THE PER SE RULE AGAINST HARD-CORE ANTITRUST VIOLATIONS: ETCHED IN STONE OR ENDANGERED SPECIES?

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I. INTRODUCTION

A year ago last June, defense counsel in *United States v. Kemp & Associates, Inc.*[2] achieved a rare result in a criminal antitrust prosecution: a bench ruling by the District of Utah rejecting the *per se* rule's application to an admitted agreement by Kemp & Associates, Inc. ("Kemp") and a competitor to allocate customers — conduct traditionally held *per se* illegal under the Sherman Act. Finding that the case, which arose in the heir location industry, was "unique and unusual," the court held that the allocation arrangement charged in the indictment was subject to the rule of reason.[3] The court's decision effectively foreclosed criminal prosecution since, under established policy, the Antitrust Division declines to prosecute criminally antitrust violations "that require analysis under the rule of reason."[4] The district court's ruling is on appeal in the Tenth Circuit, and the impending decision could have significant ramifications for both criminal and civil antitrust actions.

After first overviewing the *per se* rule, we discuss *Kemp* further below. We then address the foreign currency exchange ("FX") criminal case, where the defense similarly challenged application of the *per se* rule. After that, we discuss several recent DOJ antitrust enforcement actions filed as *per se* civil, rather than criminal, cases even though the conduct alleged seemed like a hard-core violation. In concluding remarks, we sum up where we are, and where we could be going.

II. APPLICATION OF THE *PER SE* RULE TO ANTICOMPETITIVE CONDUCT

Sixty years ago, the Supreme Court wrote: "there 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."[5] The *per se* rule thus establishes a "conclusive presumption that [a] restraint is unreasonable" under Section 1 of the Sherman Act.[6] To promote "business certainty and litigation efficiency," the rule eliminates the "costs of judging business practices under the rule of reason."[7]

Accordingly, adopting *per se* treatment invalidates agreements even if "a fullblown inquiry might have proved [the agreement] to be reasonable."[8] However, application of the "*per se* rule is appropriate only after courts have had considerable experience with the type of restraint at issue, . . . and only if courts can predict with confidence that it would be invalidated in all or almost all instances under the rule of reason."[9]

Thus, in *Maricopa*, Arizona alleged that fee schedules adopted by several medical associations amounted to illegal price-fixing conspiracies. The Supreme Court reversed the lower courts and applied the *per se* rule even though the judiciary arguably had "little antitrust experience in the health care industry."[10] The Court explained:

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2 No. 2:16-cr-403 (D. Utah) ("*Kemp*"). Order on Defense Motion Regarding Application of Rule of Reason, *Kemp* (Aug. 28, 2017), ECF No. 96.

3 Motions Hearing Transcript at 49, 50-51, *Kemp* (June 21, 2017), ECF No. 88.

4 U.S. Department of Justice ("DOJ"), *Antitrust Division Manual* at III-12 (5th ed. updated Apr. 2018) ("In general, current Division policy is to proceed by criminal investigation and prosecution in cases involving horizontal, per se unlawful agreements such as price fixing, bid rigging, and customer and territorial allocations."), https://www.justice.gov/atr/division-manual (follow link). See also DOJ Antitrust Division and Federal Trade Commission, *Antitrust Guidance For Human Resource Professionals* 4 (Oct. 2016) ("agreements to fix product prices or allocate customers . . . have traditionally been criminally investigated and prosecuted as hardcore cartel conduct"), https://www.justice.gov/atr/file/903511/download.

5 *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). See also *United States v. Trenton Potteries Co.*, 273 U.S. 392, 397-98 (1927) (price fixing agreements "may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable or unreasonable as fixed").

6 *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 344 (1982) (categorizing price-fixing agreements as unlawful *per se*).

7 Id. at 343.

8 Id.

9 *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886-87 (2007).

10 *Maricopa*, 457 U.S. at 349.

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> [T]he argument that the *per se* rule must be rejustified for every industry that has not been subject to significant antitrust litigation ignores the rationale for *per se* rules, which in part is to avoid "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.[11]

Likewise, the Court rejected the argument that *per se* treatment was inappropriate because the agreements at issue were "alleged to have pro-competitive justifications."[12] The Court further explained that the "anticompetitive potential inherent in all price-fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some."[13]

As *Maricopa* reiterated, horizontal price-fixing conspiracies are *per se* illegal under the Sherman Act. Similarly, geographic and customer allocations, as well as bid-rigging, are *per se* illegal.[14] The list of *per se* conduct has, of course, shrunk in recent years.

III. THE ANTITRUST DIVISION'S PROSECUTION OF KEMP'S CUSTOMER ALLOCATION AGREEMENT

A Utah-based company, Kemp provides services to potential heirs to intestate estates who are unaware of their possible inheritance. The company locates potential heirs using available public records and then contacts them, offering to develop evidence to prove their claims against the estate. In exchange for its services, Kemp charges a contingent fee based on the heir's recovery. Other companies in the industry operate similarly. Thus, a potential heir may receive multiple offers from different companies at different contingency fee rates. Of course, if multiple companies identify the same heir, those companies would be expected to compete on price by offering lower contingency fee rates than their competitors, or another service arrangement entirely.

In 2016, a grand jury empaneled in the District of Utah indicted Kemp and one of its executives on violating Section 1 of the Sherman Act, 15 U.S.C. § 1. According to the indictment, in an effort to suppress and eliminate competition in the heir location industry, Kemp conspired with a competing company to allocate customers. The owner-president of the competitor previously pled guilty to the alleged conspiracy.[15]

In summary, Kemp and one of its competitors allegedly agreed that if each identified the same potential heir, the first company to contact the heir would also be allocated any additional remaining heirs to that same estate. In exchange, the second company would receive a portion of the first company's contingency fee and simultaneously agree not to compete for any business with that same estate. Therefore, under the conspiracy, the two companies were able to allocate customers at noncompetitive contingency fee rates, while splitting the fee paid.

Kemp filed a motion seeking an order that the rule of reason, rather than the *per se* rule, applied to the case. At oral argument in June 2017, the court ruled that Kemp's conduct was subject to the rule of reason. Subsequently, in a written decision the court denied the DOJ's motion to reconsider. That decision, together with the earlier hearing transcript, set out the court's reasoning. Denying *per se* treatment, the court focused on: (1) the "relatively obscure industry," (2) the "unusual manner of [defendants'] operation," and (3) the "small number" of affected customers.[16] The court further explained that:

- The case is "unique and unusual."
- It "doesn't affect a very large part of our society."

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11 Id. at 351 (quoting *N. Pac. Ry. Co.*, 356 U.S. at 5).

12 Id.

13 Id.

14 See, e.g. *Palmer v. BRG of Ga., Inc.*, 498 U.S. 46 (1990) (per curiam) (a geographic market allocation scheme is *per se* unlawful); *United States v. Green*, 592 F. 3d 1057, 1068 (9th Cir. 2010) (bid rigging is *per se* unlawful) (citing authorities).

15 Order, *United States v. Blake*, No. 1:16-cr-25 (N.D. Ill. Mar. 8, 2016), ECF No. 21.

16 Order on Defense Motion Regarding Application of Rule of Reason, supra note 2, at 3.

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- "[I]t's just very narrowly focused," and "does not . . . fit like [the court] would like to see cases fit" within the reach of the Sherman Act.[17]

These considerations, the court explained, made the case better-suited for rule of reason analysis, thereby affording Kemp an opportunity to present at trial potentially procompetitive effects arising from the underlying agreement that the DOJ charged was an unlawful conspiracy.

The DOJ appealed to the Tenth Circuit, arguing that the district court ignored controlling precedent holding that a customer allocation scheme is *per se* illegal, regardless of the individual circumstances or the nature of the industry.[18] The DOJ relied on several appellate decisions, including ones from both the Supreme Court and the Tenth Circuit, which establish that an agreement among horizontal competitors to allocate customers is a *per se* Section 1 violation.[19] The DOJ also asserted that the district court's holding "threatens to undermine the government's ability to prosecute antitrust conspiracies that have long been condemned as *per se* illegal."[20]

Kemp countered that while a "customer allocation is, in certain forms, *per se* unreasonable," its own situation was unique.[21] Kemp argued that it "negotiated a complicated agreement that governed a very limited subset of estates and used profit sharing to incentivize efficiency."[22] In consequence, in Kemp's view, the agreement at best had pro-competitive effects, and at worst had a *de minimis* effect on customer pricing.[23] Accordingly, Kemp contends that the rule of reason is, as the lower court held, the appropriate way to analyze the lawfulness of its agreement.[24]

IV. THE RULE OF REASON ARGUMENT RE-APPEARS IN THE SOUTHERN DISTRICT OF NEW YORK

More recently, the DOJ fared better in a criminal Section 1 case charging individual traders in the FX market with conspiring to fix prices and rig bids and offers for Euros and U.S. Dollars.[25] The traders, employees at three global banks, were competitors who purchased and sold Euro-Dollar instruments in the FX market. The indictment described in detail how, by "working together instead of competing," the traders manipulated FX prices.[26] By sharing information about their trading intentions and market positions, the traders were able to move FX Euro-Dollar prices in directions favorable to their account positions.

The traders moved to dismiss the indictment, arguing (among other points) that the *per se* rule was inapplicable to their conduct.[27] They maintained that: (1) the DOJ failed to adequately allege they were horizontal competitors in the FX spot market (essentially because they both bought and sold — sometimes to each other); (2) the courts lacked sufficient experience with trading practices in the FX market to permit the traders' conduct to be condemned under the *per se* rule; and (3) their trading conduct was not plainly anticompetitive on its face. More specifically, on application of the *per se* rule the traders argued that the FX market is "enormous, sophisticated, and decentralized" — "a hectic,

17 Motions Hearing Transcript, supra note 3, at 49.

18 Brief of Plaintiff-Appellant at 11, *United States v. Kemp & Associates, Inc.*, No. 17-4148 (10th Cir. Jan. 3, 2018).

19 Id. at 3, 11, 27 (citing, among other authorities, *Palmer* and *United States v. Suntar Roofing, Inc.*, 897 F.2d 469 (10th Cir. 1990)).

20 Id. at 27.

21 Brief of Defendant-Appellant at 42, *United States v. Kemp & Associates, Inc.*, No. 17-4148 (10th Cir. Feb. 2, 2018).

22 Id. at 43.

23 Id. at 48.

24 Although not the subject of this paper, Kemp also successfully moved to dismiss on the ground that the five-year statute of limitations had run. Briefly, having fleeced the heirs, Kemp and its conspirator had to await estate administration before receiving a fee. In the lower court's view, dividing the loot as fees were paid periodically did not continue the conspiracy for limitations purposes. This ruling is similarly on appeal to the Tenth Circuit.

25 *United States v. Richard Usher, et al.*, No. 17-cr-19 (S.D.N.Y.) ("*Usher*").

26 United States' Opposition to Motion to Dismiss Indictment at 5, *Usher* (Dec. 8, 2017), ECF No. 72.

27 Traders' Memorandum of Law in Support of Defendants' Motion to Dismiss Indictment at 8, *Usher* (Nov. 17, 2017), ECF No. 63

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modernized bazaar, comprising an unlimited number of participants simultaneously conversing, negotiating, and transacting with each other."[28] Because a "constant stream of communication among traders" allows for the most efficient FX trading, information sharing as part of a conspiracy to fix prices and rig bids, the traders maintained, simply cannot be *per se* illegal under the Sherman Act.[29]

The DOJ countered that the violations charged in the indictment were similar to those prior cases where courts held that price fixing and bid rigging allegations pleaded conduct subject to *per se* treatment. For example, in a civil FX case brought by private plaintiffs, the court ruled that the complaint "'plausibly allege[d] a price-fixing conspiracy among horizontal competitors,'" a *per se* violation of the Sherman Act, since the defendants colluded to manipulate benchmark prices of currencies in the FX market.[30] The DOJ also relied on a decision in the ISDAfix litigation, where a court similarly held that the dealer banks' conspiracy to manipulate ISDAfix benchmark prices was *per se* illegal.[31] Accordingly, courts had previously held that trading activity in complex financial markets was unlawful *per se*, and, as the DOJ argued, this criminal case was no different.

The court denied the traders' motion to dismiss the indictment. On application of the *per se* rule, the court explained:

> Price-fixing conspiracies which entail agreements among competitors formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price are (clearly) *per se* restraints of trade under the Sherman Act. The Indictment in this case plainly alleges that Defendant competitors agreed to coordinate their bidding, offering, and trading (including their agreement to refrain from bidding, offering, and trading) [at certain times in market trading].[32]

Quoting the Supreme Court in *Maricopa* — "'We are equally unpersuaded by the argument that we should not apply the *per se* rule in this case because the judiciary has little antitrust experience in the health care industry'"[33] — the *FX* court rejected the argument that *per se* treatment was inappropriate because the FX market was unique or complex or large. It was, instead, enough that "courts have experience assessing price fixing."[34]

V. *PER SE* VIOLATIONS IN DOJ CIVIL ENFORCEMENT CASES

Despite strong evidence of price fixing or bid rigging, in three recent cases the DOJ, while pleading a *per se* violation, nevertheless "went civil." These DOJ decisions to refrain from criminal prosecutions may well be fueling defense efforts to argue for rule of reason treatment in criminal cases.

The *electronic books* ("*e-books*") case against Apple and five book publishers is a leading example. The DOJ (together with many states) filed a civil antitrust action, alleging that the companies conspired to fix retail prices of newly released and bestselling e-books.[35] The publishers met in smoke-filled rooms (aka private dining rooms in fancy Manhattan restaurants), and they "hashed over their meetings with Apple with one another."[36] And "Apple kept the Publisher Defendants apprised about who was in and how many were on board."[37] For a hub-and-spoke price fixing conspiracy, this one was about as good as it gets. There was even one publisher that refused to participate; the others either had more aggressive (or less able) antitrust lawyers or were simply willing to roll the dice.

28 Id. at 12.

29 Id. at 13.

30 United States' Opposition to Motion to Dismiss Indictment at 7, *Usher*, ECF No. 72, supra note 25 (quoting *In re Foreign Exch. Benchmark Rates Antitrust Litig.*, 74 F. Supp. 3d 581, 592, 596-97 (S.D.N.Y. 2015)).

31 Id. at 7-8 (citing *Alaska Elec. Pension Fund v. Bank of Am. Corp.*, 175 F. Supp. 3d 44 (S.D.N.Y. 2016)).

32 *United States v. Usher*, No. 17 Cr. 19, 2018 WL 2424555, at *4 (S.D.N.Y. May 4, 2018) (citation omitted).

33 Id. (quoting *Maricopa*, 457 U.S. at 349).

34 Id.

35 *United States v. Apple, Inc., et al.* No. 1:12-cv-2826 (S.D.N.Y.).

36 *United States v. Apple, Inc.,* 952 F. Supp. 2d 638, 651, 658 (S.D.N.Y.).

37 Id. at 673.

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The five conspiring publishers all settled quickly — three contemporaneously with the DOJ's initial complaint. After a bench trial against Apple, the district court wrote that there was "very little dispute about many of the most material facts."[38] Among the facts:

- Apple knew that the publishers wanted to raise e-book prices above the $9.99 e-book price set by Amazon;
- Apple assured the publishers that it "was willing to work with them to raise those prices, suggesting prices such as $12.99 and $14.99."
- Apple and the publishers entered into an agreement on the eve of Apple's iPad launch to divide new release e-books "among price tiers." As part of the agreement, the publishers would bear a "severe financial penalty . . . if they did not force Amazon and other retailers similarly to change their business models and cede control over e-book pricing to the Publishers."
- As a result of Apple's efforts, "the prices in the nascent e-book industry shifted upward, in some cases 50% or more for an individual title." The conspiracy had the immediate impact of forcing Amazon to abandon its $9.99 flat price for e-books.[39]

The court found "overwhelming evidence" that the publishers had entered into a horizontal price-fixing conspiracy to raise the prices of certain e-books, and as part of that, "Apple not only willingly joined [that] conspiracy, but also forcefully facilitated it."[40] The court specifically rejected Apple's attempts to evade the *per se* rule against horizontal price fixing, reasoning that the agreement between Apple and the publishers — although involving companies at different levels of the supply chain — was precisely the type of conduct condemned by the *per se* rule.[41] The Second Circuit affirmed, albeit with a dissent. As the majority succinctly put it: "Apple consciously orchestrated a conspiracy among the Publisher Defendants."[42]

The mountain of liability evidence that the DOJ offered at trial could surely have been adduced in a grand jury investigation. The DOJ's apparent decision to refrain from criminal prosecution here appears bizarre — understandable, perhaps, only because Apple's brand recognition and consumer loyalty would have presented uncommon challenges in a criminal case. Bearing in mind the risk of a hung jury, prosecutorial discretion may have been thought the better part of litigation valor.[43]

The DOJ took a similarly peculiar course of action in its 2010 high-tech "no-poaching" cases, choosing to file civil enforcement actions against six high technology companies rather than criminally prosecuting any company or executive.[44] There, the DOJ announced that six companies — Adobe, Apple, Google, Intel, Intuit and Pixar — had entered into "no solicitation agreements for employees," whereby companies could not "directly solicit[] each other's employees."[45] Simply put, the tech company buyers agreed not to compete for employee labor.

If the input subject to a non-compete agreement by purchasers were a raw material offered by their suppliers, a criminal prosecution would seem inevitable. Buyer conspiracies directed to sellers have long been illegal *per se*: "the agreement is the sort of combination condemned by the Act even though the price-fixing was by purchasers."[46] Yes, sometimes collective action by purchasers may call for close inquiry. But this was not one of those situations. The tech companies were not running a coop that negotiated a common input price for the benefit of all

38 Id. at 647-48.

39 Id.

40 Id. at 691.

41 Id. at 694; see also *United States v. General Motors Corp.*, 384 U.S. 127 (1966) (*per se* violation where a manufacturer and auto dealers agreed to eliminate vehicle sales through "discount houses"); *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) (*per se* violation where manufacturers, distributors, and a retailer agreed not to sell to a competing retailer).

42 *United States v. Apple, Inc.*, 791 F.3d 290, 316 (2d Cir. 2015).

43 For a fuller discussion, see Himes & Hollywood, *New Toys For Old Games: eBooks – iTroubles*, CPI Antitrust Chronicle (June 2012).

44 E.g. *United States v. Adobe Systems, Inc., et al.*, No 1:10-cv-1629 (D.D.C.).

45 Press Release, DOJ, Justice Department Requires Six High Tech Companies to Stop Entering into Anticompetitive Employee Solicitation Agreements (Sept. 24, 2010), https://www.justice.gov/opa/pr/justice-department-requires-six-high-tech-companies-stop-entering-anticompetitive-employee.

46 *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219, 235 (1948). See also *United States v. Brown*, 936 F.2d 1042, 1045 (9th Cir. 1991) (affirming Sherman Act conviction of buyers for conspiring to allocate billboard space bid on).

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members.[47] Nor were they acting collectively to create a new product in the market.[48] They were carving up the job opportunities available to industry employees.

Is there any serious doubt that the tech companies dodged a bullet when they entered into civil consent decrees?

The DOJ subsequently announced as much. In October 2016, together with the FTC, the DOJ issued "Antitrust Guidance for Human Resource Professionals."[49] The Guidance states explicitly that the DOJ "intends to proceed criminally against naked wage-fixing or no-poaching agreements."[50] Yet, having laid down a marker, the next time the DOJ encountered a buyer conspiracy to refrain from competing for employees, the Division again filed a civil suit because it seemingly was persuaded that the conspiracy had ended before the Guidance was issued.[51]

The irony here should not be lost on any of us. Upon enactment of the Sherman Act in 1890, a principal target for its use was not so much the trusts, but labor organizations instead.[52] More than a hundred years later, there apparently is a debate over whether to condemn as *per se* illegal collective employer action to refrain from competing for employees.

The DOJ similarly chose to proceed civilly against a bid rigging scheme involving federal auctions of leases to explore and develop natural gas resources in Colorado.[53] Under the scheme, the two primary auction bidders agreed to refrain from competing on upcoming auctions. Rather, one company would bid during the auction and, if successful, "assign a fifty percent interest in the acquired leases" to the other.[54] This conduct looks, feels, and smells like a criminal violation — and the victims here were U.S. taxpayers. But the DOJ filed a civil complaint and immediately settled with the defendants. To make matters worse, the settlement seemed so ineffectual that the district court declined to approve it, thus requiring renegotiation before the court signed off.[55]

Viewed collectively, these cases bespeak unwarranted DOJ hesitancy to bring criminal antitrust prosecutions against hard-core violations. When the DOJ itself foregoes criminal prosecution in these sorts of cases, its decision sends a message not only to the business community and antitrust bar, but also to the courts: maybe the *per se* rule — even when applied to price fixing, bid rigging and market allocation — isn't so clear after all. The very "no-poach" euphemism sets a tone. If we expect the courts to respond as they should, we ought to be calling the conduct what it is: an unlawful conspiracy to allocate suppliers — a federal felony under the Sherman Act. Although fewer *per se* antitrust violations remain than in years past, *per se* cases are — or at least they should be — bad, really bad. Not sort of bad.

Indeed, in the Second Circuit, Apple's rule of reason trial defense had traction with Circuit Judge Jacobs, who dissented. After reminding that "the *per se* rule has been in steady retreat," Judge Jacobs asserted that a "vertical relationship that facilitates a horizontal price conspiracy

47 *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.*, 472 U.S. 284, 295 (1985) ("Wholesale purchasing cooperatives . . . are not a form of concerted activity characteristically likely to result in predominantly anticompetitive effects, [but instead] would seem to be designed to increase economic efficiency and render markets more, rather than less, competitive." (citation and quotations omitted)).

48 *Nat'l Collegiate Athletic Assn. v. Board of Regents of Univ. of Okla.*, 468 U.S. 85, 101 (1984) ("[T]his case involves an industry in which horizontal restraints on competition are essential if the product is to be available at all."); *Broad. Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 21-22, 23 (1979) (The "blanket license" challenged as price fixing "is, to some extent, a different product. . . . [C]ooperative arrangements are also not usually unlawful . . . where the agreement . . . is necessary to market the product at all.").

49 DOJ/FTC Antitrust Guidance for Human Resource Professionals, supra note 4.

50 Id. at 4.

51 See Press Release, DOJ, Justice Department Requires Knorr and Wabtec to Terminate Unlawful Agreements Not to Compete for Employees (Apr. 3, 2018), https://www.justice.gov/opa/pr/justice-department-requires-knorr-and-wabtec-terminate-unlawful-agreements-not-compete.

52 See, e.g. *In re Debs*, 158 U.S. 564 (1895) (affirming a criminal contempt order enforcing an injunction sought by the United States and issued by the lower court under the Sherman Act); Hamilton & Till, Antitrust In Action 79 (TNEC 1941) (During the first 50 years of the Sherman Act's life "less than 110 individuals altogether . . . have served prison sentences. And, without a single exception, all have been trade union officials or racketeers.").

53 *United States v. SG Interests I, Ltd., et al.*, No. 1:12-cv-0395 (D. Colo.) ("*SG Interests*").

54 Complaint at 2, *SG Interests* (Feb. 15, 2012), ECF No. 1.

55 Order Denying Motion for Entry of Final Judgment at 11, *SG Interests* (Dec. 12, 2012), ECF No. 20. The court criticized the settlement as "nothing more than the nuisance value of this litigation [which] is not in the public interest." Id.

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does not amount to a *per se* violation."[56] But that conclusion flies in the face of *Interstate Circuit, General Motors*, and *Klor's*, to name just a few authorities.[57] Applying the rule of reason nonetheless, the dissent found Apple's conduct to be pro-competitive.

The DOJ's reluctance to bring criminal antitrust charges can have ramifications for private follow-on civil litigation as well. When the DOJ brings a *per se* case civilly, there is, again, a dilutive or blurred message that defendants can seek to exploit and that private plaintiffs, therefore, may need to eviscerate. There are plenty of *Twombly, Comcast, Matsushita,* and *Daubert* hurdles that private plaintiff litigants must already overcome. Industry or conduct-specific defenses that aren't supposed to be legally cognizable at all under the *per se* rule should not become another one.

VI. THE *PER SE* RULE GOING FORWARD

Litigants and counsel should pay close attention to the upcoming Tenth Circuit decision in *Kemp*. The outcome there could have significant ramifications for future antitrust actions. If the Tenth Circuit declines to apply the *per se* rule, despite facts charging an obvious agreement to allocate customers, those investigated criminally by the DOJ can be expected to argue increasingly that their own "unique and unusual" circumstances preclude criminal charges — and if that effort fails at the charging stage, to renew the argument before the court after indictment.

To its credit, the DOJ is fighting tooth and nail to overturn the lower court's ruling in *Kemp*. But even if it succeeds, the DOJ has already provided enough other cases for defendants to use in arguing against criminal prosecution. The *per se* rule could be under prolonged siege in DOJ criminal cases.

56 *Apple,* 791 F.3d at 345 (Jacobs, C.J., dissenting).

57 See id. at 320, 322-23 (citing *Interstate Circuit v. United States*, 306 U.S. 208, 222 (1939); *General Motors*, 384 U.S. at 145; *Klor's*, 359 U.S. at 212-13).

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