IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1101

CATALANO, INC., et al.,
Petitioners,

vs.

TARGET SALES, INC., et al.,
Respondents.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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Catalano, Inc., C & C Food Marts, Inc., Neilscarl, Inc., Tollhouse Enterprises, Inc. and Gong, Chun & Young, Inc., on behalf of themselves and all others similarly situated, respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit entered on August 20, 1979.

OPINIONS BELOW

The opinion of Judge Sneed, for himself and Judge Wallace, and the dissenting opinion of Judge Blumenfeld[1] (Appendix A) are reported at 605 F.2d 1097. The order denying petitioners' petition for rehearing and suggestion

1. Honorable M. Joseph Blumenfeld, Senior District Judge for the District of Connecticut, sitting by designation.

for rehearing in banc (Appendix B) is not reported. The initial order of the district court (Appendix C) and the amendment to that order (Appendix D) are not reported.

JURISDICTION

The opinion of the United States Court of Appeals for the Ninth Circuit was filed on August 20, 1979. A timely petition for rehearing and suggestion for rehearing in banc was denied on October 23, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Petitioners, owners and operators of retail grocery and liquor businesses in the Fresno, California area, purchase beer from respondents, competitors at the wholesale level of beer distribution. Respondents together control the supply of beer in Fresno, doing business under a comprehensive state regulatory scheme which, as a practical matter, eliminates effective price competition at the wholesale level. The regulatory scheme leaves largely undisturbed competition with respect to credit terms. But such competition in the Fresno area was abruptly terminated in late 1967 when respondents met secretly and agreed to a concerted elimination of trade credit, resulting in an effective increase in the wholesale price of beer.

The Ninth Circuit held, 2 to 1, that this horizontal conspiracy to eliminate trade credit was not a *per se* violation of the Sherman Act because, according to that court, credit is a "non-price" condition of sale. The question presented by the Ninth Circuit's decision is as follows:

Does an agreement among competitors to eliminate trade credit, effectively increasing the price of goods sold by them, constitute a *per se* violation of Section 1 of the Sherman Act (15 U.S.C. § 1)?

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in pertinent part:

> 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.

STATEMENT OF THE CASE

The Parties

Petitioners are a class[2] of several hundred businessmen in and around Fresno, California who sell beer at retail. Most are small, independent businessmen, operating grocery and liquor stores.

Respondents[3] are the beer wholesalers in the Fresno area. Individually they compete with each other and, in combination, they control the wholesale supply of beer in Fresno.

The Conspiracy to Eliminate Credit

Respondents operate under a comprehensive regulatory scheme applicable to alcoholic beverages of all types. This regulation works to restrict or eliminate altogether price competition in the wholesale distribution of beer.[4]

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2. The district court certified a class consisting of all Fresno beer retailers who received trade credit from respondents prior to, but not after, the implementation of respondents' conspiracy to eliminate credit.

3. Respondents, each of which engages or did engage in the wholesale distribution of beer in the Fresno, California area, are Target Sales, Inc., Donaghy Sales, Inc., M & T Distributing Company, Frank Diel and Thomas Diel and their partnership, D & D Beverage Company, and Carskaddon Enterprises, Inc.

4. California Business and Professions Code § 25000 *et seq.* Analogous provisions applicable to retail sales of distilled spirits and beer (*Rice v. Alcoholic Beverage Control Appeals Board*, 21

Under California law, producers, wholesalers and brand owners of alcoholic beverages are required to file price lists with the California Department of Alcoholic Beverage Control, listing the retail and wholesale price of goods offered for sale. The prices so "posted" with the Department, once approved, apply to all subsequent transactions, until new prices are posted and approved, and the price lists are published in trade journals. In the case of wholesale prices, goods may only be sold at the posted prices and any sales or purchases at other prices result in fines and/or license suspension or revocation.

As a result of this regulatory scheme, price competition in the wholesale distribution of beer, as a practical matter, has been replaced by state-enforced price fixing. Importantly, however, California law does not preclude competition with respect to every element of price. Beer wholesalers may compete in the terms of credit extended to retailers, so long as such terms do not exceed the 30 and 42-day limits on cost-free credit under California law.[5]

Prior to October 1967, respondents in fact competed with each other with respect to trade credit. That competition permitted beer retailers to obtain cost-free trade credit for periods of from 15 to 30 days. Thus, the effective price—the cost of beer to the retailers—was the "raw" price less the value of the use of their capital during the period in which payment was deferred.

Cal. 3d 431 (1978)), retail sales of wine (*Capiscean Corp. v. Alcoholic Beverage Control Appeals Board*, 87 Cal. App. 3d 996 (1979)) and wholesale sales of wine (*Midcal Aluminum, Inc. v. Rice*, 90 Cal. App. 3d 979 (1979)) have recently been held to violate the Sherman Act. The wine price maintenance provisions are presently before this Court in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, No. 79-97, cert. granted October 1, 1979.

5. California Business and Professions Code § 25509.

Individually, respondents were relatively powerless to effect any substantial change in the competition on credit. A refusal by any one of them to extend credit to petitioners would simply result in a loss of business, as retailers would switch to those wholesalers extending credit. Concerted action, however, could easily alter the competitive situation. Accordingly, in October 1967, respondents embarked upon a course of concerted activity designed to eliminate competition on credit from the market which they collectively controlled.

In a series of secret meetings held in the warehouse of one of them, respondents agreed that all trade credit to beer retailers would be eliminated. To guard against any faithless conspirator seeking to reap a competitive advantage by offering credit in breach of the agreement, respondents drew straws to select which would be the first to eliminate credit and collectively monitored the mailing of notices of the elimination to each of their retailer customers.

Once the agreement went into effect, Fresno beer retailers were faced with a choice of C.O.D. payments or advance deposits of money with respondents. The posted list prices of beer remained unchanged after the conspiracy was implemented and thus the cost to the retailers of obtaining beer increased.

Proceedings Below

THE DISTRICT COURT

Petitioners, on behalf of all retailers harmed by the concerted elimination of credit, brought this action in November 1972. Following conditional certification of a plaintiff class and extensive discovery which established the facts set forth above, petitioners moved for an order that the alleged conspiracy, if proved, would constitute a *per se* violation of Section 1 of the Sherman Act. On September 23, 1976, the district court denied the motion without clearly indicating its view as to the applicability of a *per se* rule. (Appendix C) Subsequently, on April 4, 1977, the order was amended to make clear the district court's conclusion that the alleged conspiracy would not constitute a *per se* violation of Section 1. (Appendix D) Recognizing the significance of the ruling on the subsequent course of the litigation, the district court granted petitioners' motion to certify the issue for interlocutory review pursuant to 28 U.S.C. § 1292(b).

THE COURT OF APPEALS

The Ninth Circuit granted permission to appeal, and the case was heard by a panel consisting of Judges Wallace and Sneed, with District Judge Blumenfeld of the District of Connecticut sitting by designation. By a 2 to 1 decision, the court affirmed. Writing for himself and Judge Wallace, Judge Sneed held that an agreement among competitors to fix credit terms did not amount to indirect price fixing because, according to the court, credit is a "non-price condition of sale."[6] Ignoring the relationship between price and credit in order to characterize credit as "non-price," the majority concluded that agreements fixing non-price aspects of trade either promote or inhibit competition, depending on the circumstances, and thus a *per se* evaluation would be inappropriate.

Judge Blumenfeld, dissenting on the *per se* issue, recognized that credit fixing is simply indirect price fixing. Since "credit is one component of the overall price paid for a product," the elimination of credit results in immediate rather than deferred payment and thus is the equivalent

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6. Appendix A at 4. The court also unanimously reversed a summary judgment against two petitioners granted by the district court on the basis of no injury in fact, holding that injury results from an elimination of credit. Appendix A at 7-10.

of a price increase. (Appendix A at 12) Accordingly, Judge Blumenfeld concluded that an agreement among competitors to eliminate credit "fits comfortably within the classic mode of price fixing" and is *per se* illegal. (Appendix A at 14)

A petition for rehearing and suggestion for rehearing in banc was subsequently denied on October 23, 1979. (Appendix B)

REASONS FOR GRANTING THE WRIT

By Summarily Characterizing Credit As a "Non-Price" Condition of Sale, the Court Below Would Insulate Horizontal Agreements to Fix Credit, On Their Face a Tampering With Price Structure, From Effective Enforcement of the Antitrust Laws.

The failure of the court of appeals majority to understand the term "price fixing" in any but the most literal sense, and its unexplained reluctance to implement this Court's repeated injunction that indirect as well as direct price-fixing schemes are *per se* illegal, threaten to work a serious erosion of the Sherman Act's *per se* rule against agreements which, on their face, are destructive of competition. *National Society of Professional Engineers v. United States*, 435 U.S. 679, 692 (1978). But it is not simply the majority's misunderstanding of the term "price fixing" which poses that danger, or even the patent error to which that misunderstanding necessarily led. It is instead the implications of that misunderstanding which warrant the exercise of this Court's jurisdiction.

By summarily characterizing credit as a "non-price condition of sale," the majority would shield from effective antitrust enforcement horizontal agreements eliminating competition as to what has become a component of the total cost of acquiring nearly every good or service in this nation. The increasing importance of trade credit to the nation's economy is not in doubt. At year-end 1978, trade debt out-standing was over $288 billion, 220% greater than a decade ago and representing about 13% of the total Gross National Product for 1978.[7] Participants in the economy, large and small and at every level, rely on the availability of credit. It is, we believe, no overstatement to say that retail businesses could not continue to function without trade credit.

Petitioners do not seek this Court's writ on the basis of any inter-circuit or other conflict. It is precisely the absence of any squarely on-point authority which lends urgency to this petition. The opinion below implicitly proclaims itself the one authoritative discussion of the proper treatment of pure credit fixing under the antitrust laws. It has already been extensively noted[8] and further comment is expected by the academic community, members of which have expressed interest in reviewing the record below. In the absence of the exercise of this Court's jurisdiction, the erroneous and confused majority opinion will stand as the highest authority on a question of vital and increasing importance.

To note the absence of authority on pure credit fixing, however, is not to say that the relationship of price and credit has not been the object of some comment, both by commentators[9] and by this Court.

7. Flow of Funds Accounts (2nd Quarter 1979), Division of Research and Statistics, Board of Governors of the Federal Reserve System (August 1979); Economic Indicators (October 1979), U.S. Government Printing Office.

8. 48 U.S. Law Week 2169 (Sept. 11, 1979); 930 *Antitrust & Trade Reg. Rep. (BNA)* at A.6 (Sept. 13, 1979).

9. See *P. Areeda, Antitrust Analysis* 878 (2d ed. 1974) ("To charge cash and credit customers the same price is, economically speaking, to discriminate against the former."); see also *Lamb and Shields, Trade Association Law and Practice* 129 (1971 ed.) (recognizing that credit terms "are increasingly viewed as elements of price" and assuming that credit fixing is illegal *per se* under the Sherman Act).

In the *Fortner* cases,[10] the price-credit relationship was explored at length. At issue in *Fortner* was whether a seller's offer of low cost credit, unavailable unless accepted with overpriced building materials, represented an unlawful tying arrangement. In *Fortner I*, the majority, in discussing whether credit is a separate product, recognized that credit in the usual case is part of the price:

> In the usual sale on credit the seller, a single individual or corporation, simply makes an agreement determining when and how much he will be paid for his product. In such a sale the credit may constitute such an inseparable part of the purchase price for the item that the entire transaction could be considered to involve only a single product. 394 U.S. at 507.

Finding no basis to exempt credit as the source of leverage in a tying arrangement, the case was returned for trial. The dissenters in *Fortner I* made clear their view that low-cost credit was "functionally equivalent" to a price reduction and that the offer of favorable credit terms was merely a "price cut in one form rather than another." 394 U.S. at 515. In *Fortner II*, that view became law, as this Court found that the low-cost credit involved there was merely a vehicle for price competition.

Conspiratorial agreements that involve credit fixing in part are not new to the law. In both *Plymouth Dealers' Association of Northern California v. United States*, 279 F. 2d 128 (9th Cir. 1960) and *Wall Products Co. v. Northern Gypsum Co.*, 326 F. Supp. 295 (N.D. Cal. 1971), such schemes were characterized as *per se* violations of Section 1.

The court below simply ignored *Fortner I and II*. Further, it distinguished the earlier Ninth Circuit authorities, assert-

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10. *Fortner Enterprises, Inc. v. United States Steel Corp.*, 394 U.S. 495 (1969) [*Fortner I*]; *United States Steel Corp. v. Fortner Enterprises, Inc.*, 429 U.S. 610 (1977) [*Fortner II*].

ing that where a credit-fixing scheme takes place in the context of "an overall scheme to restrain competition," the anticompetitive impact is more apparent than where the credit-fixing scheme is independent. (Appendix A at 4)[11]

The majority opinion makes bad law based on faulty economics. If one accepts the proposition that "credit fixing" is not "price fixing" (direct or indirect), but instead some new commercial practice with which the antitrust laws have had no experience, it would seem appropriate to equate that practice with blanket licensing of copyrights,[12] or exchanges of price information,[13] and therefore require a case-by-case analysis. But no elaborate inquiry is necessary to determine the anticompetitive consequences of a horizontal credit-fixing conspiracy, as if the price-credit relationship or respondents' agreement were novel or ambiguous.

The relationship between price and credit is a familiar one. As Judge Blumenfeld noted in dissent, the cost to a retailer consists of the price he has to pay and the date when that price must be paid. A retailer who buys on credit pays less than one who buys for cash and thus the elimination of credit "is the equivalent of a price increase." (Appendix A at 12)

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11. The majority acknowledged that an agreement to fix credit terms would amount to price fixing where "competition with respect to price primarily centered on credit terms, as where, for example, explicit prices are fixed by government." (Appendix A at 5) As Judge Blumenfeld noted, here the "limits to competition on price" as a result of the regulatory scheme, coupled with the near fungibility of beer, result in a market in which "competition between wholesalers in extending credit takes on greater importance as a method by which wholesalers can effectively lower the price of beer in order to compete for the business of retailers." (Appendix A at 12-13)

12. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, ... U.S. ...., 99 S. Ct. 1551 (1979).

13. *United States v. United Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978).

There is here nothing that suggests the necessity of a rule-of-reason analysis. No elaborate study of this industry is necessary to determine the anticompetitive nature of the agreement and no business necessity or excuse suggests itself.[14] As Judge Blumenfeld recognized, the conspiracy here "was a naked agreement among competitors to fix credit—a restraint which serves no economic purpose other than to affect prices." (Appendix A at 13)

The inevitable consequence of respondents' actions was a tampering with price. Assembling in secret meetings, respondents agreed on concerted action fixing the purchase terms of wholesale beer in order to increase their profits—by an effective price increase—at petitioners' expense. This is hardly the sort of conduct with which the antitrust laws have had no experience but instead precisely that type of conduct which gave rise to the *per se* rule in the first instance.

In light of the obligation of the courts to probe behind labels in order to strike down indirect price-fixing agreements, the majority opinion emerges as nothing more than exalting form over substance. Only by an *ipse dixit* assertion that credit is a "non-price" condition of sale was the majority able to resist the conclusion that an agreement to fix credit terms represents price fixing.

This Court reaffirmed two terms ago in *Professional Engineers* that competition, not agreement, on all parts of a bargain lies at the heart of the Sherman Act:

14. The concerted elimination of credit here cannot be excused on the basis of the need to control bad debts. Petitioners are precisely those who present no risk of non-payment, inasmuch as they were each extended credit prior to the implementation of the conspiracy. They are by definition "creditworthy." As relevant to any "business excuse," it is one thing for a single wholesaler, acting independently, to restrict or eliminate credit for particular delinquent retailers but quite another for all competitors to agree on an across-the-board elimination.

> The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. 435 U.S. at 695.

Should the decision of the majority be permitted to stand, the law will be to the contrary, and the "emasculation" of the Act feared by this Court in *United States v. Socony-Vacuum Oil Co., Inc.*, 310 U.S. 150 (1940), will become a reality for agreements affecting a component of price which, in today's economy, has become nearly as important as price itself.

CONCLUSION

For the above reasons, petitioners respectfully submit that this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A

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U. S. Court of Appeals

United States Court of Appeals
For the Ninth Circuit

Nos. 77-2221, 77-2222

CATALANO, INC., et al., on behalf of themselves and all others similarly situated,

Plaintiff-Appellants,

vs.

TARGET SALES, INC., et al.,

Defendant-Appellees.

OPINION

Appeal from the United States District Court for the Eastern District of California

Before: WALLACE and SNEED, Circuit Judges, and BLUMENFELD*, District Judge

SNEED, Circuit Judge:

Plaintiffs, a conditionally certified class of beer retailers doing business within the Fresno area, appeal from a ruling that defendants' alleged credit fixing agreement was not *per se* illegal, but rather must be proven illegal under the rule of reason standard. Catalano, Inc. and C & C Food Marts, Inc. (hereinafter Catalano), two named plaintiffs, also appeal from a summary judgment of the district court adjudging that neither plaintiff had suffered injury in fact. Both appeals were consolidated. We affirm the district court's ruling that credit fixing, standing alone, was not an agreement to fix prices subject to a *per se* rule of illegality.

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*Honorable M. Joseph Blumenfeld, Senior District Judge for the District of Connecticut, sitting by designation.

We reverse the district court's entry of summary judgment against Catalano and remand Catalano's claim for further proceedings.

I. FACTUAL BACKGROUND

Plaintiffs-appellants claim that defendants-appellees, various beer wholesalers, have engaged in a conspiracy to restrain trade violative of section 1 of the Sherman Act.[1] The class of plaintiff retailers sought to establish, *inter alia*, that the defendant wholesalers conspired to eliminate deferred payment terms, specifically short term trade credit formerly granted to them on beer purchases.[2]

Plaintiffs sought an order from the district court declaring the alleged credit fixing agreement, if proven, violative *per se* of the antitrust laws. The district court refused to so rule. Plaintiffs then sought an interlocutory appeal from the district court's ruling on the *per se* issue pursuant to 28 U.S.C. § 1292(b). The district court properly certified the issue and we granted permission to appeal.

Contemporaneous with the request for the order declaring credit fixing a *per se* violation, defendants sought a motion for summary judgment against plaintiffs Catalano asserting that they failed to establish injury in fact. The district court agreed, granted the motion for summary judgment, and Catalano appealed therefrom.

We granted a motion to consolidate the two appeals.

II. QUESTIONS PRESENTED

Two issues are presented by these appeals. First, did the district court err by ruling that a horizontal agreement among wholesalers to eliminate credit on retail sales would

1. 15 U.S.C. § 1.

2. The district court conditionally certified plaintiffs' class to include those retailers to whom the wholesalers extended credit prior to the alleged agreement to terminate the credit provisions.

not constitute a *per se* violation of the antitrust laws? Second, did the district court err by granting summary judgment against plaintiffs Catalano on the ground that they failed to demonstrate the existence of any injury in fact? We shall turn first to the *per se* issue.

III. THE PER SE ISSUE

To support their contention that an alleged horizontal agreement among beer distributors to eliminate formerly free short term trade credit should be considered as illegal *per se*, plaintiffs argue that: (1) Price fixing is subject to a *per se* evaluation under the Sherman Act.[3] (2) Under the pertinent standard price fixing may be accomplished directly or indirectly.[4] (3) An agreement to fix credit terms fixes prices indirectly. (4) As a result, credit fixing is a *per se* violation of the antitrust laws.

We cannot agree that on this record an agreement to fix credit terms amounts to indirect price fixing within the meaning of the antitrust laws. *Northern Pacific Ry. v. United States*, 356 U.S. 1, 5 (1958), established the rationale for *per se* illegality in antitrust suits: "[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." Particular acts, of which price fixing is one, have been held so plainly anti-competitive as to be conclusively presumed illegal. The fixing of credit terms, on the other hand, is not

3. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940).

4. Plymouth Dealers Assoc. v. United States, 279 F.2d 128 (9th Cir. 1960); National Macaroni Mfrs. Assoc. v. Federal Trade Commission, 345 F.2d 421 (7th Cir. 1965).

"manifestly anticompetitive." An agreement to fix credit, a "non-price" condition of sale, may actually enhance competition. Proper analysis reveals "that an agreement fixing non-price trade items may either help or hurt competition, depending upon industry structure." L. Sullivan, *Handbook of the Law of Antitrust,* § 99, at 277 (1977).[5] Thus, an agreement to eliminate credit could sharpen competition with respect to price by removing a barrier perceived by some sellers to market entry. Moreover, competition could be fostered by the increased visibility of price made possible by the agreement to eliminate credit. For example, an agreement to eliminate credit might foster competition by increasing the visibility of the price term, and hence, promote open price competition in an industry in which imperfect information shielded various sellers from vigorous competition.

We readily acknowledge that an agreement to fix credit may be in violation of the antitrust laws when made pursuant to a conscious purpose to fix prices or as part of an overall scheme to restrain competition. *See Arizona v. Cook Paint & Varnish Co.,* 391 F. Supp. 962, 966 n.2 (D. Ariz. 1975), *aff'd,* 541 F.2d 226 (9th Cir. 1976); *Wall Products*

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> The effects of an agreement standardizing non-price terms will vary much as will an agreement standardizing product. By such standardization the variety of offerings open to buyers and competitive differentiation open to sellers will inevitably be reduced, as they are when the product is standardized. . . . But the standardization of non-price terms, like standardization of product will have other effects. It will in a sense serve to channel all transactions into a single, better integrated market; buyers will more easily be able to compare their alternative opportunities as to the unstandardized terms, most notably price, and sellers will more likely be aware of competitive offerings.

L. Sullivan, *supra,* § 99, at 277-78.

Co. v. National Gypsum Co., 326 F. Supp. 295 (N.D. Cal. 1971). Thus, were competition with respect to price primarily centered on credit terms, as where, for example, explicit prices are fixed by government, an agreement to fix credit terms would amount to price fixing. And, of course, an agreement to fix credit terms as part of an effort to fix prices would contravene the antitrust law.

At this juncture of the proceeding it has not been established that the agreement was entered into with the purpose, or had the effect, of restraining price competition in the industry. Simply labeling concerted conduct as price fixing without proof of purpose to affect price will not justify application of a *per se* rule. "The antitrust laws concern substance, not form, in the preservation of competition." L. Sullivan, *supra,* § 74, at 198. As a result, we refuse to characterize the credit fixing agreement here before us as price fixing.

Our conclusion is reinforced when we consider the function of *per se* rules in antitrust law enforcement. A particular practice which is established as *inherently* anticompetitive eliminates the need for elaborate analysis and may be deemed illegal *per se.* Determination of the applicability of *per se* illegality turns on whether the practice "appears to be one that would always or almost always tend to restrict and decrease output . . . or instead one designed to 'increase economic efficiency and render markets more rather than less competitive.'" *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.,* ...... U.S. ......, ..., 99 S. Ct. 1551, 1562 (1979); *United States v. United Gypsum Co.,* 438 U.S. 422, 441 n.16 (1978); *see Continental T.V., Inc. v. GTE Sylvania,* 433 U.S. 36, 50 n.16 (1977); *Northern Pacific Ry. v. United States,* 356 U.S. 1, 4 (1958). We cannot say that credit term fixing "would always or almost always tend to restrict and decrease output." It is better, we believe, to rest an antitrust violation on demonstrable economic effects rather than "formalistic line drawing." *Continental T.V., Inc. v. GTE Sylvania, supra,* 433 U.S. at 59. Thus, to determine the legality of credit fixing an evaluation of the competitive detriment or enhancement must be made in each situation.

Application of the rule of reason, however, does not necessitate invariably the conclusion that a horizontal agreement to eliminate trade credit is lawful. Under the rule of reason any concerted action violates the Sherman Act if its purpose or effect would significantly impair competition. The rule of reason, moreover, "does not open the field of antitrust inquiry to any argument that may fall within the realm of reason." *National Society of Professional Engineers v. United States,* 435 U.S. 679, 688 (1978). It requires examination of the impact of credit fixing on competitive conditions, and such an agreement can benefit competition only if it improves the operation of the market. L. Sullivan, *supra,* § 100, at 280.

Any argument that the special characteristics of the beer industry render monopolistic arrangements better for trade and commerce than competition is foreclosed. *National Society of Professional Engineers v. United States, supra,* 435 at 689.

> The Sherman Act reflects a legislative judgment that ultimately competition will not only produce lower prices, but also better goods and services. "The heart of our economic policy long has been faith in the value of competition." *Standard Oil Co. v. F.T.C.,* 340 U.S. 231, 248. The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate

> cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.

Id. at 695. The underlying premise is that "unless the market is rigged, either by concerted agreement . . . or by excessive concentration and interdependent action, the market when left alone ought to adjust to consumer interests with responses at least as fine as those which the industry could concertedly agree upon." L. Sullivan, *supra,* § 100, at 281.

Application of the rule of reason to the facts presented here may be unlikely to require an elaborate inquiry into the effects on the beer industry. A horizontal agreement among distributors eliminating deferred payment terms, while leaving all other terms subject to competitive forces, may well be unreasonable. Such an agreement tends to impair competition. The ease with which the rule of reason may be applied in this case does not, however, justify the invocation of a *per se* rule. We must remain open to the possibility that situations will occur where such an agreement might work to increase competition. *See id., supra,* § 100, at 281.

IV. SUMMARY JUDGMENT

Turning to the summary judgment against Catalano, we note that under Fed. R. Civ. P. 56(c) "[t]he burden is on the party moving for summary judgment to show the absence of any genuine issue of material fact, and, in determining whether the burden has been met, . . . [the court] must draw all inferences of fact against the movant and in favor of the party opposing the motion." *Calnetics, Corp. v.*

Volkswagen of America, Inc., 532 F.2d 674, 683 (9th Cir. 1976), *cert. denied,* 429 U.S. 940 (1976). Once it appears from the movant's papers that the motion should be granted, the opposing party must controvert the showing. All evidence and inferences are to be viewed in a light most favorable to the party opposing the motion. *Mutual Fund Investors v. Putnam Management Co.,* 553 F.2d 620, 624 (9th Cir. 1977). In the antitrust context the general standards for the granting of summary judgment are applied even more stringently. *See Poller v. Columbia Broadcasting System, Inc.,* 368 U.S. 464 (1962).

The district court concluded that the cessation of credit on wholesale distribution caused no injury in fact to plaintiffs. Summary judgment against plaintiffs Catalano was based upon a determination that there was no genuine issue of material fact regarding the injury issue. This, in turn, rested upon the deposition of Joseph Catalano, principal owner of the two Catalano businesses. He stated that, except for the possibility of selling more beer, paying cash for beer had no effect on profit and loss. Also, he could not estimate how much more profit might have been made had beer been sold on credit.

Opposing the motion, plaintiffs also relied on Catalano's deposition. They contended that the fact that Catalano could have sold more beer but for the cutoff of credit presented a material issue. Additionally, they relied on a subsequent affidavit in which Catalano testified:

> Both of my companies have always kept more money in checking accounts than absolutely necessary . . . . When defendants cut off credit, some of this money had to be put into beer inventory. As a result, my companies were less liquid than they were before . . . . [T]hey deprived my companies of the opportunity to put that money in time deposits, where it would have drawn interest . . . .

Plaintiffs further controverted the motion with testimony of an expert witness in the field of finance. He stated that a termination of trade credit has an adverse effect on *any* business. "[I]f the company finances the inventories . . . by drawing down its cash reserves, the firm's liquidity and its financial strength are reduced resulting in a decrease in the value of the enterprise." In sum, he was of the opinion that plaintiffs suffered financial injury as a result of the agreement to end credit.

The district court reasoned that because Catalano could not specify how much more beer might have been sold, or how much profit might have been made, he suffered no injury. The court also rejected the claim that an injury can be suffered when surplus cash is utilized to finance inventories even though such use is accompanied by no borrowing or investment of additional cash. The district court erred. It failed to distinguish between the existence of an injury in fact and the means by which the amount of damage can be measured.

Plaintiffs' inability to fix the amount of lost profits bears directly on the issue of amount of damages rather than the existence of an injury. Catalano's inability to estimate his damages does not mean that they were not suffered; nor does it bar an antitrust suit. *Bosgosian v. Gulf Oil Corp.*, 393 F. Supp. 1046, 1050 n.7 (E.D. Pa. 1975).

The plaintiffs made a sufficient showing of a genuine issue of material fact. The existence of an injury is a material fact sufficiently made a genuine issue by Catalano's claim of lesser sales and the expert witness' testimony that injury did exist.[6] Plaintiffs made an adequate showing of

6. Plaintiffs allege that the defendants have not reduced the price of beer to reflect the termination of free credit. As a result, the measure of damages for plaintiffs' injury, it is argued, should be equal to the cost of financing the beer inventories. Three different

some damage flowing from the agreement, "inquiry beyond this minimum point goes only to the amount and not the fact of damage." *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 114 n.9 (1969), *accord Knutson v. Daily Review, Inc.*, 548 F.2d 795, 811 (9th Cir. 1976).

Affirmed in Part, Reversed and Remanded in Part.

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methods for determining the amount of damages were suggested by plaintiffs: (1) measure the opportunity cost of any new capital that plaintiffs invested in the business; (2) measure the opportunity cost of borrowing outside funds to finance the inventories; or; (3) measure the reduction in the value of plaintiffs' business occasioned by the financing of inventories out of cash on hand, thereby reducing the liquidity of the business. While not specifically sanctioning any of these methods, difficulty in measuring the amount of damages should not preclude plaintiffs from establishing that injury was suffered.

Filed—Aug 20 1979
Emil E. MELFI, Jr. Clerk
U.S. Court of Appeals

CATALANO, INC., et al. v. TARGET SALES, INC., et al.
Nos. 77-2221 and 77-2222

BLUMENFELD, District Judge, (Concurring and Dissenting):

I am in agreement with the decision of the majority reversing the lower court's grant of summary judgment against the plaintiffs on the issue of damages; however, contrary to the majority, I would hold that the alleged horizontal agreement among wholesalers to eliminate credit on sales of beer to retailers constitutes a per se violation of the antitrust laws.

It is clear enough by the citation to *Northern Pac. Ry. v. United States,* 356 U.S. 1, 5 (1958),[1] that the majority does not intend to change the established rule of law in antitrust cases that price fixing is a per se violation. *See also United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 218

1.

"[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use. This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken. Among the practices which the courts have heretofore deemed to be unlawful in and of themselves [is] price fixing, *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 210 . . . ."

356 U.S. at 5.

(1940). Although recognizing that price fixing may be accomplished directly or indirectly, the majority finds that the alleged agreement to fix credit terms does not amount to either direct or indirect price fixing. I disagree.

The purchase of goods creates an obligation to pay for them. Credit is one component of the overall price paid for a product. The cost to a retailer of purchasing goods consists of (1) the amount he has to pay to obtain the goods, and (2) the date on which he has to make that payment. If there is a differential between a purchase for cash and one on time, that difference is not interest but part of the price. *See Hogg v. Ruffner*, 66 U.S. (1 Black) 115, 118-19 (1861). Allowing a retailer interest-free short-term credit on beer purchases effectively reduces the price of beer, when compared to a requirement that the retailer pay the same amount immediately in cash; and, conversely, the elimination of free credit is the equivalent of a price increase.[2]

To declare in the instant case that credit is "a 'non-price' condition of sale," as the majority asserts *supra*, is too generalized to be entirely true, and disintegrates when exposed to the economic realities of the beer industry in California. Price competition in the beer industry in California is partially restricted by state law through a system of mandatory territorial restrictions and price posting. *See* Cal Bus. & Prof. Code §§ 25000 *et seq.* While containers vary in material, and contents vary in taste, calories, and sometimes color, beer of one brand is substantially the same as that of another. It is common for retailers to buy and carry in stock for resale different brands from several distributors concurrently. Given the limits to competition

2. The defendants here do not argue that the purchase price of their beer decreased in proportion to the savings they realized from eliminating free short-term credit.

on price and on product desirability, competition between wholesalers in extending credit takes on greater importance as a method by which wholesalers can effectively lower the price of beer in order to compete for the business of retailers. The majority acknowledges that where "competition with respect to price primarily center[s] on credit terms, . . . an agreement to fix credit terms would amount to price fixing." This was a naked agreement among competitors to fix credit—a restraint which serves no economic purpose other than to affect prices. It affects no other functional element in a sale of beer by a distributor to a retailer. I would therefore hold that the alleged agreement is illegal per se. Nearly 40 years ago the Supreme Court stated:

> "Any combination which tampers with price structures is engaged in an unlawful activity. Even though the members of the price-fixing group were in no position to control the market, to the extent that they raised, lowered, or stabilized prices they would be directly interfering with the free play of market forces. The Act places all such schemes beyond the pale and protects that vital part of our economy against any degree of interference. Congress has not left with us the determination of whether or not particular price-fixing schemes are wise or unwise, healthy or destructive.
>
> ". . . .
>
> "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*."

United States v. Socony-Vacuum Oil Co., supra, 310 U.S. at 221, 223.

The suggestion in the majority opinion that the per se rule cannot be applied without proof that the purpose of the agreement was to affect prices finds no support in the cases. What the purpose of the defendants was, and what they thought about the wisdom of cutting off credit, is irrelevant. The Supreme Court has recently emphasized:

> "In construing and applying the Sherman Act's ban against contracts, conspiracies, and combinations in restraint of trade, the Court has held that certain agreements or practices are so 'plainly anticompetitive,' National Society of Professional Engineers v. United States, 435 U.S. 679, 692 (1978); Continental TV, Inc. v. GTE Sylvania Inc., 433 U.S. 36, 50 (1977), and so often 'lack . . . any redeeming virtue,' Northern Pac. R. Co. v. United States, 356 U.S. 1, 5 (1958), that they are *conclusively presumed illegal without further examination under the rule of reason* generally applied in Sherman Act cases."

Broadcast Music, Inc. v. CBS, Inc., 47 U.S.L.W. 4359, 4361 (U.S. April 17, 1979) (emphasis added). Even in the context of criminal liability under the Sherman Act, the Supreme Court has rejected the claim that a criminal conviction requires a finding of a purpose to produce anticompetitive effects. *See United States v. United States Gypsum Co.*, 438 U.S. 422, 444 & n.21; *United States v. Continental Group, Inc.*, No. 78-2328 (3d Cir., July 20, 1979), Antitrust & Trade Reg. Rep. (BNA), No. 926, E-1, E-9. The agreement among the defendant competitors in the instant case fits comfortably within the classic mode of price fixing, and it is so plainly anticompetitive in its nature and necessary effect that no elaborate study is needed to establish its illegality. *See National Society of Professional Engineers v. United States, supra*, 435 U.S. at 692.[3]

3. Lest we be led to a false conclusion by the use of ambiguous concepts, it is necessary to point out that the statement of the majority that "an agreement to eliminate credit could sharpen

Paradoxically, our ruling that the plaintiffs' alleged damages would constitute antitrust injury flowing from the withdrawal of credit under the liberal rule for proving damages gives added weight to the foregoing analysis. We hold that plaintiffs have made "an adequate showing of some damage flowing from the agreement" to terminate credit. How to measure the damage is left unresolved; however, it is clear that the damage claim is derived from the increase in the cost of purchasing beer due to the elimination of free short-term credit. To say that the overall cost of purchasing beer increased as a result of the elimination of credit is functionally the same as saying that the effective price of beer rose for these plaintiffs. Since the alleged agreement to fix credit terms raised the effective price of beer, the alleged agreement amounts to price fixing. As such, the per se rule of illegality should govern this case, and the district court's ruling to the contrary should be reversed.

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competition with respect to price by removing a barrier perceived by some sellers to market entry," is curiously inappropriate in this case. I am quite unpersuaded by this strange assertion, nor do I subscribe to the suggestion that it would justify an agreement to fix prices. No person seeking entry to the beer distributors' market is a party to this case. Furthermore, how another distributor who would abide by the agreement could add to price competition is difficult to understand since the agreement would "cripple [his] freedom . . . and thereby restrain [his] ability to sell in accordance with [his] own judgment." Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc., 340 U.S. 211, 213 (1951).

Appendix B

Filed—OCT 23 1979
Richard H. Deane
Clerk, U.S. Court of
Appeals

United States Court of Appeals
For the Ninth Circuit

Nos. 77-2221, 77-2222

CATALANO, INC., et al., on behalf of themselves and all others similarly situated,

Plaintiff-Appellants,

vs.

TARGET SALES, INC., et al.,

Defendant-Appellees.

ORDER

Before: WALLACE and SNEED, Circuit Judges,
and BLUMENFELD*, District Judge.

The panel as constituted in the above case has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for en banc rehearing, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for a rehearing en banc is rejected.

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*Honorable M. Joseph Blumenfeld, Senior United States District Judge for the District of Connecticut, sitting by designation.

Appendix C

Original Filed—SEP 23 1976
Clerk, U. S. Dist. Court
Eastern District of California

In the United States District Court
Eastern District of California

No. F-731 Civ.

CATALANO, INC., et al., on behalf of themselves and all others similarly situated,

Plaintiffs,

vs.

TARGET SALES, INC., et al.,

Defendants.

FRANK DIEL and THOMAS DIEL, et al.,

Counterclaimants,

vs.

CATALANO, INC., et al.,

Respondents.

MEMORANDUM AND ORDER

Plaintiffs' motion for preliminary injunction was denied from the bench as plaintiffs have not received credit since 1967 and to require credit now would be disruptive rather than maintaining the status quo. Also, plaintiffs have not established a threat of immediate and irreparable loss or that the remedy at law is not adequate.

Plaintiffs' motion to declare this a case of *per se* illegality is denied as plaintiffs must prove that withdrawal of credit caused some injury to some of the plaintiffs. Although counsel will not be required to have all members of the class testify on the issue of liability, causation and impact must be established for there to be liability.

Plaintiffs' motion for proof of damages to be tried in a representative capacity is denied as individual proof of damages is required in this case as injury cannot be presumed from lack of credit.

Plaintiffs ask the court to reconsider its denial of bifurcation. As long as plaintiffs understand the necessity of establishing causation and impact to establish liability, bifurcation will speed up disposition of this case. Therefore, a separate trial before a jury will first be held on the issue of liability. Assuming plaintiffs are successful in obtaining a jury verdict, perhaps the individual proof of damages of each member of the class can be heard by the court or before a master or established by proof of claim. Defendants' counterclaim will then be heard.

Plaintiffs' motions for deadlines for completing discovery are denied with defendants requested to complete their discovery with all due haste.

Plaintiffs' motions fixing the class and providing for additional letters to corporate counsel are denied as unnecessary and unsubstantiated.

DATED: September 23, 1976.

M. D. Crocker
United States District Judge

Appendix D

ORIGINAL FILED—
APR 4 1977
Clerk, U. S. Dist. Court
Eastern District of California

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United States District Court
Eastern District of California

Civil No. F-731

CATALANO, INC., et al., on behalf of themselves and all others similarly situated,
Plaintiffs,
vs.
TARGET SALES, INC., et al.,
Defendants.

FRANK DIEL and THOMAS DIEL, et al.,
Counterclaimants,
vs.
CATALANO, INC., et al.,
Respondents.

ORDER

The application of plaintiffs for certification pursuant to 28 U.S.C. § 1292(b) of the issue as to whether the conduct complained of, if proven, would constitute a *per se* violation of Section 1 of the Sherman Act (15 U.S.C. § 1), being duly heard and good cause appearing.

IT IS HEREBY ORDERED that the Order of this Court, entered herein on September 23, 1976, be and is amended by adding at page 2, line 23 of said Order, as follows:

> "In the opinion of the Court, this order involves a controlling question of law, whether an agreement among competitors to eliminate the extension of trade credit constitutes a *per se* violation of Section 1 of the Sherman Act (15 U.S.C. § 1), as to which there is substantial ground for difference of opinion, and that an immediate appeal from the order will materially advance the ultimate termination of the litigation since this issue is central to the conduct of discovery and trial of this case."

Dated: APR 4 1977

M. D. CROCKER
United States District Court Judge