AntitrustConnect Blog

Supreme Court Set To Make Cert Decision On Per Se Battle

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On February 1, 2022, Brent Brewbaker, a former executive of Contech Engineered Solutions LLC was convicted by a jury for his participation in bid-rigging and fraud schemes targeting the North Carolina Department of Transportation (NCDOT). The conviction seemed an unremarkable event at the time. "Evidence showed that Brewbaker instructed a co-conspirator to submit non-competitive bids to NCDOT and to hide his bid rigging and fraud by varying the amount of inflated bids submitted." The jury had been given a per se instruction [the agreement, if proved, was a restraint of trade]. The Fourth Circuit, however, found that the per se rule was inapplicable because, while Brewbaker's company submitted a complementary/cover bid for the winning bidder Pomona, Pomona purchased an input [aluminum structures] from Contech creating a vertical relationship. In the Fourth Circuit's view, the fact that the companies had a vertical relationship as well as being horizontal competitors created a "hybrid" horizontal and vertical restraint of trade with possible procompetitive benefits. This put the restraint outside the bounds of the per se rule and Brewbaker's bid rigging conviction was overturned. *United States v. Brewbaker*, 87 F. 4th 563 (4th Cir. 2023).

The Fourth Circuit's novel view of the scope of the per ser rule set up a battle of petitions for certiorari in the Supreme Court. The DOJ's Antitrust Division sought to preserve the Sherman Act conviction and filed a *Petition for a Writ of Certiorari,* No. 23-1365, June 28, 2024 with the question presented as: "Whether the existence of a vertical relationship between the competing bidders precluded the application of the established per se rule against horizontal bid rigging to [Brewbaker's] conduct." Brewbaker fired back with a cross cert petition, arguing that if the Fourth Circuit improperly overturned his conviction on per se rule grounds, his conviction should remain overturned on constitutional grounds. Brewbaker presented this question: "Does the criminal provision of Section 1 of the Sherman Act violate Article 1 of, and the Fifth and Sixth Amendments to, the United States Constitution?" *Brewbaker v. United States*, Conditional Cross-Petition for Writ of Certiorari, No. 23-1365, filed August 5, 2024.

On October 23, 2024 the United States filed the final brief in the matter: Reply Brief for the Petitioner which opens with "Since the enactment of Section 1 of the Sherman Act, 15 U.S.C. 1, courts have understood that 'an agreement between intending bidders at a public auction or a public letting not to bid against each other, and thus to prevent competition, is per se unlawful.'" *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 293 (6th Cir. 1898)(Taft, J.), aff 'd as modified, 175 U.S. 211 (1899).

1. **Was the Scheme in *Brewbaker* a Per Se Violation?**

The government is correct that a vertical relationship between bidders does not by itself take the agreement outside the per se rule. The government cited *U.S. v Socony Vacuum, 310 U.S. 150 (1940)* to highlight that some vertical relationship between conspiring bidders is not at all unusual. In a classic bid rigging scheme, the company agreeing to bid high and lose is often "paid off" via a vertical relationship–a subcontract or by selling an input to the winning bidder. The creation of a vertical relationship is a way to share the illegal profit generated by the collusion. Why would a losing bidder (i.e. Brewbaker's company] even submit a bid?—to restrain trade by creating the appearance of competition when there is none. See Cartel Capers, December 13, 2023 you are A Competitor If You Say So—My Disagreement with the Fourth Circuits *Brewbaker* Opinion.

The Fourth Circuit bought the red herring argument that because Pomona was a distributor for Contech, their bidding agreement potentially had the pro-competitive benefits of a dual distribution arrangement. Whether the conspirators had a dual distribution relationship [they did not], however, is irrelevant to the nature of the horizontal agreement to collude on their bid. Contech and Pomona were not bidding to simply sell aluminum structures o NCDOT. The Brewbaker indictment reads:

> "From at least as early as 2009 and continuing through at least June 2018, Defendant BRENT BREWBAKER and Defendant … *obtained bid prices* from [Pomona] and *submitted bids* to NCDOT for *aluminum structure projects* that were intentionally higher than [Pomona's] bids." (emphasis added).

Pomona was not a distributor for completing government aluminum structure projects–it was a competitor. The Fourth Circuit, however, thought the bid rigging scheme could have pro-competitive benefits by strengthening the relationship between Contech and Pomona. I'm sure it did—until they got caught. But pro-competitiveness is measured by impact on the *consumer*. The lengths that the Brewbaker and his conspirators went to hide the scheme from the consumer is a sure tip off that "consumer welfare" was not enhanced by the secret agreement.

1. **Is the Section 1 of the Sherman Act Unconstitutional?**

Should Brewbaker's conviction stand under the per se rule**?** No. I side with Brewbaker on this point, though my position is more narrow. The per se rule when applied in criminal cases is unconstitutional, but not Section One of the Sherman Act itself. For further discussion see Brewbaker Strikes Back: The DOJ's Per Se "Death Star" Attacked,Cartel Capers, August 13, 2024.

The government's Reply Brief states: "He [Brewbaker] never disputes that the type of agreement alleged in the indictment would have been per se unlawful at common law. He instead contends, in his cross-petition for a writ of certiorari, that the common law is "irrelevant." 24-124 Pet. 6 n.2 (citation omitted)." Reply Brief for Petitioner at 2. It *is* disputable whether the type of agreement alleged in the indictment would have been per se unlawful at common law.**[1]** But whatever the common law, Brewbaker is correct that it is irrelevant. The common law was developed with courts, not juries, being the fact-finder of what is lawful. Brent Brewbaker was charged with a criminal violation of the Sherman Act for an agreement in restraint of trade. Where the critical element of a criminal offense is whether the defendant restrained trade, it seems inescapable that the defendant must be found, by a jury, to have restrained trade.

In *Addyston Pipe*, Judge Taft explained the fact-finding the court undertakes in deciding whether a

restraint is unlawful or a pro-competitive ancillary restraint.**[2]** The government expands on this in its reply brief:

> "Under that approach [ancillary restraints doctrine], *a court* first decides whether the challenged restraint is ancillary to a legitimate collaboration and then (*if the court answers that question in the affirmative*) determines whether the overall arrangement is procompetitive under the rule of reason." Reply Brief of United States at 4. (emphasis added).

But "a court first decides…." is inconsistent with constitutional law which requires that a jury find every element of the offense in a criminal case.

Per se rules were developed largely in the context of civil cases but even in a criminal case like *Socony-Vacuum no* analysis was given to a defendant's constitutional right to have a jury decide every element of the offense. This constitutional issue is now before the Supreme Court and it's a critical question because: "[T]he per se rule is the trump card of antitrust law. When an antitrust [party] successfully plays it, he need only tally his score." *Med. Ctr. At Elizabeth Place, LLC v. Atrium Health Sys.*, 922 F.3d 713, 718 (6th Cir. 2019) (quoting *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1362–63 (5th Cir. 1980).

There is another section of the government's brief that sheds light on the constitutional breach in applying the per se rule in *criminal* felony cases. In its brief the government quotes *Arizona v. Maricopa County Medical Society*, 457 U.S. 332, 351 (1982):

> "The anticompetitive potential inherent in all [such] agreements justifies their facial invalidation even if procompetitive justifications are offered for some." Respondent therefore cannot avoid per se liability by asserting (Br. in Opp. 5-6) procompetitive justifications." Reply Brief for Petitioner at 3-4.

That explanation of the per se rule in essence states: "Respondent cannot avoid liability for restraining trade by asserting that he did not restrain trade." The constitution says otherwise. The rest of the quote from *Maricopa County Medical Society* further highlights why the per se rule has no place in a criminal prosecution: "Those claims of enhanced competition are so unlikely to prove significant in any particular case that we adhere to the rule of law that is justified in is general application." *Id.* The defendant might respond: "My defense may be unlikely to succeed your Honor but I'd like to give it a go anyway." [By the way, had Brewbaker had been permitted to present evidence to the jury regarding why the scheme was not a restraint of trade, I have no doubt the jury would have still found him guilty of the Sherman Act offense, as evidenced by the fact Brewbaker was found guilty of submitting false non-collusion certifications.]

The briefing is concluded and the Supreme Court Docket No. 23-1365, of October 23 2024 reads: DISTRIBUTED for Conference of 11/8/2024. While this could be the most important criminal antitrust decision since *Socony Vacuum* there is also good chance cert will be denied to both parties.

[1] *See Morris, Arval (1958) Is Price-Fixing Per Se Reasonable? A Discussion*, Kentucky Law

Journal: Volume *47: Issue1, Article 5 at 71* (with numerous citations).

[2] *United States v. Addyston Pipe & Steel Co., 85 F. 271, 282 (6th Cir. 1898), aff'd as modified, 175 U.S. 211, 20 S. Ct. 96, 44 L. Ed. 136 (1899).*

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