AntitrustConnect Blog

Will the Supreme Court Grant Certiorari and Review the Per Se Rule?

Robert E. Connolly (Law Office of Robert Connolly) · Tuesday, February 1st, 2022

I have no expertise in predicting whether the Supreme Court will grant certiorari on any given petition. But I am hopeful that the high court will do so on the issue of whether the application of the *per se* rule in a criminal antitrust case is unconstitutional. I have seen a couple of items recently that may be a sign that the Court is ready to address this issue.

First, there have been a number of Supreme Court cases where the constitutional rights of criminal defendants have been strengthened/upheld. In *Hemphill v. New York*, No. 20-637 (January 20, 2022) the Supreme Court upheld a criminal defendant's right to cross-examine a prosecution witness, overturning the conviction of a man who was found guilty of killing a 2-year-old boy. The defendant, Hemphill, had claimed that another man was the gunman in the stray bullet shooting. Prosecutors read to the jury the transcript testimony of this man, an unavailable witness, over the hearsay objection of the defendant. The testimony was portions of the plea allocution of the unavailable witness to possession of a gun different than the murder weapon. The Supreme Court ruled that this evidence was improperly admitted as a hearsay exception and reversed the conviction.

Another recent case is *Van Buren v. United States*, 141 S. Ct. 1648 (2021). In *Van Buren* the Court adopted a narrow reading of the Computer Fraud and Abuse Act statute and concluded that it was not violated when the defendant had legitimate access to a police database but improperly accessed it for personal purposes. The Court relied primarily on the text of the statute, particularly the definition of "exceeds authorized access." The majority found that Van Buren was authorized to access the material he obtained and in the manner that he obtained it. He did access the information for an improper purpose but his conduct did not fall within the prohibition of the text of the statute.

Petition for Certiorari of Christopher Lischewski Challenging the *Per Se* Rule

Hemphill, *Van Buren* and other cases[1] addressing defendants' constitutional rights have nothing to do with the *per se* rule. There is, however, a petition for cert before the Supreme Court challenging the *per se* rule application in a criminal antitrust case. On December 6, 2021, Christopher Lischewski filed a petition for a writ of certiorari. *Lischewski v. United States*, __U.S.__ , case no. 20-10211(December 8, 2021). Lischewski was convicted of orchestrating and participating in a conspiracy to fix the price of tuna. The jury had been given a typical *per se* charge:

> *Conspiracies to fix prices are deemed to be unreasonable restraints of trade and therefore illegal, without consideration of the precise harm they have caused or any business justification for their use.*
>
> *Therefore, if you find that the government has met its burden with respect to each of the elements of the charged offense, you need not be concerned with whether the agreement was reasonable or unreasonable, the justifications for the agreement, or the harm, if any, done by it. It is not a defense that the parties may have acted with good motives, or may have thought that what they were doing was legal, or that the conspiracy may have had some good results. If there was, in fact, a conspiracy to fix the prices for canned tuna as alleged, it was illegal.**[2]***

The **"Question Presented**" in Lischewski's petition is: "…whether the operation of the *per se* rule in criminal antitrust cases violates the constitutional principle that every element of an offense must be submitted to a jury and proven beyond a reasonable doubt."

On December 17, 2021, the Government filed a notice stating, "The Government hereby waives its right to file a response to the petition in this case, unless requested to do so by the Court." The Court replied on December 29, 2021: "Response requested." The government's response is due February 28, 2022. It seems interesting that the Court requested a response from the government. Does that mean that the Court may give serious consideration to granting the petition? Or that the petition caught the eye of one or more Justice? Seems so, but I don't know. *If anyone who has some expertise in this area would care to comment that would be much appreciated.*

The Supreme Court has recently denied cert in a previous appeal from the Ninth Circuit regarding the *per se* rule. *Sanchez v. United States*, case 19-288, (January 13, 2020)(cert. denied). *Sanchez* involved a conviction for bid rigging at public auctions. Nonetheless, defendants have continued to raise and preserve constitutional objections to the *per se* rule in virtually (and perhaps every) current criminal price-fixing/bid rigging/market allocation case being prosecuted by the Antitrust Division. It is time for the Supreme Court to weigh in on this issue. As one Ninth Circuit judge said: I think if it's going to get straightened out [whether the *per se* rule is constitutional in a criminal case] it's going to have to require either an *en banc* panel of this court or more likely the Supreme Court itself."[3]

What if the *Per Se* Rule Is Struck Down?

Cartels are the supreme evil of antitrust. It says so on my blog masthead–and Justice Scalia said it first in *Verizon v. Trinko*, 540 U.S. 398, 408 (2004). But a robust criminal enforcement program is not as reliant on a *per se* rule as many think. When the government charges cartel behavior such as price fixing or bid rigging the case almost always involves secrecy, code names, covert meetings, document destruction and other fraudulent activity. The *Lischewski* indictment, for example, alleged the conspirators:

> *employed measures to conceal their conduct, including, but not limited to, using code when referring to coconspirators, meeting at offsite locations to avoid detection, limiting distribution and discouraging retention of documents reflecting conspiratorial contacts, and providing misleading justifications for prices.*

US v. Lischewski, Indictment, Paragraph 10 H, Case 3:18-cr-00203-RS, filed 05/16/18 (N.D. Cal). To raise a defense that an agreement was "pro-competitive" a defendant would first have to *admit* that there was an agreement that he/she knew about and participated in. As a prosecutor, if you get that admission you are already rounding third base and on your way to home. Also, eliminating the *per* se rule does not eliminate the Federal Rules of Evidence. The evidence relevant to a price fixing trial need not be as expansive as the evidence relevant in a monopolization case.

There may be some cases where, without a *per se* rule, the government may have great difficulty proving an unreasonable restraint beyond a reasonable doubt. Perhaps those cases should not be brought as criminal cases. The *per se* rule was created by the Supreme Court when price fixing was a misdemeanor and there was no realistic threat of an individual going to jail. Today, the Sherman Act has a maximum penalty for an individual of 10 years in prison, which the Antitrust Division has actually sought. When lobbying Congress to pass a 10-year maximum prison sentence, the DOJ leadership stated: "the [criminal] cases that we are charging, and prosecuting are unmistakable fraud."[4] As long as the Antitrust Division remains faithful to that pledge, the lack of a *per se* rule should not deter the prosecution of hard-core cartels.

Thanks for reading. Bob Connolly bob@reconnollylaw.com

This post originally appeared on the CartelCapers blog.

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[1] See generally, Joseph Mark Stern, *Sotomayor and Gorsuch Resume Their Fight for the Future of the Sixth Amendment*, Slate, January 7, 2019, available at. https://slate.com/news-and-politics/2019/01/sotomayor-gorsuch-supreme-court-dissent-criminal-restitution.html; see also Mark Joseph Stern, "*Neil Gorsuch and Sonia Sotomayor Team Up to Protect Criminal Defendants,*" Slate November 19, 2018. available at https://slate.com/news-and-politics/2018/11/neil-gorsuch-sonia-sotomayor-sixth-amendment-dissent.html.

[2] As an aside, doesn't it seem a bit odd that for a felony that carries a maximum penally of 10 years in jail, the jury is instructed that good motives and even good results are irrelevant?

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

[4] Scott D. Hammond, Deputy Assistant Att'y Gen., Antitrust Div., U.S. Dep't. of Justice, Transcript of Testimony Before the United States Sentencing Commission Concerning Proposed 2005 Amendments to Section 2R1.1 at 3 (Apr. 12, 2005), available at http://www.justice.gov/atr/public/ testimony/209071.pdf.

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