8. Horizontal Market Divisions, Group Boycotts, and Other Horizontal Arrangements

Antitrust Law

Fall 2014 Yale Law School

Dale Collins

Topics

- Horizontal market allocations
- Horizontal group boycotts of customers or suppliers
- Horizontal primary group boycotts
- Horizontal secondary group boycotts
- Horizontal information sharing
- Horizontal agreements on standards
- Horizontal joint ventures

General Warnings on Group Boycotts

- Warning 1

> "Group boycotts" are often listed among the classes of economic activity that merit *per se* invalidation under § 1. Exactly what types of activity fall within the forbidden category is, however, far from certain. "[T]here is more confusion about the scope and operation of the *per se* rule against group boycotts than in reference to any other aspect of the *per se* doctrine."[1]

- Warning 2
  - Group boycotts are *concerted* refusals to deal subject to Section 1 of the Sherman Act
  - It is important to distinguish them from *unilateral* refusals to deal, which are only subject to Section 2 of the Sherman Act. The rules can be very different.
    - We will deal with unilateral refusals to deal in Unit 18

[1] Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985) (internal citations omitted).

Horizontal Market Allocations

Horizontal Market Allocations

- Definition
  - Agreements among competitors to divide territories or customers and not to compete in each other's allocated area
    - "You sell east of the Mississippi, and I will sell west of the Mississippi, and we will not compete in each other's territory."
    - "You sell to local customers, I will sell to national accounts, and we will not compete for each other's customers"
- Proving unreasonableness
  - All forms of horizontal market allocations are per se unlawful
  - Modern exception: If the allocation is ancillary to a joint venture, it will be subject to the rule of reason or quick look[1]
    - Many of the older cases would fall into this exception today

[1] For criticisms of the older cases, see, for example, Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210 (D.C. Cir. 1986) (Bork, J.); Polk Bros., Inc. v. Forest City Enters. Inc., 776 F.2d 185 (7th Cir. 1985) (Easterbrook, J.); and General Leaseways, Inc. v. National Truck Leasing Ass'n, 744 F.2d 588 (7th Cir. 1984) (Posner, J.).

Horizontal Market Allocations

- Timken Roller Bearing Co. v. United States, 341 U.S. 593 (1951)
  - Facts
    - Timken developed and patented a tapered roller bearing in late nineteenth century
    - Licensed British Timken Ltd. and ultimately acquired 30% of its stock
    - Formed and licensed Societe Anonyme Francaise Timken (French Timken) and held 50% of its stock
      - Dewar, an English businessman, held 24% of British Timken and 50% of French Timken
  - DOJ complaint: Three Timken companies—
    - allocated trade territories among themselves;
    - fixed prices on products of one sold in the territory of the others;
    - cooperated to protect each other's markets and to eliminate outside competition; and
    - participated in cartels to restrict imports to, and exports from, the United States.
  - *Held*, "aggregation of trade restraints" violated the Sherman Act
    - Dominant purpose of restraints was to eliminate competition among the Timken companies and others
    - Common ownership does not insulate defendants from Sherman Act liability[1]
    - Trademark licenses could not be used to anticompetitively allocate territories and eliminate competition in the circumstances (restraints went beyond trademark licenses)

[1] *Timken* was part of the case law that sought to expand the reach of Section 1 by ignoring intracorporate ownership relationships. Recall that the Supreme Court reversed this trend in Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).

Horizontal Market Allocations

- United States v. Sealy, Inc., 388 U.S. 350 (1967)
  - Facts
    - In 1891, Sealy began making mattresses with patented features and licensing third-party manufacturers to produce Sealy mattresses under the Sealy trademark
    - During the Great Depression, Sealy was hit hard and to survive was acquired by its licensees (about 30)
    - Licensees had exclusive territories in which to sell Sealy-branded mattresses
      - Licensees were free to sell private label mattresses without restriction
  - *Held*, per se unlawful horizontal market allocation
    - Sealy owned and controlled by stockholder-licensees, making restraint horizontal and not vertical
      - The case was precipitated when in the early 1960s when Ohio Mattress breached its license agreement and began competing with other Sealy licensees, often undercutting them in price until they sold out to Ohio Mattress. So the territorial restraints appear to be binding at least to some licensees
    - Horizontal market allocations are per se unlawful under Timken
  - Notes:
    - The DOJ charged and the district court found that Sealy stockholder-licensees also fixed minimum retail prices, but this was not appealed to the Supreme Court
    - Following the Supreme Court's decision, Sealy eliminated its contractual provisions for territorial exclusivity but its licensees apparently maintained de facto exclusive territories. Ohio Mattress later successfully challenged this arrangement in a private action, which ultimately resulted in Ohio Mattress gaining control over Sealy.

Horizontal Market Allocations

- United States v. Topco Assocs., Inc., 405 U.S. 596 (1972)
  - Facts
    - In 1944, 25 small and medium-sized regional supermarket chains operating stores in 33 states form co-op (Topco) to act as purchasing agent for products to become Topco private label goods.
      - Topco governed by members
      - Topco earns no profits
      - Members operate independently and with no pooling of earnings or profits
      - About 10% of the total goods sold by Topco members are Topco-branded (but still very important)
    - Members agreed that they would each sell Topco-branded goods only within their Topco-assigned exclusive marketing territory. Stated rationale—
      - Formation and operation of Topco is procompetitive since it allows smaller firms to take advantage of volume purchasing discounts and so better compete with large firms
      - Topco-private labelling provides a brand to promote and a means of differentiation
      - Exclusive territories necessary to avoid free rider problem in Topco brand promotion

Horizontal Market Allocations

- United States v. Topco Assocs., Inc., 405 U.S. 596 (1972) (con't)
  - District court: After trial on the merits judgment for the defendants (not per se illegal and satisfies rule of reason)

    > Whatever anti-competitive effect these practices may have on competition in the sale of Topco private label brands is far outweighed by the increased ability of Topco members to compete both with the national chains and other supermarkets operating in their respective territories. Moreover, if the testimony of all the live witnesses at the trial is correct, the elimination of the Topco territorial limitations in the franchises would result in the demise of the Topco organization and its private label program with no benefit to competition in those private label brands and with a substantial reduction in the competition between its members and both the national chains and other supermarkets. Expressed another way, the relief which the government here seeks would not increase competition in Topco private label brands but would substantially diminish competition in the supermarket filed.[1]

  - Supreme Court (6-1): Reversed—per se unlawful horizontal division of markets

    > Whether or not we would decide this case the same way under the rule of reason used by the District Court is irrelevant to the issue before us. The fact is that courts are of limited utility in examining difficult economic problems. Our inability to weigh, in any meaningful sense, destruction of competition in one sector of the economy against promotion of competition in another sector is one important reason we have formulated per se rules.
    >
    > In applying these rigid rules, the Court has consistently rejected the notion that naked restraints of trade are to be tolerated because they are well intended or because they are allegedly developed to increase competition.[2]

[1] United States v. Topco Assocs., Inc., 319 F. Supp. 1031, 1043 (N.D. Ill. 1970), *rev'd*, 405 U.S. 596 (1972).
[2] *Topco*, 405 U.S. at 609-10 (footnote omitted).

Horizontal Market Allocations

- *Sealy* and *Topco* today
  - Properly stated black letter law: “Naked” horizontal market allocations are per se unlawful
  - But considered wrongly decided on facts
  - Modern analysis
    - View Sealy and Topco as joint ventures
    - Rule of reason applies to restraints ancillary to a joint venture (see below)
    - The restraints in *Sealy* and *Topco* are ancillary to the joint venture
    - Rule of reason analysis (using *Topco*)--
      - *Prima facie case*: Restraints reduce intrabrand competition (i.e., competition among supermarkets with Topco-branded goods)
      - *Justification*: Restraints increase interbrand competition (i.e., competition between supermarkets with Topco-branded goods and other supermarkets)
      - *Competitive weighing*: Consumers better off with restraints
        - Usual articulation: “Increased interbrand competition outweighs reduced intrabrand competition” (which is what the district court found)
        - Better way of testing: Compare average prices for a diverse bundle of supermarket products between the restrained world and the “but for” world. Unless the “but for” world prices are lower, competition is not reduced by the restraint and the defendant wins
      - *Less restrictive alternative*: Not argued by government
  - *Key question*: When is a horizontal allocation of markets “naked” (without colorable justification)?

Horizontal Market Allocations

- Palmer v. BRG of Georgia, Inc., 498 U.S. 46 (1990) (per curiam)
  - Facts:
    - BRG offered a bar review course in Georgia for the Georgia bar examination
    - In 1976, HBJ began a competing course
    - Between 1977 and 1979, BRG and HBJ were the main providers of bar review courses in Georgia and were often in intense competition with one another
    - In 1980, BRG and HBJ agreed that:
      - BRG would become the exclusive licensee of HBJ in Georgia, offer its courses under the HBJ trade name (BAR/BRI), and pay royalties to HBJ
      - HBJ would withdraw and not offer courses in Georgia as long as BRG remained its licensee
      - BRG agreed that it would not offer courses outside of Georgia
    - Immediately after the 1980 agreement, the price of BRG's course was increased from $150 to over $400
  - *Held*, an agreement that allocates markets between competitors is per se unlawful
    - Sufficient that BRG and HBJ competed in Georgia, which was allocated to BRG
      - Irrelevant that BRG had not competed outside of Georgia, which was allocated to HBJ
    - Court found no colorable justification for the allocation other than to end competition and raise prices.

Horizontal Market Allocations

- Hammes v. AAMCO Transmissions, Inc., 33 F.3d 774 (7th Cir. 1994)
  - Facts
    - AAMCO franchisees through the AAMCO Dealers' Advertising Pool agreed not place separate advertisements in the yellow pages of a telephone book but instead take out a single large ad listing the name, address and telephone number of all five companies
      - Calls placed to number of one of the five pool members were handled by that member
      - The ad also listed five fictitious companies. Calls placed to a fictitious company were routed by agreement to one of the real companies
  - Held, district court's dismissal of complaint on the pleadings reversed (Posner, C.J.)

    > A type of conspiracy that has effects almost identical to those of price-fixing and is treated the same by the law is a conspiracy between competitors to rotate or otherwise allocate customers among the conspirators, so that each customer faces a monopoly seller. The AAMCO dealers in Indianapolis are located in different parts of the city and each presumably has an advantage in competing for the customers nearest to it. Under conditions of unrestricted competition, customers on the borderline of these zones of advantage would be courted by two or more dealers. The allocation of these customers among the dealers by means of automatic call forwarding from phantom dealers supposedly located in the borderline areas could eliminate competition for customers who, not being within the gravitational field of any dealer by reason of proximity, would, were it not for the allocation, have a real and not merely theoretical choice between dealers. Such an out-and-out scheme of customer allocation would be a per se violation of section 1.

    - Cause remanded for factual development
      - Posner posited a theory to be tested; he did not find any facts (and the remand)

Horizontal Group Boycotts of Customers and Suppliers

Horizontal Group Boycotts of Customers/Suppliers

- Definition
  - Agreements among competitors that they will not deal with a customer (or a supplier) except on terms set by the combination.
- Proving unreasonableness
  - Legal standard where boycott is an implementation of a price fixing conspiracy
    - *Non-labor*: Per se unlawful (usually regarded as horizontal price fixing). *FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411 (1990).
    - *Labor*: Per se unlawful unless subject to the statutory or non-statutory labor exemptions
  - Legal standard where boycott is for some other reason
    - Generally, rule of reason or quick look
    - If the boycott is a genuine political expression, the conduct does not violate the Sherman Act.
      - *See* Missouri v. National Organization for Women, Inc., 620 F.2d 1301 (8th Cir. 1980) (holding that the Sherman Act did not apply to a boycott organized by NOW against states that did not ratify the Equal Rights Amendment) (following NAACP v. Claiborne Hardware, 458 U.S. 886 (1982))

Horizontal Group Boycotts of Customers/Suppliers

- FTC v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411 (1990)
  - Facts
    - On August 11, 1983, members of the SCTLA agreed not to represent indigent criminal defendants after September 6, 1983, in the District of Columbia Superior Court until the District of Columbia government increased the lawyers' compensation to $35 per hour
      - The SCTLA is a bar association, not a labor union
      - SCTLA members are private practitioners, some of whom accept appointments to represent individual criminal defendants accused of less serious and misdemeanor cases pursuant to the District of Columbia Criminal Justice Act (CJA)
      - Most appointments go to about 100 members (called "CJA regulars")
    - After September 6, about 90% of the CJA regulars refused to accept new appointments and there was no one to replace them
    - With the system of the verse of collapse, on September 19 the District of Columbia increased the rate to $35 per hour and the boycotted ended.
    - The FTC sued the SCTLA and four of its officers for violating Section 5 of the FTC Act
  - *Held*, SCTLA per se illegal
    - Group boycott among competing members of the bar as a device to increase prices paid for their services: a "naked restraint on price and output" (citing *NCAA*)
    - Boycott not justified even if preboycott compensation rates were unreasonably low and increased rates brought about better representation and lower case loads
      - "The statutory policy underlying the Sherman Act 'precludes inquiry into the question whether competition is good or bad.'" (quoting *Prof. Engr's*)

Horizontal Primary Group Boycotts

Horizontal Primary Group Boycotts

- Definition
  - Agreements among competitors not to deal directly with another competitor
- Proving unreasonableness
  - *Essential facility*: Per se unlawful if the boycotting competitors refuse to supply the targeted competitor with an “essential facility” they jointly control on reasonable terms and without which the targeted competitor cannot compete in the market. *United States v. Terminal Railroad Ass’n*, 224 U.S. 383 (1912).
    - “Reasonable” terms means terms that allows the competitor to compete in the market
    - *Modern view*: Reasonable terms need not be non-discriminatory
      - In a joint venture, for example, the venture partners (who have taken the risk in forming the venture) may receive more favorable terms than third-parties as long as the terms offered to third parties enable them to compete
  - *Non-essential facilities*: Judged under the rule or reason/quick look unless—
    - Access to the product or service provided by the boycotting competitors is important to effective competition;
    - The boycott is likely to eliminate significant competition and increase the market power of the boycotting competitors; and
    - The boycott is not connected with any plausible efficiency
  - Note: This is one of the rare areas of antitrust law that imposes a *duty to deal*

Horizontal Primary Group Boycotts

- United States v. Terminal Railroad Ass'n, 224 U.S. 383 (1912)
  - Facts
    - The Terminal Railroad Association (TRRA) was a corporation formed in 1899 pursuant to an agreement among Jay Gould and several defendant railroad companies for the purpose of acquiring several independent terminal companies in St. Louis
    - TRRA then gained control of all three means for railroad traffic to cross the Mississippi River at St. Louis
    - Of the 24 railroads converging on St. Louis, 14 held an interest in the TRRA and 10 did not
  - *Held*, the Sherman Act imposed a duty on the TRRA to permit non-member railroads access to the TRRA bridges and terminal facilities on nondiscriminatory terms
    - Access to the bridges and terminal facilities were essential to the enable to non-members to compete with members
    - It was not feasible for nonmembers to build alternate facilities
    - The TRRA could accommodate nonmember traffic without difficulty (and in fact did so)
  - Observations
    - This is the origin of the *essential facility doctrine* in antitrust law. Its scope, which has always been uncertain, has been narrowed in recent years
    - This is a rare instance of where the antitrust laws impose an *affirmative duty to deal*
    - The converse rule of *TRRA* is that a horizontal primary group boycott is a per se violation when there is a duty to deal

Horizontal Primary Group Boycotts

- Eastern States Retail Lumbers Dealers Ass’n v. United States, 234 U.S. 600 (1914)
  - Facts
    - Retail lumber dealers conspired to prevent wholesale dealers from selling in competition with them at retail by placing the names of wholesale dealers that sold at retail on association-maintained “blacklists”
    - Although there was no explicit agreement among retail dealers not to purchase lumber from “blacklisted” wholesale dealers, retail dealers generally did not do so
  - *Held*, conspiracy violated the Sherman Act
    - The case has been read by the Supreme Court to hold that horizontal primary group boycotts that are “so likely to restrict competition without any offsetting efficiency gains . . . should be condemned as per se violations of § 1 of the Sherman Act.”[1]

[1] Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284, 290 (1985).

Horizontal Primary Group Boycotts

- Associated Press v. United States, 326 U.S. 1 (1945)
  - Facts
    - AP is a cooperative association of the publishers of more than 1200 newspapers
    - Collects and distributes news originally obtained by AP employees, employees of the member newspapers, and the employees of foreign independent news agencies with contracts with AP
    - Challenged restraints in AP by-laws:
      - AP members prohibited from selling news to non-members
      - Each AP member the power to block ("blackball") its non-member competitors from AP membership
  - *Held*, blackball restraint violated the Sherman Act
    - Acknowledged that the AP increased efficiency in the dissemination of news
    - While AP was not an essential facility, AP members had a natural advantage in the news business because AP gathered the most news and gathered it efficiently
    - Enjoined the blackball restraint, but permitted the prohibition on sales of news by non-members
      - The idea appears to be that dissemination of news within the AP was efficient and that exclusivity was necessary to this efficiency, and
      - Membership unrestricted by competitive considerations would give nonmembers an opportunity to access the efficient services of the AP
  - Observations
    - *AP* seems to extend *Terminal Railroad* because access to the AP news service was not essential

Horizontal Primary Group Boycotts

- Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985)
  - Facts
    - Northwest Wholesale Stationers is a purchasing cooperative made up of approximately 100 office supply retailers in the Pacific Northwest
    - Members and non-members can purchase supplies from NWS at same price, but NWS distributes its profits to members pro rata on their purchases
      - Enables members to purchase supplies at net prices considerably less than nonmembers
      - NWS also provides members with warehousing services at an advantageous price
    - Significant cost advantage to being a NWS member
    - NWS by-laws prohibited a member from engaging in both retail and wholesale operations
      - Grandfather clause preserved Pacific's right to engage in both retail and wholesale
      - But in 1977 Pacific failed to notify NWS of a change in control as required by the by-laws and in 1978 the membership voted to expel Pacific from NWS
      - Pacific was given no notice, hearing, or other opportunity to challenge expulsion
      - Pacific earned $10,000 in NWS rebates in its last year of membership (Total Pacific sales; $7.6 million)
  - Complaint
    - Pacific challenged expulsion as a violation of Section 1 of the Sherman Act
      - *Theory*: Northwest's expulsion of Pacific from the cooperative without procedural protections was a group boycott that limited Pacific's ability to compete and should be considered *per se* violation of Section 1.

Horizontal Primary Group Boycotts

- Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co., 472 U.S. 284 (1985) (con't)
  - *Held*, per se rule does not apply
    - The lack of procedural safeguards does not make the per se rule apply:

      > In any event, the absence of procedural safeguards can in no sense determine the antitrust analysis. If the challenged concerted activity of Northwest's members would amount to a *per se* violation of § 1 of the Sherman Act, no amount of procedural protection would save it. If the challenged action would not amount to a violation of § 1, no lack of procedural protections would convert it into a *per se* violation because the antitrust laws do not themselves impose on joint ventures a requirement of process.[1]

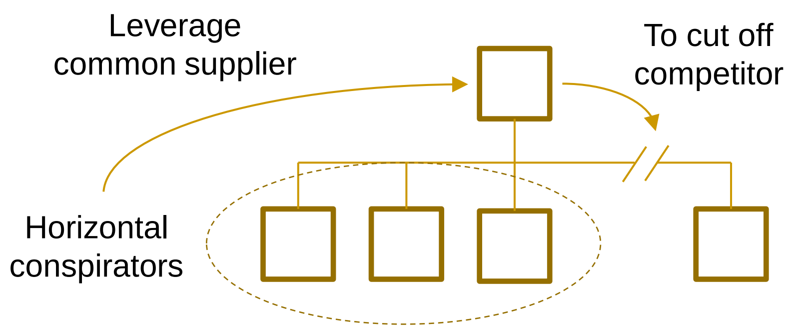
    - "Unless the cooperative possesses market power or exclusive access to an element essential to effective competition, the conclusion that expulsion is virtually always likely to have an anticompetitive effect is not warranted."[2]
      - NWS does not provide access to a supply, facility, or market necessary to enable the boycotted firm to compete
      - Nor are the boycotting firms dominant in the market
    - NWS plausibly produces significant efficiencies to which the challenged restraints could be ancillary
  - Observations
    - *NWS* cuts back significantly on *Terminal Railroad* and *AP* by putting conditions on the application of the per se rule to horizontal primary group boycotts

[1] *Northwest Wholesale Stationers*, 472 U.S. at 293.
[2] *Id*. at 296.

Horizontal Secondary Group Boycotts

Horizontal Secondary Group Boycotts

- Definition
  - Agreements among competitors not to deal with (or otherwise put pressure on) a vertically-related firm if that firm deals with a targeted competitor



  - Also works when the vertically-related firm is a critical distribution channel
  - *Query*: Are the compliant common supplier members of the conspiracy even if their compliance was coerced?
- Proving unreasonableness
  - Per se unlawful
  - Almost always appears in the cases as
    - a means of disciplining or driving out of business discounting competitor, or
    - driving competitors out of business in order to jointly monopolize a market

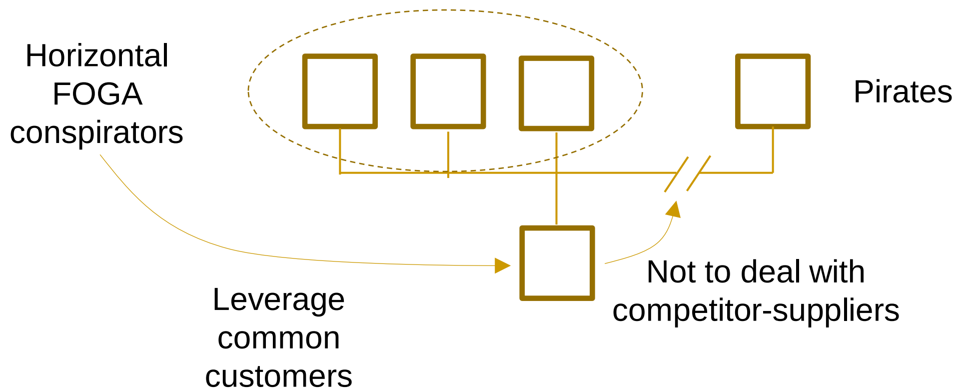
Horizontal Secondary Group Boycotts

- Fashion Originators' Guild of Am. v. FTC, 312 U.S. 457 (1941)
  - Facts
    - Member garment designers and manufacturers adopted a policy not to sell "original creations" of women's clothing to retailers that also purchased from so-called "pirates"—manufacturers that "stole" FOGA member designs and sold to retailers at a low price
    - "Original creations" are not protected by copyright or patent
    - As a result of policy, 12,000 retailers signed statements not to buy from pirates
    - FOGA is powerful: In 1936, members account for
      - 38% of all women's garments wholesaling at $6.75 and above
      - 60% of all women's garments wholesaling at $10.75 and above
  - *Held*, FTC correctly held that agreement violated Section 5 of the FTC Act
    - Has as its purpose and effect the direct suppression of competition from the sale of unregistered textiles and copied designs
      - No error for FTC to refuse to hear much of FOGA's evidence that its practices were reasonable to protect FOGA members from the pirating of their original designs, since this was not a justification[1]
      - "[E]ven if copying were an acknowledged tort under the law of every state, that situation would not justify petitioners in combining together to regulate and restrain interstate commerce in violation of federal law."[2]
    - The Supreme Court has characterized the *FOGA* rule as a rule of per se illegality[3]
      - *Query*: Is market power a precondition of the application of the per se rule?

[1] *FOGA*, 312 U.S. at 468 ("[T] the reasonableness of the methods pursued by the combination to accomplish its unlawful object is no more material than would be the reasonableness of the prices fixed by unlawful combination.").
[2] *Id*.
[3] NYNEX Corp. v. Discon, Inc., 525 U.S. 128, 134 (1998).

Horizontal Secondary Group Boycotts

- Fashion Originators' Guild of Am. v. FTC, 312 U.S. 457 (1941) (con't)



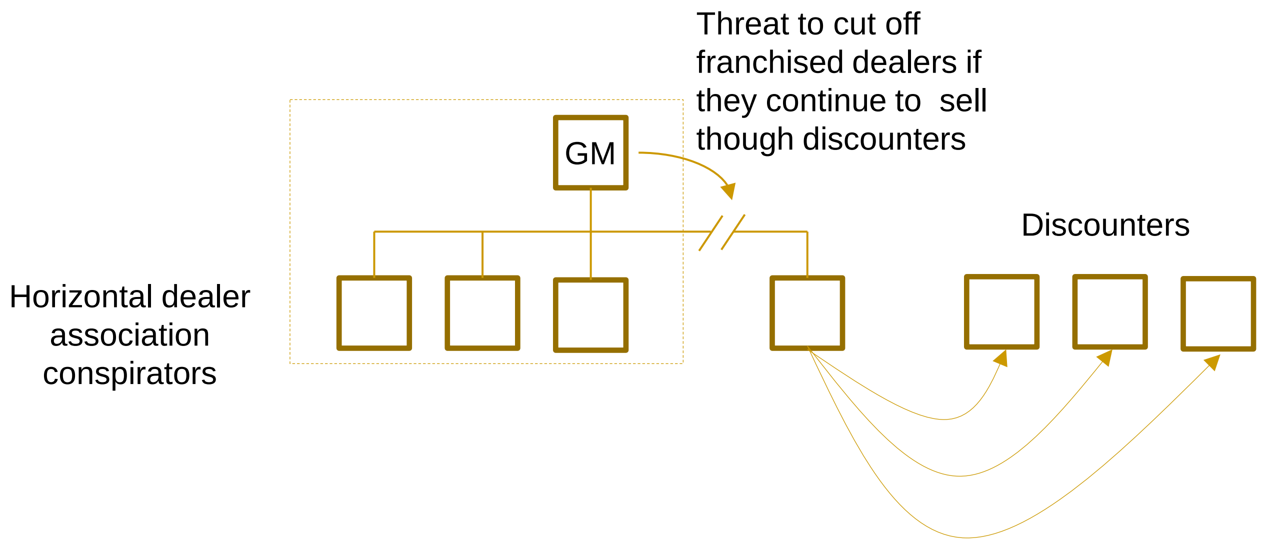
  - Traditional form of secondary boycott implemented through common customers rather than common suppliers

Horizontal Secondary Group Boycotts

- United States v. General Motors Corp., 384 U.S. 127 (1966)
  - Facts
    - Only franchised dealers can buy cars from General Motors
    - About 12 of the 85 franchised Chevrolet dealers in the LA area sold cars they purchased from GM through nonfranchised firms that competed with franchised firms by offering customers substantial discounts
    - Three dealer associations vigorously complained to GM about the practice and sought GM's assistance in putting pressure on dealers not to sell through discounters
      - At the urging of the associations, GM took the position that dealing through discounters violated the "location clause" in its franchise agreement that limited franchised dealers to specific locations from which they could sell and sought assurance from all of its LA-area dealers that they would conform to the location clause and not sell to discounters
      - No evidence that GM had an independent interest in eliminating discounters apart from assuaging the bulk of its franchised dealers
      - The dealer associations assisted GM in policing the location clause
  - *Held*,
    - Dealer associations and their dealers conspired horizontally to cut the supply of GM cars to the competing discounters
    - GM joined this conspiracy and implemented it though its enforcement of the location clause to prevent its franchised dealers from selling through discounters
    - Conspiracy was per se unlawful since it comprised a horizontal boycott with the purpose and effect of eliminating price competition from discounters

Horizontal Secondary Group Boycotts

- United States v. General Motors Corp., 384 U.S. 127 (1966) (con't)



- This is not the usual form of secondary boycott
  - The dealer associations are not threatening to stop dealing with GM if GM does not cut off the franchised dealers dealing with the discounters
  - But it still is a form of secondary boycott because the real targets are the discounters, not the franchised dealers selling through the discounters

Horizontal Information Sharing

Horizontal Information Sharing

- Definition
  - Agreements among competitors to exchange information among themselves
    - The information exchanged is often prices, quotes, sales levels, production levels, inventories, shipments, or production costs
- Proving unreasonableness
    - Horizontal information exchanges are subject to the rule of reason. So a horizontal information sharing arrangement that tends to raise price without any offsetting procompetitive justification would violate the rule of reason, even in the absence of any finding of horizontal price fixing.
    - However, horizontal information exchanges may be facilitating devices for horizontal price fixing and may be circumstantial evidence of per se unlawful horizontal price fixing. *See United States v. Container Corp. of Am.*, 393 U.S. 333 (1969).
    - *Note*: As a general rule, the more aggregated and dated the information, the less likely that it will be found to raise of stabilize market prices and therefore violate the Sherman Act. Conversely, the exchange of current, customer-specific, competitively sensitive information—especially prices—is likely to be found to violate the rule of reason, if not be a facilitating device for a per se unlawful horizontal price-fixing arrangement.

Horizontal Information Sharing

- American Column & Lumber Co. v. United States, 257 U.S. 377 (1921)
  - Facts
    - 365 members of the American Hardwood Manufacturers' Association—accounting for 1/3 of U.S. production—agreed to an "Open Competition Plan" to disseminate information about production and market conditions to enable members to make "intelligent decisions" based on accurate data
    - Members provided (by standardized grade of lumber)—
      - A *daily* report of all sales actually made, with the name and address of the purchaser
      - A *daily* shipping report, with exact copies of the invoices
      - A *monthly* production report
      - A *monthly* stock (inventory) report by each member
      - Price-lists for the beginning or each month and price changes when made
    - Association would then aggregate members report and provide members with—
      - A *monthly* summary showing the production of each member for the previous month
      - A *weekly* report of all sales, giving each sale and the price, and the name of the purchaser
      - A *weekly* report of each shipment by each member
      - A *monthly* report of the individual stock on hand of each member
      - A monthly summary of the pricelists furnished by members, showing the prices asked by each, with any changes made immediately transmitted to all the members
      - A *monthly* market report letter from the association interpreting market conditions
    - Monthly regional meetings for members "for the discussion of all subjects of interest"
      - Questionnaire distributed beforehand on future production, plant shut-downs, expected market conditions

Horizontal Information Sharing

- American Column & Lumber Co. v. United States, 257 U.S. 377 (1921) (con't)
  - *Held*, agreement to exchange information violated the Sherman Act
    - Provided a detailed picture of sales, inventories, and expectations for future market conditions
    - In turn, provided a basis for discussions at meetings, especially for controlling "overproduction" that was putting substantial downward pressure on prices
    - Information exchange, meetings, and market report letter intended to and had the effect of raising prices above what they would have been otherwise

> *Interesting factoid*: Every report and market letter issued by the Association to members was also filed with the DOJ and FTC and all meetings were open to the public, with dealers and the public invited to join.

  - Modern interpretation
    - Detailed information exchanges (especially of current customer-specific prices and shipments, individual firm inventories, and expected future production) + evidence of an intent to affect or an actual effect on price is unlawful under the rule of reason
    - Same evidence circumstantial evidence of a per se unlawful price-fixing conspiracy
      - Becomes more compelling if (as here) the information and its consequences for the industry are discussed in meetings among competitors
      - Also becomes more compelling if (as here) the Association provides suggestions (even if broadly phrased) as to what members should do in order to increase prices (e.g., "Hold the line of production in order to keep prices up")

Horizontal Information Sharing

- American Column & Lumber Co. v. United States, 257 U.S. 377 (1921) (con't)

Genuine competitors do not make daily, weekly, and monthly reports of the minutest details of their business to their rivals, as the defendants did; they do not contract, as was done here, to submit their books to the discretionary audit, and their stocks to the discretionary inspection, of their rivals, for the purpose of successfully competing with them; and they do not submit the details of their business to the analysis of an expert, jointly employed, and obtain from him a "harmonized" estimate of the market as it is, and as, in his specially and confidentially informed judgment, it promises to be. This is not the conduct of competitors, but is so clearly that of men united in an agreement, express or implied, to act together and pursue a common purpose under a common guide that, if it did not stand confessed a combination to restrict production and increase prices in interstate commerce, and as, therefore, a direct restraint upon that commerce, as we have seen that it is, that conclusion must inevitably have been inferred from the facts which were proved. To pronounce such abnormal conduct on the part of 365 natural competitors, controlling one third of the trade of the country in an article of prime necessity, a "new form of competition," and not an old form of combination in restraint of trade, as it so plainly is, would be for this court to confess itself blinded by words and forms to realities which men in general very plainly see, and under-stand and condemn, as an old evil in a new dress and with a new name.

The Plan is, essentially, simply an expansion of the gentleman's agreement of former days, skillfully devised to evade the law. To call it open competition, because the meetings were nominally open to the public, or because some voluminous reports were transmitted to the Department of Justice, or because no specific agreement to restrict trade or fix prices is proved, cannot conceal the fact that the fundamental purpose of the Plan was to procure "harmonious" individual action among a large number of naturally competing dealers with respect to the volume of production and prices, without having any specific agreement with respect to them, and to rely for maintenance of concerted action in both respects, not upon fines and forfeitures as in earlier days, out upon what experience has shown to be the more potent and dependable restraints, of business honor and social penalties-cautiously reinforced by many and elaborate reports, which would promptly expose to his associates any disposition in any member to deviate from the tacit understanding that all were to act together under the subtle direction of a single interpreter of their common purposes, as evidenced in the minute reports of what they had done and in their expressed purposes as to what they intended to do.[1]

[1] *American Column*, 257 U.S. at 410-11.

Horizontal Information Sharing

- Maple Flooring Manufacturers' Ass'n v. United States, 268 U.S. 563 (1925)
  - Facts
    - Association
      - Consisted of 22 members accounting for about 70% of maple, beech and birch flooring
      - Organized in March 1922, about four months after American Column was decided
    - Activities
      - Detailed information submitted by members to Association, but Association only disseminated aggregated historical data on past and closed transactions
        - No identification of individual customers, individual mills or geographic distribution of sales
        - Statistics published in trade journals and open to the public
      - Complied aggregated data showing average cost of production for association members
      - Complied information as to freight rates on flooring
        - Members often experienced a delay in securing quotations of freight rates from carriers
    - Prices
      - No direct proof that the Association activities had any adverse effect on consumer prices
      - No proof of price uniformity among Association members
        - In particular, no proof that Association members used Association average cost + Association freight rates + some margin to calculate sales prices
      - Association members generally priced lower than non-association members
  - Held, no violation of the Sherman Act
    - Procompetitive to disseminate accurate general data on the market, provided that competition is not thereby adversely affected

Horizontal Information Sharing

- United States v. Container Corp., 393 U.S. 333 (1969)
  - Facts
    - Practice was that a corrugated container firm could request its competitor-defendant for information about the most recent price charged or quoted to a specific customer
    - Each defendant gave price information to other defendants with the expectation of reciprocity
    - No evidence of an express agreement or understanding between or among any of the defendants to either exchange price information or to restrict price competition
    - Defendants accounted for 90% of corrugated container shipments
    - Product fungible and demand inelastic
    - Industry overcapacity, but reciprocal information exchange stabilized downward pricing
  - *Held*,
    - As circumstantial evidence, practice + effect on price sufficient to find a per se illegal price-fixing agreement

Horizontal Standard Setting

Horizontal Standard Setting

- Definition
  - Agreements among competitors on standards that for various products or services
    - E.g., the Blu-ray standard for video discs or the CDMA telecommunications standard for mobile phones

- Proving unreasonableness
  - Subject to rule of reason analysis

    There is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm. Agreement on a product standard is, after all, implicitly an agreement not to manufacture, distribute, or purchase certain types of products. Accordingly, private standard-setting associations have traditionally been objects of antitrust scrutiny. When, however, private associations promulgate safety standards based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition, those private standards can have significant procompetitive advantages. It is this potential for procompetitive benefits that has led most lower courts to apply rule-of-reason analysis to product standard-setting by private associations.[1]

[1] Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492, 500-01 (988).

Horizontal Standard Setting

- Radiant Burners, Inc. v. Peoples Gas Light & Coke Co., 364 U.S. 656 (1961) (per curiam)
  - Allegations (on motion to dismiss)
    - The American Gas Association (AGA) operates testing laboratories and provides a “seal of approval” for gas burners as to safety, utility and durability
    - AGA tests are not objective and can be influenced by members
    - Radiant Burner was twice rejected by the AGA. Although its burners are safer, more efficient, and just as durable as burners that AGA has approved
  - Complaint
    - AGA and 10 of its members (six of whom are manufacturer-competitors of Radiant Burners) conspired to deny AGA approval of the Radiant Burner, with the effect that the Radiant Burner has been excluded from the market
      - Gas companies would not supply gas to uncertified burner
  - *Held*, complaint states a cause of action for a Sherman Act per se violation
    - No defense that exclusion did not have an adverse market impact because the manufacturer was too small to make a competitive difference
      - Hence, per se illegal
    - Per se illegality appears to require—
      - Certification was based on standards that were not objective and that could be manipulated by competitors, and
      - The denial of certification in some way prevented the product from entering the market

Horizontal Standard Setting

- American Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556 (1982)
  - Facts
    - M&M had dominated the market for low water cut-off safety devices for water boilers
    - When Hydrolevel entered the market with a new design of cut-off device, it began taking business from M&M
    - ASME is a nonprofit membership corporation that, among other things, promulgates standards (codes) for product safety, including standards for boiler and pressure vessel components.
      - Although only advisory, the codes have a powerful impact since they are often incorporated by reference in federal regulations and state and local laws
      - An M&M vice president (James) was the vice chairman of the ASME subcommittee that drafted and interpreted ASME's code governing cut-off devices
    - Hydrolevel showed at trial that James used his position on the ASME subcommittee to cause ASME in 1971 to mischaracterize Hydrolevel's product as unsafe
    - As a result, Hydrolevel experienced significant difficulty in selling its cut off device and ultimately exited the market in 1975
  - Held,
    - ASME could be held liable for a Section 1 violation if its agents (including James) had acted within the scope of their apparent authority
    - The issue of whether James' conduct violated the Sherman Act was not before the Court
      - But the theory of anticompetitive harm in the case is widely regarded as being endorsed by the Court

Horizontal Standard Setting

- Allied Tube & Conduit Corp. v. Indian Head, Inc., 486 U.S. 492 (1988)
  - Facts
    - National Fire Protection Association
      - A private, voluntary organization with more than 31,500 individual and group members representing industry, labor, academia, insurers, organized medicine, firefighters, and government
      - Publishes product standards and codes related to fire protection through a process known as “consensus standard making,” which allows members to vote on codes
      - Codes are widely adopted by state and local government
    - Electrical conduit
      - Pipes through which electrical wires are run in buildings
      - Prior to 1980, NFPA code required steel conduit
      - Indian Head sought to get the code changed to include polyvinyl chloride (PVC) conduit
      - Approved by NFPA professional panel and set for vote at 1981 NAPA annual meeting
      - Allied Tube (the largest manufacturer steel conduit) and other steel conduit manufacturers packed the annual meeting with new NAFA members—paying all expenses—and voted down the PVC proposal
  - Jury: Rule of reason violation
    - *Special interrogatories*: Although Allied Tube had a good faith belief that PVC pipe was unsafe and did not violate any of the NFPA rules, it did subvert the NFPA process, which had an adverse effect on competition, and did not use the least restrictive means of expressing its opposition to the inclusion of PVC pipe in the code
  - Supreme Court
    - *Held*, no defense that the codes were implemented by government entities and not by the NFPA (i.e., Allied Tube’s conduct was not *Noerr-Pennington* protected petitioning conduct)

Horizontal Joint Ventures

Horizontal Joint Ventures

- Definition
  - Agreements among competitors to partially integrate their existing operations or create a new business in a single business unit
    - Sometimes call a “partial merger”
  - Typically, “bona fide” joint ventures are designed to either—
    - Create a new product or service,
    - Improve an existing product or service, or
    - Reduce the costs of manufacture or distribution
- Proving unreasonableness
  - Restraints that are ancillary to a bona fide joint venture are subject to the rule of reason/quick look
    - Analogous to the common law treatment of contracts in restraint of trade, where the restraints were ancillary to a more fundamental business purpose

Horizontal Joint Ventures

- Sample case authority
  - *Copperweld Corp. v. Independence Tube Corp*., 467 U.S. 752, 768 (1984) ("Other combinations, such as mergers, joint ventures, and various vertical agreements, hold the promise of increasing a firm's efficiency and enabling it to compete more effectively. Accordingly, such combinations are judged under a rule of reason, an inquiry into market power and market structure designed to assess the combination's actual effect.")
  - *In re Sulfuric Acid Antitrust Litig*., 703 F.3d 1004, 1013 (7th Cir. 2012) ("If two or more competing firms, wanting to fix prices, agreed to form a joint venture to sell their output at a price agreed on by the parties, the designation of the price-fixing agreement as a joint venture would not save it from being adjudged illegal per se. But as also explained in the cases and treatise that we've just cited, if a joint venture has a legitimate business purpose, as the defendants' joint venture with DuPont did, the fact that as part of the venture the prices of the venturers are coordinated does not condemn it out of hand, but instead subjects it to scrutiny under the rule of reason. If the coordination is ancillary to (that is, supportive of) the legitimate business purpose of the venture, it may be permissible—a rule of reason question.") (internal citation omitted)
  - *Addamax Corp. v. Open Software Found., Inc.*, 152 F.3d 48, 52 (1st Cir. 1998) (observing that research joint venture research "unless they amount to complete shams, are rarely susceptible to per se treatment. Where the venture is producing a new product . . . there is patently a potential for a productive contribution to the economy, and conduct that is strictly ancillary to this productive effort . . . is evaluated under the rule of reason.").

Horizontal Joint Ventures

- Sample case authority
  - *MLB Props., Inc. v. Salvino, Inc*., 542 F.3d 290, 339 (2d Cir. 2008) (Sotomayor, J., concurring in the judgment) ("[A] restraint that is unnecessary to achieve a joint venture's efficiency-enhancing benefits may not be justified based on those benefits. . . . In contrast, where a restraint is reasonably necessary to achieve a joint venture's efficiency-enhancing purposes (i.e., ancillary), it will be analyzed under the rule of reason as part of the joint venture because the effects of that restraint are not so plainly anticompetitive as to make a per se or quick-look approach appropriate.").

Horizontal Joint Ventures