No. 80-419

In the Supreme Court of the United States

OCTOBER TERM, 1980

STATE OF ARIZONA, PETITIONER

v.

MARICOPA COUNTY MEDICAL SOCIETY, ET AL.

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

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether an agreement among competing physicians setting maximum prices to be paid by insurance companies for services provided by physicians to insured patients is illegal per se under Section 1 of the Sherman Act.

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INTEREST OF THE UNITED STATES

The United States, which has primary responsibility for enforcing the federal antitrust laws, has a substantial interest in protecting the economy against anticompetitive price fixing activities. It also has a substantial interest in defining the circumstances in which the per se rule against price fixing is applicable. As part of its effort to promote rational enforcement of the antitrust laws, the United States has participated as amicus curiae before this Court in other private antitrust cases involving the proper application of the per se rule. See, *e.g.*, *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980); *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979).

STATEMENT

1. Respondents Maricopa Foundation for Medical Care and Pima Foundation for Medical Care are associations of doctors that approve, set maximum payment levels for, and assist in the administration of prepaid health insur-

ance plans underwritten by private insurers (Pet. App. 2-3, 39).[1] Membership in the foundations is open to all physicians licensed in Arizona (*id.* at 3). More than seventy percent of the practicing physicians in each of Maricopa and Pima Counties are members of the respective foundations (J.A. 407; C.R. 7(a), Ex. PF-125).[2] Seven insurers that do business in Arizona operate foundation-approved insurance plans (C.R. 7(b), Ex. MF-90).

In order to obtain and retain foundation approval, an insurer must agree that it will pay member physicians for medical services to insured patients up to the maximum amounts specified by the foundation (Pet. App. 42-43; Br. in Opp. 4; J.A. 129-130).[3] The maximum fees that the insurers must pay are set by majoriy vote of each foundation's member physicians on proposals made by the foundation's board of trustees (Pet. App. 2, 39).[4] As

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[1] Under "prepaid" plans approved by the foundations, economieally independent participating physicians agree to bill insurers directly rather than billing patients. Under "indemnity" plans, in contrast, patients pay the bills and then seek reimbursement from their insurers.

[2] "C.R." refers to the clerk's record in the district court. Maricopa County includes the city of Phoenix. Pima County includes the city of Tucson. The population of Maricopa County is 1,508,030; the population of Pima County is 531,263. The total population of the State of Arizona is 2,717,866. Bureau of the Census, *1980 Census of Population & Housing: Advance Reports PHC 80-v-4* (March 1981).

[3] Physicians are paid on a fee-for-service basis according to the number and type of services rendered. There are no limits on total insurer payments to a physician.

[4] The foundations "use relative value schedules and conversion factors to determine the maximum reimbursable levels of compensation for medical services provided to patients insured under foundation endorsed health insurance plans" (Br. in Opp. 5-6). A "relative value schedule" is a list that gives each medical service a numerical unit designation expressing its value in relation to other services. Conversion factors are dollar amounts by which the relative values are multiplied to create a list of fees. See generally Havighurst and Kissam, *The Antitrust Implications of Relative Value Studies in Medicine*, 4 J. Health Politics, Policy and Law 48 (1979); Bureau of Competition, Federal Trade Commission, *Medical*

the foundations acknowledge, revisions of the maximum fees occur when the board of trustees "feels they have fallen so far below usual and customary fees that physicians will resign from or refuse to renew membership in the foundation if they are not revised" (Br. in Opp. 4). To determine what its revised maximum fees should be, each foundation's board surveys physicians—including those who are not foundation members—and inquires about their usual and customary fees (Br. in Opp. 4; C.R. 7(b), Ex. MF-3, MF-6, reproduced in petitioner's Reply Memorandum, Exs. B, C).[5] In 1979, eighty-five to ninety-five percent of the physicians in Maricopa County billed at or above the Maricopa Foundation's maximum reimbursement levels, which were adopted in 1977 (Pet. App. 3; Br. in Opp. 8 n.24).

Subscribers to foundation-approved insurance plans individually select the physicians from whom they will receive medical care (Br. in Opp. 5). Foundation member physicians agree that they will accept the approved insurers' payments as full compensation for their services, *i.e.*, they agree not to seek additional payments from their patients who are covered by foundation-approved insurance (*id.* at 3, 6).[6]

Participation in Control of Blue Shield and Certain Other Open-Panel Medical Prepayment Plans 128 (1979).

[5] As the President of the Maricopa Foundation stated in a 1977 letter soliciting fee information (C.R. 7(b), Exhibit MF-33, reproduced in petitioner's Reply Memorandum, Appendix A): "The Maricopa Foundation for Medical Care is interested in maintaining as close-as-possible a relationship between the maximum allowance for Foundation plans and the usual and customary charges made by physicians in this area." In a 1974 letter to doctors urging them to renew their foundation membership (C.R. 7(b), Ex. MF-90), the Maricopa Foundation summarized its "progress" between 1970 and 1974. It noted that its "percent of increase" in the "maximum fee schedule" ranged between 30 and 33% for covered medical services.

[6] Persons insured under foundation-approved plans are not required to obtain medical services from member physicians (Br. in Opp. 5). Charges of nonmember physicians are paid by insurers up to the foundation-prescribed maximums, but such physicians need not accept those amounts in full satisfaction of their charges and may bill patients for the balance of any fee (*id.* at 5-6).

In addition to setting maximum fees, the foundations perform two other functions in conjunction with approved insurance plans: (1) peer review, *i.e.*, evaluating the necessity and appropriateness of treatment and hospital services rendered to insured patients, and (2) insurance administration, *i.e.*, serving as agents for underwriters and drawing funds from insurers' accounts to pay doctors' bills (Pet. App. 3). Respondents have not asserted that performance of either of those functions requires that doctors set the maximum fees that insurers must pay.

2. In 1978, the State of Arizona brought suit in the United States District Court for the District of Arizona, seeking injunctive relief against the two respondent foundations, the Maricopa County Medical Society, and the Pima County Medical Society.[7] The complaint alleged that the foundations were engaged in price fixing, in violation of Section 1 of the Sherman Act, 15 U.S.C. 1. Arizona moved for summary judgment on the issue of liability, asserting that maximum price fixing agreements are illegal per se.

The respondent foundations admitted that, by vote of their member physicians, they set the maximum prices that insurers must pay for services rendered to insured patients (Pet. App. 2, 39; J.A. 123, 126). They denied, however, that this constituted illegal "price fixing" (Br. in Opp. 7). While the foundations argued that the foundation plans were procompetitive because they provided an alternative type of health care coverage, and that foundation plans that used maximum fee agreements were effective in containing health care costs, they did not assert that prepaid insurance coverage or cost containment required that member doctors set the maximum amounts that insurance companies must pay.

The district court denied Arizona's motion for summary judgment on the issue of liability (Pet. App. 48).

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[7] The Pima County Medical Society was later dismissed under a consent order (Pet. App. 2 n.2).

Although it noted that "[p]rice-fixing has for some time been viewed as per se unlawful" (*id.* at 43), the court refused to apply a per se rule to the conduct at issue for two reasons. First, it perceived "a recent antitrust trend [that] appears to be emerging where the Rule of Reason is the preferred method of determining whether a particular practice is in violation of the antitrust law" (*id.* at 43-44). Second, it considered the per se rule inapplicable because members of a profession were involved in the allegedly illegal conduct (*id.* at 45-47). The district court nonetheless certified to the court of appeals the question whether the rule of reason should be used in analyzing the foundations' price fixing activities (*id.* at 50-51).

On appeal, the foundations argued that a rule of reason analysis was required because the "antitrust laws were not intended to straightjacket imaginative experimentation in fields, such as the professions, not traditionally subject to antitrust scrutiny" (Brief of Defendant-Appellee Maricopa Foundation for Medical Care at 36).[8] They also asserted (*id.* at 38-39) that the Ninth Circuit's decision in *Catalano, Inc.* v. *Target Sales, Inc.*, 605 F.2d 1097 (1979), rev'd and remanded, 446 U.S. 643 (1980), required a rule of reason approach. The foundations further contended that the challenged price agreements were not illegal because they would not necessarily affect the fees charged to patients. Finally, the foundations cited this Court's decision in *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), in support of their argument that the per se rule against price fixing was inapplicable. At no time, however, did they attempt to demonstrate that price fixing agreements among competing doctors are necessary to any cooperative productive activity of the foundations.

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[8] Pima Foundation for Medical Care joined in this brief in the court of appeals.

The court of appeals affirmed the district court's decision by a divided vote (Pet. App. 1-32). The court recognized that the agreements at issue in this case are horizontal agreements among competing physicians to set maximum fees that insurers must pay (*id.* at 2). It also recognized that, under this Court's decisions, price fixing, including vertical maximum price fixing, is illegal per se (*id.* at 7 n.4). Since the agreements at issue were maximum price agreements among direct competitors, however, the court of appeals did not believe that it was bound by prior decisions of this Court applying the per se rule. In addition, the court of appeals referred to the "professional" nature of the services provided by the foundations (*id.* at 5-6), and stated that "a restraint may serve the public, the transcendent end of all professions, even though its presence in a purely commercial setting would violate the antitrust law[s]" (*id.* at 12). Finally, the court asserted that the per se rule was inapplicable because the "record reveals nothing about the actual competitive effects of the challenged arrangement" (*id.* at 5).[9]

Judge Larson dissented. He concluded that the fee setting agreements among physicians are the type of "naked price restraint" previously held by this Court to be illegal per se. He observed that nothing in the nature of the medical profession or the health care industry warrants an exception from per se rules against price fixing (Pet. App. 19-27). Judge Larson also concluded that, "[e]ven if this were the first judicial examination of this form of restraint, its anticompetitive vices are egregious and its procompetitive features nonexistent, so that this Court could declare it to be within the per se rules" (*id.* at 27).[10]

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[9] What the court meant by evidence of "actual competitive effects" apparently was evidence that the fees paid to doctors would be less in the absence of the maximum fee schedules fixed by the foundations (see Pet. App. 6, 30-31).

[10] Judge Larson added that "even if the rule of reason is the correct standard * * * a detailed economic analysis of the industry

SUMMARY OF ARGUMENT

A. This Court consistently has applied a per se rule in holding horizontal price fixing agreements unlawful under Section 1 of the Sherman Act. *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 397-399 (1927); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940); *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643 (1980). The per se rule has been deemed applicable to maximum as well as minimum price agreements. *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951); *Albrecht* v. *Herald Co.*, 390 U.S. 145, 152-154 (1968).

B. Horizontal maximum price agreements only rarely have legitimate purposes and typically pose significant dangers to competition. Such agreements may be minimum price agreements in disguise. Moreover, even when they do not begin as such, they are likely to have the long-run effect of raising prices above a competitive level, for sellers have strong incentives to use the economic power aggregated through the agreements to further their own economic interests.

C. The reasons advanced by the court of appeals for remanding the case for a rule of reason trial are inconsistent with this Court's decisions and would impose on the district court a regulatory task it is ill-equipped to perform. A price fixing agreement is not exempt from speedy condemnation merely because the physicians who are parties to it are professionals. *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 788 (1975); *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 696 (1978). Nor do escalating costs of health care warrant a rejection of established antitrust principles. In the health care industry, as in other industries, the level

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is not necessary. This agreement to fix fees is so plainly anticompetitive that it is an unreasonable restraint of trade on its face" (Pet. App. 31-32). Arizona's motion for summary judgment on liability based on the rule of reason also had been denied by the district court (Pet. 6; Br. in Opp. 10).

of prices fixed by an agreement among competitors is not relevant to a determination of the agreement's legality under the Sherman Act. *Catalano, Inc.* v. *Target Sales, Inc., supra,* 446 U.S. at 647; *United States* v. *Trans-Missouri Freight Ass'n,* 166 U.S. 290, 340-341 (1897); *United States* v. *Socony-Vacuum Oil Co., supra.* Moreover, an inquiry into an agreement's actual effect on prices over the long term would impose on the district courts a continuing "ratemaking" burden which they are not equipped to sustain. *United States* v. *Trenton Potteries Co., supra,* 273 U.S. at 397-398. Finally, the court of appeals' assumption that price fixing by sellers, who have not integrated their productive capacity, is an acceptable means to correct deficiencies in the competitive marketplace conflicts with this Court's conclusion that it is solely the province of legislatures, not private groups, to decide when the public interest requires allocation of resources by some method other than competition. *National Society of Professional Engineers* v. *United States, supra,* 435 U.S. at 695-696.

D. When a court is confronted with a horizontal maximum price fixing agreement, its initial inquiry—which may be denominated either a "quick look" to determine the applicability of the per se rule or a limited rule of reason inquiry—must focus on determining whether the proponents of the agreement have shown it to be necessary to some integration of productive capacity. If they have not, the price agreement should be deemed to have no effect other than restraining competition and should be held "illegal on its face." *National Society of Professional Engineers* v. *United States, supra,* 435 U.S. at 692.

E. This type of limited inquiry reveals that the agreements at issue in the present case are illegal on their face. Respondents have not identified any reason why the legitimate activities of the foundations require competing doctors to agree on prices. Thus, the restraint on price competition is not necessary to any integration of productive capacity. In addition, the maximum price agreements at issue have the practical effect of minimum

price agreements. Once an insurer agrees to pay the prices fixed by the foundations, no doctor has a financial incentive to charge less than those prices for services rendered to insured patients. Finally, maximum price agreements among a substantial percentage of the doctors in a community—here more than seventy percent—frustrate the development of insurer-imposed limitations on prices that would promote rather than impair competition. Instead of being faced with prices set by a powerful combination of sellers, insurers, like other buyers, should have access to a competitive market. The economic benefits of price competition which then would accrue to insurers could be passed on to their subscriber customers.

ARGUMENT

A. This Court's Decisions Establish That Maximum Price Fixing By Competitors Is Illegal Under The Federal Antitrust Laws Unless Necessary To Cooperative Productive Activity

The complaint in this antitrust case, filed by the State of Arizona, seeks to enjoin the enforcement of horizontal agreements among hundreds of doctors that directly fix the maximum prices they charge to insurance companies. The price fixing agreements are implemented through foundations that include more than seventy percent of the practicing physicians in the two most populous counties in Arizona.[11] The members of the foundations are independent practicing physicians.[12] They agree by

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[11] When the Maricopa Foundation for Medical Care was incorporated in 1969, it initially enrolled 80 percent of the practicing physicians in Maricopa County (J.A. 407). Its membership consistently has been in excess of 70 percent of the practicing physicians in the County (*ibid.*); at times it has exceeded 90 percent (C.R. 7(b), Ex. MS-1). The percentages are similar for the Pima Foundation (C.R. 7(a), Ex. PF-125). In 1974, the Maricopa Foundation had 899 physician members (C.R. 7(b), Ex. MF-90), and the Pima Foundation had 400 physician members (C.R. 7(a), Ex. PF-125).

[12] The agreements at issue in this case differ fundamentally from the kinds of agreements that facilitate the operation of health

majority vote on the maximum prices that insurance companies must pay if they wish to do business with the foundations.[13] The insurance companies are required to pay any fee up to the prescribed maximums for medical services rendered to subscribers of foundation-approved insurance plans (Pet. App. 2; Br. in Opp. 2). We submit that Judge Larson correctly concluded, in view of the record before him (Pet. App. 31), that "[b]ased on an assessment of its competitive impact," this mechanism to prescribe the maximum fees that purchasers of medical services must pay "should be sub-

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maintenance organizations ("HMOs"). The member physicians of the defendant foundations practice as separate economic entities who have not integrated their medical practices or entered into any risk-sharing arrangements. By contrast, the Health Maintenance Organization Act of 1973, 42 U.S.C. 300e *et seq.*, provides that, in a health maintenance organization, a group of physicians and other health professionals may provide coordinated and integrated comprehensive medical services to subscribers for a periodic fee. Physicians in an HMO share income (from subscriber fees) and expenses according to employment or partnership agreements and usually are at risk for any adverse financial results of the HMO. Under those circumstances, agreements among participating doctors about the fees to be charged and the salaries or partnership shares to be paid to physicians and others who provide services through an HMO, like similar agreements among individuals who form a partnership or joint venture, may be essential to render the service provided by the HMO. See *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 281-282 (6th Cir. 1898) (Taft, J.), aff'd as modified, 175 U.S. 211 (1899). See also pages 19-24, *infra*.

[13] Respondents argue that their agreements do not fix prices because "[a]ll physicians are free to bill as they like" (Br. in Opp. 6). But freedom to bill an amount that one has agreed not to collect has no economic significance (see Pet. App. 42-43). Even if the agreements did not fix a maximum for "billed prices," they would still fix a maximum for real prices—*i.e.*, the prices doctors charge insurers. Moreover, since any price-fixing agreement that violates the Sherman Act is legally unenforceable, the pertinent consideration is not the theoretical freedom of action the parties to the agreement legally retain, but the constraint to which they have agreed in the exercise of that freedom.

ject to the per se standards traditionally applied to price-fixing." [14]

The antitrust laws rest on the premise that a competitive market system will result in an optimal allocation of resources. Accordingly, the fundamental issue in any case under Section 1 of the Sherman Act is whether the agreement at issue promotes competition or undermines competition. *National Society of Professional Engineers* v. *United States*, 435 U.S. 679, 691 (1978). In construing and applying Section 1, however, this Court "has held that certain agreements or practices are so 'plainly anticompetitive,' * * * and so often 'lack * * * any redeeming virtue' * * * that they are conclusively presumed illegal without further examination." *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, 441 U.S. 1, 8 (1979). Such agreements are described as being illegal per se.

This Court long ago established that a horizontal minimum price fixing agreement among competitors with respect to the prices to be charged for their products or services is a per se violation of Section 1. *United States* v. *Trenton Potteries Co.*, 273 U.S. 392, 397 (1927); *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 223 (1940). The continuing validity of the per se rule was reaffirmed just last year. *Catalano, Inc.* v. *Target Sales, Inc.*, 446 U.S. 643, 647 (1980).[15]

The Court's opinions have not limited the per se rule against price fixing to agreements that set a uniform or minimum price. "Under the Sherman Act a combination

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[14] Respondents argue that their agreements do not fix prices because they apply only to payments by foundation-approved insurers to foundation member doctors. However, a showing that the effect of the agreements was limited to transactions with insurers would provide no defense. Price fixing agreements are illegal per se even if they "may not be aimed at complete elimination of price competition." *United States* v. *Socony-Vacuum Oil Co.*, 310 U.S. 150, 225 n.59 (1940).

[15] In *Catalano*, this Court summarily reversed a decision of the Ninth Circuit which had held that an agreement among competitors to eliminate free trade credit did not constitute price fixing and consequently was not per se illegal.

formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing * * * price * * * is illegal *per se.*" *United States* v. *Socony-Vacuum Oil Co., supra,* 310 U.S. 223. Thus, the Court has indicated that agreements to fix maximum prices are illegal per se. *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.,* 340 U.S. 211, 213 (1951); *Albrecht* v. *Herald Co.,* 390 U.S. 145, 152-154 (1968). In *Kiefer-Stewart,* the agreement at issue was viewed as horizontal as well as vertical, even though the defendants were affiliated enterprises. In that context, the Court ruled that "agreement[s] *among competitors* to fix *maximum* * * * prices of their products * * * no less than those to fix minimum prices * * * [are] * * * illegal *per se.*" 340 U.S. 213 (emphasis added). These principles provide the starting point for analysis in this case.

B. Maximum Price Fixing Agreements Among Competitors Pose A Serious Threat To Competitive Conditions

Compelling economic reasons support this Court's conclusion that horizontal agreements to fix maximum prices generally are illegal under the antitrust laws. In a competitive economy, buyers and sellers are motivated by financial self-interest. It is socially beneficial that each seller strive independently to obtain the best possible price for his product or service. A seller may, of course, misjudge what his profit-maximizing price is, and thus temporarily underprice or overprice his product. But few sellers willingly would enter into an agreement requiring them to take less for their products or services than could be obtained under prevailing market conditions.[16]

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[16] There is one possible exception to this observation, but it reinforces the traditional rule against maximum price fixing. Sellers with dominant market power might believe it to be in their economic interest to decrease prices in the short run—that is, to maintain prices above a competitive level but at less than the monopoly price they would be able to command—in order to discourage new entry and thus preserve supra-competitive prices. Such anticom-

While there is little incentive for sellers to band together to keep their prices below a competitive level,[17] there is a direct and substantial incentive for them to combine to raise prices to a supra-competitive level. That incentive to restrict output and raise prices by agreement is the central concern behind Section 1 of the Sherman Act. Because sellers have an incentive to agree to raise prices, there is a dangerous probability that agreements among competing sellers to fix maximum prices in reality are agreements to fix minimum prices, or are likely to be used to do so over time. See *Albrecht* v. *Herald Co.*, *supra*, 390 U.S. at 153, where the Court, in discussing a vertical maximum price fixing arrangement, noted that "if the actual price charged under a maximum price scheme is nearly always the fixed maximum price * * * the scheme tends to acquire all the attributes of an arrangement fixing minimum prices." That risk is greatest when the defendants possess substantial market power, as they do in this case.[18]

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petitive behavior was found to exist in *American Tobacco Co.* v. *United States*, 328 U.S. 781, 806-807 (1946); see also L. Sullivan, *Antitrust* § 78 at 211 (1977); Comment, *The Per Se Illegality of Price Fixing—Sans Power, Purpose, or Effect*, 19 U. Chi. L. Rev. 837, 846 & n.55 (1952). This concern is not immaterial in the medical service industry. See generally, Halper, *The Health Care Industry and the Antitrust Laws: Collision Course?*, 49 Antitrust L.J. 17, 20, 22 (1980), describing the "many physician group efforts to discourage development of HMOs," and noting that physician groups have not proven immune to "fears of a new form of competition, or any competition at all, that could take away patients, put pressure on fees, or change the accepted economics of physician practice."

[17] Of course, an individual seller who wished to sell below the competitive price to a particular customer for "altruistic" reasons would have no need to combine with his rivals to do so.

[18] The court of appeals in this case was of the view that an extensive economic analysis was called for because the agreements at issue are horizontal, while the agreements treated as illegal per se in this Court's past decisions were vertical. In adopting that view, the court of appeals not only overlooked *Kiefer-Stewart's* statement that maximum price fixing by *competitors* is illegal per

The danger that horizontal maximum price agreements will allow sellers to increase their prices above a competitive level takes two principal forms. First, the so-called maximum price fixing agreement may be a sham and really be no more than a convenient cover for a classic cartel arrangement to fix minimum prices. Second, even if the participants are initially well-intentioned and do not start by fixing minimum prices, they have the power to do so. See *United States* v. *Trans-Missouri Freight Ass'n*, 166 U.S. 290, 324 (1897) ("it is not material that the price of an article may be lowered. It is in the power of the combination to raise it"). Changing circumstances will call for adjustments in the initially prescribed maximum price that buyers must pay. See page 3, *supra*. At such time, in view of the normal economic incentive to increase profits, it is unlikely that the participants in the agreement would continue to exercise their market power in an altruistic manner. This Court long ago recognized that danger in *United States* v. *Trenton Potteries Co.*, *supra*, 273 U.S. at 397-398:

> The power to fix prices, whether reasonably exercised or not, involves power to control the market and to fix arbitrary and unreasonable prices. The reasonable price fixed today may through economic and business changes become the unreasonable price of tomorrow. * * * Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed and without placing on the government in enforcing the

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se, but also reached a result opposite to that which could be drawn from economic analysis. Economically, there is a stronger case for per se treatment of horizontal maximum price agreements. Restrictive vertical agreements have a potential for procompetitive effects that exceeds that of horizontal agreements. See *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 51-52, 56-59 & n.28 (1977). A more detailed analysis, therefore, may be appropriate to determine whether certain vertical restraints should be held unlawful.

> Sherman Law the burden of ascertaining from day to day whether it has become unreasonable * * *.

Accordingly, in a case in which the challenged agreement among competitors to fix prices is not a necessary element of cooperative productive activity—such as a partnership or joint venture that creates efficiencies by integrating the economic functions of its members—the decisions of this Court properly characterize the agreement as a naked restraint illegal per se under the antitrust laws. See note 12, *supra*.

C. The Illegality Of Maximum Price Fixing Agreements Is Not Affected By The Fact That The Defendants Are Participants In The Health Care Industry

1. The court of appeals hesitated to find the agreements at issue in this case illegal on their face because it was uncertain about the extent to which the Sherman Act applies to professionals, and because it had difficulty in discerning the "competitive order that should exist within the health care industry" (Pet. App. 5). But the fact that the parties to the agreements are doctors does not, by itself, justify the court of appeals' refusal to determine the legality of their action on the basis of settled principles of antitrust law as applied to the undisputed facts before it. The court's view that the public service goals of the medical profession warrant analysis different from that applicable to similar restraints imposed by other sellers (Pet. App. 12) conflicts with this Court's decisions in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 788 (1975), and *National Society of Professional Engineers* v. *United States*, *supra*, 435 U.S. at 696. Those cases hold that price fixing among competitors is not exempt from traditional antitrust analysis merely because the parties to the agreement are professionals. And nothing about the medical profession distinguishes it from the legal and engineering professions in any respect that would mitigate the anticompetitive effects of price fixing. See *American Medical Association* v. *United States*, 317 U.S. 519, 528 (1943), noting that "the calling or occupa-

tion of the individual physicians charged as defendants is immaterial if the purpose and effect of their conspiracy was * * * obstruction and restraint" of trade in the group health care industry.

2. The court of appeals also erred in concluding (Pet. App. 6-9) that, because the health care industry has special characteristics and does not operate as a purely competitive market, horizontal maximum price fixing agreements should be condoned if they have the effect of reducing medical fees. In suggesting that it is appropriate to consider the effect of the agreements on the level of price, the court of appeals apparently believed that a private restraint on competition (horizontal price fixing) could serve as an acceptable means to offset a perceived deficiency in the competitive characteristics of the health care industry.[19] Even in the short run, however, any such balancing process would create a "sea of doubt" on which the decisions of this Court wisely have refused to embark. See *National Society of Professional Engineers* v. *United States, supra*, 435 U.S. at 696. Neither economic analysis nor legal precedent would provide adequate guidance in applying such a balancing test.[20] Moreover, the court of appeals' approach would clash with this Court's decisions, which "foreclose the argument that be-

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[19] Effective competition in the health care industry can be diminished by consumer indifference to price resulting from insurance and other factors. See 42 U.S.C. (Supp. III) 300k-2(b)(1).

[20] If, due to perceived imperfections in competition, antitrust courts were free partially to displace competition or prescribe a mixture of competition and other conditions, they would enter the obscure world of "second best." See R. Bork, *The Antitrust Paradox* 113-114 (1978). Under such an approach, there would be "no criteria that could be applied by a court to the decision of individual cases." *Id.* at 113. For this reason, courts should not be empowered to decide "how much restraint of competition is in the public interest, and how much is not." *United States* v. *Addyston Pipe & Steel Co., supra*, 85 F. at 284. "The manifest danger in the administration of justice according to so shifting, vague, and indeterminate a standard would seem to be a strong reason against adopting it." *Ibid.*

cause of the special characteristics of a particular industry, monopolistic arrangements will better promote trade and commerce than competition." *Id.* at 689.

Indeed, judicial inquiry into the effect on prices of maximum price agreements would be virtually impossible as a practical matter, for it would force antitrust courts to immerse themselves in voluminous price and output data without ascertainable standards for analysis. They would have to make the kind of judgments that rate regulating agencies make, but without statutory guidance, rulemaking power, or specialized expertise and staff. The measurement of reasonableness, moreover, would have to extend over time, as formal rate regulation does. Otherwise, parties to a maximum price agreement initially could restrain their prices and receive judicial approval, only to exercise their power to fix supra-competitive prices thereafter with impunity.[21] This Court repeatedly has recognized that district courts are not equipped to make this kind of inquiry. *United States* v. *Trans-Missouri Freight Ass'n, supra,* 166 U.S. at 323-324; *United States* v. *Trenton Potteries Co., supra,* 273 U.S. at 397-398; *National Society of Professional Engineers* v. *United States, supra,* 435 U.S. at 689. With federal court dockets more crowded now than in the past, it makes even less sense to saddle the district courts with a new burden of essentially regulatory tasks. Since an inquiry into the level and reasonableness of price is judicially unmanageable, the legality of price fixing agreements cannot depend on a showing of unreasonable effect on price as the court of appeals envisioned. See *Catalano, Inc.* v. *Target Sales, Inc., supra,* 446 U.S. at 647 ("[i]t is no excuse that the prices fixed are themselves reasonable"); see also F. Scherer, *Industrial Market Structure and Economic Performance* 438-440 (1970).

3. The court of appeals' further suggestion that the legality of horizontal price fixing agreements turns on

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[21] Evaluation of output, even if it were an adequate substitute for evaluation of price reasonableness, would itself be unmanageable: indeed, when services such as medical care are involved, the concept becomes almost metaphysical.

perceived inadequacies in the marketplace for medical services also is unsound as a matter of legal policy. If market forces do not result in a socially acceptable level of price or supply for particular services, state and federal legislatures may displace the competitive process with regulatory controls. See, *e.g.*, The National Health Planning and Resources Development Act of 1974, 42 U.S.C. (& Supp. III) 300k-l, 300m-2, 300m-6 and 300n-1(b) (encouraging the states to adopt certificate of need programs under which state agencies must approve new competitive entry by health care providers to avoid unnecessary duplication of services). But it is solely the province of the legislatures, not private groups, to decide when the public interest requires that economic resources be allocated by some means other than competition. *National Society of Professional Engineers* v. *United States*, *supra*, 435 U.S. at 695-696; see also *Standard Oil Co.* v. *FTC*, 340 U.S. 231, 248 (1951); *Fashion Originators' Guild* v. *FTC*, 312 U.S. 457, 463-468 (1941). Absent specific legislative action to supersede the Sherman Act,[22] private parties are bound by the

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[22] Respondents have not argued that any express or implied statutory immunity shields their price agreements from the antitrust laws. Moreover, recent legislation shows that Congress intended that competition in the health care industry should be encouraged and strengthened. See, *e.g.*, 42 U.S.C. (Supp. III) 300k-2(a)(17) (prescribing as a national health priority the "strengthening of competitive forces in the health services industry" when competition can serve the public interest); S. Rep. No. 96-96, 96th Cong., 1st Sess. 85 (1979) ("[health] planning agencies at all levels have as important a responsibility to promote competition among health care providers as the obligation to encourage cost containment, facility closure or shared services. The experience with other public regulatory authorities has been one of creating industry cartels which emphasize market stability rather than innovation and consumer preference. The Committee intends to protect against such tendencies in health sector regulation."); 42 U.S.C. (Supp. III) 300k-2(b)(1)-(3) (calling for promotion of competition when it can serve the public interest); 42 U.S.C. (Supp. III) 300*l*-2(a)(5) (directing health systems agencies to chart their course with a view

congressional mandate that prices must be the product of competition and not of private compacts among sellers.[23]

D. Horizontal Maximum Price Fixing Agreements Should Be Declared Illegal Without Further Judicial Examination Unless The Defendants Establish That Their Agreements Are Necessary To Cooperative Productive Activity

1. *a.* The per se rule plays an important role in antitrust enforcement. It is applied appropriately to business practices that are usually anticompetitive or that have significant anticompetitive potential and little or no potential to foster competition. In such instances, with little cost to society, the per se rule makes the proscriptions of the Sherman Act more certain and predictable for all concerned and eliminates the need for protracted and costly economic investigations into the history, purpose and effect of restraints of trade in every case. *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc., supra*, 441 U.S. at 8 n.11. Per se rules, however, also pose dangers, for if they are applied without reference to their rationale they can hinder competition by banning conduct with significant procompetitive potential and economic utility. See *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 57-58 (1977).

Therefore, when a court is confronted with a particular agreement that appears on its face to fall within a

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to "preserving and improving, in accordance with section 300k-2(b) of this title, competition in the health service area"). This statutory scheme is discussed in the government's brief amicus curiae in *National Gerimedical Hospital* v. *Blue Cross of Kansas City*, No. 80-802.

[23] See Rahl, *Price Competition and the Price Fixing Rule—Preface and Perspective*, 57 Nw. U. L. Rev. 137, 142 (1962) ("Those who find it difficult to accept a per se rule when applied to an agreement to hold prices down miss the point to the rule. The rule is grounded on faith in price competition as a market force."). See also *United States* v. *Container Corp.*, 393 U.S. 333, 338 (1969) ("Price is too critical, too sensitive a control to allow it to be used even in an informal manner to restrain competition").

per se rule, but which the defendants claim has some competitive justification, a preliminary factual inquiry may be necessary to determine if the per se rule should be applied. This inquiry is necessarily limited, for as this Court has cautioned, "[t]he scrutiny occasionally required [to determine whether the per se rule applies] must not merely subsume the burdensome analysis required under the rule of reason." *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc., supra,* 441 U.S. at 19 n.33; see also *United States* v. *Trenton Potteries Co., supra,* 273 U.S. at 398, 400-401. The judicial focus of this preliminary scrutiny or "quick look" should be limited to ascertaining whether the proponents of the agreement have identified signficant procompetitive effects achieved through integration of productive capacity that are unattainable in the absence of the agreement. Only if such effects are found would further inquiry under the rule of reason be warranted.[24] Thus, if an agreement on price were necessary to cooperative economic activity, as in a true partnership, joint venture or merger, the elimination of price rivalry would be a facet of an integration of productive resources capable of yielding efficiencies beneficial to competition, and would require further analysis. In the absence of such a necessary relationship to integrated productive activity, however, an agreement among competitors fixing prices properly is deemed a naked restraint with no purpose other than elimination of rivalry. Such a restraint should be held "illegal on its face." *National Society of Professional Engineers* v. *United States, supra,* 435 U.S. at 692.[25]

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[24] Purported benefits that are not procompetitive would not be relevant even under the rule of reason. *National Society of Professional Engineers* v. *United States, supra,* 435 U.S. at 690 ("the inquiry is confined to a consideration of impact on competitive conditions").

[25] See R. Bork, *The Antitrust Paradox, supra,* at 267:

> None of this analysis in any way detracts from the merit of the per se rule. It simply argues that the rule can be made more beneficial by confining its scope to its rationale. Price-fixing and market-division agreements (and any other hori-

b. The need to take a "quick look" before declaring an agreement illegal per se does not, of course, mean that an extended rule of reason analysis must be applied each time a new form of horizontal maximum price fixing is challenged under the Sherman Act. On the contrary, as this Court recognized in *Catalano, Inc.* v. *Target Sales, Inc., supra*, the fact that a particular kind of price agreement—in that case an agreement to eliminate free credit—has never been the subject of Sherman Act adjudication does not preclude condemnation of the practice as illegal per se following a quick look. Thus, in *Catalano* the Court determined that the agreement to eliminate free credit foreclosed one type of price competition. It then looked to see whether any justifications relied on by the court of appeals required further analysis. 446 U.S. at 646 n.8. Finding no "procompetitive justification," the Court applied the per se rule. Accordingly, if, as in *Catalano*, a preliminary scrutiny of the procompetitive justifications offered by defendants in a horizontal maximum price fixing case does not indicate that the agreement is necessary to " 'increase economic efficiency and render markets more, rather than less, competitive,' " [26] expeditious condemnation, under whatever

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> zontal agreements eliminating competition) should be illegal per se when they do not accompany a contract integration or are not capable of contributing to its efficiency. This is not to suggest that every ancillary restraint should be lawful. A showing that a restraint is ancillary, in the sense just stated, merely lifts it out of the per se category and subjects it to the other tests of the rule of reason: market share and specific intent. A finding of ancillarity merely proclaims the presence of an economic integration that entitles the restraint to be judged on the same terms as horizontal mergers or internal growth, the reason being that the same need to weigh possible efficiencies against possible restriction of output is present.

Competitively beneficial integration of economic functions may occur at both the production and distribution stages. See L. Sullivan, *Antitrust, supra*, § 77 at 206-208.

[26] *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc., supra*, 441 U.S. at 20, quoting *United States* v. *United States Gypsum Co.*, 438 U.S. 442, 441 n.16; see also *National Society of Professional Engineers* v. *United States, supra*, 435 U.S. at 688.

label, is appropriate. There is no need to proceed to an elaborate or lengthy rule of reason inquiry.[27]

The critical requirement, of course, in applying Section 1 of the Sherman Act to maximum price fixing agreements is to focus on economic reality. Debate about the "per se" and "rule of reason" labels should not obscure the fact that horizontal maximum price fixing agreements have great anticompetitive potential, and should be declared illegal as naked restraints without extensive judicial inquiry except in those rare cases where they are essential to the operation of integrated productive activity.

2. As Judge Larson noted in his dissenting opinion in the court of appeals (Pet. App. 31), application of the "rule of reason" to maximum price fixing agreements would not significantly alter the substance of the analysis. Even under the rule of reason, "a detailed economic analysis of the industry is not necessary" (*ibid.*).

The per se rule and the rule of reason are not unrelated or conflicting standards but "two complementary categories of antitrust analysis." *National Society of Professional Engineers* v. *United States*, *supra*, 435 U.S. 692. As this Court has cautioned, "the Rule [of Reason] does not open the field of antitrust inquiry to any argument in favor of a challenged restraint that may fall

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[27] Where defendants fail to show that any genuine issue of material fact remains in dispute, plaintiffs are entitled to summary judgment. See Fed. R. Civ. P. 56(e). For this Court to accept respondents' suggestion that the issue whether there has been a violation of Section 1 cannot be decided because "[t]his action has not advanced beyond motions for summary judgment, discovery has not been completed and there has been no trial on the merits" (Br. in Opp. 2) and "that this litigation [should] be permitted to follow its natural course and proceed to trial" (*id.* at 25), would be contrary to Rule 56 and would serve only to waste the resources of the parties and the courts and further delay the injunctive relief to which Arizona may be entitled. See *First National Bank of Arizona* v. *Cities Service Co.*, 391 U.S. 253, 284-290 (1968); see also *Catalano, Inc.* v. *Target Sales, Inc.*, *supra*, 446 U.S. at 643-644, 646 & n.8 (summarily rejecting meritless justifications for price fixing and applying the per se rule at a pretrial stage in the litigation).

within the realm of reason. Instead, it focuses directly on the challenged restraint's impact on competitive conditions." *Id.* at 688. Thus, the rule of reason requires a court to weigh the injury to competition that may result from the agreement at issue against any enhancement of competition that could not be achieved without the restraint. The court thereby determines whether "the restraint imposed is such as merely regulates and perhaps thereby promotes competition or whether it is such as may suppress or even destroy competition." *Chicago Board of Trade* v. *United States*, 246 U.S. 231, 238 (1918).

Accordingly, the rule of reason analysis in a horizontal maximum price fixing case would require that the plaintiff first establish that the challenged practice is an agreement among competitors fixing maximum price. If the plaintiff satisfied that burden, the court, without inquiry into actual effect on price, would recognize the dangers to competition posed by the agreement, *i.e.*, that, in some contexts, such agreements actually set minimum prices and, in many other contexts, they confer power to raise prices in the future (see pages 12-15, *supra*). The burden would then shift to the defendants to show that their agreement is essential to integrated productive activity and thereby yields efficiencies and procompetitive benefits which outweigh those dangers. If the defendants fail to do so, or if a review of the purported justifications reveals them to be without merit, the limited rule of reason inquiry—which in this situation would be no different from the "quick look" required to hold that the maximum price agreement is subject to a per se rule—would be at an end. It would then be clear that the agreement restrains competition without offsetting competitive benefits and is therefore illegal under Section 1. See R. Bork, *The Antitrust Paradox*, *supra*, at 267-269, 279.

If the defendants did demonstrate some significant procompetitive effect, the analysis would have to proceed further to determine the need for the challenged agreement and its overall economic impact in the factual situation before the court. But again, the analysis would be

no different from that under a sound application of the per se rule, for defendants who have made the showing of productive integration necessary to enable them to proceed beyond the initial stage of a rule of reason inquiry also have made a showing sufficient to avoid application of a per se rule following a "quick look."

In short, both the per se rule and the rule of reason focus on the impact of the challenged agreement on competitive conditions. In the absence of a showing that an agreement fixing maximum prices has a significant procompetitive effect due to its necessary relationship to cooperative productive activity, there is no reason for further judicial examination of the purported benefits of the agreement. It would be extremely wasteful of the resources of both courts and litigants if, as suggested by the court of appeals, district courts were required to attempt to ascertain the actual effect of horizontal maximum price fixing agreements on price levels over either the short or long run.[28]

E. The Maximum Price Fixing Agreements At Issue In This Case Are Illegal No Matter How They Are Analyzed

The agreements at issue, whether given a quick look under the per se rule or subjected to a limited inquiry under the rule of reason, violate Section 1 of the Sherman Act. Under either articulation of the appropriate criteria, respondents have failed to even suggest how the challenged price restraints could be deemed ancillary or necessary to a procompetitive venture. No further inquiry is required.[29]

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[28] As noted on pages 14-15, *supra*, such an inquiry would produce little information relevant to an examination of the competitive impact of a price fixing agreement. The level of prices, at any given point in time, cannot be dispositive since the agreement itself may confer market power which can be misused in the future. The only safeguard against that consequence would be to make the district courts "rate bureaus" with a continuing duty to monitor the prices fixed by all such agreements.

[29] Thus, the present case differs substantially from *Broadcast Music, Inc.* v. *Columbia Broadcasting System, Inc.*, *supra*, where

1. Respondents' assertion (Br. in Opp. 19) that their price fixing agreements promote competition by "offering an alternative to closed panel prepaid medical plans with foundation endorsed insurance" should be rejected. It is the medical insurance coverage provided by insurers, not the price fixing activities of doctors, that offers this competitive alternative. There is simply no reason to believe, and respondents offer no reason to believe, that maximum price fixing by physicians is necessary to the operation of health insurance plans that allow subscribers to choose their physicians. Insurers can, and often do, establish their own maximum payments to providers of medical services under plans that allow subscribers to choose their provider.[30] See generally *Group Life & Health Insurance Co.* v. *Royal Drug Co.*, 440 U.S. 205, 209-210 & n.5 (1979); see also the brief amicus curiae filed by the United States in the *Royal Drug Co.* case (77-952 Br. 10-13); Kallstrom, *Health Care Cost Control by Third Party Payors: Fee Schedules and the Sherman Act*, 1978 Duke L.J. 645, 661-665, 670, 678-684.

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a more detailed analysis under the rule of reason was justified because preliminary scrutiny disclosed that the challenged blanket license for musical compositions had a procompetitive effect and that its restraint on price competition was necessary to achieve that effect.

In *Broadcast Music, Inc.*, the blanket license at issue was found to be a unique product that improved the functioning of the market for the benefit of both buyers and sellers. At least for some customers, the desired product could be provided only on a collaborative basis. The challenged restraints on price competition, moreover, were inherent in the blanket license. Thus, this Court held that a rule of reason analysis was required to determine whether the commercial necessity of the blanket license in some types of transactions made it reasonably necessary in transactions with the plaintiffs. The lower courts were directed to balance the need for the blanket license against the anticompetitive effect of the license's pricing formula as applied to transactions with particlular customers.

[30] In that case, of course, it is the individual *buyer* of services—*i.e.*, the insurer—rather than a cartel of sellers which prescribes a "low" price.

2. Respondents also suggest, as a "procompetitive justification," that "the effect of the foundation medical plans is to decrease the cost of medical service rather than to increase its cost" (Br. in Opp. 19). If by this they invite a judicial inquiry into the reasonableness of their prices, their invitation must be rejected. See page 17, *supra*. If they mean that the foundations' activities as a whole make it possible for doctors to provide medical care more efficiently, they would still have to show that *price fixing* was necessary to achieve the efficiency. For if the competitive benefits could be obtained without price fixing, there is no reason why society should accept the risk of anticompetitive abuse. Consequently, reference to competitive benefits will not save from per se condemnation restraints of trade that preliminary scrutiny shows to be unnecessary to achieve those benefits. See *United States* v. *Realty Multi-List, Inc.*, 629 F.2d 1351, 1374-1376 (5th Cir. 1980); *United States* v. *Addyston Pipe & Steel Co.*, 85 F. 271, 282-283 (6th Cir. 1898), aff'd as modified, 175 U.S. 211 (1899); L. Sullivan, *Antitrust* § 77 at 208-209 (1977); R. Bork, *The Antitrust Paradox*, 268, 279 (1978).

In this case only the price agreements themselves are challenged, and respondents have not contended that efficient functioning of peer review or claims administration [31] requires that the doctors collectively set maximum prices insurers must pay.[32] Indeed, the severability of these functions is demonstrated by the fact that the

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[31] The foundations perform "peer review" of the medical necessity and appropriateness of treatment given to insured patients and, for some groups, the necessity and appropriateness of hospital utilization (Pet. App. 3; Br. in Opp. 4). For some insured groups the foundations also serve as agents for underwriters to facilitate payments to doctors (Pet. App. 3; Br. in Opp. 4). The savings respondents claim as a result of the foundation plans (Br. in Opp. 4-5) appear to be at least partially attributable to these activities.

[32] It is not, of course, relevant that doctors might refuse to participate in other activities if they were enjoined from fixing prices (see Br. in Opp. 4). Illegal conduct cannot be immunized by the violators' threat to cease lawful activity if the illegal conduct is enjoined.

Maricopa Foundation itself has a contract with the State of Arizona to administer the Comprehensive Medical Dental Program for Foster Children, a program in which maximum payments to physicians are set by a state agency rather than by foundation members (Br. in Opp. 7). Accordingly, the legality of respondents' horizontal price fixing agreements must be determined solely by analysis of the likely competitive effect of price fixing, *i.e.*, without reference to the foundations' other activities that would not be impaired by an injunction against price fixing.[33]

3. *a.* Existing deficiencies in competition in the health care industry make the dangers to competition inherent in maximum price fixing agreements particularly acute. Indeed, because of those deficiencies there is a pressing

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[33] The maximum price agreements at issue in this case cannot be justified as a means of communicating information that could improve price competition or facilitate efficient development of prepaid insurance plans. As this Court recognized in *Catalano, Inc.* v. *Target Sales, Inc., supra,* 446 U.S. at 649, the "informing function" of a price fixing agreement cannot "justify its restraint on the individual wholesaler's freedom to select his own prices and terms of sale. For * * * it is obvious that any industrywide agreement on prices will result in a more accurate understanding of the terms offered by all parties to the agreement." The Court added that there is a "plain distinction" between advertising prices and fixing prices. *Id.* at 649-650. Moreover, in this case, the only information communicated to patients by a doctor's participation in the foundation is that the doctor's fee will be paid by the insurer. The only information communicated to insurers by the fee schedule is that foundation members will not do business unless insurers agree to pay fees up to the collectively-determined maximum prices. The fee agreements do nothing to communicate the information that insurer-buyers really need: How many and which doctors would do business at prices below those set by the foundations? In the absence of maximum fee agreements, there would be no significant difficulty in establishing efficient communication between doctors and insurers. Insurers would be free to prepare their own maximum price schedules and offer them to individual doctors or small groups of doctors working together to provide related medical services. See page 29, *infra.* Horizontal fee agreements among doctors, however, make it unlikely that such competitively beneficial information will be obtained by insurers.

need to eliminate restraints that might impede adoption of more competitive alternatives. In this context, once an insurer agrees to pay up to the maximum prices set by the foundations, the insurer's ability to obtain medical services at lower prices is foreclosed. No individual doctor has a financial incentive to charge less than the maximum fee for any service to insured patients. To do so would reduce his profit on each service, but it would not result in any corresponding increase in the volume of his business. Insurers, under the terms of the agreements with the foundations, cannot require patients to use a particular doctor. They cannot therefore shift business from a doctor who charges the maximum to a doctor who charges a lower price for the same service. It is the insured patient who selects the physician, and such a patient has no financial incentive to search for a doctor who charges less than the maximum. The doctor's fee is paid directly by the insurer, and an individual patient's insurance premiums are not reduced if he selects a less expensive doctor. In short, a doctor acting in his own economic interest—as the antitrust laws assume he will—has no financial incentive to charge an insurer less than the maximum price.[34]

Maximum price agreements among doctors who have substantial market power—as is true here—also may make it easier for them to increase prices by providing a uniform floor from which to seek upward adjustments. See Kallstrom, *Health Care Cost Control by Third Party Payors: Fee Schedules and the Sherman Act*, 1978 Duke L.J. 645, 650. Respondents acknowledge that "in 1979 eighty-five to ninety-five percent of physicians in Maricopa County billed at or above the maximum reimbursement levels adopted by Maricopa Foundation in 1977" (Br. in Opp. 8 n.24; see Pet. App. 3). Respond-

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[34] For the reasons summarized above, moreover, neither doctors nor insured patients have a direct financial incentive to reduce insurers' costs by limiting use of medical services, and doctors have no incentive to pass on any savings from increased efficiency. See generally, Council on Wage and Price Stability, Executive Office of the President, *The Complex Puzzle of Rising Health Care Costs: Can the Private Sector Fit It Together* 11-13, 83-88 (1976).

ents also acknowledge that they make upward revisions in their maximum fees when those fees fall below prevailing or customary fee levels (Br. in Opp. 4; see Petitioner's Reply Memorandum, Appendices A-C).

b. Fortunately, our economy need not look to horizontal maximum price fixing by sellers of medical services to contain health service costs. In the absence of horizontal price agreements, significant price competition could develop in the market for health care services even when payments for such services are made through insurance plans. Insurers have a direct financial incentive to negotiate for fee levels that would minimize costs for services rendered to their subscribers while allowing them to attract a sufficient number of qualified doctors to make their insurance plans marketable. Similarly, in the absence of horizontal price agreements, doctors who wished to sell their services to insurers, that is, who needed insured patients to maintain a profitable volume of business, would have an economic incentive to price their services so that insurers would do business with them.

Insurers who successfully negotiated lower maximum prices for medical services would be in a position to charge lower premiums for similar benefits.[35] And competition among insurers could be expected to force them to pass at least some of their savings on to subscribers. Thus, the benefits of prohibiting maximum price fixing by doctors would accrue to the general public even though many insured patients do not pay directly for medical services.[36]

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[35] Rather than offering the same benefits, of course, some insurers might offer a more limited choice of doctors or covered services at a lower cost. The development of such competitive options would benefit consumers. See Goldberg & Greenberg, *The Effect of Physician-Controlled Health Insurance*, 2 J. Health Politics, Policy and Law 48, 68-69 (1977).

[36] See Havighurst, *Health Insurers and Health-Care Costs*, 5 Health Commun. Informatics 319 (1979); Havighurst, *Controlling Health Care Costs*, 1 J. Health Politics, Policy and Law 471, 485-487 (1977); Kallstrom, *Health Care Cost Control by Third Party Payors: Fee Schedules and the Sherman Act*, *supra*, 1978 Duke L.J. at 647-649, 678-681.

In contrast, when insurers are faced with a price schedule fixed by a combination of doctors embracing most of the practitioners in a given geographic area, the insurers' efforts to restrain costs by fostering price competition at the provider level are impeded.[37] Insurers wishing to do business with such a powerful combination must agree to pay any price up to the maximum prescribed by the doctors themselves. Insurers and consumers are then deprived of the cost benefits that would result from competitive decisionmaking by doctors. See *Kiefer-Stewart Co.* v. *Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951); L. Sullivan, *Antitrust*, *supra*, § 78 at 210-212. In its understandable desire to contain health care costs, the court of appeals unfortunately lost sight of the fact that maximum price agreements of the type here involved frustrate the *competitive* system of "cost containment" mandated by Congress under the Sherman Act.

CONCLUSION

The decision of the court of appeals should be reversed.

Respectfully submitted.

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[37] As indicated on page 9, n.11, *supra*, both defendant foundations embrace more than 70% of the physicians in their respective areas. As a result, there is an aggregation of significant market power, under any measure, in the hands of the sellers of medical services.

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