Strafford

Presenting a live 90-minute webinar with interactive Q&A

Antitrust Concerns With Joint Ventures and Collaborations: Competitive vs. Anticompetitive Effects, NCAA v. Alston

Avoiding Liability for "Naked" Agreements, Ancillary Restraints, Collusion

TUESDAY, JUNE 15, 2021

1pm Eastern | 12pm Central | 11am Mountain | 10am Pacific

Today's faculty features:

Karen Kazmerzak, Partner, **Sidley Austin LLP**, Washington, D.C.

Howard M. Ullman, Of Counsel, **Orrick Herrington & Sutcliffe LLP**, San Francisco

The audio portion of the conference may be accessed via the telephone or by using your computer's speakers. Please refer to the instructions emailed to registrants for additional information. If you have any questions, please contact **Customer Service at 1-800-926-7926 ext. 1**.

Tips for Optimal Quality

FOR LIVE EVENT ONLY

Sound Quality

If you are listening via your computer speakers, please note that the quality of your sound will vary depending on the speed and quality of your internet connection.

If the sound quality is not satisfactory, you may listen via the phone: dial **1-877-447-0294** and enter your **Conference ID and PIN** when prompted. Otherwise, please **send us a chat** or e-mail **sound@straffordpub.com** immediately so we can address the problem.

If you dialed in and have any difficulties during the call, press *0 for assistance.

Viewing Quality

To maximize your screen, press the 'Full Screen' symbol located on the bottom right of the slides. To exit full screen, press the Esc button.

Continuing Education Credits

FOR LIVE EVENT ONLY

In order for us to process your continuing education credit, you must confirm your participation in this webinar by completing and submitting the Attendance Affirmation/Evaluation after the webinar.

A link to the Attendance Affirmation/Evaluation will be in the thank you email that you will receive immediately following the program.

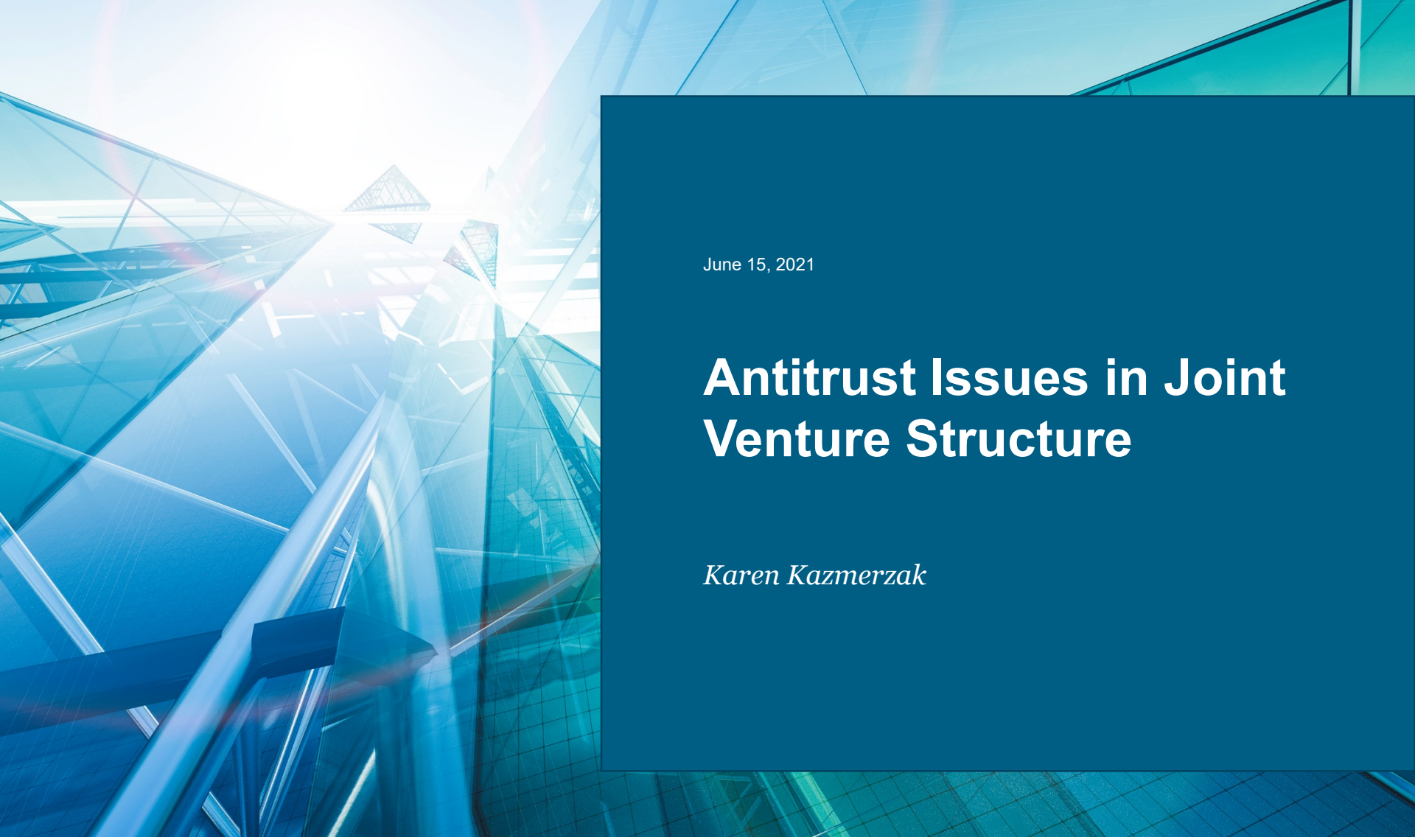
For additional information about continuing education, call us at 1-800-926-7926 ext. 2.

Program Materials

FOR LIVE EVENT ONLY

If you have not printed the conference materials for this program, please complete the following steps:

- Click on the link to the PDF of the slides for today's program, which is located to the right of the slides, just above the Q&A box.
- The PDF will open a separate tab/window. Print the slides by clicking on the printer icon.



June 15, 2021

Antitrust Issues in Joint Venture Structure

Karen Kazmerzak

SIDLEY

Introduction and Background

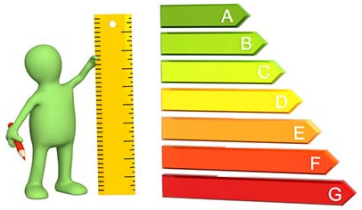
What is a Joint Venture?

- A joint venture (JV) can be any collaborative undertaking by which two or more entities devote their resources to pursuing a common objective.
  - Not all JVs are between competitors
  - Not all competitor collaborations are JVs
- For purposes of this presentation, it means:
  - One or more agreements, other than merger agreements
  - Between or among competitors to engage in economic activity
  - It does not need to be labeled a “joint venture” to be one
- Standards generally more permissive when arrangements do not involve competitors

JVs Come in a Number of Forms

- Co-venturers compete with each other outside the JV
- Co-venturers compete with the JV
- Joint activity often not performed through entities
  - Joint development arrangements
  - Joint marketing and promotion
  - Joint purchasing
- Standard-setting organizations
- Trade association data collection and dissemination
- Benchmarking
- Distribution by vertically integrated firms
  - Where a manufacturer sells through independent distributors and through own distribution arm
  - Where a component manufacturer sells to independent downstream firms and transfers in internal manufacturing operations

"But under a different accounting convention ..."



Why Joint Venture?

- Lower costs
- Obtain economies of scale
- Increase production capacity
- Pool research and development resources
- Commercialize new products
- Facilitate entry into new markets

Pre-formation Considerations

- Composition
  - Relationship between the JV parties
  - Purpose of JV
  - Other ways to achieve same objective of JV
- Strategic decisions
  - Pricing and output decisions
  - Territories
  - Customers
- Restraints on parties activities outside the JV
  - Purpose of restraint
  - Effects on competition
  - Less restrictive alternatives
- Anticipated customer reaction

Legal Framework

Antitrust Laws

- Sherman Act § 1: Restraints of trade
- Sherman Act § 2: Monopolization
- FTC Act § 5: Unfair methods of competition
- Clayton Act §§ 7 and 7A: M&A that substantially lessens competition or tends to create a monopoly
- Clayton Act § 8: interlocking directorates

DOJ/FTC Guidance

- Antitrust Guidelines for Collaborations Among Competitors
- Statements of Antitrust Enforcement Policy in Health Care
- Accountable Care Organization Guidelines
- Antitrust Guidelines for the Licensing of Intellectual Property

Antitrust Concerns with Joint Ventures

Strafford Webinar 6/15/21

Howard M. Ullman
hullman@orrick.com

orrick

Antitrust Issues in JV Structure

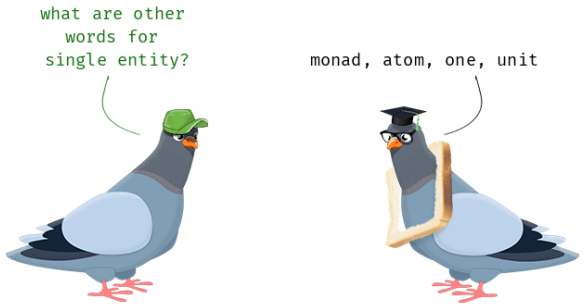
奥睿 orrick

Antitrust Issues in JV Structure

- Structure determines type of analysis ("*per se* lawful"), Rule of Reason, *per se* unlawful, so need to consider structure carefully
- Is the JV a **single entity**?
  - No structural issues
- Is the restraint a **core restraint**?
  - No structural issues
- Is the restraint an **ancillary restraint**?
  - Balancing test
- Is the restraint a **collateral restraint**?
  - Potentially problematic, could be *per se* unlawful
- NCAA case; other caveats
- Exclusion of competitors – can raise boycott and related issues

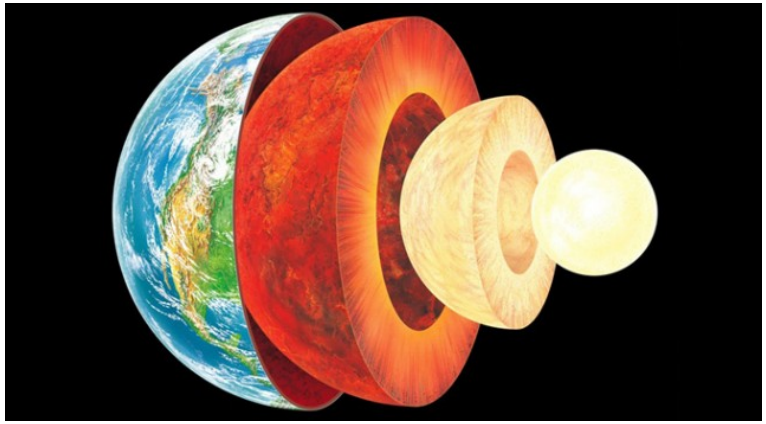
Is the JV a Single Entity?

- If the JV is a single entity, then there are no issues in terms of problematic agreements or restraints; unless the JV exercises or facilitates the exercise of market power, it is lawful
- *American Needle, Inc. v. NFL*, 560 U.S. 183 (2010)
  - JV functions that are controlled by the JV through its ownership of the assets necessary to supply those functions are single-entity functions. Benjamin Klein, *Single Entity Analysis of Joint Ventures After American Needle*
- *Cf. Rothery Storage & Van Co. v. Atlas Van Lines*, 792 F.2d 210 (D.C. Cir. 1986) (nationwide network of moving companies not a single entity)



Is the Restraint a Core Restraint?

- A restraint (a) involving the JV's products or services and (b) necessary to produce those very products or services (*e.g.*, setting JV prices) is a core restraint
  - A core restraint is either not an antitrust restraint within Section 1, is effectively *per se* lawful, or only to a very limited extent subject to the Rule of Reason. R of R analysis would likely focus on whether the formation of the JV was itself problematic. *Texaco Inc. v. Dagher*, 547 U.S. 1 (2006)
  - JV restraint regarding purchase of inputs



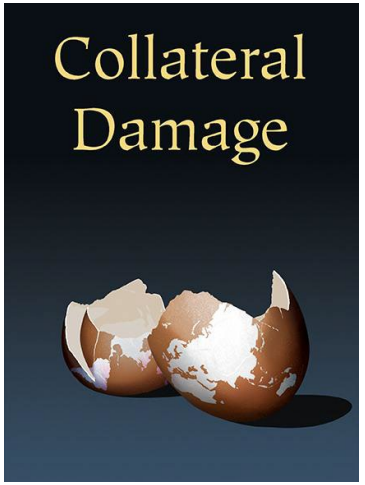
Is the Restraint an Ancillary Restraint?

- An ancillary restraint promotes the procompetitive attributes and competitive success of a legitimate collaboration
  - *E.g.*, agreement by parent not to compete directly with JV
- If a restraint is ancillary, then the burden arguably should be on a plaintiff to prove a less-restrictive alternative that furthers the same legitimate objectives
  - *Cf*. DOJ/FTC Antitrust Guidelines for Collaborations Among Competitors ("Collaboration Guidelines")(*) § 3.2 (restraint must be reasonably related to efficiency-enhancing integration and reasonably necessary to achieve pro-competitive benefits)

(*) https://www.ftc.gov/sites/default/files/documents/public_events/joint-venture-hearings-antitrust-guidelines-collaboration-among-competitors/ftcdojguidelines-2.pdf

Is the Restraint a Collateral Restraint?

- Collateral restraint – *e.g.*, a non-compete between JV parents. *Yamaha Motor Co. v. FTC*, 657 F.2d 971 (8th Cir. 1981)
- Collateral restraints involving competitors are likely condemned under some sort of "quick look." *Polygram Holding, Inc. v. FTC*, 416 F.3d 29 (D.C. Cir. 2005)
  - *Cf.* agreement by parent(s) not to compete with JV itself – ancillary restraint – Rule of Reason



Is the Restraint a Collateral Restraint? (Continued)

- At the extremes, such restraints may render the JV a “sham” and may be *per se* unlawful “naked” restraints
  - *U.S. v. Topco Associates, Inc*., 405 U.S. 596 (1972)
    - Cooperative of grocery stores, lacked market power, used private labels
    - Agreed to territorial restrictions
- *In re Blue Cross Blue Shield Antitrust Litig*., 26 F. Supp. 3d 1172, 1186 (N.D. Ala. 2014)
  - Denying motion to dismiss *per se* challenge to geographical restrictions on Blue companies’ ability to compete outside assigned territories

Caveats

- *The Medical Center at Elizabeth Place, LLC v. Atrium Health System*, 817 F.3d 934 (6th Cir. 2016)
  - Careful structure defeated by thin "intent" evidence
    - Integrated network, losses shared
    - Significant operational authority → central operator
    - Central operator had authority to manage all operations
    - Central operator controlled strategic plans, budgets, business plans, etc.
  - Anomalous decision?

NCAA Litigation

- Series of cases, latest in Ninth Circuit, 958 F.3d 1239, just argued in the Supreme Court on March 31
- NCAA is a joint venture, limits athlete compensation to college-related expenses for the purpose of promoting amateurism (pro-competitive purpose)
- Ninth Circuit went through a full Rule of Reason analysis of the NCAA's restrictions instead of a more limited analysis generally applicable to joint ventures (or at least to restraints that are necessary to create and preserve the product that the joint ventures created)

NCAA Litigation (Continued)

- Ninth Circuit also put the burden on the NCAA to show that its compensation rules were the least restrictive restraints and that there were no viable alternatives. This is most definitely <not> a “twinkling of the eye” type of analysis, and arguably reverses even the traditional Rule of Reason analysis that requires plaintiffs to show that there are less restrictive but equally effective alternatives
- While the first of these errors lamentable, the second one is particularly problematic. If a defendant engaged in pro-competitive conduct has to disprove hypothetical less-restrictive restraints, many JVs will fail the test. The Ninth Circuit’s test calls into questions many JVs and collaborations in industries ranging from health care to software

Exclusion of Competitors

- Buying cooperative – Rule of Reason. *Northwest Wholesale Stationers v. Pacific Stationery & Printing*, 472 U.S. 284 (1985)
- Denial of access can nevertheless be condemned. *See, e.g., Realcomp II Ltd. v. FTC*, 635 F.3d 815 (6th Cir. 2011)

IP and JVs

奥睿 orrick

IP and JVs

- Patent pools
- Standard-setting organizations
- Network JVs

Patent Pools

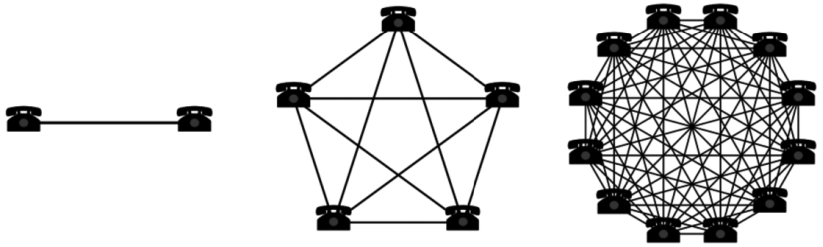
- *U.S. Philips Corp. v. ITC*, 424 F.3d 1179 (Fed. Cir. 2005); *Princo Corp. v. ITC*, 616 F.3d 1318 (Fed. Cir. 2010)
- Offering of a package license
  - Essential patents: normally pro-competitive
  - Non-essential patents: can raise issues (buyers being forced to buy licenses to patents they do not want)
- Suppression of a patented technology
  - *Princo*: Pooling of patents, allow licensees to use only one of several possible competing technological solutions – may not be patent misuse, could be subject to antitrust challenge
- *Cf. Broadcast Music v. CBS*, 441 U.S. 1 (1979) (JV to provide blanket copyright licenses OK; new product)

Standard-Setting Organizations

- *Addamax Corp. v. Open Software Foundation*, 888 F. Supp. 274, 280-81 (D. Mass. 1995) (treating standard-setting organization as a joint venture for antitrust purposes)
- Rule of Reason analysis
  - *National Association of Review Appraisers v. Appraisal Foundation*, 64 F.3d 1130, 1133-34 (8th Cir. 1995)
  - *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 309 (3d Cir. 2007) ("private standard setting . . . need not, in fact, violate antitrust law" because of its procompetitive effects)

Network JVs

- Networks – network effects
  - Positive feedback due to demand-side scale-economies; the larger the network, the more valuable it is to buyers/users of network products and services
  - Cooperation may be essential to ensure functions, but may facilitate market power (creation of entry barriers; denial of access to rivals)
  - Rule of Reason generally applied (bank / credit card network cases)
  - Large networks may be subject to Sherman Act § 2



Special Statutory Protections

奥睿 orrick

Special Statutory Protections

- National Cooperative Research Act of 1984 (“NCRA”) and National Cooperative Research and Production Act of 1993 (“NCRPA”), codified together at 15 U.S.C. § § 4301-06
- R&D and production JVs (and, after 2004), voluntary standards development organizations
  - Rule of Reason treatment (would likely get anyway)
  - Notification to Agencies → no treble damages (JV and parents)

Special Statutory Protections (continued)

- Limitations
  - Use of existing facilities not for production of new product/technology
  - Exclusions: marketing / distribution to party other than parent; certain information exchanges; allocating a market with a competitor
  - U.S. nexus required

Questions?

Howard M. Ullman
Orrick, Herrington & Sutcliffe LLP
405 Howard Street
San Francisco, CA 94105-2669
415-773-5652
hullman@orrick.com


orrick

What Information is Permissible to Share Among Co-Venturers?

Benefits and Potential Harms of Information Exchanges

Benefits	Examples
• Facilitates efficient investment	• Stock exchanges
• Reduces search costs	• Airline reservation systems
• Cooperative price setting	• Co-brokerage fees in real estate
• Synchronization of technologies	

But also…

Potential Harms	Examples
• Facilitates collusion	• Mechanism to monitor adherence to a collusive arrangement
• Facilitates coordination or stabilize prices	• Benchmarking among limited set of firms

Main Legal Principles in U.S.

- Information exchanges meant to enhance the efficiencies and output of the JV are subject to rule of reason treatment.
  - Standard established in *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918) (emphasis added)
  - "The true test of legality is whether the restraint imposed is such as merely regulates and perhaps thereby ***promotes competition or*** whether it is such as ***may suppress or even destroy competition***."
  - Burden-shifting framework
    - Plaintiff bears burden of presenting evidence that restraint harms competition
    - If met, defendant bears burden of demonstrating procompetitive effects of conduct
    - Plaintiff maintains ultimate burden of showing harm to competition outweighs benefits of restraint

- How to know when the conduct is subject to "rule of reason" or "per se illegal"?
  - JV (or other collaboration) must involve actual efficiencies
  - Information exchanged must be directly related and in furtherance of the collaborative activities

History Behind this Principle

- *Maple Flooring Manufacturers Association v. United States*, 268 U.S. 53 (1925)
  - 22 manufacturers of hardwood flooring located in upper Midwest accounting for ~70% of the flooring produced and sold in U.S., but accounted for much smaller percentage of total stands of timber available for flooring.
  - Government conceded many of the activities of the trade association beneficial.
  - Government challenged four types of information exchange concerning the potential harm of price uniformity.
    - Average costs of various classes of flooring
    - Compilation and dissemination of freight rates
    - Quantity and prices of flooring types sold (aggregated and anonymized)
    - Organized meetings of association
  - Court held conduct was lawful.
    - "[C]onsensus opinion of economists and of many of the most important agencies of the Government that the public interest is served by the gathering and dissemination, in the widest possible manner, of information with respect to the production and distribution, cost and prices in actual sales, of market commodities, because the making available of such information tends to stabilize trade and industry, to produce fairer price levels and to avoid the waste which inevitably attends the unintelligent conduct of economic enterprise."

Progeny of *Maple Flooring*: Treatment of Ad Hoc Exchanges

- *United States v. Container Corporation of America*, 393 U.S. 333 (1969)
  - Defendants accounted for 90% of corrugated containers in southeastern U.S.
  - Prices paid depended on alternative offers; suppliers would lower prices to match or beat a competing offer.
  - But then the suppliers began exchanging information with each other relating to specific sales to identified customers, including exchange of price.
  - This exchange had the effect of stabilizing prices, which the court deemed unlawful.
    - "Price is too critical, too sensitive a control to allow it be used even in an informal manner to restrain competition."
- *United States v. United States of Gypsum Company*, 438 U.S. 422 (1978)
  - Government alleged that gypsum board manufacturers telephoned each other to determine the price currently being offered on gypsum board to a specific customer.
  - Defendants claimed that the practice was intended to ensure the manufacturers were meeting competition in compliance with the Robinson-Patman Act.
  - Court recognized that the exchange of price information, without intent to conspire, is a gray zone within the Sherman Act and cautioned against per se treatment and criminal liability.

Agency Guidance

- Competitor Collaboration Guidelines § 3.31(b)
  - "[T]he sharing of information related to a market in which the venture operates or in which the participants are actual or potential competitors may increase the likelihood of collusion on matters such as price, output or other competitively sensitive variables."

- Health Care Statement 6: Provider Participation in Exchanges of Price and Cost Information Safety Zone
  - Independent third-party manages the information exchange
  - Data collected at least 3 months old
  - At least 5 firms reporting and no one firm represents more the 25% of statistic
  - Sufficiently aggregated

Agency Enforcement Actions

- PepsiCo, Inc., FTC File No. 0910133 (2010)
  - Memorialize protocol for handling restricted information
  - Adopt defensive measures (e.g., limit employees, restrict access with IT safeguards)
  - Require confidentiality agreements
  - Train employees on antitrust compliance best practices
  - Monitor compliance

- Decisions & Orders, Sigma Corp.(C-4347) and McWane (C-9351) (FTC 2012)
  - Data exchanged must relate to transactions that are at least 6 months old
  - Data with respect to price, output, and cost for any 3 competitors must not represent more than 60% of dollar or unit sales
  - Communications among competitors may only take place at official meetings relating to the exchange on topics identified on a written agenda prepared in advance of meeting and in the presence of antitrust counsel
  - Industry statistics gathered through the exchange must be made publicly available

Key Takeaways

- **Who is collecting the information?**
- **What information is being collected?**
- **What are they going to do with it?**
- **How is it being protected?**

- Ad hoc exchanges among competitors are inherently suspect. *See Container Board*
- A neutral third party is less likely to raise antitrust concerns. *But see Todd v. Exxon*
- If exchange is for JV or benchmarking purpose
  - Used for benchmarking by a trade association—generally can be okay, but be careful the information is sufficiently aggregated, anonymized, and stale.
  - Price and output information—increased risk of antitrust liability, but may be okay if (1) within scope of JV or (2) used to benchmark and sufficiently aggregated, anonymized, and stale.
  - Other types of information less likely to be problematic unless allows a competitor to back into price or output information of a competitor.
  - Competitively sensitive information should be shared subject to strict information sharing protocols.

Biography

KAREN KAZMERZAK
Partner

SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, DC 20005
+1 202 736 8068
kkazmerzak@sidley.com
www.sidley.com

KAREN KAZMERZAK, a former Federal Trade Commission lawyer, has a broad practice counseling clients regarding antitrust matters involved in mergers and acquisitions and concerning antitrust issues in licensing, distribution, pricing, and competitor collaborations. She has been recognized as a leader in her field by *Chambers USA* 2018-2021. Hailed as “very knowledgeable and easy to talk to,” her clients appreciate her strong legal acumen combined with her ability to address the business issues in an array of industries.