University of Dayton Law Review

Volume 6 | Number 1 Article 3

1981

The Per Se Rule: Alive and Well and Living in Catalano

Richard J. Favretto
U.S. Department of Justice

THE PER SE RULE: ALIVE AND WELL AND LIVING IN CATALANO

*Richard J. Favretto**

The antitrust plaintiff's favorite rule of liability—the *per se* rule—has through the years served as the cornerstone of substantive analysis under Section 1 of the Sherman Act. Recently, however, the Rule has been rumored to be undergoing hard times in the courts. Such a development, if true, would be of no mean significance to the Antitrust Division of the United States Department of Justice. The scope and application of the *per se* rule to a given set of facts frequently is the focus of many of the cases with which the Division deals on a day to day basis. The propriety of characterizing a course of conduct as subject to *per se* liability often determines whether or not a case is appropriate for criminal prosecution. Moreover, even in the civil area, the scope of the *per se* rule becomes a key factor in structuring the government's approach to litigation.

After the change in membership of the Supreme Court during the days of Chief Justice Warren, and particularly after the Supreme Court's opinions in *Continental T.V., Inc. v. GTE Sylvania, Inc.*,[1] and, more recently, *Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc.*,[2] many antitrust conferences began predicting the imminent erosion and demise of the *per se* rule as a tool of antitrust analysis. Many lawyers around the country began, depending upon their perspective, either gleefully or despondently anticipating the ultimate narrowing and perhaps judicial repeal of the *per se* rule in all but the most extreme cases of anticompetitive purpose and effect. To paraphrase Mark Twain, these reports of death of the *per se* rule have been grossly exaggerated. Indeed, this fundamental tool of Sherman Act analysis continues to endure and even flourish.

The *per se* rule acts as a conclusive presumption that certain practices that generally lack any redeeming competitive virtue because they are so plainly anticompetitive, are illegal without further inquiry or examination.[3] Of course, applying the *per se* rule requires characterizing

*Deputy Assistant Attorney General, Antitrust Division—U.S. Dep't of Justice. B.A., Iona College, 1963; LL.B., Catholic University Law School, 1966. Paper originally delivered before the 1980 Lyle P. Jones Antitrust Conference, Vacation Village Hotel, San Diego, California.

1. 433 U.S. 36 (1977).

2. 441 U.S. 1 (1979). *See* Redlich, *The Burger Court and the Per Se Rule*, 44 ALB. L. REV. 1 (1979).

3. Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958). *See generally* 1 E. KITNER, FEDERAL ANTITRUST LAW § 8.3 (1980) [hereinafter cited as KITNER].

the challenged conduct within a category of behavior which has been, or should be, presumed unlawful. Often this characterization merely involves analyzing the practice on its face. Sometimes, however, where a less direct or obvious restraint is involved, a more detailed assessment of the conduct is necessary.[4] This process of characterization in *per se* cases should not be confused with whether the rule itself remains intact.

Increasingly, the reasons for the original adoption and evolution of the *per se* rule maintain today. The rule fulfills the dual purposes of judicial economy and business certainty, objectives which are increasingly important in today's complex and evolving economic system. Far from being eroded or attenuated, the rule stands as firmly as ever against the variety of clear cut anticompetitive restraints that it embraces.[5] The rule, far from being narrowed, should be expanded where appropriate to achieve the purposes for which it has been widely recognized through the years. In an era of already too—complex litigation, the *per se* rule should and will play a major role in future antitrust litigation.

After the Supreme Court's opinion in *Continental T.V., Inc. v. GTE Sylvania, Inc.*,[6] many lawyers, both defense and plaintiff, predicted an era of judicial hostility to the *per se* rule and a trend toward additional economic analysis in antitrust litigation. Consequently, many antitrust cases would become encumbered in an incredibly complex economic analysis that would be incomprehensible to jurors. Nevertheless, *GTE Sylvania* and subsequent cases carry no such message. The recent Supreme Court decision in *Catalano, Inc. v. Target Sales, Inc.*[7] demonstrates the contrary.

GTE Sylvania represents no more than a statement by the Supreme Court concerning the inadvisability of extending the *per se* rule to vertical territorial and customer restrictions. The Supreme Court's refusal to expand the *per se* rule was foreseeable because *United States v. Arnold, Schwinn & Co.*,[8] in extending the *per se* rule to vertical restraints, had surprisingly accomplished what the court refused to do only four years earlier in *White Motor Co. v. United States*.[9] Because

4. *See* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L.J. 775 (1965). Professor Bork traces the origins of the Rule of Reason and explores the divergent views of the Court.

5. *See* note 3 *supra*.

6. 433 U.S. 36 (1977).

7. 100 S. Ct. 1925 (1980).

8. 388 U.S. 365 (1967), *rev'd*, Continental T.V., Inc. v. GTE Sylvania, Inc., 433 U.S. 36 (1977).

9. 372 U.S. 253 (1963).

the *Schwinn* doctrine proved unworkable, however, lower courts sought artificial distinctions to circumvent *Schwinn* in situations where its application imposed harsh and perhaps anticompetitive results.

In *GTE Sylvania*, the Supreme Court merely conceded that extending the *per se* rule in *Schwinn* to a new category of conduct had been accomplished through an insufficient foundation of judicial experience with the practice in question and by an inadequate analysis of the underlying economic and business justifications. Thus, in *GTE Sylvania*, the issue was more one involving the necessary basis for the *extension* of the rule to a new category of business activity rather than the *application* of the rule to an already established category of *per se* unlawful conduct.

The Court in *GTE Sylvania* did not, however, foreclose the extension of the *per se* rule to appropriate cases involving vertical nonprice restraints. Rather, the Court indicated that such particular applications should be made on the basis of hard economic analysis instead of the "formalistic line drawing"[10] undertaken in *Schwinn*. Since *GTE Sylvania*, some lower courts have continued to characterize vertically imposed customer and territorial restrictions as *per se* unlawful in given factual circumstances.[11]

The *GTE Sylvania* Court affirmed, rather than eroded, the significance of the *per se* rule when it recognized the continued validity of the *per se* rule for resale price agreements and when it endorsed the *per se* rule in *United States v. Topco Associates, Inc.*[12] for horizontal territorial restrictions.[13] Recently, in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*,[14] the Supreme Court again confirmed the validity of the *per se* rule for resale price fixing. For these reasons, *GTE Sylvania* is much less credible support for arguing that the viability of the *per se* rule is fading.

Another recent case that has tended to support critics of the *per se* rule is *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc. (ASCAP)*.[15] *ASCAP* did not, however, attenuate the *per se* doctrine. Instead, *ASCAP* involved characterization, an issue that turns on the particular facts of any given case: Is the conduct in question a species of activity that falls into a *per se* category?

In *ASCAP*, the Court essentially stated that the practice of marketing a blanket copyright license was not a horizontal combina-

10. 433 U.S. at 59.
11. *E.g.*, Eiberger v. Sony Corp. of America, 459 F. Supp. 1276 (S.D.N.Y. 1978).
12. United States v. Topco Assocs. Inc., 405 U.S. 596 (1972).
13. 433 U.S. at 51, n.18 and 58, n.28.
14. 100 S. Ct. 937 (1980).
15. 441 U.S. 1 (1979).

tion to fix prices. Rather, the Court declared that the practice was a joint venture formed to market a product that could not otherwise exist and that the pricing mechanism for that product was a necessary consequence of the joint venture activity.[16]

In a sense, the *ASCAP* Court viewed the activity in question as the creation of a new product by joint venture partners. Determining the price of that product necessarily constituted a joint effort by the venturers, but not a horizontal agreement among competing sellers of the same product. Thus the arrangement, whatever its competitive significance, should be determined according to a rule of reason analysis. Nowhere in *ASCAP*, however, does the Court retreat from the propriety of *per se* rules in antitrust litigation. Indeed, the Court recognized the utility and necessity of *per se* antitrust analysis[17] by citing the famous language in *Northern Pacific Railway Co. v. United States.*

Another recent Supreme Court decision which supports the general validity of *per se* analysis, has been cited by commentators as signifying the Supreme Court's suspicion about *per se* rules. In *National Society of Professional Engineers v. United States*,[18] the Court struck down a competitive bidding restraint embodied in a professional society's canon of ethics, as unlawful on its face without requiring elaborate industry analysis to demonstrate the anticompetitive character of the canon.[19] Because the Court extensively discussed the parameters of a rule of reason analysis and its failure to explicitly characterize the restraint in that case as a *per se* violation, *Professional Engineers* has been interpreted as an indication of the Supreme Court's reluctance to apply a *per se* analysis to indirect pricing restraints.[20]

Both the district court and the circuit court had no trouble characterizing the *Professional Engineers* restraint as unlawful *per se*.[21]

---

16. *Id.* at 20-24.

17. *Id.* at 8, n.11 (citing Northern Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958)).

18. 435 U.S. 679 (1978).

19. *Id.* at 692-93.

20. *See* R. POSNER, *Information and Antitrust: Reflections on Gypsum and Engineers Decisions*, 1187 (1979); Robinson, *Recent Antitrust Developments—1979*, 80 COLUM. L. REV. 1, 13-27 (1980); Sullivan & Wiley, *Recent Antitrust Developments: Defining the Scope of Exemptions, Expanding Coverage, and Refining the Rule of Reason*, 27 U.C.L.A. L. REV. 265, 302 (1979).

21. United States v. Nat'l Soc'y. of Professional Engineers, 389 F. Supp. 1193 (D.D.C. 1974), *aff'd* (*rev'd on other grounds*) 555 F.2d 978 (D.C. Cir. 1977), *rev'd*, 435 U.S. 679 (1978). Judge Smith made separate findings of fact and law. The court concluded that § 11(c) of the National Society of Professional Engineer's Code of Ethics:

> [P]rohibits defendant's [Society] members from engaging in any form of price competition when offering their services; selection is restricted to considerations

Extensive findings of fact had demonstrated the plainly anticompetitive nature and scope of the competitive bidding ban and had convinced the lower courts that *per se* characterization was appropriate. A fair reading of the Supreme Court's opinion indicates that the Court was applying, in substance, a *per se* rule to the practice in question and affirming the analysis of the lower courts in that case. Although the Court stated that the practice did not constitute price fixing as such, the Court concluded that the competitive bidding ban was unlawful on its face.[22] Because the Court deemed the justifications urged by the defendant in *Professional Engineers* to be irrelevant even under the rule of reason test, some have argued that the Court's discussion of that issue implies that the case involved a rule of reason analysis. I do not believe this is correct. Although the words "*per se*" are not used to describe the violation, the analysis of the restraint as being unlawful on its face without requiring elaborate industry inquiry certainly suggests that the Court treated the restriction as a *per se* violation. This is the interpretation the opinion has received from lower courts dealing with competitive bidding restraints in other contexts.[23]

---

of reputation and ability. No fee information may be given a prospective client which takes the form of cost estimates or other proposals in terms of dollars, man days of work required, or percentage of construction cost which can be compared to that of another engineer.

Id. at 1200. The court specifically held in the third conclusion of law that § 11(c) has as its purpose and effect "the suppression and elimination of price competition for the sale of engineering services in *per se* violation of § 1 of the Sherman Act." *Id.* at 1216 (citations omitted).

The court of appeals in United States v. Nat'l Soc'y of Professional Engineers, 555 F.2d 978 (D.C. Cir. 1977), affirmed in part and remanded with instructions to limit the district court's holding that the society must "state affirmatively that it does not consider competitive bidding to be unethical." *Id.* at 984. because the order is overly intrusive into protected first amendment freedoms than is necessary to protect governmental interests. The court of appeals did affirm, however, the district court's holding that the ethical canon was a *per se* violation of section 1 of the Sherman Act. "Defendant's prohibition of competitive bidding, by blocking the free flow of price information, strikes at the functioning of the free market. The Society may not have engaged in direct price fixing as such, but its prohibition of free price competition is not far removed, in both legal and practical consequence." *Id.* at 981.

22. 435 U.S. at 692-93.

23. *E.g.*, United States v. Texas State Bd. of Pub. Accountancy, 464 F. Supp. 400 (W.D. Tex. 1978), *aff'd per curiam*, 592 F.2d 919 (5th Cir. 1979), *cert. denied*, 100 S. Ct. 262 (1979). The decision in *Professional Engineers* signified a major victory for antitrust enforcement for the appropriate analysis to be instituted under the rule of reason. In that case, the Court finally clarified the test of Sherman Act legality in a rule of reason case: the procompetitive and anticompetitive aspects of the practice in question are balanced against each other. Other considerations of social policy, absent statutory exemption from the Sherman Act, simply are irrelevant in a rule of reason case. This opinion clarified the reach of the Sherman Act in cases presenting more ambiguous competitive practices where the immediate anticompetitive impact or purpose

The most recent pronouncement of the Supreme Court on the *per se* rule came in *Catalano, Inc. v. Target Sales, Inc.*[24] In *Catalano*, the Court said that it was not retreating from the application of the *per se* rule to pricing restraints of whatever nature. In an impressive affirmation of the basic doctrine enunciated in *United States v. Socony-Vacuum Oil Co.*,[25] the Court addressed the question whether an agreement restricting the extension of credit was a *per se* restraint. The Court's *per curiam* opinion, rendered with neither full briefs on the merits nor oral argument, summarily reversed the Ninth Circuit. The Court held that a horizontal agreement to terminate the practice of giving credit is tantamount to an agreement to eliminate discounts that falls squarely within the traditional *per se* rule against price fixing. The short shrift that the Supreme Court afforded *Catalano* should resolve any doubts about the continuing validity of the *per se* rule. Furthermore, the Court's citation of *Professional Engineers* in *Catalano* as illustrating the type of indirect pricing agreements that it has formerly held unlawful *per se*, supports an interpretation of *Professional Engineers* as a *per se* case.[26]

The Department of Justice views *Catalano* as a ringing endorsement of the *per se* rule in cases involving pricing restraints. Additionally, *Catalano* reaffirms the Court's long-standing reliance on *per se* analysis in other antitrust cases and supports a *per se* enforcement policy in cases involving horizontal territorial division, boycotts, and other practices traditionally subject to *per se* treatment.[27] As business practices become more sophisticated, and as the anticompetitive impact becomes less clear in particular cases, the litigation battle may well focus on appropriate characterization of the practice in question. Prosecutors and plaintiffs should be ready for this; but such difficulties in cases involving indirect restraints have always existed. These realities of a sophisticated economic system and the dynamics of antitrust litigation, however, should not be interpreted as a retreat from the *per se* rule. The Sherman Act is amazingly flexible and adaptable.

---

is unclear. Although the competitive effect of such restrictions may need to be measured against the peculiar industry context and surrounding circumstances, the bottom line of legality is the competitive significance of the restraint. It is in this area that *Professional Engineers* will have its widest and most lasting impact. Its explication of the rule of reason is a procompetitive, proenforcement articulation of the basic policy underlying the Sherman Act.

24. 100 S. Ct. 1925 (1980) (per curiam).
25. 310 U.S. 150 (1940).
26. Catalano, Inc. v. Target Sales, Inc., 100 S. Ct. 1925, 1927 (1980).
27. *See generally* KITNER, *supra* note 3.

At the same time, however, its basic principles remain constant and fundamental.

The process of properly characterizing a practice will ultimately turn on good, old-fashioned common sense, and that, after all, is what the *per se* rule is all about. The courts will continue to foreclose specious arguments defending agreements, the anticompetitive nature of which, is apparent. For example, the *Catalano* Court summarily rejected the defendants' argument that the credit restriction in that case increased the certainty of consumer information about prices and made entry more feasible for potential competitors.[28] As the Court recognized, to permit such arguments in defense of agreements tampering with competitive pricing would stand the antitrust laws on their head.

Catalano should quiet the rumors about the imminent demise of the *per se* rule. That case and the others previously considered indicate a healthy future for the *per se* rule as a tool of judicial analysis and antitrust enforcement. Predictions after *GTE Sylvania*, *ASCAP*, and the Ninth Circuit opinion in *Catalano*, that litigation on the merits in section 1 cases would become hopeless contests between industry experts, economic experts, and other prognosticators, were no more than wishful thinking on the part of many and hand wringing on the part of some.

Lawyers have occasionally despaired at the seeming willingness of some lower courts to eschew *per se* analysis in favor of what was perceived as a Supreme Court invitation to engage in difficult economic analysis in almost every antitrust case. Furthermore, some private lawyers have doubted the ability of plaintiffs to prove liability in a case depending upon a *per se* characterization. These predictions probably will never materialize. Instead, the Supreme Court in *Catalano* has sounded a message that the lower courts should more closely scrutinize *Professional Engineers*, *ASCAP* and *GTE Sylvania*, and confirm what has proven to be sound and effective judicial reliance upon the *per se* rule. Although the characterization of a particular practice in a particular case may be disputed, no question should remain about the continued validity of the *per se* rule in antitrust litigation.

28. 100 S. Ct. at 1928.