Antitrust - Price Fixing. Blue Cross v. Commonwealth, 211 Va. 180, 176 S.E.2d 439 (1970)

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Antitrust Law—PRICE FIXING. *Blue Cross v. Commonwealth*, 211 Va. 180, 176 S.E.2d 439 (1970).

Blue Cross, a Virginia non-stock corporation, inaugurated a prepaid drug plan covering out-of-hospital prescriptions. Each cooperating pharmacist contracted with Blue Cross to furnish prescription drugs to subscribers at a price equal to the pharmacist's cost plus a professional fee of $1.85 per prescription.[1] By statute in Virginia, Blue Cross is authorized to conduct a plan furnishing prepaid hospital and similar or related services as an agent for participating hospitals.[2] Under the plan in issue, payments for drugs furnished by the cooperating pharmacist were made directly to the pharmacist. In the case of a non-cooperating pharmacist, payments were made at Blue Cross' option either to the pharmacist or the subscriber.[3] The participating hospitals were bound to supply the drugs to the subscriber whether or not the funds in the hands of its agent, Blue Cross, were adequate to defray the cost.[4] This plan was unlike an insurance policy which typically provides for payments to be made directly to the insured as reimbursement for his expenses.[5]

The Supreme Court of Appeals of Virginia held that the prepaid drug plan was a combination of competing pharmacists formed for the purpose and with the effect of stabilizing the price of drugs. It therefore constituted a price fixing agreement which is illegal per se under the Sherman Act as well as under the Virginia Code.[6]

The Sherman Act condemns *every* contract, combination, or conspiracy in restraint of trade or commerce.[7] However, two decades after the enactment of the Sherman Act, in the landmark decision of *Stand-*

1. Blue Cross v. Commonwealth, 211 Va. 180, 182, 176 S.E.2d 439, 440 (1970).
2. VA. CODE ANN. § 32-195.1 (Repl. Vol. 1969):

   Hospital Plans.—A hospital or a group of hospitals may conduct directly or through an agent, who may be either an individual or a non-stock corporation, a plan or plans for furnishing prepaid hospital and similar or related services.
3. 211 Va. at 182, 176 S.E.2d at 440.
4. *Id.* at 185, 176 S.E.2d at 442.
5. *Id.* at 182, 176 S.E.2d at 440.
6. *Id.* at 192, 176 S.E.2d at 446-47.
7. "Every 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, is declared to be illegal . . . ." Sherman Act, 15 U.S.C. § 1 (1964).

ard Oil Co. of New Jersey v. United States, the Supreme Court held that the Act proscribed only unreasonable restraints of competition.[8] This construction of the Sherman Act has become known as the "rule of reason," and requires that a court consider the anticompetitive effect of an alleged antitrust offense in light of all the factors and circumstances in any given situation. By applying the rule of reason in numerous cases to various anticompetitive business practices, the courts have determined that certain devices are conclusively presumed to be unreasonable.

> . . . [T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.[9]

One business practice which has been established as a per se violation is price fixing.[10] In *United States v. Socony-Vacuum Oil Co.*, the Supreme Court stated, "Under the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal *per se*."[11] The fixing of maximum as well as minimum price levels has been held to be illegal per se.[12] Once a per se violation is established, desirable business consequences or good faith on the part of the defendant do not constitute a defense.[13] The language of section one of the Sherman Act requires an agreement, *i.e.*, a contract, combi-

8. 221 U.S. 1, 60 (1911).

9. Northern Pacific Ry. v. United States, 356 U.S. 1, 5 (1958).

10. United States v. Socony-Vacuum Oil Co., 310 U.S. 150 (1940). *See* Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division*, 74 YALE L. J. 775 (1965), continued in 75 YALE L. J. 373 (1966); Morris, *Is Price Fixing Per Se Reasonable? A Discussion*, 47 KY. L. J. 63 (1958); Rahl, *Price Competition and the Price Fixing Rule—Preface and Perspective*, 57 NW. U. L. REV. 137 (1962). *See also* Kalinowski, *The Per Se Doctrine—An Emerging Philosophy of Antitrust Law*, 11 U.C.L.A. L. REV. 569 (1964); Van Cise, *The Future of Per Se in Antitrust Law*, 50 VA. L. REV. 1165 (1964). Other per se violations include division of markets, United States v. Addyston Pipe and Steel Co., 85 F.271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899); group boycotts, Fashion Originators' Guild of America v. FTC, 312 U.S. 457 (1941); and tying arrangements, International Salt Co. v. United States, 332 U.S. 392 (1947).

11. 310 U.S. 150, 223 (1940).

12. Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, 340 U.S. 211 (1951).

13. *See* United States v. McKesson & Robbins, Inc., 351 U.S. 305, 310 (1956); United States v. Masonite Corp., 316 U.S. 265, 276 (1942).

nation, or conspiracy,[14] but the agreement need not be express. Rather, the statutory language is satisfied even though an agreement be of a tacit nature.[15]

The decision in *Blue Cross* represents the first time that an appellate court has had an opportunity to squarely evaluate a prepaid drug plan under the antitrust laws.[16] The court did not hesitate to find a per se violation and avoid the necessity of a "rule of reason" analysis. Perhaps a more prudent approach was indicated. In *White Motor Co. v. United States*,[17] the Supreme Court indicated that a per se label should be applied cautiously to an entirely new factual setting where the possible economic ramifications of a novel business practice are unknown. It is arguable that there is a significant difference between the purchase and sale of industrial commodities or services and a prepaid drug plan. Therefore, to automatically apply the same per se standard to both situations is unwarranted until more is known about the anticompetitive nature of such a plan.[18] The holding in *Blue Cross* casts a shadow on similar prepaid drug plans which exist in other states.[19] However, other

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14. Sherman Act, 15 U.S.C. § 1 (1964).

15. It is elementary that an unlawful conspiracy may be and often is formed without simultaneous action or agreement on the part of the conspirators. Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act.

Interstate Circuit, Inc. v. United States, 306 U.S. 208, 227 (1939) (citations omitted). *But see* Theatre Enterprises, Inc. v. Paramount Film Distributing Corp., 346 U.S. 537, 541 (1954) wherein, after referring to *Interstate Circuit*, the Supreme Court stated:

> But this Court has never held that proof of parallel business behavior conclusively establishes agreement or, phrased differently, that such behavior itself constitutes a Sherman Act offense. Circumstantial evidence of consciously parallel behavior may have made heavy inroads into the traditional judicial attitude toward conspiracy; but "conscious parallelism" has not yet read conspiracy out of the Sherman Act entirely.

16. In B & L Pharmacy, Inc. v. Metropolitan Life Insurance Co., 44 Ill.2d –, 262 N.E.2d 462 (1970), the Supreme Court of Illinois found a similar prepaid drug plan to be not violative of the Illinois Antitrust Act because it was exempt as an insurance plan under the state statute. The plan was not considered under the federal antitrust laws.

17. 372 U.S. 253 (1963).

18. ANTITRUST & TRADE REG. REP., No. 490, at A-13 to -14 (Dec. 1, 1970).

19. The national Blue Cross Association is a trade association of Blue Cross organizations similar to Blue Cross of Virginia. The association has recommended the cost plus a professional fee prepaid drug plan in at least fifteen other states. 211 Va. at 183 n. 5, 176 S.E.2d at 441 n. 5. The Antitrust Division of the Justice Department has advised by way of a business review letter, pursuant to 28 C.F.R. § 50.6 (1970), that on the basis of information submitted on similar plans in Kansas and California, the Division did not propose to initiate proceedings under the federal antitrust laws. 211 Va. at 191, 176

courts may not be as quick to label the plans as illegal per se without first attempting the significant economic analysis that is required by the "rule of reason" approach.

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Constitutional Law—THE ESTABLISHMENT CLAUSE AND PROPERTY TAX EXEMPTIONS FOR RELIGIOUS ORGANIZATIONS. *Walz v. Tax Commission*, 397 U.S. 664 (1970).

In *Walz v. Tax Commission*[1] the appellate taxpayer sought to have provisions of New York State's Constitution[2] and Code[3] allowing church property exemption from real and personal property taxes declared in violation of the establishment clause[4] of the United States Constitution. The taxpayer argued that exemption of church property indirectly required him to "make a contribution to religious bodies. . . ." [5] The state courts upheld the tax exemptions,[6] and their rulings were affirmed upon appeal to the Supreme Court of the United States.

Chief Justice Burger's majority opinion declared that a literal interpretation and strict application of the establishment clause was impossible because it conflicts with the free exercise clause.[7] Strict and complete application of both would "defeat the basic purpose of . . . [the] provisions, which . . . [was] to insure that no religion be sponsored or favored, none commanded, and none inhibited." [8] The Court determined that the establishment clause did not require complete neutrality on the part of the government; for the authors of the establishment clause sought only to prevent "sponsorship, financial support, and active involvement of the sovereign in religious activity." [9] Finally, while admitting that tax exemption benefited churches, the Court found the

S.E.2d at 446. Although the Justice Department is not bound by the views stated in the letter, the court in *Blue Cross* refused to give the letter any weight. *Id.*; ANTITRUST & TRADE REG. REP., *supra* note 18.

1. 397 U.S. 664 (1970).
2. N.Y. CONST. art. 16, § 1.
3. N.Y. REAL PROPERTY TAX LAW § 420 (McKinney Supp. 1970-71).
4. U.S. CONST. amend. I: "Congress shall make no law respecting an establishment of religion . . . ."
5. 397 U.S. at 667.
6. Walz v. Tax Commission, 30 App. Div. 2d 778, 292 N.Y.S.2d 353 (1st Dept., Sup. Ct. 1968), *aff'd*, 24 N.Y.2d 30, 246 N.E.2d 517, 298 N.Y.S.2d 711 (1969).
7. 397 U.S. at 668-69. U.S. CONST. amend. I: "Congress shall make no law . . . prohibiting the free exercise [of religion] . . . ."
8. 397 U.S. at 669.
9. *Id.* at 668.