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Case Comment

Antitrust: Agreement to Exchange Price Information Violates Sherman Act

Defendants, producers of 90 percent of the corrugated containers in the southeastern United States, exchanged on request the most recent prices charged or quoted to specific customers. Information was exchanged infrequently and irregularly and often the information sought was available from the customers themselves. The product was basically a homogeneous one for which the demand was inelastic, and the industry was characterized by excess capacity and a downward trend of slightly varying prices. Even so, the number of manufacturers and plants had increased because of the rapid growth of total demand and the ease of entry into the industry. The government brought a civil action charging a price fixing agreement in violation of section 1 of the Sherman Act.¹ The lower court found no agreement to exchange information for the purpose of maintaining price uniformity nor any restriction of price competition. The Supreme Court reversed, *holding* that the agreement to exchange prices had an anticompetitive effect on the industry in violation of section 1 of the Sherman Act. *United States v. Container Corporation of America*, 393 U.S. 333 (1969).

As originally enacted in 1890, section 1 of the Sherman Act was too broad to be applied literally and the courts have had to exercise substantial discretion in its application.² While agreements to fix or maintain prices were held to be unlawful per se,³ other restraints upon interstate commerce were prohibited by the Sherman Act only if they were unreasonable.⁴ This "Rule of Reason" that developed from the case law is more

1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.

Sherman Act § 1, 15 U.S.C. § 1 (1964).

2. *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911).

3. *United States v. Socony Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927).

4. *United States v. American Tobacco Co.*, 221 U.S. 106, 179-80 (1911); *Standard Oil Co. v. United States*, 221 U.S. 1, 60 (1911). An activity which is unlawful per se is an automatic antitrust violation requiring no investigation into its actual or probable effect. An activity which is not unlawful per se is unlawful only if it is unreasonable. G. LAMB & S. KITTELLE, *TRADE ASSOCIATION LAW AND PRACTICE* 22 (1956) [hereinafter cited as LAMB].

than a simple test of whether competition has been restrained. Since a restraint *may* regulate or even promote competition, only those restraints that suppress or destroy competition are deemed unreasonable. The factors to be considered in determining reasonableness are the nature of the business involved, the condition of the industry both before and after the restraint was in effect, the nature, history and purpose of the restraint, and the actual and probable effects of the restraint.⁵

Both sellers and buyers have a legitimate interest in maintaining a free flow of market information.⁶ Sellers base their production programs on their knowledge of market behavior, and buyers can purchase more wisely when given access to the information. This results in a benefit to society as a whole by making competition more workable. Trade associations or cooperative exchanges of market data by trade rivals are appropriate mechanisms for forwarding all of these interests.⁷ The question to be asked in applying the "Rule of Reason" is whether such cooperation promotes informed though independent decision making or common judgment and behavior.⁸

The Supreme Court has applied the "Rule of Reason" to the exchange of market information by trade associations in a number of cases.⁹ Illustrative of these is *Maple Flooring Manufacturers Association v. United States*¹⁰ where association members controlling 70 percent of the production of certain types of flooring received information regarding average cost figures for the flooring,¹¹ freight rates from a fixed point¹² and statistics detailing past sales.¹³ Despite the stabilizing effect on the in-

5. *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918).

6. Stocking, *The Rule of Reason, Workable Competition, and the Legality of Trade Association Activities*, 21 U. CHI. L. REV. 527, 542 (1954) [hereinafter cited as Stocking].

7. *Id.*

8. *Id.* at 543.

9. *Sugar Institute, Inc. v. United States*, 297 U.S. 553 (1936); *Cement Mfrs. Protective Ass'n v. United States*, 268 U.S. 588 (1925); *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563 (1925); *United States v. American Linseed Oil Co.*, 262 U.S. 371 (1923); *See Tag Mfrs. Institute v. FTC*, 174 F.2d 452 (1st Cir. 1949); *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921).

10. 268 U.S. 563 (1925).

11. *Id.* at 566.

12. *Id.* at 566-67.

13. The trade association in *Maple Flooring* did not provide information regarding *current* price quotations, the identity of specific customers or details concerning new orders. However, the members attended meetings where trade conditions were discussed and their statistics were widely reported to trade journals, the Department of Commerce and the Federal Reserve Bank.

dustry and the resultant uniformity of prices, the Supreme Court did not find an unreasonable restraint of trade since the association neither reached nor attempted to reach "any agreement or any concerted action with respect to prices or production or restraining competition."¹⁴

Various factors have emerged from the cases following *Maple Flooring* as indicative of the reasonableness of the exchange of information between members of a trade association.¹⁵ Those factors are:

- (1) *Market structure or the collective power of the participants in the plan.* The greater the market power of the participants, the greater the danger of price uniformity at an unnaturally high price level.
- (2) *Whether the participants must adhere to the exchanged or published prices.* While adherence may eliminate price discrimination, it is likely that it amounts to a method of fixing prices.¹⁶
- (3) *Whether past sales prices, current list prices, or price offers for future sales are reported.* Reporting of offers for future sales may inform other sellers that they should charge a certain price, whether identical to a competitor's or not. This practice would maintain a given price structure or differential and reduce price competition whereas the reporting of past or current prices would not effectively accomplish this purpose.¹⁷

14. 268 U.S. at 586; *accord*, *Sugar Institute Inc. v. United States*, 297 U.S. 553, 598 (1936).

15. In *Cement Mfrs. Protective Ass'n v. United States*, 268 U.S. 588 (1925), the exchange of price information on specific job contracts was held to be lawful because the scheme was designed to prevent fraud on the seller. The price uniformity did not result from an agreement but from the competition meeting prices that became known through other channels of communication. The Court also held that as long as individual judgment in extending credit was preserved, the exchange of information concerning the credit worthiness of customers was not unlawful even though not made public. *Id.* at 599-600.

In *Tag Mfrs. Institute v. FTC*, 174 F.2d 452 (1st Cir. 1949), the members sold about 95 percent of the tag products purchased and used in the United States. The activities of the Institute consisted of the compilation and coordination of comprehensive price lists, terms and conditions of sales, and detailed definitions and specifications for each quality of tag product sold. Invoices were collected to verify reports and failure to comply with the requirements and reports resulted in a penalty. Buyers' access to the information—as opposed to sellers'—was merely nominal. The court of appeals found no unreasonable restraint of commerce and based its decision on the failure to show a price fixing agreement. The court characterized the price lists as public property and the reporting of off-list sales as merely reporting past transactions. *Id.* at 462-66.

16. *See Sugar Institute, Inc. v. United States*, 297 U.S. 553, 582-86 (1936).

17. However, if prices move slowly this may be just as effective as reporting future prices. Also, if there is a small time lag, the reporting of past prices may amount to the reporting of current or future prices.

- and would more likely be upheld.¹⁸
- (4) *The frequency of reporting and the time lag between a past sale and the report of its price.* A small time lag would permit another seller to know the price which he must quote to a customer and thus would amount to the reporting of current prices.¹⁹
 - (5) *Whether the seller, buyer and particular transaction are identified.* If these facts are disclosed the seller might feel pressure against deviating from the status quo since all who receive this information will know who has initiated a change. This information is not likely to have any legitimate use and therefore would be a factor showing unreasonableness.²⁰
 - (6) *Whether stock or inventory reports and estimates of future production are made.* While such information can be very useful in analyzing market conditions, in the case of an industry with a homogeneous product and a stable market, estimates of future production suggest the use of quotas. This is especially true where capacity exceeds demand and relatively few companies have a consistent share of the market.²¹
 - (7) *Whether average cost figures are reported.* Average cost figures may help many small firms that experience difficulty in determining their costs. While this may cause uniformity in the procedure for determining costs, it should not by itself carry antitrust implications.²²
 - (8) *Whether off-list sales are reported.* An off-list sale represents a sale made at a price other than the published list price. Reporting of off-list sales adds to the pressure not to deviate from list prices, especially where the identity of the seller is also reported.
 - (9) *Whether there is an inspection system.* Since an inspection system may be necessary to enforce a price or production fixing agreement but is not really necessary to insure an accurate reporting scheme,²³ its presence tends to show unreasonableness.

18. LAMB, *supra* note 4, at 51; see Miron, *Antitrust Implications of the Exchange of Business Information*, 10 ANTITRUST BULL. 485, 497 (1965) [hereinafter cited as Miron].

19. The required frequency of reporting—annual, monthly, weekly or daily—depends on the industry, the statistical program and the evidence of an illegal purpose or agreement which the program may cause.

20. LAMB, *supra* note 4, at 42; see Miron, *supra* note 18, at 496-97; see also *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 573 (1925) where the Court commented favorably on the omission of the names of sellers and purchasers in the information exchanged. It should be noted that special circumstances may relax this rule of thumb against disclosure of individual data, as in *Cement Manufacturers* where information on specific job contracts was needed to prevent fraud on the sellers by the buyers. *Cement Mfrs. Protective Ass'n v. United States*, 268 U.S. 588, 603-04 (1925).

21. LAMB, *supra* note 4, at 41, 49-50.

22. See *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 568-70 (1925).

23. LAMB, *supra* note 4, at 47-49; see *American Column & Lumber Co. v. United States*, 257 U.S. 377, 410 (1921). It is usually in the

- (10) *Whether there are penalties for failure to make the required reports or for making inaccurate reports.* Generally the existence of such penalties raises suspicions of unlawful agreement.²⁴
- (11) *Whether meetings among the participants or competitors take place.* There is generally no prohibition against meeting to discuss common problems, the condition of the industry, etc., unless the meetings provide evidence of an unlawful agreement.²⁵
- (12) *Whether there is an analysis of the statistics published with the other information.* This may give rise to the inference that collective judgment has replaced individual judgment.²⁶
- (13) *Whether the exchanged information is available to buyers or the public.* If information is not available to buyers, the sellers may have an unfair advantage.²⁷
- (14) *Whether nonmember competitors of an association or plan are permitted to have access to the plan.* Participation in a statistical program should not be withheld if a competitive advantage to members would result in an unreasonable restraint of trade.²⁸

These factors or elements of reasonableness, when considered together, permit one to conclude that the critical question is whether the exchange of information restricts individual decision-making, resulting in an unreasonable restraint of trade.²⁹ These factors serve as the basis for analyzing the *Container* opinion.

seller's own interest to make his reports accurately because only if all sellers do this will the published information be accurate and thus useful.

24. LAMB, *supra* note 4, at 47-49. *But see* Tag Mfrs. Institute v. FTC, 174 F.2d 452, 461, (1st Cir. 1949), where the court held that a valid reporting scheme is not made invalid by the existence of penalties. This statement merely means that a penalty system alone will not cause an agreement to be unreasonable. This is also true of the other factors, since they must be considered together in determining reasonableness.

25. LAMB, *supra* note 4, at 50; *see* Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563, 574-75 (1925); American Column & Lumber Co. v. United States, 257 U.S. 377, 396-410 (1921); *cf.* Miron, *supra* note 18, at 497.

26. LAMB, *supra* note 4, at 49-50; *see* American Column & Lumber Co. v. United States 257 U.S. 377, 410 (1921). *See also* Miron, *supra* note 18, at 496.

27. Sugar Institute, Inc. v. United States, 297 U.S. 553, 596-97 (1936); LAMB, *supra* note 4, at 43-55; *see* Miron, *supra* note 18, at 494-95. It is not clear to what extent sellers must make the information available to buyers or the public. In Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563 (1925), there was wide dissemination, while in Tag Mfrs. Institute v. FTC, 174 F.2d 452 (1st Cir. 1949), information was available only at great expense to those who desired it. The exchange of information in both of these cases was held to be reasonable.

28. LAMB, *supra* note 4, at 47. It should be noted that members of a program may desire to include competitors in their statistics to make them more meaningful.

29. LAMB, *supra* note 4, at 30 states that the general rule of thumb for keeping within the antitrust laws is that:

[T]here [can] be no agreements, express or implied, which

After distinguishing earlier decisions involving the exchange of price information,³⁰ the majority in *Container* analyzed the factors involved in the determination of reasonableness. The important facts as the majority saw them were the market structure, the homogeneous nature of the product and the inelasticity of the demand. These facts made price the most important variable in the competition even though prices had stabilized in a slightly downward trend. The majority felt that this stabilizing effect constituted a limitation or reduction of price competition and held that such effect was unlawful per se under *United States v. Socony Vacuum Oil Company*.³¹

Both the concurring and dissenting opinions repudiated the need to find a violation per se. The dissent argued that the government had failed to prove either a purpose or effect of restraining competition³² while the concurring opinion stated that the probability of such effect was so high that the evidence offered was sufficient.³³

While the majority appears to rely on the per se rule of *Socony*, it does examine the market structure, the nature of the product, the effect of the exchange of prices and some of the factors previously discussed. An examination of these factors is generally inconsistent with a per se test and is more appropriate to a reasonableness test. If the majority intended a reasonableness test their reliance on *Socony* is misplaced. The most likely interpretation—though never explicitly stated—is that the majority analyzed those factors associated with a reasonableness test to determine if there was a price fixing agreement.

restrict the individual's freedom to make independent business decisions [The exchange of information] should afford enlightenment and possibly a forum for . . . [discussing mutual problems and interests] but it should not substitute group judgment for that of the individual in the day-to-day conduct of the latter's business.

30. 393 U.S. at 334-35.

31. 310 U.S. 150 (1940). The Court also referred to *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921), and *United States v. American Linseed Oil Co.*, 262 U.S. 371 (1923) as analogous cases but did not rely on them. 393 U.S. at 337.

32. The dissent found that neither of these alternatives was supported by the evidence or the lower court's findings of fact. The effect of restraining competition was supported only by the government's *theoretical* assumption, which was adopted by both the majority and concurring opinions, that prices would have fallen further than they did if price information had not been exchanged. Thus, in accordance with the "Rule of Reason" the dissent found that exchanged information was used to reach an individual price decision and thus the exchange was reasonable. 393 U.S. at 343-47.

33. *Id.* at 339.

Once they decided a price fixing agreement existed, the application of the per se rule became appropriate.

There seems to be no reason for the sudden departure of the majority from the "Rule of Reason" in analyzing the exchange of information among competitors. While it is true, as the opinion points out, that the facts of *Container* are not identical to any prior case, it does not follow that the reasoning of those cases should be disregarded, especially when no basis for the per se approach is asserted. The broad language of *Socony* that "stabilization is but one form of manipulation"³⁴ is in conflict with *Maple Flooring*. There the Court said that while the exchange of price information has a stabilizing effect and results in price uniformity, this stabilization is not an unreasonable restraint of commerce or in any respect unlawful.³⁵ The *Socony* Court distinguished *Maple Flooring* by pointing out that the issue in the latter was the existence of a price fixing agreement.³⁶ The Court in *Container* did not find the existence of an express price fixing agreement, but merely an effect on prices caused by an agreement to exchange price information.³⁷ It thus appears that the facts of *Container* are closer to *Maple Flooring* and the line of cases using the "Rule of Reason" than *Socony* and the line of cases holding that price fixing agreements are illegal per se. Therefore, it was error for the Court to apply the per se rule of *Socony*.

Assuming that the "Rule of Reason" should have been applied in *Container*, the previously isolated factors should have been employed to determine the reasonableness of the exchange of price information. In lieu of this detailed analysis however, the majority merely assumed that the combination of excess capacity and increased number of sellers could only mean that there were excess profits attracting the new sellers into the industry.³⁸ While this was a possible inference, it was by no means a necessary one, especially in light of greater demand and a downward trend of prices. The ease of entry and the growth in the number of sellers suggested the industry was not in danger of becoming oligopolistic. Moreover, the majority seemed to ignore important

34. 310 U.S. at 223.

35. *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563, 582 (1925); *accord Sugar Institute, Inc. v. United States*, 297 U.S. 553, 598 (1936).

36. 310 U.S. at 217.

37. 393 U.S. at 335-37.

38. It should be noted that no evidence as to the level of profits was ever introduced.

findings of fact by the trial court, such as the highly competitive nature of the industry, the use of independent business judgment in setting prices,³⁹ the lack of uniformity, harmony, stability or parallelism in prices, and the downward trend of prices while the costs of labor and supplies were rising.

Had the Court analyzed reasonableness in terms of the factors previously set forth, it would have found an exchange of information scheme that was generally less comprehensive than that of any case previously discussed, especially that of *Maple Flooring*. The information was exchanged infrequently and irregularly, the buyers were aware of the prices quoted,⁴⁰ the information was generally restricted to the requesting seller and not widely circulated, there was no penalty for refusal to supply information, there was no exchange of production, stock or cost information, there was no evidence that the scheme was restricted to the named defendants and there was no statistical analysis of the exchanged information. Collectively, these factors tend to show that the setting of prices resulted from independent business judgment and not from an industry-wide mandate.

A comparison of the facts of *Container* with the factors of reasonableness reveals that the weight of the evidence supports the position of the dissent that the exchange of information did not have an anticompetitive effect. It appears that the majority has applied precedent incorrectly by following the *per se* rule of *Socony* instead of the reasonableness test of *Maple Flooring*. Applying the general standard of reasonableness, the slight change, if any, in the industry due to the exchange of price information, the failure to prove an anticompetitive effect on the industry and the fact that the exchange of price information did not deprive trade rivals of their independent judgment in making business decisions,⁴¹ it must be concluded that there was no unreasonable restraint of commerce.

39. *United States v. Container Corp. of America*, 273 F. Supp. 18, 26-27 (M.D.N.C. 1967). At least 16 factors entered into the decision to quote a specific price of which the exchanged price or the competitor's price was just one.

40. Although all buyers did not have the exchanged price information for all transactions, each one had it for each transaction in which he was involved. Thus, when seller A requested seller B to report the last price charged to buyer X, X also knew the price and was in the position of waiting for the best quote from at least two buyers.

41. *Stocking*, *supra* note 6, at 543.

