SMU Law Review

Volume 62 | Issue 2 Article 9

January 2009

Toward the Reaffirmation of the Antitrust Rule of Per Se Illegality as a Law of Rules for Horizontal Price Fixing and Territorial Allocation Agreements: A Reflection on the Palmer Case in a Renewed Era of Economic Regulation

James F. Ponsoldt

TOWARD THE REAFFIRMATION OF THE ANTITRUST RULE OF PER SE ILLEGALITY AS A LAW OF RULES FOR HORIZONTAL PRICE FIXING AND TERRITORIAL ALLOCATION AGREEMENTS: A REFLECTION ON THE *PALMER* CASE IN A RENEWED ERA OF ECONOMIC REGULATION

*James F. Ponsoldt**

INTRODUCTION

THE application of the rule of per se illegality has been the focal point for a long-standing debate in antitrust law. A case filed in 1985 by a class of law students at a southern law school against the dominant marketer of bar review courses and legal publishing and one of its competitors, which eventually reached the Supreme Court in 1990 and was finally resolved in a 1993 settlement, provides an interesting foundation to reexamine that debate.[1] The current economic collapse, attributed in part to deregulation to an ideological extreme, provides a timely context.

The lower courts which heard *Palmer v. BRG of Georgia, Inc.*[2] refused to apply per se analysis to alleged horizontal price fixing and market allocation as Supreme Court precedent required.[3] The Supreme Court summarily reversed and re-affirmed two historic precedents for which enthusiasm had waned in the lower courts and (in civil cases) in the Executive Branch.

Yet in the immediately following years, we see three different judicial responses to that case. Some courts accepted it and applied it well, particularly in criminal cases. Some courts wiggled, trying to differentiate

---

* J.D., Harvard University; Joseph Henry Lumpkin Professor of Law (Retired), University of Georgia School of Law.

1. *See generally* Palmer v. BRG of Ga., Inc., 498 U.S. 46 (1990) (per curiam). The author was counsel of record for the plaintiffs/petitioners in *Palmer*.

2. *Id.*

3. *See* Palmer v. BRG of Ga., Inc., 874 F.2d 1417, 1324 (1989), *amended by* 893 F.2d 293 (11th Cir. 1990).

their facts to avoid using the per se rule. Other courts simply ignored or misapplied the rule.

Prior to this drama, the Supreme Court and individual Justices had extolled per se rules as providing valuable benefit to the law. The per se rules are based on economic experience, so they are not theoretical test balloons. They aid the courts in efficient functioning. Their use gives clear boundaries for businesses to act within. Perhaps most importantly and intrinsically, they provide for the consistent administration of the law.

Yet despite these per se rules, some lower courts have debated analysis that seems clearly controlled by *Palmer*. And perhaps because of this waffling and ambivalence, the benefits of a per se rule and the careful considerations of the Supreme Court have been frustrated. Of course, the deregulatory push of the Bush Administration has rendered this resulting uncertainty of temporarily historical interest, but it may be time for the pendulum to swing back toward reinvigorating the use of the per se rule.

I. PER SE RULES HAVE AN IMPORTANT ROLE IN LAW

The question that should be asked, and has often been answered by the Supreme Court, is: Why do we have per se violations of the Sherman Act? We know that the per se rule has a tumultuous history, being favored roughly by the courts until the late 1970s. Before discussing the per se rule's importance, a brief history of the development of the modern per se analysis is in order.[4]

In the face of an economic crisis and the Great Depression, as well as with the imprimatur of government approval, oil companies in the late 1930s joined together to prop up oil prices and save their industry.[5] Despite the necessity of the action to save the industry and the stamp of government approval, the Supreme Court condemned the collaboration as per se illegal.[6] This strong message invigorated the per se rule, and the next three decades saw an increasing usage of the rule.[7]

Up until 1977, when the Supreme Court decided *Continental T. V., Inc. v. GTE Sylvania Inc.*,[8] the per se rule was used with relative consistency. The Court found the locality restriction on a local television dealer did

---

4. *See generally* Eleanor M. Fox, *The Future of the Per Se Rule: Two Visions at War with One Another*, 29 WASHBURN L.J. 200 (1990).

5. United States v. Socony-Vacuum Oil. Co., 310 U.S. 150, 210-11, 219, 225-28 (1940).

6. *See Id.* at 225-28.

7. *See, e.g.*, United States v. Topco Assocs., Inc., 405 U.S. 596, 598, 610-12 (1972) (holding horizontal territory allocations, even for a cooperative of small stores, are per se illegal and regaling the Sherman Act as the "Magna Carta of free enterprise"); United States v. Arnold, Schwinn & Co., 388 U.S. 365, 382 (1967) (holding agreements restricting distributors to exclusive territories are illegal per se), *overruled by* Cont'l T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36, 57-58 (1977); Fashion Originators' Guild of Am., Inc. v. FTC, 312 U.S. 457, 464 (1941) (holding boycott of members who used copied fashions illegal).

8. 433 U.S. 36 (1977).

not warrant the use of a per se condemnation, and Justice Powell announced that the "prevailing standard of analysis" was the "rule of reason" and that the per se rule was the exception.[9]

A series of cases since then have redefined the per se rule. In *National Society of Professional Engineers v. United States*, the Society's Code of Ethics had condemned competitive bidding and forbade any of its members from price bidding until selected for a job.[10] The Society tried to justify its position on the basis of safety, as cheaper bridges were inherently unsafe.[11] The Supreme Court opinion condemned the ethics rule and introduced a third category of analysis. Justice Stevens described the first category as per se: "agreements whose nature and necessary effect are so plainly anticompetitive that no elaborate study of the industry is needed to establish their illegality";[12] the second as rule of reason: "agreements whose competitive effect can only be evaluated by analyzing the facts peculiar to the business, the history of the restraint, and the reasons why it was imposed";[13] and the third category, where the restraint is not per se unlawful, but the anticompetitive effect is clear and no elaborate analysis is needed.[14] The Society's ethics rule was condemned under the third mode of analysis.[15]

Soon afterwards, two other cases refined this new era of analysis. In *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, the music industry's blanket licensing for musicians was under attack from one of the customer networks.[16] The language focused on the economics of the agreement and its effect on limiting output. As the agreement allowed for certain "efficiencies," the increased ease of monitoring the music's use for the payment of royalties, and the view that a blanket license was a separate product, then such licenses were not illegal.[17]

Five years later, *NCAA v. Board of Regents of the University of Oklahoma*, set forth this new "quick look" rule of reason.[18] Such a method did not involve a lengthy investigation of the market share or monopoly power, but quickly balanced the anticompetitive effects with the procompetitive effects.[19]

In a case that seemed to threaten any potency left to the per se rule, *Business Electronics Corp. v. Sharp Electronics Corp.*, a vertical agreement to cut off a price discounter was held not to be within the per se

9. *Id.* at 37, 49-50.
10. 435 U.S. 679, 862-83 (1978). The author was a senior trial attorney in the United States Department of Justice and worked on *Professional Engineers* for the Government.
11. *Id.* at 684-85.
12. *Id.* at 692.
13. *Id.*
14. *See id.*
15. *See id.* at 692-93.
16. 441 U.S. 1, 4 (1979).
17. *See id.* at 19-22.
18. 468 U.S. 85, 115-120 (1984). The author served as counsel to the plaintiffs/respondents in the Supreme Court.
19. *See id.*

illegal category unless a specified price was agreed to.[20] This decision narrowed the per se rule for vertical agreements to literal resale price maintenance and also provided lower courts with strong ammunition with which to avoid per se analysis in other categories, including the *Palmer* district and appellate courts.

It was against this economics-induced backlash of cases that several horizontal cases appeared. The first, *FTC v. Indiana Federation of Dentists*, dealt with dentists in a small area of Indiana who refused to send x-rays to insurance companies and formed an ad hoc association to cement their refusal.[21] The insurance company was reviewing x-rays to ensure that the procedures paid for were necessary or the best course.[22] Under a quick look rule of reason, the Court found that the Federation of Dentists had acted illegally.[23] The Court also stated its hesitancy to expand the per se analysis within the area of boycotts.[24] This was not a condemnation of per se rules, but it certainly made per se analysis of other horizontal violations that much more suspect.

In 1990, months before *Palmer*, the Court reaffirmed that competitors' agreements to withhold services for the express purpose of raising prices (or salaries) were per se illegal. In *FTC v. Superior Court Trial Lawyers Ass'n*, a group of overworked and underpaid court-appointed criminal defense attorneys banded together to refuse to provide their services and demand better wages.[25] While Justice Stevens, speaking for the Court, sympathized with the "worthwhile and unpopular" cause, he still condemned the agreement and action as an illegal horizontal restraint of trade and stated that "*per se* rules are, of course, the product of judicial interpretations of the Sherman Act, but the rules nevertheless have the same force and effect as any other statutory commands."[26]

It was within this new-found resurgence that *Palmer* appeared, as well as against a backdrop of confusion. However, per se rules not only carry the force of "statutory command," but they are also deemed to serve four valuable purposes: to promote economic reliability, to allow for ease of judicial administration, to provide predictability of the law for the business community, and, most essentially, to promote the most basic form of justice.

A. Economic Reliability

The essential nature of per se rules is that the subject matter is well known. Courts would be unwilling to condemn something of which they

20. 485 U.S. 717, 726-27 (1988).
21. 476 U.S. 447, 451 (1986).
22. *Id.* at 449.
23. *See id.* at 463-66.
24. *See id.* at 458-59.
25. 493 U.S. 411, 414 (1990).
26. *Id.* at 421, 432-33.

know little. And rightfully so.[27] The reason to use per se rules is familiarity; we know that this arrangement or restraint is patently anticompetitive. The Court has recognized that "[o]nce experience with a particular kind of restraint enables the Court to predict with confidence that the rule of reason will condemn it, [the Court] has applied a conclusive presumption that the restraint is unreasonable."[28] It was clear in *Arizona v. Maricopa County Medical Society* that the Court was considering the type of restraint, and not the industry restrained, when considering the amount of judicial experience.[29] Thus, a court's reasoning that the per se rule does not apply due to lack of judicial experience with an industry is being less than open.

B. Ease of Judicial Administration

Investigations into the anticompetitive effects of an agreement or action are costly. It costs the parties money to hire experts and to litigate. It involves a court's time, a jury's time, and it may be a waste of resources if the per se rule can predict the outcome. Use of the per se rule can avoid "the necessity for an incredibly complicated and prolonged economic investigation into the entire history of the industry involved, as well as related industries."[30]

There is a calculus that can be applied to predict when per se rules are beneficial.

> Per se rules always contain a degree of arbitrariness. They are justified on the assumption that the gains from imposition of the rule will far outweigh the losses and that significant administrative advantages will result. In other words, the potential competitive harm plus the administrative costs of determining in what particular situations the practice may be harmful must far outweigh the benefits that may result. If the potential benefits in the aggregate are outweighed to this degree, then they are simply not worth identifying in individual cases.[31]

Recall Justice Stevens' definition of per se: "*[P]er se* rules are, of course, the product of judicial interpretations of the Sherman Act, but the rules nevertheless have the same force and effect as any other statutory

27. *See* White Motor Co. v. United States, 372 U.S. 253, 263 (1963) (showing that the Supreme Court is unwilling to condemn a vertical territorial restriction as per se illegal without more experience with the subject matter).

28. Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 344, 348 (1982) (finding medical providers who fixed maximum fee schedules to be per se horizontal price fixing).

29. *See id.*

> We are equally unpersuaded by the argument that we should not apply the per se rule in this case because the judiciary has little antitrust experience in the health care industry . . . . [T]he result of this reasoning was the adoption by the Court of Appeals of a legal standard based on the reasonableness of the fixed prices, an inquiry we have so often condemned.

Id. at 349-50.

30. N. Pac. Ry. Co. v. United States, 356 U.S. 1, 5 (1958).

31. United States v. Container Corp. of Am., 393 U.S. 333, 341 (1969) (Marshall, J., dissenting).

commands."[32] Once a proscribed act has been alleged and proven, perhaps a court should not be concerned with differentiating it, as some courts may have done with *Palmer.* The act has been condemned; it increases the efficiency of the courts to follow it.

C. Predictability of the Law for the Business Community

Clear rules are essential to the fluid functioning of society. Businesses need to know what is allowed and what is forbidden. The grey areas may be great for attorneys but difficult for businesses to manage within. If the rules are clear and the definitions well-known, then businesses can act accordingly.[33]

It has been noted that the rule may be clearly stated, but the definition of "price fixing" or "market allocation" may be unclear, providing a false guidance to businesses.[34] However, if a metaphor may be drawn, where the ice is thin, one should not skate closely.

In addition, if the court has had enough experience with a certain category of restraints to label it per se illegal, then the experience should be enough for a clear definition. Price fixing has been defined to be agreements "'formed for the purpose and with the effect of raising'" prices or pricing structures.[35] Market allocation also has been defined:

> One of the classic examples of a *per se* violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition . . . . This Court has reiterated time and time again that "[h]orizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition." Such limitations are *per se* violations of the Sherman Act.[36]

D. Justice is Served by Per Se Rules

As indicated by the language of the opinion, Justice Scalia may not believe in the protection of competition afforded by antitrust rules,[37] instead preferring the language of the University of Chicago article[38] and the protection of efficiency. However, in the article, Justice Scalia has found that per se rules are profoundly important.[39] Per se rules embody justice, which, to Justice Scalia, means fairness. When kings were the law and each different case was decided through the king's sensibilities, the

32. FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 432-33 (1990).
33. *See* Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 354 (1982); *see also* Note, *Fixing the Price Fixing Confusion: A Rule of Reason Approach*, 92 YALE L.J. 706, 710 (1983).
34. *See* Note, *supra* note 33, at 710.
35. Palmer v. BCG of Ga., Inc., 498 U.S. 46, 48 (1990) (quoting United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940)).
36. *Id.* (quoting United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972)).
37. *See* Bus. Elecs. Corp. v. Sharp Elecs. Corp., 485 U.S. 717, 724 (1988).
38. *See generally* Justice Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).
39. *Id.*

results were often capricious and unpredictable, he writes.[40] In today's courts, he likens that kingly prerogative to the "personal discretion to do justice" exercised by some courts.[41]

On the other hand, a democracy such as the United States depends on a general rule of law, as it is *fair*.[42] To punish one person and not another is not equal protection, nor is it justice.

> [T]he trouble with the discretion-conferring approach to judicial law making is that it does not satisfy this sense of justice very well. When a case is accorded a different disposition from an earlier one, it is important, if the system of justice is to be respected, not only that the later case *be* different, but that it *be seen to be so*. When one is dealing, as my Court often is, with issues so heartfelt that they are believed by one side or the other to be resolved by the Constitution itself, it does not greatly appeal to one's sense of justice to say: "Well, that earlier case had nine factors, this one has nine plus one." Much better, even at the expense of the mild substantive distortion that any generalization introduces, to have a clear, previously enunciated rule that one can point to in explanation of the decision.[43]

Justice Scalia draws on that sense of justice throughout the entire essay and draws in the other three purposes for per se rules: economic reliability, ease of judicial administration, and predictability of the law for the business community. As the Supreme Court can review a mere speck of the federal cases, Justice Scalia points out that anyone hoping to close in on "a fully articulated rule of law by deciding one discrete fact situation after another until (by process of elimination, as it were) the truly *operative* facts become apparent—that notion simply cannot be applied to a court that will revisit the area in question with great infrequency."[44]

Besides the inability of the Supreme Court to carve away at cases until the law emerges, Justice Scalia also points out that a predictable or reliable decision is also a just one.

> Rudimentary justice requires that those subject to the law must have the means of knowing what it proscribes . . . . As laws have become more numerous, and as people have become increasingly ready to punish their adversaries in the courts, we can less and less afford protracted uncertainty regarding what the law may mean. Predictability, or as Llewellyn put it, "reckonability," is a needful characteristic of any law worthy of the name. There are times when even a bad rule is better than no rule at all.[45]

---

40. *See id.* at 1175-76.
41. *See id.* at 1176.
42. *Id.*
43. *Id.* at 1178. He compares the search for the "perfect answer" to the competing value of justice, two values of which Justice Scalia obviously thought justice to be the more important. *See id.*
44. *Id.*
45. *Id.* at 1179 (citing KARL N. LLEWELLYN, THE COMMON LAW TRADITION: DECIDING APPEALS 17 (Little, Brown 1960)).

A last essential point Justice Scalia makes is to demonstrate that when a court eschews a per se rule for the totality of the circumstances test, he leaves law behind and becomes a finder of fact.[46]

> To reach such a stage is, in a way, a regrettable concession of defeat—an acknowledgement that we have passed the point where "law," properly speaking, has any further application. And to reiterate the unfortunate practical consequences of reaching such a pass when there still remains a good deal of judgment to be applied: equality of treatment is difficult to demonstrate and, in a multi-tiered judicial system, impossible to achieve; predictability is destroyed; judicial arbitrariness is facilitated; judicial courage is impaired.[47]

To square his argument, Justice Scalia quotes Aristotle to say that "'personal rule, whether it be exercised by a single person or a body of persons, should be sovereign only in those matters on which law is unable, owing to the difficulty of framing general rules for all contingencies, to make an exact pronouncement.'"[48] In the context of the Sherman Act, such an exact pronouncement has been often made. "As we have correctly expressed the test for per se Sherman Act illegality, it is whether the type of conduct in question 'would always *or almost always* tend to restrict competition and decrease output.'"[49]

To be fair, Justice Scalia included a disclaimer which still leaves open a role for "totality of the circumstances" tests, but stressed the importance of per se rules.

> Lest the observations in this essay be used against me unfairly in the future, let me call attention to what I have *not* said. I have not said that legal determinations that do not reflect a general rule can be entirely avoided. We will have totality of the circumstances tests and balancing modes of analysis with us forever—and for my sins, I will probably write some of the opinions that use them. All I urge is that those modes of analysis be avoided where possible; that the *Rule* of Law, the law of *rules*, be extended as far as the nature of the question allows; and that, to foster a correct attitude toward the matter, we appellate judges bear in mind that when we have finally reached the point where we can do no more than consult the totality of the circumstances, we are acting more as fact-finders than as expositors of the law.[50]

Once a per se rule has been announced, what is condemned is condemned with certainty. Its use is not only based on the practical benefits such as judicial ease or predictability. Per se rules, once announced, perform justice and maintain fairness and equality. Both Justices Stevens

46. *Id.* at 1182.

47. *Id.* The judicial courage referred to is the courage a judge may feel in the face of an unpopular but correct decision when he takes refuge in a per se rule; the ability to say "I would do this, but the law is very clear."

48. *Id.* (quoting THE POLITICS OF ARISTOTLE 127 (Ernest Baker trans., Oxford 1946)).

49. *Id.* at 1183 (quoting Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19-20 (1979)).

50. *Id.* at 1186-87.

and Scalia agreed that the use of per se rules should be encouraged, and that lower courts to turning their backs to such rules disrupts both the law and justice.[51]

II. PALMER'S ROUGH RIDE

Palmer may have been a resounding reaffirmation of the per se rules against both market allocation (*Topco Associates*) and horizontal price fixing (*Socony-Vacuum Oil Co.*), but as it rose through the court system, it received nothing but resistance. The baffling refusal to follow sound precedent by both the district courts and appellate courts, with the confusing and novel analysis found in those opinions, showcases the level of resistance or misunderstanding many lower courts hold towards per se rules in antitrust.

In the early 1980s, there were essentially two competitors for bar review courses in Athens, Georgia: Bar Review Group, Inc. (BRG) and Harcourt Brace Janovanovich Legal and Professional Publications, Inc. (HBJ), which operated under the trade name "BAR/BRI." They had become increasingly cutthroat in their pricing and were offering more live lectures and study materials as they competed for a fixed number of law students.[52] This price competition resulted in HBJ losing $45,000 on its Georgia course in 1979.[53] In early 1980, the Chairman of HBJ and the owner of the BRG met in Atlanta and Chicago to discuss the problem.[54] Shortly after a series of lunches, they signed an agreement that gave the newly created BRG of Georgia the exclusive right to use BAR/BRI materials in Georgia, with HBJ withdrawing from Georgia.[55]

With the license agreement between the two competitors came a schedule of "licensing fees" that gave HBJ $100 per new student and 40% of all charges in excess of $350.[56] When this license agreement was drafted, the going rate for the bar review courses was about $150.[57] Immediately after the agreement was signed, posters were placed around the law school

51. *See* FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 432-33 (1990) ("*[P]er se* rules are, of course, the product of judicial interpretations of the Sherman Act, but the rules nevertheless have the same force and effect as any other statutory commands.").

52. Palmer v. BRG of Ga., Inc., No. C85-4377 (N.D. Ga. Jan. 9, 1987) (Order Granting Summary Judgment). The competition was described by Mr. Conviser, the Chairman of HBJ Legal and Professional Publications, as "a grudge match between [HBJ Legal] and Mr. Pelletier," the owner and president of Bar Review Group, Inc. Deposition of Richard Conviser at 36-39, *reprinted in* Brief in Support of Plaintiffs' Motion for Partial Summary Judgment, *Palmer*, No. C85-4377 (N.D. Ga.) (on file with author).

53. *Id.* at 3.

54. Deposition of Ronald O. Pelletier at 39, 57-59, *reprinted in* Brief in Support of Plaintiffs' Motion for Partial Summary Judgment, *Palmer*, No. C85-4377 (N.D. Ga.) (on file with author).

55. License Agreement between BRG of Georgia, Inc. and Harcourt Brace Jovanovich Legal and Professional Publications, Inc. (Apr. 22, 1980) (on file with author).

56. *Id.*

57. Palmer v. BRG of Ga., Inc., No. C85-4377 (N.D. Ga. Jan. 9, 1987) (Order Granting Summary Judgment) (on file with author).

that proclaimed "BRG & BAR/BRI = the best of both worlds."[58] The posters also announced the new price for this combined course would be over $400.[59]

The vast majority of law students in Athens, Georgia subscribed to either BRG or BAR/BRI, and they combined in a class action lawsuit to challenge the combination of the two competitors and the rise in price.[60] This first case settled, and the original license agreement was altered so that it was no longer exclusive.[61] Despite the altered written agreement, the price and the competitive environment did not change, and a second class action suit was filed on November 4, 1985.

A. The District Court

The complaint charged the defendants with nine counts of violating the Sherman Act, 15 U.S.C. §§ 1-2. The first four counts asserted violations of section 1 of the Sherman Act, alleging a price-fixing cartel, market allocation, boycott/concerted refusal to deal, and unreasonable joint venture.[62] The remaining counts alleged violations of section 2 of the Sherman Act. They charged the defendants with attempting to monopolize or conspiring to monopolize bar review service in Georgia and nationally. They also charged the defendants with monopolization in Georgia.[63]

The defendants moved for summary judgment, based mostly on the fact that the license agreement was no longer exclusive and, hence, competition was not barred. The summary judgment was also based on the fact that no specific price was mentioned.[64]

The plaintiffs filed a cross-motion for partial summary judgment based on the theory of horizontal price fixing as being per se illegal. Characterizing the defendants' actions as agreeing "to stop competing and [agreeing] on a method to stabilize and raise prices," the plaintiffs concluded that such arrangements were horizontal price fixing and per se illegal.[65] As support, they cited *Catalano, Inc. v. Target Sales, Inc.*;[66] *National Society of Professional Engineers v. United States*;[67] and *United States v. Socony-Vacuum Oil Co.*[68] They also cited a case with similar factual

58. Deposition of Ronald O. Pelletier, *supra* note 54, at Ex. 10.
59. Palmer v. BRG of Ga., Inc., No. C85-4377 (N.D. Ga. Jan. 9, 1987) (Order Granting Summary Judgment) (on file with author).
60. *Id.* (citing Edwards v. BRG of Ga., Inc., No. 82-13-Ath (M.D. Ga. June 14, 1984) (on file with author)).
61. *See* License Agreement between BRG of Georgia, Inc. and Harcourt Brace Jovanovich Legal and Professional Publications, Inc. (Oct. 5, 1982) (on file with author).
62. Palmer v. BRG of Ga., Inc., No. C85-4377 (N.D. Ga. Jan. 9, 1987) (Order Granting Summary Judgment) (on file with author).
63. *Id.* at 6.
64. Plaintiffs' Brief in Opposition to Defendants' Motion for Summary Judgment, *Palmer*, No. C85-4377 (N.D. Ga.) (on file with author).
65. Brief in Support of Plaintiffs' Motion for Partial Summary Judgment, *Palmer*, No. C85-4377 (N.D. Ga.) (on file with author).
66. 446 U.S. 643 (1980).
67. 435 U.S. 679 (1978).
68. 310 U.S. 150 (1940).

circumstances, *Citizen Publishing Co. v. United States*.[69] In that case, two newspapers agreed to stop competing in advertising and circulation, keeping their separate identities but pooling profits.[70] This was done through a joint management agreement, as compared to the *Palmer* defendants' license agreement.[71]

The court granted the defendants' summary judgment on eight of nine counts. In a most interesting fashion, the section 1 claims of per se illegality were disregarded. "The court finds that the arrangement between BRG and Harcourt does not fit within any recognized category of per se liability."[72] While the court recognized that per se liability could occur,[73] it refused to recognize that horizontal price fixing could occur without a specific price being agreed on.[74] "While it is true that the agreement of two competitors to 'pool' their products may exert an upward influence on price, such an agreement is not inherently anticompetitive, and in a given setting could actually be precompetitive."[75]

The district court also refused to recognize that HBJ's withdrawal from competing in Georgia in return for a share of the profits constituted market allocation. Despite the original license agreement prohibiting competition between the two parties, both within Georgia and nationally,[76] the court ruled that neither the original agreement nor the modified agreement allocated markets.[77] The basis for this ruling was that since BRG had never competed outside of Georgia, and since HBJ had withdrawn from Georgia, the only market that both defendants had claimed was the state of Georgia. Since the two defendants had not carved up the state of Georgia amongst themselves, the court ruled that there was no market allocation between the defendants.[78]

The district court granted summary judgment on all counts but the price fixing claim, deferring that ruling for thirty days. The plaintiffs were to provide proof sufficient to survive a rule of reason test, showing an

---

69. 394 U.S. 131 (1969).
70. *Id.* at 133-34.
71. *See id.* at 133.
72. Palmer v. BRG of Ga., Inc., No. C85-4377 (N.D. Ga. Jan. 9, 1987) (Order Granting Summary Judgment) (on file with author).
73. *Id.* at 7. The court specifically cited four cases that illustrated "categories" of per se liability: *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940), which illustrated price fixing; *United States v. Topco Assocs., Inc.*, 405 U.S. 596 (1972), which illustrated market and customer allocation; *Fashion Originators' Guild of America v. FTC*, 312 U.S. 457 (1941), which illustrated boycotts and concerted refusal to deal; and *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), which illustrated unreasonable joint venture.
74. *Id.* at 8.
75. *Id.* The effect of this agreement certainly did have an upward pressure on price, and the district court did acknowledge that the prices "skyrocketed" after the license agreement. *Id.* at 4.
76. License Agreement between BRG of Georgia, Inc. and Harcourt Brace Jovanovich Legal and Professional Publications, Inc. (Apr. 22, 1980) (on file with author). Section 13 contains a covenant not to compete and section 1 grants exclusive license of BAR/BRI materials to BRG of Georgia for courses within Georgia. *Id.*
77. Palmer v. BRG of Ga., Inc., No. C85-4377 (N.D. Ga. Jan. 9, 1987) (Order Granting Summary Judgment) (on file with author).
78. *Id.*

anticompetitive effect in relevant geographic and product markets.[79] To prove an anticompetitive effect in a relevant product market, the plaintiffs offered evidence from the record showing that the original contract was facially anticompetitive and that the price of the product rose precipitously after the contract was signed.[80] Plaintiffs also provided an affidavit from a student who stated that where BAR/BRI had competition, in his case the state of Washington, the prices were much lower.[81]

The court dismissed any reference to the original contract, since the modified contract deleted the offensive exclusivity terms.[82] Because BRG had been using free materials from West Publishing up to the contract date and now had to pay for those materials, the District Court attributed BRG's higher prices to that new cost. The court also dismissed the student affidavit as insignificant. Competing testimony claimed that the prices of Washington bar review courses were nearly the lowest in all of the forty states in which HBJ operated. This supposedly offset the student's testimony.[83]

To prove an anticompetitive effect in a relevant geographic market, the plaintiffs offered the expert testimony of an economist from Georgia State University. He defined the relevant geographic market as "Athens, Georgia during the winter academic term of law school."[84] The court found that the area stated was too small, with the state as a whole being more appropriate.[85]

Based on this analysis, the district court granted the defendants' last motion for summary judgment. The district court had read the facts in a skewed, distorted fashion to find that there was no price fixing, despite a quite obvious cause and effect relationship. It also read the facts in a distorted fashion to find that no allocation of markets or customers had occurred, despite a facial attempt within the initial licensing agreement to delineate Georgia to BRG and the rest of the country to HBJ. The plaintiffs hoped to cure such a skewed reading of the facts by appealing to the Eleventh Circuit Court of Appeals.

B. The Appellate Court

1. *The Majority Opinion*

The law students' appeal focused on the refusal by the district court to certify the class, the failure of the district court to properly employ per se liability for price fixing, market allocation, and conspiracy to monopolize, and the improper application of structural tests for the horizontal price

79. *Id.* at 9.
80. Palmer v. BRG of Ga., Inc., No. C85-4377 (N.D. Ga. Jul. 8, 1987) (Order Granting Summary Judgment and Denying Motion for Reconsideration) (on file with author).
81. *Id.*
82. *Id.* at 4.
83. *Id.* at 5.
84. *Id.* (quoting Dr. William Henry of Georgia State University).
85. *Id.* at 6.

fixing claim.[86]

The appellate court responded to the appeal with a largely deaf ear, crediting the district court as having properly employed the per se rule of horizontal price fixing. The dissent by Judge Clarke found the district court and the majority to be largely misstating the law.

The majority, reading *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*[87] to its fullest extent, required the plaintiff to prove that the inference of conspiracy was more reasonable than the possibility of independent action.[88] They also drew from *Standard Oil Co. v. United States*,[89] requiring the plaintiff, under a per se theory of liability, to prove the defendant had an anticompetitive effect in both relevant geographic and product markets.[90]

Simply repeating the district court's flawed analysis, the appellate decision found that BRG's and HBJ's conduct did not fit into any pigeonhole category for per se liability. The appellate court accepted the defendants' claim that the license agreement created a vertical supplier-retailer relationship, which did not require a per se analysis.[91] In fact, the Eleventh Circuit stated that "[t]he district court's analyses of these issues are thorough and legally sound."[92]

Based on the district court's findings, the appellate court agreed that the license agreement did not state a specified price and, therefore, was not per se price fixing. The court even cited *Socony-Vacuum Oil Co.*[93] for this, despite the fact that *Socony* broadly condemned *any* tampering with price structures.[94]

It also agreed with the district court that this was not per se market allocation, finding that HBJ and BRG were not horizontal competitors and that "the agreement [was] not a 'naked agreement' between competitors to allocate the market."[95] The Eleventh Circuit also echoed the district court, finding that since BRG and HBJ had not divided a market in which both had done business, namely Georgia, there was no market allocation to even consider.[96] The court held that two businesses that, prior to the agreement, were tooth-and-tooth, blood-drawing competitors were not horizontal competitors.[97]

86. Brief for Appellants, Palmer v. BRG of Ga., Inc., No. 87-8804 (11th Cir. Feb. 2, 1988) (on file with author).

87. 475 U.S. 574 (1986).

88. Palmer v. BRG of Ga., Inc., 874 F.2d 1417, 1422 (11th Cir. 1989), *rev'd*, 498 U.S. 46 (1990).

89. 337 U.S. 293 (1949).

90. *Palmer*, 874 F.2d at 1422-23.

91. *Id.* at 1424.

92. *Id.* at 1423-24.

93. *Id.* at 1424.

94. *See* United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940).

95. *Id.*

96. *Id.*

97. *See id.*

2. *The Dissent*

Judge Clarke roundly dissented. His first point of contention was with the majority's reading of *Matsushita*. While this opinion occurred before *Eastman Kodak Co. v. Image Technical Services, Inc.*,[98] Judge Clarke limited *Matsushita*'s pro-defendant holding to its facts: "Both *Matsushita* and *Monsanto* presented the Court with the difficult task of defining the proper evidentiary standard for determining under what factual circumstances an illegal antitrust conspiracy may be inferred from parallel conduct and other circumstantial evidence where direct evidence of conspiracy is lacking."[99]

Judge Clarke continued: "Both *Matsushita* and *Monsanto*, however, are distinguishable from the instant action. Neither case involved a consumer action based upon well-established horizontal *per se* and rule of reason theories where direct evidence establishes an explicit written agreement between two competitors allocating markets and interfering with independent price setting."[100] Rather than being blind to the reality of the agreement between BRG and HBJ, Judge Clarke correctly read *Matsushita* to be inapt to cases that present direct evidence of an agreement. He further recognized the license agreement to be direct evidence of an agreement to allocate markets and fix prices.[101] From this factual revelation, Judge Clarke was able to make three important points: that HBJ and BRG were horizontal competitors, that market allocation had occurred that was per se illegal, and that price fixing had occurred that was per se illegal.

HBJ and BRG of Georgia had argued that by HBJ's withdrawal from Georgia, the relationship shifted from that of horizontal competitors to a vertical supplier/retailer relationship.[102] While that argument convinced the district court and the Eleventh Circuit majority, Judge Clarke found that argument to be "disingenuous and meritless."[103] He saw the two bar review companies as at least potential competitors, which the license agreement alone barred from actual competition.[104] He feared the majority's rule would nullify the per se rule, since potential competitors could cloak their illegal agreement as being a vertical contract and escape antitrust liability.[105] "Instead, a court must view an arrangement's eco-

98. 504 U.S. 451 (1992).

99. Palmer v. BRG of Georgia, Inc., 874 F.2d 1417, 1431 (11th Cir. 1989), *rev'd*, 498 U.S. 46 (1990) (Clarke, J., dissenting) (citing Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 494 (1989)).

100. *Id.*

101. *Id.* at 1432 ("The district court's analysis of the plaintiffs' *per se* claims is contrary to well-established antitrust case law. Under binding Supreme Court precedent, the 1980 agreement between HBJ and BRG falls within one of two recognized *per se* categories: market allocation and price-fixing. The district court, however, misapplied the proper test on both claims.").

102. *Id.*

103. *Id.*

104. *Id.* at 1432-33.

105. *Id.* at 1433.

nomic substance rather than its form."[106]

Since the two former competitors could now be seen for the constrained competitors they really were, the other two points Judge Clarke made were easily reached. He cited *Topco Associates* as "[w]ell-established case law" that makes allocation of markets or sub-markets by competitors per se illegal.[107] Though the majority and the district court required per se unlawful market allocation to involve competitors having previously competed within the same market, Judge Clarke found no basis in law for that requirement.[108] The dissent further stated that BRG and HBJ "[e]ach agreed not to compete in the other's respective market."[109] Judge Clarke would have labeled that agreement as per se unlawful market allocation.[110]

Judge Clarke also saw the agreement as per se unlawful price fixing, unconvinced by the argument that since no price had been specified in the license agreement, it did not fit within the per se illegal category.[111] Citing *Socony-Vacuum Oil Co.*, Judge Clarke found clear law that made even indirect effects on pricing illegal.[112] He found further indirect effects, such as agreements on the granting of credit[113] and agreements not to bid competitively,[114] that had been condemned as illegal.

In contrast with those indirect effects, the dissent characterized the BRG-HBJ agreement as having a directly inflationary effect on prices.[115] In order for any revenue sharing to begin, the price had to be above $350, a price far above the price of a bar review course when the agreement was entered into.[116] The agreement also facially eliminated any incentive to compete: any competition would reduce the revenue resulting from the license agreement, while HBJ could not even compete using its own materials, as they had been exclusively licensed to BRG.[117] This agree-

106. *Id.*

107. *Id.* (citing United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972)).

108. *Id.* at 1434. In *Topco Associates*, a cooperative of small grocery stores had allocated territories among its members to prevent competition on the cooperative store brands. Judge Clarke pointed out that "[t]he defendants in *Topco* did not divide a market in which they had previously competed; they simply agreed to allocate markets." *Id.* Market division was thus "simply a subset of market allocation both of which are *per se* antitrust violations." *Id.*

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.* at 1434-35. "[U]nder the Sherman Act a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging, or stabilizing the price of a commodity in interstate or foreign commerce is illegal per se." *Id.* (quoting United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940)).

113. *Id.* at 1434 n.21 (citing Catalano, Inc. v. Target Sales, Inc., 446 U.S. 643 (1980) (finding an agreement between beer wholesalers to not grant credit indirectly affects price and is thus illegal per se)).

114. *Id.* (citing Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 692 (1978) (holding an agreement by an association that prevents its members from bidding competitively is illegal on its face)).

115. *Id.* at 1435.

116. *Id.*

117. *Id.*

ment was, in Judge Clarke's eyes, more direct than those indirect cases cited and was equally prohibited.

Mindful of the cases that gave a procompetitive defense to otherwise illegal horizontal price agreements, Judge Clarke examined whether any defense existed.[118]

He found no evidence of any efficiency-creating, procompetitive potential in the agreement at all.[119] He saw no need for the two bar review courses to be combined to provide services in Georgia, especially as they had competed for some time prior to the agreement.[120] The only result of the agreement he could see was a rise in price and injury to the customer, a result "the antitrust laws were designed to prevent."[121]

3. *The Petition for Rehearing*

The district court and Eleventh Circuit had largely ignored the well understood legal analysis that Judge Clarke described. Based on that dissent, and bolstered by an amicus brief from the U.S. Department of Justice, the law students petitioned for a rehearing and suggested a rehearing in banc.[122] While the petition was denied,[123] the Justice Department's amicus brief was a strong statement about the importance of per se rules in general and the importance of per se rules on market allocation. The brief limited itself to correctly stating the per se rule for market allocation, reacting to the Eleventh Circuit's requirement of a market previously competed within.

The amicus brief stressed that the "per se rule serves important policy purposes."[124] It serves these purposes by streamlining litigation and making antitrust enforcement more effective, while further making the law more predictable, and thus contributing to economic stability.[125]

In this case, the brief argued, the agreement between BRG and HBJ was a naked agreement not to compete, and the Eleventh Circuit's analy-

---

118. *Id.* at 1435 & n.22 (citing two cases that presented a precompetitive defense for horizontal agreements affecting price: NCAA v. Bd. of Regents of University of Oklahoma, 468 U.S. 85, 101 (1984) (holding that if college football was to be available at all as a product, certain constraints were needed; hence the agreements on revenue were subject to a "quick look" rule of reason) and Broadcast Music, Inc. v. Columbia Broadcasting System, Inc., 441 U.S. 1, 36-37 (1979) (finding that a broad music license for many different artists constituted a separate product that required monitoring of the licenses that single artists couldn't do by themselves, while artists could still separately license their music; thus the license agreement was not unlawful)).

119. *Id.* at 1435.

120. *Id.*

121. *Id.*

122. *See* Palmer v. BRG of Ga., Inc., 893 F.2d 293, 293 (11th Cir. 1990).

123. *Id.*

124. Memorandum of the United States of America as Amicus Curiae in Support of Suggestion of Rehearing en Banc, Palmer v. BRG of Ga., Inc., No. 87-8804 (11th Cir. Jan. 27, 1990) (on file with author).

125. *Id.* at 3-4 (citing Northern Pacific Railway Co. v. United States, 356 U.S. 1 (1958), Continental T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977), and Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332 (1982), for these two policies of business certainty and litigation efficiency).

sis that a market previously competed within must be divided among the former competitors was in error. "However the parties divided up the United States, they agreed not to compete. The Supreme Court has found territorial market division to be a per se offense without reference to whether markets were split among actual competitors."[126]

Despite this strong amicus brief, the Eleventh Circuit merely added two points to address the amicus brief. First, it restated that this was not a naked agreement between competitors to allocate markets, as the amicus brief defined the agreement.[127] Second, it restated that HBJ and BRG were not horizontal competitors and that no evidence had been produced to the contrary.[128] It then succinctly denied the petition,[129] paving for the law students a path to the Supreme Court.

C. The Supreme Court

There were two glaring errors that were presented to the Supreme Court, both involving the per se rule. The first error was in requiring that per se illegal price fixing agreements must specify a price.[130] The second was the misstatement that in order to employ the per se rule for market allocation, the two competitors must divide a market in which both are competing.[131] After summarizing the facts of the case, the Supreme Court summarily reversed the Eleventh Circuit on both errors.[132]

1. *Per se illegal horizontal price fixing*

Based on *Socony-Vacuum Oil Co.*, the Court held

> The revenue-sharing formula in the 1980 agreement between BRG and HBJ, coupled with the price increase that took place immediately after the parties agreed to cease competing with each other in 1980, indicates that this agreement was "'formed for the purpose and with the effect of raising'" the price of the bar review course.[133]

The Supreme Court then stated that it was "plainly incorrect for the District Court to enter summary judgment in [BRG's] favor."[134]

---

126. *Id.* at 5 (citing United States v. Topco Assocs., Inc., 405 U.S. 596 (1972)).
127. *Palmer*, 893 F.2d at 293.
128. *Id.*
129. *See id.*
130. Palmer v. BRG of Ga., Inc., 498 U.S. 46, 48-49 (1990) (per curiam).
131. *Id.* at 49.
132. *Id.*
133. *Id.* at 48-49 (quoting United States v. Socony-Vacuum Oil. Co., 310 U.S. 150, 223 (1940)).
134. *Id.* at 49 & n.5 (citing Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 255 (1986) ("The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor.")).

2. *Per se illegal market allocation*

The Court, with equal dispatch, summarily reversed the appellate court's erroneous market allocation test. Quoting heavily from *United States v. Topco Associates, Inc.*, the Court emphasized that:

> One of the classic examples of a *per se* violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition. . . . This Court has reiterated time and time again that "horizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition." Such limitations are *per se* violations of the Sherman Act.[135]

In response to the district court and Eleventh Circuit adding the requirement that the market must be one in which both competitors have previously competed for the per se rule to be employed, the Supreme Court simply said:

> Each agreed not to compete in the other's territories. Such agreements are anticompetitive regardless of whether the parties split a market within which both do business or whether they merely reserve one market for one and another for the other. Thus, the 1980 agreement between HBJ and BRG was unlawful on its face.[136]

In one fell motion, the Supreme Court granted certiorari and summarily reversed the Eleventh Circuit.[137] The decision reinvigorated the use of per se rules and in its language a sense of impatience can be seen. The case demonstrates two similar per se rules, both of which required the Court to look past the written agreement to the economic reality. In both instances, where the district and appellate courts failed to do so, the Supreme Court shortly and clearly reversed. This sends a strong message from the Supreme Court about the importance of these two per se rules, but to an audience that may not be heeding.

III. LOWER COURTS' RESPONSE TO *PALMER*'S PER SE RULE REVIVAL

It is almost axiomatic that a Supreme Court ruling can live or die based on its acceptance by the lower courts. This is not the case, however, for the per se rule. Time and time again, the per se rule has been chipped away, only to be re-pronounced by the Supreme Court.[138] This most re-

135. *Id.* at 49 (quoting United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972)).

136. *Id.* at 49-50.

137. *Id.* at 50. Justice Marshall dissented, but only to protest the use of summary reversals. *See id.* (Marshall, J., dissenting). He agreed that the limited facts indicated the Court of Appeals was in error, but felt uncomfortable with making final decisions on a limited record. *Id.*

138. *Id.* at 48 "This Court has reiterated time and time again that horizontal territorial limitations . . . are naked restraints of trade with no purpose except stifling of competition." (quoting *Topco Assocs., Inc.*, 405 U.S. at 6).

cent reassertion of the per se rule has shown signs of resistance, acceptance, and ignorance.

A survey of the post-*Palmer* cases that involve either horizontal price fixing, horizontal market allocation, or both revealed three major patterns of reception by the federal district and appellate courts. The first is a simple acceptance of the rule, accurately restating the holdings and applying them. Strangely enough, the clear majority of these cases are in the Seventh Circuit, home of both the Chicago School of Economics and Judge Posner.

The second pattern is for the court to differentiate the facts, sometimes straining to do so. Often the court labels a clearly horizontal agreement as vertical or as a nonprice restraint. This allows a circumvention of the per se rule and the use of the rule of reason. While the factual record is not before this author, and there may be good reason for the differentiation, the short shrift given to the per se rule and *Palmer* seems unwarranted.

The last pattern is the most outrageous, for the courts either do not cite *Palmer* as controlling precedent, do not mention *Palmer*, or wrongly cite its findings. Several courts cite the summarily reversed Eleventh Circuit Court of Appeals decision. Whether this is due to a conscious effort or to carelessness, this Article does not presume to address.

A. Acceptance of the Rule

A horizontal price fixing or market allocation action brought in Illinois would appear to have the best chance of being evaluated with the *Palmer* per se rule. Of the four cases that straightforwardly cite *Palmer*, three were decided by the Seventh Circuit or an Illinois district court. The fourth was decided in Pennsylvania.

1) In *Burns v. Cover Studios, Inc.*, a school district had an exclusive arrangement with a commercial photographer for its yearbook photos.[139] Another photographer sued, claiming that such an arrangement constituted horizontal price fixing, among other charges.[140] The court found that the horizontal price fixing claim was without merit but analyzed the case under *Palmer*'s per se test.[141] The court found that, as there was no evidence presented at all to indicate that the plaintiff could not bid on the annual contract or otherwise provide services, there was no price fixing.[142] The plaintiff simply and conclusorily stated that the defendant had "cornered the market" without offering any supporting evidence.[143]

2) In another case with substantially more evidence involved, two in-

139. 818 F. Supp. 888, 889-90 (W.D. Pa. 1993).

140. *Id.* at 890-91. The plaintiff also alleged an attempt to monopolize and illegal tying. *Id.* at 891.

141. *See id.* at 893.

142. *Id.*

143. *Id.*

surance companies merged when one encountered financial problems.[144] In doing so, the failing company's policies had to be canceled.[145] In *Garot Anderson Agencies, Inc. v. Blue Cross & Blue Shield of Wisconsin*, the plaintiff alleged that the way the insureds and the agents were informed of the failing company's cancellations ensured that the new company would gain the canceled policies.[146] In essence, as one competitor was mailing out cancellation letters, the other was mailing out notices of the merger, making it appear as though the customers should stay with the new company.[147]

On the plaintiff's claim of horizontal territorial agreement, the defendant tried to differentiate *Palmer*. The defendant "argue[d] that, unlike in *Palmer*, there is no evidence that Blue Cross and Health Care agreed to completely remove themselves from each other's territory."[148] The court found that argument unpersuasive and cited *Topco* to show that the difference between co-extensive territories and exclusive territories was not germane to the per se rule.[149] The fact that Blue Cross continued to sell insurance from across state lines also did not matter, as "[u]nder this doctrine, a court is unconcerned with the potential anticompetitive effects of an agreement, once it is found that the per se rule applies."[150]

The district court found that "[t]he thrust of the Supreme Court's reasoning [in *Palmer*] is the agreement's anticompetitive effect on a market."[151] With that in mind, the court found that the market withdrawal agreement was facially unlawful and relied on *Palmer* to condemn it under a per se analysis.[152]

3) The Seventh Circuit has had more than its share of these cases, the first of which involved a horizontal agreement to exclude a price discounter from a major boat show: *Denny's Marina, Inc. v. Renfro Productions, Inc.*[153] The plaintiff would attend the show as a dealer, encouraging customers to shop around and then come back for a lower price.[154] The other dealers complained, and the boat show producer informed the plaintiff that it could not longer participate in the show.[155]

---

144. Garot Anderson Agencies, Inc. v. Blue Cross & Blue Shield United of Wis., No. 88-C-20255, 1993 U.S. Dist. LEXIS 3446, at *3 (N.D. Ill. Feb. 26, 1993).
145. *Id.* at *3-4.
146. *See id.* at *4.
147. *Id.* at *3-4.
148. *Id.* at *34.
149. *Id.* at *34-35 (citing United States v. Topco Assocs., Inc., 405 U.S. 596, 605, 608 (1972) (holding agreement where small grocers allocated territories to protect their common, cooperative store brand from price competition to be per se illegal)).
150. *Id.* at *37.
151. *Id.* at *39.
152. *Id.* at *40. The court recounts that Supreme Court decisions subsequent to *Topco* have cast an uncertain light on that case's holding; however, it states that *Palmer* quoted *Topco* with approval. *Id.* The court tried to cover its bases by analyzing the agreement under a "quick look" rule of reason, also finding the agreement illegal under that analysis. *Id.* at *40-41.
153. 8 F.3d 1217, 1219 (7th Cir. 1993).
154. *Id.* at 1220.
155. *Id.*

After deciding that the agreement was horizontal, the court cited *Palmer* for the holding that specific prices need not be agreed on for a price fixing conspiracy to exist.[156] It also cited *Socony-Vacuum Oil Co.* in condemning horizontal price-fixing agreements using a per se test.[157]

The defendant attempted to justify the exclusion from the show as a "unilateral" attempt to protect other dealers from the plaintiff's "free-riding."[158] The court found that there was too much evidence of a conspiracy to accept that argument.[159] However, the district court committed error by not applying the per se analysis, and instead requiring the plaintiff to show an adverse impact on competition in the relevant market.[160] The Seventh Circuit found that such a rule of reason analysis was not at all appropriate as it "would effectively require plaintiffs to make a rule of reason demonstration in order to invoke the *per se* rule!"[161] The court found that the exclusion from the boat show was per se illegal price fixing, reversing the district court's grant of summary judgment and remanding the case for a trial on damages.[162]

4) In yet another Seventh Circuit case, *Hammes v. AAMCO Transmissions, Inc.*,[163] Chief Judge Posner dealt with several antitrust issues. In Indianapolis the phone book listed ten AAMCO dealers where, in fact, five existed.[164] The "ghost dealers" were routed to a call-forwarding system.[165] A new dealer who offered competition to the existing dealers was denied admission to this phone pool, as a result getting far fewer calls than the other dealers.[166]

The district court had dismissed the suit on the ground that the complaint did not allege that interstate commerce was affected.[167] Reversing that finding, Chief Judge Posner also addressed the substance of the case in dictum. He warned that if the purpose of the call-forwarding scheme was to allocate territory within the Indianapolis market, then under *Palmer* such a scheme would be per se illegal market allocation.[168]

156. *Id.* at 1221.
157. *Id.* (citing United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 223 (1940)).
158. *Id.* at 1221 n.5.
159. *Id.*
160. *Id.* at 1221.
161. *Id.* at 1221 n.7.
162. *Id.* at 1222.
163. 33 F.3d 774 (7th Cir. 1994).
164. *Id.* at 777.
165. *Id.*
166. *Id.*
167. *Id.*
168. *Id.* at 782. Chief Judge Posner supposed that the scheme may have allocated those customers equidistant between existing dealers. *Id.* Where customers on the borders between the existing dealers would go to the closest dealer, the call-forwarding tricked those customers into thinking one dealer was closer than another. *Id.* In this way, Chief Judge Posner continued, price competition would be lessened. *Id.* He cautioned that this was simply speculation based on an inadequate factual record. *Id.*

B. Differentiation

This category is, by its nature, the most difficult to assess. Courts that have access to the evidence and differentiate their case from *Palmer*, thus avoiding the per se rule, may be exercising proper judicial restraint. They may also be twisting the facts to avoid using the per se rule—a situation that does not seem so farfetched in light of the difficulties the lower courts imposed in *Palmer*.

Without commenting much on the cases' outcomes, many of the courts may be differentiating their cases in several ways. They may differentiate their cases as non-price vertical restraints that are evaluated by a rule of reason. They may simply state that the facts do not warrant a per se analysis. The background of Supreme Court cases that introduced a "quick look" rule of reason have also been a source for some courts to narrowly interpret *Palmer*.[169]

1) The earliest case to cite *Palmer* yet not apply the per se rule, was *Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n*.[170] In that case, the National Basketball Association (NBA) had limited the number of games available for broadcast by cable "superstations."[171] A superstation is a local broadcast station that rebroadcasts via satellite to cable TV systems throughout the country.[172] Examples are WTBS in Atlanta, WWOR in New York, and the station in question, WGN TV in Chicago.[173] The district court stated that the reduction in games allowed to be broadcast "results in a significant restraint on trade."[174]

However, when the plaintiffs suggested that *Topco* and *Palmer* should be followed for analyzing such a horizontal agreement, condemning it under a per se test, the district court balked: "[*Palmer*] recently confirmed that per se condemnation of horizontal agreements is still sometimes appropriate . . . . Some horizontal restraints may still be branded illegal per se, as *Palmer*, shows, but the NBA's 5-game reduction is not one of them."[175]

The similarity between the facts of *NCAA v. Board of Regents of the University of Oklahoma*,[176] where college football teams were restricted

169. *See* NCAA v. Bd. of Regents of the Univ. of Okla., 468 U.S. 85, 101 (1984) (holding that if college football was to be available at all as a product, certain constraints were needed; hence the agreements on revenue were subject to a "quick look" rule of reason); Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 36-37 (1979) (finding that a broad music license for many different artists constituted a separate product that required monitoring of the licenses that single artists couldn't do by themselves, while artists could still separately license their music; thus the license agreement was not unlawful). Both of these cases presented a precompetitive defense for horizontal agreements affecting price.

170. 754 F. Supp. 1336 (N.D. Ill. 1991).

171. *Id.* at 1338.

172. *Id.*

173. *Id.*

174. *Id.* at 1357.

175. *Id.* (citation omitted).

176. 468 U.S. 85, 92-93 (1984).

in their television coverage and payments made by the NCAA, and this case provided too much gravitational pull for the court to use the per se rule. However, the court mistakenly cites *Palmer* for naked restraints being "condemned after a quick look."[177] It went further, finding that "a quick look here does not yield any absolute conclusions about the probable impact of the 5-game reduction."[178] Yet, under a rule of reason analysis, the district court found that the reduction in games negatively impacted competition with the sole purpose of increasing the price of those games and as such was illegal.[179]

On appeal in *Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n*,[180] Judge Easterbrook also mentioned *Palmer* as condemning agreements between rivals to fix prices.[181] He also stated that those same two rivals could merge into a single entity with "little ado."[182] Recognizing that the characterization of the agreement, upon which the mode of analysis turns, "is a creative rather than exact endeavor," Judge Easterbrook deferred to the district court's ruling.[183]

2) A recent case that also took place in Illinois, *Panache Broadcasting of Pennsylvania, Inc. v. Richardson Electronics, Ltd.*, involved a joint venture between two competitors who manufactured and distributed high-power electron tubes for radio stations, increasing prices and reducing competition.[184] The joint venture, VASCO, was the exclusive distributor for tubes of both manufacturers, with prices set by a management committee staffed by both manufacturers.[185] After VASCO was disbanded, the manufacturers agreed not to compete on certain restricted accounts.[186] In earlier proceedings, the district court, adopting the magistrate's report and recommendation, dismissed the horizontal price fixing claim with prejudice, finding that the claim had not been adequately pleaded.[187] The magistrate found that the agreement impermissibly allocated customers but that the pleadings were faulty, and so allowed the plaintiffs to amend their pleadings.[188] These findings only affected the per se claims, and the claims based on a rule of reason analysis were al-

177. *Chicago Prof'l Sports*, 754 F. Supp. at 1357.

178. *Id.* at 1358.

179. *Id.* at 1364. The rule of reason was rather truncated, including no formal structural analysis of the market. *See id.* at 1357-62. It resembled a long, "quick look" rule of reason. The court seemed to treat the NBA less as a cartel and more as a joint venture.

180. 961 F.2d 667 (7th Cir. 1992).

181. *Id.* at 671

182. *Id.*

183. *Id.* at 672, 677. He did state that the free-rider argument presented by the NBA was worth looking at, but that the trial had been complete enough so as not to disturb the ruling. *Id.* at 674, 677.

184. No. 90-C-6400, 1994 U.S. Dist. LEXIS 4830, at *3-4 (N.D. Ill. Apr. 15, 1994).

185. *Id.* at *13-15.

186. *Id.* at *28-29.

187. Panache Broad. of Pa., Inc. v. Richardson Elecs., Ltd, No. 90-C-6400, 1993 U.S. Dist. LEXIS 1729, at *12 (N.D. Ill. Feb. 16, 1993), *adopting*, 1994 U.S. Dist. LEXIS 4830, at *7.

188. *Panache Broad*, 1994 U.S. Dist. LEXIS 4830, at *7-8.

lowed to continue.[189]

Citing *Palmer*, the magistrate evaluated the market allocation claim under the per se rule of reason, finding the agreements not to compete for certain future accounts were not per se rule violations.[190] "[T]his court is unwilling to conclude that provisions contemplating future conduct themselves make out a *per se* claim."[191]

After reviewing a rule of reason analysis that demonstrated anticompetitive effects, the court re-cited *Palmer* to support the plaintiff's claim that acquisitions by one of the manufacturers of the other's competing product lines lessened output, and thus the claim was able to survive a motion to dismiss.[192]

The price fixing claim was revived as well, if only briefly.[193] *Palmer* was cited to support the argument that agreements for the purpose and with the effect of raising prices can survive summary judgment.[194] The magistrate allowed the rule of reason claim to withstand a motion to dismiss, but after an elaborate revival of the per se claim, did nothing with it and, in fact, snuffed it out.[195] Strangely, *Palmer* was cited correctly and in detail, and the most potent and obvious claim of horizontal price fixing was revived but then ignored. The magistrate made no attempt to differentiate the per se claim, but simply left the claim open for rule of reason analysis.

3) Another case in which the court differentiates *Palmer*, and likely with good reason, is *Blackburn v. Sweeney*.[196] After a law partnership dissolved, a written agreement was entered into restricting the former partners from advertising against each other, and the agreement was immediately challenged under the Sherman Act by those same lawyers.[197] An exacerbated judge, weary of the discovery abuses conducted by both parties, was unwilling to give much latitude to either party.[198] In response to the plaintiffs' motion for summary judgment based on the market allocation per se rule cited in *Palmer*, the court accepted the rule and *Palmer*'s authority.[199] However, the judge noted that both *Palmer* and *Topco* were "light years away from this factual setting."[200] In fact, the

189. *Id.* at *8-9.
190. *Id.* at *25-30.
191. *Id.* at *30.
192. *Id.* at *39-41.
193. The prior ruling by the court had addressed a horizontal price fixing claim, but it had analyzed it as a vertical resale price maintenance case. *Id.* at *48. Thus, the court stated that the dismissal with prejudice of the horizontal claim only precluded a claim of resale price maintenance. *Id.* at *49. Despite this revival, the court did not mention any per se claims, and it completes its analysis under a rule of reason. *See id.* at *50.
194. *Id.* at *49-50. The court made no mention of *Palmer*'s per se rule holding, despite the court reviving the per se claim for horizontal price fixing in the previous paragraph. *See id.*
195. *See id.* at *48-50.
196. 850 F. Supp. 758 (N.D. Ind. 1994).
197. *Id.* at 759, 652.
198. *Id.* at 760.
199. *See id.* at 763.
200. *Id.*

court was "totally confident that this case [was] not a *per se* violation case."[201] The court was not even sure if the rule of reason could divine any antitrust violation.[202]

The facts were so distant to this judge because the agreement was to restrict attorney advertising, a goal the judge was in hearty agreement with.[203] He saw no linkage between attorney advertising restricted to a specified city and horizontal allocation of territories with allocation of market territory.[204] As there was no price agreement contained within the advertising agreement, he also did not see *Palmer* as relevant.[205] "It takes an extremely large jump in logic, as well as in law, to conclude from the agreed restrictions on advertisements to an agreement to allocate market territory."[206]

Although the court may have accepted *Palmer*, it did not analyze the case under *Palmer*. *Palmer* stands for the per se rule applying to agreements that do not specify prices but are "formed for the purpose and with the effect of raising" prices.[207] As such, the court here failed to investigate why this agreement to restrict advertising took place in order to decide if it had the purpose or effect of raising prices. Instead, the court just summarily stated that the facts are dissimilar.

C. Ignorance of the Rule

This last category of the surveyed cases includes the most obvious rebuttals of *Palmer*, as the facts dictate its citation but it is not mentioned. In many instances, the Supreme Court case has been ignored in favor of the summarily reversed Eleventh Circuit opinion. It is hard to think of a reason why a court would so handily ignore a recent Supreme Court ruling, other than possibly to further a political agenda.

1) In *Smalley & Co. v. Emerson & Cuming, Inc.*, subcontractors provided a certain unique and patented adhesive for use in space shuttle rockets.[208] The adhesive was the only material approved for the rockets, and the patent-holder and manufacturers were also a dual-distributor, often bidding against a handful of its own distributors.[209] The manufacturer, wanting to keep the major accounts for itself, often told the plaintiff distributor not to bid on the space shuttle contract.[210] When the plaintiff continued to not only bid, but also undercut the bids of the manufacturer-distributor, the manufacturer terminated the distributor agreement.[211]

201. *Id.* at 764.
202. *Id.*
203. *See id.* at 762-63.
204. *Id.* at 763.
205. *See id.* at 763-64.
206. *Id.* at 763.
207. *See* Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49 (1990).
208. 808 F. Supp. 1503, 1507 (D. Colo. 1992).
209. *Id.*
210. *Id.*
211. *Id.* at 1507-09.

The plaintiff brought section 1 market allocation and price-fixing claims, as well as conspiracy to monopolize, attempted monopolization, and monopolization claims.[212] Without mentioning *Palmer*, but relying loosely on *Arizona v. Maricopa County Medical Society*,[213] the court discussed the categories accepted for per se violations.[214] It then denied the per se price-fixing claim, stating that the plaintiff had not proven the relevant market.[215] It simply found that one product (the adhesive) sold to one customer (the NASA contractor) could not be a relevant market,[216] despite the fact that the adhesive was the only substance approved and was regularly bid on by the subcontractors.[217]

One of the important holdings of *Palmer* was that, in a price-fixing claim, it was irrelevant whether a specific price was agreed to or fixed. As long as the agreement was "formed for the purpose and with the effect of raising" prices, then the agreement was illegal per se.[218] The district court accepted as true evidence that the defendant told the plaintiff not to discount, both orally and in writing.[219] The court also accepted as true that the defendant told the plaintiff that it "had no business" bidding for the NASA contractor's business.[220] Accepting that evidence, the court found it crucial that the defendant had not specified any price to be fixed and that the plaintiff was unable to "prove any contract or agreement on price."[221] The court thus denied the per se claim.[222]

The market allocation claim was treated equally. The manufacturer was not only the sole manufacturer, but also a major distributor that bid against the other distributor for contracts. Yet, the court treated the case not as a horizontal market allocation conspiracy, but as a vertical nonprice restraint.[223] Accordingly, the court denied the per se market allocation claim.[224]

"At best, plaintiff has produced some evidence of agreement to set nonprice restrictions-payment terms. However, agreement to set nonprice restriction [sic] are subject to the rule of reason."[225] Not only did the court ignore *Palmer*, but it also ignored *Catalano, Inc. v. Target Sales,*

---

212. *Id.* at 1508.
213. 457 U.S. 332 (1982).
214. *Smalley & Co.*, 808 F. Supp. at 1508. The court found that here the plaintiff had alleged two of these categories: price fixing and horizontal market allocation. *Id.*
215. *Id.* at 1506.
216. *Id.*
217. *Id.* at 1507.
218. Palmer v. BRG of Ga., Inc., 498 U.S. 46, 49 (1990).
219. *Smalley & Co.*, 808 F. Supp. at 1509.
220. *Id.* at 1507, 1509.
221. *Id.* at 1509.
222. *Id.* at 1510.
223. *Id.* The district court cited circuit precedent for the treating of dual distributors as vertical restrainers. *Id.* (citing Dart Indus., Inc. v. Plunkett Co. of Okla., Inc., 704 F.2d 496, 499 (10th Cir. 1983)). The court also cited Department of Justice guidelines for support, stating that too often vertical restraints are too easily called horizontal restraints. *Id.* (citing Vertical Restraints Guidelines, 50 Fed. Reg. 6263, 6265 (Feb. 14, 1985)).
224. *Id.* at 1511.
225. *Id.* (citing Monsanto v. Spray-Ryte Serv. Corp., 465 U.S. 752, 760 (1984)).

Inc.,[226] where credit terms restrictions were considered price restrictions.

The court, reviewing the claim under the rule of reason, dismissed the claim.[227] This is but one example of a court ignoring controlling precedent in order to avoid the proper per se evaluation of an antitrust case. Unfortunately, the survey revealed an even more flagrant case.

2) In a criminal bid rigging case, *United States v. Reicher*, a jury convicted a contractor who arranged to have a friend supply a fraudulently high bid.[228] In fact, the defendant filled out the bid proposal, which his friend then signed.[229] Despite the jury conviction, the judge set aside the jury's verdict and dismissed the case with prejudice.[230]

The court reasoned that because, as the second bidder, the contractor was truly unable to build the building, he was neither a competitor nor a potential competitor.[231] "By this, I mean that neither was a competitor in the relevant market. Although a charge of *per se* violation of the Sherman Act proscribes inquiry into competitive effects, 'it does not excuse identification of the relevant markets.'"[232]

In support of this conclusion, the court described per se rules as "appropriate 'for conduct which is manifestly anticompetitive'" stating that they "'should be invoked when surrounding circumstances make the likelihood of the anticompetitive conduct so great as to render unjustified further examination of the challenged conduct.'"[233] Remarkably, this is a quote from the summarily reversed Eleventh Circuit *Palmer* opinion. Without so much as discussing the most current Supreme Court opinion on per se market allocation, the district court set aside the jury verdict.[234]

---

226. 446 U.S. 643 (1980) (finding an agreement between beer wholesalers not to grant credit indirectly affects price and is thus illegal per se).

227. *Smalley & Co.*, 808 F. Supp. at 1511.

228. 777 F. Supp. 901, 902 (D.N.M. 1991). Just prior to the bids being closed, Reicher had discovered that his was the only bid to build a special building for use in the weapons testing grounds. *Id.* He knew that if only one bid was entered, the project would be canceled. *Id.* He convinced a friend in Utah, who was on the bid list but unable to actually build the building, to submit a higher bid. *Id.*

229. *Id.* at 902-03.

230. *Id.* at 906.

231. *Id.* at 903-04. In a peculiar display of circular logic, the court cited *Socony-Vacuum*. *Id.* at 905 (citing United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 224 n.59 (1940)). That cite supports the principle that a non-competitor may be guilty of conspiring if still unable to commit the objective offense. *Id.* The court also cited *United States v. Metropolitan Enterprises, Inc.*, 728 F.2d 444, 449 (10th Cir. 1984), for the principle that a non-competitor can violate section 1 of the Sherman Act by participating in bid rigging. *Id.* Yet, the court then states that since the second bidder was not a competitor, "it is impossible to join a conspiracy that does not exist." *Id.*

232. *Id.* at 904 (quoting United States v. Sargent Elec. Co., 785 F.2d 1123, 1127 (3d Cir. 1986)).

233. *Id.* at 906 (quoting Palmer v. BRG of Ga., Inc., 874 F.2d 1417, 1432 n.13 (11th Cir. 1989), *rev'd*, 498 U.S. 46 (1990) (per curiam) (internal quotations omitted)).

234. Two other cases that do not involve horizontal restraints and per se analysis still cite the Eleventh Circuit opinion without mention of the Supreme Court opinion. *Davis v. Southern Bell Telephone & Telegraph Co.*, No. 89-2839-CIV-NESBITT, 1993 U.S. Dist. LEXIS 20033, at *2, *4 (S.D. Fla. Dec. 23, 1993), involved a phone service that the Public Service Commission ordered unbundled from the basic services, which Southern Bell did in an allegedly misleading way. In evaluating a section 2 claim, the court cites *Palmer*'s

It is clear that a few courts are willing to ignore controlling Supreme Court precedent, such as *Palmer*, in order to avoid per se analysis. What is unclear is the reason courts do this or try to differentiate their cases. Whether it is out of confusion of the law or a genuine ulterior, politically-motivated purpose is unknown. However, the Supreme Court Justices, speaking both together and individually, have found per se rules to be extremely important. It seems that other courts do not share their view.[235]

IV. ARE LOWER COURTS HONESTLY DEBATING THE GROUNDS OF THE *PALMER* PER SE RULE?

Per se rules are the result of sufficient judicial experience to condemn those acts "that would always or almost always tend to restrict competition and decrease output."[236] It is rare that such conduct can be procompetitive or efficient, but we still find lower courts that try to differentiate underlying facts to avoid using the per se rule. Per se rules have "the same force and effect as any other statutory commands,"[237] yet some courts ignore or misconstrue clear per se edicts. When courts differentiate or ignore a rule of law, are they being intellectually honest with those the law is meant to protect? Should they instead be debating whether the purposes of the per se rule are furthered by its application? After all, to debate the substantive facts already condemned by a per se rule is to do harm to the law and justice.

However, if the rule's application fails to improve judicial administration provide clarity to the business community, seems without economic certainty, or offends the equitable administration of justice,[238] then perhaps in that certain case the court can and should go beyond the law and

---

Eleventh Circuit decision. *Id.* at *25 (citing Palmer v. BRG of Ga., Inc., 874 F.2d 1417, 1439 n.33 (11th Cir. 1989), *rev'd*, 498 U. .S. 46 (1990)). It did not even signal that it had been reversed on other grounds. *See id.*

Another case that involved vertical restraints in bus station leasing and ticket agencies, *Pratt v. Indian Trails, Inc.*, No. 4:88-CV-2, 1991 U.S. Dist. LEXIS 7908, at *26 (W.D. Mich. June 11, 1991), cited the Eleventh Circuit opinion for the principle that, in a section 1 rule of reason claim, the plaintiff must prove that defendants' agreement had an anticompetitive effect in relevant geographic and product markets. As in the above case, it did not even signal that opinion's summary reversal, however correct those suppositions cited may be. *Id.*

235. *See* Leegin Creative Leather Prods. v. PSKS, Inc., 127 S. Ct. 2705, 2717, 2720 (2007) (holding that vertical price restraints are no longer, after more than ninety-five years, appropriate candidates for a per se analysis, but that (horizontal) cartels are, "and ought to be, *per se* unlawful"). *But see* Cont'l Airlines, Inc. v. United Airlines, Inc., 277 F.3d 499, 509-10 (4th Cir. 2002) (approving a district court's refusal to apply a per se analysis where "precompetitive justifications" exist and its choice of an "abbreviated" rule of reason analysis); Denny's Marina v. Renfro Prods., 8 F.3d 1217 (7th Cir. 1993) (reversing an order for summary judgment where the district court refused to apply the per se rule without first demonstrating "a substantial potential for impact on competition").

236. Broad. Music, Inc. v. Columbia Broad. Sys., Inc., 441 U.S. 1, 19-20 (1979).

237. FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 433 (1990).

238. This does not necessarily mean justice between the parties, but justice between cases.

into the realm of fact finding. Such a debate avoids an uncertain body of law and promotes justice and fairness.

V. CONCLUSION

In the 1990s a resurgence of per se analysis in antitrust was embodied in *Palmer v. BRG of Georgia, Inc.* Horizontal price fixing and market allocation claims, clearly seen as per se illegal by commentators,[239] were badly mishandled by lower courts. Whether they were confused about the law or acting for other reasons, the Supreme Court summarily reversed their decisions and revived the per se illegality of both categories.

In the following years of the 1990s, the lower courts continued to treat horizontal price fixing and market allocation claims unevenly and with a variety of analyses. The gains associated with a per se analysis—ease of judicial administration, economic reliability, predictability, and the promotion of justice—are not realized because some lower courts might not employ per se analysis. The underlying premise of this historical summary is that, with the rejection of the ideology of deregulation, we may soon see the relevance of a return to the pre-Bush years, including their confusion in antitrust analysis.[240]

239. See Stephen Calkins, *The October 1989 Supreme Court Term and Antitrust: Power, Access, and Legitimacy*, 59 ANTITRUST L.J. 339, 354-55 (1991).

240. As has been confirmed in recent months, the deregulatory ideology associated with the modern Republican Party (combined with the intensive litmus-testing of potential judicial appointees to assure commitment to that ideology) has been partly responsible for our recent economic collapse. Perhaps one answer is for Congress to legislate, as discretely as possible, to add per se rule jurisprudence from cases like *Palmer* to section one of the Sherman Act, 15 U.S.C. § 1 (2006). The head of the Obama Administration's antitrust division, Christine Varney, recently has announced that the Administration withdraws and repudiates the Bush Administration's policies on single-firm conduct, just released in 2008. This is a very promising development—suggesting the disavowal of ideology in antitrust enforcement—for which Varney should be commended. *See* Stephen Labaton, *Administration Plans to Strengthen Antitrust Rules*, N.Y. TIMES, May 11, 2009, at A1, *available at* http://www.nytimes.com/2009/05/11/business/11antitrust.html.