

Antitrust Analysis of Competitor Joint Ventures

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How May Competition Break Down?

- One Seller (Buyer)
 - Monopoly (Monopsony)

- Agreements Not to Compete
 - Collusion

Structure of the Sherman Act

- Monopolization Provision (Section 2)
 - “Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony....”
- Collusion Provision (Section 1)
 - “Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. ...”

Elements of a Section 1 Violation

- Contract, Combination, Conspiracy – i.e., an “Agreement”
- Restraint of Trade
 - Must be an *unreasonable* restraint.

What's an "Unreasonable" Restraint?: Foundational Cases

■ Chicago Board of Trade (1914)

- CBOT members adopted a "call rule" that fixed the price of "to arrive" grain contracts from the end of the call session until the next day.
- HELD: Test of legality is "Rule of Reason"
- Probing inquiry; restraint upheld.

■ Trenton Potteries (1927)

- Agreement setting prices for pottery at "reasonable" rates.
- HELD: Illegal on its face.
- Cursory inquiry; restraint struck.

Foundational Cases, Cont'd.

■ Appalachian Coals (1933)

- To combat excess supply and low prices, 137 coal producers hired a joint sales agent who set a fixed price for coal.
- HELD: Restraint was reasonable.
- Probing inquiry.

■ Socony-Vacuum (1940)

- To combat excess supply and low prices, “major” gasoline producers agreed to purchase distress gas from independents on condition that independents curtail production.
- HELD: Restraint illegal.
- Cursory inquiry.

Synthesis of the Foundational Cases

- If restraint is profitable because it reduces output and drives up price (i.e. is "naked"), it's *per se* illegal.
- If restraint makes business sense without reducing output and driving up price (i.e., is "ancillary"), then apply the **rule of reason** (i.e., probing inquiry into whether the practice likely expands or reduces market output).

Cases Applying the Modern ROR

■ Professional Engineers (1978)

- Members of engineering society agreed to an ethical canon prohibiting them from discussing price until engaged by a client. (Public safety rationale.)
- HELD: Illegal under “quick look” ROR. Can’t question the value of competition.

■ Broadcast Music (1979)

- BMI and ASCAP issue “blanket licenses” for songs in repertoire. Agencies then monitor broadcasters and pay royalties based on number of times a copyrighted work is aired. Copyright holders thus agree to a fixed performance price.
- HELD: Passes muster under ROR.
- Rationale: reduces transaction costs, creates a “new product,” venture is non-exclusive.

Cases Applying the Modern ROR

■ Maricopa County (1982)

- Physicians and insurers in Maricopa County adopted a plan under which physicians would adhere to maximum prices if insurers would cover all medical expenses.
- HELD: Per se illegal
- Lessons: Max PF is per se illegal; restraint purporting to achieve pro-competitive ends must be narrowly tailored.

■ NCAA (1984)

- Members of NCAA agreed to broadcast limitations; asserted rationale was to preserve competitive balance and encourage attendance at live games.
- HELD: ROR applies b/c “network joint venture,” but restraint is unreasonable.
- Lesson: Restraint must be reasonably necessary.

Case law's Guiding Principles

- If restraint "naked," then illegal. Otherwise, ROR.
- In applying ROR, key question is whether the restraint enhances or reduces competition (\approx mkt. output).
- A restraint is more likely to pass muster under the ROR if...
 - It reduces transaction costs
 - It facilitates the creation of a new product or service
 - BUT: Must be "reasonably necessary" and the "least restrictive alternative"
 - It's not exclusive (i.e., venturers are free to contract outside the venture)
 - ALSO: Better if venturers set their own terms.
 - Entry is easy.