Minnesota Journal of Law & Inequality

Inequality Inquiry

Spring 2025

The Myth of the Firm Exception: Why *Trial Lawyers* Continues to Harm Contract Workers

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Introduction

In *FTC v. Superior Court Trial Lawyers Association*, the Supreme Court decided that a coordinated strike and demand for better wages was per se illegal price-fixing under the Sherman Act.[1] While this case was decided in 1990, its holding continues to prevent workers who fall outside the traditional employer-employee relationship from organizing for better working conditions. The *Trial Lawyers* reasoning is flawed because it places workers striking for increased wages into the same field as a profit-maximizing business. The "firm exemption"[2] to price-fixing is insufficient, because it leaves workers who are not formally organized or outside of the traditional employee-employer relationship unable to collectively strike in demand of better wages. Rather than the Court's inauthentic attempt to place court-appointed lawyers into the same category as businesses attempting to fix prices on the free market, courts should look to the purpose beyond coordinated efforts to raise wages—here, improving wages and work conditions—in determining whether a coordinated action can be considered price-fixing in violation of the Sherman Act. The purpose behind the coordination in *Trial Lawyers* cannot be said to fit into the evils antitrust laws were designed to protect, and thus, the labor exemption should cover these types of actions. This should be the case whether or not the group of individuals engaging in this action can be deemed a "firm."

I. Background

In *Trial Lawyers*, the Federal Trade Commission (FTC) alleged that the plaintiffs "entered into an agreement among themselves and with other lawyers to restrain trade" in violation of Section 5 of the Federal Trade Commission Act (FTCA).[3] The defendants were a group of about 100 lawyers who agreed amongst themselves to not accept Criminal Justice Act (CJA) appointments until their wages were increased. The Court found that the defendants' agreement "constituted a classic restraint of trade within the meaning of Section 1 of the Sherman Act."[4]

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[1] FTC v. Superior Court Trial Lawyers Ass'n, 110 S.Ct. 768, 772–73 (1990).
[2] Sanjukta Paul, *Fissuring and the Firm Exemption*, 72 L. & CONTEMPORARY PROBLEMS 65, 66 (2019).
[3] *Trial Lawyers*, 110 S.Ct. at 772–73.
[4] *Id.* at 774.

The Court deemed the defendants' collective action of refusing to accept appointments until their wages were increased to be unlawful, inter-firm "price-fixing" under Section 1 of the FTCA.[5]

II. Analysis

The Court construed the lawyers' organizing to refuse appointments until their wages increased as either "agreeing upon a price, which [would] decrease the quantity demanded," or "agreeing upon an output, which [would] increase the price offered."[6] The Court declined to consider how the lawyers' organizing might not fit into this market-based model, stating, "it is not our task to pass upon the social utility or political wisdom of price-fixing agreements."[7]

Under the Sherman Act, it is, generally, the Court's duty to "pass upon the social utility" of a violation.[8] Section 5(a) of the FTCA bans "unfair or deceptive acts or practices in or affecting commerce . . . ."[9] A practice is "unfair" if it "causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves *and not outweighed by countervailing benefits to consumers or to competition.*"[10] In other words, the Act tells courts to weigh the potential harms against the potential benefits to consumers. However, by declaring the lawyer's scheme as per se illegal price-fixing, the Court avoided having to consider arguments about any countervailing benefits of the scheme. If the Court had not labeled this as per se illegal price-fixing, they could not have found a violation of Section 5. Here, the potential harms are nonexistent. There is no competition in this "market." CJA lawyers' salaries are set by the government, and each lawyer receives the same fees. The "consumers" of this market, individuals who are being charged with a crime and unable to afford counsel, face no negative consequences from increased salaries. Contrastingly, on the other side of the scale, the "consumers" face a potential benefit from increased wages: with increased wages, lawyers would provide more effective counsel.

The Court also declined to find the First Amendment protected the lawyers' actions. While the activities of publicizing the boycott, explaining the merits of the case, and lobbying district officials were protected, the coordinated price fixing was not. The Court distinguished the lawyers' case from *Claiborne*, finding the "undenied objective of their boycott was an economic advantage for those who agreed to participate," while in *Claiborne*, the individuals boycotting "sought no special advantage themselves."[11] The Court further characterizes the lawyers as "business competitors" who "stand to profit financially from a lessening of competition in the boycotted market."[12] The Court dispensed of the Court of Appeals' finding that prohibitions

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[5] *Id.*
[6] *Id.* at 775.
[7] *Id.* at 774.
[8] *Id.* at 774.
[9] 15 U.S.C. § 45(a)(1).
[10] *Id.* § 45(n) (emphasis added).
[11] *Trial Lawyers,* 110 S.Ct. at 777 (citing NAACP v. Claiborne Hardware Co., 458 U.S. 886 (1982)).
[12] *Id.*

against price-fixing and boycotts "do not serve any substantial governmental interest unless the price-fixing competitors actually possess market power."[13] The Court said it was unwilling to make an exception for cases such as these, even if their boycott were "uniquely expressive," because the government has a strong "interest in adhering to a uniform rule" even in a case where allowing an exception "might cause no serious damage."[14]

The Court sets forth the rule from *O'Brien* for protecting activity under the First Amendment:

> [A] government regulation is sufficiently justified if it is within the constitutional power of the Government; if it furthers an important or substantial governmental interest; if the governmental interest is unrelated to the suppression of free expression; and if the incidental restriction on alleged First Amendment Freedoms is no greater than is essential to the furtherance of that interest.[15]

The Court said that the Court of Appeals' analysis "exaggerate[d] the significance of the expressive component" in the lawyers' coordinated action and "denigrate[d] the importance of the rule of law that respondents violated."[16]

The Court, instead, should have weighed the government interest in enforcing the violation *in the case at hand* against the interest in protecting the First Amendment rights of these workers rather than focusing on the general interest in preventing price-fixing in the free market. While, as the Court insists, the government has a strong interest in protecting against price-fixing schemes in the capitalist market, this is not what is happening in this case. The lawyers are not "business competitors" that the government has an interest in protecting under antitrust law, but contractors for a public service. Weighing the government's minimal interest in enforcing antitrust laws against workers' demanding better wages with the lawyers' First Amendment right to refuse to work in demand of better pay, the Court should have found that the government did not satisfy the *O'Brien* test.

The Court's insistence in fitting the lawyers' coordinated efforts into the same category of cases as price-fixing schemes is disingenuous. Contrary to the Court's insistence that the lawyers were acting as anti-competitive business entities attempting to push out competition, the stated purpose of raising prices was not to create an economic advantage for those who chose to participate. There is no competition in this field: lawyers are not offering up their services at the lowest price to be picked by a judge to appoint an indigent client. None of these lawyers are seeking a separate advantage for themselves compared to other lawyers. They were pressuring the government to raise the wage for *all* CJA appointed lawyers. This kind of activity is not of the kind the Sherman Act was designed to protect, as evidenced by the several amendments

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[13] *Id.* at 778.
[14] *Id.*
[15] *Id.*
[16] *Id.*

following its enactment after it was repeatedly enforced against workers.[17] The Court insists that an exception to this rule would not outweigh the benefits of a uniform rule. However, this case should not be considered an exception, but rather, an action that entirely falls outside of the bounds the Sherman Act.

The question of whether the labor exemption granted by the Clayton and Norris-LaGuardia Acts extend to situations where the labor relationship falls outside the bounds of a traditional employer-employee relationship, such as contractors or subtractors, is contested. In the final days of the Biden administration, the FTC released a policy statement stating that, in their view,

> [T]he labor exemption's application does not turn on whether a worker is formally classified by a firm as an independent contractor . . . . Rather, workers' organizing and collective bargaining activity may be protected from antitrust liability when what is at issue is the compensation for their labor or their working conditions.[18]

Courts have found that the labor exemption extends beyond this traditional relationship in several cases.[19] Consistent with *Trial Lawyers*, "[c]ourts have . . . rejected application of the exemption where the party seeking the exemption was best characterized as an independent business pursuing its business interests, rather than as a worker who provides labor services seeking to improve his or her compensation or labor conditions."[20] Here, the workers cannot be considered independent businesses pursuing their own interests. They are workers who are acting together to improve their wages.

Antitrust law allows economic coordination in situations such as collective bargaining and price setting "within business firms" but bars them "when they take place beyond firm boundaries."[21] In other words, contract-based employees, such as the defendants in *Trial Lawyers*, are unable to organize and collectively bargain for wages. However, if they are incorporated as a firm, then they would not subject to antitrust liability for the same actions as in *Trial Lawyers*. Deciding whether workers are violating antitrust laws based upon whether they are incorporated as a firm or not is arbitrary, protecting some workers' rights to demand better working conditions while leaving other workers demanding the same rights without protection. Rather than trying to squeeze workers like those in *Trial Lawyers* into a false narrative of individuals acting as firms and price-fixing between themselves, courts should look to the facts

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[17] Fed. Trade Comm'n, Federal Trade Commission Enforcement Policy Statement on Exemption of Protected Labor Activity by Workers from Antitrust Liability 2–3 (Jan. 14, 2025), https://www.ftc.gov/legal-library/browse/enforcement-policy-statement-exemption-protected-labor-activity-workers-antitrust-liability (explaining that Section 20 of the Clayton Act passed in 1914 created a labor exemption to antitrust laws and the Norris-LaGuardia Act of 1932 further clarified the labor exemptions, including preventing courts from issuing injunctions in cases growing out of a labor dispute).

[18] *Id.* at 1.

[19] *Id.* at 8 (citing several First Circuit cases).

[20] *Id.* at 9 (citing several cases, including from the First and Fourth Circuit, and the Supreme Court).

[21] Sanjukta Paul & Nathan Tankus, *The Firm Exemption and the Hierarchy of Finance in the Gig Economy*, 16 U. ST. THOMAS L.J. 44, 45 (2019).

in front of them and see whether they are seeking to improve their compensation or labor conditions. If workers are striking to demand better wages for that purpose, then they should be exempted from antitrust liability.

One present group of workers facing the perils of this arbitrary distinction are ride-share drivers. Ride-share companies have been permitted to set consumer prices across drivers who use their application.[22] However, ride-share drivers are barred, under antitrust law, from coordinating amongst themselves to demand better wages from their company.[23] Rather than fabricate a reality where ride-share drivers are on the same field as the ride-share companies that contract them and seeking to price-fix for some sort of profit maximizing gain, courts should look to the true purpose behind the coordination efforts amongst ride-share drivers to determine whether they should be exempted from antitrust liability. A company's capitalistic purpose cannot be equated to an individual's demand for better wages.

Conclusion

The per se liability for price-fixing set out by the Court in *Trial Lawyers* refuses to acknowledge the realities of how workers who fall outside the traditional employer-employee relationship exist in the world. The Court places contract workers in the same category as profit-maximizing businesses. However, the purpose behind what the Court deems "price-fixing" in the context of workers striking for better wages, in reality, is not the same as coordinated price fixing between companies across some sort of sector participating in the capitalist market. Rather than applying a per se rule, courts should look to the purpose of coordinated wage setting by workers to determine whether there is an antitrust violation.

[22] *Id.* at 46–47.
[23] *Id.* at 47.