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# Casenotes: Antitrust Laws — Agreement among Competing Physicians Setting Maximum Fees That May Be Claimed for Health Services Provided to Policyholders of Specified Insurance Plans Is a per Se Violation of the Sherman Antitrust Act. Arizona v. Maricopa County Medical Society, 457 U.S. 332 (1982)

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# CASENOTES

ANTITRUST LAWS — AGREEMENT AMONG COMPETING PHYSICIANS SETTING MAXIMUM FEES THAT MAY BE CLAIMED FOR HEALTH SERVICES PROVIDED TO POLICY-HOLDERS OF SPECIFIED INSURANCE PLANS IS A *PER SE* VIOLATION OF THE SHERMAN ANTITRUST ACT. *Arizona v. Maricopa County Medical Society,* 457 U.S. 332 (1982).

A medical society and the two foundations which it had formed were the defendants in *Arizona v. Maricopa County Medical Society.*[1] The foundations were composed of licensed physicians. One of the foundation's primary functions was to construct tables of maximum fees that member doctors would accept as full payment for services provided to patients who belonged to foundation-approved insurance plans.[2] The State of Arizona filed a complaint against the defendants in federal district court alleging that the foundation's activities constituted illegal price fixing conspiracies in violation of section I of the Sherman Antitrust Act.[3] Pursuant to an interlocutory appeal, the United States Court of Appeals for the Ninth Circuit affirmed the District Court's refusal to enter a partial summary judgment and found that the issues could not be resolved without evaluating the agreement at a full trial.[4] However, the United States Supreme Court reversed the lower court's denial of summary judgment, holding that a maximum fee arrangement between competing physicians was a *per se* violation of the Sherman Antitrust Act.[5]

Initially state statutes were found to be insufficient to prevent restraints of trade affecting interstate commerce.[6] Therefore, in 1890, Congress enacted the Sherman Antitrust Act as the first of the American antitrust laws.[7] The Act seeks to protect the public from restraints on competition,[8] and is based on the premise that the lowest prices, highest quality, and best allocation of economic resources can only be achieved when the interaction of competitive forces is unrestrained.[9]

Section I of the Sherman Act provides in pertinent part that: "Every contract, combination in the form of trust or otherwise, or con-

1. 457 U.S. 332 (1982).
2. *Id.* at 339. Other purposes enumerated in the foundation agreement were to review the treatment administered to patients to determine if it was necessary and appropriate, and to draw checks on the accounts of insurance companies to pay doctors for services rendered to covered patients. *Id.* at 339-40.
3. *See* Sherman Antitrust Act, 15 U.S.C. § 1 (1976).
4. *Maricopa,* 643 F.2d 553 (9th Cir. 1980), *rev'd,* 457 U.S. 332 (1982).
5. 457 U.S. at 357.
6. Apex Hosiery Co. v. Leader, 310 U.S. 469, 495 (1940).
7. Sherman Antitrust Act, ch. 647, 26 Stat. 209 (1890) (codified as amended at 15 U.S.C. §§ 1-7 (1976)); *see* Borsody, *The Antitrust Laws and the Health Industry,* 12 AKRON L. REV. 417, 449 (1979).
8. Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 43 (1930).
9. Northern Pac. R.R. Co. v. United States, 356 U.S. 1, 4 (1958).

spiracy, in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal."[10] In the early decisions, some courts literally interpreted this section to mandate that every agreement restraining trade, whether reasonable or unreasonable, was illegal.[11] However, the Supreme Court recognized that every trade agreement restrains trade to some extent[12] and that the scope of the Sherman Act is very broad.[13] Hence, the Court promptly realized the need to restrict the scope of section I by adopting a standard to aid in determining whether an agreement was, in fact, a restraint of trade.[14] Because the Sherman Act did not expressly provide for such a standard, the Court adopted the common law standard of reasonableness, rendering literal interpretations of the section obsolete.[15]

The application of the rule of reason to section I cases requires a determination of whether a particular restraint reasonably promotes competition or unreasonably suppresses it.[16] In making that determination, the circumstances surrounding each case must be considered.[17] However, some types of restraints are unreasonable *per se* and therefore do not necessitate an elaborate inquiry into their effects.[18] An agreement is condemned as a *per se* violation of section I when it is manifestly anti-competitive and void of any redeeming qualities.[19]

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10. Sherman Antitrust Act, 15 U.S.C. § 1 (1976).
11. *See, e.g.,* Northern Sec. Co. v. United States, 193 U.S. 197, 331 (1904); United States v. Trans-Missouri Freight Ass'n, 166 U.S. 290, 327-28 (1897); Wheeler-Stenzel Co. v. National Window Glass Jobbers' Ass'n, 152 F. 864, 868 (3d Cir. 1907).
12. Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).
13. Standard Oil Co. v. United States, 221 U.S. 1, 60 (1911).
14. *Id.*
15. *Id.*
16. *See* Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918); Hect v. Pro-Football, Inc., 570 F.2d 982, 995 (D.C. Cir. 1977).
17. Butterick Pub. Co. v. FTC, 85 F.2d 522, 526 (2d Cir. 1936). Factors which aid in the decisional process regarding the reasonableness of a restriction are the conditions before and after a restraint is imposed, the facts that are peculiar to the business in question, the nature of the restraint and its effect on competition, and any other relevant factors. Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).
18. United States v. Consolidated Laundries Corp., 291 F.2d 563, 574 (2d Cir. 1961). The *per se* rule is not inconsistent with the rule of reason. United States v. E.I. Du Pont De Nemours & Co., 351 U.S. 377, 387 (1956). If a particular restraint does not fall within a *per se* category, then the legality of the restraint must be determined under the rule of reason. Martin B. Glauser Dodge Co. v. Chrysler Corp., 570 F.2d 72, 82 (3d Cir. 1977).
19. White Motor Co. v. United States, 372 U.S. 253, 262 (1963). The application of the *per se* rule avoids complicated and prolonged investigations into the entire history of the industry involved. Northern Pac. R.R. Co. v. United States, 356 U.S. 1, 5 (1958). For examples of types of agreements that have been condemned as unreasonable *per se,* see International Salt Co. v. United States, 332 U.S. 392 (1947) (tying arrangements); Fashion Originators Guild v. FTC, 312 U.S. 457, 468 (1941) (boycotts); United States v. Socony Vacuum Oil Co., 310 U.S. 150, 210 (1940) (price fixing agreements).

In addition to federal law regulating restraints of trade, most states have

In *Arizona v. Maricopa County Medical Society,*[20] the United States Supreme Court held that the agreement in question violated section I of the Sherman Act, *per se*, notwithstanding that the agreement involved maximum as opposed to minimum price fixing, professionals rather than nonprofessionals, a novel concept, and possible procompetitive justifications. First, the Court declared that maximum price restraints are as deleterious as minimum price restraints because the maximum restraints provide the same economic rewards to all physicians regardless of their skills, resulting in a diminished use of innovative procedures and a lack of new physicians entering the market.[21] Second, the Court acknowledged prior decisions which recognized that the public aspects of certain professions may warrant different treatment under the Sherman Act,[22] but refused to afford such treatment to the Maricopa plan after deciding that the plan was not premised on the public aspects of the health care profession.[23] Third, the majority found that the novelty of the agreement was an insufficient reason for refusing to apply the *per se* rule, and reasoned that the purpose of the rule would be greatly frustrated if its application could be avoided by every industry that has not been subjected to considerable antitrust litigation.[24] Next, the Court rejected, as a "misunderstanding of the *per se* concept," respondent's argument that the agreement should not be condemned because of its procompetitive justifications.[25] Finally, the majority found the Maricopa plan to be fundamentally different from the price restraint in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,*[26] which was upheld as reasonable because it only involved

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adopted some type of antitrust legislation. *See* Reynolds, *A Practitioner's Guide to the Maryland Antitrust Act,* 36 MD. L. REV. 323, 325 (1977).

20. 457 U.S. 332 (1982).

21. *Id.* at 348. Without elaborating, the Court also rejected the argument that the agreement should escape *per se* condemnation because it involved horizontal as opposed to vertical price fixing and concluded that, "horizontal restraints are generally less defensible than vertical restraints." *Id.* at 348 n.18.

22. National Soc'y of Professional Eng'r v. United States, 435 U.S. 679, 696 (1978); Goldfarb v. Virginia State Bar, 421 U.S. 773, 788-89, n.17 (1975).

23. *Maricopa,* 457 U.S. at 349. The agreement was not premised on public service because the respondents failed to assert that the quality of their treatment was enhanced by the price restraint. *Id.*

24. *Id.* at 351. The Court also found this argument inconsistent with precedent. Quoting from United States v. Socony Vacuum Oil Co., 310 U.S. 150 (1940), the Court stated, "Whatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike." *Id.* at 222, *quoted in Maricopa,* 457 U.S. at 349.

25. *Maricopa,* 457 U.S. at 351. According to the majority, this argument indicates a misunderstanding of the *per se* concept because "[t]he anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some." *Id.* (footnote omitted).

26. 441 U.S. 1 (1979). The Court found the Maricopa agreement different from the Columbia agreement in two respects: (1) the blanket license in *Columbia* was completely different from any one product that the composer was able to sell himself, whereas in *Maricopa* the combination in the form of the foundations did not

price fixing in the literal sense.[27] As a result of the above analysis, the Court granted summary judgment, and concluded that the Maricopa plan lacked any justifications which would distinguish it from the type of price-fixing arrangements considered *per se* violations of the Sherman Act.[28]

A strong dissent stressed the majority's failure to emphasize important aspects of the record, its improper application of the *per se* rule, and its inadequate attempt to distinguish precedent. The dissent asserted that the Court was required to infer from the record that the Maricopa agreement had pro-competitive justifications.[29] Therefore, before the majority granted summary judgment, it should have addressed the question of whether an agreement that benefits the consumer should be condemned under the Sherman Act.[30] Other aspects of the record which the dissent believed deserved greater consideration were that the foundation agreement did not actually prevent competition[31] and that the insurer represents the interests of the consumer.[32] In addition, the dissent contended that the majority erroneously applied the *per se* rule by failing to "acknowledge that *per se* characterization is inappropriate if the challenged agreement or plan achieves for the public pro-competitive benefits that otherwise are not attainable."[33] According to the dissent, the majority was content simply to label the plan as "price-fixing" and distinguish it as "fundamentally different" from the agreement in *Columbia Broadcasting,* which also involved price-fixing in the literal sense.[34] Finally, the dissent asserted that because the *per se* rule is strictly a creature of the judiciary, the duty to

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enable the physicians to sell a different product; and (2) the competition among the composers in *Columbia* was not as severe as that among the physicians in *Maricopa. Maricopa,* 457 U.S. at 356-57.

27. The *Columbia* Court held that an arrangement by which copyright clearinghouses sold performance rights to their entire libraries on a blanket rather than an individual basis did not warrant condemnation on a *per se* basis and was merely price-fixing in the literal sense. *Columbia,* 441 U.S. at 8-9.

28. *Maricopa,* 457 U.S. at 356-57. The Court also interjected that any argument concerning an alteration of the *per se* rule would be better directed to the legislature. *Id.* at 354-55.

29. *See id.* at 360 (Powell, Rehnquist, J.J. and Burger, C.J., dissenting).

30. *Id.*

31. *Id.* According to the dissent, member physicians were free to associate with other insurance plans at any fee level, they could engage in business with nonmember physicians, and they were not locked into the plan for more than one year. *Id.*

32. *Id.* at 360-61. The dissent found that as a practical matter the insurer represents the consumer's interest. Therefore, insofar as no evidence had been presented indicating that insurance companies had opposed the Maricopa plan, it logically followed that the plan benefited the consumer. *Id.*

33. *Id.* at 364.

34. *Id.* The dissent argued that the two plans were similar in major respects. First, "[e]ach [plan] involved competitors and resulted in cooperative pricing." Second, "[e]ach arrangement also was prompted by the need for better service to the consumers." Third, "[e]ach arrangement makes possible a new product by reaping otherwise unattainable efficiencies." *Id.* at 364-65 (footnotes omitted).

define its application has always been left to the courts and not to the legislature.[35]

The dissent contains the more flexible, well-reasoned analysis. The majority's mechanical application of the *per se* rule condemning the agreement based on a limited record without considering its pro-competitive justifications accords with neither precedent nor logic. In its application of the *per se* rule, the majority over-emphasized the otherwise legitimate concern of avoiding the cost and judicial burdens that a detailed inquiry entails. The avoidance of such burdens is not, in itself, sufficient to justify the application of the *per se* rule resulting in an order for summary judgment.[36] When a court addresses a motion for summary judgment, it must interpret inferences drawn from the record in a light most favorable to the respondents.[37] As the majority acknowledged, the necessary inferences that should have been drawn from the record were: (1) that the agreement "impose[d] a meaningful limit on physicians' charges"; (2) that it "enable[d] the insurance carriers to limit and calculate more efficiently the risks they underwrite"; and (3) that it resulted in "an effective cost containment mechanism that has saved patients and insurers millions of dollars."[38] The Court's granting of summary judgment, after placing little importance on these inferences, effectively condemned an agreement that benefited the consumer, a result which directly contravenes the purpose of the Sherman Act.[39]

When faced with respondent's contention that the *per se* rule was inapplicable because of the plan's benefits to the consumer, the Court avoided the issue by labeling the argument "a misunderstanding of the *per se* concept."[40] The majority seemed satisfied to categorize the plan as unlawful price-fixing without giving serious consideration to its pro-competitive justifications. In so doing, the Court has misconstrued the application of the *per se* concept. As the Supreme Court has previously recognized, an agreement cannot be condemned as *per se* unreasonable merely because it involves price-fixing in the literal sense.[41] Before such condemnation can occur, the Court must determine whether the agreement meets the accepted standard for applying the *per se* rule.[42] This standard, clearly established by prior decisions, states that a restraint cannot be condemned as illegal *per se* unless it has a pernicious

35. *Id.* at 366.
36. *See* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50 n.16 (1977).
37. United States v. Diebold, Inc., 369 U.S. 654, 655 (1962).
38. *Maricopa,* 457 U.S. at 342.
39. The purpose of the Sherman Act is to protect the consumer from restraints that destroy competition. Paramount Famous Lasky Corp. v. United States, 282 U.S. 30, 43 (1930).
40. *Maricopa,* 457 U.S. at 351.
41. Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc., 441 U.S. 1, 9 (1979).
42. *Id.*

effect on competition and lacks any redeeming virtue.[43]

The courts have been especially quick to realize the importance of satisfying the standard for applying the *per se* rule when dealing with a novel and unique agreement due to the scarcity of evidence concerning such an agreement's affect on competition and its possible redeeming virtues.[44] The agreement in this case, involving the health care industry, is certainly a novel[45] and unique[46] concept. Therefore, after refusing to conduct further inquiry into the Maricopa plan's pro-competitive effects, the majority could not have determined that the plan had a pernicious effect on competition and lacked any redeeming virtue without basing its decision on unfounded conclusions.

The majority also misapplied the principle set forth in *Goldfarb v. Virginia State Bar.*[47] This principle states that "[t]he public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently."[48] Although the majority acknowledged this passage they refused to apply it, reasoning that the Maricopa agreement was not premised on public service.[49] This rationale, however, is unconvincing. The respondents premised their agreement on the fact that it served as an effective cost containment mechanism that saves patients and insurers millions of

43. Northern Pac. R.R. Co. v. United States, 356 U.S. 1, 5 (1958), *cited with approval in* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50 (1977).

44. *See, e.g.,* Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36, 50-51, 57-59 (1977); White Motor Co. v. United States, 372 U.S. 253, 263 (1963); Worthen Bank & Trust Co. v. National BankAmericard, Inc., 485 F.2d 119, 126 (8th Cir. 1973), *cert. denied,* 415 U.S. 918 (1974).

45. The Ninth Circuit recognized the novelty of the Maricopa agreement by stating, "In truth, we know very little about the impact of this and many other arrangements within the health care industry. This alone should make us reluctant to invoke a *per se* rule with respect to the challenged arrangement." *Maricopa,* 643 F.2d 553, 556 (9th Cir. 1980), *rev'd,* 457 U.S. 332 (1982).

46. One commentator points out several unique aspects of the health care industry: (1) it is not easily evaluated by consumers, thus consumer choice is not as important as it is in other areas; (2) a large portion of services in the industry are compensated by third party insurers; and (3) demand for health care is frequently controlled by the provider. Rosoff, *Antitrust Laws and the Health Care Industry: New Warriors Into an Old Battle,* 23 ST. LOUIS U.L.J. 446, 447 (1979). The same commentator suggests that "[t]here are many elements unique to the health care field which may make traditional antitrust approaches inappropriate." *Id.* at 479.

47. 421 U.S. 773, 788-89 n.17 (1975).

48. *Id.* One commentator has suggested this passage indicates that "most activities of professional groups should be analyzed according to the 'rule of reason,' even though the conduct complained of might be a *per se* violation in another context." Tyler, Goldfarb v. Virginia State Bar*: The Professions are Subject to the Sherman Act,* 41 MO. L. REV. 1, 11 (1976). The Court also stated in *Goldfarb* that, "[i]t would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas." Goldfarb v. Virginia State Bar, 421 U.S. 773, 788 n.17 (1975).

49. *Maricopa,* 457 U.S. at 349.

dollars.[50] The prevention of exorbitant medical costs, resulting in more affordable care to the community, certainly constitutes a public service. Therefore, in rendering its decision, the majority should have considered the Maricopa plan's impact on the public service aspect of the health care profession.

Finally, the majority's assertion that an alteration of the *per se* rule is better directed to the legislature appears misplaced. The Court created the *per se* rule and determined the types of agreements to which it should apply.[51] The legislature did not participate in defining the rule's application in the past and the majority gives no valid reason why they should begin to do so now.

As precedent, future courts should give the *Maricopa* decision a very narrow interpretation. The legislature enacted the Sherman Antitrust Act as a shield to protect an unwary public against restraints that destroy competition and attack the stability of the economic system. The *Maricopa* Court distorts this purpose and threatens to erase nearly a century of judicial interpretation by returning to earlier constructions of the Sherman Act which condemned every restraint of trade regardless of whether the restraint was reasonable. If this trend is not reversed, then innovative agreements among professionals, which serve to benefit the public, may be struck down as *per se* unlawful and their beneficial effects will be lost forever.

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50. *Id.* at 342.
51. Northern Pac. R.R. Co. v. United States, 356 U.S. 1, 5 (1958).