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Federal Appeate Court Narrow Scope of Per Se Rule

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On Dec. 1, 2023, the U.S. Court of Appeals for the Fourth Circuit reversed a bid-rigging conviction of a former aluminum products manufacturing company executive, holding that the alleged conspiracy should be analyzed under the more permissive rule of reason rather than the per se standard because of the supplier-customer relationship between the alleged conspiring bidders. The Fourth Circuit declined to reconsider its panel ruling on Feb. 16 despite the Department of Justice's (DOJ) arguments that the court's decision is inconsistent with long-standing Sherman Act precedent. Although the DOJ may still seek U.S. Supreme Court review of the Fourth Circuit's decision, if upheld the decision represents a significant restriction on the DOJ's prosecutions for alleged collusive conduct between parties when there is any type of vertical business relationship present.

Background

In October 2020, an aluminum manufacturing company (Contech) and its former executive (Brent Brewbaker) were indicted on six counts of alleged bid-rigging, conspiracy to commit fraud, and mail and wire fraud in connection with a decade-long conspiracy involving public works projects in North Carolina. According to the DOJ, Contech conspired with another aluminum manufacturer (Pomona Pipe) across numerous bids to ensure that Pomona always submitted a lower bid than Contech. And if Pomona was the winning bidder, Contech would supply Pomona with the aluminum needed for the public works contract. In a motion to dismiss the indictment, the defendants argued that this manufacturer-supplier relationship should control how the court should analyze the conduct, i.e., under the rule of reason rather than the per se standard. In its opposition, the DOJ argued that the manufacturer and supplier were holding themselves out to the world as competitors, and as such, this was classic bid-rigging conduct subject to per se analysis. On March 15, 2021, the court denied the defendants' motion to dismiss and agreed with the DOJ that the alleged conduct would be considered under a per se, rather than rule of reason, analysis.

In June 2021, Contech pleaded guilty to one count of bid-rigging and one count of conspiracy to commit mail and wire fraud and was sentenced to pay a $7 million fine as well as over $1.5 million in restitution.

And in February 2022, a federal jury found Brewbaker guilty of bid-rigging and five counts of fraud.

The Fourth Circuit Narrows the Per Se Rule

On appeal, the Fourth Circuit affirmed the five fraud convictions but reversed Brewbaker's bid-rigging conviction, holding that the alleged "hybrid" restraint with Contech and Pomona involved both vertical and horizontal components, and as such, failed to constitute a per se Sherman Act offense as charged in the indictment. The DOJ argued that the alleged restraint was unreasonable because it fell into a category of restraint—bid-rigging—that had regularly been deemed per se illegal. The government also maintained that the restraint was horizontal, as the alleged Contech and Pomona conspiracy related only to their horizontal competition in submitting public works bids in North Carolina.

The Fourth Circuit determined that the alleged bid-rigging conduct did not fall into a category of restraint that had been previously condemned as per se illegal. Noting that the Supreme Court had condemned purely horizontal competitor agreements as per se illegal, the court contrasted the hybrid nature of Contech and Pomona's alleged relationship in the indictment, as it contained both horizontal and vertical aspects. The court then concluded it would not "disregard the parties' broader relationships when classifying a restraint." And while it could be possible that Contech competed against Pomona, the court found there was insufficient economic evidence that bid-rigging between vertically related companies always harms competition: "The government would ask us to parse the form of agreement to see which part of Contech is affected … Antitrust law does not turn on such artificial mental gymnastics."

Without specific guidance from other courts, the Fourth Circuit found that the rule of reason standard—rather than per se—presumptively applied.

The DOJ sought an en banc review of the decision, arguing that the Fourth Circuit had "exempted a textbook horizontal bid-rigging conspiracy from per se scrutiny." The DOJ contended that the Fourth Circuit's holding "flouted multiple decisions of the Supreme Court, this court, and other courts of appeals" and that foreclosing the "application of the per se rule against horizontal price fixing, bid-rigging and market allocation in the presence of any vertical relationship would provide antitrust's 'supreme evil' … an easy get-out-of-jail-free card." But on Feb. 16, the Fourth Circuit issued a single-page order declining to reconsider its decision and added that no judge had requested a poll on the DOJ's petition. The DOJ will likely seek Supreme Court review of the Fourth Circuit's decision, but that has not occurred as of the time of publication.

What Does This Mean for You? Key Takeaways From the Fourth Circuit's Decision

Simply put, the Fourth Circuit's *Brewbaker* decision—if upheld—will pose significant challenges for application of the per se rule to traditionally collusive agreements between horizontal companies that also have a vertical business relationship.

The DOJ's traditional position has been that collusive conduct between competing bidders is per se illegal without regard to the competitors' business relationships. The Fourth Circuit upended that notion, and now horizontal bidders with a hybrid relationship may not be condemned to the draconian per se standard without additional economic and/or traditional rule of reason analysis.

It remains to be seen whether other courts will follow the Fourth Circuit's lead. The Fourth Circuit's approach calls on trial courts to examine and consider the complete economic relationship between the entities. Courts may need to consider not just the entities' relationship but also economic evidence relating to anticompetitive effects, procompetitive benefits and other important commercial factors.

Importantly, this type of evidence is consistent with a rule of reason analysis and is not typically present in per se matters. Moreover, the Fourth Circuit is welcoming this economic justification evidence and arguments as early as a motion to dismiss a criminal indictment, so that a court can determine whether the per se standard should apply in a specific case.

This ruling may have a broad impact on antitrust matters beyond alleged bid rigging conspiracies. For example, for alleged labor market-related cases, in its original October 2016 Antitrust Guidance for Human Resource Professional proclamation, the government declared that companies that compete to retain or hire employees are competitors in the employment market, whether or not those companies are otherwise competitors or even make the same products/offer the same services.

Under *Brewbaker*, it seems less likely that such hybrid relationships between companies would be subject to the per se standard.

The *Brewbaker* decision reflects a narrowing and additional erosion of the per se rule, and further restricts what DOJ can and cannot prosecute as a per se matter. In response, we can expect to see DOJ continue to add fraud-related charges to charging documents to bolster the government's Sherman Act charges.

Stay tuned.

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