New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 262—NO. 114
THURSDAY, DECEMBER 12, 2019

WHITE-COLLAR CRIME

Expert Analysis

Supreme Court Asked To Assess Per Se Rule in Criminal Antitrust

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In recent years, practitioners have observed a tension between criminal enforcement of the broadly written terms of the Sherman Antitrust Act of 1890 and the modern Supreme Court's notions of statutory interpretation and due process in the criminal law context. A certiorari petition filed in late August in *Sanchez et al. v. United States*, no. 19-288, asks the Supreme Court to address this tension, as embodied in the judge-made per se rule. The rule, a longstanding feature of antitrust doctrine, provides that certain categories of agreements among competitors are barred without further inquiry regarding whether, in fact, they unreasonably restrained trade. The question presented in *Sanchez* is "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."

Some notable recent cases in the financial arena have been criminally prosecuted under the Sherman Act. Two such cases include the acquittal last fall of three London-based foreign exchange traders tried in the Southern District of New York based on their participation in a chat room referred to as "the cartel" and the conviction just last month in the same court of former J.P. Morgan foreign exchange trader Akshay Aiyer. Justices on both ends of the Supreme Court's ideological spectrum, animated perhaps by the criminal law jurisprudence of the late Justice Antonin Scalia, have shown marked hostility to judge-made rules that stray beyond the statutory text or trench upon the jury's role in finding every element of a crime. With Justices Neil Gorsuch and Brett Kavanaugh now in the mix, the *Sanchez* petition offers an intriguing test of how far the court may be willing to press these principles in the face of longstanding precedent.

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The Per Se Rule

Section 1 of the Sherman Act declares illegal "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce … ." Passed in the heyday of the common law, the broad language of the Act is often viewed as in effect a directive to the courts to develop a common law of fair competition. In the seminal case interpreting the Act, *Standard Oil Co. v. United States*, 221 U.S. 1 (1911), the Supreme Court held that the Act required a standard of interpretation of the "rule of reason," meaning that only agreements that unreasonably restrain trade are prohibited. As the case law interpreting the Sherman Act has evolved, the legal assessment of reasonableness typically entails a complex and detailed economic analysis that weighs any pro-competitive

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and anti-competitive impacts of the conduct in its specific market context. Under the per se rule, however, if the agreement is determined to fall into certain defined categories—now limited to price fixing, customer allocation, or bid-rigging—no consideration is given to any claimed efficiency enhancing or pro-competitive justification of the conduct. As a matter of law, agreements falling into such categories are presumed to pose such a great risk of anti-competitive impact and to have so little likelihood of pro-competitive or legitimate efficiency enhancing benefit as to be per se unreasonable. In these cases, no assessment of claimed positive impact is required or permitted.

History of Criminal Sherman Act Enforcement

An amicus brief filed by the National Association of Criminal Defense Lawyers in support of the *Sanchez* certiorari petition traces how modern criminal antitrust enforcement has evolved as something of an overlay to a statute and common law doctrines that were primarily intended for, and long primarily enforced in, the civil context. Indeed, the original legislation proposed by Senator Sherman was intended as a broadly construed "remedial statute" providing that anti-competitive agreements be subject to private actions for double damages and civil forfeiture actions by the government. Sherman intended the statute to be a "bill of rights, a charter of liberty." After wending its way through various committees of both the House and Senate, where attempts were made and then withdrawn to actually define the evil legislated against—"trusts"—the law that emerged, still with broad, undefined language, nevertheless included a provision that allowed for criminal misdemeanor liability. The bill's legislative history recognized that the broad terms of the statute would need to be defined by the courts: The author of the House Judiciary Committee report on the bill admitted that neither he "nor any man could know just what contracts" will be barred by the law "until the courts determine." The NACDL brief quotes one supporting representative referring to the bill as "experimental" and "blind legislation" through "a bill of which no one can tell the meaning"; he asked in the floor debate: "Was ever criminal law made in this fashion before?"

> Long years of Sherman Act precedent, and the absence of a split in the lower courts, may deter the court from taking up the 'Sanchez' case.

The NACDL brief cites a 1970 statistical study by Judge Richard Posner finding that "[f]or eighty-four years, the Sherman Act remained a misdemeanor statute, under which imprisonment was 'a rarely used sanction,' imposed in 'fewer than 4 per cent of … criminal cases,'" often involving acts of violence. An uptick in criminal enforcement was seen in the 1930s and 1940s, but sanctions remained low, with imprisonment being rare. During this period, that the Supreme Court first articulated the per se rule in its 1940 decision in *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150.

In reaction to inflation and outrage about influence peddling in the Nixon administration (following news reports tying the Justice Department's settlement of an antitrust case against ITT Corp to a campaign contribution), the misdemeanor penalty provision of the Sherman Act was amended to a felony violation in 1974 and the maximum term of sentence was increased from one year to three years and fines were raised to $1 million for corporations and $100,000 for individuals. In 2004, the criminal penalties were further increased to imprisonment of up to 10 years and fines of $100 million for corporations and $1 million for individuals.

The certiorari petition in *Sanchez* offers the court an opportunity to re-examine the per se rule in light of the changed reality of increased criminal penalties and enforcement, with the promise of more to come in an era when many in the popular press, and a number of presidential candidates, forcefully are calling for increased criminal antitrust enforcement against big technology and other companies.

'Sanchez'

The petitioners in the case were owners and operators of separate real estate businesses in California which engaged in purchasing bank-owned properties in foreclosure auctions after the financial crisis. The government indicted the company owners in 2014 on charges of bid rigging in violation of the Sherman Act, alleging that although the petitioners were competitors, they conspired

to rig bids at auctions by agreeing in advance not to bid against each other on certain properties. Once the property was obtained, the parties conducted a private resale auction among themselves to determine the ultimate owner.

Petitioners admitted that they coordinated the bidding, but asserted it was necessary given the extraordinary circumstances that prevailed in the California foreclosure market at the time. They argued that the bank-owners exerted their control of the auction markets by withholding information about the properties (i.e., whether they were occupied, the condition of the property, existing liens, and chain of title) and listing hundreds of properties for sale, but deciding at the last minute which properties actually would be sold at the auction such that a buyer could not perform any due diligence. Because the properties were purchased "as is" with no disclosure or warranties and, under state law, the bids were irrevocable, the petitioners were at a great disadvantage in bidding at the auctions, and the banks used their control over the process to purchase the foreclosed properties themselves at below-market prices, thereby realizing substantial profits.

The company owners sought to show at trial that given these extraordinary and unique circumstances, they had to coordinate in bidding in order to be able to participate in the auctions at all. They argued that their efforts were in fact pro-competition, not anti-competitive. The petitioners proffered evidence, in the form of two expert declarations analyzing the market, as well as an empirical study showing that after the government raided their offices and stopped the claimed conspiracy, auction prices actually went *down*.

The trial court denied the petitioners' attempts to submit such evidence, ruling that the because bid rigging activity admitted by the petitioners constituted a per se violation of the Sherman Act, any evidence that their behavior was reasonable or resulted in no economic harm was irrelevant. The petitioners were convicted and sentenced to terms of imprisonment ranging from 18 to 30 months with substantial fines. The Ninth Circuit affirmed the convictions, taking the position that it was bound by years of case law holding that no assessment of reasonableness was allowed for per se conduct.

In their certiorari petition, the petitioners argue that the application of the per se rule in the criminal context is unconstitutional. Specifically, they assert that it deprives defendants of the rights afforded in the Fifth and Sixth Amendments to have a jury decide whether the prosecution has proven every element of a charged offense beyond a reasonable doubt. In support of this position, the petitioners cite longstanding precedents, highlighted by the Supreme Court in more recent years, that any jury instruction that takes an element away from the jurors by directing them to rely on an "irrebuttable or conclusive presumption" is unconstitutional.

Sanchez and his co-petitioners argue that the question presented to the court arises at the juncture of two separate lines of case law. First is the common law creation of the per se rule, which holds that in certain types of antitrust cases, the unreasonableness of the activity is conclusively presumed. The second is the constitutional criminal procedure cases which hold that conclusive presumptions are never allowed.

The per se rule was adopted by the courts as an efficiency measure. Because the examination of whether given conduct is a "reasonable" restraint of trade can be complex and costly, as the Supreme Court observed in *Arizona v. Maricopa Cty. Med. Socy.*, 457 U.S. 332 (1982), the application of the per se rule offered convenience and "litigation efficiency" even though, the court acknowledged, it is sometimes "imperfect" because it relies on broad generalizations about commercial conduct. "For the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements that a full-blown inquiry might have proved to be reasonable."

As pointed out in another amicus brief filed in support of the *Sanchez* petition, because the economic foundations of the rule have proven shaky in a variety of applications, in recent decades the Supreme Court has narrowed or overturned some longstanding precedents regarding the particular types of restraints—for example, vertical price restraints—that are subject to the per se rule. Those decisions demonstrate that the per se rule by its nature sweeps in conduct that Congress may well not have intended the statute to cover.

The petitioners note that "imperfect"

conclusive presumptions such as the per se rule have been deemed appropriate in civil cases and "comport with due process so long as they 'bear a sufficiently close nexus with [the] underlying policy objectives.'" They argue, however, that conclusive presumptions have no place in criminal cases and have been deemed unconstitutional in other contexts.

First, a conclusive presumption violates a defendant's Fifth Amendment's due process clause guarantee that he is presumed innocent until he is proven guilty beyond a reasonable doubt because it forecloses any independent consideration of an element of the crime. In addition, it removes the decision from the hands of the jury, violating the Sixth Amendment's right to a jury trial. Petitioners argue that, as the Supreme Court pointed out in a decision this past year, litigation efficiency, which serves as the underlying justification for the per se rule, cannot trump these constitutional guarantees and, for this reason, the constitutional prohibition against conclusive presumptions must prevail over the judicially created per se rule. The petitioners suggest that the easiest way to resolve the tension between the two areas of law is to hold that the per se rule applies only to civil cases.

Government Response To 'Sanchez' Petition

The Solicitor General initially waived response to the *Sanchez* petition, but then the court requested that the government respond, suggesting the court's interest. In its response, the government forcefully marshalled longstanding precedents construing the Sherman Act in support of its fundamental argument that the per se rule is actually a substantive interpretation of the Sherman Act rather than an evidentiary presumption. Going back to the seminal decision of *Standard Oil Co. v. United States*, the Supreme Court has held that certain categories of restraint "were sufficiently pernicious that 'there is [no] question of reasonableness open to the courts.'" Price-fixing and bid rigging—the practice at issue in *Sanchez*—have fallen into this category from the earliest days.

The government asserts that the court first applied a conclusive concept of unreasonableness to a criminal prosecution in 1927 in *United States v. Trenton Potteries Co.*, 273 U.S. 392, holding that price-fixing agreements were in and of themselves unreasonable and an inquiry into the reasonableness of a particular price was unnecessary. The government argues that where these well-settled principles dictate that per se unreasonable conduct falls within the statute's prohibition "as a matter of law," there is no question of reasonableness to submit to the jury.

The government rejects the petitioner's argument that the per se rule has the effect of relieving the government of its burden of proving every element of the crime beyond a reasonable doubt. The rule, it asserts, does not affect what is required to prove a crime, but rather is a long-held substantive interpretation of the terms of the Sherman Act.

The government argues that Sanchez's petition for certiorari "boils down to a request that this court broadly reexamine its criminal antitrust jurisprudence based on petitioners' assertion that the court 'has been inattentive to the special problems that arise in criminal proceedings.'" Given the well-settled nature of the law, as exemplified by the unanimity of lower court precedents, the government asserts review is not necessary.

Conclusion

Long years of Sherman Act precedent, and the absence of a split in the lower courts, may deter the court from taking up the *Sanchez* case. But the petitioners make a strong argument that the application of the per se rule runs counter to the modern understanding of the constitutional guarantees afforded a criminal defendant, and the context in which the rule has been applied in criminal cases has significantly changed over the years. If the court does grant certiorari, the case could provide an interesting test of the direction of the current court's criminal law jurisprudence.