

RECENT DEVELOPMENTS

ANTITRUST—MEDICAL SOCIETIES' LIABILITY UNDER SHERMAN ACT FOR HORIZONTAL MAXIMUM PRICE-FIXING AGREEMENT—*Arizona v. Maricopa County Medical Society*, 102 S. Ct. 2466 (1982). The State of Arizona filed suit against two medical societies, and two foundations for medical care (FMC),¹ alleging that defendants conspired to fix prices in violation of section 1 of the Sherman Act.² Petitioner, in a motion for summary judgment, sought an injunction to prohibit the medical organizations from establishing maximum fees for their health services.³ The district court denied the motion,⁴ but certified for interlocutory appeal⁵ the question of whether the FMCs' establishment of maximum prices was per se illegal⁶ under the Sherman Act. The Court of Appeals, in a split decision, affirmed,⁷ holding that the uniqueness of the medical profession,⁸ and the court's unfamiliarity⁹ with the maxi-

1. 102 S. Ct. 2466, 2469 (1982). The Court later dismissed one of the medical societies from the suit under a consent order. *Id.*

FMCs are associations of physicians that offer a prepaid health care plan. In addition, FMCs attempt to maintain the quality of care provided by the physicians in the organization by establishing standards of competence. See generally Kallstrom, *Health Care Cost Control by Third Party Payors: Fee Schedules and the Sherman Act*, 1978 DUKE L.J. 645; Ugdahl, *Foundations for Medical Care*, 288 NEW ENG. J. MED. 491 (1973).

2. Section 1 prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations. . . ." 15 U.S.C. § 1 (1976).

3. 102 S. Ct. 2466, 2469 (1982).

4. The district court offered three rationales for its decision. It suggested that recent anti-trust analysis favored an examination into the particular practice in question, and disfavored the application of per se rules of law that looked more to technical conditions of an arrangement than to its substantive conditions. Secondly, the court held that Supreme Court cases invalidating maximum price-fixing agreements, see *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), and *Keifer-Stewart Co. v. Seagram & Sons*, 340 U.S. 211 (1951), had not established a per se rule applicable to this case. Finally, the court held that the defendant's professional status warranted further inquiry by the court than is warranted under a per se analysis. See 102 S. Ct. 2466, 2569 n.2 (1982).

5. Appeal was taken pursuant to 28 U.S.C. § 1292(6) (1976), which allows appeal when the district judge is "of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion."

6. See *infra* notes 23-40 and accompanying text.

7. Circuit Judge Kennedy concurred in a separate opinion. Judge Larson dissented. 643 F.2d 553, 560 (9th Cir. 1980).

8. See *infra* notes 41-46 and accompanying text.

9. See, e.g., *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 9-10, 19 & n.33, 22 n.40 (1979) (stressing the need for familiarity with a business practice before applying

imum fee schedule established by the FMCs precluded application of a per se rule of analysis.¹⁰ On writ of certiorari to the Ninth Circuit, the Supreme Court reversed, and *held*: physicians' horizontal maximum fee schedules constitute a per se violation of the Sherman Act.¹¹

Congress enacted the Sherman Act in an effort to ensure the maintenance of a competitive market economy,¹² and to prevent the development of powerful trusts¹³ and monopolies insensitive to the demands of the market.¹⁴ Because agreements to set prices are traditionally consid-

per se rule); *White Motor Co. v. United States*, 372 U.S. 253, 260-61 (1963) (remanding for trial on merits of an alleged price-fixing arrangement between manufacturers of trucks because of insufficient facts to decide case on basis of summary judgment).

10. 643 F.2d 553, 556-57 (9th Cir. 1980). See *infra* notes 23-40 and accompanying text.

11. *Arizona v. Maricopa County Medical Soc'y*, 102 S. Ct. 2466 (1982) (4-3 decision; Justices O'Connor and Blackmun not participating.)

12. See *e.g.*, *Brunswick Corp. v. Pueblo Bowl-O-Mat*, 429 U.S. 477, 488 (1977) ("The anti-trust laws . . . were enacted for the protection of *competition*, not competitors . . ."); *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 359 (1933) ("[T]he purpose of the Sherman Anti-Trust Act is to prevent undue restraints of interstate commerce, to maintain its appropriate freedom in the public interest, to afford protection from the subversive or coercive influences of monopolistic endeavor."). See also *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 599 (1972); *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 495 (1940); *Appalachian Coals v. United States*, 288 U.S. 344, 360 (1933); *United States v. Trenton Potteries*, 273 U.S. 392, 397 (1927); *American Column & Lumber Co. v. United States*, 257 U.S. 377, 400 (1921); *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U.S. 600, 609 (1914); *United States v. Reading Co.*, 226 U.S. 324, 369 (1912); *United States v. Union Pac. Ry.*, 226 U.S. 61, 87 (1912); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 324 (1897). See generally P. AREEDA & D. TURNER, *ANTITRUST LAW* ¶ 401 (1978); Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* (pts. 1 & 2), 74 *YALE L.J.* 775 (1965), 75 *YALE L.J.* 375 (1966); Note, *Application of the Antitrust Laws to Anticompetitive Activities by Physicians*, 30 *RUTGERS L. REV.* 991 (1977).

13. A "trust" is a "combination of establishments in the same line of business for securing the same ends by holding the individual interests of each subservient to a common authority for the common interests of all." *BLACKS LAW DICTIONARY* 1352 (5th ed. 1979). See *Mallinckrodt Chem. Works v. Missouri*, 238 U.S. 41 (1915). See also 21 *CONG. REC.* 2457 (1890) (remarks of Senator Sherman).

14. In a free market economy, a state of "perfect competition" exists where no producer is powerful enough to unilaterally affect the supply or the price of a product. A perfectly competitive economy is, however, only an ideal model with which academics can work to analyze the "real world." See P. SAMUELSON, *ECONOMICS* 69 (10th ed. 1976). In a perfectly competitive market, the interaction between the consumer's demand and the producer's capacity to supply a product at a cost which allows him to make a reasonable rate of return determines the quantity of the product produced, as well as the cost of that product. In a monopolized or cartelized market, this interaction between supply and demand is affected by the supplier's ability to control the output of necessary goods. Sellers in monopolized or cartelized markets have less incentive to produce the quantity, or quality, of products demanded by the buyers. See *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 577 (1898) ("The natural, direct and immediate effect of competition is . . . to lower rates, and to thereby increase the demand for commodities, the supplying of which increases commerce, and an agreement, whose first and direct effect is to prevent this play of

ered abhorrent to the concept of a free market, section 1 of the Sherman Act condemned price-fixing in language that sweeps broadly and forcefully.¹⁵

The broad language of section 1 required that more specific standards be established for determining the legality or illegality of an alleged restraint of trade; certainly the Act did not contemplate that all restraints would be illegal.¹⁶ Reviewing courts adopted two standards of analysis—the rule of reason¹⁷ and the per se doctrine.¹⁸

In *Standard Oil Co. of New Jersey v. United States*,¹⁹ the Supreme Court articulated the rule of reason approach for assessing the legality of price-fixing agreements under section 1.²⁰ Chief Justice White interpreted section 1 as forbidding only those restraints of trade that are

competition, restrained instead of promote[s] trade and commerce . . ."). See also *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (Sherman Act reflects congressional judgment that competition produces lower prices, in addition to better goods and services). See generally *Northern Sec. Co. v. United States*, 193 U.S. 197 (1903); L. ABBOTT, *QUALITY AND COMPETITION* (1955); J. CLARK, *COMPETITION AS A DYNAMIC PROCESS* (1961); R. POSNER, *ANTI-TRUST LAW: AN ECONOMIC PERSPECTIVE* (1976); Akerlof, *The Market for Lemons: Quality Uncertainty and the Market Mechanism*, 84 Q.J. ECON. 488 (1970).

15. See, e.g., Note, *The Applicability of the Sherman Act to Legal Practice and Other "Non-Commercial Activities"*, 82 YALE L.J. 313, 314 (1972) ("Congress clearly intended to strike broadly at certain economic evils"). For good discussions of the historical and political developments that led to the enactment of the Sherman Act, see generally J. VAN CISE, *UNDERSTANDING THE ANTI-TRUST LAWS* (1973); Letwin, *Congress and the Sherman Antitrust Law: 1887-1890*, 23 U. CHI. L. REV. 221 (1956).

16. The need for establishing specific guidelines for interpreting the phrase "in restraint of trade" became clear soon after the decision in *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1877). In *Trans-Missouri*, Justice Peckham declared that the Sherman Act condemned every restraint of trade, and not just unreasonable restraints. *Id.* at 312. Justice White, in a dissenting opinion, observed the problem with such a sweeping interpretation:

To define, then, the words 'in restraint of trade' as embracing every contract which in any degree produced that effect would be violative of reason, because it would include all those contracts which are the very essence of trade, and would be equivalent to saying that there should be no trade, and therefore nothing to restrain.

Id. at 351 (White, J., dissenting). See also *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 687-88 (1978) (language of Sherman Act is so broad that it cannot mean what it says).

17. See *infra* notes 19-22 and accompanying text.

18. See *infra* notes 23-40 and accompanying text. See also *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679 (1978) (discussing the two competing modes of antitrust analysis).

19. 221 U.S. 1 (1911).

20. For an excellent discussion of the seminal opinions in the development of the rule of reason, see Bork, *The Rule of Reason and the Per Se Concept: Price-Fixing and Market Division* (pt. 1), 74 YALE L.J. 775, 775-820 (1965).

"unreasonable."²¹ This rule of reason approach requires the factfinder to determine whether a particular business practice merely regulates, and perhaps promotes competition, or whether it operates to restrain, and thereby injure, competition.²² Only the latter is forbidden by the antitrust laws.

The determination of reasonableness required under *Standard Oil* involves sophisticated and protracted analysis.²³ As a result, per se rules²⁴ developed that enabled judges to invalidate particular kinds of

21. 221 U.S. 1, 63-68 (1911).

22. *Id.* at 66. Perhaps the best known formulation of the rule of reason is found in *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1917), where Justice Brandeis wrote:

[T]he legality of an agreement or regulation cannot be determined by so simple a test, as whether it restrains competition. Every agreement concerning trade, every regulation of trade, restrains The true 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 generally L. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 171-75, 186-89 (1977).

23. See McAllister, *The Big Case: Procedural Problems in Antitrust Litigation*, 64 HARV. L. REV. 27, 29 (1950):

Prolonged proceedings and a massive record are almost inevitable if an antitrust controversy is carried to court [I]n antitrust litigation the sprawling changes, the elastic rules of substantive law, the case by case approach and the rules of evidence that set no effective limits to what may be offered and received in court pose a serious problem of judicial administration.

Id. See also Dession, *The Trial of Economic and Technological Issues of Fact*, 58 YALE L.J. 1019 (1949).

24. For a good discussion on how rules generally, and per se rules in particular, can help ensure the orderly administration of law, see Ehrlich & Posner, *An Economic Analysis of Legal Rulemaking*, 3 J. LEGAL STUD. 257 (1974); LaFave, "Case-by-Case Adjudication" Versus "Standardize Procedures": *The Robinson Dilemma*, 1974 SUP. CT. REV. 127; Posner, *An Economic Approach to Legal Procedure and Judicial Administration*, 2 J. LEGAL STUD. 399 (1973).

A number of courts have favored the use of per se rules because of judicial reluctance to make sophisticated judgments concerning antitrust economics. See, e.g., *United States v. Topco Assocs.*, 405 U.S. 596, 607, 609-10 (1972); *Northern Pac. R.R. v. United States*, 356 U.S. 1, 5 (1958); *Ethyl Gasoline Corp. v. United States*, 309 U.S. 436, 458 (1940); *Jacobi v. Bache & Co.*, 520 F.2d 1231, 1238 (2d Cir. 1975), cert. denied, 423 U.S. 1053 (1976).

Recent Supreme Court decisions have emphasized the importance of judicial familiarity with a particular practice before a per se rule is established to invalidate that practice. See *infra* cases cited at note 9. See also *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 692-93 (1978) (per se rule applies to those agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed).

The Supreme Court has also recently cautioned that invocation of the per se rule requires a

restraints by establishing conclusive presumptions.²⁵ In *United States v. Trenton Potteries*,²⁶ the Supreme Court established a per se rule based on the unreasonableness of price-fixing agreements. Stating that the purpose and consequence of every effective price-fixing agreement is the elimination of one form of competition,²⁷ the Court held that all such agreements are per se illegal.²⁸

showing that the allegedly unlawful practice threatens the free market economy. See *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.* 441 U.S. 1, 19-20 (1979):

[O]ur inquiry must focus on whether the effect and . . . the purpose of the practice are to threaten the proper operation of our predominantly free-market economy—that is, whether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output, and in what portion of the market, or instead one designed to increase economic efficiency and render markets more, rather than less competitive [citations].

Id. Professor Easterbrook observed that the Supreme Court has never determined, nor attempted to determine, “whether maximum price-fixing almost always would ‘tend to restrict competition and decrease output’ or ‘increase economic efficiency’ instead.” Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886, 890 (1981). Easterbrook noted that the per se rule against maximum price-fixing announced in *Albrecht* is “open for re-examination.” *Id.* at 890 n.19. See generally Bauer, *Per Se Illegality of Concerted Refusals to Deal: A Rule Ripe for Reexamination*, 79 COLUM. L. REV. 685 (1979); Rahl, *Price Competition and the Price Fixing Rule—Preface and Perspective*, 57 NW. U. L. REV. 137 (1962); 5 U. RICH. L. REV. 422 (1971).

25. See, e.g., *United States v. Container Corp. of America*, 393 U.S. 333, 341 (1969) (Marshall, J., dissenting) (the potential harm to competition, in addition to the administrative costs of distinguishing harmful from beneficial practices, justifies the use of per se rules despite the possibility of advantages in some instances). There are a number of well recognized arrangements that have been held to be per se unreasonable, including boycotts, territorial restrictions, tying arrangements, and price-fixing. See, e.g., *United States v. Topco Assocs.*, 405 U.S. 396 (1972) (territorial restriction); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967) (same); *United States v. General Motors Corp.*, 384 U.S. 127 (1966) (boycotts); *Klor's, Inc., v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) (same); *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1959) (tying arrangements); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951) (territorial restrictions).

26. 273 U.S. 392 (1927). The respondents manufactured and distributed 82% of the vitreous pottery fixtures produced in the United States for use in bathrooms. Charged with conspiring to fix and maintain uniform prices for the sale of their products, the respondents' defense was that their established price was not economically unreasonable.

27. *Id.* at 397.

28. *Id.* at 397-98.

Justice Stone's rationale for establishing a per se rule against price-fixing is a well known and frequently cited justification for the rule. He stated:

The aim and result of every price-fixing agreement, if effective, is the elimination of one form of competition. 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. Once established, it may be maintained unchanged because of the absence of competition secured by the agreement for a price reasonable when fixed [W]e should hesitate to adopt a construction making the difference between legal and illegal conduct if the field of business relations depend upon so uncertain a test as whether prices are reasonable

In *Keifer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*,²⁹ the Court extended the per se rule against price-fixing agreements to maximum vertical price-fixing agreements.³⁰ In *Keifer-Stewart* two liquor distillers agreed on the maximum resale price which their distributors could charge.³¹ Without discerning the economic effect on the free market of a maximum price-fixing agreement, the Supreme Court found that the resale price agreement constituted a per se section 1 violation.³² The Court based its decision on the assumption that all price-fixing agreements interfere with the seller's freedom and ability to market products according to his own better judgment.³³

Id.

Traditional antitrust theory holds that price-fixing agreements among competitors is a per se violation of section 1. *See, e.g.*, *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980); *United States v. Sealy, Inc.*, 388 U.S. 350 (1967); *Northern Pac. Ry. Co. v. United States*, 356 U.S. 1 (1958); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 305 (1956); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899). *See also* cases cited in L. SULLIVAN, *supra* note 22, at 198 n.1.

The success or failure of a price-fixing agreement is irrelevant to the court's determination of illegality. *See, e.g.*, *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 125, 128 (1980) ("[T]he fact that a [price-fixing agreement] may turn out to be harmless in a particular set of circumstances will not prevent its being declared unlawful *per se*."); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 226 n.59 (1940) ("Whatever economic justification particular price-fixing agreements may be thought to have, the law does not permit an inquiry into reasonableness.")

For further discussion of price-fixing agreements and antitrust law, see R. BORK, *THE ANTI-TRUST PARADOX* (1978); L. SULLIVAN, *supra* note 22, at 197-212; Erickson, *Price-Fixing Conspiracies: Their Long-Term Impact*, 24 J. IND. ECON. 189 (1976); Peppin, *Price-Fixing Agreements Under the Sherman Antitrust Law*, 28 CALIF. L. REV. 297 (1940); Rahl, *supra* note 24, at 137; Wiley, *The Per Se Illegality of Price-Fixing—Sans Power, Purpose or Effect*, 19 U. CHI. L. REV. 837 (1952).

29. 340 U.S. 211 (1951).

30. A manufacturer's restriction on the retailer's resale price is a vertical restriction. *See* L. SULLIVAN, *supra* note 22, at 379 ("When the manufacturer fixes the resale price, price competition is ended among retailers of the manufacturer's product"). In contrast, horizontal restriction is an agreement between manufacturers, wholesalers, or retailers, to establish and fix sale or resale prices. *Id.* at 683-89.

31. 340 U.S. at 212.

32. *Id.* at 212-13.

33. *Id.* at 213. The court stated that "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.*

Professor Easterbrook noted that the Supreme Court has since rejected this rationale:

[T]he 'freedom of traders' has nothing to do with consumers' welfare. . . . The Supreme Court has . . . explicitly rejected any analysis that makes antitrust cases turn on the 'autonomy of independent businessmen.' Arguments about the effect of a practice on quantity and price, not argument, about freedom and autonomy, control antitrust analysis.

In *Albrecht v. Herald Co.*,³⁴ the Supreme Court again addressed the legality of a maximum price-fixing agreement involving vertical restrictions.³⁵ In *Albrecht*, a newspaper established a maximum price schedule for its carriers.³⁶ The petitioner exceeded that maximum price and, as a result, lost his delivery route.³⁷ The Supreme Court found that the price-fixing agreement violated section 1.³⁸ The Court, following *Keifer-Stewart*, emphasized the importance of the "freedom of traders."³⁹ The *Albrecht* Court also stated that the maximum price schedule interfered with the efficient operation of the free market by allowing the seller's judgment to replace market forces.⁴⁰

Easterbrook, *supra* note 24, at 888 (citing *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977)).

34. 390 U.S. 145 (1968).

35. *See supra* note 30.

36. 390 U.S. at 147.

37. *Id.*

38. *Id.* at 150.

39. *Id.* at 152-53. *See supra* note 33.

40. 390 U.S. at 152-53. The Court stated:

Maximum and minimum price-fixing may have different consequences in many situations. But schemes to fix maximum prices, by substituting the perhaps erroneous judgment of a seller for the forces of the competitive market, may severely intrude upon the ability of buyers to compete and survive in that market. Competition, even in a single product, is not cast in a single mold. Maximum prices may be fixed too low for the dealer to furnish services essential to the value which goods have for the consumer or to furnish services and conveniences which consumers desire and for which they are willing to pay. Maximum price fixing may channel distribution through a few large or specifically advantaged dealers who otherwise would be subject to significant non-price competition. Moreover, if the actual price charged under a maximum price scheme is nearly always the fixed maximum price, which is increasingly likely as the maximum price approaches the actual cost of the dealer, the scheme tends to acquire all the attributes of an arrangement fixing minimum prices.

Id. Professor Easterbrook argued in his article on price fixing that there are significant distinctions between minimum and maximum price-fixing agreements, and that the latter are "almost always beneficial to consumers." Easterbrook, *supra* note 24, at 887. Professor Easterbrook articulated at least five reasons why maximum price-fixing agreements are beneficial to consumers. First, "[a] maximum price agreement can help reduce search costs." *Id.* at 894. Second, using partnerships and corporations as an example, he noted that "[c]ooperative behavior often reduces costs." Easterbrook suggested that such behavior might be economically advantageous for both suppliers and consumers of medical care if the agreement establishes rational, and not arbitrary, prices. Third, "[a]lthough the law of restitution supplies an off-the-shelf answer [to unbargained for, emergency service] it may be quite costly to apply the legal principles. A price schedule that allows instantaneous service is one of the benefits a maximum fee schedule offers." *Id.* at 897. Fourth, a maximum fee schedule reduces the cost of supervising insurance claims by, among other reasons, eliminating investigatory bills to determine whether the services provided were warranted. Finally, "[i]f the physician's fee for described courses of treatment is fixed, he loses any incentive to provide unwarranted care." The instances of overcompensating or undercompensating a physician, spread over many cases, balance out, and in the process, an insurance device is

Traditionally, courts have distinguished between "trades" and "learned professions" in their application of the antitrust laws.⁴¹ The learned professions, generally, were either exempt from coverage, or subject to less vigorous application of the rules.⁴² The rationale for a learned professions exemption was based on the belief that professional standards of care, while perhaps a restraint on a free-wheeling market, helped ensure both high quality service and an ethically responsible profession.⁴³ In the landmark case of *Goldfarb v. Virginia State Bar*,⁴⁴

established. Easterbrook noted that if the physician is acting as an insurer, there is no longer an incentive to provide unwarranted treatment. *Id.* at 899-90.

Professor Gellhorn suggested some additional benefits from maximum price-fixing. He noted the following:

- (a) consumers are protected from temporary exploitation; (b) public anti-inflation policy is served; and (c) industry interests are served by increasing demand and reassuring buyers against price disruptions.

E. GELLHORN, *ANTITRUST LAW AND ECONOMICS IN A NUTSHELL* 167 n.6 (1981). Gellhorn also noted some potential disadvantages arising from maximum price schedules. Among the disadvantages are:

- (a) the parties may select an entry-discouraging price; (b) the agreement may be an implicit arrangement to forego additional service or quality improvements; (c) the parties may be selecting some mechanism other than price for allocating short supplies; and (d) the price selected may in fact become the minimum and in any case be an occasion for discussing prices generally.

Id.

41. Defining what is a "learned profession" is beyond the scope of this Recent Development. It is enough to assume that physicians are included in the group of learned professionals. *See, e.g.,* *FTC v. Raladam Co.*, 283 U.S. 643, 653 (1931) ("[doctors] follow a profession and not a trade").

42. The Supreme Court has never specifically recognized a distinction between trades and professions for purposes of the antitrust laws, but such a distinction nevertheless appears as a result of broad language in early antitrust cases. *See, e.g.,* *United States v. National Ass'n of Real Estate Bds.*, 339 U.S. 485 (1950); *FTC v. Raladam Co.*, 283 U.S. 643 (1931); *Riggall v. Washington County Medical Soc'y*, 249 F.2d 266 (8th Cir. 1957), *cert. denied*, 353 U.S. 954 (1958); *The Nymph*, 18 F. Cas. 506 (C.C.D. Me. 1834). *See also* Note, *Application of the Antitrust Laws to Anticompetitive Activities by Physicians*, 30 RUTGERS L. REV. 991, 991 (1977) ("[T]he learned professions, such as law and medicine, traditionally have not been subjected to antitrust scrutiny"). *See generally* Bauer, *Professional Activities and the Antitrust Laws*, 50 NOTRE DAME LAW. 570 (1975); Coleman, *The Learned Professions*, 33 ABA ANTITRUST L.J. 48 (1967); Note, *The Applicability of the Sherman Act to Legal Practice and Other "Non-commercial" Activities*, 82 YALE L.J. 313 (1972).

Congress has, on several occasions, specifically exempted a number of "trades" from coverage of the Sherman Act. *See, e.g.,* Capper-Volstead Act, 7 U.S.C. §§ 291-292 (1976) (agricultural cooperatives); McCarran-Ferguson Act, 15 U.S.C. §§ 1011-1015 (1976) (insurance); Newspaper Preservation Act, 15 U.S.C. § 1801 (1976) (newspapers).

43. Professor Bauer stated:

The policy arguments [for a professional exemption rule] . . . are [that professionals] are interested in the well-being of their clients, patients, or the general public; any restraints they impose are not motivated by a desire to lessen competition. They also urge that not

the Supreme Court clarified the applicability of the antitrust laws to the learned professions. The Court, recognizing the commercial aspect involved in professional careers,⁴⁵ rejected a general exemption of the learned professions from the antitrust laws. After *Goldfarb*, if a court determines that the anticompetitive effect of a particular practice is motivated by commercial benefit rather than a desire to provide public service, then the per se rules invalidating price fixing agreements will apply.⁴⁶

In *Arizona v. Maricopa County Medical Society*,⁴⁷ the Supreme Court extended the scope of the per se rule⁴⁸ of analysis beyond maximum vertical price agreements by holding that horizontal maximum price-fixing agreements⁴⁹ by a learned profession⁵⁰ constitute per se violations of section 1 of the Sherman Act. The Court reasoned that the Sherman Act condemns all price-fixing agreements, whether maximum or minimum price schedules, as unreasonable restraints of trade.⁵¹ The majority argued that the desideratum of business certainty and litiga-

only are these higher ethical ideals not inconsistent with competition, but they might in fact be jeopardized by the conduct which the antitrust laws seek to promote in the business world.

Bauer, *supra* note 42, at 571-72.

44. 421 U.S. 773 (1975).

45. 421 U.S. at 788 ("In the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse").

46. 421 U.S. at 788 n.17. The Court warned, however, that it might validate a "professional restraint" if noncommercial reasons that enhance the profession's public service function were offered as a reason for the apparent anticompetitive activity. *Id.* It is important to observe, however, that the Supreme Court has stated that exemptions from the antitrust laws should be construed narrowly. See, e.g., *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979); *Abbott Labs. v. Portland Retail Druggist Ass'n*, 425 U.S. 1 (1976); *Cornwell Constr. Co. v. Plumbers & Steamfitters*, 421 U.S. 616 (1976); *United States v. McKesson & Robbins, Inc.*, 351 U.S. 306 (1956). For additional information on the applicability of the antitrust laws to "learned professions," see generally Bauer, *supra* note 42, at 570; Craver, *The Application of Labor and Antitrust Laws to Physician Unions: The Need for a Re-Evaluation of Traditional Concepts in a Radically Changing Field*, 27 HASTINGS L.J. 55 (1975); Note, *The Antitrust Liability of Professional Associations After Goldfarb: Reformulating the Learned Profession Exception in the Lower Courts*, 1977 DUKE L.J. 1047; Note, *Antitrust and Nonprofits*, 94 HARV. L. REV. 802 (1981); Note, *The Professions and Noncommercial Purposes: Applicability of Per Se Rules Under the Sherman Act*, 11 U. MICH. J. L. REF. 387 (1978); Comment, *Private Physician Unions: Federal Antitrust and Labor Law Implications*, 20 U.C.L.A. L. REV. 983 (1973).

47. 102 S. Ct. 2466 (1982).

48. See *supra* notes 23-40 and accompanying text.

49. See *supra* note 30.

50. See *supra* notes 41-46 and accompanying text.

51. 102 S. Ct. at 2472-75.

tion efficiency⁵² justified the continued application of a per se rule against price-fixing. In addition, the Court, citing *Keifer-Stewart*, declared that this price-fixing agreement crippled the effective operation of the free market.⁵³

The majority dismissed the possibility of justifying the fee schedule under a learned profession exception,⁵⁴ finding that the physicians' price-fixing agreement was established because of commercial, not public service, considerations.⁵⁵ The majority concluded its analysis by stating that Congress is the proper authority to consider the physician's request for a section 1 exemption.⁵⁶

The dissent questioned the majority's willingness to decide the case on the basis of the incomplete record before the court.⁵⁷ The dissent argued that the considerable complexity of the issues presented, and the Court's unfamiliarity with the health care profession, merited a more considered examination of the case than the per se approach normally requires.⁵⁸

A per se rule offers the very real advantages of certainty in business planning and advising and of litigation efficiency.⁵⁹ The disadvantage of applying a per se rule is that it fails to consider a potentially useful mechanism that could serve society. The problem presented in *Mari-copa* is whether to apply this rule to a situation that is novel on its facts. Unfamiliarity with a particular practice should caution against use of a per se rule.⁶⁰ A maximum price-fixing agreement among physicians might offer a "boon to consumers."⁶¹

One commentator has suggested that where there is disagreement among the Justices,⁶² the most desirable outcome is for the bright line

52. *Id.* at 2473. *See supra* notes 23-25.

53. 102 S. Ct. at 2474-75. *See supra* notes 29-33 and accompanying text.

54. *See supra* notes 41-46 and accompanying text.

55. 102 S. Ct. at 2475-76 ("[t]he price fixing agreements in this case . . . are not premised on public service or ethical norms").

56. *Id.* at 2478-79 ("Congress may consider the exception that we are not free to read into the statute"). *See supra* note 42.

57. 102 S. Ct. at 2480.

58. *Id.* at 2483. *See supra* notes 8-10.

59. *See supra* notes 23-25 and accompanying text.

60. *See supra* note 9.

61. *See supra* note 40.

62. *See* Easterbrook, *Ways of Criticizing the Court*, 95 HARV. L. REV. 802, 805 (1982) ("[I]t is easy to reach agreement on easy cases, but the Court does not decide many easy cases. Its certiorari jurisdiction allows it to select cases that seem interesting or important, the very cases most apt

supporters to yield to the balancing supporters—here, those Justices willing to examine the reasonableness of the physician's agreement.⁶³ The author suggested that if individualized inquiry proves unworkable, those in favor of a per se rule will have sufficient ammunition to support their case, and win a reversal.⁶⁴

Given the complexity of the *Maricopa* case, the Court's unfamiliarity with the effects of the physicians' agreement, and the novelty of the issue, the decision to invalidate the agreement as a per se violation is unwise. If a horizontal maximum price-fixing agreement is a boon to consumers, few social policies would be effectuated by applying a per se rule.

The *Maricopa* decision adds a degree of certainty to antitrust law at an uncertain cost. It remains unclear whether the game of certainty and efficiency is worth the candle of consumer protection.

S.E.F.

TORT LAW: DAMAGES FOR EMOTIONAL DISTRESS—BY-STANDER MAY RECOVER FOR MENTAL DISTRESS CAUSED BY WITNESSING A NEGLIGENT ACT. *Haught v. Maceluch*, 681 F.2d 291 (5th Cir.), *reh'g denied*, 685 F.2d 1385 (5th Cir. 1982). Plaintiff checked into the hospital at the direction of defendant-physician when she went into labor.¹ Attending nurses repeatedly phoned defendant to inform him that plaintiff showed clear signs of fetal distress.² Defendant, however,

to produce division"). See generally Note, *Plurality Decisions and Judicial Decision-making*, 94 HARV. L. REV. 1127 (1981).

63. See Easterbrook, *supra* note 62, at 810.

64. *Id.*

1. *Haught v. Maceluch*, 681 F.2d 291 (5th Cir.), *reh'g denied*, 685 F.2d 1385 (5th Cir. 1982). Plaintiff's initial obstetrician referred her to defendant. Both doctors had examined plaintiff for the duration of her pregnancy. When she checked into the hospital her baby was already eleven days overdue. *Id.* at 294.

2. 681 F.2d at 294. Plaintiff arrived at the hospital at 10:30 p.m., at which time nurses at the hospital notified the doctor that her contractions were moderate and that her cervix was not dilated. One and a half hours later, plaintiff's contractions were irregular. At three a.m., nurses noted that plaintiff's amniotic fluid had appeared and indicated the presence of meconium. Meconium is dark green fluid and "is the matter excreted in the baby's first bowel movement" and is "a symptom of fetal distress, indicating a compromise or interruption of the baby's oxygen