AntitrustConnect Blog

District Court Finds Antitrust Division's First Wage Fixing Indictment Alleges a Per Se Violation

Robert E. Connolly (Law Office of Robert Connolly) · Monday, December 6th, 2021

On November 29, 2021 in *U.S. v. Neeraj Jindal and John Rodgers*, Civil Action No. 4:20-CR-00358A (N.D. Texas), District Court Judge Amos L. Mazzant rejected defendants' motion to dismiss the indictment on various grounds, including challenges to the *per se* rule. Among other arguments, defendants argued that "wage-fixing" was not covered by the Sherman Act because it did not involve the purchase and sale of goods. Defendants also argued that courts did not have enough experience with wage-fixing (this was the government's first wage-fixing indictment) to label the conduct a *per se* violation.

The indictment charges Neeraj Jindal, the former owner of a physical therapist staffing company, and John Rodgers an ex-director of the company, with a *per se* Sherman Act violation by agreeing to fix the wages paid to physical therapists and therapist assistants in the Dallas-Fort Worth area.

Judge Mazzant wrote a thoroughly researched and well-reasoned opinion finding that the *per se* rule applied to an agreement to fix wages. The opinion dealt with number of issues raised but in this blog post I discuss two important aspects of the Court's ruling. The full opinion is well worth reading (here).

The *Per Se* Rule Applies to Buyers as Well as Sellers

Judge Mazzant recognized that the facts of the case were unusual. This was the first ever criminal wage fixing case brought by the Antitrust Division. Price-fixing cases nearly always involve the sale of good with the restraint resulting in increased prices for consumers. A successful wage-fixing conspiracy could arguably reduce the price paid by consumers–if the savings in suppressed wages was passed on. Nonetheless, the Court found that "[J]ust because the typical price-fixing conspiracy involves certain hallmarks does not mean that other less prevalent forms of price-fixing agreements are not likewise unlawful." The Court noted that price-fixing agreements among buyers have been condemned as *per se* violations citing *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.,* 334 U.S. 219, 235 (1948)("It is clear that the agreement is the sort of combination condemned by the Act, even though the price-fixing was by purchasers, and the persons specially injured . . . are sellers, not customers or consumers.") and *Nat'l Macaroni Mfrs. Ass'n v. Fed. Trade Comm'n.,* 345 F.2d 421, 426–27 (7th Cir. 1995)(finding a price-fixing agreement among manufacturers to standardize the composition of their product in an effort to depress the price of an essential raw material to be illegal *per se*).

The *Per Se* Rule Covers All Price Fixing Schemes Even If it Is The First Time an Industry Has Been Targeted.

The defendants also argued that the *per se* rule applies only after the courts have had enough experience with a particular restraint to find that it always or almost always would restrain trade and since this was the first ever wage-fixing case, that threshold was not met here. "Defendants contend that agreements are deemed unlawful *per se* "only after courts have had considerable experience with the type of restraint at issue" (Dkt. #36 at p. 10)(quoting Leegin, 551 U.S. at 886)." The Court wrote that judicial experience is needed to *create* a new *per se* rule, "Judicial experience informs the decision to recognize a "new *per se* rule." But price-fixing is not a new *per se* rule and judicial experience is not needed in every industry before applying the established *per se* rule against price-fixing to a new form. ("As courts have recognized, price-fixing agreements come in many forms."). After surveying many cases Judge Mazzant wrote:

> "the definition of horizontal price-fixing agreements cuts broadly. As such, any naked agreement among competitors—whether by sellers or buyers—that fixes components that affect price meets the definition of a horizontal price-fixing agreement. See Socony-Vacuum, 310 U.S. at 221."

The Court concluded, "The indictment thus alleges a naked price-fixing conspiracy among buyers in the labor market to fix the pay rates" and "As such, the indictment describes a price-fixing conspiracy that is *per se* unlawful."

Judge Mazzant also quoted higher authority, Justice Kavanaugh, who wrote in his concurrence in *National Collegiate Athletic Ass'n v. Alston,* 141 S. Ct. 2141 (2021): "Price-fixing labor is price-fixing labor. And price-fixing labor is ordinarily a textbook antitrust problem because it extinguishes the free market in which individuals can otherwise obtain fair compensation for their work." Id. at 2167–68 (Kavanaugh, J., concurring) (citations omitted).

I wholeheartedly agree with Justice Kavanaugh and Judge Mazzant. In an earlier blog post I wrote:

> "Labor is an input for making any product. Businesses can't collude with competitors about the price they will pay for inputs to make a product or to allocate suppliers. Think about a company that produces widgets. This widget requires copper wire, glass products, machinery and labor. It seems obvious (hopefully) that an executive in one company cannot call a competitor and say, "Let's agree to not pay any more than X for the copper?" Or "If you don't solicit quotes from my supplier, I won't from yours." Labor is also an input. Why would it be OK to call a competitor and say, "Let's agree not to pay any more than X per hour" for the input of
> labor?" http://cartelcapers.com/blog/prosecutors-focus-on-labor-market-collusion-sharpens-the-need-for-compliance-training/, November 15, 2021.

Will There Problems With the *Per Se* Rule Down the Road? (Or In the Supreme Court?)

While I agree that the *per se* rule applies to labor markets with the same force (and exceptions for ancillary agreements) as it does to other markets, there are two points of blackletter law relied on in Judge Mazzant's opinion that I believe may eventually be overturned by the Supreme Court and lead to the ultimate demise of the *per se* rule in any criminal antitrust cases.

The Court As Fact Finder On An Element Of the Offense

Judge Mazzant correctly noted that, "Whether the allegations in an Indictment constitute a *per se* violation is a legal question for the court." But under the *per se* rule the court is the finder of fact on an element of the offense: whether the agreement constituted a "restraint of trade" beyond a reasonable doubt. I doubt, under current Supreme Court jurisprudence, whether the court can do that. It reminds me of a case when I was Chief of the Antitrust Division's Philadelphia Field Office. We prosecuted and convicted a defendant for making a false statement. The trial court, as every court before it had done, found that the "materiality" element of the statement/offense was an issue for the court to decide. The conviction was overturned as a companion case to *United States v. Gaudin*, 115 S.Ct. 2310 (1995), where the Supreme Court reversed long standing precedent and held that materiality is an issue to be determined by the jury. The Supreme Court explained that if materiality is an element of the offense, that element must be submitted to the jury, and the jury must find materiality beyond a reasonable doubt to convict. Whether an agreement constitutes a "restraint of trade" is an element of the Sherman Act (indeed the very conduct Section One condemns) so it follows that a jury must make that finding. Reading Judge Mazzant's correct statement, that whether the *per se* rule applies is a matter of law, gives me a flashback to how surprised we were (but ultimately agreed) when the Supreme Court ruled in *Gaudin*. Is the antitrust bar in for a big surprise if the *per se* rule challenges ever reach the Supreme Court?

Did the Sherman Act or the Supreme Court Create the *Per Se* Rule?

Judge Mazzant also correctly notes that under current jurisprudence the Supreme Court has created two substantive rule for analyzing restraints of trade: the *per se* rule and the rule of reason. ("In determining whether a restraint is unreasonable, and thus unlawful, courts use one of two rules of decision [*per se* and rule of reason]."). This is another passage I've read hundreds of times as a prosecutor and never had pause–it is, after all, blackletter law. But can the Supreme Court do that? Well, they did. But will the current Supreme Court have a different view?

One problem with having a *per se* rule and rule of reason may be that a textualist Supreme Court may fail to see those words in the text of Section One of the Sherman Act. Do these three words "restraint of trade" set forth a *per se* rule and/or a rule of reason? That's a curious and expansive way to read "restraint of trade" and not one to be found in any dictionary. Could it be that in a criminal antitrust case, the proper interpretation of the Sherman Act Section One would be to put it to the jury whether the restraint alleged existed and whether it was a restraint of trade?[1] And if the Supreme Court created the two substantive rules, (*per se* and rule of reason), is that not judicial legislation? Justice Gorsuch Justice wrote in one of his last opinions while on the 10th Circuit Court of Appeals, explaining the court's job: "[I]t is (or should be) emphatically to apply, not rewrite, the law enacted by the people's representatives." *A.M. ex rel. FM v. Holmes*, 830 F.3d 1123, 1170 (10th Cir. 2016). How then might a court apply the Sherman Act as written. I believe that in every Sherman Act Section One indictment, the question should be put to the jury "Is the agreement [if you find one] a restraint of trade?" This does not mean every criminal trial will be a wide open for requiring evidence of product market, market power, etc. Instead the concepts of *per se*, quick look and rule of reason are not substantive rules, but are guideposts under the

Federal Rule of Evidence 401 and 403 of what is relevant evidence given the particular charge in the case.

Congress, of course, could amend the Sherman Act to actually say, "Price fixing, bid rigging and market allocation are *per se* illegal." Condemning price-fixing is still among a shrinking number of policies that have bipartisan support.

Challenges to the *per se* rule have appeared in various forms in almost every recent criminal antitrust case. Lower courts will almost certainly continue to bat down these challenges with ample precedent, including, of course, Supreme Court precedent establishing the *per se* rule. At oral argument in the Ninth Circuit on a per se challenge one panelist commented, "I think if it's going to get straightened out [whether the per se rule is constitutional] it's going to have to require an en banc panel of this court or more likely the Supreme Court itself." I have written before about what I perceive to be fatal flaws in the use of the *per se* rule in criminal antitrust cases, *see e.g.*, The End is Near For the Per Se Rule in Criminal Sherman Act Cases, April 2019, and since then, in numerous blog posts. I am hoping to revise my writing on this issue with some new thoughts and discussion of recent cases.

I would be most grateful if anyone cares to give feedback from "Connolly, you're an idiot" to "Have you thought about…" Please contact me if you'd like to discuss. bob@reconnollylaw.com (215) 219-4418.

Thanks for reading.

This post originally appeared on the CartelCapers blog.

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[1] From watching television shows about UFO's and aliens, I've learned a good way to hedge your bets is with statements like "Could it be…?" "Some people say…." "Is it possible?," etc.

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