

NOTE

***UNITED STATES V. BREWBAKER*: JUST HOW PER SE IS THE PER SE RULE IN CRIMINAL ANTITRUST ENFORCEMENT?**

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The Fourth Circuit recently held in *United States v. Brewbaker* that a bid-rigging agreement between horizontal competitors who also interacted with each other vertically as manufacturer and distributor must be analyzed under the Sherman Act using the rule of reason, not the per se rule. This holding is incorrect. The general rule is that bid-rigging agreements are analyzed using the per se rule, and the vertical interaction between the *Brewbaker* parties outside the scope of their bid-rigging agreement should not have altered this general rule. By looking at the entire relationship between the parties to ascertain whether the per se rule or the rule of reason applied, rather than just the relationship between the parties within the allegedly anticompetitive agreement, the court ignored decades' worth of analogous precedent from other circuits and the United States Supreme Court. Further, the court ignored the fact that any procompetitive effects from the vertical interaction between the parties did not mitigate the anticompetitive effects from the horizontal bid-rigging agreement between the parties. The government typically only criminally prosecutes per se illegal schemes, so, in practice, the *Brewbaker* decision will lead to lower prosecution rates within the Fourth Circuit. This, in turn, will harm consumers and taxpayers who often bear the financial burden of increased costs resulting from bid rigging. Considering the country's recent antagonism towards the per se rule more broadly, there is a plausible chance that this holding will be adopted by other circuits, leading to a reckoning for the government's criminal antitrust enforcement.

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INTRODUCTION

Criminal antitrust enforcement relies on a presumption that certain categorically anticompetitive behaviors, including bid rigging, price fixing, and market allocation, are per se illegal. The Fourth Circuit's recent decision in *United States v. Brewbaker*¹ threatens just how "per se" this presumption is.

Enforcing criminal antitrust law is crucial to keeping prices low for consumers. The classic example is two gas stations located across the street from each other. To entice customers to stop at its gas station, gas station A lowers its prices below those of gas station B. When B sees those lower prices and observes that customers are flocking to gas station A, it lowers its own prices to win back those customers' business. In this setup, everyone wins: A and B consistently adjust their prices to stay competitive, and the customers benefit from the lowered prices resulting from this competition. However, if A and B get greedy, they might enter into an agreement whereby both gas stations set their prices at the same higher, inflated price. That way, A and B split the competition evenly and both have a higher take-home pay, but customers lose because they wind up paying more at the pump than if A and B were actively competing for their business. This anticompetitive behavior is illegal under § 1 of the Sherman Act, and it is the government's responsibility to prosecute this behavior.² The ease with which the government can

1. 87 F.4th 563 (4th Cir. 2023).

2. Sherman Antitrust Act of 1890, 15 U.S.C. § 1.

effectively do so has large downstream effects on consumers' everyday costs.

The Fourth Circuit's decision in *Brewbaker* complicates the prosecution of criminal behavior similar to that of gas stations A and B by holding that agreements between competitors who are also engaged in a manufacturer-distributor relationship (*i.e.*, a "dual-distribution relationship") must be analyzed under the rule of reason rather than the per se rule.³ The *Brewbaker* decision is contrary to that of two other circuits, which have held that agreements regarding direct competition where the parties have a dual-distribution relationship are per se illegal.⁴ The mode of analysis (per se rule versus rule of reason) under which antitrust cases are evaluated has a significant impact on how they are litigated.⁵ It is a long-standing U.S. Department of Justice (DOJ) policy that criminal antitrust prosecution is reserved for anticompetitive behaviors deemed to be per se illegal, whereas anticompetitive behaviors analyzed under the rule of reason are left for civil, often private, enforcement.⁶ Thus, in the Fourth Circuit and in any other circuit that might adopt the *Brewbaker* holding in the future, parties entering into agreements as competitors who also interact with each other at different levels of the distribution chain will only be subject to civil suits, and the scope of DOJ criminal prosecution will be significantly narrowed.⁷ Criminal prosecution of Sherman Act violations is crucial for stopping existing anticompetitive behavior and deterring future anticompetitive behavior.⁸ Therefore, consumers in the Fourth Circuit and any circuit that follows suit will feel the negative economic effects of this behavior more acutely.⁹

These dual-distribution relationships have become increasingly common in the digital age with the rise of e-commerce channels, allowing

3. *Brewbaker*, 87 F.4th at 582–83. According to the Fourth Circuit, application of the rule of reason in this situation is due to the potential for procompetitive effects stemming from the vertical aspect of the parties' relationship. *Id.*

4. *United States v. Koppers Co.*, 652 F.2d 290, 291–93 (2d Cir. 1981); *Deslandes v. McDonald's USA, LLC*, 81 F.4th 699, 703–05 (7th Cir. 2023), *cert. denied*, 144 S. Ct. 1057 (2024).

5. See Petition for a Writ of Certiorari at 21, *Brewbaker*, 87 F.4th 563 (No. 23-1365); see also U.S. Dep't of Just., Just. Manual § 7-2.000 (2022) [hereinafter Antitrust Statutes] (describing which antitrust violations are prosecuted criminally versus civilly).

6. Antitrust Statutes, *supra* note 5.

7. Petition for a Writ of Certiorari, *supra* note 5, at 21–23.

8. Donald I. Baker, *The Use of Criminal Law Remedies to Deter and Punish Cartels and Bid-Rigging*, 69 GEO. WASH. L. REV. 693, 697 (2001).

9. See *id.* at 705.

companies to sell the products they manufacture on their own websites.¹⁰ With this increase in dual-distribution relationships and the circuit split created by the Fourth Circuit's holding in *Brewbaker*, the economic stakes are higher than ever for consumers. It is thus increasingly important to understand the current and future implications that the *Brewbaker* decision will have on criminal antitrust prosecution and to understand the proper way to conceptualize dual-distribution relationships.

This Note argues that the *Brewbaker* court incorrectly conceptualized dual-distribution relationships by misapplying per se precedent, leading to the potential exclusion of harmful anticompetitive schemes from criminal prosecution. Part I explains how the per se rule operates within Sherman Act § 1 prosecutions and details the Fourth Circuit's holding and analysis in *Brewbaker*. Part II expands upon the arguments in the DOJ's petition for certiorari and argues that competitor agreements between parties with dual-distribution relationships should be analyzed under the per se rule, not the rule of reason. This is because the proper question when dealing with a dual-distribution relationship is whether the nature of the *agreement at issue* is always anticompetitive, not whether the nature of the parties' relationship as a whole is always anticompetitive. Part III argues that the agreement at issue in *Brewbaker* was a horizontal restraint of trade that is always anticompetitive and thus should have been per se illegal. Part IV argues that the proper avenue for evaluating any procompetitive effects stemming from the vertical relationship between competing parties in a dual-distribution relationship is the ancillary restraints doctrine, not the Fourth Circuit's rule of reason presumption. Lastly, Part V examines the implications of the *Brewbaker* holding on prosecution of parties in dual-distribution relationships and on the per se rule more broadly and explores the possible future of DOJ criminal antitrust enforcement.

I. MODERN STANDARDS FOR ANTITRUST PROSECUTION

Brewbaker was wrongly decided. The bid-rigging arrangement at issue in the case—involving a dual-distribution relationship—was rightfully categorized by the government as a per se violation of § 1 of the Sherman Act. What follows is a brief overview of the Sherman Act and the two common theories under which a § 1 Sherman Act claim can be brought (the per se rule and the rule of reason), the modern-day general rule about which categories of anticompetitive

10. See Charlotte Breuvart & Henry de la Barre, *Dual Distribution in the Digital Age: The European Commission Drafts New Competition Rules*, CPI ANTITRUST CHRON., Apr. 2022, at 3.

behaviors are brought under each theory, and the Fourth Circuit's analysis in *Brewbaker*.

A. *The Sherman Act's Per Se Rule and Rule of Reason*

The Sherman Act is one of our country's core federal antitrust laws.¹¹ In relevant part, § 1 of the Sherman Act holds that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal.”¹² The term “unreasonable,” while not appearing in the text of the Act, is read in: Only unreasonable restraints of trade are illegal.¹³ An unreasonable restraint of trade in violation of § 1 of the Sherman Act is a felony offense.¹⁴

A court can find a restraint of trade unreasonable under two different types of analysis: the per se rule and the rule of reason.¹⁵ Under the per se rule, certain categories of restraints are automatically deemed unreasonable, and thus illegal, because the nature of the agreement “always or almost always tend[s] to restrict competition and decrease output.”¹⁶ “To justify a *per se* prohibition, a restraint must have ‘manifestly anticompetitive’ effects and ‘lack . . . any redeeming virtue.’”¹⁷ In prosecuting per se restraints, the DOJ must prove that the agreement (1) was a restraint of trade (*i.e.*, an agreement that stifles free market competition), (2) was knowingly entered into, and (3) affected interstate commerce.¹⁸ The defendant is not allowed to introduce any

11. Sherman Antitrust Act of 1890, 15 U.S.C. §§ 1–7.

12. *Id.* § 1.

13. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2283 (2018); *The Antitrust Laws*, U.S. DEP’T OF JUST.: ANTITRUST DIV. (Dec. 20, 2023), <https://www.justice.gov/atr/antitrust-laws-and-you> [<https://perma.cc/XV39-E9BL>].

14. 15 U.S.C. § 1.

15. *Am. Express Co.*, 138 S. Ct. at 2283–84.

16. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (quoting *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)); see also *Standard Oil Co. v. United States*, 221 U.S. 1, 64 (1911) (recognizing that some restraints are inherently unreasonable and unlawful without further inquiry); *Am. Express Co.*, 138 S. Ct. at 2283–84 (same). Once a certain category of trade restraint (*e.g.*, horizontal price fixing such as that between gas stations A and B) has been declared per se illegal due to its pervasive anticompetitive effects, any subsequent restraint falling into the same category will automatically be analyzed under the per se rule. See *Leegin*, 551 U.S. at 886–87.

17. *Leegin*, 551 U.S. at 886 (citations omitted) (first quoting *Cont’l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 (1977); and then quoting *Nw. Wholesale Stationers, Inc. v. Pac. Stationary & Printing Co.*, 472 U.S. 284, 289 (1984)).

18. *Antitrust Resource Manual: 1. Elements of the Offense*, U.S. DEP’T OF JUST. (Nov. 2017), <https://www.justice.gov/archives/jm/antitrust-resource-manual-1-attorney-generals-policy-statement> [<https://perma.cc/Y2F7-889M>].

evidence about the reasonableness of the restraint or its economic justifications, such as potential procompetitive effects on the market.¹⁹

On the other hand, in prosecuting restraints under the rule of reason, the government must prove that the restraint is unreasonable in addition to proving the three previously described elements.²⁰ To do this, the government must engage in a factual inquiry into the circumstances of the case and show that the restraint harms competition more than it benefits competition.²¹ This factual inquiry under the rule of reason involves an investigation “into the specific business and market, along with the restraint’s history, nature, and effect, to identify the specific restraint’s actual competitive impact.”²² Under the rule of reason framework, if the government can establish a *prima facie* case, the burden shifts to the defendant to demonstrate procompetitive effects; if those are demonstrated, it then shifts back to the government to show that those effects “could be reasonably achieved through less anticompetitive means.”²³ For categories of restraints not already declared *per se* illegal by the courts, the presumption is that the restraint should be evaluated under the rule of reason.²⁴ The government can overcome this presumption and convince the court to declare a category of restraint *per se* illegal upon a showing of “demonstrable economic effect.”²⁵

B. Application of the Per Se Rule to Categories of Restraints

In the modern era of antitrust law, whether a court analyzes a category of restraint under the *per se* rule or the rule of reason depends in large part on whether the restraint is classified as horizontal or vertical.²⁶ A restraint is horizontal when two direct competitors form an agreement about how they will compete.²⁷ A restraint is vertical when

19. *Id.*

20. *Am. Express Co.*, 138 S. Ct. at 2284.

21. *Id.*

22. *United States v. Brewbaker*, 87 F.4th 563, 573 (4th Cir. 2023).

23. *Am. Express Co.*, 138 S. Ct. at 2284.

24. *Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 726 (1988).

25. *Id.*; see also JEFFREY M. CROSS, ANTITRUST LAW: SECTION 1 OF THE SHERMAN ACT 73 (Kris Markarian ed., 2021) (“[T]he [initial] determination of whether to apply the Rule of Reason or the *per se* rule [to a new category of restraint] often requires some factual analysis to ascertain whether the restraint is designed to increase economic efficiency and render markets more competitive or whether it would always or almost always tend to restrict competition and decrease output.”).

26. *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 893 (2007); *Brewbaker*, 87 F.4th at 571.

27. *Am. Express Co.*, 138 S. Ct. at 2283–84. An example of a horizontal restraint is two gas stations agreeing to both set their price at the same level. See discussion *supra* Introduction.

parties at different levels of the distribution chain (*i.e.*, a manufacturer and a distributor) form an agreement regarding a matter in which they do not directly compete.²⁸ The general rule courts follow is that horizontal restraints are analyzed under the per se rule, while vertical restraints are analyzed under the rule of reason.²⁹ The theory behind this distinction is as follows: While agreements between direct competitors will almost always harm competition and raise downstream prices for consumers, agreements between parties at different levels of the distribution chain might predictably have some procompetitive effects that need to be weighed on a case-by-case basis against the anticompetitive effects to see what the overall effect is on competition and prices for consumers.³⁰ While this is not a perfect rule, the Supreme Court has held that “[f]or the sake of business certainty and litigation efficiency, we have tolerated the invalidation of some agreements [under the per se rule] that a fullblown inquiry might have proved to be reasonable.”³¹

Per se illegal horizontal restraints include market allocation, price fixing, and a subcategory of price fixing known as bid rigging.³² Bid rigging—the restraint alleged in *Brewbaker*—is defined by the Fourth Circuit as “[a]ny agreement between competitors pursuant to which contract offers are to be submitted to or withheld from a third party.”³³ In holding price-fixing and bid-rigging agreements per se unreasonable, the Supreme Court has explained that:

28. *Am. Express Co.*, 138 S. Ct. at 2284. An example of a vertical restraint is a leather goods manufacturer and leather goods retailer agreeing that the retailer will sell the goods at or above a specified minimum price. *See, e.g., Leegin*, 551 U.S. at 881–82.

29. *Am. Express Co.*, 138 S. Ct. at 2283–84. This general rule was established in the 2007 *Leegin* decision. *Leegin*, 551 U.S. at 907. Prior to that decision, the Supreme Court had categorized certain vertical restraints as per se illegal. *Id.* at 887.

30. *Cont’l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 50 (1977); *see* Antitrust Statutes, *supra* note 5.

31. *Arizona v. Maricopa Cnty. Med. Soc’y*, 457 U.S. 332, 344 (1982).

32. *Leegin*, 551 U.S. at 886; *Antitrust Resource Manual: 1. Elements of the Offense*, *supra* note 18.

33. *United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 325 (4th Cir. 1982). Market allocation includes both customer allocation and territorial allocation: Customer allocation is defined as “an agreement among competitors . . . that each will service certain designated customers or classes of customers,” and territorial allocation is defined as “an agreement among competitors . . . to solicit or service customers only within a certain geographic area.” *Antitrust Resource Manual: 2. Identifying Sherman Act Violations*, U.S. DEP’T OF JUST. (Nov. 2017), <https://www.justice.gov/archives/jm/antitrust-resource-manual-2-antitrust-division-field-offices> [<https://perma.cc/9XYF-3TUX>]. Price fixing is defined as “any agreement between competitors to tamper with prices or price levels, or terms and conditions of sale . . . for commodities or services.” *Id.*

The reasonableness of prices has no constancy due to the dynamic quality of business facts underlying price structures. Those who fixed reasonable prices today would perpetuate unreasonable prices tomorrow, since those prices would not be subject to continuous administrative supervision and readjustment in light of changed conditions. Those who controlled the prices would control or effectively dominate the market. And those who were in that strategic position would have it in their power to destroy or drastically impair the competitive system.³⁴

In other words, even if the price agreed upon by competing parties is reasonable one day (*i.e.*, does not make things more expensive for third parties and consumers than it would be without such an agreement), there is no guarantee that this price would stay reasonable.³⁵ The parties' prices would not be controlled by each other's competition and by market forces, so the parties would be free to agree upon a much higher, unreasonable price the next day.

C. United States v. Brewbaker's Application of These Standards

The restraint of trade at issue in *Brewbaker* consisted of a bid-rigging scheme between Contech Engineering Solutions, where Brent Brewbaker was a sales manager, and Pomona Pipe Products.³⁶ Contech was both a manufacturer and a distributor of aluminum pipes, while Pomona was a distributor of aluminum pipes.³⁷ Contech and Pomona both regularly bid on North Carolina Department of Transportation (NCDOT) projects for installing flood-preventing aluminum structures along with a third distributor, Lane Enterprises.³⁸ When Pomona won a bid, it would typically purchase its aluminum pipes from Contech.³⁹ To increase profits, Contech (via Brewbaker) and Pomona entered into an agreement whereby Pomona would communicate its bid price to Contech, and Contech would submit a bid that was a set percentage higher than Pomona's to ensure that Pomona would win the project (unrelatedly, the third bidder, Lane, typically submitted higher bids than both parties, so

34. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 221 (1940).

35. *See Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 647 (1980) (per curiam) ("It is no excuse that the prices fixed are themselves reasonable.").

36. *United States v. Brewbaker*, 87 F.4th 563, 569 (4th Cir. 2023).

37. *Id.*

38. *Id.*

39. *Id.*

it would not win the bids).⁴⁰ Pomona would then purchase its aluminum pipes for any NCDOT project it won from Contech.⁴¹

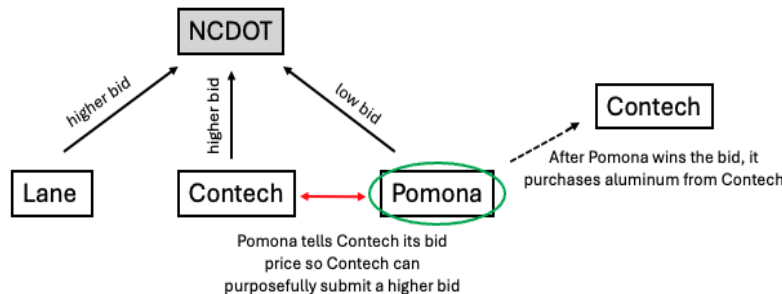


Figure 1. Illustration of the Bid-Rigging Agreement⁴²

The DOJ argued that this scheme constituted bid rigging, as there was an agreement between competitors—Contech and Pomona—pursuant to which contract (*i.e.*, bid) offers were to be submitted to a third party, NCDOT.⁴³ The DOJ alleged that this bid rigging was a *per se* violation of § 1 of the Sherman Act and charged Brewbaker under that theory.⁴⁴ Contech was also charged with the same violation in a separate indictment.⁴⁵ Contech filed a motion, which Brewbaker joined, arguing that the rule of reason should be applied instead because the indictment alleged a vertical restraint where Contech was a supplier and Pomona was a distributor, not a horizontal restraint.⁴⁶ The district court denied the motion.⁴⁷ Contech pleaded guilty, and Brewbaker was convicted at trial for violating the Sherman Act under the *per se* rule.⁴⁸ Brewbaker appealed, arguing that “the indictment should have been dismissed because it did not state a *per se* Sherman Act offense.”⁴⁹

The Fourth Circuit agreed with Brewbaker and reversed his conviction.⁵⁰ The court termed the arrangement between Contech and

40. *Id.* at 569–70.

41. *Id.* at 570.

42. *Id.* at 569–70.

43. *Id.* at 570; *see also United States v. Portsmouth Paving Corp.*, 694 F.2d 312, 325 (4th Cir. 1982) (“Any agreement between competitors pursuant to which contract offers are to be submitted to . . . a third party constitutes bid rigging *per se* violative of 15 U.S.C. section 1.”).

44. *Brewbaker*, 87 F.4th at 570. In charging under the *per se* theory, the DOJ did not include any analysis of the economic effects of the specific agreement. *See id.*

45. *Id.*

46. *Id.* at 571.

47. *Id.*

48. *Id.* at 571–72.

49. *Id.* at 572.

50. *Id.*

Pomona a “hybrid restraint,” which it stated has not yet been deemed per se illegal.⁵¹ It reasoned that the restraint must be classified by looking at the broader relationship between the parties, not just at the relationship of the parties as they relate within the specific agreement, “because agreements that otherwise look identical in form produce different economic effects based on how the parties relate to one another.”⁵² Given the horizontal *and* vertical aspects of the broader relationship between Contech and Pomona, the court concluded that it did not fit into the category of a per se horizontal restraint.⁵³ Therefore, it began the analysis with a presumption for the rule of reason.⁵⁴ The court found that this hybrid category of restraint did not overcome that rule of reason presumption by demonstrable economic effect, so it should be evaluated under the rule of reason.⁵⁵ This is because, according to the court, the relationship would have some procompetitive effects: “By increasing Pomona’s sales of Contech’s aluminum, the restraint could lead to greater competition between Contech and other aluminum manufacturers.”⁵⁶

In June 2024, the DOJ filed a petition for a writ of certiorari in this case,⁵⁷ but the Supreme Court denied the petition in November 2024 without comment or explanation.⁵⁸ Accordingly, the Fourth Circuit’s decision in *Brewbaker* stands.

II. THE PROPER SCOPE OF THE PER SE INQUIRY IS THE RELATIONSHIP BETWEEN THE PARTIES WITHIN THE ANTICOMPETITIVE AGREEMENT

The central dispute in *Brewbaker* was the scope of the inquiry: How broadly should courts look when categorizing a restraint as horizontal or vertical, and therefore subject to the per se rule or the rule of reason? The Fourth Circuit held that the scope should be broad and that courts must look to the nature of the complete relationship between the parties.⁵⁹ In its view, a restraint is per se illegal only if the parties maintain a completely horizontal relationship, meaning that they interact only as competitors.⁶⁰ Meanwhile, the DOJ argued that the proper scope of the inquiry is the nature of the relationship between the parties within the specific agreement alleged to be anticompetitive.⁶¹ Per the DOJ, if parties

51. *Id.* at 576.

52. *Id.* at 577.

53. *Id.* at 576.

54. *Id.*

55. *See id.* at 582–83.

56. *Id.* at 582.

57. Petition for a Writ of Certiorari, *supra* note 5.

58. *United States v. Brewbaker*, 145 S. Ct. 544 (2024) (mem.).

59. *Brewbaker*, 87 F.4th at 577.

60. *See id.* at 583.

61. Petition for a Writ of Certiorari, *supra* note 5, at 13.

are acting horizontally (*i.e.*, as direct competitors) within the agreement at issue, then the restraint is per se illegal, regardless of whether those parties interact vertically elsewhere in their relationship.⁶²

This Note argues that the proper scope is the narrower one proposed by the DOJ. Second and Seventh Circuit precedent, which the *Brewbaker* court ignored, supports this conclusion.⁶³ Furthermore, courts across the country, including the Supreme Court, have limited the scope of their inquiry to the nature of the parties' relationship within the alleged anticompetitive agreement, holding that bid-rigging restraints with subcontract arrangements and hub-and-spoke conspiracies—both of which necessarily include the parties interacting vertically at times—are per se illegal.⁶⁴ These precedents demonstrate why the narrower approach better aligns with the goals of antitrust law.

A. The Second Circuit's Analysis

The Fourth Circuit stands alone in its holding that a court should analyze the relationship between the parties as a whole when categorizing a restraint. On the contrary, the Second Circuit in *United States v. Koppers Co.*⁶⁵ has held that a court should instead analyze the relationship between the parties within the specific agreement at issue.⁶⁶ The reasoning of the Second Circuit (and the Seventh Circuit, to be discussed in the following section) is persuasive.

Similar to *Brewbaker*, in *Koppers*, two companies—Koppers and Dosch-King—regularly submitted bids (and were the only bidders) to the State of Connecticut for the sale and application of tar to resurface roads.⁶⁷ The companies had a dual-distribution relationship: Koppers manufactured and distributed tar, while Dosch-King only distributed tar and sometimes purchased its tar from Koppers.⁶⁸ The companies were located on opposite ends of the state, so they entered into an agreement whereby Koppers would be the designated low bidder for all projects on its side of the state, and Dosch-King would be the designated low bidder

62. *Id.*

63. See generally *United States v. Koppers Co.*, 652 F.2d 290 (2d Cir. 1981) (holding that an agreement regarding direct competition between parties with a dual-distribution relationship was per se illegal); *Deslandes v. McDonald's USA, LLC*, 81 F.4th 699 (7th Cir. 2023), *cert. denied*, 144 S. Ct. 1057 (2024) (same).

64. See *infra* Sections II.C and II.D for an explanation of these concepts.

65. 652 F.2d 290 (2d Cir. 1981).

66. *Id.* at 293; see also *United States v. Apple, Inc.*, 791 F.3d 290, 325 (2d Cir. 2015) (finding a price fixing agreement per se illegal despite the existence of vertical “hub-and-spoke” contracts between the parties to the agreement).

67. *Koppers Co.*, 652 F.2d at 291–92.

68. *Id.* at 292.

for all projects on its side of the state.⁶⁹ To ensure this, the companies regularly met in person and agreed to use the same base costs for their bids; therefore, the company with the lower transportation costs, which would always be the company located on the same side of the state as the project, would submit a lower total bid and win the contract.⁷⁰ A few years into the seven-year conspiracy, Dosch-King began purchasing all its tar from Koppers.⁷¹ The government alleged that the two companies had engaged in bid rigging and market allocation and charged them with per se violations of § 1 of the Sherman Act.⁷² Dosch-King pleaded no contest and was fined.⁷³ Koppers stood trial and was convicted by a jury under the per se theory.⁷⁴

On appeal of the judgment, Koppers argued that the judge had improperly instructed the jury to analyze the restraint under the per se rule, “withdr[awing] the question of reasonableness from the jury by the use of a conclusive presumption . . . that bid rigging and customer allocation are unreasonable *per se*.”⁷⁵ In Koppers’s view, its relationship with Dosch-King was vertical due to its supply of tar to Dosch-King, so the restraint should have been analyzed under the rule of reason.⁷⁶ It analogized its restraint to that in *Continental T. V., Inc. v. GTE Sylvania, Inc.*,⁷⁷ where the Supreme Court applied the rule of reason to a manufacturer-distributor agreement in restraint of trade that had a possibility of increased competition.⁷⁸ The Second Circuit rejected Koppers’ argument and affirmed the judgment, holding that this restraint of trade was correctly categorized as per se illegal and that the judge’s jury instructions were therefore correct.⁷⁹ While the court never explicitly declared the focus of its inquiry as limited to the nature of the agreement, it focused only on the competitor relationship of the parties as it pertained to the bid-rigging and market-allocation agreement, not the more broad dual-distribution relationship between the parties.⁸⁰ As such, the Second Circuit implicitly applied the narrower approach to conceptualizing dual-distribution relationships that was rejected by the Fourth Circuit in *Brewbaker*.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 291.

73. *Id.*

74. *Id.*

75. *Id.* at 293.

76. *Id.* at 296.

77. 433 U.S. 36 (1977).

78. *Id.* at 58–59.

79. *Koppers Co.*, 652 F.2d at 297–99.

80. *See id.* at 296–97.

The Second Circuit distinguished *Continental T. V.* in two ways. First, it focused on the effect of the companies' behavior. While in *Continental T. V.* the kind of restraint might have possibly increased competition, the restraint in *Koppers* did not.⁸¹ "Koppers' obvious and only motive for maintaining Dosch-King as a supplier and bidder . . . was not to promote competition but to raise prices and deceive state and local officials into the belief that Koppers and Dosch-King were bona fide competitors" ⁸² It thus concluded that this agreement had only anticompetitive effects.⁸³ Second, the circuit held that unlike the parties in *Continental T. V.*, the parties here acted as horizontal competitors in the bid-rigging and market-allocation agreement.⁸⁴ This direct competitive relationship was altered only technically (in terms of adding a "vertical" label to the parties' relationship), not substantively (in terms of anticompetitive effect), when Dosch-King began exclusively purchasing tar from Koppers; the bid-rigging and market-allocation agreements were still completely anticompetitive and horizontal.⁸⁵

This reasoning reflects a recognition by the Second Circuit that the harm felt from the bid-rigging and market-allocation scheme by the entity soliciting the bids—the State of Connecticut—was not altered by the vertical portion of the parties' dual-distribution relationship. Regardless of whether the vertical relationship between Koppers and Dosch-King increased competition among tar manufacturers and might have feasibly lowered prices for other purchasers of tar,⁸⁶ these potential effects would not have been felt by the victims of the scheme: the State of Connecticut and Connecticut's taxpayers who fund road resurface projects such as the one at issue. The Second Circuit also recognized that the parties' purpose was no different than the purpose of the parties in any other defined horizontal restraint of trade, leading to the natural conclusion that the parties should be treated the same. Proponents of a broader scope seize onto the theme of *Continental T. V.* that "departure from the rule of reason standard must be based upon demonstrable economic effect rather than . . . upon formalistic line drawing" between horizontal and vertical.⁸⁷ But as *Koppers* demonstrated, considering the vertical relationship was formalistic, as "there is no evidence whatsoever that this

81. *Id.*

82. *Id.*

83. *Id.* at 297.

84. *Id.*

85. *Id.*

86. Although this argument was not made by Koppers, it could conceivably be argued that Dosch-King exclusively purchasing tar from Koppers might have increased competition between Koppers and other tar manufacturers, which might have led to lower prices for other purchasers of tar.

87. *Cont'l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58–59 (1977).

[vertical] change in supply patterns had any effect on the basic non-competitive relationship between the companies.”⁸⁸ In summary, because the parties’ vertical interaction did not alter the anticompetitive effects of the otherwise horizontal bid-rigging and market-allocation agreement, the Second Circuit correctly disregarded the vertical relationship in declaring the scheme per se illegal.

B. The Seventh Circuit’s Analysis

The Seventh Circuit came to a similar conclusion in *Deslandes v. McDonald’s USA, LLC*⁸⁹ to that of the Second Circuit in *Koppers*.⁹⁰ In that case, McDonald’s operated as both a franchisor and a pseudo-franchisee, owning and operating some individual restaurants itself or through wholly owned subsidiaries.⁹¹ McDonald’s organized and entered into a no-poach agreement between all franchise operators across the country whereby they each agreed not to hire workers employed by another franchise, or by the McDonald’s-operated restaurants, for at least six months after the worker’s employment ended.⁹² They also agreed not to solicit each other’s employees.⁹³

Employees filed a civil suit against McDonald’s claiming that the no-poach agreement violated § 1 of the Sherman Act, pleading under both the per se theory⁹⁴ and quick look analysis.⁹⁵ McDonald’s filed multiple dispositive motions in which it argued that the restraint should be properly analyzed under the rule of reason, which plaintiffs did not plead and could not plausibly allege.⁹⁶ The district court agreed with McDonald’s and rejected the plaintiffs’ per se theory.⁹⁷ It concluded that the horizontal elements of the restraint were ancillary to (*i.e.*, subordinate and necessary to support) the larger, vertical agreement that generated procompetitive effects by increasing the productivity of workers and

88. *Koppers Co.*, 652 F.2d at 297.

89. 81 F.4th 699 (7th Cir. 2023).

90. *Id.* at 703.

91. *Id.* at 702. This Note uses the terms franchisee, franchise operator, and franchised restaurant synonymously, as distinct from a franchisor.

92. *Id.*

93. *Id.*

94. Although *Deslandes* is a civil case between private parties, the per se standard applies the same way as in a criminal case. The only difference is the burden of proof required.

95. *Deslandes v. McDonald’s USA, LLC*, No. 17 C 4857, 2022 WL 2316187, at *1 (N.D. Ill. June 28, 2022), *vacated and remanded*, 81 F.4th 699 (7th Cir. 2023). The quick look analysis is a middle ground between the per se rule and the rule of reason and is further discussed later in this Note. See discussion *infra* Section V.C.

96. *Deslandes*, 2022 WL 2316187, at *1.

97. *Id.* at *5.

output of burgers and fries.⁹⁸ The court also found that the plaintiffs did not show that the restraint was unlawful under the rule of reason analysis.⁹⁹ The plaintiffs appealed.¹⁰⁰

The Seventh Circuit held that the district court had dismissed the per se rule too early.¹⁰¹ It concluded that the complaint alleged a valid horizontal restraint and refused to consider any positive effect the no-poach agreement might have had on McDonald's (as the franchisor) and on consumers through increased output.¹⁰² The appellate court explained that because McDonald's and its wholly owned subsidiaries operated their own restaurants and enforced the no-poach agreements against themselves at those restaurants, they operated horizontally with the franchised restaurants within the bounds of the agreement.¹⁰³ In rejecting the district court's ancillary line of reasoning, it found that the district court's approach "treats benefits to consumers (increased output) as justifying detriments to workers (monopsony pricing). That's not right [T]he [no-poach] clause may have nothing to do with the output. A restraint does not qualify as ancillary merely because it accompanies some other agreement that is itself lawful."¹⁰⁴

In this analysis, the Seventh Circuit separated McDonald's vertical agreement with the franchisees, whereby it granted franchises and maintained limited control over them, from its horizontal agreement with the franchisees, whereby it entered into a no-poach agreement with its franchise operator competitors.¹⁰⁵ The no-poach agreement concerned McDonald's acting in its horizontal capacity with the franchisees, not as a franchisor, so that was where the court's per se versus rule of reason inquiry focused. Like in *Koppers*, the court in *Deslandes* also recognized that the potential procompetitive effects of the vertical relationship—expanding the output of food and increasing profits by “capitaliz[ing] on workers’ sunk costs”—did not mitigate or in any way affect the anticompetitive effects of the horizontal no-poach agreement between restaurants—“prevent[ing] workers from reaping the gains from skills they learned by agreeing to work at lower wages at the outset of their employment.”¹⁰⁶ As the economic effects were distinct, the relationships should be, and were, considered distinct as well.

98. *Id.*

99. *Id.* at *7.

100. *Deslandes*, 81 F.4th at 702.

101. *Id.* at 703.

102. *Id.*

103. *Id.*

104. *Id.* at 703–04 (cleaned up).

105. *See id.* at 704.

106. *Id.*

C. Subcontract Arrangements in Bid-Rigging Conspiracies

Although the majority of courts have never explicitly discussed the proper scope by which to analyze price-fixing, bid-rigging, and market-allocation restraints between parties with dual-distribution relationships, they have implicitly analyzed such restraints under the per se rule, with an eye only towards the nature of the agreement at issue between the parties. Specifically in regard to bid rigging, courts have analyzed agreements between two parties competing for bids as per se illegal, even if the agreement included a “subcontract arrangement” where the party designated to win the bid agreed to subcontract part of the project to the party designated to lose the bid as a quid pro quo.¹⁰⁷ These arrangements position the otherwise-horizontal entities vertically: The winning bidder becomes the manager of the losing bidder. Subcontract arrangements are a common characteristic in bid-rigging schemes and are actually considered one of the four main interrelated categories of bid rigging.¹⁰⁸ If one competitor agrees to submit an inflated bid they know will lose or agrees to not bid at all, it is only natural that they will want something in return.¹⁰⁹ That may be a guaranteed win on the next bid, a financial kickback, or a guaranteed offer to subcontract on the bid they purposefully lost.¹¹⁰ Courts often acknowledge the existence of these vertical dynamics within bid-rigging conspiracies and regularly regard them as having no effect on the horizontally anticompetitive agreement between the conspiring parties.¹¹¹

The Fourth Circuit in *Brewbaker* treated the fact that Pomona agreed to purchase all its aluminum for NCDOT projects from Contech as

107. See sources cited *infra* note 111.

108. ANTITRUST DIV., U.S. DEP'T OF JUST., PRICE FIXING, BID RIGGING, AND MARKET ALLOCATION SCHEMES: WHAT THEY ARE AND WHAT TO LOOK FOR: AN ANTITRUST PRIMER 2–3 (2021), <http://www.justice.gov/atr/public/guidelines/211578.htm>. The three other categories are bid suppression, complementary bidding, and bid rotation. *Id.*

109. See Petition for a Writ of Certiorari, *supra* note 5, at 14–15, 22–23.

110. See *id.*

111. See, e.g., *State of N.Y. v. Hendrickson Bros.*, 840 F.2d 1065, 1070 (2d Cir. 1988) (affirming as per se illegal a bid-rigging scheme where one company would award subcontracts to another company as a reward for not bidding on projects); *United States v. Inryco, Inc.*, 642 F.2d 290, 291–92, 295 (9th Cir. 1981) (finding the subcontracts the winning bidder gave the losing bidder as an award for submitting inflated bids to be part of the conspiratorial horizontal agreement, and thus reversing the district court's dismissal of the per se violation as time barred); *United States v. Metro. Enters., Inc.*, 728 F.2d 444, 447–50 (10th Cir. 1984) (affirming the jury's finding that a bid-rigging scheme in which one company handed out subcontracts in exchange for other companies' agreements to submit inflated bids or not to bid was a per se violation of the Sherman Act); *United States v. Anderson*, 326 F.3d 1319, 1322–23 (11th Cir. 2003) (affirming as per se illegal a bid-rigging scheme where the winning bidders awarded lucrative subcontracts as “loser's fees” to the other bidders in the scheme).

creating a vertical relationship that transformed the restraint of trade into a new “hybrid restraint” meriting a rule of reason presumption.¹¹² However, the *Brewbaker* scenario is no different than the subcontract arrangements described in this Section and in *Koppers* and *Deslandes*: Pomona awarded Contech with subcontracts in exchange for Contech submitting inflated bids. The Fourth Circuit’s conception is therefore contrary to the mainstream reasoning that subcontract arrangements within a bid-rigging agreement do not change an otherwise horizontal restraint into a vertical restraint.

D. Hub-and-Spoke Conspiracies

In addition to subcontract arrangements within bid-rigging conspiracies, the Supreme Court has also declared hub-and-spoke conspiracies per se illegal.¹¹³ A hub-and-spoke conspiracy, perhaps more aptly referred to as a hub-spoke-and-rim conspiracy, “involves a hub, generally the dominant purchaser or supplier in the relevant market [who directs the conspiracy], and the spokes, made up of the distributors involved in the conspiracy. The rim of the wheel is the connecting agreements among the horizontal competitors (distributors) that form the spokes.”¹¹⁴ As the Supreme Court sees it, “a hub-and-spoke conspiracy simply incorporates vertical elements in order to facilitate horizontal collusion.”¹¹⁵

112. *United States v. Brewbaker*, 87 F.4th 563, 576, 582–83 (4th Cir. 2023).

113. *United States v. Gen. Motors Corp.*, 384 U.S. 127, 145 (1966) (“There can be no doubt that the effect of the combination or conspiracy here was to restrain trade and commerce within the meaning of the Sherman Act. Elimination, by joint collaborative action, of discounters from access to the market is a *per se* violation of the Act.”).

114. *Howard Hess Dental Lab’ys Inc. v. Dentsply Int’l, Inc.*, 602 F.3d 237, 255 (3d Cir. 2010) (quoting *Total Benefits Plan. Agency, Inc. v. Anthem Blue Cross & Blue Shield*, 552 F.3d 430, 435 n.3 (6th Cir. 2008)).

115. Amanda Triplett, “No More No-Poach”: *An Antitrust Plaintiff’s Guide*, 26 WASH. & LEE J. CIV. RTS. & SOC. JUST. 381, 413–14 (2019) (citing *Interstate Cir., Inc. v. United States*, 306 U.S. 208 (1939)).

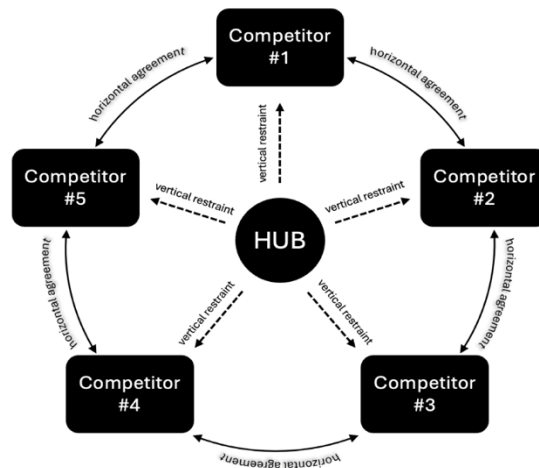


Figure 2. Illustration of a Hub-and-Spoke Conspiracy ¹¹⁶

The Second Circuit's decision in *United States v. Apple, Inc.*,¹¹⁷ discussed by both the Fourth Circuit and the DOJ in its petition for certiorari, is the classic example.¹¹⁸ In that case, Apple developed an e-book marketplace—the iBookstore—on its software products and met with publishing companies to discuss stocking its marketplace with e-books.¹¹⁹ Apple (the hub) proceeded to facilitate a horizontal agreement (the rim) between the publishers (the spokes), where they all agreed to sign contracts with Apple to raise the retail prices of their e-books to prearranged amounts in the iBookstore and in all other e-bookstores, like Amazon.¹²⁰ This agreement would grow the publishers' profit margins and eliminate retail price competition of e-books for Apple.¹²¹ In line with Supreme Court precedent,¹²² the Second Circuit found this price fixing conspiracy per se illegal, both for the publishers and Apple.¹²³ The circuit acknowledged the individual vertical relationships between the publishers and Apple, but affirmed that “the relevant ‘agreement in restraint of trade’ in this case is not Apple’s vertical Contracts with the Publisher Defendants (which might well, if challenged, have to be evaluated under

116. See *Howard Hess*, 602 F.3d at 255.

117. 791 F.3d 290 (2d Cir. 2015).

118. *Id.* at 321–25.

119. *Id.* at 301–02.

120. *Id.* at 305–08.

121. *Id.* at 307–08.

122. See generally *United States v. Gen. Motors Corp.*, 384 U.S. 127 (1966) (holding that an anticompetitive agreement between car manufacturer General Motors (the hub) and three car dealers (the spokes) was per se illegal).

123. *Apple*, 791 F.3d at 325.

the rule of reason); it is the horizontal agreement that Apple organized among the Publisher Defendants to raise ebook prices.”¹²⁴

The Fourth Circuit in *Brewbaker* does not dispute the holding in *Apple*, but it does misinterpret it. In distinguishing *Apple* from the case before it, the Fourth Circuit pointed out that in *Apple*, the vertical entity, Apple, did not participate in the publishers’ horizontal price fixing agreement but merely encouraged it.¹²⁵ Thus, in the Fourth Circuit’s view, the actual parties to the agreement in *Apple*, the publishers, only ever related horizontally.¹²⁶ On the other hand, in *Brewbaker*, the sometimes-vertical entity, Contech, did participate in the alleged bid-rigging agreement, which led the Fourth Circuit to conclude that the parties to the agreement related vertically and horizontally.¹²⁷ On a granular level, this distinction makes sense. However, the *Brewbaker* court ignored the fact that Apple was convicted of per se price fixing alongside the publishers, meaning the Second Circuit must have perceived Apple as part of the price-fixing agreement by way of facilitating it. With this perception in mind, applying the Fourth Circuit’s defined scope (looking at the entire relationship between the parties participating in the agreement), Apple’s vertical relationship with the publishers would have removed the agreement from per se analysis. But that is not what happened in *Apple*; Apple’s vertical relationship did not affect the per se presumption stemming from the otherwise horizontal restraint.¹²⁸ Therefore, the Fourth Circuit’s attempt to distinguish the case falls flat. In both hub-and-spoke conspiracies and subcontract arrangements, vertical elements do not take an otherwise per se illegal horizontal agreement out of the per se analysis. That is where *Brewbaker* got it wrong.

III. THE PARTIES ACTED HORIZONTALLY WITHIN THE AGREEMENT IN *BREWBAKER*

Having determined that the proper scope of the per se inquiry is the relationship between the parties within the alleged anticompetitive agreement at issue, not the relationship between the parties as a whole, the next step is to analyze the relationship between Contech and Pomona in the *Brewbaker* agreement. If the *agreement at issue* between the parties is purely horizontal bid rigging, then that restraint of trade is per se

124. *Id.* at 323.

125. *United States v. Brewbaker*, 87 F.4th 563, 577–78 (4th Cir. 2023).

126. *Id.* at 578.

127. *Id.*

128. *Apple*, 791 F.3d at 325.

illegal; the vertical elements of the parties' overall relationship do not change that analysis.¹²⁹ That is ultimately what happened here.

The facts in *Brewbaker* are nearly identical to those in *Koppers* and *Deslandes*: Contech, Koppers, and McDonald's were in dual-distribution relationships with Pomona, Dosch-King, and the restaurant franchisees, respectively. In addition to competing with the latter group directly, the former group also interacted with the latter group while sitting one level above on the distribution chain. In all three cases, the parties entered into an anticompetitive agreement with each other while acting as direct competitors. Contech and Pomona, both bidding for the same projects, conspired to rig bids; Koppers and Dosch-King, both bidding for the same projects, conspired to rig bids and allocate the geographical market; and McDonald's and the restaurant franchisees, both competing for cheap labor in the restaurants they operated, agreed not to poach each other's employees. Applying the proper scope of inquiry—focusing on how the parties interact within the agreement—the *Koppers* and *Deslandes* courts concluded that the parties were interacting horizontally as competitors within the agreements, and therefore the agreements were per se illegal.¹³⁰ Likewise, the court in *Brewbaker* should have found that Contech and Pomona were interacting horizontally as competitors when they organized the bid-rigging agreement, and therefore the agreement was per se illegal.

It might at first appear that the vertical relationship in *Brewbaker* is harder to disentangle from the horizontal agreement than in *Koppers* and *Deslandes*. That may well be true. Unlike in those cases, in *Brewbaker*, the agreement that Pomona would purchase its aluminum exclusively from Contech (acting as a manufacturer) was offered directly in exchange for Contech's (acting as a distributor) agreement to inflate its bids so Pomona would win every project.¹³¹ Meanwhile, in *Koppers*, Dosch-King did not start purchasing exclusively from Koppers (acting as a manufacturer) until years into the conspiracy,¹³² and therefore it does not appear to have been a quid pro quo. However, as discussed previously, this kind of "subcontract arrangement" is common in bid rigging, and courts without hesitation ignore this type of verticality when analyzing the parties' interactions within the agreement.¹³³

129. "Although this court has never expressly held that bid rigging is a per se violation of Section 1 of the Sherman Act, . . . bid rigging is 'a price-fixing agreement of the simplest kind, and price-fixing agreements are per se violations of the Sherman Act.'" *United States v. Joyce*, 895 F.3d 673, 677 (9th Cir. 2018) (quoting *United States v. Bensinger Co.*, 430 F.2d 584, 589 (8th Cir. 1970)).

130. *United States v. Koppers Co.*, 652 F.2d 290, 297 (2d Cir. 1981); *Deslandes v. McDonald's USA, LLC*, 81 F.4th 699, 703 (7th Cir. 2023).

131. *See Brewbaker*, 87 F.4th at 570.

132. *Koppers Co.*, 652 F.2d at 292.

133. *See discussion supra* notes 107–111.

Given the proper scope, it is clear by looking at the economic effects of the bid-rigging scheme in *Brewbaker* that the district court's per se classification was correct. The Supreme Court classified bid rigging as per se illegal because of its pervasive anticompetitive effects.¹³⁴ In *United States v. Addyston Pipe & Steel Co.*,¹³⁵ Justice Taft explained bid rigging's effect on the entity soliciting the bids:

It is well settled that an agreement between intending bidders at a public auction or a public letting not to bid against each other, and thus to prevent competition, is a fraud upon the intending vendor or contractor The largest purchasers of pipe are municipal corporations, and they are by law required to solicit bids for the sale of pipe in order that the public may get the benefit of competition. One of the means adopted by the defendants in their plan of combination was this illegal and fraudulent effort to evade such laws, and to deceive intending purchasers.¹³⁶

Put simply, bid rigging tricks the entity soliciting bids into thinking it is receiving competitive bids, when, in reality, it is receiving a series of inflated bids. This results in the entity ultimately paying more for the project, and those increased costs are often passed down to consumers in the form of higher prices.¹³⁷ If the entity had known it was not receiving competitive bids, it might have rejected the bids and re-let the project to ensure competitive prices.¹³⁸

The economic effects of the agreement in *Brewbaker* are exactly in line with those of per se horizontal bid rigging. Prior to the agreement, when Contech and Pomona competed to win NCDOT bids, they likely calculated total bid numbers that reflected the following considerations: (1) covering their estimated total costs; (2) making a profit; and (3) being the lowest bidder and winning the contract. This third counterbalancing consideration ensured that NCDOT received bids reflecting the companies' best possible offers for the project. However, when Contech and Pomona agreed that Pomona would bid lower on every contract, Pomona began calculating total bid numbers based only on the first two

134. See *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 293–94 (6th Cir. 1898), *aff'd as modified*, 175 U.S. 211 (1899).

135. 85 F. 271 (6th Cir. 1898).

136. *Id.* at 293–94.

137. ANTITRUST DIV., U.S. DEP'T OF JUST., FEDERAL ANTITRUST CRIME: A PRIMER FOR LAW ENFORCEMENT PERSONNEL 2–3 (2023); see also Baker, *supra* note 8, at 705 (noting how price-fixing conspiracies in the 1950s forced electrical utilities to pay inflated costs for equipment, which were then passed on to consumers through higher rates).

138. See *McMullen v. Hoffman*, 174 U.S. 639, 647 (1899).

considerations, not having to worry about losing the contract to Contech. Contech's inflated bids also only reflected those first two considerations. Without that third counterbalancing consideration, so long as Pomona stayed lower than Lane (which apparently never seemed to be a problem), Pomona could submit a higher bid, still win the project, and take home higher profits. Therefore, without knowing, NCDOT was directly paying for Pomona's increased profits.

The fact that NCDOT is a state agency makes matters worse. Unlike a private company, which might choose to simply eat the costs,¹³⁹ NCDOT is funded by taxpayers and therefore passes on its extra costs to those taxpayers. Contech and Pomona therefore took money directly out of North Carolina taxpayers' pockets and deposited it into their own.¹⁴⁰ And by doing this all in secret, even going so far as to have Contech submit sham bids, they all but guaranteed that NCDOT would not find out and then solicit new, competitive bids. Although the economic impact of the *Brewbaker* scheme has not been measured (and does not need to be measured under the per se analysis), one study of the downstream consumer effects of a "fairly typical bid-rigging scheme" against a federal agency found that the scheme raised prices an average of 23.1 percent during the conspiracy period.¹⁴¹ The economic effects of the agreement in *Brewbaker* on consumers might be similar.

However, the Fourth Circuit held that the potential procompetitive effects of the overall relationship between Contech and Pomona prevailed over any anticompetitive effects, and described those potential procompetitive effects as follows:

The alleged bid rigging (a type of price fixing) could allow Contech to maintain its relationship with Pomona by making sure it never undercut, and thus upset, its distributor. . . . By increasing Pomona's sales of Contech's aluminum, the restraint

139. Although in all likelihood, it would pass these costs on to consumers in the form of higher prices.

140. See *Guidelines for Fighting Bid Rigging in Public Procurement*, ORG. FOR ECON. CO-OP. & DEV., https://www.oecd.org/content/dam/oecd/en/publications/reports/2009/02/guidelines-for-fighting-bid-rigging-in-public-procurement_d4a5f7a8/8cfeafbb-en.pdf [<https://perma.cc/8HHT-FKBE>] (last visited Oct. 26, 2025) ("Bid rigging can be particularly harmful if it affects public procurement. Such conspiracies take resources from purchasers and taxpayers, diminish public confidence in the competitive process, and undermine the benefits of a competitive marketplace." (footnote omitted)).

141. Luke M. Froeb, Robert A. Koyak & Gregory J. Werden, *What Is the Effect of Bid-Rigging on Prices?*, 42 ECON. LETTERS 419, 419, 422 (1993). The study considered a bid-rigging conspiracy for the sale of frozen perch filets to the Department of Defense. *Id.* at 420. The economists used the market cost of fresh perch filets throughout the conspiracy period as an economic marker by which to compare the bid-rigged cost of the frozen perch filets during that same period. *Id.*

could lead to greater competition between Contech and other aluminum manufacturers.¹⁴²

This may well be true. But these procompetitive effects stemming from Pomona's vertical purchase of Contech's aluminum are not within the scope of a per se analysis. As recognized in *Koppers* and *Deslandes*, this is a completely distinct effect that does not mitigate the effect of the rigged bids on NCDOT and North Carolina taxpayers. Outside the context of dual-distribution relationships, this is also generally in line with circuit precedent rejecting similar arguments that distinct procompetitive effects must turn an otherwise per se horizontal restraint of trade into one instead analyzed under the rule of reason.¹⁴³

To be clear, not all agreements between parties with a dual-distribution relationship are horizontal, and thus per se illegal. If Contech and Pomona had maintained the same dual-distribution relationship but entered into an agreement whereby Contech would dictate the minimum price that Pomona could sell the aluminum it purchased from Contech, the restraint would not be classified as per se illegal simply because Contech and Pomona sometimes interacted horizontally as competitors as well. If the parties acted vertically within the agreement, they would be subject to rule of reason analysis.¹⁴⁴ But in this case, the parties acted

142. *United States v. Brewbaker*, 87 F.4th 563, 582 (4th Cir. 2023) (citation omitted).

143. *See, e.g., United States v. Kemp & Assocs., Inc.*, 907 F.3d 1264, 1277 (10th Cir. 2018) (advising the lower court that the rule of reason should not apply to a horizontal customer allocation restraint simply because the allocation might make the market more efficient); *United States v. Marr*, No. 14-CR-00580, 2017 WL 1540815, at *4–5 (N.D. Cal. Apr. 28, 2017), *aff'd sub nom., United States v. Sanchez*, 760 F. App'x 533 (9th Cir. 2019) (applying the per se rule to a horizontal bid-rigging restraint despite defendants' arguments that the prices they artificially suppressed in property foreclosure sales actually helped provide lower-priced houses to other buyers). *But see In re Processed Eggs Products Antitrust Litigation*, 962 F.3d 719, 730 (3d Cir. 2020) (applying the rule of reason in a civil case to a horizontal conspiracy to limit the production of eggs in the face of similar procompetitive effects and a lack of increase in the price of eggs). However, Professor Peter Carstensen convincingly argues that the court in *In re Processed Eggs* mistakenly conflated “two distinct issues: (1) whether there was a conspiracy that violated the law and (2) whether the conspiracy had had any effect on the market,” which would be an issue for the damages stage, not the liability stage. Peter C. Carstensen, *The Third Circuit's Scrambling of Precedent in Processed Eggs*, 68 ANTITRUST BULL. 73, 74, 83 (2023). He points out that the idea of a restraint having procompetitive benefits “is illogical . . . because by definition it has diminished competition.” *Id.* at 83. While some suppressed competition might be socially or economically desirable within another portion of the market, that position is at odds with the fundamental antitrust concept “that competitors must independently determine how they will compete.” *Id.*

144. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 882 (2007).

horizontally within the agreement, so they should have been subject to analysis under the per se rule.

IV. THE ANCILLARY RESTRAINTS DOCTRINE ACCOUNTS FOR POTENTIAL PROCOMPETITIVE EFFECTS IN DUAL-DISTRIBUTION RELATIONSHIPS

The Fourth Circuit reasoned that it could not ignore the possible procompetitive effects stemming from Contech and Pomona interacting vertically, and thus expanded the scope of its analysis to account for that interaction.¹⁴⁵ It presumptively analyzed this new “hybrid restraint” under the rule of reason and found that the presumption could not be overcome by demonstrable economic effect.¹⁴⁶ However, as the DOJ pointed out in its petition for certiorari, the Fourth Circuit was wrong in assuming that a narrower scope of analysis would completely ignore these possible procompetitive effects.¹⁴⁷

Antitrust law includes a framework known as the ancillary restraints doctrine that acknowledges and accounts for situations where “legitimate vertical collaboration between the parties may bear on whether a challenged horizontal restraint is *lawful*.”¹⁴⁸ Pursuant to the ancillary restraints doctrine, “an otherwise per se unlawful horizontal restraint may be lawful if it is ancillary to a legitimate transaction or collaboration and promotes competition overall.”¹⁴⁹ Courts apply this doctrine when a defendant argues that the restraint has an overall procompetitive effect and is therefore not an unreasonable restraint of trade.¹⁵⁰ If the court decides that the horizontal restraint is ancillary (*i.e.*, subsidiary and necessary to support) legitimate collaboration, it will engage in rule of reason analysis and allow evidence of market effects.¹⁵¹ This approach, proposed by the DOJ, is better than the Fourth Circuit’s because it is less “accommodating to antitrust defendants” and more “consistent with the historically disfavored status of practices like collusive bidding.”¹⁵²

As an example, the Supreme Court applied this doctrine in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*¹⁵³ to conclude that a horizontal price fixing restraint should be analyzed under the rule of

145. *Brewbaker*, 87 F.4th at 582–83.

146. *Id.* at 580.

147. *See* Petition for a Writ of Certiorari, *supra* note 5, at 15.

148. *Id.*

149. *Id.*

150. *Id.* at 16.

151. *See id.*

152. *Id.* at 18.

153. 441 U.S. 1 (1979).

reason.¹⁵⁴ The restraint in that case consisted of two companies issuing blanket copyrighted musical composition licenses “at fees negotiated by them” rather than set by competition between individual copyright owners.¹⁵⁵ The Court acknowledged that price fixing is typically per se illegal, but found that these blanket licenses were ancillary to “the integration of sales, monitoring, and enforcement against unauthorized copyright use” because these tasks would be too difficult and cost prohibitive if undertaken individually.¹⁵⁶ It therefore remanded the case to be analyzed under the rule of reason.¹⁵⁷

In this case, the DOJ argued that Brewbaker’s use of the term “ancillary” was insufficient to raise an ancillary restraints doctrine inquiry.¹⁵⁸ In any case, any such argument was forfeited at trial when Brewbaker failed to introduce supporting evidence and request a jury instruction on the matter.¹⁵⁹ The DOJ acknowledged that the Fourth Circuit engaged in a superficial version of the analysis when “not[ing] the possibility that the two firms’ horizontal collusion might have furthered their vertical collaboration as supplier and purchaser of aluminum,” but pointed out that the court did not require Brewbaker—as is required for an ancillary restraints doctrine analysis—to prove “that the horizontal bid-rigging conspiracy was ‘subordinate’ and collateral to that legitimate collaboration and ‘reasonably necessary’ to achieve its procompetitive objectives.”¹⁶⁰

Thus, while the ancillary restraints doctrine would not have moved the bid-rigging restraint in *Brewbaker* into the sphere of rule of reason analysis, this doctrine could be applied in other cases with dual-distribution relationships where the defendant thinks the procompetitive effects of the agreement outweighed and necessitated the anticompetitive effects. If the defendant can make an initial showing that the agreement was ancillary to legitimate collaboration, then the government will have to prove unreasonableness with economic evidence. To harken back to the concerns expressed in *Continental T. V.*, this doctrine avoids “formalistic line drawing”¹⁶¹ better than grouping all dual-distribution bid-rigging agreements in the rule of reason category.

154. *Id.* at 24–25.

155. *Id.* at 4. Blanket licenses “give the licensees the right to perform any and all of the compositions owned by the members or affiliates as often as the licensees desire for a stated term.” *Id.* at 5.

156. *Id.* at 20.

157. *Id.* at 3.

158. Petition for a Writ of Certiorari, *supra* note 5, at 16–17.

159. *Id.* at 17.

160. *Id.* (quoting *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 285, 291 (6th Cir. 1898)).

161. *Cont’l T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 58–59 (1977).

V. POTENTIAL IMPLICATIONS OF THE *BREWBAKER* RULING

The Supreme Court denied the DOJ's petition for certiorari in *Brewbaker*,¹⁶² so the Fourth Circuit's holding stands as the precedential law in Maryland, North Carolina, South Carolina, Virginia, and West Virginia.¹⁶³ The potential effects on antitrust prosecutions within the Fourth Circuit are not hard to imagine—the DOJ will likely avoid criminally prosecuting analogous antitrust schemes where the parties have a dual-distribution relationship in those states, at least under the per se rule.¹⁶⁴ This will increase prices for consumers and taxes for taxpayers. However, what remains unclear is *Brewbaker*'s effect on dual-distribution per se precedent in other circuits, on the per se rule more broadly, and on the DOJ's broader enforcement goals and methods. The potential repercussions discussed in this Part reflect another, more systematic reason why *Brewbaker* was wrongly decided.

A. *Potential Spread to Other Circuits*

Aside from rethinking how to prosecute antitrust schemes within the Fourth Circuit, the most immediate concern for the DOJ—and consumers—is the potential that other circuits might adopt the holding in *Brewbaker*.¹⁶⁵ Prior to the Fourth Circuit's decision, the Second and Seventh Circuits were the only circuits to have decided whether an agreement not to compete between parties in a dual-distribution relationship was per se illegal or subject to the rule of reason.¹⁶⁶ As thoroughly discussed, both circuits found these restraints to be per se illegal.¹⁶⁷ The *Brewbaker* opinion lays out an alternative roadmap of reasoning for still-undecided circuits to follow.

162. *United States v. Brewbaker*, 145 S. Ct. 544 (2024) (mem.).

163. See *FAQs - About the Court*, U.S. CT. OF APPEALS FOR THE FOURTH CIR., <https://www.ca4.uscourts.gov/faqs/faqs-about-the-court> [https://perma.cc/RQ7W-PR9C] (last visited Nov. 13, 2025).

164. Jeffrey (Jeff) D. Martino, Ashley Eickhof, Stephen Loertscher & Byron Tuyay, *United States: Supreme Court Refuses to Review Fourth Circuit's Reversal of DOJ's Criminal Bid-Rigging Conviction*, GLOB. COMPLIANCE NEWS (Nov. 26, 2024), <https://www.globalcompliancenews.com/2024/11/26/united-states-supreme-court-refuses-to-review-fourth-circuits-reversal-of-doj-criminal-bid-rigging-conviction/> [https://perma.cc/Q962-Y4KV]; see Antitrust Statutes, *supra* note 5.

165. See Petition for a Writ of Certiorari, *supra* note 5, at 18–20.

166. See *United States v. Koppers Co.*, 652 F.2d 290, 296–97 (2d Cir. 1981); *Deslandes v. McDonald's USA, LLC*, 81 F.4th 699, 703 (7th Cir. 2023), *cert. denied*, 144 S. Ct. 1057 (2024).

167. See *supra* Sections II.A–B.

No lower court from outside the Fourth Circuit has fully adopted *Brewbaker*'s "hybrid restraint" holding and reasoning yet,¹⁶⁸ but lower courts in undecided circuits have been grappling with this issue for years. *Brewbaker* might be the impetus appellate courts need to provide an answer to these questions.¹⁶⁹ The following three lower court cases are prime examples of this. First, in *In re Mushroom Direct Purchaser Antitrust Litigation*,¹⁷⁰ a district court in the Eastern District of Pennsylvania was presented with a mushroom cooperative consisting of companies that grew mushrooms and several integrated companies that grew, processed, shipped, and distributed the mushrooms.¹⁷¹ The members of the mushroom cooperative were indicted under § 1 of the Sherman Act for organizing a "supply control scheme" where the members agreed to buy mushroom farms and lease them with the lease restriction that the lessees were prohibited from entering the mushroom-growing business.¹⁷² Although the mushroom cooperative members had dual-distribution relationships, the court applied the per se rule, finding that "no secondary agreements with vertically aligned distribution entities were necessary to implement the claimed supply control agreement."¹⁷³ As such, the Eastern District of Pennsylvania adopted the same narrower scope as the Second and Seventh Circuits, focusing only on the horizontal nature of the parties' relationship within the supply control scheme agreement.

168. As of November 6, 2025. In the 2025 case *Doctors Hospital of Laredo v. Cigarroa*, the Western District of Texas partially relied on *Brewbaker* to hold that the rule of reason applied to an agreement between parties with a dual-distribution relationship. 782 F. Supp. 3d 406, 448–50 (W.D. Tex. 2025). Quoting *Brewbaker*, the court wrote that "[t]he only restraints that the Supreme Court has held to be *per se* unreasonable are purely horizontal, or, in other words, are agreements between entities who are *only* related as competitors." *Id.* at 448 (quoting *United States v. Brewbaker*, 87 F.4th 563, 576 n.9 (4th Cir. 2023)). However, this reliance was somewhat superficial, as the court did not apply the same broader scope as in *Brewbaker*, the presence of the vertical relationship between the parties did not immediately lead it to apply the rule of reason. *See id.* Instead, the court looked at both the horizontal and vertical aspects of the relationship and noted that "it is the vertical relationship that plays the larger role here." *Id.* "Because the alleged boycott stems from the parties' vertical relationship, Defendants do not occupy the same level of the market, and so the *per se* rule does not apply." *Id.* (cleaned up). This court's holding thus still seems to be in line with the narrower scope that this Note proposes. *See infra* notes 176–177 and accompanying text. However, given some of the court's wording, it is unclear how the court would have come out if the agreement at issue between the parties was horizontal (*e.g.*, bid rigging) instead of vertical.

169. Ann O'Brien & Emme Tyler, *Chipping Away at Per Se: Is Brewbaker a Harbinger or Abberation?*, A.B.A. (June 5, 2024), https://www.americanbar.org/groups/antitrust_law/resources/newsletters/chipping-away-at-per-se/?login.

170. No. 06-0620, 2015 WL 6322383 (E.D. Pa. May 26, 2015).

171. *Id.* at *5.

172. *Id.* at *2.

173. *Id.* at *16.

In *Floyd v. Amazon.com, Inc.*,¹⁷⁴ a district court in the Western District of Washington adopted the same narrower scope.¹⁷⁵ It held that the rule of reason should apply to an agreement between Amazon and Apple, in which Apple required that Amazon only sell Apple products from Apple-authorized sellers on its marketplace.¹⁷⁶ The court acknowledged that “although [Apple] may compete for the sale of products at a horizontal level” by also selling its own products directly to consumers, “they are vertically situated as manufacturer and reseller under the agreement at issue here. . . . While the Defendants may be horizontally situated in other circumstances, this does not automatically place all their dealings—particularly, their vertical ones—into a per se context.”¹⁷⁷ Neither party appealed. While this case had a different result than *In re Mushroom*, the analysis was the same: The Western District of Washington applied rule of reason not because the parties were in a dual-distribution relationship more broadly, but because the parties were acting vertically within the *agreement* alleged to be anticompetitive.

In contrast, in *2238 Victory Corp. v. Fjallraven USA Retail, LLC*,¹⁷⁸ a district court in the Southern District of New York applied the same broader scope subsequently applied in *Brewbaker*, considering the entire dual-distribution relationship between the parties in deciding whether per se treatment was proper.¹⁷⁹ In that case, Fjallraven was a manufacturer of backpacks and also maintained a retail website where it distributed its backpacks.¹⁸⁰ Fjallraven selected Netrush to be its exclusive distributor of Fjallraven backpacks on Amazon.¹⁸¹ Victory was a third-party distributor (with no relationship to Fjallraven) that purchased Fjallraven backpacks from authorized distributors at wholesale prices and sold the backpacks at lower prices.¹⁸² Victory began selling its supply of Fjallraven backpacks on Amazon as well, which Amazon permitted, but was kicked off the platform after Fjallraven and Netrush filed intellectual property complaints against Victory alleging the sale of counterfeit products.¹⁸³ Victory filed suit against Fjallraven and Netrush, alleging that Netrush and Fjallraven formed a horizontal agreement between competitors to stifle competition—a per se violation of § 1 of the Sherman Act.¹⁸⁴ The court dismissed the complaint due to its per se

174. No. C22-1599, 2023 WL 3891973 (W.D. Wash. June 8, 2023).

175. *Id.* at *1.

176. *Id.*

177. *Id.* at *3 (emphasis omitted).

178. No. 19-cv-11733, 2021 WL 76334 (S.D.N.Y. Jan. 8, 2021).

179. *Id.* at *5.

180. *Id.* at *1, *4.

181. *Id.* at *2.

182. *Id.*

183. *Id.* at *2–3.

184. *Id.* at *4.

theory, broadly declaring that “[w]here a defendant both manufactures and distributes a product, its coordination with its distributors is known as a ‘dual distribution’ arrangement, and is evaluated as a vertical restraint under the rule of reason.”¹⁸⁵ Thus, the Southern District of New York thought that the mere existence of a vertical relationship between parties made any anticompetitive agreement between those parties subject to the rule of reason, regardless of how the parties interacted within that agreement.

B. The Brewbaker Ruling Is Indicative of the Narrowing of the Per Se Rule

The decision in *Brewbaker* comes in the midst of a broader attack on the per se rule and serves as a signal that the scope of the per se rule as we know it might be coming to an end.¹⁸⁶ Reflective of that, in a cross-petition for a writ of certiorari, *Brewbaker* argued that the Sherman Act’s per se rule is unconstitutional under the Fifth and Sixth Amendments.¹⁸⁷ According to *Brewbaker*, “[t]hese *per se* rules take the element of unreasonableness away from the jury. They instruct a jury to ‘conclusively presume’ that any restraint triggering the rule is unreasonable.”¹⁸⁸ The Supreme Court declined to address this issue at the same time it declined to address the DOJ’s appeal.¹⁸⁹ According to one legal analyst, the Supreme Court’s hesitancy to revisit the per se rule “also serves as a warning that, having done its job for more than a

185. *Id.* at *5 (citing *Elecs. Commc’ns Corp. v. Toshiba Am. Consumer Prods., Inc.*, 129 F.3d 240, 243 (2d Cir. 1997)). However, in *Electronics Communications Corp.*, the allegedly anticompetitive agreement was vertical: In an attempt to preserve its role as exclusive distributor, a distributor of a manufacturer’s product threatened the manufacturer upon learning that the manufacturer was considering entering the distribution market. 129 F.3d at 241–43. For reasons unknown, neither of these cases cited to *Koppers*.

186. Eleanor Tyler, *ANALYSIS: SCOTUS Punts, But Sherman Act May Face a Reckoning*, BLOOMBERG L. (Nov. 25, 2024, at 04:00 CT), https://www.bloomberglaw.com/bloomberglawnews/bloomberg-law-analysis/X64FMQA0000000?bna_news_filter=bloomberg-law-analysis#jcite; Adam Weg, *Per Se Treatment: An Unnecessary Relic of Antitrust Litigation*, 60 HASTINGS L.J. 1535, 1538 (2009).

187. *See* Conditional Cross-Petition for Writ of Certiorari at 7, *United States v. Brewbaker*, 87 F.4th 563 (4th Cir. 2023) (No. 24-124).

188. *Id.* at 8 (citing *Arizona v. Maricopa Cnty. Med. Soc’y*, 457 U.S. 332, 344 (1982)).

189. *United States v. Brewbaker*, 145 S. Ct. 544 (2024) (mem.). This Note does not comment on the constitutionality of the per se rule. Rather, this petition is mentioned as an example of an attack on the per se rule. For an in-depth discussion of this issue, see generally Roxann E. Henry, *Per Se Antitrust Presumptions in Criminal Cases*, 2021 COLUM. BUS. L. REV. 114 (2021); James J. Brosnahan & William J. Dowling III, *The Constitutionality of the Per Se Rule in Criminal Antitrust Prosecutions*, 16 SANTA CLARA L. REV. 55 (1975).

hundred years, the Sherman Act may be in for some reevaluation of its own.”¹⁹⁰

These attacks on the per se rule do not stem only from criminal antitrust defendants prosecuted under the per se rule; courts across the country have already significantly narrowed the scope of the per se rule. The first modern attack came in 2007 when the Supreme Court decided *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*¹⁹¹ In that case, the Court rejected the longstanding application of the per se rule to vertical price restraints, finding that because these types of restraints often have procompetitive effects, the economic effects of each restraint must be evaluated.¹⁹² In doing so, *Leegin* established the horizontal-or-vertical question that permeates per se versus rule of reason analysis today.¹⁹³

More recently, the DOJ’s preliminary efforts to prosecute no-poach violations criminally under the per se rule have been thwarted by the courts.¹⁹⁴ Starting in 2016, the DOJ began arguing that no-poach agreements are simply market-allocation restraints (of the labor market rather than of customers or territory), which have long been held per se illegal.¹⁹⁵ However, although the DOJ has had success at the pleading stage and has secured one guilty plea, it has lost all four of the cases it attempted to prosecute criminally under the per se rule at trial.¹⁹⁶ Aware of this failure, the DOJ dismissed its last pending criminal no-poach case in 2023.¹⁹⁷ Although the DOJ insists that they are not giving up,¹⁹⁸ the road ahead seems unsure. One theory accounting for this failure is that courts and juries are skeptical that no-poach agreements are *always* criminal, failing to see how the agreements reduce competition and constitute per se illegal market allocation.¹⁹⁹ Some scholars have suggested that courts and juries would be more comfortable if they were able to consider the actual effects of each agreement.²⁰⁰ So, *Brewbaker*

190. Tyler, *supra* note 186.

191. Bryce J. Jones, II & James R. Turner, *The Fall of the Per Se Vertical Price Fixing Rule*, 13 J. LEGAL, ETHICAL & REGUL. ISSUES 83, 90 (2010); *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877 (2007).

192. Jones & Turner, *supra* note 191, at 90.

193. *Id.* at 83–84.

194. Perry A. Lange, Nana Wilberforce, Lauren Ige & John W. O’Toole, *The State of “No-Poach” Prosecution: Is It Just like Market Allocation After All?*, 38 ANTITRUST 12, 12 (2024). Courts have approved of the per se rule in private, civil no-poach actions. *See, e.g., Deslandes v. McDonald’s USA, LLC*, 81 F.4th 699, 702–03 (7th Cir. 2023), *cert. denied*, 144 S. Ct. 1057 (2024).

195. Triplett, *supra* note 115, at 390–91.

196. Lange, Wilberforce, Ige & O’Toole, *supra* note 194, at 12.

197. *Id.*

198. *Id.* at 15.

199. *Id.* at 12.

200. *Id.*

has simply added to the existing trend of courts requiring investigation into the effects of a restraint.

If the per se question makes its way to the Supreme Court, the current makeup of the Court might be poised either to follow the trend narrowing the per se rule or to declare it completely unconstitutional. Textualism is trending in the Court, and textualist Justices, such as Justice Gorsuch, might argue that the per se presumption is a judicial creation not found in the text of the Sherman Act.²⁰¹ More progressive Justices who have advocated for criminal defendants' jury rights under the Sixth Amendment, such as Justice Sotomayor, might argue that the per se presumption takes the fact finding duty of determining whether an agreement constitutes a restraint of trade away from the jury.²⁰² Although the Court rejected the petition for certiorari in *Brewbaker*, a continuing trend of courts narrowing the scope of the per se rule might prompt the Court to step in.

C. The Future of DOJ Criminal Antitrust Enforcement

It is clear from the *Brewbaker* holding and the Supreme Court's refusal to review the holding that the DOJ must rethink its criminal antitrust enforcement strategy. This will be even more important if other circuits, or the Supreme Court, align with *Brewbaker* rather than *Koppers* and *Deslandes* and narrow the scope of the per se rule.

It is a longstanding DOJ policy to only criminally prosecute per se illegal restraints, leaving restraints subject to the rule of reason to its civil enforcement branch.²⁰³ However, this is a choice; "neither the legislature nor the courts have exempted such arrangements [subject to the rule of reason] from criminal enforcement."²⁰⁴ So, it is possible for the DOJ to bring criminal cases under the rule of reason. However, the DOJ instituted this longstanding policy for good reasons: costs and vagueness concerns. Because rule of reason "analysis is heavily fact-dependent and often comes down to a battle of experts, it cannot be sufficiently clear in advance whether the restraint at issue is unlawful."²⁰⁵ This makes prosecution extremely expensive and potentially inconsistent with the

201. Robert Connolly, The End is Near for the Per Se Rule in Criminal Sherman Act Cases 7–8 (Mar. 20, 2019) (unpublished manuscript), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3356731.

202. *See id.* at 8.

203. Antitrust Statutes, *supra* note 5.

204. Henry, *supra* note 189, at 133.

205. Nicholas Bourtin, Alexander J. Willscher & Sabrina Solow, *Challenging the Constitutionality of the Sherman Act's Sec. 1 Criminal Enforcement*, BLOOMBERG L. (July 2023), <https://www.bloomberglaw.com/external/document/X4B9FDOS000000/litigation-professional-perspective-challenging-the-constitution>.

Due Process Clause due to the arbitrary results it produces.²⁰⁶ Additionally, plaintiffs in civil cases often purposefully plead their cases as per se violations because they cannot satisfy the evidentiary burden (proving market power and anticompetitive effects) of the rule of reason.²⁰⁷ Prosecutors might experience the same burden issues in criminal cases, leading to less successful prosecutions and higher prices continually being passed down to consumers.

Another option would be for the DOJ to continue indicting parties under the per se theory but arguing for the rule of reason in the alternative to anticipate potential rejection of the per se rule. This would avoid the result in *Brewbaker*; there the DOJ only asserted a per se violation in their indictment,²⁰⁸ so when that was rejected by the Fourth Circuit, there was no possibility for review of the Contech-Pomona agreement under the rule of reason. However, if the DOJ had to amass evidence of economic effects for potential rule of reason prosecution, that would undercut the whole purpose of the per se rule as a shortcut for restraints that are, as a class, virtually always anticompetitive.

Another alternative would be for the DOJ to try prosecuting these types of restraints under the “quick look” approach, which is a rarely used middle ground between the per se rule and the rule of reason.²⁰⁹ While the Second Circuit in *Apple* applied the per se rule to the hub-and-spoke conspiracy at issue, it hypothesized that even if the per se rule was inappropriate, the quick look approach, rather than the full rule of reason approach, would be the appropriate method of review.²¹⁰ The Supreme Court conceptualized the quick look analysis in the late seventies and eighties,²¹¹ and articulated it fully in the 1999 case *California Dental Ass’n v. FTC*.²¹² The quick look analysis applies when a restraint is obviously anticompetitive on its face (upon a “quick look”).²¹³ In such a

206. See *id.*; Herbert Hovenkamp, *The Rule of Reason*, 70 FLA. L. REV. 81, 98–99 (2018).

207. Hovenkamp, *supra* note 206, at 102.

208. *United States v. Brewbaker*, 87 F.4th 563, 570 (4th Cir. 2023).

209. *United States v. Apple, Inc.*, 791 F.3d 290, 329–30 (2d Cir. 2015).

210. *Id.*

211. Weg, *supra* note 186, at 1541; *Nat’l Soc’y of Pro. Eng’rs v. United States*, 435 U.S. 679, 692 (1978); *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 117–20 (1984).

212. Weg, *supra* note 186, at 1541; *Cal. Dental Ass’n v. FTC*, 526 U.S. 756 (1999).

213. Jonathan Berman, *The Failure of “Quick Look” Analyses of Antitrust Claims*, 14 AM. U. BUS. L. REV. 79, 89–90 (2024); see also *Cal. Dental Ass’n*, 526 U.S. at 770 (describing that the quick look analysis applies when “an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets”). In *NCAA v. Board of Regents of the University of Oklahoma*, the Supreme Court found that “agreements not to compete in terms of price or output” are anticompetitive on their face.

case, there becomes a legal presumption that the restraint is anticompetitive and the burden shifts to the defendant, who must then justify the conduct by pointing to procompetitive effects that outweigh the anticompetitive effects.²¹⁴ This burden-shifting analysis relieves the plaintiff of having to initially provide an in-depth market analysis to prove the restraint's anticompetitiveness, as would be required in a rule of reason analysis.²¹⁵ However, it is still more accommodating to defendants than the per se analysis, where no evidence of procompetitive effects would be allowed in.²¹⁶

Some legal scholars support this quick look analysis, finding that it balances critiques of the per se rule with fears that a full rule of reason analysis is too costly and time-consuming.²¹⁷ Other scholars recognize its flaws, pointing out that the quick look analysis is rarely applied in practice and does not typically make a difference—either in the result or in terms of cutting cost and time—when it is applied.²¹⁸ Possibly the most important flaw is that it is predicated on judges acting as economists, even though they have no economic training, which leads to inconsistent application of the standard and judges who are cautious about engaging in the analysis in the first place.²¹⁹

This Note is not ignorant of the courts' and scholars' critiques of the per se rule. However, at this moment in time, there does not seem to be a better option for effective criminal enforcement of antitrust laws. As such, the narrowing of the per se rule, reflected in the *Brewbaker* decision, will likely lead to lower rates of antitrust prosecution and result in higher rates of anticompetitive behavior and higher costs for consumers.

CONCLUSION

The Fourth Circuit's holding in *Brewbaker* is incorrect; the bidding scheme at issue should have been analyzed under the per se rule.

468 U.S. at 109 (for example, an agreement between university members of the NCAA limiting broadcasting of their football games to two games per season and prohibiting the universities from selling their team's own broadcast rights).

214. Berman, *supra* note 213, at 89–90.

215. *Apple*, 791 F.3d at 330.

216. *See id.*

217. *See, e.g.,* Weg, *supra* note 186, at 1542; Edward D. Cavanagh, *Whatever Happened to Quick Look?*, 26 U. MIA. BUS. L. REV. 39, 40–41, 55 (2017); Adrianna Exler, *Supreme Court "Quickly" Ends Circuit Split over Reverse Payments Without the Adoption of a "Quick" Analysis: Why the Rule of Reason Is Inferior to the "Quick Look" Rule of Reason*, 11 RUTGERS J.L. & PUB. POL'Y 740, 771 (2014).

218. *See, e.g.,* Berman, *supra* note 213, at 82; Alan J. Meese, *In Praise of All or Nothing Dichotomous Categories: Why Antitrust Law Should Reject the Quick Look*, 104 GEO. L.J. 835, 871–72 (2016).

219. Berman, *supra* note 213, at 114–15.

By looking at the entire dual-distribution relationship between the parties to determine whether a restraint is horizontal or vertical, the court ignored decades worth of analogous precedent from other circuits and the Supreme Court. Further, the decision contravenes the goals of antitrust law by forcing the government to needlessly, and often unsuccessfully, try to prove the anticompetitive effects of lawful party dynamics that have no effect on the anticompetitiveness of the unlawful bid-rigging restraint of trade. Considering the country's recent antagonism towards the per se rule more broadly, there is a plausible chance this holding will be adopted by other circuits, leading to adverse effects for consumers and a reckoning for the DOJ's criminal antitrust enforcement.