Practices Violating The Antitrust Laws

§2.01 AGREEMENTS IN RESTRAINT OF TRADE—SECTION 1 OF THE SHERMAN ACT

§2.01(a) Elements

Section 1 of the Sherman Act (15 U.S.C. §1) makes unlawful “every contract, combination...or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations.” These few words would seem to cover much terrain. Indeed, countless contracts—including agreements to purchase one supplier’s products instead of another's—restrain trade. Are such contracts always illegal? We know that cannot be right. Otherwise, the courts would be littered with triple damage supplicants and the world as we know it would grind to a halt. In fact, such contracts are seldom illegal, and maybe that’s the reason.1

In any event, section 1 itself provides no immediate answers to the question of what specific conduct is illegal. In bellows-like fashion, the test for violation widens and contracts depending on the trial judge, 2


2 Unschooled outsiders believe cases are decided invariably by fact-finders, normally selected jurors. So, why does section 1 enforcement depend on the trial judge? One reason is because so many section 1 cases are now subjected to the summary judgment referendum. In that referendum, there is but one voter, the trial judge. Well, actually there may be four voters. Here’s how it works: a section 1 defendant will ritualistically move for summary judgment. If the motion is denied, the matter proceeds—usually to settlement. If the motion is granted, the trial Court will issue some kind of opinion explaining how the plaintiff fell short. The law itself may, at least, appear then to narrow.

But that's not the end of it. Three more voters in a Court of appeal will review the decision de novo. If those voter-judges believe the voter below has erred, they will issue an opinion, the apparent effect of which will be to ratchet up the law to the position it previously occupied or in very rare instances to a broader position it never occupied before. Or they will affirm. Much ap-
reviewing court, and the times.

Thus, what turns out to be illegal can be observed in an accumulation of frequently inconsistent Court decisions that interpret the Sherman Act and implicitly advise how its rules should be applied—at times through the prism of a tacit, or not so tacit, political agenda (that theoretically should have no influence at all on its routine enforcement). This perspective, plus the unique factual scenarios and irregular lawyering that characterize many such cases, may well affect their outcome. In short, reported section 1 decisions are not always helpful to understanding the law. Still, there are a few rules. Here they are, such as they are.

§2.01(a)(1) Contract, Combination, Or Conspiracy

The first requirement of a section 1 violation is that there be some form of relationship that amounts to a “contract, combination...or conspiracy.” The combination need not be in writing or even expressed. A wink, a nod—even a course of conduct that suggests a combination—may suffice. Virtually any relationship between competing sellers or buyers satisfies this requirement. A combination between a supplier and its customer forced by one of them to do or not do something against the other’s wishes also qualifies.

But there are some competitor relationships that do not quite amount to the requisite conspiracy. A recent decision in the Second Circuit reminded us that Adam Smith’s well-worn view that competitors “seldom meet together...but the conversation ends in a conspiracy against the public...to raise prices” may not be employed as the basis for a jury to jump to the conclusion that a mere meeting between competitors necessarily leads to illegal conspiracy. The Court specifically excoriated the government for intoning this mantra too frequently in its trials (presumably the result of the usual government insecurity about

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3 American Tobacco Co. v. United States, 328 U.S. 781 (1946); Blomkest Fertilizer, Inc. v. Potash Corp. of Saskatchewan, 176 F.3d 1055 (8th Cir. 1999), opinion superseded by 203 F.3d 1028 (8th Cir.), cert. denied, 531 U.S. 815 (2000).

the merits of its case). Of course, businesses hell-bent on conspiring seldom do so in writing. So most section 1 violations begin with unwritten combinations—where detection and proof are difficult. Not surprisingly, participants in such agreements also tend to have notoriously poor memories. One might think they would put important agreements like these in writing if they have such poor memories. But this seems to be a hang-up of the law abiding.

Generally, relationships between competitors (so-called horizontal relationships) are more likely to be viewed as illegal combinations than relationships between sellers and customers (so-called vertical relationships). For example, if dealer A complains about dealer B’s lower prices to their common supplier, and dealer B is then terminated without explanation, that would not, without more, constitute sufficient evidence from which to infer a conspiracy. On the other hand, an irregular, ephemeral horizontal relationship may amount to an illegal conspiracy.

However, some courts have characterized more regular, less ephemeral horizontal relationships to the contrary. In one case, the membership of defendant corporation in the trade association of convicted price fixers, with price similarities, proven communications by the defendant with those price fixers, and their failure to increase capacity (which the freedom to price should permit) resulted in a summary judgment against the plaintiffs. Significant to the Court there was that the

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5 U.S. v. Taubman, 297 F.3d 161 (2d Cir. 2002).

6 For example, the combination of the PGA and local tournament operators hosting its Senior PGA (Golf) Tour to bar subpar, i.e., lesser, players from said tour did not amount to the concerted action required to restrain trade. The PGA sets the rules and the operators dutifully obey them. Toscano v. Professional Golfers’ Association, 258 F.3d 978 (9th Cir 2001).

7 Miles Distributors, Inc. v. Specialty Construction Brands, __F.3d__, 2007 U.S. App. LEXIS 2519 (7th Cir. 2007).

8 It is worth pointing out early in this tome that “summary judgments” prove to be the free radical in antitrust law enforcement. In re Citric Acid Litigation, 191 F.3d 1090 (9th Cir. 1999), cert. denied sub nom. Gangi Bros. Packing v. Cargill, 529 U.S. 1037 (2000), loaded with factual disputes as it obviously was, should have been resolved by the finder of fact, likely a jury. However, Judges over the past generation have been increasingly reluctant to permit juries to decide antitrust cases, for fear that, swayed by passion, they will “not get it right,” i.e., as the judge him/herself would assess the case were he/she alone allowed to be the passionless finder of fact. See also Miles, __F.3d__, above.
convicted felons (price fixers), presumably with no incentive to lie any further, pointedly failed to implicate the defendant in their own price-fixing ring.9

Perhaps not all that contradictory was the decision of antitrust scholar and Seventh Circuit Judge Richard Posner, who reversed the grant of summary judgment and reinstated the plaintiffs’ price fixing claims in In re High Fructose Corn Syrup, 295 F.3d 651 (7th Cir. 2002). The Court counseled there as follows: “In deciding whether there is enough evidence of price fixing to create a jury issue, a court asked to dismiss a price fixing suit on summary judgment must be careful to avoid three traps....The first is to weigh conflicting evidence (the job of the jury )....The second...is to suppose that if no single item of evidence presented by the plaintiff points unequivocally to conspiracy, the evidence as a whole cannot defeat summary judgment....The third trap is failing to distinguish between the existence of a conspiracy and its efficacy.” (Id. at 655-56.) These bright-line pronouncements should carry considerable weight in future antitrust summary judgment motions in the Seventh Circuit, if not elsewhere.

A sure-fire way to avoid liability then is to prove there is no conspiracy, combination, or contract. For there to be liability under section 1 of the Sherman Act, by definition, there must be at least two involved parties with, at least, some evidence of their working together (voluntarily or involuntarily), each with its own separate interest to achieve an anti-competitive objective.10 Thus, two officers or directors from one company (or a company and its officer) who agree to restrain competition, cannot violate section 1 if they act on behalf of their employer.11 Similarly, those with an innocuous (sounding) “unity of interest,” such as improving patient care or their bargaining power with managed health care plans, or even those insurance company physician board members who “assist” it to decide not to provide coverage for non-physicians, e.g., podiatrists, are incapable of conspiring.12 However, even those who do not

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9 In re Citric Acid Litigation, 191 F.3d 1090, above.
10 In re Brand Name Prescription Drugs Antitrust Litigation, 288 F.3d 1028 (7th Cir. 2002).
11 Gregory v. Fort Bridger Rendezvous Ass’n., 448 F.3d 1195 (10th Cir. 2006).
12 American Chiropractic Association, Inc. v. Trigon Healthcare, 367 F.3d 212 (4th Cir.)
appear to exhibit such a “unity of [a higher calling] interest” still seem to avoid the conspiracy tag at times. Recently, a national dog breed club and its regional “affiliates” were found to be not capable of conspiring.\textsuperscript{13} Perhaps they collectively barked, but they did not collectively bite.

To the same effect, neither a company’s division nor its wholly owned subsidiary can be sufficiently independent of that company, as a matter of law, to violate section 1 when they “conspire.” \textit{Copperweld Corp. v. Independence Tube Corp.}, 467 U.S. 752 (1984). However, a company may be held accountable for conspiring with its separately managed and operated subsidiary if it is only partially owned.\textsuperscript{14} Plus, different owners of a company holding separate interests from that company may be held liable for the collusive acts of that company.\textsuperscript{15} So, if an officer of a company runs a side business that provides services to his employer, an agreement between them to restrain trade in, say, the market of the officer’s separate business, could also amount to an unlawful conspiracy.\textsuperscript{16}

Among other things, the \textit{Copperweld} defense has shielded hospitals from liability in much, though not quite all, of the country for combining with their medical staffs to exclude competition.\textsuperscript{17} Similarly, this de-

\textsuperscript{13} Jack Russell Terrier Network of Northern Cal. v. American Kennel Club, Inc., 407 F.3d 1027 (9th Cir. 2005).

\textsuperscript{14} That said, the total overlap in ownership between the claimed conspirators is not required to invoke the \textit{Copperweld} defense. In one case an ownership overlap of just 20 percent sufficed to defeat liability. Fresh Made, Inc. v. Lifeway Foods, 2002-2 Trade Cas. (CCH) ¶73,779 (E.D. Pa. 2002). However, another Court found that one company’s 79 percent share in the equity of, and its holding all of the voting shares of, its subsidiary was insufficient to avoid a conspiracy charge. Tunis Bros. Co. v. Ford Motor Co., 763 F.2d 1482 (3d Cir. 1985).

\textsuperscript{15} \textit{Cf.}, Freeman v. San Diego Ass’n of Realtors, 322 F.3d 1133 (9th Cir. 2003), cert. denied, 540 U.S. 940 (2003).

\textsuperscript{16} See, \textit{e.g.}, Pink Supply Corp. v. Hiebert, Inc., 788 F.2d 1313 (8th Cir. 1986).

\textsuperscript{17} The Ninth and Eleventh Circuits are the exceptions. Oltz v. St. Peters Community Hosp., 861 F.2d 1440 (9th Cir. 1988); Crosby v. Hosp. Auth. of Valdosta and Lowndes County, 93 F.3d 1515 (11th Cir. 1996), cert. denied, 520 U.S. 1116 (1997).
fense has shielded podiatrists from liability for dancing with health insurance providers, because they were not the lead dancers and only had some input in the insurer’s decision-making process. However, hospital service districts, because they are separate entities, are not immune from the very conduct from which individual hospitals in those districts may be immune. Also, individuals on hospital medical staffs, with independent practices, still may be liable for conspiring to exclude competition with other competing practitioners.

Apart from intra-enterprise corporate control, another “antidote” to the legal risks of joint behavior is a consignment arrangement. A true consignment, of course, will not involve any sale between the supplier and its seller. With no sale, there can be no conspiracy. Of course, for the “consignment” defense to hold up, it must be bona fide, with the supplier bearing the risk of loss, etc. A legitimate agency arrangement between supplier and dealer, with similar risk allocation, operates the same way to avoid liability.

When joint behavior is not readily visible, it nevertheless may be inferred from various “plus factors.” Among these are that:

1. The challenged acts of the defendants are contrary to their independent self-interests (i.e., if not part of a combination);

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18 Podiatrist Association, Inc., 332 F.3d. 6, above.

19 Surgical Care Center of Hammond, L.C. dba St. Luke’s Surgicenter v. Hospital Service District No. 1 of Tangipahoa Parish dba North Oaks Medical Center, 171 F.3d 231 (5th Cir.) (en banc), cert. denied, 528 U.S. 964 (1999).


21 Simpson v. Union Oil Co, 377 U.S. 13 (1964); See also Ozark Heartland Electronics, Inc. v. Radio Shack, 278 F.3d 759 (8th Cir. 2002). Perhaps the most intriguing aspect of this opinion, finding no resale price maintenance because the favored satellite dish seller was actually a consignee, is that the plaintiff’s owner was one Daniel Boone. The bearer of such an iconic name in American history could not cut a break from the court. Now well beyond the generation of coonskin caps, apparently Daniel Boone, the name, has been consigned (along with Davy Crockett) to the scrap heap of spent commercialism.