

January 1983

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Recommended Citation

Seth E. Lipner, Antitrust's Per Se Rule: Reports of Its Death Are Greatly Exaggerated, 60 Denv. L.J. 593 (1983).

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Antitrust's Per Se Rule: Reports of Its Death Are Greatly Exaggerated

ANTITRUST'S PER SE RULE: REPORTS OF ITS DEATH ARE GREATLY EXAGGERATED

SETH E. LIPNER*

In the five years between 1975 and 1980, the Supreme Court, led by "the new antitrust majority,"¹ appeared to undo thirty years of antitrust precedent. A series of cases under section 1 of the Sherman Act² discarded the much criticized *per se* rule in favor of the rule of reason. Due in large part to a change in membership on the Court,³ the transition has had resounding effects.

In *Arizona v. Maricopa County Medical Society*,⁴ however, the Supreme Court may have reversed this trend. In a four-three opinion, the Court declared that competing physicians who had agreed to use a maximum fee schedule had violated the Sherman Act *per se*.⁵ Less than ten years ago the decision would not have been considered controversial or even noteworthy; today it is both.

This article will examine the current state of the law under section 1 of the Sherman Act. Part I traces, in detail, the series of events which brought about increased reliance on the rule of reason, reviewing in particular the Burger Court's price-fixing cases. Part II reports the *Maricopa County* decision. Finally, Part III analyzes the Supreme Court's decision in *Maricopa County* and attempts to assess the status of antitrust law under section 1 of the Sherman Act.

I. THE BURGER COURT AND THE *PER SE* RULE

Success or failure in an antitrust case frequently depends upon whether the court applies the *per se* rule of illegality. This rule states that if a practice falls into a forbidden category,⁶ it will be condemned without inquiry into

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1. *United States v. Marine Bancorporation*, 418 U.S. 602, 643 (1974) (White, J., dissenting).

2. Sherman Anti-Trust Act, ch. 647, 26 Stat. 209 (1890) (current version at 15 U.S.C. §§ 1-7 (1976)).

3. The resignation of Justices Douglas and Black during the 1970's had a major impact upon antitrust law. For many years, these two jurists greatly influenced the development of antitrust law. A perusal of a standard law school antitrust casebook reveals a total of 20 cases in which one of them authored the majority opinion. See M. HANDLER, H. BLAKE, R. PITOFSKY & H. GOLDSCHMID, *CASES AND MATERIALS ON TRADE REGULATION* (1975).

4. 457 U.S. 332 (1982).

5. *Id.* at 344-45.

6. Over the years the forbidden categories have been expanded to include: price fixing, division of markets by competitors, group boycotts, tie-ins, and certain exchanges of price information. Vertical division of markets by manufacturers, placed into the *per se* category in *United*

its justifications or procompetitive benefits.⁷ Since the inception of our anti-trust laws, price fixing has been held to be one of the forbidden practices.⁸ Thus, characterization of a practice as price fixing inevitably leads to *per se* treatment. During the Warren Court era, the *per se* rule was used with remarkable frequency;⁹ its complement, the rule of reason,¹⁰ which calls for a full-scale economic analysis of the impact of the restraint,¹¹ was never invoked by the Warren Court to decide a price-fixing case.¹²

In a series of cases beginning in 1975, the Supreme Court, under the influence of its new members, resurrected the rule of reason. The Burger Court quickly expanded the breadth of the rule of reason and brought its previously undefined contours into sharper focus. Increased reliance on the rule of reason was necessarily accompanied by a decreased role for the *per se*

States v. Arnold Schwinn & Co., 388 U.S. 365 (1967), was withdrawn from that category in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). See *infra* text accompanying notes 31-42. See also L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* §§ 63-77 (1977); Redlich, *The Burger Court and the Per Se Rule*, 44 ALB. L. REV. 1 (1979).

7. See *National Soc'y of Prof. Eng'rs*, 435 U.S. 679, 692 (1978); *Northern Pac. R.R. v. United States*, 356 U.S. 1, 5 (1958).

8. See *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *modified*, 175 U.S. 211 (1899). See also *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 213 (1951); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927); *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373 (1911); L. SULLIVAN, *supra* note 6, at § 167; Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Divisions*, 74 YALE L.J. 775 (1965); Redlich, *supra* note 6.

9. See, e.g., *United States v. Topco Assocs.*, 405 U.S. 596 (1972) (*per se* rule applied to division of markets by competitors); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968) (maximum price fixing); *United States v. Arnold Schwinn & Co.*, 388 U.S. 365 (1967) (division of markets by manufacturers); *United States v. General Motors Corp.*, 384 U.S. 127 (1966) (refusal to deal by manufacturer induced by competitor); *Simpson v. Union Oil Co.*, 377 U.S. 13 (1964) (price fixing by manufacturer); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) (concerted refusal to deal induced by competitors). But see *United States v. Container Corp.*, 393 U.S. 333, 338 (1969) (Fortas, J., concurring) (stating that a *per se* rule was not being applied; the majority opinion, authored by Justice Douglas, is unclear as to the standard utilized).

10. The rule of reason dates back to Chief Justice Edward White's opinion in *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). The application of the rule was expounded upon by Justice Brandeis in *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918). The rule of reason has lain largely dormant since that time, although it has made occasional appearances. See *White Motor Co. v. United States*, 372 U.S. 253 (1963); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933).

11. See *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918), where Justice Brandeis stated:

The . . . test of legality is 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. To determine that question the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.

Id. at 238. See also *National Soc'y of Prof. Eng'rs v. United States*, 435 U.S. 679, 687-99 (1978) (Justice Stevens, for the majority, stating that inquiry under the rule is directed at forming a judgment about the impact of a restraint upon competition); *cf. id.* at 700 (Blackmun, J., concurring) (questioning the narrowness of the majority's approach to the rule, at least as applied to professional organizations).

12. But see *United States v. Container Corp.*, 393 U.S. 333, 338 (1969) (Fortas, J., concurring).

rule. While some of this decrease has been substantive and substantial, other aspects of it have been more symbolic. For instance, in the first case, *Goldfarb v. Virginia State Bar*,¹³ the Court held that dissemination and enforcement of a minimum fee schedule for attorneys constituted "a classic illustration of price-fixing."¹⁴ But despite this finding, the Court never expressly declared the practice "*per se*" unlawful.¹⁵

The State and County Bar Associations in Virginia had distributed a "suggested" minimum fee schedule to all the state's attorneys.¹⁶ When Mr. and Mrs. Goldfarb sought an attorney for a title search, they could not find one who would charge less than the suggested fee.¹⁷ Compliance with the schedule had been secured by the State Bar Association's publication of ethical opinions indicating that failure to adhere to the fee schedule was "misconduct."¹⁸

Chief Justice Burger, speaking for a unanimous Court, distinguished several cases which had not involved the *per se* rule,¹⁹ demonstrating, for instance, that the schedule was more than merely advisory.²⁰ The opinion thus suggests that an advisory schedule,²¹ or perhaps one involving past transactions,²² might have been lawful.²³ Since the Bar Association en-

13. 421 U.S. 773 (1975).

14. *Id.* at 783.

15. The words "*per se*" are never used. Instead, Chief Justice Burger noted that the practice was unusually damaging, an irrelevancy under the *per se* rule. *id.* at 782. See *supra* text accompanying note 7. See also *Arizona v. Maricopa County Medical Soc'y*, 643 F.2d 553, 564 (9th Cir. 1980) (Larson, J., dissenting), *rev'd* 457 U.S. 332 (1982) (stating that nevertheless a *per se* rule was applied in *Goldfarb*).

16. 421 U.S. at 776-78.

17. *Id.* at 775-76. The Goldfarbs contacted over 36 attorneys; of those who replied, none would charge less than the suggested minimum fee, and several stated that they knew of none who would. *Id.* at 776.

18. *Id.* at 776-78, 783. The Court stated: "[The associations created] a pricing system that consumers could not realistically escape." *Id.* at 783. Membership in the State Bar Association was required in order to practice law in Virginia. *Id.* at 776. The ethical opinions stated, *inter alia*, that "evidence that an attorney *habitually* charges less than the suggested minimum fee schedule adopted by his local Bar Association, raises a presumption that such lawyer is guilty of misconduct. . . ." *Id.* at 777-78.

19. *Id.* at 781. For example, the Court cited *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921), which had involved a purely advisory fee schedule.

20. 421 U.S. at 781-83.

21. Advisory schedules have historically been treated as information exchanges, rather than outright price fixing. An exchange might facilitate price fixing, as in *American Column & Lumber Co. v. United States*, 257 U.S. 377 (1921), or it may be a legitimate effort by businessmen to improve market information. *United States v. United States Gypsum Co.*, 438 U.S. 422 (1978). The crucial distinction between price fixing (*per se*) and information exchanges (rule of reason) is that the former includes an agreement lacking in the latter, to adhere to a price or follow a particular policy. See also *United States v. Container Corp.*, 393 U.S. 333 (1969); L. SULLIVAN, *supra* note 6 at § 73; Redlich, *supra* note 6 at 24-26.

22. See *Cement Mfrs. Protective Ass'n v. United States*, 268 U.S. 588 (1925); *Maple Flooring Mfrs. Ass'n v. United States*, 268 U.S. 563 (1925).

23. Thus, for example, the American Society of Anesthesiologists was able to escape condemnation when their members agreed to adopt, publish and disseminate a relative value guide for professional service. See *United States v. American Soc'y of Anesthesiologists*, 473 F. Supp. 147 (S.D.N.Y. 1979). The schedule in that case, however, was also insulated because it contained no suggestion of any monetary values, just suggested formulas for the computation of professional time for various medical procedures. *Id.* at 153. Cf. *Plymouth Dealers Ass'n v. United States*, 279 F.2d 128 (9th Cir. 1960) (agreement among competitors to begin negotiations from agreed list prices held unlawful *per se* as price fixing).

forced the schedule through the prospect of professional discipline, the effect was to produce adherence to the fee schedule, and thus the Bar Associations were guilty of price fixing.²⁴

The opinion also rejected any notion that a learned profession was exempt from Sherman Act proscriptions.²⁵ The practice of law, stated the Court, is "trade or commerce" which falls within the ambit of the Sherman Act.²⁶ The Court did indicate, however, that the public service aspects of a profession might, in some cases, warrant treatment different from that governing other businesses.²⁷ It was left unclear exactly what that different treatment might be.

In retrospect, it is significant that early *per se* price-fixing cases, such as *United States v. Trans-Missouri Freight Association*²⁸ and *United States v. Socony-Vacuum Oil Co.*,²⁹ were not cited to support the Court's decision. In addition, the Chief Justice cited no Warren Court majority opinion on the price-fixing question.³⁰ The *Goldfarb* opinion foreshadowed the coming change in court philosophy.

Two years later, in *Continental T.V., Inc. v. GTE Sylvania Inc.*,³¹ the Burger Court made what is to date its greatest assault on the *per se* rule. Sylvania, a subsidiary of the giant, General Telephone and Electronics, was accused of a *per se* violation of section 1 by enforcing franchise agreements which limited its distributors to the sale of Sylvania products from specified locations only.³² A similar nonprice restraint, allocation of exclusive territo-

24. 421 U.S. at 781-83.

25. *Id.* at 786-88. The County Association advanced several reasons for its contention, including the existence of state licensing regulations and that the goal of professional services is not profit but provision of necessary services. The defendant thus argued it was totally exempt from the Sherman Act. *Id.* at 787.

26. *Id.* As the Court stated: "[T]o read into [the Act] so wide an exemption as that urged on us would be at odds with [congressional] purpose." *Id.* The Court also rejected the argument that since the Bar Association was established by act of the Virginia legislature, the Association's practice was immunized as state action under *Parker v. Brown*, 317 U.S. 341 (1943). It could not be argued, said the Court, that the price schedule was mandated by the legislature and thus immunized. 421 U.S. at 790-92.

27. *Id.* at 788 n.17. The Court stated:

The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today.

Id.

28. 166 U.S. 290 (1897).

29. 310 U.S. 150 (1940).

30. The opinion does cite the concurring opinion in *United States v. Container Corp.*, 393 U.S. 333, 337-39 (1969), in which Justice Fortas states that his understanding of Justice Douglas' majority opinion is that the case was to be analyzed under the rule of reason. See 421 U.S. at 782. Justice Douglas' opinion in *Container*, silent on that question, is notably terse and indicates, at least to some, a *per se* analysis. For an in depth analysis of the question see Kefauver, *The Legality of Dissemination of Market Data by Trade Associations: What Does Container Hold?*, 57 CORNELL L. REV. 777 (1972).

31. 433 U.S. 36 (1977).

32. *Id.* at 40. Sylvania had extracted from dealers "location clauses" requiring the distrib-

ries to distributors, was held by the Warren Court to be *per se* unlawful only ten years earlier in the case of *United States v. Schwinn*.³³ In *Sylvania*, the Burger Court overruled *Schwinn*,³⁴ refused to apply the *per se* rule, and instead applied the rule of reason.³⁵ Justice Powell, writing for a divided Court, reasoned that the restraint was not necessarily pernicious and without redeeming effect. Therefore, he stated, a *per se* rule could not be applied. Rather, a full-scale inquiry into the effect of the restraint was required.³⁶

Over a dissent by Justice Brennan,³⁷ Justice Powell thus cast into chaos

utors to resell only at designated locations. Continental T.V., a San Francisco distributor who had so agreed, opened a new outlet in Sacramento. Under pressure from its Sacramento distributor, Sylvania reduced Continental's line of credit. In response Continental withheld payments owed to Sylvania's finance company. When the finance company sued Continental for these payments, Continental cross-claimed against Sylvania, asserting the § 1 violation. The trial court, Justice Clark (retired) sitting by designation, held the practice to be a *per se* violation. On appeal, the Court of Appeals affirmed, 1974-1 Trade Cas. (CCH) ¶ 75,072 (9th Cir. 1974), but on rehearing *en banc*, the court reversed, 537 F.2d 980 (9th Cir. 1976), over two vigorous dissents, *id.* at 1004, 1018.

33. 388 U.S. 365 (1967). The *Schwinn* case came to the Supreme Court only four years after the Court had decided *White Motor Co. v. United States*, 372 U.S. 253 (1963). In *White Motor* the Court held that the judiciary's unfamiliarity with vertical territorial restraints required remand for the study of their effects. *Id.* at 263-64. In *Schwinn*, the Court changed its approach and held that *Schwinn's* allocation of exclusive territories to its independent distributors was a *per se* violation of § 1. 388 U.S. at 379. The *Schwinn* decision was subjected to severe criticism from some scholars. See, e.g., McClaren, *Marketing Limitations on Independent Distributors and Dealers—Prices, Territories, Customers and Handling of Competitive Products*, 13 ANTITRUST BULL. 161 (1968); Orrick, *Marketing Restrictions Imposed to Protect the Integrity of Franchise Distribution Systems*, 36 A.B.A. ANTITRUST L.J. 63 (1967); Posner, *Antitrust Policy and the Supreme Court: An Analysis of the Restricted Distribution, Horizontal Merger and Potential Competition Decisions*, 75 COLUM. L. REV. 282 (1975). But see Redlich, *supra* note 6.

34. 433 U.S. at 58. The Court could not find a "principled basis for distinguishing" the *Schwinn* restraints from those present in *Sylvania*. *Id.* at 46.

35. *Id.* at 57-59.

36. *Id.* at 49, 54-59. Relying primarily on the writings of antitrust scholars and economists, the Court noted that competition among different brands, interbrand competition, is enhanced by vertical restraints such as the location restrictions in *Sylvania* or the exclusive territories in *Schwinn*. Each "exclusive" dealer has the incentive to furnish local advertising and other point-of-sale services, such as showrooms and repair and maintenance shops. Without the restraint, firms which also sell the manufacturer's product in the territory would take a "free ride" on the other distributor's advertising or services, thereby discouraging the provision of these services. Elimination of the free rider effect through allocation of territories thus improves a manufacturer's ability to compete with other brands. The Court therefore would not condemn the practice *per se*. *Id.*

As the Court recognized, vertical restraints, while protecting interbrand competition, also reduce intrabrand competition by limiting the number of sellers of a particular product in any given market. *Id.* at 54. A court's job is to balance the procompetitive interbrand effects of the vertical restraint against the concomitant reduction in intrabrand competition. The Court intimated no view on how this balancing would be done. The Court's willingness to so balance, however, is significant in light of its refusal to engage in a similar balancing in *United States v. Topco Assocs.*, 405 U.S. 596 (1972). In that case, Justice Marshall, writing for the majority, stated that the Court's "inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated *per se* rules." *Id.* at 609-10. In *Topco*, the Court, over the dissent of Chief Justice Burger, *id.* at 613, held an agreement among competitors to divide territories was illegal *per se*.

37. 433 U.S. at 71. Joined by Justice Marshall, Justice Brennan would have applied the *per se* rule of *Schwinn*. Justice White, in a separate concurrence, would have distinguished *Schwinn* from *Sylvania* and applied the rule of reason in *Sylvania*. He argued there was no need to overrule *Schwinn* since, in his view, the restrictions in *Sylvania* had "less potential for restraint of intrabrand competition and more potential for stimulating interbrand competition" than the exclusive territories restrictions in *Schwinn*. *Id.* at 59 (White, J., concurring).

the entire body of law under section 1.³⁸ The little used³⁹ and poorly understood rule of reason⁴⁰ was brought to the forefront of antitrust analysis. But perhaps more significant was the suggestion that *per se* treatment was always inappropriate if the restraint had any "redeeming virtue."⁴¹ Courts and commentators began to wonder what the effect of this new test of *per se* illegality was on other classes of trade restraints.⁴²

Only a year later, the Court, by expounding on the factors that define the rule of reason, set out to remedy some of the problems it had created. In *National Society of Professional Engineers v. United States*,⁴³ the Court considered the legality of a professional society's ethical canon prohibiting competitive bidding on engineering projects.⁴⁴ The defendant in the case was a nationwide association of engineers, organized to deal with the nontechnical, business aspects of engineering.⁴⁵ The Society's code of ethics provided that members could not submit competitive bids. The question of fees was not even to be discussed until the prospective client had selected an engineer for his project.⁴⁶ In 1972, the government charged that this ethical canon had the effect of suppressing price competition, and was therefore unlawful *per se*.⁴⁷ The Society argued that the canon promoted the interests of safety and quality by ensuring against inferior engineering work, which might flow from the desire and ability to cut prices.⁴⁸ In essence, the Society asserted that the Canon was reasonable and thus insulated from section 1 condemnation, because competition among engineers was contrary to the public interest.⁴⁹

38. See Posner, *The Rule of Reason and the Economic Approaches: Reflections on the Sylvania Decision*, 45 U. CHI. L. REV. 1 (1977); Redlich, *supra* note 6.

39. See *supra* text accompanying note 12.

40. Professor Posner, upon whose writings the Court partially relied, see 433 U.S. at 55-56, has written:

The content of the Rule of Reason is largely unknown; in practice, it is little more than a euphemism for nonliability. Before *Schwinn*, restrictions on distribution were tested under the Rule of Reason, meaning: they were lawful. The Court in *Sylvania* may not have intended by its invocation of the Rule of Reason to bless all restrictions on distribution, but it was deceived if it thought it was subjecting those restrictions to scrutiny under a well-understood legal standard.

Posner, *supra* note 38, at 14.

41. 433 U.S. at 58 (quoting *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958)).

42. See, e.g., Posner, *supra* note 38, at 6-12; Redlich, *supra* note 6, at 56 n.397; see also Bohling, *A Simplified Rule of Reason for Vertical Restraints: Integrating Social Goals, Economic Analysis and Sylvania*, 64 IOWA L. REV. 461, 519-24 (1979); Robinson, *Antitrust Development*, 80 COLUM. L.J. 1, 14 (1980); Note, *Sylvania and Beyond: An Expanding Rule of Reason for Distributional Restraints*, 4 J. CORP. LAW 169, 185-89 (1978).

43. 435 U.S. 679 (1978).

44. *Id.* at 683-84.

45. *Id.* at 682. The Society's membership of 69,000 represents less than one quarter of the nation's licensed professional engineers. See *id.* at 681-82.

46. The Society's Code of Ethics prohibited members from soliciting or submitting competitive bids for engineering projects. A member was not permitted to give any estimate on fees, either verbal or written, prior to selection of a project's engineer. In fact, a prospective engineer was required to withdraw his name from consideration if a prospective client persisted in requesting a fee proposal. The Society thus sought to preserve the traditional method of selection, based upon quality and reputation rather than price. *Id.* at 683-84.

47. *Id.* at 684. The complaint prayed for an injunction against the practice.

48. *Id.* at 684-85.

49. *Id.*

Justice Stevens, writing for the majority,⁵⁰ rejected the Society's assertions⁵¹ and in so doing set forth his understanding of the rule of reason. Reviewing its history,⁵² he stated that inquiry under the rule is limited to balancing anticompetitive and procompetitive effects.⁵³ Justice Stevens then compared the "two complementary categories of antitrust analysis,"⁵⁴ the rule of reason and the *per se* rule. He stated that under both categories the judicial inquiry is directed at forming "a judgment about the competitive significance of the restraint."⁵⁵ But, the Court is not to judge the wisdom of the congressional policy in favor of economic competition.⁵⁶ The legislative mandate in favor of free and unfettered competition cannot be questioned by the courts.

In order to demonstrate that the Society's "public interest" argument was fatally flawed, Justice Stevens concentrated not on the price-fixing characterization,⁵⁷ which had dominated Warren Court antitrust analysis,⁵⁸ but rather on the restraint's impact upon competition. In fact, he hedges when he states that the engineers' restraint is "not price fixing as such,"⁵⁹ even though the Society's practice clearly had an effect upon price.⁶⁰ The Warren Court would have condemned it on that basis alone.

In a detailed discussion, which would only have been necessary under the rule of reason, Justice Stevens concluded that the restraint had an anticompetitive character, requiring no elaborate industry analysis.⁶¹ The Court's language, however, indicates reliance on the *per se* rule. The Court asserted, for example, that allegations of better quality,⁶² or even improved health and safety⁶³ are not "reason[s], cognizable under the Sherman Act, for doing away with competition."⁶⁴ But, by leaving unclear which rule he was actually applying, Justice Stevens came close to obliterating the differ-

50. Justice Blackmun, joined by Justice Rehnquist, concurred separately in the Court's opinion. *Id.* at 699. Chief Justice Burger dissented in part, asserting tersely that the first amendment guaranteed the right of the Society to state in its canon that competitive bidding is unethical. *Id.* at 701.

51. *Id.* at 692-96.

52. *Id.* at 687-92.

53. *Id.* at 691-92. *But see supra* note 11.

54. *Id.* at 692. *See* L. SULLIVAN, *supra* note 6, at § 72.

55. 435 U.S. at 692.

56. *Id.*

57. *See* cases cited *supra* note 8.

58. *See* L. SULLIVAN, *supra* note 6, at § 74; cases cited *supra* note 9.

59. 435 U.S. at 692.

60. *See* *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940).

61. 435 U.S. at 692.

62. *Id.* at 693-96.

63. *Id.* at 696 n.22.

64. *Id.* at 696. *See also* *Mardirosian v. American Inst. of Architects*, 474 F. Supp. 628 (D. D.C. 1979) where the court held a similar restraint among architects unlawful under the rule of reason. The court facially distinguished the engineers case by pointing out that the architects had not banned *all* price discussions between potential client and potential architect. Rather, in *Mardirosian* one architect could discuss price with a client, but a second architect could not seek to match or underbid the first. *Id.* at 645-48. If one notes that the practices of both the engineers and the architects affected price, the distinction offered by the court highlights no real difference. Although the engineers' restraint is probably more injurious, both are now clearly illegal.

ence between the *per se* rule and the rule of reason.⁶⁵

In its next term, the Supreme Court was faced with a different and difficult price-fixing case. The Columbia Broadcasting System (CBS) television network attacked the blanket licensure practices of two copyright performing rights societies, Broadcast Music, Inc. (BMI) and American Society of Composers, Authors and Publishers (ASCAP).⁶⁶ These societies are granted nonexclusive⁶⁷ performance rights by individual copyright owners; the societies, in turn, sell a "blanket license," permitting licensees to use any composition in the licensor's repertoire.⁶⁸ The price charged for this license is based not upon frequency or amount of use, but rather upon the licensee's gross revenues.⁶⁹ The societies then distribute the royalties to copyright owners. A necessary result of this scheme is that the society must choose a price for its license, and CBS challenged that practice of price setting as violating section 1 of the Sherman Act.⁷⁰

The blanket license has been in use for several decades and, although it has often been challenged⁷¹ under the antitrust laws, it has never been proscribed.⁷² Nevertheless, the Supreme Court in *BMI v. CBS*⁷³ was faced with a court of appeals opinion which, for the first time in the license's history, decreed the practice illegal *per se*.⁷⁴

The Supreme Court reversed the court of appeals.⁷⁵ Justice White, writing for a unanimous Court,⁷⁶ refused to apply the *per se* rule.⁷⁷ He

65. See *supra* text accompanying note 55.

66. *Broadcast Music, Inc. v. Columbia Broadcasting System*, 441 U.S. 1 (1979). BMI is a nonprofit corporation owned by members of the broadcasting industry and represents approximately 30,000 authors, composers, and publishers. ASCAP was organized in 1914 and represents some 22,000 composers and publishers. *Id.* at 4-5.

67. The nonexclusivity of the license is an important aspect of its legality. *Id.* at 28-30 (Stevens, J., dissenting). Prior to 1950, members granted ASCAP exclusive rights to license their works. In 1950, the government challenged a 1941 consent decree, resulting in, *inter alia*, the nonexclusivity of the license granted by ASCAP. See *United States v. ASCAP*, 1950-51 Trade Cas. (CCH) ¶ 62,595 (S.D.N.Y. 1950). BMI is in a similar situation. 441 U.S. at 12 n.20.

68. The societies also sell a per-program license. According to the most recent challenge to the blanket license, the per-program license was, at least regarding television stations, an unattractive alternative to the blanket license because 1) its base percentage rate is several times higher than the blanket license, and 2) its reporting provisions are unusually onerous. See *Buffalo Broadcasting Co. v. ASCAP*, 1982-2 Trade Cas. (CCH) ¶ 64,898, at 72,533 (S.D.N.Y. 1982).

69. 441 U.S. at 31 (Stevens, J., dissenting). This fee, based upon a user's ability to pay, is, as Justice Stevens points out in a dissenting opinion, nothing more than an effective price discrimination. The blanket license requires a user to purchase a license which is far broader than his actual needs. The price he pays is unrelated to either the quantity or the quality of the music used. *Id.* at 30-31. For a detailed economic analysis, see Cirace, *CBS v. ASCAP: An Economic Analysis of A Political Problem*, 47 *FORDHAM L. REV.* 277 (1978).

70. 441 U.S. at 6, 8-9.

71. The license continues to be the subject of antitrust litigation. Subsequent to *CBS v. BMI* the license was challenged and found to violate the rule of reason in *Buffalo Broadcasting Co. v. ASCAP*, 1982-2 Trade Cas. (CCH) ¶ 64,898 (S.D.N.Y. 1982).

72. See Cirace, *supra* note 69. The *CBS* case, and the history of ASCAP and BMI in the courts, is the subject of two excellent notes: Note, *CBS v. ASCAP: Blanket Licensing and the Unresolved Conflict Between Copyright and Antitrust Law*, 13 *CONN. L. REV.* 465 (1981); Note, *Blanket Licensing: The Clash Between Copyright Protection and the Sherman Act*, 55 *NOTRE DAME LAW.* 729 (1980).

73. 441 U.S. 1 (1979).

74. *CBS v. ASCAP*, 562 F.2d 130 (2d Cir. 1978), *rev'd*, 441 U.S. 1 (1979).

75. 441 U.S. at 7.

76. Justice Stevens, in a dissenting opinion, stated that while the practice should be evalu-

would not characterize the practice in question as price-fixing,⁷⁸ stating that the Court had some doubt whether the practice was a threat to free market pricing.⁷⁹ "The blanket license cannot be wholly equated with a simple horizontal arrangement among competitors."⁸⁰ Factors such as lowered transaction costs through reduction of the number of individual sales, and easier monitoring and enforcement against unauthorized copyright use made the blanket license a necessary and useful part of commerce.⁸¹

The license was viewed as being unlike anything the individual copyright owners could sell.⁸² The setting of a price was a necessary consequence of creation of this new product.⁸³ Analogous to a joint venture, the legality of the blanket license must be judged under the rule of reason rather than under the *per se* rule.⁸⁴ The Court thus remanded the case⁸⁵ for evaluation of its legality under that rule.⁸⁶ Justice Stevens, in a dissenting opinion,⁸⁷ would have avoided the remand; he found sufficient evidence in the record to declare that the practice violates the rule of reason.⁸⁸

With its decision in *BMI*, the Court concluded four years of restructuring antitrust law under section 1 of the Sherman Act. The new members of the Court had had the opportunity to set forth their views of antitrust law. Lower courts and commentators were predictably split on the effect and wisdom of the Court's decisions.⁸⁹ Yet, even as *BMI* was being decided, the

ated under the rule of reason, there was sufficient evidence then before the Court to ban the blanket license. *Id.* at 25 (Stevens, J., dissenting).

77. *Id.* at 24-25.

78. *Id.* at 23.

79. *Id.*

80. *Id.* at 23.

81. *Id.* at 20-21. *But see* Buffalo Broadcasting Co. v. ASCAP, 1982-2 Trade Cas. (CCH) ¶ 64,898 (S.D.N.Y. 1982).

82. 441 U.S. at 21-23.

83. *Id.* at 21.

84. *Id.* at 23. *See also infra* text accompanying notes 170-71.

85. 441 U.S. at 25.

86. On remand to the Second Circuit, Judge Newman held that the blanket license, at least as regards CBS, is not an antitrust violation. *See* CBS v. ASCAP, 620 F.2d 930 (2d Cir. 1980).

87. 441 U.S. at 25 (Stevens, J., dissenting).

88. *Id.* at 34-38. In *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980) (*per curiam*), the Supreme Court ruled that an agreement among competitors fixing credit terms affected price and thus was a *per se* violation of § 1. Credit terms, held the Court, are an inseparable part of price, and any attempt to tamper with price has always been unlawful *per se*. *Id.* at 648. "The fact that a practice may turn out to be harmless in a particular set of circumstances will not prevent its being declared unlawful *per se*." *Id.* at 649. The Court's decision was not surprising. In *United States Steel Corp. v. Fortner Enters.*, 429 U.S. 610 (1977), the Court, including the dissenters, agreed that in the normal case, credit terms are intimately associated with price. For an extended discussion, see Favretto, *The Per Se Rule: Alive and Well and Living in Catalano*, 6 U. DAYTON L. REV. 11 (1981).

89. Compare Bohling, *A Simplified Rule of Reason for Vertical Restraints: Integrating Social Goals, Economic Analysis and* *Sylvania*, 64 IOWA L. REV. 461 (1979); Posner, *supra* note 38 with Redlich, *supra* note 7; Sullivan, *Economics and More Humanistic Disciplines: What Are The Sources of Wisdom for Antitrust?* 125 U. PA. L. REV. 1214 (1977). *See* *Arizona v. Maricopa County Medical Soc'y*, 643 F.2d 553 (9th Cir. 1980), *rev'd*, 457 U.S. 332 (1982) (discussed *infra* note 100); *Mardirosian v. American Inst. of Architects*, 474 F. Supp. 628, 636-40 (D. D.C. 1979) (discussed *supra* note 64); *see also, e.g.*, *Hydrolevel Corp. v. American Soc'y of Mechanical Eng'rs*, 635 F.2d 118, 126-27 (2d Cir. 1980); *Paralegal Inst., Inc. v. American Bar Ass'n*, 475 F. Supp. 1123 (E.D.N.Y. 1979);

District Court of Arizona had issued an opinion⁹⁰ which was clearly influenced by the Burger Court's trend. Two years later, the Supreme Court would be confronted with that very case, and would be presented with the opportunity to extend its four previous opinions to a logical conclusion.

II. ARIZONA V. MARICOPA COUNTY MEDICAL SOCIETY

In 1978, the State of Arizona charged that a nonprofit county medical society, composed of competing doctors, had violated the Sherman Act by establishing maximum fee schedules for use by its members.⁹¹ Insurance companies gained Society approval by agreeing to pay member doctors the scheduled amount, and doctors in turn agreed to accept this payment in full satisfaction for their services.⁹² The doctors were permitted to charge insured patients less than but no more than the scheduled amount; they could charge uninsured patients more than the scheduled amount.⁹³ Insured patients were also free to visit nonmember doctors, but then they were not guaranteed full insurance coverage.⁹⁴

The state charged that the fee schedules had the effect of enhancing prices,⁹⁵ primarily through periodic upward revisions of the fees.⁹⁶ The Society, on the other hand, argued that the schedules were an effective cost containment device and assured patients full coverage.⁹⁷ The state moved for partial summary judgment on the issue of liability, alleging that the agreement was a *per se* violation of section 1.⁹⁸ The district court, influenced by the Supreme Court's recent decisions, denied the motion⁹⁹ and ordered a

Veizaga v. National Bd. of Respiratory Therapy, 1977-1 Trade Cas. (CCH) ¶ 61,274 (N.D. Ill. 1977).

90. Arizona v. Maricopa County Medical Soc'y, 1979-1 Trade Cas. (CCH) ¶ 62,694 (D. Ariz. 1979), *aff'd*, 643 F.2d 553 (9th Cir. 1980), *rev'd* 457 U.S. 332 (1982).

91. Arizona v. Maricopa County Medical Soc'y, 457 U.S. 332, 337 (1982). Actually two such societies were charged; one in Maricopa County, the other in Pima County. The complaint also charged a violation of the state antitrust law, a law which is read in conformity with the federal statute. *Id.* at 336 n.1.

92. *Id.* at 341.

93. *Id.*

94. *Id.*

95. Unlike the advisory relative value guide involved in United States v. American Soc'y of Anesthesiologists, 473 F. Supp. 147 (S.D.N.Y. 1979), the doctors in the Maricopa County Society: 1) agreed to abide by the plan, and 2) established a monetary conversion factor in addition to the relative value guide. 457 U.S. at 340-41. For a discussion of how antitrust has been applied to the health care field, see Borsody, *The Antitrust Laws and the Health Industry*, 12 AKRON L. REV. 417 (1979); Grad, *The Antitrust Laws and Professional Discipline in Medicine*, 1978 DUKE L.J. 443; Havighurst, *Professional Restraints on Innovation in Health Care Financing*, 1978 DUKE L.J. 303; Kallstrom, *Health Care Cost Control by Third Party Payors: Fee Schedules and the Sherman Act*, 1978 DUKE L.J. 645; Leibenluft & Pollard, *Antitrust Scrutiny of the Health Professions: Developing a Framework for Assessing Private Restraints*, 34 VAND. L. REV. 927 (1981); Rosoff, *Antitrust Laws and the Health Care Industry: New Warriors into an Old Battle*, 23 ST. LOUIS U.L.J. 446 (1979); Comment, *The Professions and Noncommercial Purposes: Applicability of Per Se Rules Under the Sherman Act*, 11 U. MICH. J.L. REF. 387 (1978).

96. 457 U.S. at 341-42. But the questions of upward revision are irrelevant to the question under § 1: whether the Sherman Act prohibits establishment of a maximum fee schedule in this case. See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940).

97. 457 U.S. at 342, 351.

98. *Id.* at 336-37.

99. 1979-1 Trade Cas. (CCH) ¶ 62,694, at 77,897 (D. Ariz. 1979). The district judge offered three justifications for his result: 1) the Court's trend as embodied in *Engineers and Sylva-*

trial under the rule of reason. On interlocutory appeal, the court of appeals issued three separate opinions,¹⁰⁰ each judge expressing a different view. Nevertheless the court upheld the denial of the motion, applying the rule of reason.¹⁰¹

Before the Supreme Court, the Society conceded the established principle that price-fixing agreements are illegal *per se*, but argued that the rule did not apply to them because the agreements at issue: 1) fixed maximum, not minimum prices; 2) were among members of a profession; 3) were in an industry with which the judiciary had little antitrust experience; and 4) had redeeming competitive effects.¹⁰²

Justice Stevens took pains to review the Court's price-fixing cases, emphasizing that both minimum and maximum price-fixing arrangements have always been *per se* unlawful.¹⁰³ Justice Stevens then quickly dismissed the doctors' contention that the professional character of their business justified different treatment. The agreements involved, said the Court, "are not premised on public service or ethical norms. . . . [T]he claim that the price restraint will make it easier for customers to pay does not distinguish the medical profession from any other provider of goods or services."¹⁰⁴ The Court similarly rejected the argument that the *per se* rule should not apply because the judiciary has little antitrust experience with the health care industry.¹⁰⁵ The Sherman Act, said the Court, "establishes one uniform rule applicable to all industries alike."¹⁰⁶

nia, 2) that the professional character of the restraint dictated rule of reason treatment; and, 3) that the Supreme Court cases involving maximum price fixing did not expressly call for *per se* treatment. *Id.* at 77,895-97.

100. *Arizona v. Maricopa County Medical Soc'y*, 643 F.2d 553 (9th Cir. 1980), *rev'd*, 457 U.S. 332 (1982). The majority opinion was authored by Circuit Judge Sneed. It expressed uncertainty regarding the state of antitrust law as applied to the health care field. 643 F.2d at 556. Admitting that even doctors can be motivated by economic considerations, the court refused to characterize the restraint as price fixing, since the doctors apparently lacked monopoly power and thus could not effectively raise prices. *Id.* at 557. The court also concluded that *Socony-Vacuum* was inapposite in light of the Supreme Court's decision in *BMI*. *Id.* at 557-58. Judge Kennedy filed a separate concurring opinion, asking for additional evidence before making the price-fixing determination. *Id.* at 560 (Kennedy, J., concurring). In dissent, Judge Larson stated that in spite of the uncertainty created by *Goldfarb and Engineers*, "the Supreme Court would be willing to apply *per se* rules to professional price tampering. . . ." *Id.* at 564 (Larson, J., dissenting). He also admonished the other members of his bench that if a cautious approach was proper as the majority asserted, then caution counseled application of the long established *per se* rule rather than embarkation upon a theory based on "erroneous legal premises and abused. . . discretion." *Id.* at 569.

101. *Id.* at 560.

102. 457 U.S. at 342.

103. Justice Stevens traced the history of the *per se* rule and rule of reason, beginning with the Court's decisions in *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898) and *Standard Oil Co. v. United States*, 221 U.S. 1 (1911). He then turned to the strict rule against price fixing, noting Justice Stone's words to that effect in *United States v. Trenton Potteries Co.*, 273 U.S. 392, 398 (1927), and the harsh treatment of the defendants applied by Justice Douglas in the seminal case, *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). Justice Stevens then quoted at length from two prior maximum price-fixing cases in the Supreme Court, *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951) and *Albrecht v. Herald Co.*, 390 U.S. 145 (1968). 457 U.S. at 342-48. Thus, with sweeping language, Justice Stevens foreclosed the notion that a price restraint can be anything other than *per se* unlawful.

104. 457 U.S. at 349.

105. *Id.* at 349-51.

106. *Id.* (quoting *United States v. Socony-Vacuum*, 310 U.S. 150, 222 (1940)).

The defendant's principal argument was that *per se* treatment was inappropriate because of the presence of significant procompetitive effects. These effects included full insurance coverage, a choice of doctors, and lower premiums.¹⁰⁷ The Court rejected the argument as demonstrating "a misunderstanding of the *per se* concept."¹⁰⁸ The rule that price fixing is illegal *per se* precludes any argument that an individual price-fixing scheme might have a beneficial effect.¹⁰⁹ Such a claim, the Court stated, is so unlikely to prove significant in a particular case that the general rule warrants application in all price-fixing cases.¹¹⁰

Justice Stevens then noted that the goal of lower fees, allegedly flowing from transaction cost savings,¹¹¹ could be achieved without price fixing among doctors.¹¹² The opinion alludes to state regulation or doctor-insurer agreements as alternative means of accomplishing this end.¹¹³ There was thus no factual basis in the record for defendant's contention that doctors alone must set the price schedule.¹¹⁴

The dissenters argued that the doctors' agreements should be judged under what was a rule of reason approach, citing the *BMI* case.¹¹⁵ The majority distinguished the *BMI* decision, as involving price fixing in the "literal sense" only.¹¹⁶ The salient feature of the blanket license in *BMI* was that it had characteristics quite different from anything the individual copyright owners could sell. The establishment of performance rights societies permitted the free flow of performance rights licensure; without them, efficient selling and monitoring would be impossible. The "price fixing" involved in that case was nothing more than a producer's decision as to what price he would charge for this new product, the blanket license.¹¹⁷

Justice Stevens contrasted the doctors' maximum fee schedule with price setting in partnerships and other joint arrangements where collective pricing decisions are necessary.¹¹⁸ He found the doctors' fee schedule analogous neither to a partnership's price setting nor to the blanket license in *BMI*.¹¹⁹ No new and distinct product was offered. Rather, the only effect was to permit the sale of medical services at predetermined prices, avoiding

107. 457 U.S. at 351.

108. *Id.*

109. *Id.*

110. *Id.* As Justice Black said in *Northern Pac. R.R. v. United States*, 356 U.S. 1, 5 (1958):

This principle of *per se* unreasonableness not only makes the type of restraints which are proscribed by the Sherman Act more certain to the benefit of everyone concerned, but it also avoids the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries, in an effort to determine at large whether a particular restraint has been unreasonable—an inquiry so often wholly fruitless when undertaken.

111. 457 U.S. at 352.

112. *Id.* at 352-54.

113. *Id.* (citing, *e.g.*, *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979)). See also *Kartell v. Blue Shield, Inc.*, 592 F.2d 1191 (1st Cir. 1979); *Medical Arts Pharmacy, Inc. v. Blue Cross & Blue Shield, Inc.*, 518 F. Supp. 1100 (D. Conn. 1981).

114. 457 U.S. at 352-53 n.26.

115. *Id.* at 357-67. (Powell, J., dissenting).

116. 457 U.S. at 355-56.

117. *Id.* at 355-56 & nn. 31-32.

118. *Id.* at 356-57.

119. *Id.*

the interplay of free market forces.¹²⁰ Such arrangements among independent competing entrepreneurs, declared the Court, remain illegal *per se*.¹²¹

Joined by the Chief Justice and Justice Rehnquist, Justice Powell dissented on the question of whether to apply the *per se* rule.¹²² The dissenters would have avoided the price-fixing characterization in two ways. They found no showing in the record that the plan was plainly anticompetitive,¹²³ and they would have held that the facts of *Maricopa County* fell within *BMI*.¹²⁴ Regarding the first, Justice Powell did not expressly find that competitive efficiencies were present, but instead he bemoaned the lack of a detailed record.¹²⁵ He noted that the plan "seems to be in the public interest,"¹²⁶ although he could point to no specific procompetitive benefit.¹²⁷ According to the dissent, if significant procompetitive effects could be found, *per se* treatment would be inappropriate.¹²⁸

Turning to their second argument, the dissenters would hold that the agreement in *Maricopa County* had enough in common with the blanket license in *BMI* to justify rule of reason treatment.¹²⁹ Justice Powell asserted that the plan has characteristics different from the usual horizontal arrangement,¹³⁰ similar to the combination in *BMI*. Several similarities between *BMI* and *Maricopa County* were said to be of significance: each involved competitors in cooperative pricing, each addressed the need for better service to consumers, and each created a new product through otherwise unattainable efficiencies.¹³¹

The plaintiff State of Arizona, wrote Justice Powell, had not yet discharged its burden of proving the plainly anticompetitive character of the restraint.¹³² In basing its *per se* condemnation of this novel plan upon a limited record, the majority had lost sight of the central "consumer welfare" purpose of the Sherman Act.¹³³ Unlike Justice Stevens, Justice Powell

120. *Id.* at 356.

121. *Id.* at 356-57.

122. 457 U.S. at 357 (Powell, J., dissenting). Justices Blackmun and O'Connor took no part in the consideration of the case.

123. *Id.* at 359-64.

124. *Id.* at 364-66.

125. *Id.* at 358, 361, 367.

126. *Id.* at 357.

127. Justice Powell noted that the Society's plan "forecloses no competition," *id.* at 360, since consumers and doctors are free to participate or withdraw. Even if that is so, the fact that no injury results from the restraint cannot be equated with a *procompetitive* benefit. Second, the dissent asserts that the insurers adequately represent consumer interests, quality service at lower prices. *Id.* at 360-61. But, as the majority properly notes, the plan allegedly reduces transaction costs, *not medical costs*. *Id.* at 352 n.25. Thus, the plan does not promote that which consumers desire: lower medical cost and quality of care. See *infra* text accompanying note 156.

128. 457 U.S. at 352 (Powell, J., dissenting). See *infra* text accompanying notes 151-62, 175-78.

129. 457 U.S. at 361-64 (Powell, J., dissenting).

130. *Id.* at 360.

131. *Id.* at 364-65. Justice Powell argued that the Societies had created a different product in that they "set up an innovative means to deliver a basic service—insured medical care from a wide range of physicians of one's choice—in a more economical manner." *Id.* at 365 n.12. See *infra* text accompanying notes 167-74.

132. *Id.* at 366.

133. *Id.* at 367.

would have remanded the case for trial under the rule of reason.

III. THE REVITALIZATION OF THE *PER SE* RULE

The Court's decision in *Maricopa County* is a stunning reaffirmation of the *per se* rule against price fixing. After several years of movement away from the use of *per se* rules, the Court has for the present halted this trend.¹³⁴ While *Maricopa County* is certain to engender some confusion, it must nevertheless be lauded as a significant step toward reestablishment of a predictable and functional rule of law.

Maricopa County, though, is not particularly noteworthy in its assertion that professions must not be treated differently from other businesses in the legality of their pricing practices. The Court thus continues to clarify its statement in *Goldfarb*, left open in *Engineers*,¹³⁵ that the public service aspects of professions might require varied rules. *Goldfarb* had made clear that professions are not exempt from the Sherman Act's proscriptions;¹³⁶ *Maricopa County* confirms the thrust of *Engineers*: professions will be treated no differently from other providers of goods and services, at least regarding agreements affecting price.

In fact, *Engineers* had decreed that even if a professional agreement improves the quality of service, it remains unlawful if there is an affect upon price.¹³⁷ The doctors in *Maricopa County* did not even assert that their agreement improved the quality of medical service offered. They alleged, rather, that the agreement made payment easier for customers.¹³⁸ The latter, said Justice Stevens, is a concern endemic to all industries, and it alone will not distinguish the doctors' restraint from agreements among nonprofessionals.¹³⁹

Justice Stevens also reaffirmed the long-standing principle that the *per se* rule applies to all industries alike. The doctors had argued that *per se* treatment was inappropriate because the judiciary had little antitrust experience in the health care field.¹⁴⁰ The Court has, in the past, spoken of not applying a *per se* rule in areas in which it was unfamiliar.¹⁴¹ These statements, however, referred to unfamiliar restraints rather than industries.¹⁴² Price fixing, the restraint involved in *Maricopa County*, has always been illegal.¹⁴³ Agreements establishing price ceilings have twice been condemned by the Supreme Court.¹⁴⁴ The fact that courts might lack experience in the

134. The existence of such a trend cannot be doubted. See, e.g., *supra* notes 99-100.

135. See *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 696 (1978).

136. 421 U.S. at 787-88. See *supra* text accompanying notes 13-27.

137. 435 U.S. at 696 n.22.

138. 457 U.S. at 348-49.

139. *Id.* at 349.

140. *Id.* at 350-51.

141. See, e.g., *United States v. Topco Assocs.*, 405 U.S. 596, 607-08 (1972); *White Motor Co. v. United States*, 372 U.S. 253, 261-63 (1963).

142. See *White Motor Co. v. United States*, 372 U.S. 253 (1963). Justice Stevens refers to the distinction in *Maricopa County*, 457 U.S. at 349 n.19.

143. See *supra* note 8 and accompanying text.

144. See *Albrecht v. Herald Co.*, 390 U.S. 145 (1968); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951). These cases arguably involved "vertical" restraints, agree-

health care field does not warrant a different rule of law. In fact, the uniformity of the *per se* rule is one of its primary virtues.¹⁴⁵

The two most important aspects of the Court's opinion are: 1) the role of the price-fixing characterization in section 1 analysis¹⁴⁶ and 2) the narrowing of *BMI*. Regarding the first, Justice Stevens' opinion is founded upon his description of the agreement as one fixing prices.¹⁴⁷ Once this characterization is made, *per se* treatment necessarily follows; questions of procompetitive benefits become wholly irrelevant.

In its first four cases, the Burger Court apparently retreated from the characterization approach. *Engineers* bypassed the characterization issue, and *BMI* questioned its utility¹⁴⁸ in the copyright field. *Maricopa County* reverses this trend. While the dissent calls for more detailed rules,¹⁴⁹ the majority applies the traditional rule that an agreement which affects price is to be placed in the forbidden category.¹⁵⁰ Characterization's role has, with the *Maricopa County* decision, been restored after a short hiatus.

The dissenters would have avoided the price-fixing label.¹⁵¹ Relying on occasional Court language to the effect that agreements in the *per se* category had no purpose except stifling competition,¹⁵² Justice Powell would have allowed the alleged procompetitive virtue to remove the practice from the *per se* category.¹⁵³ Once removed, trial under the rule of reason must follow. The dissent, however, seems to have taken that language out of context; language referring to "no purpose except stifling of competition," or "lack of any redeeming virtue" was not intended as a talisman.¹⁵⁴ It is noteworthy

ments between firms at different levels of the distribution system. The agreement in *Maricopa County* was among entrepreneurs at the same level of competition, and is known as a "horizontal" arrangement. But Justice Stevens wrote that: 1) the earlier cases did have horizontal aspects as well as vertical, and 2) in general, horizontal restraints are less defensible than vertical restraints. 457 U.S. at 348 n.18. *But see* Blair and Kaserman, *The Albrecht Rule and Consumer Welfare: An Economic Analysis*, 33 U. FLA. L. REV. 461 (1981); Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886 (1981).

145. 457 U.S. at 349-51, 353-54. Even Professor Bork, whose writings have greatly influenced the Burger Court, wrote: "The benefits of a broad *per se* category in ease of enforcement and predictability are so great that its legitimate availability constitutes one of the main tradition's chief assets." Bork, *supra* note 8, at 837. *See also* Redlich, *supra* note 6, at 54-58. Sullivan, *supra* note 89. *But see* Posner, *The Chicago School of Antitrust Analysis*, 127 U. PA. L. REV. 925 (1979).

146. *See supra* note 8. The characterization approach is well developed and explained in L. SULLIVAN, *supra* note 6, at § 74.

147. *See* 457 U.S. at 348-54.

148. *See supra* text accompanying notes 77-79.

149. 457 U.S. at 366 (Powell, J., dissenting). But the characterization approach to price fixing is not as unclear as the dissent believes. *See* L. SULLIVAN, *supra* note 6, at §§ 74-78, 81, 86-92; Redlich, *supra* note 6, at 14 n.91.

150. *See supra* text accompanying note 103.

151. *See supra* text accompanying notes 122-28.

152. *United States v. Topco Assocs.*, 405 U.S. 596, 608 (1972) (quoting *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963)). *See also* *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49, 50 (1977); *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5, *quoted in Sylvania*, 433 U.S. at 50.

153. 457 U.S. at 361-64.

154. *See, e.g.*, *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958). To confirm that language such as this is not to be taken literally, one need only look to the remainder of the paragraph in which it is contained. Justice Black therein states that regarding restraints in the *per se* categories, a general reasonableness inquiry is "so often fruitless" as to be judicially un-

that Justice Stevens avoided reference to this "standard".

Assuming *arguendo* the dissent's view of the significance of a benefit, Justice Stevens demonstrated that the procompetitive benefit was not even present.¹⁵⁵ He noted that in Maricopa County, Arizona about seventy percent of the doctors offered the benefits of the Society's plan, and that a patient therefore had a seven in ten chance of choosing a doctor who offered full insurance coverage. In other markets that do not have the plan, however, presumably at least seventy percent of the doctors also offer "usual, customary, and reasonable" rates, that typical insurers will reimburse. A prospective patient in those counties, therefore, also has a seven in ten chance of full coverage.¹⁵⁶ A patient is no better off in Maricopa County than is a patient elsewhere. The alleged benefit to the patient, guaranteed coverage with freedom of choice of doctor, simply is not effected as a result of the doctors' agreement.

Further, the allegation of lower insurance cost, perhaps the most significant potential procompetitive benefit, was rejected as a valid defense.¹⁵⁷ Such "lower cost" defenses historically have been invalid in price-fixing cases.¹⁵⁸ There is, however, an important distinction between the defendant's argument and previous "lower cost" defenses. The doctors did not allege that the agreement reduced medical costs, but rather that a prearrangement on fees makes medical insurance less expensive by improving the accuracy of the insurer's risk calculation.¹⁵⁹ But, says the Court, even if some prearrangement is desirable, it is not necessary for the doctors to set the maximum price.¹⁶⁰ State regulation or insurer-doctor arrangements are possible alternatives.¹⁶¹ "[I]n any event," wrote Justice Stevens, "there is no reason to believe that any savings that might accrue from this arrangement would be sufficiently great to affect the competitiveness of these kinds of insurance plans."¹⁶²

The dissenters take a different view of the significance of potentially lower insurance rates. Justice Powell analogized the case to *BMI*, noting that the agreements in both *BMI* and *Maricopa County* were intended to pro-

economical. *Id.* By inference then, a reasonableness inquiry in a *per se* case would often, *but not always*, result in condemnation. If the "no purpose except stifling of competition" language is read outside its context, the *per se* rule and its attributes would be forever lost. Indeed as the Court stated in *United States v. Topco Assocs.*, 405 U.S. 596, 609 (1972): "Whether or not we would decide this [*per se*] case the same way under the rule of reason . . . is irrelevant to the issue before us." *See also* *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. at 332, 343-44 (1982); *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16 (1977).

155. 457 U.S. at 351-52.

156. *Id.* Justice Stevens indicated this presumption was in accord with the Society's figures. *Id.* at 352 n.24. Discussions between this author and members of the medical and insurance fields confirm the validity of those figures.

157. *See supra* text accompanying notes 107-13.

158. *See, e.g.*, *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 663, 647 (1980); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940); *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927); *United States v. Trans-Missouri Freight Ass'n.*, 166 U.S. 290, 340-41 (1897).

159. 457 U.S. at 352 n.25.

160. *Id.* 352-53.

161. *Id.* The fact that the doctors can best compute medical fees does not insulate them from *per se* treatment. *See* 457 U.S. at 353.

162. *Id.* at 353-54.

vide "better service" to the consumer through the creation of a new and more efficient product.¹⁶³ Justice Powell's approach is clearly not as refined as that of Justice Stevens, who distinguished between improved care and a patient's ability to pay,¹⁶⁴ finding that an allegation of the former was not present.¹⁶⁵ Justice Powell simply refers to "better service."¹⁶⁶

Cheaper full insurance coverage is the "new product" created by the doctors, according to Justice Powell.¹⁶⁷ He would thus hold that, as in *BMI*, the doctors' agreements are price fixing only in the "literal sense."¹⁶⁸ Yet the crucial distinction, according to the majority, lay in the fact that the doctors had created no new product;¹⁶⁹ they sold only medical services. It was the price for these services that the doctors tried to affect through agreement. In *BMI*, by contrast, the societies were created to sell what was, in fact, a new product, the blanket license.

Justice Stevens also analogized the *BMI* blanket license to a joint venture or partnership which involved the creation of a new entity.¹⁷⁰ This new entity would naturally have to price its product. For instance, doctors with different specialties might combine to form a new business entity which offered a wider range of health care services. In such an arrangement, each doctor would give up his identity as an independent competitor in order to become a member of the group, much as a composer delegates his price setting power to the performing rights societies.¹⁷¹ Price setting by such an entity is a necessary part of our economic system.

The agreement in *Maricopa County*, however, was "fundamentally different."¹⁷² It involved no new product and no new entity.¹⁷³ Each doctor maintained his individual identity as a competitor. The Court has declared repeatedly that any agreement among individual competitors that establishes a fee schedule of any kind is unlawful *per se*.¹⁷⁴ At least four Justices are unwilling to change this rule.

Having found that the doctors' agreements were illegal *per se*, the Court saw no need to analyze in depth the restraint's anticompetitive nature. The entire history of the Sherman Act is replete with judicial statements that, in price-fixing cases, no such inquiry is required.¹⁷⁵ The maximum price wrinkle is not unfamiliar to the courts, and it is easily seen how the doctors' conspiratorial price ceiling tends to become a uniform price.¹⁷⁶ Each doctor,

163. *Id.* at 364-65 (Powell, J., dissenting).

164. *See supra* text accompanying notes 104, 138-39.

165. 457 U.S. at 349.

166. *Id.* 364-65 (Powell, J., dissenting).

167. *Id.* 365 n.12.

168. *Id.* at 361-64.

169. 457 U.S. at 356-57.

170. *Id.*

171. *Id.* at 2480.

172. *Id.* at 2479.

173. "Neither the foundations nor the doctors sell insurance, and they derive no profits from the sale of health insurance policies. The members of the foundations [the doctors] sell medical services." *Id.*

174. *See cases cited supra* note 8.

175. *See, e.g.,* United States v. Socony-Vacuum Oil Co., 340 U.S. 150 (1940).

176. 457 U.S. at 348. *See* Albrecht v. Herald Co., 390 U.S. 145, 152-53 (1968) (Harlan, J.,

confident of the prospect of full payment from an insurer, has little or no incentive to lower prices to insured patients. The patient makes the choice of doctor without considering the price; he need only be concerned with whether the doctor is a Society member. Price competition among Society members is thus eliminated; the pricing decision is removed from the marketplace and placed in the Society's smokefilled rooms.¹⁷⁷ The Sherman Act, from its inception, has proscribed any such removal. Justice Stevens thus stated that the doctors' agreements "fit squarely into the horizontal price fixing mold."¹⁷⁸

The dissent, on the other hand, would not condemn the doctors' plan on the limited record before the Court. The case reached the Court on motion for partial summary judgment, the State of Arizona demanding *per se* treatment. Justice Powell indicated that he would not characterize the agreement as a *per se* violation without additional information.¹⁷⁹ But such an approach in every case would undermine the utility of the *per se* rule whose purpose, at least in part,¹⁸⁰ is to enhance judicial economy.¹⁸¹

In conclusion, Justice Stevens praises in general terms the benefits of the

dissenting); *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 213 (1951). See also L. SULLIVAN, *supra* note 6, at § 78.

177. Antiseptic-smelling corridors? In addition, the restraint reduces the incentive to innovate. 457 U.S. at 348.

178. 457 U.S. at 357 (Powell, J., dissenting).

179. *Id.*

180. There are those who believe that the antitrust laws in general, and the *per se* rule in particular, have social as well as economic goals. Foremost among these social goals is the protection of small businesses and independent decisionmaking. See, e.g., *United States v. Aluminum Co.*, 148 F.2d 416 (2d Cir. 1945) where Judge Hand stated:

It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few. These considerations, which we have suggested only as possible purposes of the Act, we think the decisions prove to have been in fact its purposes.

Id. at 427. Judge Hand added that "[t]hroughout the history of these statutes it has been constantly assumed that one of their purposes was to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other." *Id.* at 429.

In *Standard Oil Co. v. United States*, 337 U.S. 293 (1949), Justice Douglas stated:

But beyond all that there is the effect on the community when independents are swallowed up by the trusts and entrepreneurs become employees of absentee owners. Then there is a serious loss in citizenship. Local leadership is diluted. . . . These are the prices which the nation pays for the almost ceaseless growth in bigness on the part of industry.

Id. at 318-19 (Douglas, J., dissenting).

Justice Black, adding strength to this view, used it as the basis of his decision in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211 (1951), stating:

The Court of Appeals erred in holding that an agreement among competitors to fix maximum resale prices of their products does not violate the Sherman Act. *For such agreements, no less than those to fix minimum prices, cripple the freedom of traders and thereby restrain their ability to sell in accordance with their own judgment.*

Id. at 213 (emphasis added). See also *United States v. Von's Grocery Co.*, 384 U.S. 270, 274-78 (1966); *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1957).

Commentators have also expressed this view. Blake and Jones have stated:

Another political objective of antitrust is the enlargement of individual liberty. . . . [I]t was the purpose of the antitrust laws to expand the range of consumer choice and entrepreneurial opportunity by encouraging the formation of markets of numerous buyers and sellers, assuring ease of entry to such markets, and protecting participants—particularly small businessmen—against exclusionary practices.

per se rule,¹⁸² concluding with the almost proverbial suggestion that the doctors take their case to Congress.¹⁸³ The Court's commendation of the *per se* rule in *Maricopa County* is particularly interesting; mention of the virtues of the *per se* rule is notably absent from *Goldfarb*¹⁸⁴ and *Engineers*,¹⁸⁵ and is contained in a mere footnote in *Sylvania*.¹⁸⁶ At least four members of the Court now clearly approve of a broad *per se* rule against price fixing.

The apparent difference of opinion which has arisen between Justices Stevens and Powell is worthy of continued observation. The battle will undoubtedly continue for the last word in shaping the nature and policy of the Sherman Act. But the Supreme Court, which in recent years has concentrated on the rule of reason, has once again demonstrated its preference for the *per se* rule. While the future remains uncertain, the *per se* rule has returned to improve predictability and reaffirm the roles of Congress and the judiciary in formulating antitrust law.

CONCLUSION

With the Court's decision in *Maricopa County*, the *per se* rule, at least for now, retains its vitality in antitrust analysis. The four-three decision, however, leaves open the possibility that the Court will again shift its approach.¹⁸⁷ Justice Stevens, joining the remaining Warren Court members,¹⁸⁸ has reaffirmed a wise rule and its traditions. If a restraint is characterized as price fixing, it will be condemned *per se*; there is no need for elaborate inquiry into alleged procompetitive benefits or redeeming virtues.

Blake & Jones, *In Defense of Antitrust*, 65 COLUM. L. REV. 377, 383-84 (1965). See also Redlich, *supra* note 6; Sullivan, *supra* note 89.

Similar concerns motivated other antitrust legislation. See the statements by Representative Celler, 95 CONG. REC. 11,486 (1949), and Senator Kefauver, 96 CONG. REC. 16,450 (1950), regarding the need for stronger measures against economic concentration.

181. 457 U.S. at 343-44 & n.14.

182. *Id.* at 355-57.

183. *Id.* See also Borsody, *supra* note 95; Kallstrom, *supra* note 95; Rosoff, *supra* note 95.

184. *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975).

185. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978).

186. *Continental T.V., Inc., v. GTE Sylvania Inc.*, 433 U.S. at 50 n.16 (1977).

187. Justice Blackmun took no part in the *Maricopa County* decision. It is not clear which side of the argument he would favor. In *United States v. Topco Assocs.*, 405 U.S. 596 (1972), Justice Blackmun concurred separately in Justice Marshall's majority opinion, stating that the *per se* rule "appears to be so firmly established by the Court that, at this late date, I could not oppose it." *Id.* at 613 (Blackmun, J., concurring). But in *Sylvania*, Justice Blackmun agreed with the majority, and thus supported the Court when it overruled *Schwinn's per se* approach in favor of the rule of reason. See *supra* text accompanying notes 31-32. Justice Stewart, the "perennial antitrust dissenter," has been replaced by Justice O'Connor, whose views in the area of antitrust are, as yet, unknown. Redlich, *supra* note 6, at 46.

188. Justices White, Marshall, and Brennan made up the remainder of the four-judge majority in *Maricopa County*. It is noteworthy that it was Justice Stevens, in *Engineers*, 435 U.S. 679, 681 (1978), who first elevated the phrase "rule of reason" to "Rule of Reason." In *Maricopa County*, Justice Stevens has reduced the phrase to lower case designation. 457 U.S. at 342.

