AntitrustConnect Blog

What If There Was No Per Se Rule in Criminal Cases?

Robert E. Connolly (Law Office of Robert Connolly) · Thursday, January 16th, 2025

The Supreme Court has now denied cert in three different challenges to the per se rule in criminal antitrust cases, the latest being the denial of the cross-cert petition by Brent Brewbaker. It is unlikely that a Court of Appeals will overturn the per se rule given the extensive precedent—although it is not impossible. Instead, courts that find fault with the per se rule will likely make an end run around, as has been done in certain labor collusion cases. See e.g., *United States v. DaVita Inc.*, 2022 WL 833368, *2, *5 (D. Colo. 2022) (finding that the DOJ had to show more than that the defendants entered the non-solicitation agreement but would have to prove beyond a reasonable doubt that the defendants entered into an agreement with the purpose of allocating the market" and that the defendants "intended to allocate the market as charged in the indictment."). The Fourth Circuit also chipped away at the per se rule in *United States v. Brewbaker*, 87 F.4th 563, 583 (4th Cir. 2023), finding that a vertical component in a relationship between two horizontal competitors who rigged bids on a government contract took the agreement out of the per se rule and into rule of reason land.

It is probably time for me to find a new hobby besides writing on my view of the unconstitutionality of the per se rule. But first, there are a couple of questions to explore: 1) would the lack of a per se rule seriously crimp criminal antitrust enforcement? and 2) if the jury charge did not receive a per se rule charge (i.e. if the court did not instruct the jury that the agreement alleged is an unreasonable restraint of trade) what would the judge charge the jury concerning finding whether the agreement unreasonably restrained trade? The latter question is for later blog post. Below, I share some thoughts on the potential effects of removing the per se rule from criminal antitrust enforcement.

- **Would Criminal Antitrust Enforcement be Materially, Negatively Impacted Without the Per Se Rule?**

No. Let's start with *Brewbaker*. It was, in most antitrust observers' opinion, a classic bid rig. One bidder (Pomona) gave its final bid price to another bidder with the understanding that the second bidder (Contech/Brent Brewbaker) would submit an intentionally higher price. In addition to bid rigging, Brewbaker was charged with and convicted on fraud counts which alleged that he falsely and fraudulently certified that the bids his company submitted were competitive and not subject to collusion. This finding makes it highly likely that the jury would also have found Brewbaker guilty of the Sherman Act count if they were the fact finder on whether the alleged agreement was an unreasonable restraint of trade. Of course an acquittal on bid rigging was possible; the ingenuity of defense lawyers should not be underestimated, but neither should the ability of jurors to reach

rational decisions.

One justification for the per se rule is that it "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…." *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958). Constitutionally speaking, that hardly seems like a justification for having the court decide an element of the offense, and the most crucial one at that—did the agreement restrain trade? But, if there were no per se rule, would the trial really necessarily involve a "complicated and prolonged investigation into the entire history of the industry involved?" Id. Not necessarily. Going back to *Brewbaker*, what about the proffered defense that dual distribution agreements can be procompetitive? The trial court excluded this defense because of the per se rule. However, even without a per se rule, the trial court may have also excluded this defense on relevance ground. The rules of evidence apply to a criminal trial. Was the proffered expert testimony relevant describing the procompetitive benefits of dual distribution relationships? Not without a foundation. Who for the defense was going to establish that the bidders were in a dual distribution arrangement? What documents would they have to support this? I suspect none. Voir dire of Brewbaker's proffered expert may well have resulted in the expert's testimony being excluded under Fed. R. Evid 702 and/or 403.

It is also revealing that the Fourth Circuit acknowledged that Brewbaker went to some lengths to deceive the consumer and keep the complementary bidding scheme secret: "Also during this time [of submitting complementary bids] Brewbaker tried to cover his tracks. He deleted conversations between Pomona and Contech employees, otherwise opted for phone calls over digital paper trails, and made sure that the percent he added to Pomona's bid varied to avoid raising 'red flag[s]' to NCDOT." *United States v. Brewbaker*, 87 F. 4th at 569. The Contech/Pomona agreement was kept secret to conceal the collusion from NCDOT. Would the jury have bought a procompetitive argument, if the court had even allowed it? Highly doubtful. Of course, instructing the jury on the per se rule removes all doubt, and as such it is a great tool for the prosecution. But, if the Constitution requires that the jury, not the court, made the finding of whether the agreement was an unreasonable restraint of trade, it is highly likely that the jury would have done so.

Brewbaker is just one case but it is representative of typical government procurement collusion cases. The bidders arrange in advance who the winning bidder will be. Other bidders submit intentionally high (complementary) bids in return for some form of future payoff. The collusion allows the winner to inflate the bid. The winning bidder shares or pays off the loser(s) often with future reciprocated complementary bids. The payoff, however, could also be money. The payoff also is often a subcontract from the winning bidder or an agreement to buy an input(s) from the winning bidder, also at an inflated price to share the spoils of the collusion. The great irony of the Fourth Circuit's *Brewbaker* ruling is that this form of payoff would establish a vertical relationship and take the collusion out of the reach of the per se rule. Given the fraudulent nature of bid rigging, the division of the spoils among the colluders and the secrecy necessary to deceive the buyer, it is highly unlikely a defendant would admit the agreement to collude but successfully argue it was not an unreasonable restraint of trade.

The other class of agreements prosecuted by the Antitrust Division as criminal cases are price fixing cases. In cartels cases, the issue at trial has been whether there was an agreement or whether the particular defendant(s) on trial were members of the cartel. Given the secretive nature of the cartels and other ample evidence of consciousness of guilt and deception of customers, it would be unlikely a defendant would **admit** that he was a member of the cartel but then defend on the

ground that it was not an unreasonable restraint of trade. In any case I ever tried, I would gladly have traded for an admission from the defendant that he was a member of the charged conspiracy in return for the defendant's' right to argue that the agreement was not an unreasonable restraint of trade.

Every head of the Antitrust Division in recent memory has made statements such as, "price fixing, market allocation and bid rigging steal from, and commit fraud upon American business and customers."[1] The Antitrust Division has taken the position that "the [criminal] cases that we are charging and prosecuting are unmistakable fraud."[2] It is true that having the jury, not the court, decide whether an agreement was an unreasonable restraint of trade adds an element of uncertainty that may make conviction more difficult by some unmeasurable degree, depending on the circumstances of the case. But as long as the DOJ sticks closely to this fraud standard (which is entirely appropriate for a crime that carries a maximum jail sentence of 10 years) it is likely that the jury would find the alleged agreement constituted an unreasonable restraint of trade.

Without reliance on a per se rule, prosecutors may be restrained from bringing criminal cases that are not clear-cut fraud. This would be a beneficial restraint. The kinds of cases that come to my mind where lack of a per se rule would seriously impact the government's prospects might be the labor market cases and Heir Locators (where Judge Sam initially ruled the case was a rule of reason case but changed course after the government's successful appeal to the Tenth Circuit). See Cartel Capers, Heir Locators Is Now A Per Se Production, February 25, 2019. However, a criminal indictment is not the only option to punish and deter antitrust violations. Many jurisdictions, such as the EU, have vigorous anti-cartel programs relying only on civil prosecutions. The threat of jail is the most significant form of deterrent and hard core bid rigging and price fixing prosecutions would continue without a per se rule. But in some circumstances, much can be accomplished, and perhaps sometimes more efficiently, by bringing certain cases as civil prosecutions.

Thanks for reading. I understand that the topics raised here warrant much more consideration than a blog post, unless they warrant no consideration at all, but it's a start.

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1. Anne K. Bingaman, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Justice, The Clinton Administration: Trends in Criminal Antitrust Enforcement, Remarks Before the Corporate Counsel Inst. (Nov. 30, 1995), available at http://www.justice.gov/atr/public/speeches/0471.htm.
2. 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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