

The *Per Se* Rule That Ate Maricopa County: *Arizona v. Maricopa County Medical Society*¹ — The extent to which the health care industry should be governed by the antitrust laws² has been the subject of a lively scholarly debate.³ A major issue in this debate was the proper level of judicial scrutiny to be afforded business agreements among health care providers and insurers in light of the conflict between the public's interest in health care cost containment and the inflationary market forces present in the industry.⁴ Although in *Goldfarb v. Virginia State Bar*⁵ and *National Society of Professional Engineers v. United States*⁶ the Supreme Court of the United States explicitly rejected the argument that "professionals," such as physicians, were wholly exempt from the traditional sweep of the Sherman Antitrust Act,⁷ it nevertheless remained open to speculation whether the standard of antitrust analysis in future cases was to be

¹ 102 S. Ct. 2466 (1982).

² 15 U.S.C. §§ 1-77 (1976).

³ Shapiro, *Cost Containment in the Health Care Field and Antitrust Laws*, 7 AM. J.L. & MED. 425 (1982). See, e.g., Borsody, *The Antitrust Laws and the Health Care Industry*, 12 AKRON L. REV. 417 (1979); Havighurst, *Professional Restraints on Innovation in Health Care Financing*, 1978 DUKE L.J. 303; Herndon, *Competition Policy and the Professions*, 48 ANTITRUST L.J. 1533 (1979); Horan & Nord, *Application of Antitrust Law to the Health Care Delivery Systems*, 9 CUMBERLAND L. REV. 685 (1979); Kallstrom, *Health Care Cost Control by Third Party Payors: Fee Schedules and the Sherman Act*, 1978 DUKE L.J. 645; Rosdeitcher, *Contemporary Issues in Health Care: Cost Containment and Competition*, 17 FORUM 690 (1982); Note, *Antitrust and Nonprofit Entities*, 94 HARV. L. REV. 802 (1981); Note, *The Professions and Noncommercial Purposes*, 11 U. MICH. J.L. REFORM 387 (1978).

⁴ In 1981, health care in America cost \$287 billion, representing almost 10% of the nation's gross national product. See Keisling, *Radical Surgery: Let's Draft The Doctors*, THE WASHINGTON MONTHLY, February 1983, at 26. Of that figure, \$55 billion went to physicians, representing an increase of 17% over the previous year. See PARADE MAGAZINE, October 17, 1982, at 10. Additionally, employee health insurance premiums for the nation's largest companies have risen nearly 25% in 1983, the largest increase since World War II. Keisling, *supra* note 4, at 26.

There appears to be general agreement among observers that the current structure of the health care market contributes greatly to ever-escalating health care costs in the United States. See Rosdeitcher, *supra* note 3, at 691; Keisling, *supra* note 4, at 27-29. Rosdeitcher notes, for example, that the health services system is not a classic competitive market because the law of supply and demand does not govern the system. Rosdeitcher, *supra* note 3, at 691. Rather, he points out, various well known factors contribute to a lack of traditional free market price discipline. *Id.* First, the doctor-patient relationship may obscure objective consumer assessments of quality. *Id.* Second, complex medical advances frustrate informed consumer selection and promote excessive deference to professional judgments. *Id.* Third, the consumer's concern for his or her health usually makes price a secondary consideration. *Id.* Finally, and most importantly, the prevalence of public and third party payors insulates consumers from the true cost of health care. *Id.* As health care providers compete for these enormous subsidized expenditures, the consumer's concern for the best possible care and concomitant insensitivity to price spur the providers to continually initiate new, sophisticated and expensive services—often without any relation to actual community demand. *Id.* at 692. According to Rosdeitcher, the result of such misallocation is the creation of an artificial level of consumer demand which parallels the escalating supply of costly medical services. *Id.* See also Weller, *Antitrust and Health Care: Provider Controlled Health Plans and the Maricopa Decision*, 8 AM. J.L. & MED. 223, 224-5 (Fall 1982).

⁵ 421 U.S. 773 (1975).

⁶ 435 U.S. 679 (1978).

⁷ 15 U.S.C. §§ 1-7 (1976).

the same for both professional and non-professional enterprises.⁸ Recently, in *Arizona v. Maricopa County Medical Society*,⁹ the Supreme Court held that an agreement among physicians and health insurers to establish and abide by maximum fee reimbursement schedules was *per se* illegal price fixing under section 1¹⁰ of the Sherman Act.¹¹ By so holding, the Court dispelled any previous notions that an agreement among physicians or other professionals found to be clearly anticompetitive might be looked upon more leniently by virtue of either its proconsumer nature or its non-commercial market setting.

Maricopa County is thus a significant decision in that the Court explicitly and unequivocally applied traditional antitrust rules to business arrangements involving professionals. More significant, however, was the Court's perfunctory condemnation of the maximum fee reimbursement agreements on a limited summary judgment record — a record which arguably supported an inference that the challenged agreements achieved substantial economic efficiencies not otherwise attainable to the benefit of health care consumers.¹² The majority's decision and rationale prompted Justice Powell to question in dissent both the Court's interpretation of antitrust precedent and its conception of the consumer welfare purpose underlying the Sherman Act.¹³

In *Maricopa County*, the respondent foundations for medical care (FMCs)¹⁴ were non-profit corporations organized by their respective county medical societies for the purpose of promoting cost-effective, fee-for-service health care.¹⁵ The foundations each promulgated a schedule of maximum fee reimbursement levels¹⁶ which participating physicians¹⁷ contractually agreed to ac-

⁸ See *infra* notes 123-57 and accompanying text.

⁹ 102 S. Ct. 2466 (1982).

¹⁰ Section 1 prohibits "[e]very contract, combination, . . . or conspiracy in restraint of trade or commerce. . . ." 15 U.S.C. § 1 (1976).

¹¹ *Maricopa County*, 102 S. Ct. at 2466-80.

¹² See *infra* notes 206-66 and accompanying text.

¹³ *Maricopa County*, 102 S. Ct. at 2480-85 (Powell, J., dissenting).

¹⁴ Foundations for Medical Care (FMCs) are associations of physicians who provide prepaid health care. Kallstrom, *supra* note 3, at 680. Unlike health maintenance organizations (HMOs) and conventional insurance plans, however, FMCs are sponsored or managed by state or county medical societies. *Id.* FMC health plans set maximum limits on the fee paid to a participating physician for a particular health service. *Id.* Generally, FMCs also provide peer review of fees and utilization (frequency with which a physician orders specific health care procedures). *Id.* See also Havighurst, *supra* note 3, at 315-16.

The respondent foundations in *Maricopa County* were Maricopa Foundation for Medical Care and Pima Foundation for Medical Care. *Arizona v. Maricopa County Medical Soc'y*, 643 F.2d 553, 554 (9th Cir. 1980). The remaining respondent was Maricopa County Medical Society. *Id.* The Pima County Medical Society, originally joined, was dismissed from the suit under a consent order. *Id.* at 554 n.2.

¹⁵ *Arizona v. Maricopa County Medical Soc'y*, 102 S. Ct. 2466, 2470 (1982); Joint Brief for Respondents at 8-9, *Arizona v. Maricopa County Medical Soc'y*, 102 S. Ct. 2466 (1982) [hereinafter cited as Brief for Respondents].

¹⁶ At the time the suit was filed, each foundation made use of relative values and conversion factors in compiling a schedule of maximum reimbursement levels. The relative value was the numerical value assigned to a particular service performed by the physician (e.g., an office examination). The conversion factor was the dollar amount for a given medical specialty

cept as payment in full for services rendered to patients insured under foundation-approved insurance plans.¹⁸ Additionally, the foundations were authorized to draw funds to pay physician's bills from insurance company accounts as well as review the appropriateness and medical necessity of treatment rendered to insured patients.¹⁹ Participating physicians were free to charge higher fees to uninsured patients and lower fees to those insured under the plan.²⁰ Moreover, insured patients were free to visit non-participating physicians for care, but the FMC insurance guaranteed payment only up to the pre-set maximum for the specific care received.²¹

In 1978, the State of Arizona filed a civil complaint against the Maricopa and Pima foundations for medical care and their respective county medical societies alleging an illegal price fixing conspiracy under section 1 of the Sherman Act.²² After a limited pretrial discovery period, the state moved for partial summary judgment on the issue of liability on the ground that the foundations'

(e.g., surgery). The actual maximum reimbursable amount for a given procedure was then determined by multiplying the applicable relative value by the applicable conversion factor. *Arizona v. Maricopa County Medical Soc'y*, 102 S. Ct. 2466, 2471 (1982); Brief for Petitioner at 4-5, *Arizona v. Maricopa County Medical Soc'y*, 102 S. Ct. 2466 (1982) [hereinafter cited as Brief for Petitioner].

Each foundation discontinued the use of this computation method in 1980 and the Maricopa FMC revised its by-laws to give its Board of Trustees the power to adopt reimbursement levels without a vote of the membership. Brief for Respondents at 10 n.29. The Supreme Court nevertheless held that the suit was not mooted as a result of the changes. *Maricopa County*, 102 S. Ct. at 2471 n.9.

¹⁷ Approximately 70% of the private practicing doctors of medicine, osteopathy and podiatry in Maricopa County were members of the Maricopa Foundation at the time of trial. *Arizona v. Maricopa County Medical Soc'y*, 102 S. Ct. 2466, 2470 (1982). There was some dispute, however, as to the exact percentage of Pima County physicians participating in the Pima Foundation. The available estimates ranged from 30% to 80%. *Id.* at 2471 n.8.

¹⁸ *Id.* at 2471. For an insurer to receive FMC approval, it had to agree to reimburse the physician for medical services rendered to insured patients at fee levels not to exceed the maximum established for any particular procedure by the FMC except at the insurer's discretion. *Id.* Also, the insurer had to agree to cover all the medical services described in the foundation's minimum standards. *Id.*; Brief for Respondents at 11.

¹⁹ *Arizona v. Maricopa County Medical Soc'y*, 102 S. Ct. 2466, 2471 (1982). In this regard, Maricopa FMC was considered an insurance administrator by the Arizona Department of Insurance. *Id.*

²⁰ *Id.* Member physicians were free to associate with any other medical insurers or self-insuring health care consumers. Brief for Respondents at 25 n.77. Moreover, physician members agreed that membership would not affect their billing levels. *Id.* at 9-10, 25. Likewise, any participating insurer could deal with any individual member physician in an attempt to bargain for a fee which was lower than the maximum reimbursement level and, conversely, was free to pay the physician more than the maximum. *Id.* at 25 n.77.

²¹ *Arizona v. Maricopa County Medical Soc'y*, 102 S. Ct. 2466, 2471-72 (1982).

²² *Id.* at 2469. The case was brought under both section 1 of the Sherman Act and the Arizona Uniform Antitrust Act, ARIZ. REV. STAT. ANN. §§ 44-1401 (1978). *Arizona v. Maricopa County Medical Soc'y* [1979-1] Trade Cas. (CCH) ¶ 62,694, at 77,893 (D. Ariz. 1979). On review, the United States Court of Appeals for the Ninth Circuit interpreted both laws as in conformity. *Arizona v. Maricopa County Medical Soc'y*, 653 F.2d 553, 553 n.1 (9th Cir. 1980). The state sought declaratory and injunctive relief against the physicians agreed-upon maximum fee reimbursement schedules. Brief for Petitioner at 12.

maintenance of the maximum fee reimbursement schedules was a *per se* violation of the Act.²³ The district court denied the motion, but certified the issue for interlocutory appeal.²⁴ In denying the state's motion, the trial court held that the challenged agreements were more appropriately analyzed under a Rule of Reason,²⁵ rather than a *per se*,²⁶ approach and, therefore, the pretrial record was insufficient to support summary judgment.²⁷

The United States Court of Appeals for the Ninth Circuit, in a divided vote, affirmed the lower court's refusal to enter judgment.²⁸ A majority of the panel held that the court knew too little about the competitive effects of the FMC schedules on the relevant health care markets to characterize²⁹ them as *per se* illegal price fixing.³⁰ The appeals court further held that even under a Rule of Reason approach the court was also unable, without a more complete record upon which to judge the competitive impact of the system, to determine whether the FMC health insurance plans were an unreasonable and therefore illegal restraint on competition.³¹

In a four to three decision,³² the Supreme Court reversed the decision of the appeals court and held that the maximum fee reimbursement schedules

²³ *Maricopa County*, 102 S. Ct. at 2469.

²⁴ *Id.* The question certified for interlocutory appeal by the district court pursuant to 28 U.S.C. § 1292(b) (1976) was whether the FMC agreements were illegal *per se* under section 1 of the Sherman Act. *Id.*

²⁵ *Maricopa County* [1979-1] Trade Cas. (CCH), at 77,897. Under a Rule of Reason analysis, courts attempt to balance the harms to competition that result from the challenged practice with the potential procompetitive benefits of practice, and additionally decide whether those benefits which are allegedly associated with the practice might be realized in a manner less restrictive of competition. See L. SULLIVAN, HANDBOOK OF THE LAW OF ANTITRUST § 68, at 186, 188 (1976); see also *infra* notes 43-55 and accompanying text.

²⁶ As a general rule, *per se* liability has been imposed when the challenged practice is pernicious and generally without redeeming value. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958). For a detailed discussion of the development and application of the *per se* concept under section 1 of the Sherman Act, see *infra* notes 56-124 and accompanying text.

²⁷ *Maricopa County* [1979-1] Trade Cas. (CCH), at 77,897.

²⁸ *Arizona v. Maricopa County Medical Soc'y*, 643 F.2d 553, 555 (9th Cir. 1980). The opinion for the three judge panel was written by Circuit Judge Sneed. Circuit Judge Kennedy filed a concurring opinion. Senior District Judge Larson, sitting by designation, filed the dissenting opinion. *Id.* at 553.

²⁹ As the term is used in this article, "characterization" is the analytical process used by the courts to determine whether the challenged practice falls within an established category of conduct deemed *per se* illegal (e.g., price fixing). Once the challenged practice is properly characterized as within a forbidden category, it is facially illegal regardless of any benefits which might result from the practice. See generally *Arizona v. Maricopa County Medical Soc'y*, 102 S. Ct. 2466, 2480-85 (1982) (Powell, J., dissenting); see also *infra* notes 214-22 and accompanying text. For a discussion of *per se* characterization in the context of the appeals court decision in *Maricopa County*, see Casenote, *Antitrust—Foundations for Medical Care: Characterization of Maximum Fee Schedules—Arizona v. Maricopa County Medical Society*, 1981 ARIZONA ST. L.J. 293.

³⁰ *Maricopa County*, 643 F.2d at 556-58.

³¹ *Id.*

³² The majority opinion was written by Justice Stevens, joined by Justices Brennan, Marshall and White. Justice Powell filed a dissent, joined by Chief Justice Burger and Justice Rehnquist. Justices O'Connor and Blackmun took no part in the consideration or decision of the case.

agreed upon by physicians participating in the FMC health insurance system were price fixing agreements and, therefore, *per se* illegal under section 1 of the Sherman Act.³³ Justice Stevens, writing for the majority, refused to recognize either the horizontal, maximum nature of the reimbursement schedules,³⁴ the respondents' status as professionals,³⁵ or the Court's inexperience with the health care industry³⁶ as sufficient basis to avoid *per se* condemnation of the agreements. Justice Stevens also refused to hold that the *per se* rule against price fixing was inapplicable because of the procompetitive justifications asserted by the respondent foundations.³⁷ In this regard, he pointed out that the anticompetitive potential inherent in all price fixing agreements justified their *per se* invalidation regardless of whether procompetitive justifications were offered for some.³⁸ Finally, Justice Stevens concluded that the challenged FMC agreements did not "fix prices" in only a literal sense, but instead fit directly into a horizontal price fixing mold unlawful on its face.³⁹

Justice Powell, writing for the dissent, placed primary emphasis on the novelty of the FMC insurance plans and their potential for procompetitive efficiencies and consumer benefits in the health care industry.⁴⁰ He criticized the majority for its unexplained and mechanical characterization of the reimbursement schedules as *per se* illegal price fixing in light of past judicial application of the *per se* rules and the limited summary judgment record before the Court.⁴¹ According to Justice Powell, the majority's decision lost sight of the consumer welfare purpose of the Sherman Act and in doing so "condemn[ed] a novel plan about which it [knew] very little."⁴²

The *Maricopa County* Court's concern for the integrity of the rule against price fixing clearly did outweigh its consideration of the asserted economic and consumer benefits associated with the FMC plan. This misplaced emphasis caused the Court summarily — and therefore prematurely — to reject the reimbursement agreements as facially unlawful. The majority's opinion underscores the predominant drawback to an overly simplistic *per se* approach to antitrust analysis — expedient judicial condemnation of business arrangements which may substantially *increase* competition or economic efficiency and thereby benefit the consumer. Accordingly, this casenote will argue for a

³³ *Maricopa County*, 102 S. Ct. at 2480.

³⁴ *Id.* at 2475.

³⁵ *Id.* at 2475-76.

³⁶ *Id.* at 2476-77.

³⁷ *Id.* at 2477-78.

³⁸ *Id.* at 2477.

³⁹ *Id.* at 2480.

⁴⁰ *Id.* at 2480-85 (Powell, J., dissenting).

⁴¹ *Id.* at 2481-85. In particular, Justice Powell criticized the majority for failing to enunciate clearly the criteria by which a novel practice is to be characterized as within a *per se* category such as price fixing. *Id.* at 2483-84. He pointed out that here the majority was "content simply to brand this type of plan as 'price fixing'" *Id.* at 2484.

⁴² *Id.* at 2485.

more flexible approach to *per se* analysis — one that recognizes the necessity of additional inquiry in the face of a novel, potentially procompetitive or substantial efficiency-creating business arrangement operating in a market, such as health care, which fails to contain consumer costs. It is submitted that *per se* flexibility mandates a preliminary, realistic judicial consideration of such an arrangement's probable economic effects before it is fatally labelled as *per se* illegal. It is further submitted that this approach is neither inconsistent with antitrust precedent nor with the litigation efficiency and predictability notions underlying the *per se* rules.

This casenote will begin with a brief discussion of the scope of judicial antitrust analysis under section 1 of the Sherman Act, including the Supreme Court's treatment of agreements among professionals. The Supreme Court's decision in *Maricopa County* will then be scrutinized in light of such precedent, Justice Powell's dissent and the lower court opinions. Specifically, this casenote will focus on the Court's speculative consideration and dismissal, on a limited summary judgment record, of the procompetitive-efficiency justifications asserted by the respondent foundations as a basis for avoiding *per se* liability. Further, a standard stressing flexibility and consumer welfare will be proposed as a basis for future judicial analysis. Finally, this standard will be applied to the facts of *Maricopa County* and its effectiveness considered in light of the traditional policies behind the *per se* rule against price fixing.

I. THE BACKGROUND OF *MARICOPA COUNTY*

A. *Antitrust Analysis under the Sherman Act: A Bifurcated System*

1. The Rule of Reason

Section 1 of the Sherman Act literally prohibits every contract, trust or conspiracy in restraint of trade.⁴³ The Supreme Court has long recognized, however, that Congress could not have intended a strict prohibition of all such associations.⁴⁴ The Court's early response to the broad prohibition of section 1

⁴³ 15 U.S.C. § 1 (1976). At common law, only contracts which were *unreasonable* restraints of trade were illegal. *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 327-28 (1897). Initially, however, the Supreme Court strictly interpreted the language of the Sherman Act to mean that all agreements in restraint of trade or commerce were illegal. In *Trans-Missouri*, for example, in response to the defendant's argument that the Act should be read to comport with the common law, Justice Peckham stated:

[The Court is] asked to read into the act by way of judicial legislation an exception that is not placed there by the law making branch of the Government, and this is to be done upon the theory that the impolicy of such legislation is so clear that it cannot be supposed that Congress intended the natural import of the language used. This we cannot and ought not to do. That impolicy is not so clear, nor are there reasons for the exception so potent as to permit us to interpolate an exception into the language of the act, and thus to materially alter its meaning and effect.

Id. at 340.

⁴⁴ *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898). One year after *Trans-*

was a reasonableness standard — termed the Rule of Reason — which focused on the challenged agreement's effect on competition.⁴⁵ The Rule of Reason approach was first explicitly adopted by the Court in *Standard Oil Co. v. United States*.⁴⁶ Rejecting a literal interpretation of the Sherman Act, Chief Justice White noted that absent a reasonableness standard, future enforcement of the statute — as well as realization of the public policy it established — would be impossible.⁴⁷ He noted that the same standard of reason applied at common law was intended to be applied under the statute.⁴⁸ The Chief Justice thus concluded that only contracts or acts which were unreasonably restrictive of competitive conditions were illegal.⁴⁹ According to Chief Justice White, such unreasonableness might arise either from the anticompetitive nature or character of the contracts or acts, or where the surrounding circumstances reveal the arrangements to be of such a character as to give rise to the inference that they were intended to restrain trade.⁵⁰

Missouri, in *Joint Traffic*, Justice Peckham qualified his previous strict interpretation of the Sherman Act:

To suppose, as is assumed by counsel, that the effect of the decision in the *Trans-Missouri* case is to render illegal most business contracts or combinations, however indispensable and necessary they may be, because . . . they all restrain trade in some remote and indirect degree, is to make a most violent assumption and one not called for or justified by the decision mentioned, or by any other decision of this court.

Id. at 568.

⁴⁵ *Standard Oil Co. v. United States*, 221 U.S. 1 (1911); see also, *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918).

⁴⁶ 221 U.S. at 1. In *Standard Oil Co.*, the United States brought suit against 71 corporations and partnerships and seven individuals charging that the various defendants conspired to restrain trade and monopolize commerce in petroleum, refined oil and other petroleum products. *Id.* at 31.

⁴⁷ *Id.* at 68.

⁴⁸ *Id.* at 60. The Chief Justice reasoned that:

[As] the contracts or acts embraced in the provision were not expressly defined, since the enumeration addressed itself simply to classes of acts, those classes being broad enough to embrace every conceivable contract or combination . . . and thus caused any act done by any of the enumerated methods anywhere in the whole field of human activity to be illegal if in restraint of trade, it inevitably follows that the provision necessarily called for the exercise of judgment which required that some standard be resorted to [to determine whether the statute had been violated]. . . . [I]t follows that it was intended that the standard of reason which had been applied at common law . . . was intended to be the measure used [by the courts]. . . .

Id.

⁴⁹ *Id.* at 58-60.

⁵⁰ *Id.* Describing the common law foundation upon which judicial interpretation of the Sherman Act was to be based, Chief Justice White noted:

[I]t may be with accuracy said that the dread of enhancement of prices and of other wrongs which it was thought would flow from the undue limitations on competitive conditions caused by contracts or other acts of individuals or corporations, led, as a matter of public policy, to the prohibition or treating as illegal all contracts or acts which were unreasonably restrictive of competitive conditions, either from the nature or character of the contract or act or where the surrounding circumstances were such as to justify the conclusion that they had not been entered into or per-

As subsequently applied by the Court, the Rule of Reason approach to antitrust analysis has given the Sherman Act both definition and flexibility.⁵¹ Consistent with *Standard Oil*, the present day Rule requires the trier of fact to examine all the facts and circumstances surrounding the challenged agreement to determine whether that agreement constitutes an unreasonable restraint on competition.⁵² The Court has made it clear, however, that proper judicial inquiry under the Rule requires emphasis on the economic and not the public interest implication of any particular agreement.⁵³ The Rule of Reason approach does not sanction inquiry into any argument in favor of a challenged practice simply because it is within the realm of reason.⁵⁴ Instead, it focuses directly on whether the purpose or effect of the challenged practice may be said to affect competitive conditions adversely, given the facts peculiar to the business, the history of the particular restraint and the reasons the restraint was imposed.⁵⁵

2. The *Per Se* Rules

The Rule of Reason thus provides the judiciary with an effective tool for antitrust analysis and enforcement. The Supreme Court, however, has con-

formed with the legitimate purpose of reasonably forwarding personal interest and developing trade, but on the contrary, were of such a character as to give rise to the inference or presumption that they had been entered into or done with the intent to do wrong to the general public and to limit the right of individuals, thus restraining the free flow of commerce and tending to bring about the evils, such as enhancement of prices, which were considered to be against public policy.

Id. at 58.

One commentator has concluded that Chief Justice White developed a Rule of Reason keyed to avoiding the consequences of a monopoly and placed on the judiciary the duty of performing economic analysis to determine when the evils of monopoly were present. *See*, Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division* [I], 74 YALE L.J. 775, 803-04 (1965) [hereinafter cited as Bork, *Market Division*].

⁵¹ *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 688 (1978).

⁵² In *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918), Justice Brandeis offered his interpretation of the Rule of Reason:

Every agreement concerning trade, every regulation of trade, restrains. To bind, to restrain, is of their very essence. 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. This is not because good intention will otherwise save an objectionable regulation or the reverse; but because knowledge of intent may help the court to interpret facts and predict consequences.

Id. at 238.

⁵³ *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 692 (1978).

⁵⁴ *Id.* at 688.

⁵⁵ *Id.* at 692; *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918); *cf.* *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977) ("Under [the Rule of Reason], the factfinder weighs all the circumstances in a case in deciding whether a restrictive practice should be prohibited as imposing an unreasonable restraint on competition.")

cluded that when the clear purpose or effect of a particular business practice is to stifle competition, advantages derived from the Rule's flexibility are outweighed by notions of judicial efficiency and business certainty.⁵⁶ Such a practice is deemed *per se* illegal.⁵⁷ Once the challenged agreement is characterized by the trier of fact as falling within a category of activity which the Supreme Court has determined to be *per se* illegal, the broad scope of inquiry demanded by the Rule of Reason approach is unnecessary, and additional proof of business justifications or competitive benefits is deemed irrelevant.⁵⁸ Although *per se* rules require the courts to make generalizations concerning the potential anticompetitive consequences of certain commercial practices,⁵⁹ such generalizations are acceptable once the judiciary has had considerable experience with certain business relationships.⁶⁰ *Per se* rules reflect a judgment that although cases not fitting exactly within the generalization may arise, such cases are not sufficiently common or important to justify the time and expense necessary to identify them.⁶¹ To understand more fully those situations in

⁵⁶ *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 19-20 (1979); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49-50 (1977).

In *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958), the court elaborated on the rationale underlying such a determination:

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

Id. at 5.

⁵⁷ *Id.*; see also *National Soc'y of Professional Eng'rs. v. United States*, 435 U.S. 679, 692 (1978) ("agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality . . . are illegal *per se*").

Practices which the Court has thus far held to be illegal *per se* include price fixing, group boycotts, division of markets and tying arrangements. See *Catalano, Inc. v. Target Sales Inc.*, 446 U.S. 643 (1980) (price fixing); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940) (same); *United States v. Trenton Potteries*, 273 U.S. 392 (1927) (same); *United States v. General Motors Corp.*, 384 U.S. 127 (1966) (group boycott); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959) (same); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951) (division of markets); *United States v. Addyston Pipe & Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899) (same); *Northern Pac. Ry. v. United States*, 356 U.S. 1 (1958) (tying arrangement).

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

⁵⁹ *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 n.16 (1977) ("*Per se* rules thus require the Court to make broad generalizations about the social utility of particular commercial practices.")

⁶⁰ *United States v. Topco Assoc., Inc.*, 405 U.S. 596 (1972). The court in *Topco* noted that "[i]t is only after considerable experience with certain business relationships that courts classify them as *per se* violations of the Sherman Act." *Id.* at 607-08. See also *infra* notes 218, 228 and accompanying text.

⁶¹ *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 n.16 (1977).

which the Supreme Court is likely to characterize challenged conduct as *per se* illegal — and, conversely, those situations in which it might refuse to apply *per se* rules to concerted activity which arguably restrains competition — it is instructive to examine briefly the development of the *per se* doctrine prior to the Court's decision in *Maricopa County*.

The concept of *per se* analysis can be traced back to the language of the Supreme Court's earliest interpretations of the Sherman Act.⁶² In *United States v. Trans-Missouri Freight Association*,⁶³ Justice Peckham, writing for the majority, articulated a conceptual basis of *per se* liability for a rate agreement involving eighteen competing railroad companies by noting that the "direct, immediate, and necessary" effect of the cartel agreement was to restrain illegally trade or commerce within the meaning of the Act.⁶⁴ One year later, in *United States v. Joint Traffic Association*,⁶⁵ the Court confronted a rate fixing agreement that was substantially similar to the agreement disposed of in *Trans-Missouri*.⁶⁶ Writing

⁶² See generally Bork, *Market Division*, *supra* note 50, at 781-806; L. SULLIVAN, *supra* note 25, §§ 64-67, at 167-86.

⁶³ 166 U.S. 290 (1897).

⁶⁴ *Id.* at 342. In *Trans-Missouri*, the railroad companies formed an association for the "purpose of mutual protection by establishing and maintaining reasonable rates, rules and regulations on all freight traffic." *Id.* at 292. A committee was appointed to establish a freight rate structure applicable to all the participants. *Id.* at 294.

Subsequently, the United States filed a bill in the Circuit Court of the United States for the District of Kansas to have the agreement between the defendant railroad companies declared illegal and to have the association dissolved. *Id.* at 297. The circuit court dismissed the bill and the United States Circuit Court of Appeals for the Eighth Circuit affirmed the dismissal. *Id.* at 304. The Government then appealed to the Supreme Court. *Id.*

Concluding that the Sherman Antitrust Act applied to railroads and rendered illegal all agreements in restraint of trade or commerce, Justice Peckham noted that the agreement's violation of the Act could not be made valid by allegations of good intentions or the desire to maintain reasonable rates. *Id.* at 341. The issue, he pointed out, was whether the agreement restrained trade or commerce within the meaning of the Act. *Id.* In this regard, Justice Peckham emphasized that the association was formed for the sole purpose of adopting standardized rates. *Id.* There could be no doubt, he concluded, that the agreement's "direct, immediate and necessary" effect was to restrain trade or commerce. *Id.* at 341-42.

⁶⁵ 171 U.S. 505 (1898).

⁶⁶ In *Joint Traffic*, 31 railroad companies formed an association, whose affairs were administered by several different boards, in which participants agreed to abide by a duly published schedule of rates, fares and charges. *Id.* at 505-06. It was further agreed that the powers conferred upon the managers of the boards should be exercised so as not to permit violation of the Interstate Commerce Act, and managers should cooperate with the ICC to secure uniformity in rates, fares and charges. *Id.* at 506. The United States subsequently filed a bill in the Circuit Court of the United States for the Southern District of New York seeking declaratory and injunctive relief. *Id.* at 505-06. As in *Trans-Missouri*, the circuit court dismissed the bill and its decree was affirmed by the United States Circuit Court of Appeals for the Second Circuit. *Id.* at 509.

On appeal to the Supreme Court, the Joint Traffic Association attempted to distinguish their agreement from *Trans-Missouri* by the fact that the agreed upon rates were on file and inferentially approved by the ICC. *Id.* at 539-40. Joint Traffic argued that the *Trans-Missouri* agreement did not have any such established basis for the reasonableness of its rates. *Id.* at 540. Justice Peckham noted, however, that he could see no substantial difference between the two cases in the methods of establishing rates and fares. *Id.* at 562-65. He reasoned that the "natural and direct

for the Court, Justice Peckham again concluded that the clear effect of the agreement was to eliminate competition between the parties.⁶⁷ As such, the Court held that the agreement was illegal without regard for the reasonableness of the rates agreed upon⁶⁸ or the necessity of the restraint as a means of preventing "ruinous competition" in the industry.⁶⁹

In *Standard Oil Co.*,⁷⁰ Chief Justice White's opinion for the Court found nothing inconsistent with his newly enunciated Rule of Reason and Justice Peckham's refusal to apply a reasonableness standard in either *Trans-Missouri* or *Joint Traffic*.⁷¹ Explaining Justice Peckham's rulings in *per se* terms, the Chief Justice pointed out that the necessary effect of the rate fixing agreements between the railroads placed them clearly within the purview of the Act as restraints of trade, and as such they could not be taken out of that category by a general inquiry into their expediency or the wisdom of the statute.⁷² In this regard, Chief Justice White further noted that the general confusion surrounding Justice Peckham's literal interpretation of section 1 of the Sherman Act in *Trans-Missouri* resulted from a failure to distinguish between the Court's lack of

effect of the two agreements is the same, viz., to maintain rates at a higher level that would otherwise prevail. . . ." *Id.* at 565.

⁶⁷ *Id.* at 565, 577. Although *Joint Traffic* did not overrule *Trans-Missouri*, Justice Peckham did cut back on his former strict interpretation of the language of the Act. *See supra* notes 43-44. He did so by distinguishing between contracts whose direct and immediate effect was a restraint upon interstate commerce, and those whose effect was indirect or incidental only. *Joint Traffic*, 171 U.S. at 568. Justice Peckham thus pointed out that an agreement entered into for the purpose of promoting a legitimate business interest, with no purpose to thereby affect or restrain interstate commerce, and which did not directly do so, would not be covered by the Act despite an indirect and remote effect on such commerce. *Id.* In light of this distinction, Justice Peckham emphasized that the clear intent and direct effect of the *Joint Traffic* agreement was to destroy competition and maintain rates above what competition might otherwise produce. *Id.* at 569.

⁶⁸ *Id.* at 565, 574. As in *Trans-Missouri*, Justice Peckham rejected the association's argument that the reasonableness of the agreed upon rates should affect the agreement's legality under the Act. *Id.* In *Trans-Missouri*, Justice Peckham rejected the reasonable-rate argument based upon the judicial uncertainty of such a standard. *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 331-32 (1897). He pointed out that "[t]o say, therefore, that the Act excludes agreements . . . which tend to simply keep up reasonable rates for transportation, is substantially to leave the question of reasonableness to the companies themselves." *Id.* at 332; *see also infra* note 78.

⁶⁹ *Joint Traffic*, 171 U.S. at 576-77. The association argued that one effect of such competition would be to grant the survivor a monopoly, resulting in higher prices. *Id.* at 576. To that extent, therefore, the association asserted that their agreement was promotive of trade and competition. *Id.* at 575-76. Justice Peckham responded that an agreement which "directly and effectually" prevents competition, restrains trade and commerce. *Id.* at 577. As such, he concluded, it must be regarded as under the Act regardless of the possibility that a restraint of trade might also follow competition. *Id.*

⁷⁰ 221 U.S. 1 (1911).

⁷¹ *Id.* at 63-68.

⁷² *Id.* at 65. Chief Justice White further explained that the two cases "decided that the nature and character of the contracts, creating as they did a conclusive presumption which brought them within the statute, such result was not to be disregarded by a substitution of judicial appreciation of what the law ought to be for the plain judicial duty of enforcing the law as it was made." *Id.*

power to take a plainly anticompetitive practice out of the operation of the Act by a resort to reason, and the Court's duty in every case — where it became necessary from the nature of the conduct and the character of the parties — to decide whether in fact the statute was applicable, using the light of reason.⁷³

Thus, in *Standard Oil Co.*, while enunciating the new Rule of Reason approach, Chief Justice White also recognized and accepted the *per se* concepts stemming from Justice Peckham's decisions in *Trans-Missouri* and *Joint Traffic*.⁷⁴ Together, these early Supreme Court cases were important to the development of the modern *per se* approach in two respects. First, they established that a challenged agreement's impact on competition was the proper basis of judicial inquiry under the Sherman Act.⁷⁵ Second, they advanced the current *per se* concept that certain business practices are so clearly anticompetitive in purpose or effect that they should be conclusively presumed illegal within the meaning of the statute.⁷⁶

3. The *Per Se* Rule Against Price Fixing

Both *Trans-Missouri* and *Joint Traffic* involved clear minimum price restraints or minimum "price fixing" agreements among competitors.⁷⁷ The Court's response to these agreements illustrates its long-standing belief that such conduct is blatantly anticompetitive and, therefore, in and of itself illegal under the Sherman Act without regard to either the reasonableness of the prices fixed⁷⁸ or the industry's need to eliminate ruinous competitive conditions.⁷⁹

⁷³ *Id.* at 67. It still remained unclear, however, when a combination not to compete was plainly within the statute so as to preclude further judicial inquiry under the new Rule of Reason. Professor Bork suggested that Chief Justice White's standard was premised on a distinction between normal agreements in trade and agreements which create the evils of a monopoly. Bork, *Market Division*, *supra* note 50, at 829.

⁷⁴ See L. SULLIVAN, *supra* note 25, § 65, at 174.

⁷⁵ *Standard Oil Co. v. United States*, 221 U.S. 1, 58 (1911); *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 577 (1898); see also L. SULLIVAN, *supra* note 25, § 64, at 169, 171.

⁷⁶ See *Standard Oil Co.*, 221 U.S. at 65; L. SULLIVAN, *supra* note 25, §§ 64, 65, at 169, 174.

⁷⁷ See *United States v. Joint Traffic Ass'n*, 171 U.S. 505, 565 (1898); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 341 (1897). See generally, *Standard Oil Co. v. United States*, 221 U.S. 1, 64-68 (1911).

As generally defined in the context of antitrust law, "price fixing" is a shorthand way of describing certain business behavior to which the *per se* rule has been held applicable by the Supreme Court. *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 9 (1979).

⁷⁸ *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927). In *Trenton Potteries*, manufacturers and distributors of 82% of the vitreous pottery fixtures produced in the United States were convicted at trial of combining to fix prices and limit sales in interstate commerce to approved jobbers. *Id.* at 394. The defendants argued that their conduct was not an unreasonable restraint of trade because the prices fixed were reasonable. *Id.* at 395-96. In a classic rejection of this standard cartel defense, Justice Stone noted:

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

The *per se* unlawfulness of agreements to fix prices was made explicit in *United States v. Socony-Vacuum Oil Co.*⁸⁰ In *Socony-Vacuum*, various competitors were convicted of conspiring to raise and maintain spot prices for gasoline by buying up "distress" gasoline on the spot market and eliminating it as a price factor within the general market.⁸¹ The evidence at trial tended to show that the competitors' concerted program to regularly remove part of the spot market supply of gasoline was one factor which had stabilized the spot market and thereby caused an increase in gasoline prices.⁸² Writing for the majority, Justice Douglas held that the challenged program was a price fixing agreement and, therefore, a *per se* violation of section 1 of the Sherman Act.⁸³ Condemning

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 Agreements which create such potential power may well be held to be in themselves unreasonable or unlawful restraints, without the necessity of minute inquiry whether a particular price is reasonable

Id. at 397.

⁷⁹ *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940) ("[P]rice fixing agreements are unlawful *per se* under the Sherman Act and . . . no showing of so-called competitive abuses or evils which those agreements were designed to eliminate or alleviate may be interposed as a defense."); *see also supra* note 69.

⁸⁰ 310 U.S. 150 (1940).

⁸¹ *Id.*

⁸² *Id.* at 219. The defendants attempted to distinguish *Trenton Potteries* on the ground that, unlike the cartel of pottery manufacturers and distributors in that case, they did not control a large share of the gasoline market, and thus did not have the market power to cause a price rise for gasoline. *Id.* at 218-19. Noting the evidence showed that the defendant's buying program at least contributed to an increase in price and stability of the spot markets, and to price increases for gasoline sold in the Midwest, Justice Douglas concluded that "[p]roof that there was a conspiracy, that its purpose was to raise prices, and that it caused or contributed to a price rise is proof of the actual consummation or execution of a conspiracy under § 1 of the Sherman Act." *Id.* at 219-20.

⁸³ *Id.* at 224. Justice Douglas held:

Proof that a combination was formed for the purpose of fixing prices and it caused them to be fixed or contributed to that result is proof of the completion of a price fixing conspiracy under § 1 of the Act. The indictment in this case charged that this combination had that purpose *and* effect. And there was abundant evidence to support it.

Id. (emphasis added).

In a footnote, however, Justice Douglas qualified this standard of proof by noting that both a purpose and a power to fix prices are not necessary to establish a conspiracy under section 1 of the Act. *Id.* at 224-25 n.59. He reasoned that a conspiracy to fix prices is illegal even though no overt act is shown, the conspirators lacked the means to accomplish their objective and the conspiracy involved only a part of interstate or foreign commerce. *Id.* at 225 n.59. According to Justice Douglas, agreements as to prices might still have utility to the members of a combination regardless of whether the agreements were intended to completely eliminate price competition and regardless of whether the combination had the power to control the market. *Id.* at 225 n.59. Instead, he noted, the effectiveness of price fixing agreements depended upon various factors including "competitive tactics, position in the industry [and] the formula underlying price policies." *Id.* at 225-26 n.59. Justice Douglas concluded that an intent and a power to produce a prohibited result was necessary only in cases where the offense charged is the actual monopolizing of trade or commerce in violation of § 2 of the Sherman Act. *Id.* at 226 n.59.

any agreement which tampers with price structures, Justice Douglas stated that under the 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 commerce . . . is illegal *per se*."⁸⁴ As part of this sweeping denunciation, he noted that regardless of any economic justification that a particular price fixing agreement might be thought to have, the law would not permit further inquiry into its reasonableness.⁸⁵ All such agreements are illegal, Justice Douglas concluded, because of their actual or potential effect on price.⁸⁶

Justice Douglas' language in *Socony-Vacuum* concerning activities which depressed the price of a commodity implied that *maximum* price restraints were also covered under the *per se* rule against price fixing.⁸⁷ This implication remained dictum, however, until the Supreme Court's decision in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*⁸⁸ In *Kiefer-Stewart*, two affiliated liquor producers refused to sell to wholesale customers who would not agree to resell their product at pre-set maximum prices.⁸⁹ Justice Black, writing for the Court, held that the appeals court had erred in holding that the agreement did not violate the Sherman Act because the maximum resale prices promoted rather than restrained competition.⁹⁰ In a brief explanation, Justice Black reasoned that the maximum price agreements, like minimum price fixing agreements, "cripple[d] the freedom of traders and thereby restrain[ed] their ability to sell in accordance with their own judgment."⁹¹ Thus reaffirming the strict *Socony-Vacuum* standard, Justice Black held the agreements to be *per se* illegal price fixing.⁹²

Seventeen years later, in its 1968 *Albrecht v. Herald Co.* decision,⁹³ the Court reaffirmed both the rationale and the decision in *Kiefer-Stewart*.⁹⁴ In *Albrecht*, a newspaper attempted to force one of its independent carriers to conform to a suggested maximum resale price.⁹⁵ The appeals court held that a price ceiling was necessary to protect the public from price gouging by dealers who had monopoly power by virtue of exclusive selling territories.⁹⁶ Writing for the Court, however, Justice White followed the *Kiefer-Stewart* "freedom of the

⁸⁴ *Id.* at 223.

⁸⁵ *Id.* at 226 n.59.

⁸⁶ *Id.* Specifically, the *Socony-Vacuum* Court held that all price fixing agreements are "banned because of their actual or potential threat to the central nervous system of the economy." *Id.*

⁸⁷ *Id.* at 223.

⁸⁸ 340 U.S. 211 (1951); see generally Blair & Kaserman, *The Albrecht Rule and Consumer Welfare: An Economic Analysis*, 33 U. FLA. L. REV. 461, 463-64 (1981).

⁸⁹ *Kiefer-Stewart*, 340 U.S. at 212.

⁹⁰ *Id.* at 212-13.

⁹¹ *Id.* at 213.

⁹² *Id.*

⁹³ 390 U.S. 145 (1968).

⁹⁴ *Id.* at 152.

⁹⁵ *Id.* at 147-50.

⁹⁶ *Id.* at 153.

trader'' approach as a basis for reversing the lower court and holding that the *Albrecht* maximum resale price scheme was illegal *per se*.⁹⁷ He thus explained that agreements which fix maximum prices, by substituting the potentially erroneous judgment of the seller for the competitive forces of the market, might severely hamper the efforts of buyers to compete successfully within that market.⁹⁸ As an example, Justice White pointed out that the maximum prices might be set too low to allow a dealer to furnish essential services incident to the value of consumer goods or to allow for non-essential conveniences which consumers desire and for which they would be willing to pay.⁹⁹ Additionally, Justice White believed several other potentially adverse effects of maximum resale price agreements compelled a *per se* result in *Albrecht*. He noted that such agreements might channel distribution through a select few dealers, thereby isolating them from non-price competition.¹⁰⁰ Moreover, he concluded that if the actual price charged nearly always approached the maximum allowable level, the agreement tended to acquire the attributes of a minimum price fixing scheme.¹⁰¹

From such early cases as *Joint Traffic* and *Standard Oil Co.*, therefore, a clear rule arose whereby concerted activity whose only purpose or effect was to restrain competition was unlawful on its face. Explicit in those decisions, however, was the realization that not all agreements which adversely affected competition could be *per se* illegal.¹⁰² Nevertheless, the Court in each case failed

⁹⁷ *Id.* at 152-54.

⁹⁸ *Id.* at 152.

⁹⁹ *Id.* at 152-53.

¹⁰⁰ *Id.* at 153.

¹⁰¹ *Id.* Justice White noted that this effect was particularly likely as the actual costs of the dealer approached the maximum price limit. *Id.*

¹⁰² For example, Justice Peckham in *Joint Traffic* distinguished between agreements with direct and indirect restraints on commerce. 171 U.S. at 568. According to Justice Peckham, the Sherman Act did not prohibit agreements which only indirectly or unintentionally affected interstate commerce. *Id.*; see also *Hopkins v. United States*, 171 U.S. 578, 592 (1898) (a direct and immediate effect on competition necessary for agreement to fall within Act); *Anderson v. United States*, 171 U.S. 604, 616 (1898) (if agreement is proper for purpose intended, although it indirectly or unintentionally affects interstate commerce, it is not illegal under Sherman Act).

Chief Justice White in *Standard Oil Co.* recognized a distinction between: 1) agreements which were plainly anticompetitive and therefore facially illegal without more; 2) agreements which, although not plainly anticompetitive, were shown by all the surrounding circumstances to be unreasonable and therefore illegal restraints of trade; and 3) agreements which did not fit into either of the first two categories and thus did not come within the meaning of the Sherman Act. 221 U.S. at 66-68. In the same term, in *United States v. American Tobacco Co.*, 221 U.S. 106, 179 (1911), Chief Justice White, again speaking for the Court, reiterated the Rule of Reason, noting:

[T]he words "restraint of trade" . . . only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition or by unduly obstructing the due course of trade or which, either because of their inherent nature or effect or because of the evident purpose of the acts, etc., injuriously restrained trade . . . [T]he statute [does] not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose.

to articulate a viable theory by which combinations that restricted competition might be spared *per se* condemnation.¹⁰³ Moreover, despite the Court's historical mistrust of all agreements which fix prices — as evidenced by Justice Douglas' all-encompassing *per se* language in *Socony-Vacuum* and the Court's subsequent adherence to that language in *Kiefer-Stewart* and *Albrecht* — there have been circumstances in which the Court has permitted price fixing conduct which eliminated competition.¹⁰⁴ A consistent rationale, however, for divergence from the strict *Socony-Vacuum per se* rule is not easily articulated.¹⁰⁵ The most recent attempt by the Court to define the parameters of the rule

Id. at 179.

Professor Bork interpreted Chief Justice White's language in *American Tobacco* as a three-part test holding "an agreement unlawful if its inherent nature [a *per se* rule condemning cartel agreements or "non-ancillary" restraints], or its effect or its purpose was to produce the evils of a monopoly." Bork, *Market Division*, *supra* note 50, at 804. According to Professor Bork, if the agreement was not on its face within a *per se* category, Chief Justice White's rule of reason required the trier of fact to examine the purpose of the parties or the effects of the agreement to determine whether either was monopolistic. *Id.*

¹⁰³ See Bork, *Market Division*, *supra* note 50, at 829-30.

¹⁰⁴ See, e.g., *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933) (combination of 137 coal producers formed and used an exclusive selling agent); *Chicago Bd. of Trade v. United States*, 246 U.S. 231 (1918) ("call" rule promulgated by Board which prohibited members from purchasing or offering to purchase any "to arrive" grain during specified time period each day at any price other than the closing bid at last call session).

¹⁰⁵ An early and often-cited attempt to provide a workable judicial distinction between lawful and unlawful restrictions was made by Circuit Judge Taft in *United States v. Addyston Pipe and Steel Co.*, 85 F. 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899). Judge Taft based his distinction on a theory of ancillarity. He reasoned that no conventional restraint of trade could be enforced unless the covenant underlying it was ancillary to the main purpose of a lawful contract. 85 F. at 282. As examples of such valid covenants in partial restraint of trade at common law, Judge Taft listed agreements:

- 1) by a seller of property or business not to compete with the buyer in such a way as to derogate from the value of the property or business sold;
- 2) by retiring partner not to compete with the firm;
- 3) by a partner pending the partnership not to do anything to interfere, by competition or otherwise, with the business of the firm;
- 4) by the buyer of property not to use the same in competition with the business retained by the seller; and
- 5) by an assistant, servant or agent not to compete with the master after the expiration of his time of service.

Id. at 281.

Judge Taft pointed out in each case the main purpose of the lawful agreement suggested the extent of the allowable ancillary restraint. Where the restraint exceeded the necessity presented by the main purpose of the contract, Judge Taft believed it should be void because: 1) it oppressed the covenantor; and 2) it tended to create a monopoly. *Id.* at 282. He also noted that where the main object of the parties to the challenged agreement was solely to restrain competition or to enhance or maintain prices, there could be no justification for the restraint. *Id.* at 282-83.

Today, it is clear, as Judge Taft believed it should be, that non-ancillary or "naked" agreements which fix prices are illegal. See Bork, *Market Division*, *supra* note 50, at 800. Judge Taft's attempt to define a category of lawful ancillary restraints, however, has not been generally accepted by the courts. *Id.* According to Professor Bork, this lack of success is probably due to Judge Taft's inability to define explicitly a main purpose which would consistently justify an ancillary elimination of competition. *Id.*

against price fixing explicitly came in its 1978 *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* decision.¹⁰⁶

4. *Broadcast Music* — *Per Se* Characterization as a Prerequisite to *Per Se* Condemnation

In *Broadcast Music*, the Court was faced with a challenge by Columbia Broadcasting System, Inc. (CBS) against two licensing agencies — the American Society of Composers, Authors and Publishers (ASCAP) and Broadcast Music, Inc. (BMI) — for composers, writers and publishers of musical compositions.¹⁰⁷ CBS alleged that the system by which the agencies set and received fees for the issuance of blanket licenses to perform the copyrighted compositions of their membership was *per se* illegal price fixing under section 1 of the Sherman Act.¹⁰⁸ Although ASCAP and BMI were literally fixing the price of a blanket license, the Court nevertheless unanimously held that the agencies' conduct did not constitute price fixing that was *per se* unlawful.¹⁰⁹

Writing for the Court, Justice White emphasized that a literal approach to *per se* analysis which simply equates the setting of a price with illegal "price fixing" was not in itself sufficient to establish that a particular business practice was either clearly anticompetitive or without redeeming value and, therefore, illegal on its face.¹¹⁰ Instead, he pointed out, the challenged conduct must be characterized as within a *per se* category before it can be fatally labelled.¹¹¹ In this regard, Justice White deemed several factors important to his conclusion that the ASCAP-BMI blanket licenses were not *per se* illegal price fixing agreements. First, he noted the novelty of the licensing arrangement, and the Court's lack of experience with similar practices.¹¹² Second, Justice White observed that a blanket license of some type was a necessary consequence of the integration of sales, monitoring and enforcement functions necessary to achieve substantial market efficiencies given the large number of users and

¹⁰⁶ 441 U.S. 1 (1979).

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *Id.* at 9. Justice White noted that "[l]iteralness is overly simplistic and often overbroad." *Id.* Justice White offered as an example the price-setting activity of two partners. *Id.* Although their activity in setting a price for their goods or services is literally "price fixing," the partners have not violated the Sherman Act *per se*. *Id.*

¹¹¹ Justice White pointed out that such a characterization "will often, but not always, be a simple matter." *Id.*

¹¹² After noting that the courts classify business relationships as *per se* violations only after considerable experience with the relationship, Justice White stated that the Court had "never examined a practice like this one before; indeed, the Court of Appeals recognized that '[i]n dealing with performing rights in the music industry we confront conditions both in copyright law and in antitrust law which are *sui generis*.'" *Id.* at 9-10 (citing *United States v. Topco Assoc., Inc.*, 405 U.S. 596, 607-08 (1972); *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963)).

composers of copyrighted music.¹¹³ He pointed out that the substantial savings in transaction costs brought about by these increased efficiencies was potentially beneficial to both buyers and sellers.¹¹⁴ Third, Justice White expressed doubt about the extent to which the blanket license agreements actually threatened "competitive pricing" in the market.¹¹⁵ Stating that not all agreements among competitors which have an impact on price are *per se* illegal,¹¹⁶ Justice White reasoned that the ASCAP-BMI blanket license could not be equated with a simple, facially illegal horizontal price fixing agreement.¹¹⁷ Instead, he wrote, the license was different from anything an individual copyright owner could issue and, moreover, nothing impeded CBS from obtaining licenses on an individual basis.¹¹⁸ Justice White concluded, therefore, that the blanket license should not be automatically declared illegal, but instead should be examined more closely under a Rule of Reason approach.¹¹⁹

In light of *per se* precedent, the Court's decision in *Broadcast Music* was significant in several respects. The Court clearly backed away from the uncompromising language of *Socony-Vacuum*,¹²⁰ and explicitly manifested its belief that the *per se* rule was not an inflexible doctrine to be automatically applied to every agreement which literally fixed a price. Moreover, Justice White's opinion suggested an unwillingness to condemn a business practice on its face when the judiciary is unfamiliar with the economic effect of the arrangement.¹²¹ Equally significant, however, was the emphasis placed on the creation of cost-saving efficiencies in the market as a basis for avoiding *per se* liability.¹²² After the

¹¹³ *Broadcast Music*, 441 U.S. at 20.

¹¹⁴ *Id.* at 21.

¹¹⁵ *Id.* at 23.

¹¹⁶ *Id.* As examples of such agreements, Justice White noted:

Mergers among competitors eliminate competition, including price competition, but they are not *per se* illegal, and many of them withstand attack under any existing antitrust standard. Joint ventures and other cooperative arrangements are also not usually unlawful, at least not as price fixing schemes, where the agreement on price is necessary to market the product at all.

Id.

¹¹⁷ *Id.*

¹¹⁸ *Id.* Justice White also pointed out that the individual composers and authors neither agreed not to sell individually in any other market nor to use the blanket license to mask price fixing in other markets. *Id.* at 23-24.

¹¹⁹ *Id.* at 24.

¹²⁰ See *supra* notes 83-86 and accompanying text.

¹²¹ One commentator has suggested that the approach relied upon by the *Broadcast Music* Court involved a balancing of the competitive injury against the competitive benefits of the challenged practice — as under a rule of reason — with the inquiry narrowed according to the court's familiarity with the practice. Comment, *CBS v. ASCAP: Blanket Licensing and the Unresolved Conflict Between Copyright and Antitrust Law*, 13 CONN. L. REV. 465, 506 (1981); see also, Comment, *Price Fixing and the Per Se Rule: A Redefinition Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc.*, 5 DEL. J. CORP. L. 73, 93 (1980) (*Per se* rule not used because Court had not analyzed licensing system in the past).

¹²² Several commentators have suggested that visibility of efficiency creating potential is

Court's decision in *Broadcast Music*, "naked" price restraints — those restraints whose sole purpose or effect was to restrain competition — clearly remained *per se* illegal, without the need for additional inquiry under the Rule of Reason.¹²³ Yet, as a result of the rationale in *Broadcast Music*, it also appeared that the Court would adopt a more inquiring and flexible approach to *per se* analysis when the challenged practice did not plainly threaten competitive pricing and where the practice, although effecting a price, was novel and held the promise of attaining significant, otherwise unattainable economic efficiencies.¹²⁴

in fact a viable basis on which the Court has in the past distinguished between "naked" — and therefore *per se* illegal restraints of trade — and similar agreements, which although affecting competition, are generally not held to be *per se* illegal. See, e.g., L. SULLIVAN, *supra* note 25, § 77, at 206-10; Bork, *Market Division*, *supra* note 50, 830-32; Bork, *The Rule of Reason and the Per Se Concept: Price Fixing and Market Division (II)*, 75 YALE L.J. 373, 384 (1966) (hereinafter cited as Bork, *Price Fixing*).

For example, Professor Bork has suggested that the earliest Court interpretations of the Sherman Act by Chief Justice White and Justices Peckham and Taft, although couched in terms of preservation of competition, displayed concern that the law not condemn efficient forms of combination, but only those whose sole effect was elimination of competition. Bork, *Price Fixing*, *supra* note 122, at 375 n.2. He notes that absent a concern for efficiency creating potential, there remains no other value which would suggest a basis for greater judicial tolerance for mergers and other such competition destroying combinations as compared with the judicially feared cartel agreements. Bork, *Market Division*, *supra* note 50, at 830 n.176, 177.

In fact, Bork attributes the Court's inability to describe the contours of the *per se* rule satisfactorily to its failure to define the scope of the rule in terms of promoting "consumer wealth" or "consumer want satisfaction." Bork, *Price Fixing*, *supra* note 122, at 378. Bork uses these terms broadly to describe the net effect of an agreement's opposing tendencies — efficiency and restriction of output. *Id.* at 375 n.2. Since neither factor can be given a quantitative value, he suggests that the possible presence of efficiency is to be inferred from the presence of integration of productive activities, while the presence of restriction of output is to be inferred from a large market size. *Id.* at 386 n.32, 33. According to Bork, in each case before the court a rough balance should be struck between the two with some integration (efficiency potential) required below a certain market percentage as a prerequisite to the validity of elimination of any competition. *Id.* at 386 n.33.

A simple example of the interaction of efficiency and integration is the partnership. Both Justice Peckham in *Joint Traffic*, 171 U.S. at 567, and Judge Taft in *Addyston Pipe and Steel*, 85 F. at 281, recognized a partnership agreement as a lawful restriction of competition in the marketplace. Judge Taft found the arrangement lawful because any reduction in competition was incident to a union of the excompetitor's "capital, enterprise, and energy to carry on a successful business." *Addyston Pipe and Steel*, 85 F. at 280. Similarly, Professor Bork would argue that the reduction in competition (setting of prices for goods or services) is lawfully subordinate or ancillary to the creation of new market efficiencies based upon an integration of the new partners' productive efforts. Bork, *Price Fixing*, *supra* note 122, at 380-84.

¹²³ See, e.g., *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980). *Catalano* involved an agreement among wholesalers to eliminate short-term credit formerly granted to beer retailers and to require future payments in cash. *Id.* at 644. In a *per curiam* opinion, the Court held that "[a]n agreement to terminate the practice of giving credit is thus tantamount to an agreement to eliminate discounts, and thus falls squarely within the traditional *per se* rule against price fixing." *Id.* at 648. The Court agreed with the appeals court's dissent which characterized the practice as "plainly anticompetitive," *id.* at 645-46, and noted that the wholesaler's concerted activity entailed a clear risk of anticompetitive impact with "no apparent potentially redeeming value." *Id.* at 649.

¹²⁴ See generally Easterbrook, *Maximum Price Fixing*, 48 U. CHI. L. REV. 886, 901 (1981).

B. *Judicial Treatment of Anticompetitive Professional Agreements — An Implied Exemption from Traditional Per Se Analysis?*

In *Broadcast Music*, the Supreme Court defined and clarified the proper scope of judicial inquiry incident to a *per se* price fixing analysis.¹²⁵ Yet *Broadcast Music*, *Socony-Vacuum*, *Albrecht* and the majority of other cases around which the present-day bifurcated antitrust approach arose were argued and decided in the context of entirely commercial enterprises and markets. In light of these precedents, therefore, it remained unclear whether the involvement of "professionals," such as physicians, as parties to a challenged agreement would influence in any way the level of judicial antitrust scrutiny — particularly when the professional activity was deemed plainly anticompetitive by the court. Prior to the Court's decision in *Maricopa County*, it was arguable that the Court had never explicitly characterized such challenged professional conduct as within a *per se* category, despite several opportunities to do so.¹²⁶ The Court's reluctance to apply traditional *per se* standards seemed predicated on a historical belief that in certain instances a commercially developed standard of competition was not compatible with professional notions of self-regulation, public service and ethical conduct. Indeed, since the passage of the Sherman Act, the professions have consistently been treated more leniently than commercial businesses by the courts.¹²⁷ This special treatment was originally termed the "learned profession" exemption and arose primarily from the language of the statute and the judicially-perceived uniqueness of professional activities.¹²⁸ To better understand the extent of this "exemption" and its impact on the *Maricopa County* decisions, however, it is again instructive to briefly trace its early development and later modification by the Court.

The Sherman Act prohibits all restraints of trade or commerce between the states.¹²⁹ Based primarily on several early decisions holding that the practice of a profession was neither a trade nor a subject of commerce, however, professionals successfully argued that their activities did not fall within the meaning of the Act.¹³⁰ The Court's early refusal to classify professional services

¹²⁵ See *supra* notes 110-124 and accompanying text.

¹²⁶ See *infra* notes 138-60 and accompanying text.

¹²⁷ See generally *Goldfarb v. Virginia State Bar*, 497 F.2d 1, 13-15 (4th Cir. 1974).

¹²⁸ *Id.* at 13.

¹²⁹ 15 U.S.C. § 1 (1976).

¹³⁰ In *The Nymph*, Justice Story first formulated a distinction between the trade and commerce of a business and the public service goals of professionals. 18 F. Cas. 506 (C.C.D. Me. 1834). Reasoning that professionals were not engaged in trade or commerce because their goal was public service and not profit, Justice Story noted that "[w]herever any occupation, employment or business is carried on for the purpose of profit, or gain, or a livelihood, not in the liberal arts or in the *learned professions*, it is constantly called a trade." *Id.* at 507 (emphasis added).

This distinction formed a basis for the so-called "learned profession" exemption. It was given further credence by Justice Sutherland in *Atlantic Cleaners & Dyers, Inc. v. United States*, when he quoted Justice Story's distinction with favor in interpreting the phrase "restraint of trade" as used in § 3 of the Sherman Act. 286 U.S. 427, 435-36 (1932); see also, Federal Trade Comm'n

as "trade or commerce" appeared to be premised on the belief that, in certain instances, competition was not consistent with the ethical and public service mandates of professional activity.¹³¹ For example, in *United States v. Oregon State Medical Society*,¹³² the Court affirmed a federal district court's decision that the practice of medicine wholly within the state by physicians of the state was not "trade or commerce" within the meaning of section 1 of the Sherman Act.¹³³ Writing for the majority, Justice Jackson distinguished the ethical considerations inherent in the doctor-patient relationship from the more general business considerations prevalent in ordinary commercial matters.¹³⁴ He concluded that "forms of competition usual in the business world may be demoralizing to the ethical standards of a profession."¹³⁵

Yet as initially applied by the courts, the "learned profession" exemption was limited in scope. For example, the exemption applied only to those restraints which operated directly on the profession and were deemed to be associated with the public service and ethical norms of the profession.¹³⁶ It did not protect professional agreements that restrained trade outside of the profession and which directly affected interstate commerce.¹³⁷

More recently, in *Goldfarb v. Virginia State Bar*,¹³⁸ the Supreme Court even further narrowed the scope of the exemption. Writing for the Court, Chief Justice Burger rejected the notion that a "learned profession" exemption existed based upon the incompatibility of certain competitive practices with professional regulation.¹³⁹ Thus, the *Goldfarb* Court held that a fee schedule

v. Raladam Co., 283 U.S. 643, 653 (1931) (professional activities not a trade); *Federal Baseball Club, Inc. v. Nat'l League of Professional Baseball Clubs*, 259 U.S. 200, 209 (1922) (personal effort, not related to production, also not a subject of commerce); *Riggall v. Washington County Medical Soc'y*, 249 F.2d 266, 268 (8th Cir. 1957) (practice of plaintiff's profession as disclosed in allegations of complaint is neither trade nor commerce within the meaning of § 1 of the Sherman Act).

¹³¹ As the appeals court in *Goldfarb* noted:

The legal profession has rejected the maxim of *caveat emptor* as a standard of conduct. Unlike the mechanic or the butcher, a lawyer has a professional duty to provide his services at a reduced rate to those who need but cannot afford his services. Advertising and other forms of solicitation of business common to trade and commerce are criminal acts when utilized by lawyers. In view of the special form of regulation already imposed upon those in the legal profession the courts have been reluctant to superimpose upon the profession the sanctions of the antitrust laws, many of which are in direct contravention of existing legal and ethical restrictions.

497 F.2d at 14.

¹³² 343 U.S. 326 (1952).

¹³³ *Id.* at 338-39.

¹³⁴ Specifically, Justice Jackson stated that "there are ethical considerations where the historic direct relationship between patient and physician is involved which are quite different than the usual considerations prevailing in ordinary commercial matters." *Id.* at 336.

¹³⁵ *Id.*

¹³⁶ *Goldfarb v. Virginia State Bar*, 497 F.2d 11, 15 (4th Cir. 1974).

¹³⁷ *Id.*

¹³⁸ 421 U.S. 773 (1975).

¹³⁹ *Id.* at 787. The Court reversed the appeals court decision holding the defendant State Bar exempt from antitrust scrutiny as "learned profession." *Id.* at 793. Noting that the appeals

published by the county bar association which prescribed a minimum fee for title examinations was illegal price fixing.¹⁴⁰ The bar association defended its activities primarily on the ground that its members belonged to one of the "learned professions," and since competition was not consistent with the professional goal of providing necessary community service, the antitrust laws did not apply.¹⁴¹ Dismissing the association's argument, the Chief Justice noted that in determining whether section 1 of the Act included professionals neither the nature of an occupation, standing alone, nor the public service aspect of professional activities was controlling.¹⁴² He pointed out that in the instant case, the exchange of money for a title examination was clearly commerce and that it could not be disputed that the activities of lawyers "played an important part in commercial intercourse."¹⁴³ The Chief Justice therefore concluded that anticompetitive activities by lawyers — and presumably other professionals — might restrain commerce within the meaning of section 1 of the Sherman Act.¹⁴⁴

Chief Justice Burger appeared to soften the impact of his decision, however, by suggesting in a footnote that the decision was limited to its facts and that something other than traditional competition-oriented antitrust standards might still apply to professional restraints by virtue of the public service aspects and other unidentified features of the professions.¹⁴⁵ Moreover, although the Chief Justice found that the minimum fee schedules utilized by the bar association constituted a classic example of price fixing, he nevertheless failed to characterize explicitly the conduct as *per se* illegal.¹⁴⁶ The result of this

court premised this exemption upon the incompatibility of certain competitive practices with professional regulation by the state, Chief Justice Burger reasoned that "[w]hether state regulation is active or dormant, real or theoretical, lawyers would be able to adopt anticompetitive practices with impunity." *Id.* at 787.

¹⁴⁰ *Id.* at 781-83.

¹⁴¹ *Id.* at 786. The Bar also argued that 1) the effect on interstate commerce caused by the fee schedule was incidental and remote, *id.* at 783; and 2) their activity was "state action." *Id.* at 788.

¹⁴² *Id.* at 787. Instead, he noted that "Congress intended to strike as broadly as it could in § 1 of the Sherman Act, and to read into it so wide an exemption as that urged on us would be at odds with that purpose." *Id.*

¹⁴³ *Id.* at 787-88.

¹⁴⁴ *Id.* at 788.

¹⁴⁵ *Id.* at 787-88 n.17. In this much-scrutinized footnote, Chief Justice Burger stated: The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could be properly viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today.

Id.

¹⁴⁶ *Id.* at 783.

ambiguity was confusion among lower courts¹⁴⁷ and commentators alike.¹⁴⁸

Several years later, in *National Society of Professional Engineers v. United States*,¹⁴⁹ the Court attempted to clarify the scope of its cautionary footnote in *Goldfarb*. Speaking for the Court, Justice Stevens determined that a professional canon of ethics preventing competitive bidding for engineering services violated section 1 of the Sherman Act.¹⁵⁰ The engineers argued that their canon was justified under the Rule of Reason because the practice of awarding contracts to the lowest bidder would jeopardize the public health and safety by tempting some engineers to produce a low-cost, potentially defective product.¹⁵¹ Rejecting this argument, Justice Stevens reasoned that the absolute prohibition unreasonably restrained price competition by preventing customers from comparing prices in the marketplace.¹⁵² Justice Stevens purported to adhere to the view expressed in the *Goldfarb* footnote that the nature of competition in professional services might vary from that of other business services.¹⁵³ He concluded, however, that while ethical norms may serve to regulate and promote professional competition, the fact that such competition is not entirely conducive to ethical behavior is not a recognizable reason under the Sherman Act to eliminate it completely.¹⁵⁴

¹⁴⁷ Compare *United States v. Texas State Bd. of Pub. Accountancy*, 464 F. Supp. 400, 403 (W.D. Tex. 1978), *aff'd and modified per curiam*, 592 F.2d 919 (5th Cir.), *cert. denied*, 444 U.S. 925 (1979) (*per se* rules apply to professionals) and *American Medical Ass'n v. FTC*, 94 FTC 701, 1014-15 (1979), *aff'd sub nom. American Medical Ass'n v. FTC*, 638 F.2d 443 (2d Cir. 1980), *aff'd by an equally divided court*, 456 U.S. 901 (1982) (same) with *Virginia Academy of Clinical Psychologists v. Blue Shield*, 624 F.2d 476, 484-85 (4th Cir. 1980), *cert. denied*; 450 U.S. 916 (1980) (*per se* rule inapplicable to professionals), and *Boddicker v. Arizona State Dental Ass'n*, 549 F.2d 626, 630-32 (9th Cir. 1977), *cert. denied*, 434 U.S. 825 (1977) (*per se* rule for commercial goals and rule of reason for professional or non-commercial goals). See generally Michaelson & McDavid, *Maricopa County Ruling Unsettles the Law on Professional Activities*, NAT'L. L.J., July 19, 1982, at 22, col. 1.

¹⁴⁸ Compare *Price-Fixing, Advertising Bans and other Self-Regulation by Lawyers: What Future Under Antitrust Laws?*, 12 COLUM. J.L. SOC. PROB. 531, 538-40 (1976) (*Goldfarb* did not use *per se* analysis) and Martyn, *Lawyer Advertising: The Unique Relationship Between First Amendment and Antitrust Protections*, 23 WAYNE L. REV. 167, 183 (1976) (same) with Branca & Steinberg, *Attorney Fee Schedules and Legal Advertising: The Implications of Goldfarb*, 24 U.C.L.A. L. REV. 475, 507 (1977) (*Goldfarb* used *per se* rule) and Comment, *Antitrust—Goldfarb v. Virginia State Bar—Professional Legal Services Are Held To Be Within The Ambit Of Federal Antitrust Laws*, 7 LOYOLA U. L. J. (Chicago) 254, 261-62 (1976) (same).

¹⁴⁹ 435 U.S. 679 (1978).

¹⁵⁰ *Id.* at 693. The Court noted that after compiling a "voluminous" discovery and trial record, the district court had concluded that the ethical prohibition was "on its face a tampering with the price structure of engineering fees in violation of § 1 of the Sherman Act." *Id.* at 685-86.

¹⁵¹ *Id.* 684-85.

¹⁵² *Id.* at 692-93. Justice Stevens also noted that the "Society's affirmative defense confirms rather than refutes the anticompetitive purpose and effect of its agreement." *Id.* at 693.

¹⁵³ *Id.* at 696.

¹⁵⁴ *Id.* Addressing the Society's contention that a ban on competitive bidding was necessary to prevent engineers from submitting deceptively low bids, Justice Stevens reasoned that the equation of competition with deception, like a similar equation with safety hazards, was too broad. *Id.*

Although Justice Stevens emphasized the plainly anticompetitive character of the restrictive canon in *Professional Engineers*, it was unclear whether the Court had in fact determined the ban on competitive bidding to be illegal *per se*.¹⁵⁵ Predictably, the result of this lack of clarity was confusion about which approach — Rule of Reason or *per se* — had been applied, and whether and when *per se* rules were properly applicable to professional agreements.¹⁵⁶ Nevertheless, despite the ambiguous analysis in both *Goldfarb* and *Professional Engineers*, the decisions may be read as holding that professionals such as physicians could no longer continue to justify clear restraints on competition simply by invoking a “public service” or “ethical necessity” argument.¹⁵⁷ Indeed, it appeared that the physicians in *Maricopa County* could expect to be held to the same economic standards as other business entities, especially if the purpose or effect of the challenged activity was deemed to be plainly anticompetitive.¹⁵⁸

Confusion over the correct judicial standard of review for professional agreements whose anticompetitive purpose or effect is *not* palpably apparent was reflected in both lower court opinions in *Maricopa County*.¹⁵⁹ The Supreme Court’s decision in *Maricopa County* not to afford the physician-respondents special “professional” antitrust status, however, was neither surprising nor necessarily inconsistent with *Goldfarb* or *Professional Engineers*, once the majority determined that the FMC fee reimbursement schedules were plainly anticompetitive price fixing arrangements.¹⁶⁰ The threshold issue facing the *Maricopa County* Court, therefore, was whether under *Broadcast Music* such a *per se* characterization was proper given the state of the record, the novelty of the FMC plan and the apparent economic efficiencies associated with its operation in the health care system.¹⁶¹ The remainder of this casenote will address principally that issue and its resolution.

¹⁵⁵ Justice Stevens held that “[O]n its face, this agreement restrains trade within the meaning of § 1 of the Sherman Act.” *Id.* at 693.

¹⁵⁶ See, e.g., Havighurst, *supra* note 3, at 348 n.194 (*Professional Engineers* employed a *per se* rule); Allison, *Ambiguous Price Fixing and the Sherman Act: Simplistic Labels or Unavoidable Analysis?*, 16 HOUS. L. REV. 761, 822 (1979) (Rule of Reason); Sullivan, *Recent Antitrust Developments: Defining the Scope of Exemptions, Expanding Coverage, and Refining the Rule of Reason*, 27 U.C.L.A. L. REV. 265, 323 (1979) (Rule of Reason). See generally Michaelson & McDavid, *supra* note 147, at 22, col. 1.

In his dissenting opinion in *Maricopa County*, however, Justice Powell noted that *Professional Engineers* was a *per se* case. *Arizona v. Maricopa County Medical Soc’y*, 102 S. Ct. 2466, 2483 (1982) (Powell, J., dissenting).

¹⁵⁷ See generally Shapiro, *supra* note 3, at 426-28.

¹⁵⁸ See, e.g., *National Soc’y of Professional Eng’rs v. United States*, 435 U.S. 679, 699 (1978) (Blackmun, J., concurring in part and concurring in the judgment) (Court intimates that any ethical rule with an overall anticompetitive effect is forbidden under Sherman Act); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 786-87 (1975) (classic “professional” defense loses some force when used to support anticompetitive fee control activities).

¹⁵⁹ See *infra* note 174 and accompanying text.

¹⁶⁰ See *infra* notes 162-192 and accompanying text.

¹⁶¹ See *supra* notes 110-124 and accompanying text.

II. THE HOLDING IN *MARICOPA COUNTY*

On review by *certiorari*,¹⁶² the Supreme Court reversed the lower courts' denial of the State of Arizona's motion for partial summary judgment on the issue of *per se* liability.¹⁶³ In a 4-3 decision written by Justice Stevens, the Court held that the FMC maximum reimbursement agreements, between member physicians and third party insurance payors, constituted *per se* illegal price fixing under section 1 of the Sherman Act.¹⁶⁴

Justice Stevens prefaced his analysis by pointing out that the Court in the past had consistently held that once a price fixing agreement was proved, no showing of competitive abuses or other evils which such an agreement was designed to protect against or eliminate could be interposed as a defense.¹⁶⁵ Nevertheless, Justice Stevens addressed himself to each of the foundations' arguments.¹⁶⁶ First, he noted that the maximum reimbursement agreements did not escape *per se* condemnation because they were horizontal and fixed maximum prices.¹⁶⁷ Justice Stevens explained that *Kiefer-Stewart Co. v. Seagram & Sons*¹⁶⁸ and *Albrecht v. Herald Co.*¹⁶⁹ placed horizontal maximum price fixing agreements on "the same legal — even if not economic — footing as agreements to fix minimum or uniform prices."¹⁷⁰ Justice Stevens concluded that in

¹⁶² *Arizona v. Maricopa County Medical Soc'y*, 450 U.S. 979 (1981).

¹⁶³ *Arizona v. Maricopa County Medical Soc'y*, 102 S. Ct. 2466-80 (1982). In a brief Memorandum and Order, the district court in *Maricopa County* denied the state's motion for partial summary judgment and held that a Rule of Reason and not a *per se* approach was the appropriate judicial analysis. *Maricopa County*, 1979-1 Trade Cas. (CCH), at 77,897. The Ninth Circuit, in a divided panel, affirmed the district court's order. *Maricopa County*, 643 F.2d at 554.

¹⁶⁴ *Maricopa County*, 102 S. Ct. at 2466-80.

¹⁶⁵ *Id.* at 2473-74 (quoting *United States v. Socony-Vacuum Co.*, 310 U.S. 150, 218 (1940)). Subsequently, Justice Stevens noted that the application of the *per se* rule to maximum price fixing agreements in *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211 (1951), and later in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), followed "ineluctably" from *Socony-Vacuum*. *Maricopa County*, 102 S. Ct. at 2474.

Justice Harlan, dissenting in *Albrecht*, would undoubtedly have disagreed with such an assertion. 390 U.S. at 156-68 (Harlan, J., dissenting). He distinguished the economic impact of price floors from price ceilings. *Id.* at 156. Justice Harlan reasoned that price floors (minimum prices) are held to be *per se* unreasonable because they inevitably lessen competition. *Id.* at 159 & n.3. But resale (vertical) price ceilings (maximum prices), according to Justice Harlan, are a different matter because they do not tend to lessen competition. *Id.* at 159 (Harlan, J., dissenting). He concluded, therefore, that "in a maximum price case the asserted justification must be met on its merits, and not by incantations of a *per se* rule developed for an altogether different situation." *Id.*; see also *Albrecht*, 390 U.S. at 168-70 (Stewart, J., dissenting); R. POSNER, ANTITRUST LAW: AN ECONOMIC PERSPECTIVE 158-59 (1976).

¹⁶⁶ *Maricopa County*, 102 S. Ct. at 2475-80.

¹⁶⁷ *Id.* at 2475.

¹⁶⁸ 340 U.S. 211 (1951).

¹⁶⁹ 390 U.S. 145 (1968).

¹⁷⁰ *Maricopa County*, 102 S. Ct. at 2475. Even assuming that there was a viable economic basis for extending the *per se* rule against price fixing to include the maximum resale agreements in *Kiefer-Stewart* and *Albrecht*, it was unreasonable of Justice Stevens not to distinguish here between the legal and economic antitrust consequences of business arrangements which have been shown by judicial experience to stifle competition, and those arrangements which the Court has

the case of the FMC agreements, the *per se* rule was violated by a price restraint that "tend[ed] to provide the same economic rewards to all practitioners regardless of their skill, their experience, their training, or their willingness to employ innovative and difficult procedures in individual cases."¹⁷¹

Next, the *Maricopa County* majority held that the fact that physicians, rather than non-professionals, were parties to the price fixing agreement made no difference to its *per se* analysis.¹⁷² Justice Stevens noted that, unlike the professional agreements in *Goldfarb* and *Professional Engineers*, the justifications for the maximum reimbursement agreements were not premised on public service, ethical norms, or improved quality of professional services, but simply on the "successful marketing of an attractive insurance plan."¹⁷³ Justice Stevens concluded that such a justification did not distinguish the medical profession from any other commercial enterprise.¹⁷⁴

The majority was also unpersuaded by the argument that the *per se* rules should not apply because the judiciary had little antitrust experience in the

never before evaluated and which arguably enhance competition or reduce consumer costs through creation of substantial efficiencies. Perhaps Justice Stevens was implying that his application of the *per se* rule in *Maricopa County* to what he defined as a *horizontal* maximum price fixing agreement followed "ineluctably" from *Kiefer-Stewart* and *Albrecht*. He conceded, however, that both those cases involved *vertical* arrangements in which maximum resale prices were fixed. *Id.* at 2475 n.18. Justice Stevens nevertheless hastily concluded, that, "[i]n any event, horizontal restraints are generally less defensible than vertical restraints." *Id.*

For this final proposition, Justice Stevens cites Easterbrook, *supra* note 124, at 890 n.20. Professor Easterbrook argued there, however, that because of the "laconic" and "shallow" antitrust reasoning employed by the Court in both *Kiefer-Stewart* and *Albrecht*, neither should be controlling in maximum price fixing cases. *Id.* at 888-89. He concluded that, as mandated by the *Broadcast Music* standard, the "Court never has attempted to determine whether maximum price fixing almost always would tend to restrict competition and decrease output or increase economic efficiency instead." *Id.* at 890 (quoting *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 19-20 (1979)); *see also*, Blair & Kaserman, *supra* note 88, at 482 (Supreme Court in *Albrecht* insisted upon mechanical application of *per se* rule against price fixing despite evidence of beneficial economic effects).

Also, neither the district court nor the circuit court in *Maricopa County* held *Kiefer-Stewart* or *Albrecht* to be controlling. The district court found that neither case need be read as *per se* holdings condemning maximum price fixing. *Maricopa County* [1979-1] Trade Cas. (CCH), at 77,896. The court cited with approval Professor Kallstrom's comment that, unlike most *per se* cases, *Kiefer-Stewart* and *Albrecht* were not the culmination of a long line of rulings establishing that the practice was almost always anticompetitive, nor did the decisions discuss the possible benefits and detriments to competition and efficiency so as to conclude that virtually no defense would be successful. *Id.* (quoting Kallstrom, *supra* note 3, at 666-68). The Ninth Circuit simply noted that it had not extended either ruling to horizontal agreements establishing maximum prices. *Maricopa County*, 643 F.2d at 557 n.4.

¹⁷¹ *Maricopa County*, 102 S. Ct. at 2475. Justice Stevens also reasoned that the FMC restraint "may discourage entry into the market and may deter experimentation and new developments by individual entrepreneurs. It may be a masquerade for an agreement to fix uniform prices or it may in the future take on that character." *Id.* (emphasis added).

¹⁷² *Id.*

¹⁷³ *Id.* at 2475-76.

¹⁷⁴ *Id.* at 2476. Both the district court and the circuit court held, however, that the fact that a profession was involved was one important factor in its determination that a Rule of Reason rather than a *per se* approach was inappropriate in *Maricopa County*.

health care industry.¹⁷⁵ Justice Stevens noted that the Sherman Act establishes one uniform price fixing rule applicable to all industries alike.¹⁷⁶ Thus, he pointed out, a contrary argument offered by the foundations ignored the rationale behind the *per se* rules which is, Justice Stevens asserted, in part,¹⁷⁷ avoidance of prolonged judicial investigation of the entire history of the industry involved.¹⁷⁸

Turning to the foundations' assertion that the challenged arrangement's procompetitive nature should preclude *per se* condemnation,¹⁷⁹ Justice Stevens

The district court, citing *Goldfarb* and *Professional Engineers* as well as the Ninth Circuit's previous decision in *Boddicker v. Arizona State Dental Ass'n*, 549 F.2d 626, 632 (9th Cir. 1977), *cert. denied*, 434 U.S. 825 (1977), concluded that a Rule of Reason approach was to be applied when analyzing professional practices alleged to be in violation of the antitrust laws. *Maricopa County*, [1979-1] Trade Cas. (CCH), at 78,896-97. The district court's reasoning seemed premised on the notion that absent long judicial antitrust experience with professional activities, *per se* rules developed in a commercial context should not be automatically applied to professionals. *Id.* Similarly, Judge Sneed, writing for the circuit court, interpreted *Professional Engineers* as recognizing that marketing restraints which regulate professional competition may lawfully serve the public even though their use in a purely commercial setting would violate the antitrust law. *Maricopa County*, 643 F.2d at 560. He believed it was sufficiently probable that the FMC agreements were sheltered by such a principle to justify his refusal to label them as *per se* illegal. *Id.*

Assuming, however, that Justice Stevens concluded that the anticompetitive purpose or effect of the FMC agreements was obvious, his reasoning seems most consistent with the language and general tone of the *Goldfarb* and *Professional Engineers* decisions. See generally *supra* notes 126-160 and accompanying text.

¹⁷⁵ *Maricopa County*, 102 S. Ct. at 2476.

¹⁷⁶ *Id.* (quoting, *United States v. Socony-Vacuum Co.*, 310 U.S. 150, 222 (1940)).

¹⁷⁷ In addition to considerations of efficiency and certainty, Justice Stevens noted that the *per se* rule is grounded on a recognition of the respective roles that the judiciary and Congress play in regulating the economy. *Maricopa County*, 102 S. Ct. at 2478. Justice Stevens commented that by articulating antitrust rules with clarity and by adhering to rules justified in their general application, the Court has enhanced the legislative prerogative to amend the law. *Id.* He concluded that the foundation's arguments against application of the *per se* rule would therefore be better directed to the legislative branch, since Congress might consider a particular exception that the Court was not free to read into the statute. *Id.* at 2478-79.

In his dissent, Justice Powell reasoned that this was "curious advice" since it has always been the courts' duty to interpret and apply the mandate of the Sherman Act. *Id.* at 2484 (Powell, J., dissenting).

¹⁷⁸ *Maricopa County*, 102 S. Ct. at 2476-77 (quoting, *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958)). Justice Stevens noted that the appeals court refused to apply the *per se* rule in part because the health care industry was far removed from a perfect competitive model and as a result adopted an improper legal standard based on the reasonableness of the fixed prices. *Maricopa County*, 102 S. Ct. at 2476.

Justice Stevens was referring in particular to Judge Sneed's belief that when confronted with an industry widely deviant from a reasonably free competitive model, the proper inquiry is whether the practice enhances the prices charged for services. 643 F.2d 556-57. Judge Sneed's emphasis here possibly is misplaced, but his apparent equation of increased prices with anticompetitive impact seems to stem primarily from his inability, based on the limited record, to identify a factual baseline from which to determine competitive purpose or effect. *Id.* See *infra* note 212, 229. But see, Easterbrook, *supra* note 124, at 900-901.

¹⁷⁹ The foundations argued that their activities were procompetitive because they enabled the FMC's to provide health care consumers with a unique insurance product which could not exist unless the foundations themselves established the maximum levels of reimbursement.

stated that such an argument "indicated a misunderstanding of the *per se* concept [because] [t]he anticompetitive potential inherent in all price fixing agreements justifies their facial invalidation even if procompetitive justifications are offered for some."¹⁸⁰ Reviewing the foundations' claim that the FMC insurance plans made possible a unique form of health coverage of which the maximum reimbursement schedules were an essential part, the majority concluded that despite giving every favorable inference to the foundations, the limited record was not inconsistent with a presumption that the FMC agreements did not significantly enhance competition.¹⁸¹ To this end, Justice Stevens noted that at least two of the features of the FMC plans stressed by the respondent foundations — choice of doctors and complete insurance coverage — were not necessarily unique.¹⁸² He reasoned that at least an equal percentage of non-FMC physicians in other comparable markets would charge a patient no more than the "usual, customary and reasonable" fee that insurers are typically willing to reimburse in full.¹⁸³ Justice Stevens further reasoned that even if a fee schedule were desirable,¹⁸⁴ it was not necessary that physicians determine reimbursement levels, since insurers themselves are capable of setting maximum reimbursable prices as well as obtaining binding agreements with health care providers guaranteeing full reimbursement.¹⁸⁵ Justice Stevens concluded by noting that despite an "assumption" that physicians could set reimbursement levels more efficiently than insurers,¹⁸⁶ any savings which might accrue therefrom would not be sufficiently great to affect the competitiveness of the FMC-type insurance plan in the market.¹⁸⁷

Finally, the majority addressed the foundations' argument that the maximum reimbursement schedules — although literally fixing prices for medical services — did not fall within the ambit of those practices previously held by the Court to be illegal under the *per se* rule against price fixing.¹⁸⁸ Although

The result, according to the foundations, was a demonstrable reduction in the cost of premiums for FMC-endorsed health insurance with no effect on prices charged by physicians to their patients. Brief for Respondents at 23, 43-44.

¹⁸⁰ *Maricopa County*, 102 S. Ct. at 2477.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ Justice Stevens conceded that a binding assurance of 100% coverage, as well as the potential for reduced insurance premiums, could only be obtained if the physician and insurer agreed in advance on the maximum amount to be reimbursed for any particular health care service. *Id.*

¹⁸⁵ *Id.* at 2477-78.

¹⁸⁶ Justice Stevens termed such an assumption "far from obvious." *Id.* at 2478.

¹⁸⁷ *Id.* Justice Stevens reasoned that the foundations' actual or potential market power to dictate the terms of the insurance plans might offset the asserted efficiencies associated with the FMC arrangements. *Id.* He noted that "[i]n this case it appears that the fees are set by a group with substantial power in the market for medical services, and that there is competition among insurance companies in the sale of medical insurance. Under these circumstances the insurance companies are not likely to have significantly greater bargaining power against a monopoly of doctors than would individual consumers of medical services." *Id.* at 2478 n.29.

¹⁸⁸ *Id.* at 2479. Although Justice Stevens addresses this issue of *per se* characterization at

Justice Stevens did not elucidate the standard by which he presumably characterized the FMC agreement to be within the *per se* illegal category, he nevertheless noted that the foundations' reliance on the Court's rationale in *Broadcast Music*¹⁸⁹ was unfounded, because the cases were "fundamentally different."¹⁹⁰ Distinguishing *Broadcast Music* on its facts, Justice Stevens reasoned that in *Maricopa County* the physicians' concerted activities did not allow them to sell a "different product" as in *Broadcast Music*, but instead merely permitted them to sell their individual services to certain insured customers at fixed prices and, arguably, to affect the market price for such medical care.¹⁹¹ He concluded that, unlike a legal partnership arrangement, the FMC fee agreements were among individual competing medical entrepreneurs and as such fit directly into the horizontal price fixing mold.¹⁹²

Justice Powell, writing for the dissent, questioned the majority's basis for characterizing the agreements as *per se* illegal price fixing, and assailed Justice Stevens' conclusion that such a violation existed inasmuch as that conclusion was necessarily premised on an incomplete summary judgment record.¹⁹³ Justice Powell began his discussion by pointing out that while it is well settled that once an agreement is labelled price fixing it is *per se* illegal, it is equally settled that such a characterization is not to be automatically applied to every arrangement which literally fixes a price.¹⁹⁴ He therefore noted that only if it was

the end of his analysis, it would seem more appropriately dealt with as a threshold inquiry since all of his previous arguments apparently start from the premise that the FMC reimbursement schedules *do* in fact fit within the category of those practices traditionally held to be *per se* illegal price fixing.

¹⁸⁹ 441 U.S. 1 (1979).

¹⁹⁰ *Maricopa County*, 102 U.S. at 2479.

¹⁹¹ *Id.*

¹⁹² *Id.* at 2479-80. Justice Stevens thus distinguished the FMC arrangements from "partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as opportunities for profit." *Id.*

¹⁹³ *Id.* at 2480-85 (Powell, J., dissenting). Noting that inferences drawn from the summary judgment record must be viewed in light most favorable to the respondent foundations, Justice Powell premised his discussion by pointing out that the Court was thus required to conclude that the FMC plans served as an effective cost containment mechanism that had saved consumers millions of dollars. *Id.* at 2481. He further asserted that the Court had failed to stress several other significant aspects of the record. First, Justice Powell argued that the record disclosed that the foundation arrangements foreclosed no competition because — unlike the classic cartel arrangement — participating physicians and insurers were free to engage in price competition outside the plan. *Id.* Nor, he noted, were physicians locked into a plan for more than a one-year term of membership. *Id.* Second, Justice Powell contended that on the record the Court must find that insurers represent consumer interests. *Id.* This is so, he reasoned, because, unlike most health care consumers, insurers have a profit incentive to keep insurance premiums at a competitive level and thereby contain medical costs. *Id.* at 2481-82. Finally, Justice Powell argued that, as the record indicated no opposition to the FMC plan by either insurers or consumers, the Court must infer that it had benefitted consumers by allowing insurers to limit and more efficiently calculate the risks they underwrite. *Id.* at 2482. Justice Powell concluded that, although the case was before the Court on an incomplete summary judgment record, the majority nevertheless had conclusively drawn contrary inferences to support its *per se* judgment. *Id.*

¹⁹⁴ *Id.* (citing *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 9 (1979)).

clear from the record that the agreement among the FMC physicians was plainly anticompetitive should the Court have made a *per se* judgment.¹⁹⁵ Justice Powell explained that the fatal *per se* label should not be affixed, however, without first carefully considering whether there are substantial and realizable procompetitive economies associated with the challenged arrangement.¹⁹⁶ This is especially true, he indicated, when the challenged practice — such as the FMC insurance plan — is a novel one.¹⁹⁷ Thus, Justice Powell argued that, under the rationale of *Broadcast Music*, if an initial judicial inquiry reveals that the agreement achieves such proconsumer economies, *per se* condemnation is inappropriate despite literal fixing of prices among potential competitors.¹⁹⁸

Justice Powell concluded the dissenting opinion by noting that the majority's attempt to distinguish *Broadcast Music* was unconvincing.¹⁹⁹ He pointed out that the non-*per se* illegal blanket license agreements in *Broadcast Music* and the reimbursement agreements in *Maricopa County* were similar in several important respects.²⁰⁰ First, Justice Powell noted that both arrangements involved potential competitors engaged in cooperative pricing.²⁰¹ Next, he observed that each agreement was formed in response to the need for better service to consumers.²⁰² Finally, Justice Powell pointed out that each agreement apparently created a new product by attaining otherwise unattainable efficiencies.²⁰³ Justice Powell thus reasoned that, as in *Broadcast Music*, the plaintiff in *Maricopa County* had not yet met its burden of proving that the respondent foundations had entered into plainly anticompetitive agreements without a substantial procompetitive efficiency justification.²⁰⁴ In the absence of such proof, Justice Powell concluded that it was impossible to make a final judgment as to the *per se* invalidity of the FMC maximum reimbursement agreements.²⁰⁵

III. A CRITIQUE OF *MARICOPA COUNTY*

Traditionally, under the *per se* rules, any arrangement among competitors having the purpose or effect of stifling price competition is illegal as a matter of

¹⁹⁵ *Id.* at 2482, 2483 (citing *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 692 (1978)).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 2483 (citing *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 9-10 (1979); *United States v. Topco Assoc., Inc.* 405 U.S. 596, 607-08 (1972)).

¹⁹⁸ *Id.* at 2483-84.

¹⁹⁹ *Id.* at 2484.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.*

²⁰³ *Id.*

²⁰⁴ *Id.* at 2485. Justice Powell reasoned, therefore, that a critical and disputed issue of fact remained unresolved and summary judgment accordingly was inappropriate under FED. R. Civ. P. 56(c). *Id.*

²⁰⁵ *Id.*

law.²⁰⁶ The most obvious such restraint is a "naked" price fixing agreement.²⁰⁷ And, indeed, as cases such as *Socony-Vacuum* and *Broadcast Music* both indicate, the judiciary has consistently held that once a price fixing agreement is proved, the broad scope of inquiry required under the Rule of Reason approach is deemed unnecessary, and additional proof of any benefits allegedly associated with the agreement becomes irrelevant.²⁰⁸ In this respect, then, the majority's approach in *Maricopa County* was at least semantically consistent: The FMC plan "fixed" maximum reimbursement "prices" for physician members' services; maximum "price fixing" is illegal *per se*; the FMC plans, therefore, must also be illegal *per se*. Such an approach, however, ignores a fundamental requirement of proof incident to a proper *per se* characterization in this case — proof that the purpose or effect of the FMC agreements was simply to stifle competition within the health care market.²⁰⁹ Moreover, in its apparent haste to dispose of the matter, the *Maricopa County* Court inexplicably neither gave its basis for characterizing the maximum reimbursement agreements as *per se* illegal nor enunciated alternative criteria by which such a characterization might be avoided in the future.²¹⁰

The Court thus missed an ideal factual opportunity to resolve analytically the obvious confusion which continues to surround the bifurcated *per se*-Rule of Reason approach to antitrust enforcement.²¹¹ It is submitted that the result of the *Maricopa County* Court's unexplained and inflexible *per se* judgment was the premature dismissal of a novel arrangement with visible, potentially substantial proconsumer efficiency justifications. Moreover, the majority acted upon a record which both lower courts deemed too sparse to show either the anticompetitive purpose or effect of the challenged reimbursement agreements.²¹² This

²⁰⁶ See, e.g., *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 19-20 (1979); *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963).

²⁰⁷ Professor Sullivan describes such an agreement as "unvarnished" price fixing, and defines it as one where the anticompetitive purpose and effect are self-evident. L. SULLIVAN, *supra* note 25, § 74, at 199-200.

²⁰⁸ See *supra* notes 77-124 and accompanying text.

²⁰⁹ See generally *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 9, 19-20 (1979).

²¹⁰ *Arizona v. Maricopa County Medical Soc'y*, 102 S. Ct. 2466, 2483-84 (1982) (Powell, J., dissenting). Given the majority's substantial reliance on the sweeping language of *Socony-Vacuum* and the later cases of *Kiefer-Stewart* and *Albrecht* to the almost complete exclusion of the Court's more recent decision in *Broadcast Music*, however, its perfunctory condemnation of the FMC agreements, although unfortunate, was somewhat predictable. See *supra* notes 165-71 and accompanying text.

²¹¹ In this regard, it is instructive to note that whereas a majority of four Justices in *Maricopa County* felt that the FMC agreements violated the price fixing rule as a matter of law, two dissenting Justices, the Chief Justice and both lower courts felt that that precedent mandated a denial of the state's motion for summary judgment on the issue.

²¹² Having determined that *per se* condemnation was inappropriate, the district court in *Maricopa County* concluded that even under a Rule of Reason analysis the state's motion could not be granted because the record provided insufficient evidence as to the purpose and effect of the FMC schedules and the power of the foundations and their member physicians. *Maricopa County*, [1979-1] Trade Cas. (CCH), at 77,897.

was exactly the result that Justice White was attempting to avoid in *Broadcast Music* when he emphasized the legal inadequacy of substituting *per se* labels for economic proof and the legal necessity of characterizing conduct as within the "*per se* price fixing" category before facially condemning as such.²¹³

A. Characterization as a Flexibility Component in Per Se Analysis

Despite the implications of Justice Stevens' literal approach to *per se* analysis in *Maricopa County*, the *Broadcast Music* decision made it clear that the *per se* rule against price fixing has not always been applied by the Court to nullify every agreement which literally sets or affects prices.²¹⁴ Once an arrangement has been properly characterized as "price fixing," the *per se* rule unquestionably relieves the trier of fact of the burden of analyzing possible benefits and harms associated with the challenged conduct.²¹⁵ Unless the anticompetitive purpose or effect of the arrangement is palpably apparent, however, such a characterization absent other proof is not proper.²¹⁶ In cases where neither purpose nor effect is self-evident, before characterizing an agreement as within the *per se* price fixing category, the court should make at least a preliminary factual determination as to whether the purpose or effect of the challenged agreement is indeed simply to stifle competition.²¹⁷ Moreover, the Supreme Court in the past has expressed considerable reluctance to characterize certain practices as falling within a *per se* category unless it has had considerable prior experience with the type of relationship in question.²¹⁸ Such reluctance is consistent with the judiciary's ability to condemn a practice on its face with reasonable assurance that its true purpose or effect is to stifle competition.²¹⁹

In response to the state's argument that the FMC agreements were clearly illegal *per se* because they lacked redeeming value and suppressed and destroyed competition, Judge Sneed, writing for a majority of the Ninth Circuit panel in *Maricopa County*, stated: "The difficulty with Arizona's position is that this record reveals *nothing* about the actual competitive effects of the challenged arrangement nor do the authorities, primary or secondary, afford assurance concerning its competitive impact." *Maricopa County*, 643 F.2d at 556 (emphasis added). See also *id.* at 560 (Kennedy, J., concurring).

²¹³ *Broadcast Music*, 441 U.S. at 9.

²¹⁴ See *Maricopa County*, 102 S. Ct. at 2482 (Powell, J., dissenting); *Broadcast Music*, 441 U.S. at 8-9.

²¹⁵ *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 692 (1978); *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958).

²¹⁶ L. SULLIVAN, *supra* note 25, § 74, at 199-200.

²¹⁷ See *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 9, 19-20 (1979).

²¹⁸ See, e.g., *Broadcast Music, Inc. v. Columbia Broadcast Sys., Inc.*, 441 U.S. 1, 9-10, 19 n.33 (1979); *United States v. Topco Assoc., Inc.*, 405 U.S. 596, 607-08 (1972); *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963). For a discussion of the apparent divergence in interpretation of the "need for considerable experience" language of *Topco* by the majority and dissent in *Maricopa County*, see *infra* note 228.

²¹⁹ See *supra* notes 59-61 and accompanying text; cf. *Broadcast Music, Inc. v. Columbia*

Furthermore, as the Court's reasoning in *Broadcast Music* indicates, even if the purpose or effect of an arrangement is to influence price, it may nevertheless avoid *per se* condemnation if the potential result of the activity is a substantial increase in economic efficiency.²²⁰ If potentially significant efficiencies are initially apparent to a court, therefore, the improved economic performance may outweigh a necessary impact on price competition.²²¹ Although such activity would certainly not be *per se* legal — further judicial inquiry might reveal the efficiencies created to be insignificant or the impact on competition comparatively excessive — it should escape a perfunctory *per se* price fixing label.²²²

B. *The Maricopa County Court's Inflexible Analysis*

Thus, after *Broadcast Music*, the initial task for courts treating price fixing challenges under section 1 of the Sherman Act is to characterize *price affecting* as well as *price effecting* conduct as falling within or not within the *per se* price fixing category.²²³ In *Maricopa County*, the Court was squarely faced with this threshold issue. Yet the basis for the *Maricopa County* majority's determination that the FMC maximum reimbursement agreements were *per se* price fixing was never made explicit²²⁴ — that the complex insurance arrangements were

Broadcasting Sys., Inc., 441 U.S. 1, 19 n.33 (1979); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 n.16 (1977).

²²⁰ *Broadcast Music*, 441 U.S. 19-23; see also *United States v. United States Gypsum Co.*, 438 U.S. 422, 441 n.16 (1978) (exchange of price data and other information among competitors does not constitute *per se* violation if practices increase economic efficiency); *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 54 (1977) (efficiencies in distribution of manufacturer's products are "redeeming virtues" implicit in every decision sustaining vertical restrictions). Cf. *Arizona v. Maricopa County Medical Soc'y*, 102 S. Ct. 2466, 2482 (1982) (Powell, J., dissenting) (before characterizing arrangement as *per se* price fixing, court must determine whether pro-competitive economics purportedly made possible are substantial and realizable in the absence of arrangement).

²²¹ Professor Bork argues that the possible presence of efficiencies can only be inferred from a meaningful integration of the competitor's productive functions. Bork, *Price Fixing*, *supra* note 122, at 380-384. Thus, he notes, agreements which eliminate competition with no corresponding visible efficiency-creating potential are properly labeled as *per se* illegal. *Id.*; see also, L. SULLIVAN, *supra* note 25, § 77, at 206 (arrangement which through partial integration of functions may achieve great economies of scale, may also avoid *per se* condemnation of price competition among participating forms).

Professor Easterbrook, however, persuasively asserts that in addition to highly integrated activities, certain maximum price agreements among competitors — such as the FMC maximum reimbursement agreements — also attain visible and potentially significant cost-saving efficiencies beneficial to consumers. Easterbrook, *supra* note 124, 891-900. Specifically, he emphasized the *Maricopa County* agreements' tendency to reduce both the costs of searching for low-price sellers and the transaction costs to consumers. *Id.*

²²² Professor Easterbrook concludes, for example, that the appropriate method for analyzing maximum price agreements is that used by the Court in *Broadcast Music*, i.e., if a judicial examination reveals that significant efficiencies are at work, a more discerning inquiry is required. *Id.* at 901. If on the other hand, efficiencies are absent or not apparent, the arrangement should be found *per se* illegal to avoid the large costs associated with litigating over small efficiency gains. *Id.*

²²³ See *Broadcast Music*, 441 U.S. at 9.

²²⁴ *Arizona v. Maricopa County Medical Soc'y*, 102 S. Ct. 2466, 2483-84 (Powell, J.,

price fixing agreements within the meaning of the *per se* rule was assumed from the beginning of the decision without explanation.²²⁵ Presumably, then, the majority believed the anticompetitive purpose or effect of the FMC plan was self-evident, since the record was too sparse to give undisputed evidence of either.²²⁶ The Court did speculate on what anticompetitive effects might have occurred as a result of the agreements.²²⁷ Given the judiciary's admitted lack of experience with both the business relationships involved in the FMC plans²²⁸ and their impact upon the health care market,²²⁹ however, it was unreasonably

dissenting). Justice Stevens was apparently content to distinguish *Broadcast Music* quickly and then note that the foundations were not analogous to partnerships or other lawful joint ventures because the physicians did not pool capital and share risks or opportunities for mutual gain. *Maricopa County*, 102 S. Ct. at 2479-80. Of course, in this sense, the licensing agreement in *Broadcast Music* was equally unlike a lawful joint venture.

²²⁵ *Id.* at 2483-84 (Powell, J., dissenting).

²²⁶ See *supra* note 212.

²²⁷ See *supra* note 171. For a diametrically opposed view as to the probable economic effects of the FMC agreements, see Easterbrook, *supra* note 124, at 900-08.

²²⁸ Underlying the *Maricopa County* decision is a divergence of viewpoints in the Court as to the need for and meaning of judicial experience with a challenged practice as a prerequisite to *per se* condemnation. See generally, *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 9-10 (1979); *United States v. Topco Assoc., Inc.*, 405 U.S. 596, 607-08 (1972). For example, Justice Stevens limits his discussion of judicial inexperience in *Maricopa County* to the Court's unfamiliarity with the health care industry. This factor, Justice Stevens notes, is irrelevant to *per se* price fixing analysis since the antitrust laws establish a uniform price fixing rule applicable to all industries alike. *Maricopa County*, 102 S. Ct. at 2476-77. He points out, however, that such an argument should not be confused with Court's historical reluctance to establish a new *per se* category without considerable experience with the particular restraint. *Id.* at 2476 n.19. Implicit in such reasoning is the belief that past judicial experience is relevant only insofar as it relates to a broad category of challenged activity to which the Court has or might assign a *per se* label. Such an approach seems consistent with Justice Stevens' post-*per se* characterization analysis since it is undisputed that once an activity has been properly characterized as within a *per se* category, special procompetitive or industry facts are irrelevant.

In dissent, however, Justice Powell focuses on a narrower but correct characterization concern. Describing the FMC agreement as novel, complex, and important to the public, Justice Powell concentrates on whether past judicial experience affords an adequate background from which to presume as a general matter that the *particular arrangement* before the Court has no redeeming purpose except to stifle competition. *Id.* at 2680-85 (Powell, J., dissenting). According to Justice Powell, such experience is a necessary prerequisite to the facial inclusion of the challenged arrangement in a category of *per se* unlawful anticompetitive activity. *Id.* at 2483. Thus, under Justice Powell's approach, even where an agreement involves the concerted setting of a price, the novelty of the agreement and its market would be a determining factor in the Court's ability to facially presume the practice's anticompetitive nature or lack of substantial economics. Such an approach is consistent with the *Broadcast Music* Court's careful analysis of both the economic effects of the ASCAP-BMI "price fixing" agreements and the music industry in which the agreements operated. *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 9-24 (1979); cf. *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 58-9 (1977) (departure from Rule of Reason standard must be based on demonstrable economic effect rather than formalistic line drawing).

²²⁹ In response to the state's argument that any collective effort to tamper with price structures is offensive to antitrust policy, Judge Sneed, writing for the circuit court panel in *Maricopa County*, concluded that the novelty of the market and the inadequacy of the record made an inquiry into the affected areas of competition essential in determining whether a *per se* or even a Rule of Reason should brand the practice illegal. *Arizona v. Maricopa County Medical Soc'y*,

speculative for the Court to conclude summarily that the FMC maximum reimbursement agreements were plainly anticompetitive and without any redeeming economic virtue.²³⁰

This speculativeness was the basis for Justice Powell's dissent in *Maricopa County*. His criticism of the Court's failure to provide criteria by which a *per se* characterization is to be determined was valid in light of precedent.²³¹ Justice Powell noted that "[the majority] is content simply to brand this type of plan as 'price fixing' and describe the agreement in *Broadcast Music* — which also literally involved the fixing of prices — as 'fundamentally different.'"²³² Indeed, the Court distinguished the two cases almost entirely on the basis of the FMC agreements' perceived failure to create a new product as a result of the member physicians' cooperative behavior.²³³ Such a perfunctory basis for distinction, however, is unpersuasive.²³⁴ As Justice Powell correctly noted, the

643 F.2d 553, 557-58 (9th Cir. 1980). For example, Judge Sneed noted that the record failed to reveal how health insurers fix their own fee schedules or whether they exceed the FMC fees. *Id.* at 558. Judge Sneed further noted that it also failed to identify the nature and extent of competition of FMC and non-FMC physicians, insurance carriers, hospitals and HMOs within the market. *Id.* Accordingly, Judge Sneed declared that "[t]o affix the *per se* label to [the foundations'] conduct is . . . to substitute an unsupported belief for proper proof." *Id.* at 557.

Judge Kennedy expressed similar factual concerns in his concurring opinion: I agree with my brother Sneed that we know too little about the effects on competition produced by the practices here in question to brand them *per se* violations. . . . [A]t this point . . . I am unable . . . to say that these schedules "on [their] face [have] the effect, or could have been spurred by the purpose, of restraining trade among individual [physicians]." *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 13 . . .

* * * *

Per se rules should be derived from considerations of economic impact in particular cases illustrating the category of prohibited acts, and therefore a trial is appropriate to explore further the impact on competition of the challenged reimbursement schedules.

Id. at 560. (Kennedy, J., concurring).

²³⁰ See *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 8 (1979) (quoting *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 692 (1978) and *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958)).

²³¹ Justice Powell notes:

The Court acknowledges that the *per se* ban against price fixing is not to be invoked every time potential competitors *literally* fix prices. One also would have expected it to acknowledge that *per se* characterization is inappropriate if the challenged agreement or plan achieves for the public procompetitive benefits that otherwise are not attainable. The Court does not do this. And neither does it provide alternative criteria by which the *per se* characterization is to be determined.

Maricopa County, 102 S. Ct. at 2483-84 (Powell, J., dissenting).

²³² *Id.* at 2484.

²³³ See *supra* text accompanying notes 189-91.

²³⁴ Professor Easterbrook observes that the maximum price agreement in *Maricopa County*, like the blanket license in *Broadcast Music*, does change the identity of the final insurance product by spreading the risk of unusual or complicated treatment between the physician and the insurance company. Easterbrook, *supra* note 124, at 898-900. He questions, however, whether, from an economic standpoint, "new product creation" should have been an important element in the *Broadcast Music* decision. *Id.* at 899 n.37. Professor Easterbrook points out that economists usually

FMC reimbursement agreements created a new product to the same extent as did the blanket license agreements in *Broadcast Music*.²³⁵ In *Broadcast Music*, ASCAP and BMI simply provided an aggregate of what each composer would otherwise individually offer to sell — the right to use a copyrighted composition.²³⁶ The clearinghouses were able to distribute such rights more efficiently, however, because utilization of a blanket license significantly reduced the transaction costs which would otherwise have been incurred if each license were bargained for individually.²³⁷

Similarly, in *Maricopa County*, the foundation-endorsed medical insurance was a novel means of providing fully-insured medical care from a large number of participating physicians throughout the community in a more economical manner.²³⁸ That the FMC agreements were the most efficient means of developing and administering the maximum reimbursement schedules was evidenced by the willingness of various health insurers to participate in the plan.²³⁹ As such, the foundations permitted a more efficient form of health insurance — “to some extent, a different product.”²⁴⁰

Moreover, although the Court asserted otherwise, it is arguable from the record that the FMC insurance plans achieved substantial economic efficiencies not otherwise attainable without utilization of predetermined maximum reimbursement schedules. The Court speculated that even if a maximum fee schedule were necessary to achieve binding assurance of complete insurance coverage as well as lower insurance premiums, it was not necessary that physicians promulgate them.²⁴¹ Such an argument, however, ignores the economic

leave the definition of a “product” to popular convention, because its definition is arbitrary. *Id.* A product, he notes, is “whatever bundle of attributes can be lumped conveniently together under a single price and single name.” *Id.*

²³⁵ *Maricopa County*, 102 S. Ct. at 2484 n.12 (Powell, J., dissenting).

²³⁶ *Id.*

²³⁷ *Broadcast Music*, 441 U.S. at 20-23.

²³⁸ Brief for Respondents at 8-9, 37-38.

²³⁹ Judge Sneed, in his circuit court opinion, noted that one of the reasons behind his reluctance to apply a *per se* rule was a lack of evidence indicating that a conspiratorial exercise of monopoly power of physicians would be so easily accepted by the insurance carriers. *Arizona v. Maricopa County Medical Soc’y*, 643 F.2d 553, 557 (9th Cir. 1980).

In his *Maricopa County* dissent, Justice Powell reasoned:

On the record before us, there is no evidence of opposition to the foundation plan by insurance companies — or, for that matter, by members of the public. Rather, seven insurers willingly have chosen to contract out to the foundations the task of developing maximum fee schedules. Again, on the record before us, we must infer, that the foundation plan — open as it is to insurers, physicians, and the public — has in fact benefitted consumers by enabling the insurance carriers to limit and to calculate more efficiently the risks they underwrite.

Arizona v. Maricopa County Medical Soc’y, 102 S. Ct. 2466, 2482 (1982) (Powell, J., dissenting); see also Easterbrook, *supra* note 124, at 903 (if buyers readily cooperate in a maximum price arrangement they must perceive benefits; thus, an inquiry into behavior of buyers is valuable evidence in separating cartels from efficiency-increasing maximum price agreements).

²⁴⁰ *Arizona v. Maricopa County Medical Soc’y*, 102 S. Ct. 2466, 2484 n.12 (1982) (Powell, J., dissenting).

²⁴¹ See *supra* notes 185-87 and accompanying text. Justice Stevens noted it appeared like-

efficiency emphasis of the *Broadcast Music* analysis. In *Broadcast Music*, the individual composers could have negotiated with each potential customer,²⁴² but the transaction costs would have been extremely high for both buyers and sellers.²⁴³ The ASCAP and BMI blanket licenses were not perfunctorily labeled as *per se* price fixing — even though they did fix a price for potential competitors' products — because of the potential efficiencies and consequent reduction of costs achieved by the arrangement.²⁴⁴ The arrangement, therefore, did not "facially [appear] to be one that would always or almost always tend to restrict competition and therefore decrease output."²⁴⁵ *Maricopa County* arguably presented less compelling facts regarding the likely inefficient distribution of health care services and high transaction costs absent FMC schedules. The record before the Court, however, did not support a presumption that the FMC maximum reimbursement agreements were "naked restraints of trade with no purpose except stifling of competition,"²⁴⁶ but did reveal a potential for substantial economies in health care insurance.²⁴⁷ Reviewing the state's motion for summary judgment, the Court therefore properly could have assumed that the reimbursement schedules promulgated by the foundations were the most efficient and, indeed, a necessary method for achieving full medical care coverage at reduced insurance premiums.²⁴⁸ Based on such an assumption, the Court should have held that, on the existing record, a *per se* price fixing label was inappropriate. For the Court to have substituted speculation for evidence in *Maricopa County* undermines the reasoning of *Broadcast Music* to the detriment of health care providers, insurers and consumers.

Broadcast Music was only the most recent case in which the Supreme Court looked closely at purported transactional economies as a preliminary inquiry incident to *per se* analysis. In *Continental T. V., Inc. v. GTE Sylvania, Inc.*,²⁴⁹ the Court overruled its previous decision in *United States v. Arnold Schwinn & Co.*²⁵⁰

ly that an insurance company could simply bypass the foundations by canvassing physicians to determine proper reimbursement levels and dealing with the physicians directly. He reasoned that a similar, if somewhat more protracted, physician approval process would occur if each insurer offered a maximum fee schedule to each physician. *Maricopa County*, 102 S. Ct. at 2478 n.28 (emphasis added). Conversely, Justice Powell reasoned that participating insurers presumably wished to utilize the FMC service because, unlike commercial products, the price and quality of professional services are difficult to compare. *Id.* at 2482 n.6 (Powell, J., dissenting).

²⁴² The Court in *Broadcast Music* pointed out that there "was no legal, practical, or conspiratorial impediment to CBS's obtaining individual licenses; CBS, in short had a real choice." *Broadcast Music*, 441 U.S. at 24.

²⁴³ *Id.* at 20-21.

²⁴⁴ *Id.*

²⁴⁵ *Id.* at 19-20.

²⁴⁶ *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963).

²⁴⁷ *Arizona v. Maricopa County Medical Soc'y*, 102 S. Ct. 2466, 2484 (1982) (Powell, J., dissenting).

²⁴⁸ See generally Easterbrook, *supra* note 124 at 891-98.

²⁴⁹ 433 U.S. 36 (1977).

²⁵⁰ 388 U.S. 365 (1967).

In *Schwinn*, the Court articulated a "bright line" *per se* rule of illegality for vertical territorial restrictions imposed by trade manufacturers on distributors and dealers.²⁵¹ The *Schwinn* Court did not, however, find all such non-price restrictions *per se* illegal. Rather, it held that the *per se* rule only applied when the manufacturer had parted title with the product — otherwise, the restrictions were to be evaluated under the Rule of Reason.²⁵² Closely reexamining the *Schwinn* rationale, the *GTE* Court noted that *Schwinn* was a largely unexplained departure from *White Motor Co. v. United States*,²⁵³ where the Court had earlier refused to endorse a *per se* rule for non-price vertical restrictions.²⁵⁴ The *GTE* Court further noted that the *Schwinn* distinction between *per se* and Rule of Reason restrictions had no analytical basis, but instead apparently was premised on the *Schwinn* Court's "unexplained belief that a complete *per se* prohibition would be too 'inflexible.'"²⁵⁵

The *GTE* Court admitted that vertical territorial restrictions reduced intrabrand competition.²⁵⁶ Nevertheless, it reasoned that although competitive economies have social, political and economic benefits, an antitrust policy which failed to take into account market considerations would lack objective benchmarks.²⁵⁷ Thus, relying on scholarly and judicial authority, the Court pointed to several redeeming economic features of the vertical restrictions, the foremost of which was promotion of interbrand competition by allowing the manufacturer to achieve certain distribution efficiencies.²⁵⁸ The Court concluded that any departure from the Rule of Reason standard was to be based on "demonstratable economic effect rather than — as in *Schwinn* — upon formalistic line drawing."²⁵⁹

²⁵¹ *Id.* at 379.

²⁵² *Id.* at 379-80.

²⁵³ 372 U.S. at 253.

²⁵⁴ *GTE Sylvania*, 433 U.S. at 47.

²⁵⁵ *Id.* at 54.

²⁵⁶ *Id.* at 54.

²⁵⁷ *Id.* at 53 n.21.

²⁵⁸ *Id.* at 54-58.

²⁵⁹ *Id.* at 59. Justice Stevens noted that the Court's refusal to examine the economic justifications of the FMC "price fixing" agreements in *Maricopa County* was not inconsistent with the Court's reexamination of the general validity of the *per se* rule rejected in *GTE Sylvania*. *Arizona v. Maricopa County Medical Soc'y*, 102 S. Ct. 2466, 2476 n.19 (1982). It is submitted, however, that it makes little analytic sense to distinguish between the necessity for a careful examination of economic justifications before creating a new *per se* category and a similar need for economic inquiry prior to extending an existing *per se* category to include a novel arrangement with apparent potential for substantial economic utility. See, e.g., Elman, "Petrified Opinions" and *Competitive Realities*, 66 COLUM. L. REV. 625, 627 (1966) (realistic analysis of competitive practices is necessary, not only when question is whether practice is illegal under Rule of Reason, but also when the question is whether existing *per se* categories should be extended to embrace practice); Handler, *Changing Trends in Antitrust Doctrines: An Unprecedented Supreme Court Term — 1977*, 77 COLUM. L. REV. 979, 989 (1977) (after *GTE Sylvania*, courts no longer have to wear "*per se* blinders" in passing upon business restrictions which have redeeming virtues and may help to promote competition).

In his *Maricopa County* dissent, Justice Powell argued that the Court's decision in *Professional Engineers* was also consistent with careful judicial analysis incident to a *per se* characterization.²⁶⁰ Justice Powell pointed out that the engineers failed to have their restraints analyzed under a Rule of Reason because their affirmative public health and safety justifications for a ban on competitive bidding simply confirmed the anticompetitive nature of the agreements.²⁶¹ According to Justice Powell, a careful analysis subsequent to the final illegal price fixing label found no substantial procompetitive efficiencies.²⁶²

In this instance, however, Justice Powell's use of *Professional Engineers* seems somewhat questionable.²⁶³ If the Court did carefully search for significant efficiency justifications, it did so implicitly, for there is certainly no explicit language to that effect in the opinion. Nevertheless, unlike *Maricopa County*, at least the final result is consistent with a proper preliminary analysis. For example, in *Professional Engineers* the case was before the Court on a full trial record which clearly indicated the severity of the agreement's anticompetitive impact.²⁶⁴ Also, the engineers did not argue that the arrangement was either procompetitive or significantly increased economic efficiency.²⁶⁵ Finally, unlike *Maricopa County*, there were no identifiable potentially substantial efficiencies at work which might have outweighed any necessary impact on competition.

In *Maricopa County*, therefore, the Supreme Court had an ideal opportunity both to delineate the parameters of the *per se* rule against price fixing and clarify the proper analysis incident to characterizing an arrangement as within the parameters of the rule. The facts of the case presented the Court with an unfamiliar and complex business practice in which it was not self-evident that the purpose or effect of the challenged agreements was simply to stifle competition. The state of the record was such as to preclude meaningful analysis of the agreements' true competitive impact on the health care industry in relation to its visible potential for achieving significant, cost-saving economic efficiencies to the benefit of providers and consumers. In sum, the Court was in an excellent position to enunciate clear criteria by which the *per se* price fixing label is to be applied. Based upon such criteria, the Court should have remanded the case for a finding by the lower court either that the FMC agreement was indeed within the *per se* price fixing category or that the practice was illegal under a Rule of Reason approach.²⁶⁶

²⁶⁰ *Maricopa County*, 102 S. Ct. at 2483 (Powell, J., dissenting).

²⁶¹ *Id.*

²⁶² *Id.*

²⁶³ Contrary to Justice Powell's assertion, the *Professional Engineers* Court did not determine the engineers' ban on bidding to be illegal because it was a "price fixing" agreement, but rather because it was obviously anticompetitive. *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 692 (1978).

²⁶⁴ *Id.* at 692-93.

²⁶⁵ *Id.* at 693-94.

²⁶⁶ See, e.g., *Arizona v. Maricopa County Medical Soc'y*, 102 S. Ct. 2466, 2485 n.13

IV. A SUGGESTED *PER SE* APPROACH TO THE FMC AGREEMENTS IN *MARICOPA COUNTY*

A. *Flexibility and Per Se — A Not-So-Novel Approach*

Unfortunately, the Supreme Court did not capitalize on the opportunity presented in *Maricopa County*. Indeed, effectively ignoring the holding of its previous decision in *Broadcast Music*, the *Maricopa County* Court did not allude even to the need to characterize the FMC maximum reimbursement agreements as within the *per se* price fixing category. Its failure to do so implies a rigid *per se* concept which elevates legal form over economic proof in the name of judicial efficiency.²⁶⁷ Predictably, the result of such an uncompromising approach in *Maricopa County* was the perfunctory condemnation of a novel and complex arrangement with an identifiable potential for proconsumer efficiencies within a market which has itself clearly failed to contain costs. Nevertheless, in spite of any contrary inferences which might be drawn from the *Maricopa County* Court's rationale, it is submitted that the concepts of judicial flexibility and judicial efficiency need not be mutually exclusive under the *per se* rules. Yet, the *per se* flexibility necessary to reflect economic reality can be maintained, and the apparently inconsistent notions of litigation efficiency and economic efficiency can remain acceptably compatible, only if the judiciary realizes that *per se* categories are not self-defining.²⁶⁸

Thus, it is suggested that in characterizing conduct under the *per se* rules, a realistic, preliminary analysis of the economic impact of a challenged practice is necessary whenever the court has a strong reason to believe that the practice may create substantial²⁶⁹ cost-saving efficiencies otherwise not attainable to the benefit of consumers. As an inquiry consistent with traditional *per se* analysis, however, any additional judicial investigation is justified *only* where such potential for efficiency is initially visible to the court and the court is otherwise unfamiliar with the actual competitive or efficiency effects of the challenged practice. Immediate *per se* condemnation is proper, therefore, whenever the anticompetitive purpose or effect of an agreement is clear — either its anticompetitive nature is self-evident or the record is sufficient to reveal anticompetitive purpose or effect — and there are no apparent off-setting, significant effi-

(1982) (Powell, J., dissenting) (affirmance of district court would not foreclose eventual conclusion on remand that arrangement should be deemed *per se* illegal); *Arizona v. Maricopa County Medical Soc'y*, 643 F.2d 553, 560 (9th Cir. 1980) (Kennedy, J., concurring) (court not foreclosed at later date, when it has more evidence, from concluding FMC schedules constitute *per se* violation).

²⁶⁷ See Bork, *Price Fixing*, *supra* note 122, at 384.

²⁶⁸ See Elman, *supra* note 259, at 627.

²⁶⁹ See, e.g., *Arizona v. Maricopa County Medical Soc'y*, 102 S. Ct. 2466, 2482 (1982) (Powell, J., dissenting) (*per se* inquiry focuses on whether purported economies are substantial and realizable); *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 21 (1979) (blanket licenses substantially lower costs to potential advantage of buyers and sellers); see also Easterbrook, *supra* note 124, at 901 n.45 (courts should disregard insubstantial efficiencies as a basis of distinguishing beneficial maximum price agreements and cartels).

ciency justifications. In such a case, notions of judicial efficiency must outweigh any concern for flexibility and preclude additional litigation costs incurred by searching for possible procompetitive effects or insignificant efficiency gains.²⁷⁰ Moreover, the continued integrity of the *per se* rules requires that any preliminary search for redeeming economic utility not merely encompass the extensive and burdensome analysis mandated by a Rule of Reason approach.²⁷¹ Rather, the costly Rule of Reason analysis is justifiable only when the party attacking a practice as *per se* illegal cannot initially prove, either by means of precedent or other factual proof relevant to the economic consequences of the practice, that the probable purpose or effect of the practice is always or almost always to reduce competition and productive output as opposed to substantially increasing economic efficiencies to the benefit of consumers.²⁷²

Such an approach is hardly novel. The Supreme Court explicitly utilized it in *Broadcast Music*²⁷³ and it is arguable that the Court implicitly adopted a similar approach in *GTE Sylvania* and *Professional Engineers* by closely examining transactional economies incident to *per se* analysis.²⁷⁴ Justice Powell subsequently reiterated the necessity of such a *per se* approach in his dissenting opinion in *Maricopa County*.²⁷⁵ Consistent judicial application would tend to balance more equally the consumer welfare concern of the Sherman Act²⁷⁶ with the litigation efficiency and business predictability notions of the *per se* rules at little additional cost to the judiciary. For, as the Court pointed out in *Broadcast Music*, the characterization of a "price fixing" arrangement as *per se* illegal still "will often, but not always, be a simple matter."²⁷⁷ Admittedly, even the suggested preliminary *per se* inquiry may entail litigation and predictability costs in

²⁷⁰ Easterbrook, *supra* note 124, at 901.

²⁷¹ See *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 19 n.33 (1979).

²⁷² See *id.* at 19-20.

²⁷³ As explained by the *Broadcast Music* Court:

[I]n characterizing . . . conduct under the *per se* rule, our inquiry must focus on whether the effect and, here because it tends to show effect, 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 . . . or instead one designed to "increase economic efficiency and render markets more rather than less competitive."

Id. (citations omitted).

²⁷⁴ See *supra* text accompanying notes 249-64.

²⁷⁵ *Maricopa County*, 102 S. Ct. at 2482-84. (Powell, J., dissenting). Justice Powell argued that *per se* characterization is inappropriate if the challenged agreement achieves for the public procompetitive economies that are otherwise not attainable. *Id.* at 2483-84.

²⁷⁶ See, e.g., *Reiter v. Sonotone*, 442 U.S. 330, 343 (1979) (basic purpose of Sherman Act is consumer welfare); *Topco Assoc.*, 405 U.S. at 621 (Burger, C.J., dissenting) (*per se* rules developed and directed to protection of public welfare); Bork *Legislative Intent and the Policy of the Sherman Act*, 9 J.L. & ECON. 7, 26 (1966) (prevention and creation of efficiency is one means by which consumer welfare is achieved under Sherman Act).

²⁷⁷ *Broadcast Music*, 441 U.S. at 9.

excess of those associated with an overly-expedient *per se* approach of the type utilized by the Supreme Court in *Maricopa County*. Nevertheless, it is submitted that excessive judicial savings, predicated on inflexible *per se* reasoning divorced from economic reality, are themselves too costly to the consumer in light of the recommended standard. The standard serves simply to preclude perfunctory facial condemnation of novel business practices when a court cannot, with reasonable confidence, dismiss its asserted economic benefits.

B. *The Approach Applied To Maricopa County*

In *Maricopa County*, the state had not yet presented evidence sufficient under the suggested approach to warrant a *per se* judgment. The respondent foundations defended their activity primarily on the ground that maximum fee reimbursement agreements were necessary to provide a unique form of cost-effective health insurance otherwise not available to consumers.²⁷⁸ The foundations submitted that the benefits which accrued because of their plans included: 1) a choice of physicians; 2) one hundred percent coverage of medical services, and; 3) lower insurance costs.²⁷⁹ The *Maricopa County* majority conceded that binding assurance of complete coverage as well as the asserted potential for lower insurance premiums could *only* be obtained if the insurer and individual physicians agreed in advance on the maximum fee that the physicians would accept as full payment.²⁸⁰ Furthermore, the Court admitted that physicians may be able to determine more efficiently the appropriate maximum fees to be contained in any FMC-type schedules.²⁸¹ Additionally, it was undisputed that insurers as well as consumers wished to utilize the FMC service.²⁸² Viewing the limited summary judgment record in a light most favorable to the respondent foundations, therefore, it supported an inference that the combined efforts of physicians imposed a meaningful limit on physicians' charges, enabled participating insurers to reduce costs, and thereby saved health care consumers millions of dollars in medical costs.²⁸³

²⁷⁸ Brief for Respondents, at 37-38.

²⁷⁹ *Id.*

²⁸⁰ *Arizona v. Maricopa County Medical Soc'y*, 102 S. Ct. 2466, 2477 (1982).

²⁸¹ *Id.* at 2478. The Court also noted that it was arguable that the existence of a fee schedule makes it easier for insurers to calculate the risks they underwrite and to arrive at appropriate reimbursement of insured claims. *Id.* at 2477 n.25.

²⁸² *Id.* at 2482 (Powell, J., dissenting).

²⁸³ See *supra* note 193.

According to Professor Easterbrook, an inquiry into the potential for substantial cost-saving efficiencies serves to distinguish between a beneficial maximum price arrangement and the reduced output and higher price characteristics of a cartel. Easterbrook, *supra* note 124, at 901. See *supra* notes 221 & 269. If it is impossible to determine whether an agreement has led to an increase in output, however, Professor Easterbrook suggests several other potentially helpful avenues of judicial inquiry as a basis for such a distinction, including the concentration of the sellers' market, the size of the market share of the sellers participating in the agreement and the willingness of buyers to cooperate in the arrangement. *Id.* at 902-03. Likewise, he notes that such an examination would be useful to detect a monopsony — a concentration of buyers in a particular market. *Id.* at 904-05. Professor Easterbrook concludes, based upon his suggested ap-

Under the suggested *per se* approach, since the record thus revealed a potential for substantial cost-saving efficiencies, it was initially incumbent upon the state to show that the FMC agreements were plainly anticompetitive and in fact created no redeeming efficiencies. Although the foundations admitted that they had literally set maximum prices for physicians' services, under the proposed standard this alone is an insufficient evidentiary basis for *per se* price fixing condemnation. Additionally, despite the fact that price competition among physicians participating in the FMC's arguably was reduced by a *maximum* fee schedule, the extent of that competitive impact within the market was neither self-evident nor revealed by the limited record.²⁸⁴ This is particularly true given the Court's lack of precedential experience with the actual economic consequences of similar practices.²⁸⁵ Moreover, it was disputed whether periodic increases in the reimbursement levels were the cause or the result of increases in the prevailing rates for medical care in the relevant markets.²⁸⁶ Clearly, the state had not shown that the purpose or effect of the FMC agreements was to "threaten the proper operation of our predominantly free-market economy."²⁸⁷ Finally, in support of its motion for summary judgment, the state introduced no factual evidence supporting its argument that participating insurers could more efficiently develop the schedules necessary to achieve the apparent cost-savings associated with the FMC plan.²⁸⁸

In sum, under the recommended approach to *per se* analysis, the state in *Maricopa County* did not meet its burden of proving that the FMC agreements were plainly anticompetitive without substantial efficiency justifications. The limited summary judgment record, therefore, did not support the Supreme Court's expedient *per se* condemnation of the maximum fee reimbursement agreements in *Maricopa County*.

CONCLUSION

The *Maricopa County* decision is unprecedented in its clear *per se* condemnation of an agreement among professionals. More surprising, however, was the Supreme Court's out-of-hand rejection of the FMC maximum reimbursement

proach, that the maximum fee reimbursement arrangement in *Maricopa County* was neither a cartel in disguise nor a monopsony. *Id.* at 903 n.50, 904-05. He points out that the argument that maximum price agreements among efficient market incumbents — such as FMC physicians engaged in fee for service practice — may deter entry into a market "is ridiculous when referring to more efficient potential entrants and implausible when referring to entrants that must operate at a certain minimum scale to be efficient. It safely can be disregarded as a source of antitrust concern." *Id.* at 908.

²⁸⁴ See *supra* note 212 and accompanying text.

²⁸⁵ As Justice Powell noted, the "Court cite[d] no case in which a remotely comparable plan or agreement is condemned on a *per se* basis." *Maricopa County*, 102 S. Ct. at 2481 (Powell, J., dissenting).

²⁸⁶ *Maricopa County*, 102 S. Ct. at 2471 n.10.

²⁸⁷ *Broadcast Music, Inc. v. Columbia Broadcasting Sys., Inc.*, 441 U.S. 1, 19 (1979).

²⁸⁸ *Maricopa County*, 102 S. Ct. at 2482 n.6 (Powell, J., dissenting).

agreements on an admittedly limited summary judgment record. Although the challenged agreements in fact fixed prices paid to physicians for medical services, the record supported an inference that the FMC arrangements also achieved substantial cost-saving efficiencies not otherwise attainable to the benefit of health care providers and consumers.

The Court's literal characterization of the agreements as *per se* price fixing was not supported by its recent decision in *Broadcast Music*, especially in light of its inexperience with the economic effects of the maximum fee schedules and the industry in which they were utilized. Although the *per se* concept necessarily involves a trade-off between litigation efficiency and consumer welfare, the Court's approach weighs too heavily in favor of the former at the expense of the latter. In *Maricopa County*, the result of such an approach has made clear the danger of simplistic labelling in complex cases — potentially cost-saving, consumer-oriented arrangements may be prematurely and unnecessarily cast aside. Broad generalizations about certain types of business conduct form the basis of the *per se* rules; however, these generalizations are reasonable only when either the courts have had considerable experience with the adverse economic impact of the conduct they wish to include within an existing *per se* category or the record contains facts sufficient to support an undisputed inference that the challenged conduct is plainly anticompetitive without redeeming efficiency justifications.

It is submitted that *Maricopa County* was prematurely and, therefore, incorrectly decided. According to the *per se* approach suggested by this casenote, as a threshold analysis incident to a *per se* characterization, the Court should have determined whether, despite their necessary impact on price, the FMC maximum reimbursement schedules created redeeming, substantial cost-saving efficiencies beneficial to health care consumers. It is further submitted that the limited summary judgment record in this case together with judicial economic inexperience with the challenged agreements supported such a determination. Accordingly, the FMC agreements should not have been characterized as *per se* illegal price fixing.

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