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Dos and Don’ts of Collaborating with Competitors

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Antitrust Overview

What is Antitrust and Why Does It Matter?

Goal of antitrust law: Promote ***competition*** for benefit of consumers and public interest

THEORETICAL BASIS

- Competition maximizes output
- Competition results in highest quality goods and services at the lowest price
- Competition allows the market to determine outcomes

Antitrust law requires entities to make their ***own independent decisions*** on competitive issues, such as price, hiring decisions, etc.

U.S. Antitrust Enforcement Overview

Public & Private enforcement

Department of Justice, Antitrust Division

— Executive branch

— Staff sections with specific industry expertise

Federal Trade Commission

— Five Commissioners

— Bipartisan, independent administrative agency

— Enforcement through Bureau of Competition

— Both competition and consumer protection jurisdiction

Private Enforcement Litigation

— Class actions

— Customers or competitors

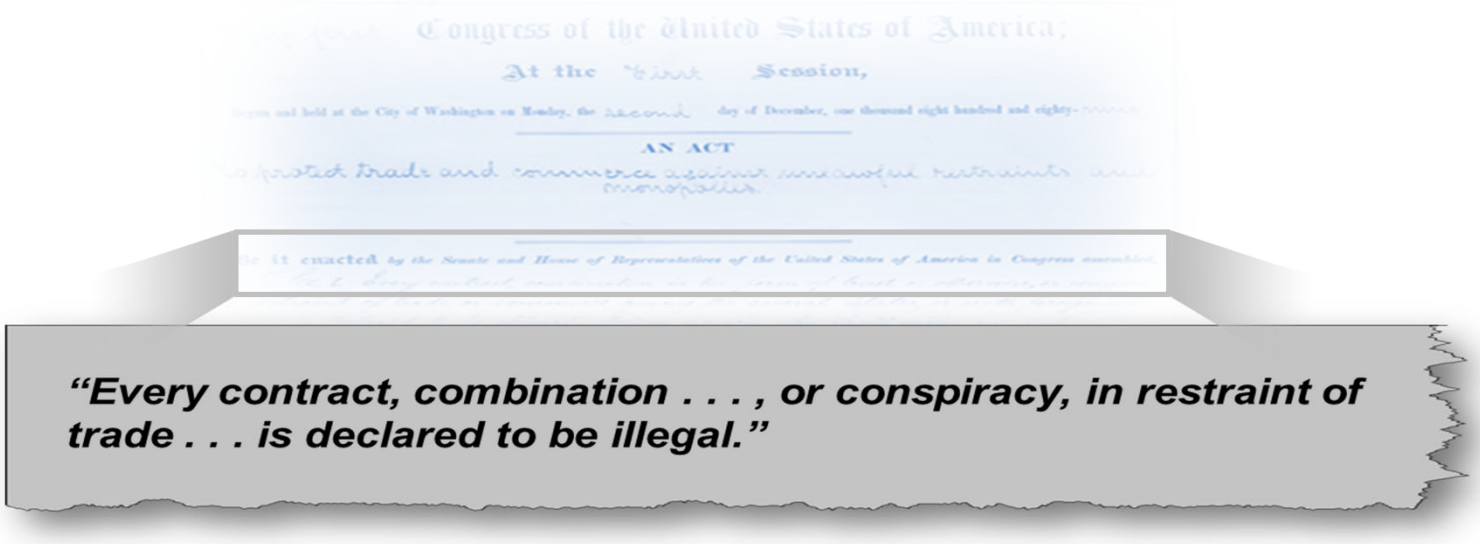
— Treble damages

State Attorneys General

— Sue under federal law on own behalf or for citizens

— Sue under state antitrust laws

Sherman Act § 1 – Agreements with Competitors



Agreements Between Two Entities

- Formal agreement, such as a written contract, not necessary – "wink and a nod"
- Agreement can be inferred from circumstances and conduct – e.g., parallel conduct following communications
- Applies to both businesses and non-profits
- Applies to trade associations

Two Categories

1. "Per se" – automatic violations as conduct is almost always anticompetitive – price fixing, market allocation, bid rigging, boycotts
2. "Rule of Reason" – agreements that could have either procompetitive or anticompetitive effects, legality depends on circumstances

"Per Se" Violations

Some types of agreements among competitors are so inherently anticompetitive that they are **"per se" illegal** and potentially criminal

Examples include agreements among competitors to:

- Raise, lower, fix, or stabilize prices
- Limit production
- Allocate suppliers, customers, or territories
- Bid rigging
- Boycott a supplier or customer
- Fix wages or terms of employment
- Agreements not to hire, "poach," or recruit one another's employees

<u>NOT</u> Defenses:

- "Everyone has always done it this way"
- "I didn't know it was illegal"
- "We had to do it or competition would have led to a financial disaster"
- "We were doing it for the customer's own good. If there was free and open competition, customers would choose bad options."
- "It didn't make a difference. There was still a lot of competition from others."
- "It happened through a trade association"

Antitrust Application to Higher Education, Labor Markets, and Trade Associations

Antitrust and Higher Education

United States v. Brown University

- Ivy League schools agreement to offer same package of need-based aid to common admits
- Third Circuit: "anticompetitive on its face" as it prevented schools from competing on aid packages and prevented students from comparing schools on price
- Case settled with schools agreeing not to discuss individual student aid or agree on individual family contributions, mix of loans, grants, and self-help
- But schools that are "need-blind and full-need" could exchange financial data, agree on general aid principles, and use a common form
- Congress adopted antitrust exemption based on settlement terms (Section 568 exemption)

1993

DOJ Admissions Investigation

- DOJ investigation into "ethics" rules promulgated by the National Association for College Admission Counseling (NACAC)
- Antitrust concerns with rules that limited (1) directly recruiting transfer students from another college, (2) offering incentives college applicants that applied Early Decision, and (3) recruiting rising college freshman after May 1
- NACAC settled, with consent decree requiring NACAC remove the offending rules and increase antitrust compliance training.

2019

Financial Aid Class Action

- Class of undergraduate students sued 16 universities alleging they engaged in cartel related to financial aid
- Antitrust exemption allowed need-blind universities to coordinate to a limited extent on financial aid
- But plaintiffs alleged that defendants were not truly need-blind
- The court denied motion to dismiss, and the case continues
- Congress has since allowed Section 568 exemption to expire

2022

Antitrust and Labor Markets

- Antitrust laws apply to labor markets
- Agreements between competitors restricting competition for labor are a significant focus of antitrust agencies
- In 2016, DOJ/FTC antitrust guidelines for HR professionals stated that agreements among competitors restricting competition for labor would be treated as criminal and "per se" illegal in the future
- DOJ developments:
  - —2020: DOJ filed first criminal case
  - —April 2022: First two criminal trials resulted in acquittals
  - —Oct. 2022: First criminal guilty plea for wage fixing
- FTC: Recently proposed ban on employment non-competes
- Private actions and class actions also significant risk

Wage Fixing Agreement

Agreement on compensation of employees, e.g., not to pay certain more than minimum wage

"No Poach" Agreement

Agreement not to hire or recruit one another's employees

Agreements on Other Aspects of Hiring

For example:

Agreement not to counter-offer

Agreement to give notice or get approval before hiring

Civil Exposure on Antitrust Labor Issues

— Bilateral agreements to not "cold call" each other's employees

— DOJ: Civil settlement in 2010
- Per se illegal
- Despite collaborations between companies, no "cold call" agreement not justified because it applied to all employees, rather than just employees in the collaborative activities

— Class: $415 million settlement, court rejected initial settlement as being too low

— No-poach agreement for railway brake employees

— DOJ: Civil settlement in 2018
- DOJ pursued civilly because conduct stopped prior to 2016 HR guidelines
- DOJ discovered conduct during a merger review

— Class: $48.9 million settlement.

— Bilateral agreements between Duke University and the University of North Carolina not to compete for medical faculty

— Class action settlements in 2019
- Duke: $54 million + injunction
- UNC: Injunction

— DOJ filed statement of interest and intervened

Trial Lawyers Case

- In 1983, DC criminal defense lawyers agreed not to represent indigent criminal defendants until the local government increased their compensation
- The "strike" was effective and DC government raised the rate paid to court-appointed counsel
- The FTC sued alleging agreement was "a conspiracy to fix prices and to conduct a boycott"
- The Supreme Court agreed, concluding that the lawyers had participated in an illegal group boycott, a violation of Section 1 of the Sherman Act

LESSON

Entering a "per se" illegal agreement for a good reason is not a defense

"We may assume that the pre-boycott rates were unreasonably low, and that the increase has produced better legal representation for indigent defendants. . . . These assumptions do not control the case, for it is not our task to pass upon the social utility or political wisdom of price-fixing agreements."

"The social justifications proffered for respondents' restraint of trade thus do not make it any less unlawful."

Federal Trade Commission v. Superior Court Trial Lawyers Ass'n, 493 U.S. 411, 421-22, 424 (1990)

Medical Match

- Class action challenged medical match in 2004
- Plaintiffs alleged that the match was:
  - Mandatory for board certification
  - Denied students the ability to field multiple offers
  - Enforced by exchanging information on applicants and compensation data between programs
- Court denied motion to dismiss, holding that plaintiffs had "alleged a common agreement to displace competition in recruitment, hiring, employment and compensation of resident physicians"

MEDICAL MATCH

- Medical residency matching program, founded in 1952, places medical students into residency training programs
- The match is a central coordinated hiring process across teaching hospitals

CONGRESSIONAL EXEMPTION

- In response to this litigation, Congress enacted statutory exemption from the antitrust laws for the residency matching program
- Exemption is limited to the medical match. Not applicable to legal recruiting.

Trade Associations

— Antitrust laws apply to trade associations

— Trade associations can create a risk of antitrust violations or appearance of opportunity to collude

— Following best practices for trade associations can help minimize risk

LOWER RISK	HIGHER RISK
• Voluntary participation • Non-members can continue to compete • Information sharing of non-competitively sensitive information for benchmarking or best practices • Ethics codes targeted to preventing illegal or deceptive behavior	• Mandatory participation • Membership required to compete • Competitively sensitive information • Ethics codes that limit competition between members by restricting prices, solicitation, marketing, etc. • "Group boycott"

Trade Association "Ethics" Policies

Trade Association	Competitive Concerns	Settlement
 American Guild of Organists	– Members should not seek a position that is already held by another member – Members should obtain approval from "incumbent" before performing at an event and "incumbent" should receive usual fee – Published fee schedule	– Do not interfere with competition on prices/engagements – Do not encourage musicians to seek approval of the "incumbent" before accepting engagements – Stop publishing fee schedule – Reject affiliates engaging in this conduct
 National Association of Animal Breeders	– Prohibited comparisons to competitors – Prohibited publication of bull purchase prices – Directly sanctioned violations	– Prohibits restrictions on advertising that limit statements about competitors or purchase prices
 Professional Skaters Association	– Prohibited solicitation of students – Directly sanctioned violations	– Do not infer with solicitation of coaching work – (Rules limiting solicitation while skater performing/in a lesson and to prevent sexual/physical abuse are OK.)
 National Association of Teachers of Singing	– Prohibited solicitation of students – Prohibited criticism of other members – Directly sanctioned violations	– Do not interfere with solicitation of teaching work – Reject affiliates that interfere with teaching solicitation, price competition, advertising, etc. – (But limits on musical judges soliciting students OK.)
 Natl. Assoc . of Residential Property Managers	– Prohibited solicitation of customers – Prohibited criticism of other property managers – Directly sanctioned violations	– Do not interfere with solicitation of work or limit statements about other competitors
 Music Teachers National Association	– Prohibited solicitation of students – Directly sanctioned violations	– Do not interfere with solicitation of teaching work – Reject affiliates that interfere with teaching solicitation, price competition, advertising, etc. – (But limits on musical judges soliciting students OK.)
 California Assoc. of Legal Support Prof.	– Prohibited discounts to customers of members – Prohibited criticism of members – Prohibited poaching employees of members – Directly sanctioned violations	– Do not interfere with price competition, statements about competitors, or solicitation of employees

Information Exchange

Information Sharing Among Competitors

- Information sharing can be procompetitive. For example, it can help promulgate best practices, it can help with benchmarking, or it can help make informed decisions.
- But information sharing among competitors can also raise antitrust concerns
  - Not "per se" illegal to share information
  - But it can be used as circumstantial evidence to support "per se" illegal agreement
  - An agreement to share information can itself violate the antitrust laws, with the level of risk depending on the nature of information, industry structure, etc.

DO	DON'T
• Ensure information exchange has procompetitive rationale • When possible, ensure information is aggregated, anonymized, and historical to reduce competitive sensitivity	• Exchange competitively sensitive information with competitors • Exchange future plans • Make public announcements intended to "invite" competitors to coordinate

Information Sharing Recent Developments

Withdrawal of Info Sharing Guidance

— Longstanding DOJ/FTC guidance on "safe harbors" said that they would not challenge information exchanges where

1. Information was aggregated from 5+ competitors, none of which made up more than 25% of the data
2. Information is at least 3 months old
3. Exchange is via third party

— Agencies recently withdrew this guidance, disclaiming any "safe harbor"

— But underlying law remains the same and guidelines still helpful "rule of thumb"

- Highest risk: Competitively sensitive, forward-looking information
- Lower risk: Aggregated, anonymized, and backward-looking information

Recent Case on Info Sharing in Labor

— July 2022 DOJ action vs. three poultry processors and data firm for information exchange about wages and benefits

— Exchanged current & future, disaggregated, identifiable wages & benefits, including:

- Hourly wages at individual plants
- Future planned salary raises by position, including dates of increase
- In-person meetings to discuss

— Civil consent decree

- 10-year term with compliance monitor
- Bans on sharing information
- $84.8 million restitution to workers

— Not a typical survey involving aggregated, anonymized, historical information

Antitrust in Legal Recruiting

Competitors in Legal Recruiting Context

Law firms are direct competitors for legal talent

- That includes recruiting existing lawyers and recruiting students
- Law firms could be competitors in labor market even if they do not compete for clients to the extent they are competing to hire the same lawyers or students

Law schools are competitors to enroll students

- Job placement is one important dimension of how law schools compete
- Thus, coordination between law schools about recruiting related issues could be viewed as affecting competition between law schools to compete for students

Law firms and law schools are not competitors with one another

Rather, they are in a "vertical" relationship (analogous to a customer and supplier working together) for law firms to recruit students at those law schools

Antitrust risks are most significant in agreements among competitors. Limited risks in bilateral agreements between law firms and law schools.

Unilateral Conduct is Low Risk

— Antitrust risk arises from coordination with competitors

— Law firms and law schools can unilaterally make their own recruiting decisions

— Policies that apply to law firms that recruit at the law school are low risk so long as they are set independently by the law school and focus on that school's students. However, risks could arise if one law school seeks to impose policies that restrict law firm activity at other schools.

Examples of Low Risk for Law Schools

— School's independent decision to limit recruiter access to students

— School's independent decision to limit campus access to law firms that agree to abide by particular restrictions

— School policy that law firms provide X days for students to respond to offer

Examples of Low Risk for Law Firms

— Firm agreeing to school policies

— Firm independently deciding where it would like to recruit and not

— Firm independently deciding not to make "exploding" offers to recruits

— Firm independently deciding to create 1L scholarship program

Legitimate Collaboration with Competitors

- Law school and firms can engage in legitimate collaborations that make it easier for law schools, law firms, and students to navigate the recruiting process
- Highest risk areas include anything relating to compensation or benefits
- Before seeking to collaborate with competitors, ask "Why? What's the benefit from the collaboration?" If the answer is that collaboration is necessary to avoid one school or firm gaining a competitive advantage over the another, then that could raise antitrust issues.

Examples of legitimate collaborations that are likely low risk

- Information on best practices, e.g., firm policies on issues that are unrelated to compensation; information on how to run a career services office; information on how different approaches affect metrics like number of students with offers, DE&I; interview tips for students; etc.
- Working with other schools or firms to set up a job fair
- Coordination of callback expenses when a student has multiple interviews in the same city
- Providing law firm information to help inform students, e.g., NALP Directory
- Providing aggregated information about recruiting outcomes by school to help students applying to law school make decisions between different law schools

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