ALERT MEMORANDUM

Fourth Circuit Emphasizes Narrowness of the Per Se Rule in *U.S. v. Brewbaker*

December 18, 2023

On December 1, 2023, the U.S. Court of Appeals for the Fourth Circuit in *United States v. Brewbaker* entered an order reversing the district court's decision denying a motion to dismiss criminal charges brought under Section 1 of the Sherman Act. The district court had held that the Indictment alleged a per se illegal bid rigging conspiracy to submit bids that were higher than the defendants' customer's bids to a state agency. The Fourth Circuit reversed, holding that the alleged conspiracy should be analyzed under the rule of reason because of the supplier-customer relationship among the alleged conspirators.

The Fourth Circuit's decision emphasizes the narrow applicability of the per se rule to restraints among pure horizontal competitors to restrict price competition or to allocate markets. Short of such an agreement among pure horizontal competitors, the "presumptive" standard to judge the restraint is the rule of reason. The rule of reason standard can be displaced in favor of the per se rule "only when demonstrable economic evidence shows that the type of restraint at hand 'always or almost always' has 'manifestly anticompetitive effects' and 'lack[s] . . . any redeeming virtue.'" The court explained that the economic relationship alleged in the Indictment had both horizontal and vertical elements that made it impossible to condemn without detailed economic analysis under the rule of reason.

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The Fourth Circuit's decision is a significant setback for the Antitrust Division. The decision calls for a holistic analysis of the overall relationship among the parties to an agreement and the potential economic justifications for any restraint among companies that are anything other than pure competitors. Assuming the decision withstands the possibility of further appellate review, it is likely that the decision will have an effect across per se theories of antitrust liability and a disproportionate impact on the Antitrust Division's labor-related cases (such as no-poach, non-solicitation, and wage-fixing agreements), where the Antitrust Division has pursued criminal charges against suppliers and customers without crediting how the challenged agreements might promote broader, procompetitive relationships.

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I. Background

In October 2020, the Antitrust Division indicted Brent Brewbaker and his employer Contech Engineered Solutions LLC, which makes pipe and pipe fittings used in infrastructure projects and installs infrastructure projects for the North Carolina Department of Transportation ("NCDOT").[1] The Indictment (*U.S. v. Brewbaker, et al.*) alleged that, for nearly a decade, the defendants coordinated with their customer, Pomona Pipe Products, which also installs infrastructure projects for the NCDOT. The defendants allegedly worked with Pomona to ensure that Contech's bids to the NCDOT were higher than the bids submitted by Pomona.[2] The Indictment charged defendants with a per se unlawful bid rigging conspiracy under Section 1,[3] and with mail and wire fraud (and conspiracy to commit the same) for submitting false certifications that each NCDOT bid was "submitted competitively and without collusion."[4]

Later that same year, defendants filed a motion to dismiss, arguing that the restraint alleged in the Indictment had to be analyzed under the rule of reason, rather than the per se rule.[5] Defendants noted that it was typical practice for a manufacturer, like Contech, to avoid undercutting its own distributor's prices, since doing so would risk losing the distributor's loyalty.[6] The motion was supported by an expert affidavit from a professor of economics, who opined on the potential benefits of the type of restraint alleged.[7]

The district court denied the defendants' motion.[8] The district court held that the Indictment stated a per se illegal bid rigging conspiracy by alleging that "Contech formed an agreement with its fellow bid competitor [Pomona], pursuant to which bids to complete infrastructure projects, contract offers, were submitted to a third-party, NCDOT."[9] The district court rejected defendants' argument that the court should consider potential procompetitive justifications for the restraint because it concluded that the alleged practice was per se illegal. As the district court noted, "further inquiry on the issues of intent or the anti-competitive effect is not required" for practices found to be per se illegal.[10]

Contech pled guilty a few months later.[11] Brewbaker was convicted on all charges after trial in February 2022.[12] Following trial, Brewbaker appealed his conviction to the Fourth Circuit.[13] Brewbaker argued that the district court erred in rejecting his motion to dismiss for failure to plead a per se offense and that the error in the Section 1 charge impacted the jury's consideration of the mail and wire fraud charges.[14]

II. Reversal by the Fourth Circuit

On December 1, 2023, the Fourth Circuit reversed the district court's denial of the motion to dismiss on the

1 Indictment, *United States v. Brewbaker*, No. 5:20-cr-481-IFL(2) (E.D.N.C. Oct. 21, 2020), Dkt. No. 1 (the "Indictment").

2 *Id.* ¶¶ 14-15, 17.

3 *Id.* ¶ 22.

4 *Id.* ¶¶ 28, 37, 40.

5 Contech's Memorandum in Support of Motion to Apply "Rule of Reason" Under 15 U.S.C. § 1 to Antitrust Charge, *United States v. Brewbaker*, No. 5:20-cr-481-IFL(2) (E.D.N.C. Dec. 4, 2020), Dkt. No. 36. The rule of reason and the per se rule are two judge made tests for assessing the reasonableness of a restraint. When it applies, the per se rule imposes a presumption that the restraint is unreasonable and certain limits on the ability of a party to defend the conduct as procompetitive.

6 *Id.* at 5.

7 Exhibit 1 to the Appendix and Index of Exhibits to Contech's Memorandum in Support of Motion to Apply "Rule of Reason" Under 15 U.S.C. § 1 to Antitrust Charge, *United States v. Brewbaker*, No. 5:20-cr-481-IFL(2) (E.D.N.C. Dec. 4, 2020), Dkt. No. 37-1.

8 *United v. Brewbaker*, 2021 WL 1011046, at *1 (E.D.N.C. Mar. 16, 2021), *rev'd* 2023 WL 8286490 (4th Cir. Dec. 1, 2023).

9 *Id.* at *6.

10 *Id.* (quoting *United States v. W.F. Brinkley & Son Const. Co., Inc.*, 783 F.2d 1157, 1162 (4th Cir. 1986)).

11 Memorandum of Plea Agreement, *United States v. Brewbaker*, No. 5:20-cr-481-IFL(2) (E.D.N.C. May 11, 2021), Dkt. No. 92.

12 Jury Verdict, *United States v. Brewbaker*, No. 5:20-cr-481-IFL(2) (E.D.N.C. Feb. 1, 2022), Dkt. No. 225.

13 *United States v. Brewbaker*, No. 22-4544 (4th Cir.).

14 Brief of Appellant at 13-15, 18-19, *United States v. Brewbaker*, No. 22-4544 (4th Cir. Feb. 14, 2023), Dkt. No. 24. Brewbaker also challenged the constitutionality of the per se rule and the Sherman Act.

Section 1 count, agreeing with Brewbaker that the Indictment did not state a per se offense, but declined to vacate his conviction for mail and wire fraud.[15]

The Fourth Circuit noted that courts must evaluate whether the facts pled in an indictment, if true, state the charged offense when a defendant moves to dismiss.[16] Section 1 has four elements, including that the restraint of trade be "unreasonable."[17] The Antitrust Division argued that the alleged restraint was unreasonable because it fell into a category of restraints deemed per se illegal.[18] The Fourth Circuit held that whether the reasonableness of the conduct alleged in an indictment should be analyzed under the per se rule or the rule of reason is a question of law to be resolved by the court.[19]

The Fourth Circuit concluded that the alleged restraint did not fall into one of the categories of restraints that have already been condemned as per se illegal.[20] The Fourth Circuit explained that the Supreme Court has condemned only agreements among "purely horizontal" competitors as per se illegal.[21] By contrast, the relationship alleged in the Indictment had "both horizontal and vertical aspects" because Contech was a manufacturer and Pomona was its distributor.[22]

The Antitrust Division had argued that the restraint alleged *was* purely horizontal, but the Fourth Circuit rejected this argument.[23] First, the Antitrust Division argued that the appropriate rule to apply depends only on the part of the parties' relationship "restrained by the agreement," which the Antitrust Division argued was only the ability of Contech and Pomona to compete as horizontal competitors on bids to NCDOT.[24] The Fourth Circuit disagreed, concluding that it would not "disregard the parties' broader relationships when classifying a restraint" because "agreements that otherwise look identical in form produce different economic effects based on how the parties relate to one another."[25]

The Fourth Circuit also rejected the Antitrust Division's argument that the alleged conspiracy was analogous to hub-and-spoke conspiracies, where vertically-situated "hubs" have been found liable under the per se standard for coordinating a horizontal agreement among "spokes."[26] The Antirust Division argued that the hub-and-spoke decisions were examples of hybrid horizontal-vertical arrangements that had been condemned as per se illegal.[27] The Fourth Circuit rejected the analogy. The court held that in hub-and-spoke cases, the "hub" is held per se liable for facilitating a purely horizontal agreement among horizontal competitors, but has an economic relationship with each of the alleged conspirators that is purely vertical and analyzed under the rule of reason.[28] By contrast, the Indictment in *Brewbaker* alleged a "single agreement between two parties related *both* vertically and horizontally."[29]

In the absence of specific case law guidance, the Fourth Circuit concluded that the rule of reason presumptively applied.[30] The court held that the rule of reason could

15 *United States v. Brewbaker*, 2023 WL 8286490, at *15 (4th Cir. Dec. 1, 2023).

16 *Id.* at *10. The Fourth Circuit noted that courts have "as much of a responsibility to police" whether criminal indictments state an offense on motions to dismiss "as they do civil complaints." *Id.* at *4.

17 *Id.* at *4.

18 *Id.*

19 *Id.* at *4, 10 (court can analyze both "whether the alleged agreement falls in a category of restraint that has already been held to be per se unlawful" and "whether the per se rule should be extended to a new category of restraint in which the alleged agreement falls.")

20 *Id.* at *7 ("But does the *per se* rule apply to such a hybrid restraint? The Supreme Court has not yet told us.").

21 *Id.* at *7 n.9 ("The only restraints that the Supreme Court has held to be *per se* unreasonable are purely horizontal, or, in other words, are agreements between entities who are only related as competitors." (collecting cases)).

22 *Id.* at *5. The Fourth Circuit noted that the Indictment included "detailed factual allegations" about the relationship among the conspirators that it was "not required" to provide, but that the district court was obligated to consider since it was pled. *Id.* at * 13.

23 *Id.* at *8.

24 *Id.*

25 *Id.*

26 *Id.* at *9.

27 *Id.*

28 *Id.*

29 *Id.*

30 *Id.* at *7 ("We must begin with a 'presumption in favor of a rule-of-reason standard.'" (quoting *Business*

be displaced for a new category of restraint "only when demonstrable economic evidence shows that the type of restraint at hand 'always or almost always' has 'manifestly anticompetitive effects' and 'lack[s] . . . any redeeming virtue.'"[31] The Fourth Circuit noted that courts are able to look at case law, academic literature, and expert opinion submitted by the parties at the pleading stage to assess whether to extend the per se rule to a new category of conduct.[32]

The Fourth Circuit ultimately concluded that the rule of reason was not displaced for the restraint alleged in the Indictment, because it could not "predict with confidence" that the hybrid horizontal-vertical restraint "would be invalidated in all or almost all instances under the rule of reason."[33] The court explained that the restraint alleged was a form of dual distribution arrangement, where Contech both distributes its own products and sells them to its distributor Pomona.[34] The court noted that limitations on Contech's ability to bid lower than Pomona could "allow Contech to maintain its relationship with Pomona by making sure it never undercut, and thus upset, its distributor."[35] The Fourth Circuit held that this could have the effect of "eliminating intrabrand competition" between Pomona and Contech, but "could benefit interbrand competition" with other competitors by eliminating "channel conflicts."[36] The court acknowledged that the types of arrangement alleged in the Indictment may lead to "some" anticompetitive effects, but concluded that the "economic uncertainty" inherent in the analysis of these restraints shows the Indictment did not allege a per se violation.[37] The court determined that it could reverse the court below without actually resolving whether the alleged restraint violates the rule of reason, because the Indictment did not allege that the restraint was also illegal under the rule of reason.[38]

The Fourth Circuit separately affirmed Brewbaker's conviction for mail and wire fraud for making false statements that Contech's bids were "submitted competitively and without collusion" because Brewbaker and Contech "colluded with Pomona to obtain their total bid price and submit a non-competitive, intentionally higher bid."[39] Brewbaker did not challenge the sufficiency of the evidence against him on the fraud charges,[40] and instead argued that the jury instructions on the Section 1 charge infected the jury's instruction of mail and wire fraud. However, the Fourth Circuit noted that the mail and wire fraud jury instructions did not reference the Section 1 charge and specifically instructed the jury to carefully consider each count separately.[41] The court concluded that the assumption that the jury followed these instructions could only be overcome under "extraordinary" circumstances that were not met.[42]

III. Key Takeaways

The Fourth Circuit's decision is likely to pose difficulties for future efforts to extend the per se rule. The court's opinion emphasizes the narrow applicability of the per se rule to "purely" horizontal conspiracies to fix prices or to allocate markets. The court's decision shows that whether a restraint is purely horizontal must be considered in the context of the "broader relationship" among the alleged conspirators, rather

Electronics Corp. v. Sharp Electronics Corp., 485 U.S. 717 (1988))).

31 *Id.* (quoting *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886-87 (2007)); *see also id.* at *10 (courts "must consult economic evidence to determine whether the category of restraint has plausible procompetitive effects.").

32 *Id.* at *10.

33 *Id.* at *13 (quoting *Leegin*, 551 U.S. at 886-87)).

34 *Id.* at *11.

35 *Id.*

36 *Id.* at *12. The court explained that "channel conflicts" arise when a manufacturer undercuts its distributor and risk undermining the distributor's "incentive to provide valuable additional services or to market" or to sell the product. *Id.*

37 *Id.* at *13.

38 *Id.* at *11 n.13. The conclusion that the rule of reason applied was dispositive because the Antitrust Division generally criminally prosecutes only per se unlawful agreements. *E.g.*, U.S. Department of Justice, Antitrust Division, An Antitrust Prime for Federal Law Enforcement Personnel (April 2022), https://www.justice.gov/atr/page/file/1091651/download.

39 *Id.* at *14.

40 *Id.*

41 *Id*.

42 *Id.* at *14-15.

than narrowly looking at the restraint itself. The per se rule will apply to restraints among parties with more than simple horizontal relationships only if the Antitrust Division can show through "demonstrable economic evidence" that the "type of restraint at hand 'always or almost always' has 'manifestly anticompetitive effects' and 'lack[s] . . . any redeeming virtue.'" Going forward, the Antitrust Division will have to be prepared to meet that standard for Section 1 criminal prosecutions. The decision is a greenlight for defendants to rebut the Antitrust Division's arguments with evidence of plausible economic justifications as early as the pleading stage.

The decision suggests the Antitrust Division may have the burden to disprove arguments for the rule of reason at trial. The Fourth Circuit's decision is clear that the unreasonableness of a restraint is itself an element of a Section 1 offense in a criminal case, even where the Antitrust Division is pursuing a per se theory. Under the Constitution, the government has the burden of proving each element of a charge beyond a reasonable doubt.[43] Defendants may cite *Brewbaker* to argue that evidence of alleged conspirators' procompetitive relationships should be presented at trial, that courts should deliver favorable jury instructions on the import of procompetitive rationales, and that the court should grant acquittal if the Antitrust Division fails to prove that a restraint is per se illegal beyond a reasonable doubt.

The decision will impact all criminal Sherman Act cases and may have a disproportionate impact on Antitrust Division's approach to labor-related cases. The Antitrust Division has repeatedly emphasized that "firms that compete to hire or retain employees are competitors in the employment marketplace, regardless of whether the firms make the same products or compete to provide the same services."[44] Adhering to this view, the Antitrust Division has brought charges for alleged labor-related agreements against companies that clearly have broader relationships as business partners (e.g., *U.S. v. Patel, et al.*).[45] The Fourth Circuit's decision in *Brewbaker* suggests these prosecutions are misguided because the per se rule likely does not apply to these hybrid agreements.[46] However, labor-related agreements–even among business partners–remain risky in the current enforcement environment.

The Antitrust Division may seek further review of the decision. On December 1, the Antitrust Division sought an extension of time for panel rehearing or en banc review of the *Brewbaker* decision.[47] The Antitrust Division told the court that additional time was necessary to consider the decision because it addressed an issue of "exceptional importance to the criminal enforcement of the antitrust laws."[48] The court granted that request a few days later, and the decision thus remains subject to possible further appellate review.[49]

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43 In *Apprendi v. New Jersey*, the Supreme Court held that the Constitution "entitle[s] a criminal defendant to 'a jury determination that he is guilty of every element of the crime with which he is charged, beyond a reasonable doubt.'" 530 U.S. 466, 477 (2000) (quoting *United States v. Gaudin*, 515 U. S. 506, 510 (1995)).

44 Antitrust Guidance for Human Resource Professionals at 2 (Oct. 2016), https://www.justice.gov/atr/file/903511/download.

45 *See, e.g.*, Memorandum of Law of the United States in Opposition to the Defendants' Joint Motion to Dismiss the Indictment, *United States v. Patel*, 3:21-cr-220(VAB) (D. Conn. Aug. 10, 2022), Dkt. No. 216 ("Defendants are accused of engaging in a purely *horizontal* restraint between competing employers in an aerospace *labor* market. The existence of a *vertical* business relationship between some of those conspirators in a *services market* is irrelevant to the Court's resolution of this motion.").

46 Other courts have reached this conclusion, relying on similar reasoning as *Brewbaker* that hybrid no-poach agreements with some vertical elements are "not amenable to a *per se* approach" because they can plausibly promote interbrand competition *E.g.*, *Ogden v. Little Caesar Enterprises, Inc.*, 393 F. Supp. 3d 622, 633-34 (E.D. Mich. 2019).

47 Motion of the United States of America for Extension of Time to File Petition for Rehearing and for Rehearing En Banc, *United States v. Brewbaker*, No. 22-4544 (Dec. 1, 2023), Dkt. No. 58.

48 *Id.* at 2.

49 Order, *United States v. Brewbaker*, No. 22-4544 (Dec. 4, 2023), Dkt. No. 59.

IV. Conclusion

The Fourth Circuit's decision is a significant setback for the Antitrust Division and highlights the difficulty of extending the per se rule beyond coordination among purely horizontal competitors. The decision suggests that the Antitrust Division should take a more holistic view of the relationship among parties to an alleged restraint and should be prepared to explain why the challenged restraint has no plausible procompetitive justification in light of that broader relationship.

The decision remains subject to the possibility of further review. It is particularly important in the current enforcement environment that companies work with experienced antitrust counsel to evaluate potential restraints of trade, and ensure that antitrust compliance programs are up to date.

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