of industry self-regulation pursuant to some policy established by "statute or otherwise."235 After Professional Engineers one should expect the Court to give the "or otherwise" language a very restrictive reading, permitting only economic policy to justify conduct otherwise per se illegal. Several pre-Professional Engineers district court cases illustrate an attempted extension of the "or otherwise" phrase.

One of the most important was Denver Rockets v. All-Pro Management, Inc.,236 in which the conduct complained of was a bylaw of the National Basketball Association (NBA) that prohibited teams from hiring a basketball player until four years after his high school class had graduated. The plaintiff, Spencer Haywood, was found by the court to be a top-notch professional basketball prospect.237 He was denied the opportunity to sign with an NBA team because of the four year rule. The court determined that the rule operated as a boycott producing threefold harm:

First, the victim of the boycott is injured by being excluded from the market he seeks to enter. Second, competition in the market in which the victim attempts to sell his services is injured. Third, by pooling their economic power, the individual members of the NBA have, in effect, established their own private government.238

The court initially took note of the Supreme Court's per se prohibition against boycotts,239 but referring to Klor's and FOGA the court stated:

[B]y its very nature the per se approach paints with a very broad

235. See text accompanying notes 159-70 supra.
237. Id. at 1052.
238. Id. at 1061. The court's second point may demonstrate an awareness of one of the problems pointed out in the discussion of Worthen and Smith, i.e., the narrow view of who constitutes a competitor. See notes 195-205 and accompanying text supra.
239. 325 F. Supp. at 1062-63.
brush and eliminates economic cooperation which may be both necessary and desirable. For this reason, lower courts have been reluctant to apply it and have frequently found reasons for not doing so.\textsuperscript{240}

The court's only cited authority for an "exception" to the per se rule was \textit{Silver}: "The possibility that all concerted refusals to deal were not per se illegal was given considerable impetus in \textit{Silver} . . . , where the court recognized that a 'justification derived from the policy of another statute or otherwise' might save a collective refusal to deal from per se illegality."\textsuperscript{241} To satisfy the \textit{Silver} exception to the per se rule, the defendant would have to show the following:

(1) There is a legislative mandate for self-regulation "or otherwise". In discussing the history of the New York Stock Exchange in \textit{Silver}, the Court suggests that self-regulation is inherently required by the market's structure. From this basis, it has been argued that where collective action is required by the industry structure, it falls within the "or otherwise" provision of \textit{Silver}.

(2) The collective action is intended to (a) accomplish an end consistent with the policy justifying self-regulation, (b) is reasonably related to that goal, and (c) is no more extensive than necessary.

(3) The association provides procedural safeguards which assure that the restraint is not arbitrary and which furnishes a basis for judicial review.\textsuperscript{242}

Unfortunately, the court ignored the distinction, emphasized in \textit{Blackburn} and other cases, that there was no competitive, horizontal relationship between plaintiff and defendants. Emphasizing the lack of notice and hearing for Haywood, the court found that the activity in question was not within the exception to the per se rule.\textsuperscript{243}

\textsuperscript{240} Id. at 1064 (emphasis added).
\textsuperscript{241} Id. (quoting 373 U.S. at 348-49).
\textsuperscript{242} Id. at 1064-65 (citation omitted).
\textsuperscript{243} Id. at 1066. The court reasoned:

With regard to the facts of the instant case it can readily be determined that the case does not fall within the "rule of reason" exception provided by \textit{Silver}. It is clear from the constitution and by-laws of the NBA that there is no provision for even the most rudimentary hearing before the four-year college rule is applied to exclude an individual player. Nor is there any provision whereby an individual player might petition for consideration of his specific case. Due to the lack of any such provisions, this court must conclude that on the basis of undisputed facts, the NBA rules in question fall outside the \textit{Silver} exception and are subject to the \textit{per se} rule normally applicable to group boycotts.

In addition, it is uncontested that the rules in question are absolute and prohibit the signing of not only college basketball players but also those who do not desire to attend college and even those who lack the mental and financial ability to do so. As such they are overly broad and thus improper under \textit{Silver}. Summary judgment for violations of the antitrust laws is proper where less restrictive means than those used could have been employed.

\textit{Id.}
Another district court, however, rejected the *Denver Rockets* analysis of *Silver*. In *Blalock v. Ladies Professional Golf Association*,\(^{244}\) the defendant, the governing organization for women's professional golf, suspended the plaintiff for alleged cheating. Relying on *E.A. McQuade Tours, Inc. v. Consolidated Air Tour Manual Committee*,\(^{245}\) until then the Fifth Circuit's most definitive treatment of boycotts, the court invoked the per se rule.\(^{246}\) The court focused on several factors in applying the rule. Most significant, the suspension was imposed without procedural fairness: the suspension was imposed by competitors of the plaintiff, without guidance by an objective standard, and without a hearing.\(^{247}\) Refusing to apply the *Denver Rockets* interpretation of *Silver*, the *Blalock* court stated:

> Whatever the "or otherwise" in *Silver* refers to, it is clear that it necessarily must be of sufficient force and effect impliedly to repeal a federal statute. This Court cannot ascribe that weight to the Constitution and By-Laws of the LPGA. Thus, the Supreme Court in *FOGA*, in rejecting the proposition that it is permissible for a private association to engage in boycott activity to police its members' activities, described the defendant private association as "... in reality an extra-governmental agency..."\(^{248}\)

*Denver Rockets* and *Blalock* differed primarily over the question of the proper interpretation of the "or otherwise" language in *Silver*, a phrase which the Supreme Court itself may have eliminated from its jurisprudence.\(^{249}\) Both cases, however, employed the principle that to avoid per se illegality a restraint must be procedurally fair. These two cases thus fall in line with the least restrictive alternative/procedural


\(^{245}\) 467 F.2d 178. The more recent *Reality Multi-List* decision, discussed at notes 261-88 infra, while relying heavily on *McQuade*, is undeniably the Fifth Circuit's last word on boycotts.


\(^{247}\) *Id.* at 1265. In addition, the purpose and effect was to exclude the plaintiff from the market, and suspension was tantamount to total exclusion from the market. *Id*.

\(^{248}\) *Id.* at 1267 (quoting 312 U.S. at 465).

The Supreme Court in *Silver* cited *Fashion Originators Guild* as primary support for the proposition that a group boycott is *per se* illegal. Therefore, it seems clear that the "or otherwise" language in *Silver* does not sanction the kind of group action present in *Fashion Originators Guild*—i.e., by a private association—which is exactly the situation in this case. Therefore, since there is no other statute present in the instant case which would justify the suspension (i.e., exclusion) of plaintiff by her own competitors (a particular exercise of self-regulation), the Court concludes that this case does not fall within the exception to the *per se* rule announced in *Silver*, but, in fact, is identical to the type of conduct proscribed in *Fashion Originators Guild*.

*Id.* (citation omitted).

\(^{249}\) See note 166 and accompanying text supra.
fairness analysis, the case-by-case per se determination, and the use of procompetitive effects as justification.

5. Private Standard-making For Noncommercial Motives

One form that industry self-regulation has taken is the establishment of qualifications for participation by an industry-wide association. Although defendants in these cases cannot argue that their enterprise would not survive absent the regulation in question, they can argue that their rules enhance the public appeal of their endeavors and that, on balance, they create no economic injury to the market in question. Two recent cases have involved the establishment of quality standards in the horse and cattle breeding industries.

In Hatley v. American Quarter Horse Association, the plaintiff applied to the defendant American Quarter Horse Association for registration of a colt. The application was denied because the colt did not meet the coloring standards for a quarter horse. The Fifth Circuit Court of Appeals adopted the Denver Rockets construction of Sil-
ver's "or otherwise" language and held that there was no per se violation. The rationale employed by the court in Hatley is, at best, suspect in light of Professional Engineers. "In some sporting enterprises a few rules are essential to survival. The definition of a quarter horse is an inquiry which the AQHA, as a sanctioning organization, ought to be able to pursue."
The court appears to have given the concept of "survival" excessive primacy; Professional Engineers arguably would permit such a defense only subject to the limitations discussed earlier in connection with Worthen and the professional sports cases. Moreover, even assuming that the standard in Hatley were procompetitive, the court failed to make either a least restrictive alternative or procedural fairness inquiry.

In the second breeding case, McCreery Angus Farms v. American Angus Association, the plaintiffs were "in effect . . . put out of business by the Association’s action, a group boycott." The court relied on Denver Rockets as well as commentary suggesting that antitrust law should not intrude upon private industrial cooperation. Although that position may have merit, it can no longer be seriously relied upon after Professional Engineers. The McCreery court did, however, apply the least restrictive alternative analysis suggested earlier and concluded that the defendants had failed to accord the plaintiff notice of the charges against him.

There are obvious similarities between conduct that is designed to prevent unfair trade practices and the establishment of industry standards. One can assume that the strongest motivating factor behind both is to protect and promote profits of those who agree to the restraint, even though a secondary motivating factor might be social concern. Whatever the motivation for their establishment, industry standards can be helpful to potential consumers in deciding

254. Id. at 652-53. See notes 236-43 and accompanying text supra.


256. The court also relied on the notion that certain industries require an exception to the per se rule, citing Bridge Corp. of Am. v. American Contract Bridge League, Inc., 428 F.2d 1365 (9th Cir. 1970), cert. denied, 401 U.S. 940 (1971) and Deesen v. Professional Golfers’ Ass’n, 358 F.2d 165 (9th Cir.), cert. denied, 385 U.S. 846 (1966).

257. 379 F. Supp. 1008 (S.D. Ill. 1974), aff’d without opinion, 506 F.2d 1404 (7th Cir. 1979).

258. Id. at 1010.


260. 379 F. Supp. at 1019. The court never stated whether it would hold the defendants per se liable; it simply granted the plaintiff temporary injunctive relief from the suspension imposed upon him. Id. at 1020-22.
which products to buy. As long as the standards relate to rational buying decisions and are neither coercive nor exclusionary, their use arguably promotes competition.

6. Realty Multi-List: The Defense of Economic Efficiency

Among the most recent lower court boycott decisions is the Fifth Circuit's lengthy and somewhat confusing decision in *United States v. Realty Multi-List, Inc.* Realty Multi-List involved a government challenge to the membership criteria and practices of a real estate brokerage multiple listing service in Columbus, Georgia. Since the case contains elements of several of the defense theories considered earlier and the government responses to them, it is an important decision, representing what might best be classified as "government boycott cases."

The facts of Realty Multi-List provide an excellent vehicle for analysis of antitrust boycott law in the context of industry self-regulation. The civil complaint was filed by the government rather than by an unhappy competitor seeking treble damages; it thus represents one of the few recent boycott cases brought by the Justice Department. Perhaps because of this government involvement, the court took considerable care in reviewing the case law, literature, and arguments of the parties. The decision is also important in that the real estate brokerage industry is representative of those professions recently targeted by the Carter Justice Department—professions that are already partially de facto state-regulated and that arguably are most likely to create guilds to restrict competition on the ground that competition is not or should not be a primary concern of the profession.

The defendant multiple listing service, essentially an acknowledged trade exchange, was organized in 1967 by eight state-licensed real estate brokers in Muscogee County, Georgia. Each broker purchased one share of stock of the corporation. Over the next ten years, during which a competing multiple listing service came into existence and then effectively merged with defendant, the defendant

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261. 629 F.2d 1351 (5th Cir. 1980).
262. In another case, *United States v. Columbia Pictures, Indus.*, the government brought an action, which included allegations of boycott, against a proposed joint venture among a cable television company and several movie producers. The trial court granted the government's motion for a preliminary injunction, resting in part on the ground that such a joint venture would effectively boycott movie producers who were not parties to the agreement. *5 TRADE REG. REP. (CCH)* ¶ 63,698 (S.D.N.Y. No. 80-4438, Dec. 31, 1980).
263. See note 1 and accompanying text supra.
264. 629 F.2d at 1355-56.
265. *Id.* at 1357.
1981] INDUSTRY SELF-REGULATION 53

grew in membership until the "vast majority of active real estate brokers" in the county were members.266 The defendant promulgated certain rules and regulations, binding upon all members, governing commercial conduct. In particular, members of defendant obligated themselves to seek "exclusive" rather than open listings and to pool all exclusive listings through defendant with defendant's other members.267 The rules also prohibited members from allowing nonmembers access to the listing book and from participating with nonmembers in the sale of real estate for which another member has the exclusive listing.268

In 1976 the Justice Department filed a civil complaint against the defendant,269 primarily challenging its membership criteria as violative of section 1 of the Sherman Act.270 The government acknowledged

266. Id.
267. Id. at 1355.
268. Id. at 1357.

RML's rules allow members to cooperate with nonmembers on an individual sale of an RML-listed property, they prohibit any member, other than the listing broker, from responding directly to a nonmember's inquiries regarding a listed property, and the RML office may not disclose any information to nonmembers. Finally, nonmembers are barred from access to the other services provided by RML.

Id. (citations omitted).

269. When the government is seeking equitable relief in a civil case there is no technical reason to name the members or shareholders of the corporation in order to accomplish the desired result. As in the Worthen case, however, the defendant multiple listing service actually is involved in a market separable from that of its shareholder-brokers and, as noted above, had competition from another multiple-listing service in that separate market. It is arguable, therefore, that the alleged victims of defendant's conduct (nonmember brokers) were not in a competitive relationship with defendant. The more strategic course, underscoring the horizontal relationships and the heart of the boycott problem, would have been for the government to have named each member broker separately as a defendant and to have focused on the individualized refusals to deal rather than defendant corporation's conduct. Where the cooperative undertaking is an unincorporated association, as in Associated Press, the individual members are de jure defendants. Of course, in light of the twelve hundred members involved in Associated Press, it would have been impractical to charge each member individually.

270. 629 F.2d at 1354. Responding to the government's theory, the court held that the membership criteria, not the bylaws restricting dealing with nonmembers, were the main issue. Thus, from the beginning the government and court failed to focus upon the Supreme Court's rationale in prior boycott cases—that a concerted refusal to deal with competitors, by competitors, has no redeeming value. Restrictive membership criteria, on the other hand, are more justifiable and are tinged with first amendment considerations. As suggested in the discussion of Associated Press, the parallel practices among member brokers—refusing to deal with nonmembers and at the same time restricting membership—should be viewed together as part of the challenged combination.

The membership requirements challenged by the government were as follows: (1) possession of a Georgia real estate broker's license; (2) a favorable recommendation by the membership committee; (3) purchase of a share of the listing service's stock; and (4) approval by 85% of the service's active membership. The fourth requirement was first reduced to approval by a mere majority and later replaced by a requirement that the member maintain an active real estate office in the county and possess a favorable credit report and business reputation. Id. at 1358.
that a multiple listing service, like any commodity or security exchange, can be a positive and procompetitive force and did not challenge the defendant's mere existence. The district court, after the completion of discovery, granted defendant's motion for summary judgment. The Fifth Circuit Court of Appeals reversed and remanded.

The government argued on appeal that defendant's membership criteria amounted to a horizontal concerted refusal to deal, or group boycott, and thus was per se illegal. Alternatively, the government argued that, if the per se rule was inapplicable, defendant's conduct was unreasonable. The court first agreed that defendant's conduct precluding members from dealing with nonmembers, accompanied by its restrictive membership criteria, was, in fact, a traditional boycott. The court, nevertheless, went on to conclude, relying heavily on Sylvania and Broadcast Music, that the defendant's conduct should not be subjected to per se analysis. Pointing to the potential public benefits arising from such a trade arrangement, the court explained:

[When a practice tends to reduce competition of this type, but nevertheless operates to make the market more efficient—thereby aiding in the reduction of prices and better allocation of resources, for example—then it may still be found, under the rule of reason, to further the Act's goal of aiding competition . . . . To evaluate the effect of a practice on competition under the Sherman Act, one must look not only to rivalry but to economic efficiency as well.]

The court then went on to find that defendant's membership criteria possessed the necessary "potential connection to the achievement of significant economic efficiencies" relieving the service from per se treatment. The court noted that the "antitrust laws must allow reasonably ancillary restraints to accomplish these enormously

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271. Id. at 1359.
272. Id.
273. Id.
274. Id. at 1362.
275. Id. at 1369.
276. Id. at 1361.
277. Id. at 1362-69.
278. Id. at 1364. The court, relying on Broadcast Music, redefined the per se rule as set forth in Northern Pacific, Klor's, Socony-Vacuum, Professional Engineers, and Catalano: "A practice is 'plainly anticompetitive' and lacking in 'any redeeming virtue' under the Sherman Act, therefore, when it . . . operates to deny consumers the opportunity to choose among alternative offers without offering the possibility of any joint, efficiency-producing economic activities." Id. (emphasis added). Under this version of the per se rule, much of our economy could be transferred into a single-ownership monopoly, by escaping per se condemnation on an economies of scale pretext.
279. Id. at 1369.
procompetitive objectives."280

The court’s conclusion regarding the application of the per se rule is unpersuasive for two reasons. First, the court focused primarily upon the general activities and existence of the defendant rather than the particular rules and practices challenged. The “reasonably ancillary” concept invoked by the court—that otherwise per se illegal conduct may escape per se condemnation if reasonably ancillary to other allegedly procompetitive conduct—is relevant only in a Rule of Reason case.281 The Supreme Court repeatedly has rejected such arguments, particularly in cases such as Socony-Vacuum282 and most recently in Catalano.283 Acceptance of the Realty Multi-List analysis could logically preclude per se condemnation of other per se illegal conduct “reasonably ancillary” to the existence of the multiple listing service, such as customer allocation and even price-fixing. Perhaps the heart of the problem is the Court’s uncritical acceptance of defendant’s argument that its members’ refusal to deal with nonmembers truly was “reasonably” ancillary to the multiple listing service.

The second problem with the Realty Multi-List analysis is potentially more serious, for it threatens to erode years of Sherman Act case law and is gaining acceptance in merger law as well: that the promotion of “efficiency” is necessarily equivalent to the promotion of competition. In other words, what is good for certain existing businesses in the short term is also good for consumers and potential competition.284 Although the defendant’s members certainly may facilitate sales as a result of the defendant’s existence, they increase their own sales at the expense of nonmember competitors and potential competitors and

280. Id. at 1368. Interestingly, among the “enormously procompetitive objectives” served by defendant, as accepted by the court, was that the multiple-listing service “aids the market in its function as price-setter for properties and financing” from which the member “broker himself doubly benefits: he gains a larger inventory to sell and gains broader exposure for his own listings.” Id. It might be suggested that the multiple-listing service does not “aid” the market as price-setter but substitutes itself for the market, thereby giving the member broker a “third” benefit—higher commissions. Cf. United States v. Foley, 598 F.2d 1323 (4th Cir. 1979), cert. denied, 444 U.S. 1043 (1980) (affirming felony price-fixing convictions against Maryland real estate brokers who utilized a multiple listing service to police the agreement on commission rates).


282. 310 U.S. 150.

283. 446 U.S. 643.

thereby vastly increase their ability to control prices via commission
rates.\textsuperscript{285} If membership in the multiple listing service were open, or if
there were absolutely no formal or informal prohibition upon members
dealing with nonmembers, the multiple listing service would serve the
same positive goals but would not allow members to exert monopolistic
power. The fact that the value of membership as represented by the
purchase price of defendant's shares rose by 15 times, from $200 to
$3000, within six years\textsuperscript{286} reveals the degree that entry was limited by
defendant's exclusionary tactics. The fact that the value of the shares
would skyrocket to such a degree reveals the demand and need for in-
volvement in the service.

The Court of Appeals opinion thus expressly sets itself apart from
established Supreme Court precedent in a way suggesting a disinclina-
tion to utilize the per se rule in any case. The opinion recognizes that a
horizontal boycott existed yet refuses to adhere to Supreme Court pre-
cedent. Moreover, it has accepted the "efficiency" defense without any
critical review.

On the other hand, the court held that defendant's membership
rules and practices were probably illegal under the Rule of Reason be-
cause the membership rules did not have a legitimate justification in
the competitive needs of defendant's members, and were not reason-
ably necessary to accomplish the procompetitive goals of the defend-
ant. Since the defendant appeared to have substantial market power,

\textsuperscript{285} The assumptions that cartels will pass efficiency-created savings to consumers and that
short-term efficiencies will be perpetuated on a long-term basis without the spur of new competi-
tion theoretically would be valid only in a near-perfect, intensely-competitive market. This, of
course, is the antithesis of cartel behavior in the first place: the fact that efficiency-promoting
cartel behavior exists itself negates the possibility of an academically pure competitive environ-
ment. The court and Professor Bork seem to acknowledge at least part of the practical problem
involved in deferring to private efficiency-creating behavior. Citing Professor Bork, the court
states:

On a theoretical level, this unjustified exclusion is an example of the predatory use
of an economy of scale. As [Professor Bork] explained: "The threat of boycott is likely
to be particularly effective in the case of cooperating groups because a group often cre-
ates an economy of scale to which any firm must have access in order to be profitable. A
trader excluded from the Chicago Board of Trade, a broker excluded from the stock
exchange, or a professional football team turned out of its league is likely to have a very
hard time of it. . . .

[There is no doubt that predation can succeed when the distribution pattern is so
much more efficient than the alternative that those forced out of the pattern cannot com-
pete. The technique of predation is the denial of access to an essential economy of scale.
Boards of trade, for example, often control such access, and their members may often
easily destroy a troublesome rival by expelling him from membership or, perhaps more
commonly, may bring a rival into line with the mere threat of expulsion."

\textsuperscript{286} 629 F.2d at 1371 n.37 (quoting R. Bork, supra note 77, at 336, 158).

\textsuperscript{286} 629 F.2d at 1358.
the court reversed the trial court's decision and remanded the case for consideration of the anticompetitive effect of the membership rules.287 Thus the court essentially held that while the defendant's challenged practices—refusing to deal with nonmembers and restricting membership—might potentially be "reasonably ancillary" to the defendant's existence, they were not reasonable in this case: "[W]here a broker is excluded from a multiple listing service with the requisite market power without an adequate justification in the competitive needs of the service, both the broker and the public are clearly harmed."288

III. THE UNRESOLVED ISSUES: A SUGGESTED RECONCILIATION

A. FASHIONING A CONSISTENT RULE OF ANTITRUST BOYCOTT LAW

As the above review of representative lower court decisions suggests, antitrust defendants have been relatively successful at persuading the courts not to apply the per se rule. Instead, the courts have chosen to analyze the post hoc business justifications for concerted private conduct with alleged anticompetitive effects. Although the particular justifications asserted have been tailored to meet the facts of each case, a unifying theme has emerged. Many courts have been deferential to quasi-governmental decisionmaking among direct competitors. A policy of presumptive legality has been adopted, even though the private plaintiffs have been prepared to prove competitive damage proximately resulted from such decisionmaking. Notwithstanding the Supreme Court's consistent condemnation of private quasi-governmental activity, the deference exists.

Another theme is that the government has won virtually every boycott equity action that it has brought in the appellate courts. Private plaintiffs, however, have lost the majority of treble damages actions. One reason for this is that the government prescreens its cases and should therefore be expected to prevail substantially more often

287. Id. at 1389. The court also noted that the issue of federal jurisdiction (whether defendants had a sufficient connection to interstate commerce) had not been addressed. Id. at 1389. The court's reluctance to hold that defendant has "the degree of economic power in the relevant market" necessary to find its practices unreasonable, is inconsistent with the court's earlier analysis of that very issue. Id. at 1372-75, 1388-89. It is difficult to see as a practical matter what additional evidence of market power would be necessary, in view of the undisputed facts as found by the court.

288. Id. at 1371. The court ultimately held that, "[a]ssuming that RML possesses the requisite degree of economic power in its market, we have concluded that its present membership criteria on their face create restraints on commerce that are not justified by RML's competitive needs." Id. at 1388-89.
than private plaintiffs. Another reason is that the lower courts are more likely to apply the per se rule and are more likely to be critical of asserted reasonableness defenses when the government has initiated the action. 289 A dichotomy based solely on the identity of the plaintiff and the nature of the remedy sought makes it exceedingly difficult to legitimately reconcile the body of boycott caselaw. 290

Essentially, there are two lines of Supreme Court authority relevant to the problem of industry self-regulation characterized as a boycott. The Court’s boycott cases have consistently applied a per se rule to boycotts involving at least one competitor of the victim and having the effect of adversely affecting the victim’s trade. The per se rule has been applied regardless of the impact of the boycott on the market and the lack of an unambiguously anticompetitive purpose. 291 The Court also noted in Radiant Burners 292 that the defendant’s industry standard had been adopted in a nonobjective manner. 293 In Silver, 294 the Court considered the SEC regulation of the defendant and applied a procedural fairness test as an abbreviated inquiry into the reasonableness of a particular restraint. 295 This procedural fairness inquiry has been an important consideration in many lower court cases involving an alleged concerted refusal to deal. In several other recent section 1 cases not involving boycotts, the Supreme Court has held that a restraint may not be per se illegal when the defendants can demonstrate a valid and substantial procompetitive justification for the restraint. 296 Sylvania 297 adopted the Rule of Reason for the whole class of cases involving vertical restraints on selling territories. 298 Broadcast Music 299 carved a potentially limited exception out of Socony-Vacuum’s price-fixing

289. A review of the description of the per se rule in Northern Pacific emphasizes that the creation and practically every extension of the per se rule to new categories of conduct has occurred in a government case. See note 14 supra. Perhaps it is justifiable to infer that the courts regard government cases as primarily regulatory in nature and private cases as compensatory. As in common law tort litigation, the concept of “reasonableness” is indispensable in the absence of legislation creating strict liability.

290. One possible explanation for the government winning more antitrust actions is that private parties often raise weak antitrust claims as defenses to other actions.

291. See note 15 supra.
292. 364 U.S. 656.
293. Id. at 658. See notes 143-53 and accompanying text supra.
294. 373 U.S. 341.
295. Id. at 361-67. See notes 159-70 and accompanying text supra.
296. See notes 71-101 and accompanying text supra.
297. 433 U.S. 36.
298. See notes 71-86 and accompanying text supra.
299. 441 U.S. 1.
holding.\textsuperscript{300} \textit{Professional Engineers},\textsuperscript{301} however, suggests a case-by-case approach for the per se rule.\textsuperscript{302} Such an approach may be consistent with the search in the lower courts for “exceptions” to the per se rule based on a procompetitive justification. On the other hand, the \textit{Gypsum}\textsuperscript{303} decision plainly reaffirmed that the defendants’ anticompetitive intent is not a separate element requiring proof in section 1 civil actions.\textsuperscript{304} \textit{Catalano},\textsuperscript{305} moreover, summarily dismissed the alleged policy justifications for a credit-elimination agreement.\textsuperscript{306}

The following rule for analyzing alleged boycott activity is proposed:

(1) If horizontally-related defendants:

(a) have agreed to exclude a competitor or potential competitors by curtailing or restricting cooperative services, supplies, or customers; or

(b) have adopted through concerted action a functionally equivalent rule, standard, or procedure with foreseeable exclusionary impact upon competitors or potential competitors; then their conduct should be deemed within the limits of the per se rule\textsuperscript{307} and the plaintiff should not be required to introduce market or structural evidence of unreasonableness, nor should the plaintiff be required to prove an anticompetitive motive.

(2) If there is no knowing concerted refusal to deal involving a horizontal relationship among the defendants and between a defendant and the target, or if the defendants’ conduct is regulated to some relevant degree by federal legislation, then the plaintiff

\begin{itemize}
\item \textsuperscript{300} Id. at 23.
\item \textsuperscript{301} 435 U.S. 679.
\item \textsuperscript{302} Id. at 692. See notes 87-93 and accompanying text supra. The Supreme Court in \textit{Broadcast Music}, however, provided one important caveat regarding the characterization of a particular form of restraint as within the per se rule:

\begin{quote}
The scrutiny occasionally required must not merely subsume the burdensome analysis required under the rule of reason, see \textit{National Society of Professional Engineers v. United States}, 435 U.S. 679, 690-692 (1978), or else we should apply the rule of reason from the start. That is why the per se rule is not employed until after considerable experience with the type of challenged restraint.
\end{quote}

441 U.S. at 19 n. 33.
\item \textsuperscript{303} 438 U.S. 422.
\item \textsuperscript{304} Id. at 436 n.13. See notes 17-19 and accompanying text supra.
\item \textsuperscript{305} 446 U.S. 643 (1980).
\item \textsuperscript{306} Id. at 649-50. See notes 79-85 and accompanying text supra.
\item \textsuperscript{307} To validly impose per se liability upon a particular defendant, the plaintiff should demonstrate not only that the defendant generally engaged in concerted action with others, but also that he knowingly engaged in a concerted refusal to deal or in conduct that was foreseeable equivalent of a refusal to deal. See notes 32-55 and accompanying text supra.
\end{itemize}
must demonstrate that the alleged anticompetitive effect of the challenged conduct is, on balance, economically unreasonable within the particular market in question. If defendants have less restrictive alternatives available to attain the alleged procompetitive purpose of their conduct, or if the conduct is procedurally unfair or irrational, then such conduct should be deemed facially unreasonable. In a similar fashion, when the plaintiff can prove that the intention of the defendants was primarily to limit competition, then defendants’ conduct should be found unreasonable.308

Where the economic reasonableness of challenged conduct is at issue in a case in which the conduct allegedly was engaged in for non-commercial or noneconomic reasons—i.e., to promote safety or some ethical cause—the defendants would normally be allowed to present a generalized argument that the promotion of noneconomic goals in the context of the industry or profession in question indirectly promotes the existence of the industry. Where the above-described per se rule is applicable, however, a noneconomic purpose should be irrelevant in a civil action: such private governmental concerted action limiting free competition must receive the sanction through legislation of federal or state government to avoid antitrust condemnation, for regardless of the alleged goals of the private rulemaking, the foreseeably exclusionary impact would allow the creation of private guilds resistant to innovation and would be contrary to the policy of the Sherman Act.309

B. ISOLATING THE PER SE FACTORS

The Rule of Reason analysis suggested in Sylvania and, to a lesser extent, in Broadcast Music would apply equally well to concerted refusals to deal and other exclusionary conduct not subject to the per se rule. The more controversial decision is the determination of the particular factors that must be evident from the pleadings in a particular case to invoke the per se analysis. In theory, lower courts confronting such a decision should attempt to apply the rule of law as set forth by

308. In other words, although defendants’ intent to violate the law is irrelevant in a per se case, their intent primarily to engage in anticompetitive conduct is virtually dispositive in a Rule of Reason case. See note 13 supra.

309. Thus, for example, if the defendant in NOW, 620 F.2d 1311 had even “coincidentally” been a business competitor of Missouri’s convention facilities, its “political” conduct would not have survived a Sherman Act challenge. Id. at 1321-24 (Gibson J., dissenting). See note 5 supra.

310. Broadcast Music may well have constituted a relatively unique situation of justifiable price-fixing. Even the Justice Department in its amicus participation opposed application of the per se rule. 441 U.S. at 14-15.
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the Supreme Court. A lower court desiring to remain consistent with Supreme Court case law while avoiding the per se condemnation of a concerted refusal to deal may rely on any of several factors. On the other hand, other factors commonly cited by the courts are irrelevant to a determination of the applicability of the per se rule.

1. Concerted Refusal to Deal

Supreme Court boycott law does not come into play unless the complaint reasonably alleges that the defendants agreed to restrict the target's supplies, services, products, or customers. The Supreme Court has not characterized a combination in restraint of trade as a boycott where at least one party to the allegedly illegal agreement did not directly or indirectly refuse to deal with the target. For this reason there is substantial doubt whether the mere establishment of product standards by a trade association should ever be condemned as a boycott under the per se rule. Nevertheless, Associated Press and Radiant Burners compel per se analysis when standard making results in the exclusion of noncomplying competitors from membership in a trade association or when members are precluded from dealing with nonmembers. A more difficult question was confronted by the Fifth Circuit in Realty Multi-List: whether in the absence of an absolute bar against association members dealing with nonmembers, the exclusion of competitors from membership nevertheless should be regarded as a boycott where membership is a practical necessity for viability as a competitor. The Supreme Court has not addressed the question under a boycott rationale.

2. Horizontal Relationship Between Target and Defendants

Several Supreme Court boycott decisions have found defendants to be liable who were not themselves in a competitive relationship with the target. The plaintiff in each of those cases, however, had alleged and demonstrated that the unlawful section 1 combination included at least

311. Although such conduct was not necessary to accomplish defendants' anticompetitive goals in Radiant Burners, the Court emphasized that a party to the agreement refused to sell gas to plaintiff's customers, thereby causing potential customers to refuse to buy plaintiff's product.

312. It is worthwhile to emphasize again that the dictionary definition of the term, "boycott" includes the element of "intimidation" or "coercion." See note 31 and accompanying text supra.

313. Thus, in Elason, there was no evidence that defendants' standard-making conduct, itself, contained an element of denial of supplies or outlets as part of the mutual undertaking.

314. The Court has dealt with such a fact situation under § 2 of the Sherman Act as a conspiracy to monopolize. See, e.g., United States v. St. Louis Terminal R.R. Ass'n, 224 U.S. 383 (1912).

315. E.g., the appliance distributors in Klor's, 359 U.S. 207 and General Motors in General Motors, 387 U.S. 127.
one party who was a competitor or potential competitor of the target. If the existence of a horizontal relationship between the target and the defendants is a prerequisite to per se analysis, then the plaintiff has the burden of proving not only that a concerted refusal to deal existed but also that at least one of the parties to the agreement was a competitor of the target. A number of lower court decisions refusing to apply the per se rule could have distinguished Supreme Court precedent focusing solely on this factor.

3. **Horizontal Relationship Among Defendants**

Generally, horizontal agreements have been deemed more suspect under section 1 than have totally vertical agreements. In order for an agreement to be characterized as a single vertical agreement, as opposed to a number of separate bilateral agreements between manufacturer and retailers, there must be relatively few participants. The primary examples of vertical refusals to deal are sole outlet and exclusive distributorship agreements, which have never been subject to the per se rule. In view of the *Klor*’s decision, however, it cannot be said that the Court has never applied the per se rule to a vertical refusal to deal. When the vertical combination involves the termination of an existing vertical relationship, certainly the defendants should be prepared with a reasonable explanation of the purpose for such a concerted agreement to terminate. Nevertheless, a lower court desiring to avoid the per se rule may technically distinguish *Klor*’s on the basis of this factor and could point to other Supreme Court vertical restraint cases supporting a Rule of Reason approach.

4. **Noncommercial Purpose**

A number of courts and commentators would not apply antitrust boycott law to conduct engaged in for reasons having nothing to do with competition. In other words, defendants are allowed to argue that, although their agreement restricted entry or harmed existing competi-
tors, their primary intent was not anticompetitive but rather to serve some unrelated ethical or social goal. The Supreme Court has repeatedly rejected such a defense in cases which otherwise implicate the per se rule. The Court has held that once the particular conduct has been proven the conduct is per se illegal, and no inquiry into motive is relevant.

Perhaps the most crucial inconsistency between Supreme Court and lower court Sherman Act case law is this factor of intent. While the Supreme Court views certain prescribed conduct as per se illegal and defendants' asserted motives as irrelevant, at least in civil cases, the lower courts routinely excuse anticompetitive conduct after analysing and characterizing defendants' noncommercial purpose. The Supreme Court's failure to accept for review a civil case involving a noncommercial purpose defense is plainly inconsistent with its relatively unambiguous decisions in Professional Engineers and Catalano.

5. No Public Injury or Impact on the Market

Structural arguments focusing on market power and public injury are relevant only in a Rule of Reason analysis. Nonetheless, some lower courts have held that a plaintiff in a boycott case must allege and prove some form of public injury. The suggestion that a boycott plaintiff must demonstrate that the defendants' conduct gave the defendant substantial market power in a relevant market is inconsistent with per se analysis. The per se rule was intended to eliminate the need for such structural evidence.

CONCLUSION

In Catalano, and to a lesser extent in Professional Engineers, the Supreme Court confirmed the viability of the per se rule. Further, the court indicated the rule should be applied to broad categories of conduct which have been determined to be presumptively anticompetitive and without sufficient redeeming economic value. The Court in General Motors reaffirmed the Klor's holding that group boycotts fall within the per se category. Finally, the Court in Gypsum suggested that

324. Gypsum, 438 U.S. 422; Socony-Vacuum, 310 U.S. 150; see note 25 supra.
325. See note 70 supra.
326. See notes 14-15 supra.
327. This was the rationale of the lower court decisions in Klor's and Radiant Burners and also was the implicit basis of the Fifth Circuit Court of Appeals summary handling of Blackburn. See notes 227-36 supra.
a defendant's benign motive is irrelevant in a civil action involving the per se rule. Nevertheless, the lower courts have resisted condemning concerted private conduct that is not clearly animated by illegal or improper purposes. Notwithstanding the Supreme Court's repeated condemnation of private governmental conduct, lower courts have been alarmingly protective of private guild-like regulations and activities established or engaged in by trade groups for self-regulatory goals. These decisions may reflect basic political disagreement with the original legislative goals and history of the Sherman Act and an understandable confusion between the protection of existing competitors, and the protection of competition.

The Supreme Court, however, has suggested generally in Sylvania and Broadcast Music a return to a pragmatic application of the Sherman Act and the need for close scrutiny of the per se label. In the boycott context, the literal per se holdings of the Court should persist in an unqualified manner but should not be extended to other self-regulatory conduct without substantial economic analysis. Certainly, the absence of proof of an anticompetitive motive should never alone excuse properly categorized private boycott activity by trade groups with coercive or exclusionary impact, even where those groups claim to be acting in the public interest. The self-regulatory conduct results in a guild-like market structure that effectively precludes new entry, innovation, and varieties of price competition on a long-term basis.