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Some “Twinkling of the Eye” Thoughts on NCAA v. Alston

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The Supreme Court’s decision in *Nat’l Collegiate Athletic Ass’n v. Alston*, Nos. 20-512 and 20-520, 2021 WL 2519036, (U.S. June 21, 2021) is a boost for the Antitrust Division’s commitment to prosecute what it calls naked “wage fixing” and “no poach” agreements. In the prosecutions it has brought to date (still in the early stages) defendants have argued that the rule of reason, not the *per se* rule, should apply, because the courts do not have sufficient experience with wage fixing and/or no poach to put them in the class of *per se* violations.

One of the cases being litigated is *United States v. Jindal*, Case 4:20-cr-00358 (E.D. Tx).

In a recent brief opposing the defendant’s motion to dismiss the indictment, the government recounts the *per se* conduct outlined in the indictment:

> From in or around March 2017 to in or around August 2017, Jindal, Rodgers, and their coconspirators knowingly entered into and engaged in a conspiracy to suppress competition by agreeing to fix prices by lowering the pay rates to PTs and PTAs (Dkt. #21). On March 10, 2017, beginning at approximately 1:36 p.m. CST, Rodgers, acting on behalf of Jindal and Company A, texted with Individual 2, the owner of competitor Company B, regarding the rates that Company A and Company B paid their PTs and PTAs (Dkt. #21¶ 12(a)). Rodgers texted Individual 2, stating “[h]ave you considered lowering PTA reimbursement” and “I think we’re going to lower PTA rates to $45” (Dkt. #21 ¶ 12(a)). Individual 2 responded, texting “[y]es I agree” and “I’ll do it with u” (Dkt. #21 ¶ 12(a)).

United States’ Response in Opposition to Defendant Jindal’s Motion to Dismiss, filed June 22, 2021) p.2 The government argues that “the *per se* rule applies categorially to price fixing in all industries and markets,” citing, among other cases, *Arizona v. Maricopa Cnty. Med. Soc’y*, 457 U.S. 332, 351 (1982). “[T]he argument that the *per se* rule must be rejustified for every industry that has not been subject to significant antitrust litigation ignores the rationale for *per se* rules … .” The government’s [correct] position received a boost in the *NCAA* case, particularly in Justice Kavanaugh’s concurring opinion:

> Conspiring to fix the price for which labor is purchased or sold is price fixing. See *Nat’l Collegiate Athletic Ass’n v. Alston*, Nos. 20-512 and 20-520, 2021 WL

> 2519036, at *21 (U.S. June 21, 2021) (Kavanaugh, J., concurring) ("Price-fixing labor is price-fixing labor."). US *Jindal* response at p. 8.

While the *per se* rule applies to labor markets as it would to any other market, when I read cases like *NCAA*, I conclude that the *per se* rule should not be applied *at all* in criminal cases. When condemning "wage-fixing" and "no-poach agreements, the government adds the modifier "naked" because some such agreements may be ancillary to procompetitive agreements. But who decides whether the agreement is "naked" or ancillary to some other procompetitive agreement? Under the *per se* rule, the government or the court, not a jury, make this call on a key element of the offense. Once the government alleges a *per se* wage-fixing or *per se* no-poach agreement, the jury no longer decides the main element of the offense: did the agreement restrain trade? Defense counsel can pitch the Antitrust Division on why a certain agreement should not be considered anticompetitive, but if counsel loses the pitch, and a *per se* criminal indictment is returned, those arguments cannot be made to the jury. That is unconstitutional, or so it seems to me, see Cartel Capers, The End is Near for the Per Se Rule in Criminal Antitrust Prosecutions, (March 21, 2019), and others, see, Roxann E. Henry, *Per Se Antitrust Presumptions in Criminal Cases*, Columbia Business Law Review, (June 14, 2021).

Consider the *NCAA* case itself. If price fixing labor is price fixing and price fixing is a *per se* offense, why were the NCAA agreements judged under the rule of reason and not as a *per se* violation? In the *NCAA* case, the Supreme Court explains:

> *Board of Regents* (*Nat'l Collegiate Athletic Ass'n v. Bd. of Regents of Univ of Okla* 468 U.S.85, 101 (1984) explained that the league's television rules amounted to "[h]orizontal price fixing and output limitation[s]" of the sort that are "ordinarily condemned" as "'illegal per se.'" Id., at 100. The Court declined to declare the NCAA's restraints per se unlawful only because they arose in "an industry" in which some "horizontal restraints on competition are essential if the product is to be available at all." Id., at 101–102. *NCAA* at 19.

The government notes in its *Jindal* opposition brief, however, that "*Alston* provides no basis for rule of reason review in an ordinary "textbook" case such as this one, involving the *per se* illegal price fixing of healthcare workers' labor." *United States' Response in Opposition to Defendant Jindal's Motion to Dismiss, filed June 22, 2021)* p.2, fn. 4. The agreement in the *Jindal* case (if there was an agreement) is conclusively a restraint of trade because the government alleged it as a *per se* violation. The jury does not get to decided that element of the offense.

If the *per se* rule is unconstitutional, then what to do? Almost everyone agrees "cartels are the supreme evil of antitrust." One option is to strike the *per se* rule and try criminal antitrust cases using the Federal Rules of Evidence to determine what evidence is relevant and thus admissible. There is no need for a *per se* rule. Instead of being a substantive rule of law, (nowhere mentioned in the Sherman Act but created by the Supreme Court), terms like *per se*,rule of reason and quick look would be merely general descriptions of the type of relevant evidence admissible in criminal antitrust cases. Under Federal Rule of Evidence 403 even relevant evidence can be excluded" if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly

presenting cumulative evidence."

In *Northern Pac. Ry. V. United States*, 356 U.S.1,5 (1958) the Court wrote:

> "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."

There are two problems with this statement: Why, in a price fixing case, would there be a "necessity for an incredibly complicated and prolonged investigation in to the entire history of the industry involved, as well as related industries…?" The Federal Rules of Evidence apply to criminal antitrust trials and a judge may rule much of this type of evidence not admissible under Rules 401 and 403. In *NCAA*, the Court started: "Always, '[t]he goal is to distinguish between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest."' Ibid. (brackets and internal quotation marks omitted). * The Court goes on to say this can be done under the *per se* rule, rule of reason or quick look. In *National Collegiate Athletic Ass'n v. Board of Regents of University of Oklahoma*, 468 U.S. 85 (1984), the Supreme Court noted that this quick look can sometimes be applied in "the twinkling of an eye." These are general descriptions of the evidence that is relevant under the Federal Rules. The Court must engage "in an enquiry meet for the case looking to the circumstances, details and logic of the restraint." *California Dental Ass'n v. FTC*., 526 U.S. 756, 781 (1999). For example, in a price fixing case, thee reasonableness of the fixed prices is not relevant to a decision about whether trade was restrained, but evidence of a joint venture might be. Applying the rules of evidence to limit the evidence admissible in a price fixing case would not be unconstitutional. Taking deciding an element of the offense away from the jury is. This change would not be as revolutionary as it may sound. Few defendants in a cartel are going to admit they held secret meetings, used code names, destroyed documents, but argue "Members of the jury: the cartel was procompetitive!"

The above statement in *Northern Pacific* justifies the *per se* rule because a wider inquiry would be "an inquiry so often wholly fruitless when undertaken." This is also problematic. Fruitless or not, in a criminal case a defendant is entitled to contest every element of the offense, including in a Sherman Act restraint of trade case, that the defendant did not restrain trade.

The constitutional defect in the *per se* rule in criminal antitrust cases could be cured by allowing the jury to decide whether the defendants' agreement, if proved, restrained trade, but using the Federal Rules of Evidence to properly narrow the evidence put before the jury. My own preference for addressing the unconstitutionality of the *per se* rule would be to amend the Sherman Act. What is it that makes some agreements subject to criminal prosecutions and others not? In my experience it is the covert, fraudulent nature of the agreement. A joint venture between two bidders, made known to the letting authority, is not a criminal violation. A secret agreement between the same bidders to divide the work would be prosecuted as a criminal violation. A Sherman Act amendment should reflect that fraudulent conduct is the true bases for what restraints

of trade are prosecuted criminally. See, Robert Connolly, *Per Se "Plus:" A Proposal to Revise the Per Se Rule in Criminal Antitrust Cases*, 29 Antitrust 105 (2104-2015).

What might be wholly fruitless is me trying to collect my thoughts about these complex issues in a blog post. Well, everybody is entitled to a mulligan (a do-over for a bad tee shot in golf), so I think I'll hit post and take my mulligan in a longer article. If anyone is inclined to talk about these issues, I'd love to hear your take. Please email or call. bob@reconnollylaw.com (215) 219-4418.

Thanks for reading.

This post originally appeared on the CartelCapers blog.

This entry was posted on Wednesday, June 30th, 2021 at 6:23 pm and is filed under Antitrust-General
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