No. 79-1101

In the Supreme Court of the United States

OCTOBER TERM, 1979

CATALANO, INC., ET AL., PETITIONERS

v.

TARGET SALES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

WADE H. MCCREE, JR.
Solicitor General
Department of Justice
Washington, D.C. 20530

In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1101

CATALANO, INC., ET AL., PETITIONERS

v.

TARGET SALES, INC., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES AS AMICUS CURIAE

The question presented in this case is whether an agreement among competing wholesalers to eliminate cost-free trade credit previously extended to retailers is a form of price fixing illegal per se under Section 1 of the Sherman Act, 15 U.S.C. 1. The proper application of the per se rule against price fixing is a matter of general public importance. It is of especially great interest to the United States. The United States is principally responsible for enforcing Section 1 of the Sherman Act, and more than half of its antitrust cases involve price fixing. See generally *National Society of Professional Engineers* v. *United States*, 435 U.S. 679 (1978).

1. In November 1972, petitioner Catalano and several other beer retailers filed an antitrust complaint against the beer wholesalers in Fresno, California (Pet. App. 2; Pet. 5). They charged that in late 1967 the wholesalers

agreed to sell to retailers only on the basis of advance payment or payment on delivery. *Ibid.* Previously, each wholesaler had permitted certain retailers to tender payment 30 days after delivery without interest, and credit terms for individual retailers varied substantially (Pet. 4). Under the California regulatory scheme then in effect, 30 days was the maximum period for which a wholesaler of alcoholic beverages could extend free credit. Competition among wholesalers took the form of providing free trade credit within this period since California law permitted producers of alcoholic beverages to prescribe ~~wholesale~~ retail prices. See Cal. Bus. & Prof. Code §§ 25509, 25000, 24755(i).[1]

Petitioners contended in the district court that the challenged agreement to eliminate free trade credit was a form of price fixing illegal per se under the Sherman Act (Pet. App. 2). Although it rejected that contention, the district court certified the question under 28 U.S.C. 1292(b) (Pet. App. 17-20).

A divided panel of the court of appeals affirmed (Pet. App. 1-15). The court recognized that an agreement to eliminate trade credit "tends to impair competition" and would be illegal per se if it were part of a broader price

---

[1]Recently, California's regulatory plan, permitting resale price maintenance for alcoholic beverages, has been challenged on antitrust grounds. In *Rice* v. *Alcoholic Beverage Control Appeals Board*, 21 Cal. 3d 431, 579 P. 2d 476, 146 Cal. Rptr. 585 (1978), the California Supreme Court held that state prohibitions against retail sale of distilled spirits for less than producer-prescribed prices are preempted by the Sherman Act. Retail price maintenance on the sale of wine has met a similar fate. See *Capiscean Corp.* v. *Alcoholic Beverage Control Appeals Board*, 87 Cal. App. 3d 996, 151 Cal. Rptr. 492 (1979). The validity of California's resale price maintenance scheme is currently before this Court in *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, No. 79-97 (argued Jan. 16, 1980).

fixing scheme or if "competition with respect to price primarily centered on credit terms" (Pet. App. 7, 4-5). Nonetheless, the court concluded that the agreement did not concern price but rather "a 'non-price' condition of sale," and that the agreement "may actually enhance competition * * * by removing a barrier perceived by some sellers to market entry" or "by increasing the visibility of the price term * * *" (Pet. App. 4). Accordingly, the court of appeals remanded the case for trial under the rule of reason, although it suggested that an extensive inquiry would be unnecessary because the agreement appeared on its face to be anticompetitive (Pet. App. 7).[2]

Judge Blumenfeld dissented, concluding that the challenged horizontal agreement among wholesalers to eliminate free trade credit was plainly anticompetitive and a form of price fixing (Pet. App. 11). He pointed out that interest-free credit effectively reduces the price of beer, and that retailers denied free trade credit by a conspiracy among wholesalers have been forced to pay a higher price (Pet. App. 12). Judge Blumenfeld also noted that the majority's holding that petitioners alleged sufficient financial injury to withstand a summary judgment motion was premised squarely on the fact that the challenged agreement increased the cost of purchasing beer (Pet. App. 15). Thus, the majority's disposition of the summary judgment issue directly contradicted its holding on the price fixing issue. *Ibid.*

---

[2]The court of appeals also reversed the district court's grant of summary judgment against petitioner Catalano and one of the other plaintiffs. It found that these plaintiffs had adequately alleged financial injury even though the precise amount of damages had not been ascertained.

3. The court of appeals' holding that a conspiracy to eliminate free trade credit is not a form of price fixing is both erroneous and important.

a. This Court established long ago that because the "aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition," such agreements are illegal per se. *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 397-398 (1927). Since price is the "central nervous system" of our competitive economy, the prohibition against price fixing extends beyond simple agreements to set a specific price. *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 221-224, 226 n.59 (1940). It includes concerted actions which directly or indirectly have the purpose or effect of controlling price—"the machinery employed by a combination for price-fixing is immaterial." *Id.* at 221-224. As the Court has recently emphasized, any "agreement that 'interfere[s] with the setting of price by free market forces' is illegal on its face." *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 692 (1978), quoting *United States* v. *Container Corp.*, 393 U.S. 333, 337 (1969).

The agreement among wholesalers to eliminate free trade credit, as alleged in petitioners' complaint, is clearly such an illegal agreement. It is elementary that the value of a given payment of money is directly affected by the timing of the payment. The opportunity to defer payment has economic value because funds that are retained rather than immediately disbursed can be put to alternative commercial uses, as reflected by the prevailing interest rate. Thus, the provision of interest-free credit is economically identical to offering a discounted price. The recipient of the credit enjoys use of the funds in question without cost. Elimination of this element of the quid pro quo is functionally the same as a price increase. See J. Henderson & R. Quandt, *Microeconomic Theory* 228 (1958); W. Nicholson, *Microeconomic Theory* 136 (1972); A. Alchian & W. Allen, *University Economics* 176-177 (1972). Thus, the court of appeals' description of free trade credit as a "nonprice condition" (Pet. App. 4) is contrary to both commercial reality and economic theory.[3]

This Court has recognized that in the usual sale on credit, the credit component is part of the purchase price. See *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 507 (1969); see also *id.* at 511, 515 (White, J., dissenting); *United States Steel Corp.* v. *Fortner Enterprises, Inc.*, 429 U.S. 610, 622 (1977) (Burger, C.J., concurring). The elimination of interest-free credit by conspiratorial agreement is indistinguishable from agreements to eliminate discounts previously afforded to customers—agreements that are illegal per se. See, *e.g.*, *United States* v. *Olympia Provision & Baking Co.*, 282 F. Supp. 819, 828 (S.D.N.Y. 1968), aff'd per curiam, 393 U.S. 480 (1969); *United States* v. *United Liquors Corp.*, 149 F. Supp. 609, 611 (W.D. Tenn. 1956), aff'd per curiam, 352 U.S. 991 (1957).[4]

---

[3]The court cited L. Sullivan, *Handbook of the Law of Antitrust* § 99 (1977), as its only authority for characterizing the elimination of interest-free trade credit as a "non-price" condition. However, while the cited text does discuss the possible legality of certain product standardization agreements, it does not suggest that agreements to eliminate interest-free credit are permissible.

[4]The court of appeals had difficulty distinguishing the present case from traditional price fixing cases. It acknowledged that the agreement here in question "tends to impair competition" (Pet. App. 7). It also acknowledged that the agreement would be illegal per se if it were part of a broader price fixing scheme or occurred in an industry where "competition with respect to price primarily centered

b. The erroneous ruling of the court of appeals is one that merits correction by this Court at this time. The per se rule against price fixing agreements has been an important part of antitrust enforcement for more than half a century. It embodies the judgment that certain kinds of agreements are so sure to produce harm to competition that they must be forbidden and that the resources of the courts need not be consumed in evaluating them individually. *United States* v. *Trenton Potteries Co.*, *supra*, 273 U.S. at 397-398. The per se rule extends to all agreements intended to frustrate the setting of price by free market forces (*National Society of Professional Engineers* v. *United States*, *supra*, 435 U.S. at 692), because such naked restraints "always or almost always tend to restrict competition" (*Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 19-20 (1979)). This rationale fully applies to horizontal agreements on credit terms, since the opportunity for negotiation concerning credit terms or to offer customers more favorable credit terms is an important element in price competition.

By confusing the law applicable to price fixing, the court of appeals' decision deprives the business community of the clear standard that the per se rule was designed to supply. See *United States* v. *Trenton Potteries Co.*, *supra*, 273 U.S. at 398. Moreover, the court's suggestion that the per se prohibition depends on the extent of other forms of price fixing occurring in conjunction with the challenged agreement to fix credit terms invites the very kind of protracted factual inquiry that this Court rejected in *Trenton Potteries*.

---

on credit terms" (Pet. App. 5). However, the limited scope of a price fixing conspiracy provides no defense. Illegal price fixing agreements "may or may not be aimed at complete elimination of price competition." *United States* v. *Socony-Vacuum Oil Co.*, *supra*, 310 U.S. at 225 n.59.

The economic importance of the court of appeals' decision is substantial. The decision significantly undermines antitrust protection against conspiracies to fix the terms of trade credit, which, as petitioners point out (Pet. 8), at present exceeds $280 billion.

It is therefore respectfully submitted that the petition for a writ of certiorari should be granted.[5]

WADE H. MCCREE, JR.
Solicitor General

FEBRUARY 1980

[5]The Court may wish to consider summary reversal.

DOJ-1980-02