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PRICE EXCHANGE AGREEMENTS: MOVING TOWARD A PER SE RULE

In *United States v. Container Corp.*,[1] the Supreme Court held that an agreement among competitors to exchange on request information as to the most recent price charged or quoted with a resulting stabilization of prices constituted a price-fixing conspiracy in violation of Section 1 of the Sherman Act.[2] The decision has been interpreted by some as meaning that price exchange agreements are now per se violations of the Sherman Act.[3] This comment will examine the standards of legality applied to price information exchange agreements in both earlier price exchange cases and in *Container* to determine whether the latter Court has adopted a per se rule, or has merely placed further limitations on price information exchange agreements through a rule of reason approach.

I. The Relationship of Price-Fixing to the Exchange of Price Information

Initially, the relationship between a price-fixing agreement and an agreement to exchange prices must be determined, for differing standards of legality under Section 1 of the Sherman Act have historically applied to each. A prerequisite in both cases, however, is that a "contract, combination, or conspiracy" exist.[4] The Court has generally interpreted "combination or conspiracy" quite broadly.[5] In *Container*, for example, the Court found that an understanding among manufacturers that each would furnish "the data with the expectation that he would be furnished reciprocal information when he wanted it" was sufficient to meet the combination or conspiracy requirement.[6]

The second requirement for a price-fixing violation under the Sherman Act is that the agreement have the purpose or the effect of raising, lowering, or stabilizing prices by interfering with free market forces involved in price setting.[7] Under a price-fixing agreement, either formal or tacit, competitors agree to charge a certain price for their product. The Supreme Court has rejected the rule of reason to determine whether price-fixing agreements are helpful or injurious to free competition and has adopted a per se rule of illegality. In the leading price-fixing case, *United States v. Socony Vacuum Oil Co.*,[8] the Court concluded that there could be no justification for an agreement to set

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1 393 U.S. 333 (1969).

2 15 U.S.C. § 1 (1964).

3 United States v. FMC Corp., 5 CCH Trade Reg. Rep. ¶ 72,901, at 87,433 (E.D. Pa. Aug. 22, 1969); Interphoto Corp. v. Minolta Corp., 295 F. Supp. 711, 717-18 (S.D.N.Y. 1969).

4 15 U.S.C. § 1 (1964).

5 Interstate Circuit, Inc. v. United States, 360 U.S. 208, 221-30 (1939).

6 393 U.S. at 335.

7 United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940).

8 310 U.S. 150 (1940).

prices, for such an agreement, in and of itself, has the effect of restraining price competition. The Court noted that

> [a] conspiracy to fix prices violates section one of the [Sherman] Act though no overt act is shown, though it is not established that the conspirators had the means available for accomplishment of their objective . . . .[9]

Thus, under the *Socony-Vacuum* rationale, an agreement to fix prices is illegal per se, and the defenses of reasonableness of price, benefit to the public, or the ineffectiveness of the agreement are not available.[10]

A price information exchange agreement differs from a price-fixing agreement in that the parties do not agree to charge the same price. An agreement to exchange price information is basically an arrangement where competitors furnish and receive information concerning past, present, or future market prices of a certain commodity. The arrangement may take various forms and include a variety of characteristics. For example, the agreement may include a central agency for collecting, interpreting and disseminating the price information;[11] it may require that subscribers provide information under the overt threat of penalty;[12] or it may require that a member adhere to his reported prices until informing members of a change.[13] As opposed to the per se rule applied to price-fixing agreements, the Court has traditionally examined the particular characteristics of a price information exchange agreement to determine its legality.

The critical difference between price-fixing agreements and the mere exchange of price information, therefore, results from their respective positions in the price setting process. The price-fixing agreement is the final step in price setting, while the exchange of price information is an intermediate step. In a truly competitive system an individual does not know what his competitor will charge for similar merchandise and is free to set his prices according to his costs. However, when competitors enter into a price-fixing agreement, they collectively set the market price, and the element of uncertainty in pricing is removed altogether.

When competitors agree to exchange price information, on the other hand, the final step in the price setting process has not been reached. Each party to a price exchange agreement knows the prices or pricing plans of his competitors, but he cannot be certain what his competitors *will* charge. Thus the element of uncertainty as to a competitor's pricing policy is still present, and each subscriber's decision may be an independent one.

Recognizing this critical difference, the Court has historically treated price information exchange cases differently from price-fixing

[9] Id. at 225 n.59.
[10] Id. at 220-21.
[11] See, e.g., American Column & Lumber Co. v. United States, 257 U.S. 377 (1921).
[12] See, e.g., United States v. American Linseed Oil Co., 262 U.S. 371, 382 (1923).
[13] Id. at 389.

cases. Utilizing the rule of reason, the Court has examined the total factual situation in each case to determine if the price exchange agreement has the purpose or effect of restraining price competition.

II. The Traditional Standard of Restraint of Price Competition applied to Price Information Exchange Agreements

The Court's utilization of the rule of reason in price information exchange cases requires a different method of proof than that required to prove a price-fixing agreement. Since price-fixing is the final step in the price setting process, an inference is made that a restraint of price competition results from the agreement. Thus it is only necessary to show that an agreement to fix prices exists in order to prove a violation. However, since a price exchange agreement may permit competitors to set prices through independent action in an atmosphere of uncertainty, the agreement may not necessarily have the purpose or effect of restraining price competition. The exchange may be designed only to inform competitors of market conditions, and more complete market knowledge could aid, rather than stifle, price competition. Under the ideal model of perfect competition, complete market knowledge by all competitors is not only desirable, but necessary.[14] Thus the Court generally examines the circumstances surrounding the exchange agreement, including the particular characteristics of the agreement, the setting in which it was made and the effect of the agreement on market prices. In this manner, the Court determines if the purpose or effect of the agreement is the illegal restraint of price competition.

A logical starting point in the search for criteria determinative of the legality of price information exchange schemes is an analysis of Supreme Court cases involving price exchange agreements. In *American Column & Lumber Co. v. United States*,[15] the Supreme Court held an agreement to exchange information relating to prices illegal under the Sherman Act because it restricted competition by maintaining and increasing prices. The Court reached this decision by examining the characteristics of the plan involved to determine its purpose and practical effect. The defendant association denied the

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[14] See Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563, 582-83 (1925), where the Court stated:

> It is the consensus of opinion of economists and many of the most important agencies of government that the public interest is served by the gathering and dissemination of information with respect to the production and distribution, cost and prices, in actual sales, of market commodities, because the making available of such information tends to stabilize trade and industry, to produce fairer price levels and to avoid the waste which inevitably attends the unintelligent conduct of economic enterprise. Free competition means a free and open market among both buyers and sellers for the sale and distribution of commodities. Competition does not become less free merely because the conduct of commercial operations becomes more intelligent through the free distribution of knowledge of all the essential factors entering into the commercial transaction.

[15] 257 U.S. 377 (1921).

existence of any plan to agree upon prices or production, claiming that the true purpose of the plan was to substitute "co-operative competition for cut-throat competition" and to "enable each member to intelligently make prices and govern his production."[16] The Court found that in practice the plan's features, which included the soliciting of members' forecasts of future business conditions, frequent meetings, and analysis of reported information by an expert employed by the association who subsequently distributed "significant suggestions as to both future prices and production," indicated that the purpose of the agreement was price-fixing.[17] The Court noted that

> [m]en in general are so easily persuaded to do that which will obviously prove profitable that this reiterated opinion from the analyst of their association, with all obtainable data before him, that higher prices were justified and could easily be obtained, must, inevitably have resulted, as it did result, in concert of action in demanding them.[18]

The Court thus found that the purpose of the agreement was to raise prices regardless of cost.[19] This finding was strengthened by evidence that the actual effect of the plan was a significant price rise in the lumber industry.[20]

In reaching the decision that the agreement in *American Column* was a violation of the Sherman Act, therefore, the Court examined both the purpose and the effect of the agreement by analyzing both its characteristics and its implementation. This approach was also adopted in *United States v. American Linseed Oil Co.*[21] The Court found that the characteristics of the agreement in *American Linseed*—a strong central collection and dissemination bureau, penalties for failure to comply with the terms of the agreement, current price lists, names of buyers and the withholding of the price information from buyers[22]—had the inevitable tendency to destroy real competition and thereby restrain trade.

This conclusion was based not on the mere existence of the exchange agreement, but upon the examination of the entire contract "in

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[16] Id. at 392-94.

[17] Id. at 399.

[18] Id. at 407.

[19] Id. at 409. The Court also noted:

> Genuine competitors do not make daily, weekly and monthly reports of the minutest details of their business to their rivals. . . . This is not the conduct of competitors but is so clearly that of men united in an agreement, express or implied, to act together and pursue a common purpose under a common guide that, if it did not stand confessed a combination to restrict production and increase prices in interstate commerce and as, therefore, a direct restraint upon that commerce, as we have seen that it is, that conclusion must inevitably have been inferred from the facts which were proved.

Id. at 410.

[20] Id. at 409.

[21] 262 U.S. 371 (1923).

[22] Id. at 380-84.

light of what has been done under it . . . ."[23] Thus the Court examined the agreement as implemented to determine its effect. The Court emphasized that the possible forfeiture of a substantial sum of money, which the subscriber deposited with the association upon enrollment as a member, constituted a financial penalty designed to insure compliance with the agreement. The Court concluded that the agreement as implemented eliminated the subscriber's freedom of action in managing its affairs at a given moment, thus restraining free competition and violating the Sherman Act.[24]

Under *American Column* and *American Linseed*, then, it can be concluded that the Court specifically condemned certain characteristics of price exchange agreements which evidenced a purpose or effect of restraining price competition. By utilizing this approach the Court did not condemn all price information exchange agreements, but carefully examined the provisions and the implementation of each agreement in reaching a decision.

The first two cases in which the Court upheld price information exchange agreements were *Maple Flooring Mfrs. Ass'n v. United States*[25] and *Cement Mfrs. Protective Ass'n v. United States*.[26] In *Maple Flooring* the agreement provided for the reporting of average costs in the industry, the gathering and dissemination of statistics by the secretary of the association, and the distributing of the information to buyers and sellers on request. The information exchanged identified neither buyers nor sellers in specific transactions.[27] The Court found that these characteristics did not provide evidence that the purpose of the agreement was the restraint of price competition, and that the case must turn on the effect of the activity carried on by the association under the terms of the agreement.

In examining the effect of the agreement in *Maple Flooring*, the Court distinguished *American Column* and *American Linseed*. The Court noted that in *American Column*, the purpose and effect of the agreement was to increase prices, as evidenced by the activities of the expert analyst employed by the association, and by the fact that the defendants exchanged names and addresses of purchasers and current prices. In *American Linseed* the Court noted that the illegal purpose and effect of the agreement was evidenced by the fact that the agreement contained financial penalties for failure to report prices, required adherence to the prices once reported, disclosed names of buyers and sellers, and reported current prices.[28]

The Court observed, however, that the *Maple Flooring* agreement included none of the condemned provisions of the two earlier cases, and thus had neither the effect nor the natural tendency to restrain price

[23] Id. at 389.
[24] Id. at 389-90.
[25] 268 U.S. 563 (1925).
[26] 268 U.S. 588 (1925).
[27] See 268 U.S. at 566-74.
[28] Id. at 581.

competition. The Court reasoned that a price information exchange scheme is not illegal in and of itself but becomes illegal when it is used in a concerted effort to raise, lower or stabilize prices at a certain level or within a narrow range.[29] The Court also noted that the fact that prices become uniform after a price exchange agreement begins to operate does not render the agreement illegal without proof that the agreement had the purpose or the effect of a concerted effort to cause the uniformity. With the necessary proof lacking, the Court distinguished the earlier cases stating that in *American Column* and *American Linseed*

> [t]he unlawfulness of the combination arose not from the fact that the defendants had effected a combination to gather and disseminate information, but from the fact that the court inferred from the peculiar circumstances of each case that concerted action had resulted, or would necessarily result, in tending arbitrarily to lessen production or increase prices.[30]

In *Cement Manufacturers* the agreement was similar to that in *Maple Flooring*, except that the buyers were identified. The Court concluded that this particular provision should not be condemned because it prevented certain fraudulent practices by buyers in the procurement of cement,[31] and the Court, relying on *Maple Flooring*, upheld the agreement.[32] Conceding that the effect of the agreement was to produce uniformity of price, the Court found that the uniformity occurred because the individual sellers met changes in competitors' prices through independent decision. The Court stated that

> this record wholly fails to establish, either directly or by inference, any concerted action other than that involved in the gathering and dissemination of pertinent information with respect to the sale and distribution of cement . . . and it fails to show any effect on prices and production except such as would naturally flow from the dissemination of that information in the trade and its natural influence on individual action.[33]

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[29] The Court reasoned:

> We decide only that trade associations or combinations of persons or corporations which openly and fairly gather and disseminate information as to the cost of their product, the volume of production, the actual price which the product has brought in past transactions . . . as did these defendants, and who, as they did, meet and discuss such information and statistics without however reaching or attempting to reach any agreement or any concerted action with respect to prices or production or restraining competition, do not thereby engage in unlawful restraint of commerce.

Id. at 586.

[30] Id. at 585.

[31] 268 U.S. at 603-04.

[32] Id. at 606.

[33] Id.

The Government was successful in proving the prohibited purpose and effect of restraining price competition in *Sugar Institute, Inc. v. United States*.[34] The agreement included provisions requiring adherence by a subscriber without deviation from the prices he exchanged, and publicly announced prices and price changes. The Court stated that the adherence requirement eliminated the freedom of the seller to make individual decisions regarding his price and reduced the uncertainty regarding competitors' prices. Thus the purpose of the agreement was restraint of price competition. The Court made it clear, however, that the exchange of future prices was not illegal in and of itself, but that the adherence requirements made the agreement illegal.[35]

The Court's treatment of the price information exchange cases prior to *Container* indicates that the critical issue in each case was whether the particular characteristics of the agreement as implemented operated as a restraint on price competition. Certain characteristics, by themselves, make price information exchange agreements illegal price-fixing, such as the adherence requirements in *Sugar Institute* and *American Linseed*. Adherence requirements fix prices because each seller knows what his competitors are charging, and the pricing decisions may be made on the basis of competitors' prices.

Other characteristics, however, do not necessarily render the exchange agreement illegal. The existence of a central exchange bureau to collect and disseminate price information is not, by itself, conclusive on the question of the legality of a price information exchange scheme. A central bureau was a characteristic condemned in *American Linseed*, but in *Maple Flooring*, the provision for the secretary of the association to collect and disseminate information was not condemned. The reason for this different treatment centers around the activity of the central agent or agency. In *American Linseed* the expert analyst provided what amounted to a blueprint for action that members followed. In *Maple Flooring* on the other hand, there was no evidence indicating that the secretary of the association did anything but compile the statistics and send them out to subscribers. Thus the subscribers were free to make their own pricing decisions—an essential element in free price competition.

The fact that information exchanged is available only to sellers, when joined with other supporting evidence, can lead to a conclusion that there has been a violation of the Sherman Act.[36] Perfect competition requires complete market knowledge on the part of both buyer and seller. If the stated purpose of an exchange scheme is to increase and enhance price competition, it is anomalous to deny the buyer access to the price information exchanged. The Court has declared that an agreement identifying both buyers and sellers was not

[34] 297 U.S. 553 (1936).

[35] Id. at 601.

[36] See American Column & Lumber Co. v. United States, 257 U.S. 377, 411 (1921).

illegal,[37] but no convincing reason exists why an agreement should provide for identification of buyers and sellers. If the agreement is merely a planning device, it is not necessary to list specific sales to identified customers by specific sellers. If sellers and buyers are identified, it is very possible that the information will be used by an individual seller for discriminatory pricing to meet the prices charged by certain competitors to certain buyers. If this happens the important factor of uncertainty dissolves and the agreement verges on price-fixing.

For purposes of examining *Container*, the most critical characteristic in the exchange agreement is the type of price information exchanged. The exchange of past prices was upheld in *Maple Flooring*[38] and *Cement Institute*. Past price information is perhaps less useful than current or future price information as far as planning is concerned, but past prices can indicate trends in the industry upon which to plan. Without adherence requirements, the exchange of past price information does not remove uncertainty as to what a competitor is charging or will charge, and thus does not reduce individual freedom in price setting. The problem in the exchange of past price information is defining what past prices are. In *Maple Flooring* the prices exchanged were those of completed transactions.[39] This may be enough to define past prices in that the price a buyer paid last week, yesterday or even that day is not necessarily what he would have to pay the next day. This may maintain a degree of uncertainty as to what will be charged and may encourage a competitor to quote his lowest price. Obviously, the closer the price exchanged approaches a current price, the more difficult it becomes to infer that the exchange stimulates price competition.

The exchange of future prices is also subject to abuse. Without any adherence requirement, however, the exchange may be legal as long as the individual seller is free to change his announced future prices. Indeed, competitors may be hesitant to rely heavily on the information exchanged since it is subject to change at the option of the subscriber. The price announced may never actually be charged, and the seller is completely free to price as he pleases. The *Sugar Institute* case states that the exchange of future prices itself does not make an agreement illegal, but any requirement that the seller adhere to the future price announced makes the agreement illegal.[40] However, even in the absence of adherence requirements, if competitors meet announced future price increases, a strong inference arises that the purpose or effect of the exchange agreement is the restraint of price competition. The agreement as implemented may raise a presumption that the agreement has changed uncertainty into certainty and that freedom of action in price setting has been affected.

[37] See Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588 (1925).
[38] 268 U.S. at 585.
[39] Id. at 573.
[40] 297 U.S. at 601.

The exchange of current prices is perhaps the most useful type of price information and therefore the most suspect, but at the same time may not be a clear restriction on price competition. The danger of abuse when current prices are exchanged, however, may raise an inference of a restraint of price competition. With such an exchange the seller has exact knowledge of what a competitor is charging at the moment. Uncertainty as to the price the seller should set is not eliminated altogether but is reduced substantially, because knowing a competitor's price may lead others to charge the same or nearly the same price, thus preventing pricing according to cost. Thus the necessary uncertainty in price setting is partially or completely eliminated. This fact may be the key to an interpretation of the *Container* case.

III. *Container Corporation*: A PER SE RULE?

In *Container* the Court declared that an informal arrangement whereby competitors exchanged information as to the most recent price charged or quoted to identified customers was illegal under Section 1 of the Sherman Act. Arguably there are four possible interpretations of the brief and somewhat cryptic majority opinion of Mr. Justice Douglas: (1) the price exchange scheme as implemented had the purpose or effect of restraining price competition, and thus the standards of legality of the earlier cases were applied; (2) the exchange of current prices with identification of buyers is illegal per se; (3) all price information exchange schemes are illegal per se; or (4) the evidentiary requirements in proving an illegal price exchange scheme have been relaxed.

Justice Fortas, in a concurring opinion, rejected any theory that the Court was adopting a per se rule. He views the decision as an application of the standards of earlier cases, particularly the *American Column* case, reasoning that the agreement was proved to restrain price competition in fact, and thus a per se rule need not be considered nor applied.[41] However, it is not clear from Justice Douglas' opinion that he intended the decision to be this narrow. Early in his opinion Justice Douglas states: "The case as proved is unlike any other price decision we have rendered."[42] He then points out differences between the case at hand and some of the former price information exchange cases:

> There was here an exchange of price information but no agreement to adhere to a price schedule as in [*Sugar Institute*]. . . . [T]here was here an exchange of information concerning specific sales to identified customers, not a statistical report on the average cost to all members, without identifying the parties to specific transactions, as in [*Maple Flooring*]. . . . While there was present here, as in [*Cement*

[41] 393 U.S. at 346.

[42] Id. at 334.

> *Manufacturers*] . . . an exchange of prices to specific customers, there was absent the controlling circumstance [of fraudulent purchasing practices in the cement industry].[43]

The Court states, however, that "the agreement in the present case, though somewhat casual, is analogous" to the *American Column* and *American Linseed* cases.[44] The basis for this conclusion is not entirely clear for, unlike *American Column* and *American Linseed*, the *Container* agreement had no adherence provision, no financial penalties for failure to supply information, and no central bureau or expert analyst.

The trial judge in the lower court carefully distinguished the two cases from *Container*, concluding that the facts in *Container* did not resemble the facts in those cases.[45] Thus the majority argument that *Container* is analogous to the two cases must refer to the fact that each of the three agreements included the exchange of current prices and the disclosure of names and buyers. The existence of these two characteristics in all three cases, however, does not provide direct authority for the illegality of the *Container* agreement. In *American Column* and *American Linseed*, neither the exchange of current prices nor the identification of buyers was the determining factor in the Court's decision. In each of those cases there were additional, more convincing factors which led the Court to its conclusion that freedom of action in setting prices had been reduced, thus restraining price competition.[46]

A second reason why *Container* may not be a mere application of earlier standards utilized by the Court is suggested by Justice Douglas:

> The inferences are irresistible that the exchange of price information has had an anticompetitive effect in the industry, chilling the vigor of price competition.[47]

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[43] Id. (citations omitted).

[44] Id. at 337.

[45] See United States v. Container Corp., 273 F. Supp. 18, 65 (M.D.N.C. 1967) where the court noted:

> Obviously, the facts present in this case do not remotely resemble the facts in *American Column*. The defendants here were under no compulsion to give or receive price information, since each defendant was free at all times to do as he pleased in this regard. . . . No fines or penalties were assessed for failure or refusal to furnish price information, and there was no compulsion to *adhere* to the price requested or received.

The court further noted that the facts in American Linseed were

> materially dissimilar to the facts in the case under consideration. We have no agreement that took away "any freedom of action" of the defendants by *requiring* . . . *adherence* . . . [or] fine[s]. . . . [E]ach defendant was at all times free to exchange, or not to exchange, price information, and each price charged or quoted was the individual decision of each defendant.

Id. at 66.

[46] 257 U.S. at 398-412, where the Court placed major emphasis on the activities of the secretary of the association; 262 U.S. at 389-90, where the Court discussed the adherence requirement and the strong central bureau.

[47] 393 U.S. at 337.

The evidence which led to this irresistible inference differs from that of the early cases. The Court found that "[t]he exchange of price information seemed to have the effect of keeping prices within a fairly narrow ambit."[48] The basis of this finding was that while capacity exceeded demand in the industry, and the price trend was downward, the number of plants and manufacturers had increased. Upon this evidence the Court concluded that "[t]he result of this reciprocal exchange of prices was to stabilize prices though at a downward level . . . [and thus] . . . the exchange of price data tends toward price uniformity."[49] The Court did not inquire, as was done in *Maple Flooring* and *Cement Manufacturers*, whether the stabilization and uniformity would have occurred without the agreement.

The lower court opinion and the dissenters in *Container* both suggest that this inquiry should have been made. Those opinions indicate that the defendants produced voluminous evidence that there was vigorous price competition in the corrugated container industry after the agreement was entered into, and the Government introduced no evidence as to price levels or profit levels in the industry. The dissenters argued that

> [t]he Government admits that the price trend was down, but asks the Court to assume that the trend would have been accelerated with less informed, and hence more vigorous, price competition. In the absence of any proof whatsoever . . . [i]t is just as likely that price competition was furthered by the exchange as it is that it was depressed.[50]

It appears that the Court did not follow the reasoning of the earlier cases that, as long as freedom of action and uncertainty in price setting is maintained, the price exchange agreement is legal, but implied that illegality springs from the existence of a price exchange agreement and a fairly uniform price structure without inquiring whether the uniformity was in fact caused by the exchange agreement. Thus it can be argued that the Court has removed the critical difference between price-fixing and the exchange of price information, and has adopted instead a per se rule to the exchange of current prices when uniformity of prices is shown.

This contention is further strengthened by the fact that the Court in *Container* stated that the exchange of price information tends toward price uniformity and that the result of the reciprocal exchange of prices was to stabilize prices, though at a downward level. It thus appears that the Court is equating price uniformity with price stabilization. Price stabilization was one of the forms of price manipulation held to be

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[48] Id. at 336.

[49] Id. at 337.

[50] Id. at 345-46. The dissenters further noted that "[t]he trial judge found that price decisions were individual decisions, and that defendants frequently did cut prices in order to obtain a particular order."

illegal per se in the *Socony-Vacuum* case.[51] It may be argued, therefore, that when the exchange of current prices tends toward price uniformity, the agreement is illegal per se. Thus, once an agreement to exchange current prices is found, and uniformity of price results, then the Court need inquire no further as to the actual reasons for the uniformity, but can infer that the uniformity resulted from the implementation of the agreement.

A logical extension of this reasoning is that any price information exchange agreement where uniformity of price is found is illegal per se. Thus, if past or future prices were exchanged and price uniformity were shown, Justice Douglas' opinion may be interpreted as requiring the application of a per se rule. It is submitted that this interpretation is incorrect, for early in the opinion Justice Douglas carefully distinguishes *Maple Flooring* and *Cement Manufacturers* from *Container*, indicating that the rule laid down in *Container* does not overrule those cases in which price information exchange agreements were upheld.[52] Then he states that "[p]rice information exchanged in some markets may have no effect on a truly competitive price."[53] If a strict per se rule as to any price information exchange agreement were intended, this language would be unnecessary.

Thus, *Container* does not apply a per se rule to all price exchange agreements nor does it adopt the standards of the earlier price exchange cases. Perhaps the most reasonable interpretation is that the decision reduces the evidentiary requirements necessary to prove that any price exchange agreement has become price-fixing. In the cases before *Container*, the Court fully discussed the evidence presented on behalf of the defendants and required actual proof that the agreement as implemented had the purpose or the effect of restraining price competition. In *American Column* and *American Linseed* no inferences had to be drawn from the agreement because the purpose and effect were clear on the facts. In *Maple Flooring* and *Cement Mfr's*, the Court refused to make any broad inferences:

> [I]n the absence of proof of such agreement of concerted action having been actually reached or actually attempted, under the present plan of operation of defendants we can find no basis in the gathering and dissemination of such information by them or in their activities under the present organization for the inference that such concerted action will necessarily result [in price uniformity].[54]

However, in *Container* the Court inferred from a theoretical

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[51] See 310 U.S. at 223, where the 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*.

[52] 393 U.S. at 334-35.

[53] Id. at 337.

[54] Maple Flooring Mfrs. Ass'n v. United States, 268 U.S. 563, 586 (1925).

model constructed by the Government, that the agreement as practiced must necessarily lead to the restraint of price competition. The Government proved that the corrugated container industry was an oligopoly, that excess capacity existed in the industry, and that new competitors were entering the industry. The Government then argued that where there are few sellers and excess capacity in an industry, prices should theoretically be driven down far enough to discourage entry into the industry by new manufacturers. Because new manufacturers were entering the industry, the Government argued that a high profit level must exist, even though the trend of the price level was downward in the years during which the exchange plan operated. The Government urged that the necessary inference was that prices would have declined even faster if the agreement had not been in existence, and thus that the effect of the agreement was to restrain price competition. The Court accepted this argument without further evidence as to causes for price uniformity.

In relaxing the evidentiary requirements to allow an inference of purpose and effect from the existence of an agreement plus the showing that pricing practices in an industry do not conform to a theoretical economic model, the Court significantly reduced the burden on the plaintiff by eliminating the requirement that the characteristics of an agreement have a demonstrable purpose or effect of restraining price competition. This view of the *Container* decision indicates that the importance of the case goes beyond a mere addition to the existing law and in fact signals a change in the law concerning price information exchange cases. In earlier cases the evidence of the purpose and effect of the agreement was analyzed carefully, as required by the rule of reason. In *Container* this evidence was not examined, signifying, perhaps, the demise of the rule of reason approach in price information exchange cases.

Conclusion

Although the *Container* decision may arguably be a harbinger of the demise of the rule of reason approach in price information exchange cases, the opinion should not be read to state that a per se rule should be applied to any price information exchange case. It is probable that *Container* establishes a per se rule as to the exchange of current prices under the *Socony-Vacuum* rationale of price-fixing agreements.[55] But as far as other types of price exchange agreements are concerned, the plaintiff must show not only that an agreement to exchange price information exists, but also that evidence exists supporting an inference that the agreement has the purpose or the effect of restraining price competition. It is by lessening this evidentiary requirement to a showing of theoretical effect that *Container* changes the standards of legality applied to price information exchange agreements.

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[55] Justice Douglas relied exclusively on *Socony-Vacuum* to determine the illegality of the agreement. 393 U.S. at 337.