Heir Locators: Now A Per Se Production

AntitrustConnect Blog
February 26, 2019

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Please refer to this post as: Robert E. Connolly, 'Heir Locators: Now A Per Se Production', AntitrustConnect Blog, February 26 2019, http://antitrustconnect.com/2019/02/26/heir-locators-now-a-per-se-production/

United States v. Kemp & Associates and Daniel Mannix, Case No., 2:16-cr-403 (DS). JudgeSamPerSeMemorandum

On August 17, 2016 the defendants in this case were indicted on one count of violating §1 of the Sherman Act by agreeing to allocate customers of heir location services sold in the United States. Utah District Court Judge David Sam initially agreed with the defendants that the case should be tried under the Rule of Reason. Judge Sam also granted the defendants' motion to dismiss the indictment based on the statute of limitations. The Tenth Circuit issued a decision reversing the statute of limitations dismissal. The Tenth Circuit also encouraged the court to reconsider its Rule of Reason decision. While noting that it did not have statutory authority to overturn the district court's decision regarding application of the Rule of Reason, the appellate court opinion highlighted Supreme Court and Tenth Circuit cases finding customer allocation schemes to be *per se* Sherman Act violations. *United States v. Kemp & Assocs., Inc.,* 907 F.3d 1264, 1278 (10th Cir. 2018). Last Thursday, February 20, 2019, upon the government's motion for reconsideration, the District Court reversed itself and held that the case would be tried under the *per se* rule.

This is a victory for the Antitrust Division. The *per se* rule has come under attack in numerous cases, and in each case the Antitrust Division has repelled the assault by citing abundant Supreme Court and lower court precedent applying the *per se* rule to certain agreements among horizontal competitors (price fixing, bid rigging and market allocation). After reconsideration, Judge Sam ruled as

precedent dictated he must; that the customer allocation scheme alleged in the indictment would be tried as a per se case.

While Judge Sam was bound by precedent, I believe his instincts regarding applying the rule of reason were correct. In any criminal case, the jury should be the fact-finder determining whether the agreement in question violated the Sherman Act, i.e. was the agreement a restraint of trade? The operative text of the Sherman Act "every contract…in restraint of trade is declared illegal" cannot be read to allow the Court to decide as a matter of law (per se) that some agreements restrain trade and are illegal, but allow the jury to decide in other cases whether the agreement restrained trade. In a criminal Sherman Act case, the key issue is whether the defendants' agreement/conduct restrained trade. Under the Sixth Amendment, only the jury can make that finding.

This, however, is not the state of the law today. Under current Supreme Court precedent, the Court is the initial fact-finder, and if the court finds the agreement fits the *per se* box, then the question of whether the agreement restrained trade is taken away from the jury. In another case where the per se rule was challenged, one Ninth Circuit judge recently said, in sympathy with the argument that the jury must be the fact-finder, "I think if it's going to get straightened out [whether the *per se* rule is constitutional] it's going to have to require either an en banc panel of this court or more likely the Supreme Court itself."[1]

Just as a mental exercise, however, suppose there was no Supreme Court per se precedent. The use of a *per se*rule in by a trial court in a criminal antitrust case where the defendant can go to jail for ten years looks puzzling (puzzling in the sense that it is unconstitutional). Below are a few statements from Judge Sam's recent opinion that are correct statements of law, but problematic when the Sherman Act is used as a felony criminal statute:

- "***In applying the Rule of Reason, the factfinder weighs all attendant circumstances of a case, and then decides whether the practice imposes an unreasonable restraint on competition. Continental T.V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 49 (1977).***"
  Memorandum and Order at 2.

This seems correct. The fact-finder decides whether the practice violates the law. But there is a limitation—in a Rule of Reason case.

- ***"If the government can prove that such an agreement [per se] exists, then the analysis ends without inquiry into the possible economic benefits the agreement could bring. In re Cox Enters., Inc., 871 F.3d 1093, 1097 (10th Cir. 2017)."*** Memorandum and Order at 3.

This is where the *per se* rule goes off track. Here, the fact-finder is the court. And if the court finds the agreement fits into the *per se* box, then the jury has no role in deciding whether the government proved an element of the criminal statute beyond a reasonable doubt.

- ***This [the per se rule] provides an evidentiary shortcut through the Rule of Reason's minutiae; in such cases, the Per Se approach is justified based on efficiency. Arizona v. Maricopa Cty. Med. Soc'y., 457 U.S. 332, 344 (1982).*** Memorandum and Order at 3.

Yikes! "Mr. Defendant, the court is going to skip over all that 'minutiae stuff' because it's much more efficient this way. Hope you don't mind. What's that? Yes, the statutory maximum is ten years in jail."

- **Thus,*'[i]t is only after considerable experience with certain business relationships that courts classify them as per se violations of the Sherman Act."' United States v. Topco, Inc., 405 U.S. 596, 607- 08 (1972) (emphasis added).*** Memorandum and Order at 3.

This statement in *Topco* is pretty ironic. The Supreme Court, not a jury, found the territorial allocation among Topco supermarkets to be a *per se* violation. Today, most commentators would argue the Supreme Court got it wrong and the intra-brand agreements did not restrain trade, but in fact promoted inter-brand competition. Luckily, I'm pretty sure no one went to jail in *Topco.* I think part of the reason little thought was given to the defendants' Sixth Amendment rights to have a jury decide questions of fact, was that the Sherman Act was a misdemeanor, and no one went to jail [except the occasional troublesome labor leader]. And, the *Apprendi*, *Booker* line of Sixth Amendment jurisprudence had not yet been developed.

- ***"Certain factors can negate application of the Per Se approach when it would be otherwise applicable. See, Nat'l Collegiate***

> ***Athletic Ass'n, 468 U.S. at 103. This court must analyze whether any of these factors apply to the present case.*** Memorandum and Order at 7.

Judge Sam noted that even in horizonal agreements among competitors, there are exceptions to the *per se* rule. Some cases that look like a *per se* violation may not be a *per se* violation, *but the fact-finder is the court.* In a criminal case, the fact-finder should be the jury. Can you imagine in a fraud case the Judge saying "Oh, the indictment alleges a swamp land sale in Florida to an elderly widow." That's "always or almost always" going to be fraud, so let's skip over that part and just have the jury decide "Did you sell her the land?"

Heir Locators is a timely and interesting case for me. To be clear, I am not criticizing Judge Sam who has correctly applied controlling precedent. But, I have been thinking a lot about whether the per se rule is unquestioned gospel truth, but in reality, under todays' Sixth Amendment jurisprudence only the jury can be the fact-finder on an element of a criminal offense—and the most critical one at that—did the defendant restrain trade?

I believe that the *per se r*ule will be found unconstitutional (or perhaps I will be found to be an idiot) when a criminal antitrust case reaches the Supreme Court. It may be sooner rather than later.

Stay tuned!

This post originally appeared in the CartelCapers blog.

[1] Mlex, Joshua Sisco, January 16, 2019 *"In foreclosure auction appeal, court questions applicability of per se standard, (behind firewall).*