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BLOG

Is It *Per Se* Unconstitutional to Apply the *Per Se* Rule in a Criminal Antitrust Prosecution?

NOVEMBER 20, 2019

A pending *certiorari* petition under the title *Sanchez et al. v. United States*, no. 19-288, asks the U.S. Supreme Court to consider the question: "whether the operation of the *per se* rule in criminal antitrust cases violates the constitutional prohibition—grounded in the Fifth and Sixth Amendments—against instructing juries that certain facts presumptively establish an element of a crime." Criminal defendants in several other recent cases have raised similar questions – a fact noted by the head of the U.S. Department of Justice's Antitrust Division in recent senate testimony. If the Supreme Court takes up the question, *Sanchez* would mark the first time since 1945 that the Supreme Court has considered application of the *per se* rule in a criminal case, according to petitioners.[1]

The petitioners in *Sanchez* are three real estate investors convicted of rigging bids to purchase properties at foreclosure auctions in California from 2008-2011. The petitioners coordinated their bidding at auctions and then conducted private secondary auctions among themselves to determine who would actually acquire the property. However, petitioners contend—but were not allowed to argue to the jury—that their conduct was procompetitive and necessary to overcome huge barriers to small investors competing against banks in foreclosure auctions. They argue that, but for their coordinated bidding conduct, they would not have participated in as many auctions and the final sale prices would actually have been lower. They further sought to introduce economist expert evidence demonstrating that auction prices did indeed decrease after their alleged conduct ceased.

As antitrust practitioners know, several categories of conduct are treated as "*per se*" antitrust violations under long established case law. Bid rigging and price-fixing are the most common examples of *per se* illegal conduct. In deeming such conduct illegal *per se*, courts have found the conduct to be so presumptively harmful to competition that defendants are not allowed to argue that there was any countervailing benefit or procompetitive justification. The category of *per se* unlawful conduct has ebbed and flowed somewhat over time—behaviors like minimum resale price maintenance were once consider *per se* illegal, but no longer.[2]

The *per se* rule stands in contrast to the "rule of reason," which is the default rubric under which alleged antitrust violations are evaluated. Under the rule of reason, fact finders must balance the conduct's anticompetitive harm against any procompetitive benefits. For example, in an antitrust challenge to an exclusive distribution contract of a branded product, harm from denying competing sellers access to a particular product could be outweighed by procompetitive benefits from the exclusive seller investing more in promoting the product and enhancing inter-brand competition.

The *per se* rule is also not found in the text of the Sherman Act or other antitrust statutes. Rather it is a judge-created rule in case law. Nearly all of that law has arisen in the context of civil antitrust enforcement. Indeed, criminal antitrust enforcement has been relatively rare historically. However, in recent decades, the U.S. Department of Justice has increasingly sought criminal penalties and jail time for price-fixing and bid rigging, with the average prison sentence for criminal antitrust convictions increasing from eight months in the 1990's to 19-20 months since 2000, although fewer prosecutions have occurred during the Trump administration. This trend toward criminal enforcement has been encouraged by Congress over time, as it has passed laws increasing the possible fines and terms of imprisonment for antitrust violations – from a misdemeanor to a felony with a maximum sentence of three years in 1974, and then increasing the maximum sentence to 10 years in 2004.[3]

But in potential tension with the *per se* rule, is a line of constitutional decisions holding that in criminal prosecutions juries must make the factual determinations as to each element of the charged crime. Based on that principle, the Supreme Court has struck down "irrebuttable or conclusive presumptions" in criminal prosecutions, which could impinge Fifth and Sixth Amendment rights by taking key factual decisions away from a jury.[4]

It remains to be seen whether the Supreme Court will take up the case. As it stands, the petitioners cannot point to a circuit split as a hook for the Court's interest. However, other factors suggest *Sanchez* could have a shot at *certiorari*. First, the Solicitor General initially waived the government's right to respond to the *certiorari* petition, but the Court then requested the government to submit a response,[5] thus signaling the Court's interest in these issues. Second, multiple amici have now weighed in to support petitioners' efforts, include the Due Process Institute and the National Association of Criminal Defense Lawyers. Third, although the circuit courts have been consistent in finding it constitutional to apply the *per se* rule in a criminal context, petitioners can point to differing justifications and standards in different circuits.[6] Cutting both ways is that the petitioners here can claim a fairly unique fact pattern where they sought to offer procompetitive justifications for their bid rigging and offered economic evidence to support it.

Notably, the petitioners do not seek to challenge the *per se* rule generally. They go to lengths to say that the rule may appropriately be applied in civil cases—it is only in the criminal context that petitioners seek a change in law.[7] Should the Supreme Court take up the case, this could prove an interesting opportunity for the Court to distinguish between treatment of antitrust violations in a criminal and civil context, and revisit the defenses available to criminal defendants.

Update: *On January 13, 2020, the Supreme Court denied certiorari in* Sanchez, *leaving the petitioners' convictions and the Ninth Circuit's ruling to stand. As is customary, the Supreme Court gave no reasons for its decision not to hear the appeal. Going forward, we expect that criminal antitrust defendants will continue to raise challenges to the application of the* per se *rule, and perhaps the Court will have occasion to address the question in the future. But for now, the* per se *rule will continue to be applied and criminal defendants in price-fixing and bid-rigging cases will likely continue to be barred from offering procompetitive defenses for their actions.*

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[1] *See United States v. Frankfort Distilleries*, 324 U.S. 293 (1945).

[2] *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

[3] *See* Antitrust Procedures and Penalties Act of 1974, Pub. L. No. 93-528 (1974); Antitrust Criminal Penalties Enhancement and Reform Act of 2004, Pub. L. No. 108-237 (2004).

[4] *See, e.g., Francis v. Franklin*, 471 U.S. 307, 317 (1985).

[5] *See* docket, S. Ct. No. 19-288, https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/19-288.html

[6] *See* Sanchez Petition at 18-20, https://www.supremecourt.gov/DocketPDF/19/19-288/114264/20190830123225264_Final_Marr_Cert_Petition_.pdf.

[7] *See, e.g.,* Sanchez Petition at 11, 15, https://www.supremecourt.gov/DocketPDF/19/19-288/114264/20190830123225264_Final_Marr_Cert_Petition_.pdf.

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