IN THE

Supreme Court of the United States

October Term, 1979
No. ~~79-1011~~ 79-1101

CATALANO INC., *et al.*,

Petitioners,

vs.

TARGET SALES INC., *et al.*,

Respondents.

Brief of Respondent Donaghy Sales, Inc. in Opposition to Petition for a Writ of Certiorari.

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SUBJECT INDEX

TABLE OF AUTHORITIES CITED

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Respondent Donaghy Sales, Inc. submits that this cause should not be heard by this Court and submits the following matters and grounds therefor.

I.
Question Presented.

One question, and only one, is presented:

Did the Court of Appeals for the Ninth Circuit err in affirming a ruling of the District Court for the Eastern District of California that a horizontal agreement among Fresno beer wholesalers to eliminate credit on sales to retailers would not constitute a *per se* violation of the antitrust laws but should be tested for legality under the rule of reason?

Since the question arose by reason of a pretrial motion by plaintiffs below for a declaration that such an agreement, if proved, would be illegal *per se* (so that evidence respecting matters relevant to a rule of reason analysis would be neither required nor admissible at trial), there are no questions as to sufficiency of evidence to prove anything, and there is no evidence from which one can make either a complete rule of reason analysis or the lesser inquiry into effect and purpose of the practice referred to in *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. (Prelim. Print) 1, 19 (1979).

It is also clear that there is no contention that the alleged agreement went beyond or included anything other than the elimination of trade credit in beer sales to retailers. The alleged agreement was *not* part of a scheme to fix prices, divide the market, allocate customers or territories, or otherwise to affect or eliminate competition among the beer wholesalers in any respect other than the extension of credit to retailers.

The issue is whether, as a matter of law and without any analysis whatsoever of purpose or effect, an agreement among beer wholesalers to eliminate trade credit on their respective sales to retailers should be characterized as illegal *per se*.

II.
Argument.

The decision of the Court of Appeals for the Ninth Circuit that the alleged agreement among Fresno beer wholesalers to eliminate trade credit to retailers was not illegal *per se* does not meet *any* of the criteria for review by this Court set forth in Rule 19(1)(b).

A. There Is No Conflict Among Courts of Appeals.

So far as we can determine, this is the *only* decision by a Court of Appeals respecting the legality or illegality of an agreement limited to credit matters; so obviously there is no conflict between this decision and any decision of any other Court of Appeals.

For that matter, there is no conflict between the decision here presented for review and any decision of any other court. Of course, in this case, the Court of Appeals agreed with and affirmed the decision of the District Court for the Eastern District of California. There are only three other reported cases, all in District Courts, which have considered the legality of agreements among competitors substantially limited to establishing credit terms: *United States v. Cincinnati Fruit and Produce Credit Ass'n*, 1956 Trade Cas. ¶68,248 (S.D. Ohio 1956); *United States v. Southern California Wholesale Grocers' Ass'n*, 7 F.2d 944 (S.D. Cal. 1925); and *United States v. Fur Dressers' & Fur Dyers' Ass'n*, 5 F.2d 869 (S.D.N.Y. 1925). In each of those cases, the agreement among competitors was held to be lawful on the facts before the court, and the *Cincinnati Fruit* case rejected the government's contention that the agreement was illegal *per se*. Thus, every Court which has considered the matter has concluded that an agreement among competitors substantially limited to credit either was or could be lawful, and every court that has considered the *per se* question has concluded that such an agreement is *not* illegal *per se*.

B. The Question Presented Does Not Involve State or Territorial Questions.

C. The Question of Federal Law Need Not Be Settled by This Court.

We freely concede that the question presented here has not been decided or settled by this Court, but it does not follow that there is any need for such settlement. As noted in the preceding section, in the entire history of Sherman Act litigation there are only four reported cases, including this one, which involved the legality of an agreement among competitors which was limited to credit. Three of them held (two in 1925 and one in 1956) the agreements to be lawful on the facts. Our case held that the agreement, if proved, might be lawful or unlawful, depending on the facts proved at trial. All of the holdings are consistent. Even though this Court has not spoken to the subject, the law is not unsettled. Furthermore, although the question is of importance to the parties, the infrequency with which it has arisen in the past demonstrates that it is not an important question in the administration of the antitrust laws. There is simply no need at all for this Court to consider or decide the question.

D. The Decision Below Does Not Conflict With Decisions of This Court.

There is no decision of this Court on the question presented by this case.

The decision of the Court of Appeals is entirely consistent with the decisions of this Court respecting the *per se* doctrine in other factual settings.

The most recent case in this Court dealing with the application of the *per se* doctrine was *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S.

(Prelim. Print) 1 (1979). While its facts and the agreements under discussion were entirely different from those presented here, its analysis and discussion confirm the correctness of the analysis and decision of the Court of Appeals and their consistency with the decisions of this Court. In *Broadcast Music*, the Court commenced its discussion of the applicable law as follows:

> "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 T.V., 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. This *per se* rule is a valid and useful tool of antitrust policy and enforcement. And agreements among competitors to fix prices on their individual goods or services are among those concerted activities that the Court has held to be within the *per se* category. But easy labels do not always supply ready answers.
>
> A.
>
> "To the Court of Appeals and CBS, the blanket license involves 'price fixing' in the literal sense: the composers and publishing houses have joined together into an organization that sets its price for the blanket license it sells. But this is not

a question simply of determining whether two or more potential competitors have literally 'fixed' a 'price.' As generally used in the antitrust field, 'price fixing' is a shorthand way of describing certain categories of business behavior to which the *per se* rule has been held applicable. The Court of Appeals' literal approach does not alone establish that this particular practice is one of those types or that it is 'plainly anticompetitive' and very likely without 'redeeming virtue.' Literalness is overly simplistic and often overbroad. When two partners set the price of their goods or services they are literally 'price fixing,' but they are not *per se* in violation of the Sherman Act. See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 280 (CA6 1898), aff'd, 175 U.S. 211 (1899). Thus, it is necessary to characterize the challenged conduct as falling within or without that category of behavior to which we apply the label '*per se* price fixing.' That will often, but not always, be a simple matter.

"Consequently, as we recognized in *United States v. Topco Associates, Inc.*, 405 U.S. 596, 607-608 (1972), '[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations. . . .' See *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963). We have never examined a practice like this one before; indeed, the Court of Appeals recognized that '[i]n dealing with performing rights in the music industry we confront conditions both in copyright law and in antitrust law which are *sui generis*.' 562 F.2d, at 132. And though there has been rather intensive antitrust scrutiny of ASCAP and its blanket licenses, that experience hardly counsels that we should outlaw the blanket license as a *per se* restraint of trade."

Id. at 7-10 (footnotes omitted).

The decision of the Court of Appeals is entirely consistent with that approach. It refused to characterize the claimed agreement as "indirect price fixing" (App. A, p. 3) or as "price fixing" on the record before it (App. A, p. 5). It recognized that such an agreement was not manifestly anticompetitive, but could actually enhance competition (App. A, pp. 3-4). It recognized that antitrust violations should rest upon demonstrable economic effects, rather than formalistic line drawing (App. A, p. 4). Although the Court of Appeals did not mention it, it is clear that the courts have not had sufficient experience with agreements limited to credit (and not part of an otherwise illegal scheme) to conclude that they should be illegal *per se*—every court thus far having concluded that the agreement before it was or at least might be lawful. The Court of Appeals considered and correctly applied *all* of the recent decisions of this Court dealing with the *per se* doctrine. There is no need to review that decision.

E. There Was No Departure From Accepted Procedure.

Petitioner's pretrial motion in the trial court for a declaration that the alleged agreement, if proved, would constitute a *per se* violation of the antitrust laws was not well taken, but it was entirely appropriate. If granted it would have obviated the necessity to prepare for and try the rule of reason issues, thus simplifying preparation for all parties and expediting the trial. Although we thought the interlocutory appeal unnecessary, because the law was not uncertain, the question was certainly a controlling question which met all of the other tests for interlocutory appeal. There was no departure from accepted procedure in either the trial court or the Court of Appeals.

III.
Specific Responses to Matters in the Petition.

There are a number of inaccurate or erroneous statements in the petition. We did not digress to address them in our principal discussion, but pointing out some of them may assist the Court in its analysis, so we do so here.

At page 3 of the petition, respondents assert that the California alcoholic beverage laws and regulations "restrict or eliminate altogether price competition in the wholesale distribution of beer." The "tied house" provisions of the law (Business & Professions Code §§25500-25510) do prohibit ownership by a wholesaler of an interest in a retail license, prohibit the furnishing or lending of money to or guaranteeing financial obligations of a retail licensee, prohibit ownership of the business or equipment of a licensee, prohibit the giving of free goods, rebates, or secret commissions to licensees or price discrimination among licensees, prohibit commercial bribery, and limit the assistance that a wholesaler can give to a licensee by way of advertising materials, beer pumps, promotional activities and services. Section 25509 requires that interest be charged on trade credit outstanding more than 42 days and prohibits credit sales to licensees having outstanding credit of more than 30 days. Beer pricing, however, is regulated by Business & Professions Code §§25000-10. Those sections require each wholesaler of beer to file with the department and post a schedule of the prices he will charge to retailers and to adhere to those prices. Amendments to the schedule may be filed at any time and are effective 10 days thereafter, except that amendments to meet lower competitive prices may be effective immediately. Copies of sections 25000 and 25001-04 are annexed as "Appendix 1." Contrary to the intimation on page 4 of the petition, there is no provision for approval of any wholesaler's price, and every wholesaler is at liberty to file and post any price he chooses.

At page 4, the petition states that "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. As the above discussion indicates, that is simply not true— the state only requires the wholesaler to sell to everyone at the price the wholesaler elected to post, without discrimination, kickbacks, discounts, or secret deals. The only evidence in the record, an affidavit of Thomas G. Diel (Clerk's Transcript pp. 1228-31), with respect to price competition among Fresno beer wholesalers is to the effect that they *did* sell at differing prices, that price movements were not uniform, and that price competition did exist. A copy of the price schedule annexed to that affidavit is annexed as "Appendix 2"—the retail prices in the schedule are the minimum retail prices "posted" by the respective *brewers*.

At page 5, the petition refers to alleged conduct by "respondents" in 1967. While it makes no difference to consideration of the question presented here, the fact is that respondent Donaghy Sales, Inc. commenced business in mid-1969 and did nothing at all in 1967.

On page 2 of the petition, the first paragraph under the heading "Question Presented" is inaccurate and misleading. As our prior discussion notes, the suggestion that state regulation eliminates effective price competition is contrary to the terms of the law and contrary to the only facts in the record. The statement that "respondents met" is inaccurate, for respondent Donaghy did not then exist. The suggestion that "Respondents together control the supply of beer in Fresno" is misleading. Respondents constitute all of the beer distributors headquartered in Fresno. Each of them is the exclusive distributor of one or more brands of beer in the area. Other brands of beer are available to petitioners and are purchased by some of petitioners from sources other than any respondent. (The second paragraph under "The Parties" at page 3 of the petition is also misleading in this respect.)

At pages 7-8 of the petition, petitioners cite some statistics which were not before the courts below and conclude "that retail business could not continue to function without trade credit." Those statistics show that retail businesses have enjoyed trade credit, but they do not support the conclusions that there would be no retail business without it. Passing the absence of evidence to support the conclusion, the evidence that is in the record and which was before the courts below indicates that at least the Catalano petitioners got along in their businesses just fine without trade credit *for beer*, which is the only credit of direct concern here (App. A, pp. 8-9).

Despite petitioners' assertions to the contrary at page 9 of the petition, the *Fortner* cases are entirely inapposite here. Both *Fortner* opinions consistently treated houses (and their price) and credit as two different things. Neither held price and credit to be the same thing. They had nothing to do with an agreement among competitors respecting credit, and they had nothing to do with whether any agreement was illegal *per se.*

The suggestion on page 9 of the petition that the *Plymouth Dealers* and *Wall Products* cases there cited characterized agreements to fix credit terms as illegal *per se* is simply wrong, as the Court of Appeals recognized (App. A, pp. 4-5), for in those cases credit was involved only as part of a scheme to fix prices or an overall scheme to restrain competition.

In footnote 11 on page 10, the petition cites Judge Blumenfeld's dissent for "the near fungibility of beer." There being no evidence in the record, Judge Blumenfeld presumably relied on his own taste and experience for his conclusions (App. A, pp. 12-13) that "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." And Judge Blumenfeld failed to recognize the inconsistency between the first and second of those conclusions—for if beer were indeed fungible, presumably the profit minded retailer would only stock the one brand on which he received the best deal for the most profit.

On page 11, the petition claims that "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." We have already commented on the inaccuracy of "respondents agreed." Of course, the issue as to the purpose of the alleged agreement has not been tried, and petitioner's conclusion is gratuitous. Furthermore, at least from the wholesaler's standpoint, eliminating credit did *not* result in "an effective price increase."

The amount of money the wholesaler received for the beer—its price—was precisely the same in either event. Elimination of credit could have decreased a wholesaler's costs of operations, but it did not increase his revenues, as a price increase would have done.

In footnote 14 on page 11, petitioners make the astonishing assertion that since petitioners were receiving credit, they are by definition creditworthy and present no risk of non-payment, so elimination of credit could not be justified by a need to control bad debts. If that proposition were so, and everybody who received credit presented no risk of non-payment, then there would never be any bad debt losses by anyone. Nonsense.

IV.
The Brief of Amici Curiae.

The brief for the State of Alabama and 38 other states, but not including California, as *amici curiae* sets forth no fact contained in the record or legal reason why this cause should be heard by this Court.

As with the Petition, there are a number of inaccurate statements contained in the brief of *amici*. For example, *amici* erroneously state at page 6 that credit is the "only price competition" which prevailed at the wholesale level and that the elimination of credit "necessarily had an inflationary impact on the overall price paid" by retailers. The nature of competition under the California alcoholic beverage laws and regulations previously has been discussed and need not be repeated. There is, in addition, nothing in the record to support the claim that the elimination of credit had any effect at all on retailers generally or on any retailers in particular. The Court of Appeals' reversal of the Summary Judgment against Catalano was not on the basis that Catalano in fact has sustained a compensable injury from the elimination of credit (as stated at page 6 of *amici's* brief) but on the basis that there was a genuine issue of material fact as to this issue (App. A, p. 9).

Similarly, *amici's* statement at page 6 of their Brief that the Court of Appeals' ruling will require an "incredibly complicated and prolonged economic investigation" is contrary to the Court of Appeals' own statement that application of the rule of reason "may be unlikely to require an elaborate inquiry into the effects on the beer industry" in Fresno (App. A, p. 7).

Amici claim at page 6 of their Brief that the Court of Appeals erred because it "failed to analyze the substantive character of the agreement, as required by this Court in *Broadcast Music, Inc. v. Columbia Broadcasting System*, ... U.S. ...., 99 S.Ct. 1551 (1979)." The Court of Appeals, however, following the mandate of *Broadcast Music*, rejected the invitation to declare the elimination of *per se* credit unlawful without an examination of the substantive purposes and effects of this agreement upon retailers, which evidence is not contained in the record and was not before the Court of Appeals. The error claimed by *amici* simply does not exist.

At pages 9 and 10 of their brief, *amici* twice completely distort the holding of the Court of Appeals by asserting that it held that "a horizontal agreement to fix credit would violate the antitrust laws only 'when made pursuant to a conscious purpose to fix prices or as part of an overall scheme to restrain competition' " (p. 9) and that it held that "a horizontal agreement to raise price by eliminating credit is not unlawful unless it is proven to be 'pursuant to a conscious purpose to fix prices or as part of an overall scheme to restrain competition' ". Of course, the Court of Appeals held no such thing. It acknowledged "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 fix prices" (App. A, p. 4), but it did *not* hold that other agreements to fix credit were necessarily lawful or could not be unlawful. Its holding simply was that, standing alone, an agreement among beer wholesalers to eliminate trade credit to retailers could not be condemned as illegal *per se,* but must be tested under the rule of reason. *Amici's* arguments at pages 9-11 of their brief, being based on their erroneous view of the holding of the Court of Appeals, are as erroneous as their statements of the holding.

Conclusion.

Petitioners and *amici* attempt to create the impression that the issue presented here is an important one of pressing significance and that the opinion of the Court of Appeals will emasculate the antitrust laws by misstating the record, exaggerating the effect of California laws, and misdescribing the cases.

The fact remains and should be apparent that this case does not satisfy any of the requirements for review by this Court. The issue is unusual. The few cases that have addressed it are in entire harmony. The simple holding of the Court of Appeals was that an agreement among Fresno beer wholesalers to eliminate trade credit on sales of beer to retailers, if proved, cannot be condemned as *per se* illegal. It can hardly emasculate the antitrust laws, for it clearly leaves open the possibility that after trial the agreement may be found to be an unreasonable restraint of trade and illegal. It even leaves open the possibility that, after sufficient experience with such agreements, courts might categorize them as illegal *per se*. The analysis of the Court of Appeals, its refusal to succumb to the temptation of reaching an easy decision by deciding the case on the basis of labels or formalistic line drawing, rather than substance, its refusal to declare the alleged agreement illegal *per se* without any analysis of purpose or effect, and its refusal to condemn a practice as illegal *per se* without adequate experience, all conform precisely to this Court's recent discussions and applications (or non-applications) of the *per se* doctrine. The question was correctly decided by the Court of Appeals, is of substantial interest only to the parties, and is resolved for purposes of this case.

The petition for a writ of certiorari should be denied.

DATED: February 11, 1980.

Respectfully submitted,

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APPENDIX 1.

Business and Professions Code.

§ 25000. Beer price schedules: Filing

Each manufacturer, importer, and wholesaler of beer shall file and thereafter maintain on file with the department, in triplicate and in such form as the department may provide, a written schedule of selling prices charged by the licensee for beer sold and distributed by him to his customers in California, except that the transfer, including the sale, of beer between wholesalers who sell the same brand in package is permitted without filing the schedule of selling prices.

§ 25001. Beer price schedules: Change or modification

The schedule of prices filed may be changed or modified from time to time by the licensee filing it by filing with the department either a new and complete schedule of prices or an amendment thereto of changed or modified prices, as the department may by rule require.

§ 25002. Beer price schedules: Effective date

The first schedule of prices filed by a licensee shall be effective immediately upon filing, but an amendatory schedule or amendments to a prior filed schedule is not effective until ten (10) days after the filing date thereof, except that if any licensee has filed a new schedule or amendments to a prior filed schedule to meet lower posted and filed competing prices in a trade area, and the prices thus posted are not lower than the competing prices sought to be met, the new schedule or amendments shall go into effect immediately if the competing prices are already effective, or at the same time as the competing prices become effective.

§ 25003. Beer price schedules: Public inspection

Filed price schedules shall be subject to public inspection and shall not in any sense be considered confidential. Each filing licensee shall retain in his licensed premises for public inspection a copy of his effective posted and filed schedule.

§ 25004. Departure from schedule by licensee

Upon the filing of an original schedule of prices and after the effective date of any schedule of amendatory prices, all prices therein stated shall be strictly adhered to by the filing licensee, and any departure or variance therefrom by a licensee is a midsemeanor, except that the transfer of beer between wholesalers who sell the same brand in package is permitted without filing the schedule of selling prices. Each sale or transaction involving a violation of posted prices under this chaper is but a single offense or violation of this chapter regardless of the number of articles covered by the sale or transaction.

APPENDIX 2.

FRESNO AREA BEER PRICES

Major Beers — 12 Oz. Cans

Note 1: Meaning of Diagonal Between Prices: Price to left is per-case price by wholesalers to retailers. Price to the right is per-case price by retailers to consumers. Figures in parentheses are retailer's margin.

Date	Budweiser	Coors	Miller	Olympia	Schlitz
2/ 2/71	$4.15/5.40	$3.95/5.16	$4.10/5.28	$3.92/5.16	$3.95/5.16
	(1.25)	(1.21)	(1.18)	(1.24)	(1.21)
4/ 2/73	4.15/5.40	3.95/5.16	4.10/5.28	3.91/5.16	3.95/5.16
	(1.25)	(1.21)	(1.18)	(1.25)	(1.21)
6/24/74	4.28/5.56	4.23/5.56	4.20/5.56	4.23/5.56	4.25/5.56
	(1.28)	(1.33)	(1.36)	(1.33)	(1.31)
7/22/74	4.46/5.80	4.45/5.80	4.40/5.80	4.23/5.56	4.43/5.80
	(1.34)	(1.35)	(1.40)	(1.33)	(1.37)
12/20/74	4.63/6.04	4.45/5.80	4.60/6.04	4.39/5.80	4.62/6.04
	(1.41)	(1.35)	(1.44)	(1.41)	(1.42)
2/17/75	4.87/6.36	4.85/6.40	4.85/6.36	4.77/6.36	4.62/6.04
	(1.49)	(1.55)	(1.51)	(1.59)	(1.42)
12/19/75	5.05/6.60	4.85/6.40	5.00/6.60	4.81/6.36	5.04/6.60
	(1.55)	(1.55)	(1.60)	(1.55)	(1.56)

Note 2: Dates appearing above were selected as representative dates.

Note 3: Wholesale prices are set by wholesalers. Retail prices and retailers margins are included as a matter of information. Retail prices are not set by wholesalers.