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BLOG

Supreme Court's Rejection of DOJ Appeal Could Shift the Landscape for Bid-Rigging Prosecutions

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The U.S. Supreme Court has denied the request from the Department of Justice (DOJ) to review a ruling from the U.S. Court of Appeals for the Fourth Circuit that overturned the bid-rigging conviction of a former engineering firm executive because the indictment did not allege a *per se* antitrust violation.

In 2022, Brent Brewbaker was convicted on five counts of mail and wire fraud and one count of a *per se* antitrust violation under Section 1 of the Sherman Act for rigging hundreds of bids on projects for the North Carolina Department of Transportation. Brewbaker and his engineering firm were coordinating bids with the firm's distributor to intentionally submit higher, losing bids. Before trial, Brewbaker asked the district court to dismiss the count for failure to state an offense. The district court refused, and Brewbaker's conviction followed.[1]

FOURTH CIRCUIT'S APPLICATION OF THE RULE OF REASON TO HYBRID RELATIONSHIPS

The key issue on appeal was the proper standard for bid-rigging antitrust violations when conspirators are both competitors and partners.

The Sherman Antitrust Act prohibits unreasonable restraints of trade, which are determined by either the rule of reason or the *per se* rule. The rule of reason involves a fact-specific inquiry into the particular restraint's impact, balancing anticompetitive and procompetitive impacts. The *per se* rule involves certain restraints that are categorically unreasonable, without consideration of any procompetitive impacts. Vertical price restraints, which are between firms at different distribution levels, are generally subject to the rule of reason. Horizontal price restraints, which are between competitors, are typically subject to the *per se* rule.

While the Fourth Circuit affirmed Brewbaker's conviction on the fraud counts, it reversed his conviction on the Sherman Act count. Critically, the Fourth Circuit ruled that a hybrid restraint, containing both horizontal and vertical restraints, is subject to the rule of reason, not the *per se* rule. For these hybrid relationships, which had not previously been categorically deemed *per se* illegal, the Fourth Circuit stated there is a presumption in favor of the rule of reason that can be overcome only with a demonstrable economic effect. Because the companies had both horizontal and vertical relationships and economic evidence showed that the dual distribution relationship may have had procompetitive effects, the Fourth Circuit held that Brewbaker's indictment did not allege a *per se* violation.[2]

UNSUCCESSFUL PETITIONS TO THE SUPREME COURT

After the Fourth Circuit denied rehearing en banc, the DOJ petitioned the Supreme Court to review whether a vertical relationship between competing bidders precluded application of the *per se* rule. The DOJ asserted that the Fourth Circuit's holding that a vertical relationship precludes the *per se* rule against bid rigging conflicts with precedent, distorts antitrust doctrine, and has significant practical implications. First, the DOJ argued that for purposes of the bid, the firms had a horizontal relationship; it should have been irrelevant that the firms' overall relationship also had a vertical component. Additionally, the DOJ suggested that the Supreme Court should resolve a now-existing circuit split because the Second and Seventh Circuits have held similar agreements are *per se* unlawful horizontal restraints. Practically, the DOJ asserted that the Fourth Circuit's holding would make it harder for the government to protect against bid rigging.

Brewbaker filed an opposing brief asserting that review was not warranted because the Fourth Circuit's ruling was correct. Brewbaker also filed a conditional cross-petition, arguing that if the Supreme Court were to grant the writ of certiorari, it should rule all criminal offenses under Section 1 of the Sherman Act are unconstitutional.

However, the Supreme Court denied both the DOJ's petition and Brewbaker's cross-petition without comment, leaving the Fourth Circuit's ruling intact.[3]

IMPLICATIONS FOR FUTURE

Because the Supreme Court has denied certiorari, the Fourth Circuit's application of the rule of reason to firms in hybrid relationships could carry significant implications for future bid-rigging prosecutions within the circuit. Under long-standing DOJ policy, the DOJ only criminally prosecutes *per se* antitrust violations; when a restraint violates only the fact-intensive rule of reason, the government opts for civil enforcement. Bid rigging is one of the most common antitrust violations and is a focus of the DOJ's Procurement Collusion Strike Force (PCSF), a joint law enforcement effort committed to combating antitrust crimes. The DOJ often pursues bid-rigging charges when co-conspirators also have a subcontracting relationship. And these hybrid relationships are becoming increasingly common. Thus, because hybrid relationships can now fall under the rule of reason in the Fourth Circuit, assuming the DOJ does not alter its policy, the number of DOJ prosecutions for bid rigging within the circuit will likely decrease. The PCSF may also need to rely more heavily on fraud charges in circumstances similar to Brewbaker's.

More broadly, the Fourth Circuit's decision (and the Supreme Court's refusal to review it) provides additional authority for courts to evaluate hybrid restraints under the rule of reason rather than subject them to *per se* condemnation. This precedent is significant not only in criminal prosecutions but also in influencing how hybrid restraints are analyzed in civil contexts, potentially shaping enforcement strategies and judicial approaches nationwide.

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[1] *United States v. Brewbaker*, 2022 WL 391310 (E.D.N.C. Feb. 8, 2022).

[2] *United States v. Brewbaker*, 87 F.4th 563 (4th Cir. 2023).

[3] *Brewbaker v. United States*, No. 24-124, 2024 WL 4743085 (U.S. Nov. 12, 2024); *United States v. Brewbaker*, No. 23-1365, 2024 WL 4743079 (U.S. Nov. 12, 2024).

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