In the Supreme Court of the United States

October Term, 1996

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State Oil Company, petitioner

v.

Barkat U. Khan and Khan & Associates, Inc.

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ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

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BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION'S AMICI CURIAE SUPPORTING REVERSAL

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QUESTION PRESENTED

The United States and the Federal Trade Commission will address the following question:

Whether petitioner's contractual imposition of maximum resale prices for the gasoline it sold to respondents, who operated a retail gasoline dealership, was a per se violation of Section 1 of the Sherman Act.

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October Term, 1996

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No. 96-871

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ON WRIT OF CERTIORARI
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BRIEF FOR THE UNITED S TATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE SUPPORTING REVERSAL

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INTEREST OF THE UNITED STATES AND THE FEDERAL TRADE COMMISSION

The United States and the Federal Trade Commission have primary responsibility for enforcing the federal antitrust laws. This case presents the question whether an agreement between a supplier and its dealer that effectively sets the dealer's maximum resale price constitutes a per se violation of Section 1 of the Sherman Act, 15 U.S.C. 1, or is instead properly analyzed under the rule of reason. The Court's resolution of that question may affect both federal antitrust enforcement and the extent to which private [2]enforcement of the antitrust laws achieves its intended purpose.

STATEMENT

1. Respondent Khan entered into a lease and supply agreement (the Agreement) to operate a gas station and convenience store owned by petitioner State Oil Company. Pet. App. 1a. The Agreement provided that respondent would ordinarily obtain his entire supply of gasoline from petitioner, at a price equal to a "suggested" retail price set by petitioner, less retail sales tax and a margin of 3.25 cents per gallon. Pet. App. 2a-3a, 25a.

The Agreement did not specify the price respondent could charge for gasoline. If, however, he charged more than petitioner's "suggested" retail price, the Agreement required that he rebate to petitioner the entire amount by which his price exceeded the suggested price, multiplied by the total number of gallons sold. Pet. App. 2a, 25a. Consequently, increasing the retail price of gasoline would not increase respondent's margin at all, and would increase his net revenue only in the unlikely event that it increased the amount of gasoline he sold. The Agreement did not specify any consequences if respondent were to sell below the suggested retail price, but provided that petitioner would not lower its price to preserve respondent's per-gallon margin. Ibid. Thus, reducing retail prices would decrease respondent's revenue per gallon, but would increase his total revenue if it led to a sufficient increase in sales.

About a year after respondent began operating the station, petitioner notified him that it intended to terminate the Agreement on the ground that he had not [3] paid the agreed rent. Pet. App. 2a, 26a. An Illinois court later appointed a receiver, who operated the station for nine months. Id. at 26a-27a.

2. Respondent sued petitioner, alleging, among other things, resale price fixing in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Respondent contended that the Agreement fixed prices by preventing him from raising or lowering his retail prices and that, but for the Agreement's pricing provisions, he would have charged different prices and increased his income. Pet. App. 34a. Petitioner argued that the Agreement left Khan free to charge whatever price he wished. Ibid.

The district court first ruled that respondent's price fixing claim did not allege a per se violation of Section 1, but should instead be analyzed under the "rule of reason." Pet. App. 35a. In the court's view, the alleged facts did not establish the sort of "manifestly anticompetitive implications" or "pernicious effect on competition" that would justify application of the per se rule. J.A. 43 (Order of Sept. 12, 1995). Later, evaluating respondent's claim on petitioner's motion for summary judgment, the court concluded that he had "failed to demonstrate antitrust injury, harm to competition, a relevant market for analysis and market power." Pet. App. 37a. Indeed, in the court's view, respondent had "not even attempted to demonstrate * * * the effect of the pricing provisions on competition in a relevant market." Id. at 40a. The court held that an expert's report offered by respondent to show that, but for the pricing provisions of the Agreement, he would have made more money would not be admissible at trial, and in any event was insufficient to establish the intended proposition. Id. at 39a.

[4] 3. The court of appeals reversed. In an opinion by Chief Judge Posner, the court first noted that the Agreement did not fix minimum prices, because it merely stated petitioner's intention not to lower its wholesale price in the event that respondent wished to charge a lower retail price--something that petitioner had, in any event, no obligation to do. Pet. App. 2a-3a. The court held that the Agreement did fix maximum prices, however, because the pricing terms made it "worthless" for respondent to exceed the price set by petitioner and amounted to "an alternative sanction to termination, and probably an equally effective one." Id. at 3a-4a.

After reviewing briefly the legal and economic aspects of various sorts of price fixing (Pet. App. 4a-6a), the court concluded that maximum price fixing of the sort involved in this case remains per se illegal under this Court's decision in Albrecht v. Herald Co., 390 U.S. 145 (1968). The court expressed "considerable sympathy" with petitioner's argument that Albrecht had been superseded by later cases establishing that a private party does not have standing to maintain an antitrust action unless it can show "antitrust injury," which would not normally be possible in a maximum price fixing case "[i]f typically and here a resale price ceiling imposed by a seller merely prevents his dealers from reaping monopoly profits." Pet. App. 8a. The court also noted (ibid.) that this Court's decision in Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977), had changed the law on vertical non-price restraints (such as exclusive dealer territories) in a way that might affect the reasoning of Albrecht. Despite, however, its view that "Albrecht was unsound when decided, * * * is inconsistent with later decisions by the [5] Supreme Court[,] * * * [and] should be overruled," the court concluded that the Albrecht rule remained controlling. Pet. App. 9a.

In light of Albrecht and of Atlantic Richfield Co. v. USA Petroleum Co., 495 U.S. 328, 336-337 (1990), the court rejected petitioner's argument that respondent had alleged no cognizable antitrust injury: "The implication [of those

The Court went on to reject (390 U.S. at 151-154) the argument (stated id. at 149) that there was "no restraint of trade * * * [in] a situation in which a seller establishes maximum prices to be charged by a retailer enjoying an exclusive [resale] territory." Citing cases dealing with horizontal price fixing, the Court reaffirmed Kiefer-Stewart's denunciation of maximum (as well as minimum) price agreements, and applied it to the case of a supplier that imposed maximum prices on its distributor. The Court concluded that "the combination formed by the [publisher] in this case to force [the distributor] to maintain a specified price for the resale of the newspapers which he had purchased from respondent constituted, without more, an illegal restraint of trade under § 1 of the Sherman Act." 390 U.S. at 153.

Finally, the Court rejected the suggestion that the publisher's fixing of maximum prices should be permitted because the publisher granted distributors exclusive routes and then set maximum prices to prevent "price gouging by dealers who had monopoly power in their own territories." 390 U.S. at 153. The Court pointed out that the factual predicates for such [12]a justification had not been established below: "[N]either the existence of exclusive territories nor the economic power they might place in the hands of the dealers was at issue before the jury." Ibid. Similarly, no evidence had been presented below about the nature of the exclusive territories, and the Court expressed skepticism that any price restraint could be justified on the ground that it was part of a larger scheme involving exclusive dealer territories, which the Court had so recently held were themselves per se illegal under normal circumstances. Id47

Nine years later, however, the Court reconsidered Schwinn in Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977). Reverting to White Motor's more cautious approach of developing experience and understanding "the actual impact of these arrangements on competition" before condemning them per se (GTE, 433 U.S. at 50-51, quoting White Motor, 372 U.S. at 263), the Court canvassed the "substantial scholarly and judicial authority supporting th[e] economic utility" of vertical non-price restraints. GTE, 433 U.S. at 57-58. That authority showed that although such restrictions (and, in particular, territorial restraints) reduced intrabrand competition, they had significant "redeeming virtues" in promoting interbrand competition by allowing a manufacturer to achieve more efficient distribution of its

possibility of such disguises does not pose so substantial a danger as to justify complete preclusion of legitimate, pro-competitive maximum price fixing.

Finally, Albrecht echoed (390 U.S. at 152) the point made in Kiefer-Stewart (340 U.S. at 213) that all sorts of price-fixing agreements, whatever their other characteristics, "cripple the freedom of traders" by "restrain[ing] their ability to sell in accordance with their own judgment." That concern has [23] considerable historical resonance. See GTE, 433

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Copperweld Corp. v. Independence Tube Corp., supra; GTE, 433 U.S. at 47-49; Simpson v. Union Oil Co., 377 U.S. 13, 22-25 (1964) (effectively overruling United States v. General Electric Co., 272 U.S. 476 (1926)).

In this case, although Albrecht effectively adopted a per se rule against vertical maximum price restraints, this Court "has never explored or analyzed in detail the justifications for such a rule," and the doctrine has played "only a relatively minor role in the Court's Sherman Act holdings" and essentially no [27]role in the government's enforcement efforts. Copperweld, 467 U.S. at 766, 777. As the GTE Court observed about Schwinn, "[s]ince its announcement, [Albrecht] has been the subject of continuing controversy and confusion," and "[t]he great weight of scholarly opinion has been critical of the decision." GTE, 433 U.S. at 47-48. Moreover, and perhaps most important, "the growth of judicial doctrine" in the area of vertical non-price restraints has largely "removed or weakened the conceptual underpinnings" of Albrecht. Patterson v. McLean Credit Union, 491 U.S. 164, 173 (1989). For all these reasons, we believe that "the experience of the past [30] years should be brought to bear on this subject of considerable commercial importance." GTE, 433 U.S. at 48-49.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

APRIL, 1997

1. Ripple concurred, writing separately "to note that I share my colleagues' substantive criticism of the per se rule as it has been applied to vertical maximum price-fixing" and to suggest that this case could be distinguished from Albrecht on the ground that it "involves a single contract between a Judge single wholesaler and a single retailer" which does not "implicate any other entities," so that "the threat of horizontal cartelization is absent or, at the very least, greatly diminished." Pet. App. 16a-17a.

2. Kiefer-Stewart involved an agreement among suppliers to fix the maximum resale prices charged by the wholesalers next in the distribution chain, and therefore had overtones of vertical price fixing. It seems clear from the Court's opinion, however, that the decision was based principally on the horizontal agreement between competing suppliers. 340 U.S. at 213-

recognized by the Albrecht Court. See also Atlantic Richfield Co. v. USA Petroleum Co. (ARCO), 495 U.S. 328, 345-346 (1990); Caribe BMW, 19 F.3d at 752-754; cf. Lear, Inc. v. Adkins, 395 U.S. 653, 670-671 (1969) (patent licensees "may often be the only cnd15(c(67)T5(c(67)Td4(t)2)-3(o A)4(t w(O)9 67)T)13(o be)13ough t t754;hfi ,nsee 67 c(e")12e Ao

maintenance rests in part on concerns about facilitating or concealing exactly such horizontal collusion. See, e.g., Dr. Miles, 220 U.S. at 407-408; Pitofsky, supra, 71 Geo. L.J. at 1490-1491. Purely vertical, maximum price agreements, on the other hand, present little or no similar danger. Moreover, in the case of vertical minimum price fixing, suppliers' stated concerns (such as inducing dealers to provide adequate point-of-sale services) could often be addressed directly in a distribution agreement without reference to price (by, for example, requiring the distributor to provide a certain level of facilities or services to its customers).

9. For a more formal exposition of the economic principles involved, see, e.g., Spengler, Vertical Integration and Antitrust Policy, 58 J. Pol. Econ. 347 (1950); Machlup & Taber, Bilateral Monopoly, S [illegible]

& Esquibel, Maximum Resale Price Restraints in Franchising, 65 Antitrust L.J. 157, 161-167 (1996).

10. This is not merely speculation. See, e.g., Paschall v. Kansas City Star Co., 727 F.2d 692, 695 (8th Cir.) (en banc) (newspaper announced termin[illegible] 13(3 0 Td [(o)13(m)-3(nt)15(s)-3(11(ela(i)-1(9(s)- 563.)d(m)-3(er)4(s)11(s)-3(3(T)1