CARLTON FIELDS

Exemplar Motion in Limine

January 03, 2012

Introduction Unfortunately, we see an increasing number of cases where federal prosecutors overreach and choose to target individuals and businesses engaged in ordinary business conduct or conduct that, at worst, could be considered "sharp" and might more properly be the subject of a civil dispute. While it's always important in a federal criminal case to attack the Government's evidence, it is especially vital to do so in opposition to such overreaching. This motion is one example of how we can attack the Government's evidence in a pre-trial motion; it also serves to educate the judge about factual and legal flaws in the Government's theory of the case. This motion is from a recent federal criminal anti-trust case: **UNITED STATES DISTRICT COURT XXXXX DISTRICT OF XXXX** Case No. XXXXXX **DEFENDANT XXXX'S MOTION IN LIMINE TO EXCLUDE REFERENCE TO A PER SE VIOLATION OF THE SHERMAN ACT** Defendant, XXXX, through undersigned counsel, hereby moves in limine to exclude references to a per se violation of Section 1 of the Sherman Act, 15 U.S.C. § 1 and/or preclude treatment of the conduct alleged here as a per se violation of the Sherman Act. In support, XXXX states as follows. **I. The conduct here is not a per se violation of the Sherman Act.** Despite the unconditional language of Section 1 of the Sherman Act, it has long been recognized that its prohibition against all agreements in restraint of trade actually extends only to those agreements that restrain trade unreasonably. *Nat'l Collegiate Athletic Ass'n v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 98 (1984); *Board of Trade of Chicago v. United States*, 246 U.S. 231, 238 (1918); *National Bankcard Corp. v. Visa U.S.A. Inc.,* 779 F.2d 592, 597 (11th Cir. 1986). A literal reading of the statute would bring a large amount of commercial dealings to a halt. This was not the intention of the Sherman Act. As a result, there are two methods of analysis that are used to determine whether a particular concerted action violates Section 1 of the Sherman Act: the per se rule and the rule of reason. Courts apply the rule of reason to agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978). The per se rule is limited to certain categories of agreements that are so plainly anticompetitive and lacking in redeeming virtue that they are conclusively presumed to be illegal without elaborate inquiry into the precise harm that they have caused or their business justification. *See, e.g., Northern Pacific Ry. v. United States*, 356 U.S. 1, 5 (1985). Examples of per se violations include horizontal price-fixing agreements, *F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 4356 n. 19 (1990), vertical restraints that include "some agreement on price or price levels," *Business Elec. Corp. v. Sharp Elec. Corp.*, 485 U.S. 717, 735-36 (1988), horizontal agreements to

divide territory, *U.S. v. Topco Assoc.*, 405 U.S. 596, 508 (1972), and certain types of tying arrangements, *Northern Pac. Ry.*, 356 U.S. at 5-6. Horizontal price-fixing can, in appropriate cases, constitute a per se violation as noted *supra*; but it does not always do so. *Broadcast Music, Inc. v. Columbia Broadcasting System*, Inc., 441 U.S. 1, 12 (1979) ("BMI"). Rather, the per se rule will be applied to an arrangement, even if it is technically characterized as "price-fixing," only where "the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output" and is not designed "to increase economic efficiency and render markets more, rather than less, competitive." *Id.* at 19-20 (quoting *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n. 16 (1978). Thus, where the practice at issue is not a "naked restraint" and has elements that are plausibly designed to further economic efficiency and promote competition, the Sherman Act can be applied only through the rule of reason. Moreover, for the per se rule to apply, it must be apparent that a challenged practice has been "shown to have a pernicious effect on competition and lack … any redeeming virtue." *Northern Pacific Ry.*, 356 U.S. at 5. And this determination, in turn, is made only after the courts have had "considerable experience" with the type of "business relationship" at issue and have developed confidence that the challenged practice is nearly always anti-competitive. *BMI*, 441 U.S. at 9, citing *Topco Associates, Inc.*, 405 U.S. at 607-08. *BMI* is instructive. In that case, the Supreme Court reversed the Second Circuit's determination that joint pricing of copyrighted musical compositions was per se illegal. 441 U.S. 9. The issue was whether organizations serving as "clearinghouses" for owners and users of copyrighted musical material had engaged in per se price-fixing by establishing blanket license fees for the copyrighted material, which arguably served to avoid the necessity of scheduling, negotiating, and monitoring activities between the thousands of copyright owners and users. *Id.* The Court reasoned that the blanket license fee was a "necessary consequence" to permit the joint copyright license arrangement to function as a seamless whole. *Id.* at 20-21. Thus, the Court concluded that the blanket license rule is not a "naked [restraint] of trade with no purpose except stifling of competition." *Id.*, citing *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963). Instead, the Court held, where "the whole is truly greater than the sum of its parts," the rule of reason analysis applies. *Id.* at 21-22. Here, the Government alleges that the corporate co-conspirators provided international air transportation service for cargo and charged a rate for these services that included a base rate and surcharges, including a fuel surcharge. [Record Cite]. The Government further alleges that the defendants agreed to impose an increase in the fuel surcharge on air cargo shipped from the United States to locations in South and Central America. [Record Cite]. As alleged by the Government, the fuel surcharge is only one component of the ultimate price paid by the consumer of air transportation services. Because the fuel surcharge was only one component in the ultimate price paid by the consumer, the fuel surcharge, either as alleged or in fact, has no direct correlation to the ultimate price paid by the consumer. Accordingly, even if defendants agreed to fix the price of the fuel surcharge [1], it is not a "naked restrain[t] of trade with no purpose except stifling of competition" as required to give this conduct per se treatment. *White Motor Co.* 372 U.S. at 263. Most important, even if the fuel surcharge was "fixed," it is not a "practice [which] facially appears to be one that would always or almost always tend to restrict competition and decrease output" and is

not designed "to increase economic efficiency and render markets more, rather than less, competitive," as required by *United States Gypsum Co.*, to receive per se treatment. 438 U.S. at 441 n. 16. As noted *supra*, the practice of fixing the fuel surcharge *cannot* "restrict competition and decrease output" because the fuel surcharge is only one component of the price it has no direct correlation to the ultimate price paid by consumer. The fact that the ultimate price is not necessarily affected makes it impossible to allege or establish that competition was restricted. At trial, defendants expect to establish that the October 2005 fuel surcharge increase was one of a series of fuel surcharge increases in 2005, was driven by the market and the price of fuel, and was not the product of any illegal agreement. Moreover, because the fuel surcharge is only one element of an overall pricing scheme, it would be inappropriate to condemn it as a per se violation. There is no allegation that the base rate was "fixed;" or the security surcharges imposed on cargo flights; or the ultimate price paid by the customer. Here, "the whole is truly greater than the sum of its parts" and therefore, the rule of reason analysis applies. **II. The only conduct the Government will establish at trial is the exchange of information, which is not a per se violation.** The Government here, at most, will be able to prove an exchange of information among competitors. The dissemination of price information is not itself a per se violation of the Sherman Act. *United States v. Citizens & Southern National Bank*, 422 U.S. 86, 113 (1975). In fact, "The exchange of price data and other information among competitors does not invariably have anticompetitive effects; indeed such practices can in certain circumstances increase economic efficiency and render markets more, rather than less, competitive." *U.S. Gypsum Co.,* 438 U.S. at 442 n. 16. In the case of *United States v. Container Corp.*, 393 U.S. 333, 334-36 (1969), the court ruled that an exchange of price information among competitors without an agreement to fix prices was sufficient to raise antitrust concerns, but only in markets where certain structural conditions exist. Specifically, those conditions are: (1) a highly concentrated market dominated by relatively few sellers; (2) a fungible product; (3) competition that is primarily based on price; (4) inelasticity of demand. *Id.* at 337. In *Container Corp.*, the court reasoned that in markets that are oligopolistic, where the competition is for a fungible product, and demand is inelastic, the exchange of price information has the anti-competitive effect of stabilizing prices. 393 U.S. at 337. However, where the exchange of information takes place in a market that is competitive, where the product is not fungible, competition is based on quality rather than price, and the market is elastic, then no anticompetitive effect exists when information is exchanged. *See Rosefielde v. Falcon Jet Corp.*, 701 F. Supp. 1053, 1062 n. 14 (D.N.J. 1988) (quoting Von Kalinowski, 16A *Business Organizations*, 6A.02[2] n. 58). The *Container Corp.* case is distinguishable from the instant case, but for that very reason useful as a point of analysis. The air cargo industry is highly competitive and non-oligopolistic; the product is not fungible; and demand is not inelastic. First, the market in the air cargo industry is complex with many different aspects and influences, including the routes involved, the type of cargo shipped, whether the routes have return north-bound flights and the nature of the air cargo customers and those companies' ultimate customers. Air cargo customers have many options, not just air shipments and air shipments not limited to the four air cargo airlines identified in the indictment. Particularly, not only do the air cargo companies named in the indictment compete against each other, they compete against other similarly situated air cargo

companies, they compete against major airlines, including American Airlines, they compete against air cargo companies and major carriers willing to transship goods, they compete against truckers that will ship the goods by land, and cargo boats that will ship goods by sea [2]. Second, the air cargo industry is highly competitive. Not only do consumers have multiple options to ship goods, the evidence will show that consumers also have the option of waiting to ship goods until they get a better price. Moreover, the evidence will show that the customers often play one company against another to get a better and discounted price. Third, the product at issue here is variable. Air cargo companies provide a service – the air transportation of goods. Because it is a service and not a good, it is impossible for the service provided by each competitor to be identical. For instance, each company has different employees that are individuals and provide different levels of service to consumers. Further, competitors may have different planes that move faster or slower or move more goods than others. Additionally, competitors may ship goods to the same destination, but at different times, or by different routes. All these differences make it impossible for the product offered – air transportation services – to be viewed as a unitary product. Finally, the evidence will show that the demand for air transportation services is elastic. A customer may decide to ship on a boat or may decide not to ship at all if the customer does not like the price or the quality offered. Simply put, the air cargo market southbound from Miami is a buyers' market, and not a sellers' market. The evidence will show that the pricing in the air cargo market exhibited the very essence of a competitive market and did not reflect any improper agreements. Moreover, the evidence will show that consumers of air transportation services had endless choices, which coupled with an elastic market, makes it impossible to fix prices. Accordingly, because the conditions in *Container Corp*. are not present the conduct here should not receive per se treatment. **III. Conclusion** For the foregoing reasons, defendant XXXX respectfully requests that this court preclude reference to a per se violation of the Sherman Act and/or preclude treatment of the conduct alleged here as a per se violation of the Sherman Act. Moreover, defendant XXX submits that the rule of reason analysis applies, and that the jury should be so instructed. **RULE 88.9 CERTIFICATE** Undersigned contacted Government counsel and understands that the Government opposes the instant motion.

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[1] We do not concede that defendants agreed to fix any price, including the price of the fuel surcharge.
[2] Noticeably absent from the Government's indictment is any reference to other companies that provide air transportation services and other services that ship goods. The Government's indictment fails to properly define and identify the market for air transportation services. [Record cite]

Authored By

Michael S. Pasano

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