# AntitrustConnect Blog

## Per Se Rule: “I’m Still Standing (Yeah yeah yeah!)”

Robert E. Connolly (Law Office of Robert Connolly) · Wednesday, May 25th, 2022

It has become common for defendants indicted on criminal antitrust charges to argue that the use of the per se rule in their trial is unconstitutional. The United States, however, has beaten back each attack with ample precedent from the relevant court of appeals fortified with long standing Supreme Court precedent (i.e., *Trenton Potteries* and *Socony Vacuum*) that hold that price fixing is a per se Sherman Act violation.

In one per se challenge before the Ninth Circuit a panel member was sympathetic to defendants’ position and noted: “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.” Joshua Sisco, Mlex, January 16, 2019 *“In foreclosure auction appeal, court questions applicability of per se standard, (behind pay firewall)].* The Ninth Circuit turned back the per se challenge in that appeal and Supreme Court denied certiorari. *Sanchez et al. v. United States,*140 S. Ct. 2655 (2020)(cert petition denied, January 13, 2020). Just recently the Supreme Court had another chance to review the constitutionality of the per se rule in a criminal antitrust case. Christopher Lischewski was convicted at trial of conspiring to fix the price of canned tuna. Lischewski preserved his objection to the per se rule in his trial; his appeal was denied by the Ninth Circuit and he filed a petition for cert with the Supreme Court. The Supreme Court again denied a cert petition challenging the constitutionality of the per se rule in a criminal trial. *Lischewski v. United States,* No. 21-852 (May 2, 2022). The per se rule lives!

More challenges lie ahead, however, for the per se rule. On May 2, 2022 the Second Circuit released an opinion rejecting yet another challenge to the per se rule. *U.S. v Aiyer*, Case No. 20-3594 (2d Cir. May 02, 2022). Aiyer was convicted after trial for his participation in a conspiracy to fix prices and rig bids in connection with his trading activity in the foreign currency exchange market. The Second Circuit rejected various challenges Aiyer raised to the use of the per se rule in his criminal trial. As other defendants have, Aiyer argued that when the judge instructs the jury that the alleged agreement, if found, is a per se violation of the Sherman Act, the court takes away from the jury an element of the offense, namely whether the alleged agreement restrained trade. Aiyer also argued that the trial court, citing the per se rule, impermissibly prohibited him from offering evidence of the procompetitive effects of the alleged agreement.

It seems likely defendant Aiyer will file a cert petition with the Supreme Court. What are the odds the Court will review the per se rule in Aiyer’s case? Not good I would imagine with the Court having recently rejected two similar cert petitions. The best chance Aiyer may have for a grant of cert is that, without going into details, the FOREX market is more complicated than the real estate

auction bid rigging conviction that was the subject of the cert petition in *Sanchez* or the garden variety price fixing agreement that was the subject of the *Lischewski* cert petition.

A defendant never wants to be in a position of seeking a cert petition with the Supreme Court because, first you have to get convicted in the trial court and then lose your appeal. Many people think that labor market collusion cases may be the most likely vehicle for Supreme Court to revisit the per se rule, but so far the Antitrust Division is 0 for 2 in labor market collusion trials. But there are more labor market collusion cases on the way so perhaps the United States will score a conviction and a case will make its way to the Supreme Court.

While losing at trial, the Antitrust Division has won judicial rulings upholding the per se rule in their first wage-fixing and labor allocation cases. In those cases the challenges to the per se rule was focused more on an argument that the conduct in question was not the type with which the courts had sufficient experience and, thus, the per se rule should not apply. The courts rejected those arguments, in essence holding that while they may not have had experience with labor market collusion cases, the types of agreements alleged in the indictments were agreements the court had sufficient experience with to treat them as per se violation. Curiously enough, this line of reasoning highlights what I consider to be the constitutional flaw with the per se rule in criminal cases. The courts are making fact-finding decisions in determining whether they have enough experience with a given type of agreement to label it as per se violation i.e. "always or almost always an unreasonable restraint of trade." In some opinions, we see the court deferring a ruling on whether the per se rule applies until there is further factual development in the case. Courts are clearly making factual determinations about whether the per se rules applies-i.e., whether the alleged agreement violates the Sherman Act as a matter of law. In 30 plus years of prosecuting criminal antitrust cases I never questioned the per se rule. But now I find myself asking, "Shouldn't the jury *always* be making the decision of whether the agreement in question is a restraint of trade?" It shouldn't matter how much experience a court has with a particular type of restraint and/or how comfortable the court is that the charged agreement is a per se violation in a criminal case the jury, and only the jury, should decide whether the agreement in question (if proven) is a restraint of trade. (After all, the Supreme Court has changed its mind many times regarding what constitutes a per se Sherman Act violation. See e.g. Dr. Miles, etc.)

In opposing cert petitions challenging the per se rule, The Department of Justice effectively cites decades of per se rule precedent at every level of the federal courts. The DOJ cert opposition can be summarized: "Nothing to see here; nothing has changed." But things have changed. The per se rule was created by the Supreme Court at a time when the Sherman Act was a misdemeanor and before the Supreme Court began to focus on requiring prosecutors to prove every element of the offense. In the 1940 case of *United States v. Socony Vacuum Oil Co.*,[1] the individual defendants were fined $1,000.[2] As was customary for this then misdemeanor, no jail sentences were imposed. Compare *Socony Vacuum* to Sherman Act as a felony: In 2014, Romano Pisciotti, an Italian citizen, was indicted under seal for violating Section One of the Sherman Act,[3] seized by Interpol while changing planes in Germany
[4] and eventually extradited to the United States.[5] Even before conviction:

> Romano Pisciotti spent 669 days in custody. This included two hours in a police station in Lugano, Switzerland; 10 months in a jail in Frankfurt, Germany fighting extradition [on a Sherman Act indictment]; and eight months in a US federal prison in Folkston, Georgia, in a room with around 40 mainly Mexican inmates and a single

> corner toilet." [6]

Times have changed.[7] Fines have taken off as well. The largest corporate fine in *Socony Vacuum* was $5,000. The largest corporate fine today stands at $925 million![8] The per se rule remains undefeated in taking on all challenges and perhaps will remain so. But the challenges will keep coming. criminal antitrust cases, however, has remained in place against all challenges.

Thanks for reading. Bob Connolly bob@reconnollylaw.com

PS. If I am wrong, (it happens), and the per se rule is never found to be unconstitutional, this is a good issue to be wrong about. After all, cartels are "the supreme evil of antitrust." It says so on my blog mast head and the Supreme Court has said so too. *Verizon Communications v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004). I don't think juries would have any difficulty finding hard core cartels are a restraint of trade, but nonetheless, the per se rule is a prosecutor's best friend.

This post originally appeared on the CartelCapers blog.
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[1] *United States v. Socony-Vacuum Oil Co*., 310 U.S. 150 (1940).

[2] See Daniel A. Crane, *The Story of United States v. Socony-Vacuum: Hot Oil and Antitrust in the Two New Deals*, in ANTITRUST STORIES 107 (Eleanor M. Fox & Daniel A. Crane eds., 2007).

[3] https://www.justice.gov/atr/case-document/file/507556/download On March 28, 2011 Pisciotti was indicted under seal for violating Section One of the Sherman Act.

[4] Lewis Crofts and Leah Nylen, December 9, 2015, *Mlex Interview with Romano Pisciotti*, available at https://mlexmarketinsight.com/insights-center/reports/interview-with-Romano-Pisciotti, see also, Gianni De Stefano, *Meet the First Extradited Businessman on Cartel Charges*, 8 J.E.C.L. & Pract. 5 (2017), available at https://academic.oup.com/jeclap/article/8/5/281/3074470.

[5] Lewis Crofts and Leah Nylen, December 9, 2015, *Mlex Interview with Romano Pisciotti*, available at https://mlexmarketinsight.com/insights-center/reports/interview-with-Romano-Pisciotti,

[6] *Id*. See also See Plea Agreement with Roman Pisciotti, https://www.justice.gov/atr/case-document/file/507541/download, which was discussed by Renata Hess in her remarks. See also Remarks of Renata Hess, https://www.justice.gov/opa/speech/acting-assistant-attorney-general-renata-hesse-antitrust-division-delivers-remarks.

[7] The increases took place in the context of the Sherman Act being elevated from a misdemeanor to a felony in 1974. In 1994 there was an even more significant enhancement to criminal penalties, including a maximum jail sentence of 10 years.

[8] See SHERMAN ACT VIOLATIONS RESULTING IN CRIMINAL FINES & PENALTIES OF $10 MILLION OR MORE, available

at https://www.justice.gov/atr/sherman-act-violations-yielding-corporate-fine-10-million-or-more.

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