

A Matter of Survival: How To Defend Small Business Cooperative Activity Against Antitrust Challenge

Small businesses must engage in cooperative activity to survive in competition with today's market leaders. However, small business cooperative activity increasingly attracts antitrust challenge. This comment marshals arguments to defend small business cooperative activity against antitrust challenge. The arguments are premised on the importance of preserving small business enterprise to ensure a decentralized economy and democratic government.

INTRODUCTION

Small business¹ struggles to survive in today's increasingly

¹ It is difficult to define "small business" precisely because its meaning varies with its use. For example, the United States Small Business Administration (S.B.A.) has four categories of definitions which describe businesses qualifying for various S.B.A. assistance. See generally U.S. Small Business Administration, *FACTS ABOUT SMALL BUSINESS AND THE U.S. SMALL BUSINESS ADMINISTRATION* (March 1979). These categories consist of definitions for the purposes of loans, procurement services, investment assistance and surety bonds. Moreover, the S.B.A. further narrows the definition of small business according to the type of business seeking the assistance. Finally, the S.B.A. regularly revises these definitions.

This comment loosely defines "small business" in terms of the market power it lacks. Chiefly, a small business does not possess a large percentage of a relevant market. However, what constitutes a "large" percentage of the market depends upon the concentration ratio of the relevant marketplace. For example, in a highly competitive market with eight sellers, a company with 30% of the business may possess the largest market share and a company with a 10% share may qualify as a small business. However, in a highly concentrated marketplace with two companies possessing 40% shares each, a small business may be a company with 20% of the market. The important point is that a small business is not a market leader.

The S.B.A.'s general definition enumerates additional characteristics of small business. It generally states that small business has relatively low numbers of employees, low absolute sales and low capital value. More specifically,

concentrated marketplace.² An independent entrepreneur cannot match the resources of corporate leviathans.³ The cost of large-scale research⁴ and advertising⁵ is prohibitive for most

an S.B.A. small business manufacturer may have no more than 1,500 employees. A small business retailer may not have annual sales or receipts greater than \$2 to \$7.5 million. Furthermore, a service business' annual receipts must not exceed \$2 to \$8 million to retain small business status. *Id.* These parameters are useful because they help distinguish non-market leaders with high absolute sales from small business. For example, American Motors could be viewed as a small business because its market share is minimal in comparison with Ford and General Motors. However, American Motors is not a true small business because its absolute sales are among the highest of companies in the United States.

For the purpose of this comment, however, the S.B.A.'s definition of small business is under-inclusive. That is, this comment may include as a small business non-market leaders with absolute sales in excess of the Administration's discrete amounts. Essentially, the Administration's definition of small business serves to clarify this comment's market share approach, but it does not limit its application in the proper circumstance.

² See generally, Keller, *Help Wanted: Small Business Researchers*, 10 ANTI-TRUST L. & ECON. REV. 83, 86-88 (1978).

Economist John Kenneth Galbraith recently emphasized the trend toward increasing concentration. He noted that about two hundred corporations in the United States provide approximately 60 percent of all manufacturing employment. Similarly, a handful of big airlines, two telephone companies, three broadcasting networks and the separate power companies are dominant in their respective industries. "The overall result is that a couple of thousand big corporations now provide more than half of all production of goods and services." Kennedy, *Political Diversity And Conglomerate Mergers: The Small Business Protection Act*, 10 ANTI-TRUST L. & ECON. REV. 47, 51 (1978) (quoting Professor John Kenneth Galbraith).

Small business is helpless to compete given this trend toward concentration. Generally, a single small business does not have the funds to turn this trend around.

³ Elzinga, *The Goals of Antitrust: Other Than Competition And Efficiency, What Else Counts?*, 125 U. PA. L. REV. 1191, 1198 n.26 (1977).

⁴ Product research is one example of a program commonly beyond the financial resources of an individual business enterprise. Thus, small business needs assistance to undertake programs that are too extensive for individual companies to manage alone. Pate, *Joint Venture Activity, 1960-1968*, ECON. REV. FED. RES. BANK CLEV., July 1969, at 16.

⁵ For example, advertising costs in the soft drink industry are so prohibitive that they virtually preclude small business entry. "[L]arge-scale advertising has once more taken its toll, converting what might have been a highly competitive American industry into a tightly oligopolistic one that serves the public poorly." Mongovern, *Advertising As A Barrier To Entry: Structure And Performance In The Soft-Drink Industry*, 9 ANTI-TRUST L. & ECON. REV. 93, 101 (1977).

small businesses. Moreover, minimum purchase requirements foreclose small business from preferential rates for raw materials, storage and transportation.⁶ These acute competitive disadvantages threaten to eliminate many small business enterprises.

Small businesses must engage in cooperative activity to achieve efficiencies⁷ necessary for competitive survival.⁸ There are three common ways that small businesses achieve economies of scale:⁹ by creating joint ventures to research, develop and market new products; by participating in trade associations to exchange market information and utilize generic advertising; and by engaging in cooperative buying and selling agencies to satisfy minimum purchase requirements for preferential rates.¹⁰

⁶ The most frequent antitrust complaint lodged by small business entrepreneurs is that suppliers insist upon minimum order requirements. The Small Business Administration cannot prohibit such requirements since they do not violate any antitrust laws. Interview with Doreen E. Thompson, Assistant Chief Counsel, Competitive Strategies & Policies, Office of the Chief Counsel for Advocacy, U.S. Small Business Administration, in Washington, D.C. (December 31, 1979) (on file at U.C. DAVIS L. REV.).

⁷ Efficiencies are methods to reduce the amount of time, energy or money required to achieve a certain goal. See L. SULLIVAN, *ANTITRUST* 282-311 (1977). For example, a trade association's generic advertising campaign is an efficiency. The members pool their financial resources to purchase national television time which would be exorbitantly expensive to the members individually. This cooperative ad campaign saves members not only money, but time and energy. One central group, instead of numerous uncoordinated businesses, plans the industry-wide promotion.

⁸ See note 5 *supra* for an example of the difficulties small business encounters in one industry.

⁹ "Economies of scale" is another term for "efficiencies." See note 7 *supra*.

¹⁰ Joint ventures, trade associations and cooperatives enable small businesses to achieve the efficiencies already enjoyed by market leaders. However, these cooperative activities have distinct characteristics.

The most common type of joint venture is for product research. Two or more businesses combine their funds to improve their product. For example, Company A and Company B combine to form Joint Research Venture C which has a distinct legal identity. Through this entity, the members can purchase otherwise unaffordable research equipment, space and expertise. This combination also avoids wasteful attempts by businesses which individually lack the capacity to conduct timely and fruitful research. See Pfeffer & Nowak, *Pattern Of Joint Venture Activity: Implications For Antitrust Policy*, 21 *ANTITRUST BULL.* 315, 318-321 (1976), for a discussion of the positive and negative aspects of joint ventures.

A joint research venture typically limits its membership, scope and duration. One practical reason for limiting membership is that consumer choices may vary with product innovation. Since product innovation often leads to competi-

These cooperative activities enable small businesses to compete

tive advantage, businesses guard their new research results with patents. There are patents specially designed for discoveries made by joint research ventures. See 10 AM. JUR. LEGAL FORMS 2D § 155:30 (1972). However, this patent protection from competitors outside the joint venture does not destroy the incentive for competition within the combination itself. The members still seek to make their products unique, even when based on a common patent. Hence, it is in the interest of the limited joint venture membership to restrict the scope of research to bare essentials. Moreover, joint ventures tend to be limited in duration because they are project-oriented. See generally Pfeffer & Nowak, *supra* this note.

A trade association has a wider membership, more general purpose and longer existence than a joint venture. It is generally open to all businesses in a particular trade. A trade association may include among its members a market leader, but usually consists of businesses with smaller market shares who need the advantages the association offers. The goal of the association is usually to promote the interests of the industry as a whole, rather than to provide a competitive edge to some members of the trade association. See generally L. SULLIVAN, ANTITRUST 282-85 (1977). The association may engage in extensive generic advertising, such as the television ads sponsored by the Milk Producers of America. The association may also conduct general market research to determine consumer demand for the industry's type of product. Moreover, trade associations provide opportunities for the exchange of general information among the members. See *Id.* at 282 for an enumeration of possible trade association activities.

In contrast to joint ventures, trade associations are designed to endure. The members should not abdicate any of their competitive decisions to the group. The members themselves still decide price and production design. They combine only to discuss and investigate broad issues which are of interest to all of the competitors within the entire industry. The existence of the group, therefore, does not endanger the competitive interests of any business in the association. Since there is no threat from within, trade associations tend to endure over time as long as they adhere to their limited purpose. See generally A. HAMMOND, TRADE AND PROFESSIONAL ASSOCIATIONS 203-15 (1977) for an outline of practices that trade associations should avoid.

Small businesses also use cooperatives to achieve advantages unavailable to a single, small entrepreneur. For example, produce buying cooperatives, consisting of small groceries, can purchase food from a supplier at bulk rates. Their large purchase orders can command the lower rates that large grocery chains use to their advantage. In *United States v. Von's Grocery Co.*, 384 U.S. 270, 298-300 (1966), Justice Stewart noted in dissent that these grocery coops in the Los Angeles area succeeded in providing their members with assistance in merchandising, advertising, promotions, inventory control and even in the financing of new entry. He lauded the ability of these cooperatives to stir competition with market leaders.

Cooperatives differ structurally from the other two types of combinations discussed. The extent of membership is usually unlimited, the scope of interest is somewhat narrow and the duration may be limited. See generally L. SULLI-

with market leaders.

However, any cooperation between competitors, regardless of their size, is subject to antitrust scrutiny.¹¹ Private and public parties are escalating antitrust litigation against small business.¹² These antitrust proponents utilize traditional¹³ and new forms¹⁴ of enforcement, as well as government surveillance.¹⁵

VAN, *supra* this note, for a discussion of joint activities. Cooperative memberships typically consist of small businesses in a particular industry, within a general geographic area. Ideally, membership in a produce-buying "coop" is available to all grocers in the area. However, there is often a temptation to restrict membership. For example, small grocer-members A, B and C may refuse membership to new grocer D because they do not want any more competition in their geographic area. Using membership restrictions to allocate market power among coop members may be illegal. See, e.g., *United States v. Topco Associates*, 405 U.S. 596 (1972).

Cooperatives can provide a number of general services, but the scope of interest may not lawfully include highly competitive decisions. Members combine for a particular purpose, such as the formation of a buying coop. Each member relinquishes its buying decisions to the coop. The coop acts as a separate group operating for the benefit of members in this discrete subject buying area. The members retain the power, indeed the obligation, to compete with each other in all other areas of their businesses. See L. SULLIVAN, *ANTITRUST* 297-98 (1977), which examines the danger of abusing cooperative arrangements.

A cooperative exists until members no longer need its advantages. A small business may prosper under a buying coop, for instance, and expand its business to the extent that it can meet bulk purchase requirements on its own. If all the members experience this growth, the coop will probably disband. *Id.*

¹¹ "Every agreement concerning trade . . . restrains." *Chicago Board of Trade v. United States* 246 U.S. 231, 238 (1918). It is true that any agreement which restrains is subject to antitrust scrutiny. However, this does not mean that such a restraint is automatically illegal. See notes 52-62 and accompanying text *infra*.

¹² See generally M. KROTINGER, *SMALL BUSINESS: EXPANDED ANTITRUST AND TRADE REGULATION EXPOSURE*, 236 (PRACTICING L. INST. COURSE HANDBOOK 9) (April-June 1977).

¹³ The traditional forms of enforcement include the following: criminal and civil prosecution by the Antitrust Division of the Department of Justice; the Federal Trade Commission suits for injunctive relief or divestiture; private civil suits for treble damages. In recent years the use of these traditional forms of enforcement against small business has increased. For example, in regard to government prosecutions, "indictments have been returned by federal grand juries with increasing frequency against small businesses and their officers in connection with local conspiracies." *Id.* at 31.

¹⁴ The HART-SCOTT-RODINO ANTITRUST ACT incorporated several recent trends in antitrust enforcement. The ACT authorized:

- a. Antitrust civil process act amendments;

This increased enforcement heightens the exposure of small business to the challenge that cooperative activity runs afoul of the Sherman Act and its progeny.¹⁶

This comment marshals arguments to defend small business cooperative activity against antitrust challenge. The fundamental defense is that the promotion of small business enterprise preserves the Jeffersonian marketplace¹⁷ intended by antitrust

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- b. Pre-merger notification and waiting period legislation;
 - c. Parens patriae actions; and
 - d. Antitrust injunction attorneys' fees.

These measures provide a new federal antitrust remedy to permit state attorneys general to recover monetary damages on behalf of state residents injured by violations of the antitrust laws. In addition, "the bill is intended to compensate the victims of antitrust offenses, to prevent antitrust violators from being unjustly enriched, and to deter future antitrust violation." Cong., 2d Sess. 3 (1976) *reprinted in* (1976) U.S. CODE CONG. & AD. NEWS 2572.

¹⁶ "The pressure of antitrust surveillance has been increased by the concurrent rise in antitrust activities by state attorneys general, and by the institution of an accelerated volume of damage actions by the federal and state branches of government." M. KROTINGER, *supra* note 12, at 33.

¹⁶ The SHERMAN ACT of 1890, as amended, 15 U.S.C. §§ 1-7 (1976), was a legislative attempt to "prevent further concentration and to preserve competition among a large number of sellers." *United States v. Von's Grocery Co.*, 384 U.S. 270, 275 (1966). This comment is concerned chiefly with § 1 of the ACT, which prohibits unlawful restraint of trade.

Since 1890 Congress has passed numerous legislative acts to clarify and extend the scope of the SHERMAN ACT in specific areas of business. The CLAYTON ACT of 1914, for example, proscribes price discrimination. It further prohibits sales on condition that the buyer cease dealing with the seller's competitors. Finally, it condemns certain corporate mergers where the effect may be to substantially lessen competition or tend to create a monopoly in any line of commerce. The CLAYTON ACT of 1914, 38 Stat. 730 (1914), (current version at 15 U.S.C. §§ 12-27 (1976)). The ROBINSON-PATMAN ACT, 49 Stat. 1526 (1936) (current version at 15 U.S.C. §§ 1-4 (1976)), and the CELLER-KEFAUVER AMENDMENT to CLAYTON § 37 are major additions to the SHERMAN and CLAYTON ACTS. In 1936 Congress used the ROBINSON-PATMAN ACT to rewrite the price discrimination provisions of CLAYTON. The CELLER-KEFAUVER AMENDMENT of 1952 substantially tightened the antimerger provisions of the CLAYTON ACT. *See generally* P. AREEDA, *ANTITRUST ANALYSIS* 40-49 (2nd ed. 1974).

The common concern of antitrust legislation is to prevent economic concentration by preserving small business. The ROBINSON-PATMAN ACT, for example, "is an antitrust statute almost explicitly ordained to carry the equity burden of promoting small business." Elzinga, *supra* note 3, at 1205. However, this does not mean that small business is exempt from antitrust scrutiny. *See generally* notes 31-62 and accompanying text *infra*.

¹⁷ The Jeffersonian marketplace consists of many highly competitive entrepreneurs, none of whom dominate the industry. This marketplace is atomistic;

law to decentralize economic and political power.¹⁸ Part I of this comment recalls Congress' intent to "promote competition through the protection of viable, small, locally owned businesses."¹⁹ Part II develops the two standards of antitrust analysis and demonstrates that modern courts sympathize with the objective of preserving small business.²⁰ Part III discusses four important factors in antitrust analysis²¹ and suggests how to use these factors to argue in support of small business cooperative activity. This comment concludes that small business cooperative activity should be able to withstand antitrust scrutiny.

I: THE INTENT OF ANTITRUST LAW

The primary intent of antitrust law is to disperse economic

that is, its strength is not centralized in one small group of businesses, but is dispersed throughout the participants in the industry. A system of small entrepreneurial units avoids such centralization. *See generally* C. PATTERSON, *THE CONSTITUTIONAL PRINCIPLES OF THOMAS JEFFERSON* 71-73 (1967), for a discussion of Jefferson's decentralization argument as applied to the judicial realm.

Judge Learned Hand once echoed this Jeffersonian conception of the marketplace: "It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few." *United States v. Aluminum Co. of America*, 148 F. 2d 416, 427 (2d Cir. 1945).

¹⁸ Cooperative activity offers at least two advantages to a market as a whole. It provides small business with a means of surviving in an increasingly concentrated economy. It also stimulates market leaders into more competitive behavior.

The rise of . . . cooperative organizations has introduced a significant new source of countervailing power against the market power of the chain stores, without in any way sacrificing the advantages of independent operation.

United States v. Von's Grocery Co., 384 U.S. 270, 299 (1966) (Stewart, J. dissenting).

¹⁹ *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962).

²⁰ Recent cases indicate a judicial concern with the preservation of small business. *See generally* *United States v. Von's Grocery Co.*, 384 U.S. 270 (1966) and *United States v. G. Heileman Brewing Co.*, 345 F. Supp. 117 (E.D. Mich. 1972).

²¹ *See generally* Brodley, *The Legal Status of Joint Ventures Under The Antitrust Laws: A Summary Assessment*, 21 *THE ANTITRUST BULL.* 453 (1976). Professor Brodley isolated four important analytical factors: the nature of the restraint, the relationship between the parties, the market structure and the purpose of the activity. *Id.* at 454-483.

power.²² This intent complements the general American preference for a system of checks and balances that decentralizes authority in order to prevent abusive government action.²³ Congress feared that concentrated economic power would lead to concentrated political power which is "antidemocratic."²⁴ For example, a striking feature of the legislative history of the CLAYTON ACT is the popular apprehension that the merger movement is politically dangerous.²⁵ A leading sponsor of the bill stated:

I am not an alarmist, but the history of what has taken place in other nations where mergers and concentrations have placed economic control in the hands of a very few people is too clear to pass over easily . . . It either results in a Fascist state or the nationalization of industries and thereafter a Socialist or Communist state. Most businessmen realize this inevitable result.²⁶

²² The end sought was the prevention of restraints to free competition in business and commercial transactions which tended to restrict production, raise prices or otherwise control the market to the detriment of purchasers or consumers of goods and services, all of which had come to be regarded as a special form of public injury. *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 (1940).

Another view maintains that the goal of antitrust law is to maximize efficiency. This view berates non-economic goals as "populist." It defines "populist" as that which would preserve small units at any cost, thereby protecting the inefficient at the expense of progress and consumer well-being.

The economic objective of a pro-competitive policy is to maximize consumer economic welfare through efficiency in the use and allocation of scarce resources, and via progressiveness in the development of new productive techniques and new products that put those resources to better use.

P. AREEDA & D. TURNER, *ANTITRUST LAW* 7 (1978).

²³ Pitofsky, *The Political Content of Antitrust*, 127 U. PA. L. REV. 1051, 1054 (1979).

²⁴ *Id.* at 1051.

²⁵ Bok, *Section 7 of the Clayton Act and the Merging of Law and Economics*, 74 HARV. L. REV. 226, 234-37 (1960).

Several years after the passage of the SHERMAN ACT, the Supreme Court noted that powerful business combinations tend to restrain competition. The Court stated that market leaders should not be allowed to increase market concentration "by driving out of business the small dealers and worthy [people] whose lives have been spent therein, and who might be unable to readjust themselves in their altered surroundings." *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 323 (1897).

²⁶ 96 Cong. Rec. 16, 452 (1950) (report by Senator Kefauver). "Populist" legislators as well as conservative economists share the concern that corporate concentration will inevitably diminish individual freedom. See Elzinga, *supra* note 3 at 1200, citing warnings by Friedrich Hayek and Milton Friedman.

Competition prevents this concentration of economic power. Thus, competition is the dominant, national policy of trade regulation.²⁷ Its promotion benefits more than the economic well-being of the American consumer—it preserves democracy.

Congress recognized that the protection of small business strengthens the forces of competition.²⁸ A major purpose of anti-trust law has been to “perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.”²⁹ The protection of small business ensures an atomistic marketplace³⁰ which disperses economic power, preventing the antidemocratic tendencies of concentration. Hence, it is arguably self-defeating to enforce antitrust law against cooperative activity when such activity is necessary for small business to survive in competition with market leaders.

II: TWO STANDARDS OF ANTITRUST ANALYSIS: PER SE RULE AND RULE OF REASON

Antitrust legislation condemns in broad language concerted conduct which restrains trade.³¹ The legality of an agreement, however, cannot be determined by simply testing whether it re-

²⁷ Handler, *Antitrust-1978*, 78 COLUM. L. REV. 1363, 1364 (1978).

²⁸ Chief Justice Warren, in *Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962), recognized Congress' intent to foster competition. “Congress appreciated that occasional higher costs and prices might result from the maintenance of fragmented industries and markets.”

Moreover, in *United States v. Aluminum Co. of America*, 148 F.2d 416, 427 (2d Cir. 1945), Judge Learned Hand asserted:

[Congress in passing the SHERMAN ACT was not necessarily actuated by economic motives alone. It is possible, because of its indirect social or moral effect, to prefer a system of small producers, each dependent for his success upon his own skill and character, to one in which the great mass of those engaged must accept the direction of a few.

²⁹ *United States v. Aluminum Co. of America*, 148 F.2d 416, 429 (2d Cir. 1945).

³⁰ See note 17 *supra*.

³¹ The antitrust statutes are worded simply. The SHERMAN ACT § 1 states “Every . . . combination . . . in restraint of trade or commerce . . . is . . . illegal.” 15 U.S.C. § 1 (1976). The other significant section, SHERMAN § 2, prohibits monopolization in similar summary fashion: “Every person who shall monopolize, or attempt to . . ., or . . . conspire . . . to shall be deemed guilty of a felony . . .” 15 U.S.C. § 2 (1976).

strains competition because every agreement concerning trade restrains.³² The true test of legality is whether the restraint causes a significant injury to competition.³³ Courts utilize two standards of analysis to determine significant anticompetitive effect: the per se rule and the rule of reason.

A. *The Per Se Rule*

[T]here are certain agreements or practices which because of their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use.³⁴

The per se rule is a conclusive presumption that particular practices always cause unreasonable injury to competition. When a court applies the per se rule, it neither inquires into the value of the particular practice nor determines the precise manner in which the practice affects competition. Rather, the court will summarily hold the practice illegal.³⁵ Properly understood,

³² Congress could not have intended to prohibit every contract or combination which restrains trade since virtually every contract or combination does this to some extent. Rather, Congress used broad language to condemn restraints of trade and left to the courts the task of defining the scope and meaning of the antitrust statutes. L. SULLIVAN, *ANTITRUST* 165 (1977).

³³ Justice Brandeis expanded on this idea:

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.

Chicago Board of Trade v. United States, 246 U.S. 231, 238 (1918).

³⁴ *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1956).

³⁵ The leading case enunciating the per se rule is *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940). During the Depression, major oil refiners bought all the surplus gasoline. The "majors" tried to keep gasoline from small refiners who lacked the storage facilities necessary for the small refiners to make similar purchases. This activity inhibited price fluctuations or "gas wars." It essentially forced small refiners to sell gasoline at prices determined by the major refiners.

The Court held that any combination which tampers with price structures is engaged in an unlawful activity. "Those who fixed reasonable prices today would perpetuate unreasonable prices tomorrow . . . Those who controlled the prices would control or effectively dominate the market. And those who were in that strategic position would have it in their power to destroy or drastically impair the competitive system." *Id.* at 221. The Court refused to determine whether or not a particular price-fixing scheme is wise or unwise, healthy or destructive. No assessment of competitive impact was necessary because the injury was inherent in the fact that price-fixing interferes with the free play of

then, per se illegality abbreviates the rule of reason analysis for the sake of judicial economy.³⁶

The per se rule of illegality is appropriate only when applied to conduct that is manifestly anticompetitive.³⁷ For example, combinations or agreements by competing firms to fix prices, divide markets or engage in group boycotts are per se illegal.³⁸ Such conduct has no "redeeming virtue."³⁹ The court will apply the per se rule⁴⁰ only after it has made prior exhaustive factual determinations⁴¹ that a particular activity always causes significant and unreasonable competitive injury⁴² and rarely serves "any purpose beyond the suppression of competition."⁴³ Hence,

market forces. Hence, a combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity would be illegal per se. *Id.*

This case exemplifies an egregious form of antitrust violation. To withstand antitrust challenge, the small business defendant must distinguish such price-fixing from its cooperative activity. Unlike horizontal price-fixing, small business cooperative activity checks the dominance of market leaders and thus strengthens the competitive system. See notes 63-94 and accompanying text *infra*.

Recent cases discussing the per se rule are: *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979); *United States v. United States Gypsum Co.*, 439 U.S. 422 (1978); *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679 (1978); *United States v. National Ass'n of Securities Dealers, Inc.*, 422 U.S. 694 (1975); and *United States v. Citizens & S. National Bank*, 422 U.S. 86 (1975).

³⁶ See notes 40 & 41 and accompanying text *supra*.

³⁷ *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 (1977).

³⁸ Traditionally, these three types of restraints receive the same per se rule treatment. Justice Harlan observed in *United States v. General Motors*, 384 U.S. 127, 148-49 (1966), that he could discern no reason for differentiating a price fixing case from a group boycott or market division suit.

³⁹ See note 49 and text accompanying note 50 *infra* for a discussion of this term of art as used to represent per se illegality.

⁴⁰ See generally Van Cise, *The Future of Per Se in Antitrust Law*, 50 VA. L. REV. 1165 (1964).

⁴¹ These factual determinations are made under the rule of reason. "Properly understood, rule of reason analysis is not distinct from 'per se' analysis. On the contrary, agreements that are illegal per se are merely a species within the broad category of agreements that unreasonably restrain trade; less proof is required to establish their illegality, but they nonetheless violate the basic rule of reason." *United States v. U.S. Gypsum Co.*, 438 U.S. 422, 476 (1978) (Stevens, J., concurring in part and dissenting in part). For further discussion of the rule of reason see notes 52-62 and accompanying text *infra*.

⁴² See notes 40 & 41 and accompanying text *supra*.

⁴³ *Standard Oil Co. of Cal. v. United States*, 337 U.S. 293, 305-06 (1949).

per se illegality is a substantiated generalization of anticompetitive effect.⁴⁴

To avoid the over-use of an easy label for complex activity,⁴⁵ however, modern courts are reluctant to apply the per se rule in borderline cases.⁴⁶ Some courts narrow the scope of the per se prohibited classes so as not to include the challenged conduct.⁴⁷ Other courts defer per se application pending further judicial experience with a novel type of alleged restraint.⁴⁸ Not only are modern courts reluctant to extend per se illegality, but the Supreme Court in 1977 reversed its prior application of the per se

Referring to this passage, the Court in *Northern Pac. Ry. v. United States*, 356 U.S. 1, 6 n. 5 (1958) states that "such nonanticompetitive [sic] purposes as these arrangements have been asserted to possess can be adequately accomplished by other means much less inimical to competition."

⁴⁴ See *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 50 n.16 (1977):

Cases that do not fit the generalization may arise, but a per se rule reflects the judgment that such cases are not sufficiently common or important to justify the time and expense necessary to identify them. Once established, per se rules tend to provide guidance to the business community and to minimize the burdens on litigants and the judicial system of the more complex rule of reason trials.

⁴⁵ See Elman, *PETRIFIED OPINIONS AND COMPETITIVE REALITIES*, 66 COLUM. L. REV. 625, 627 (1966):

It should be plain why there is a real danger of the abuse of the per se principle by those predisposed to offer mechanical or dogmatic solutions to legal problems. In every antitrust case there are two routes to a finding of illegality: critically analyzing the competitive effects and possible justifications of the challenged practice; or subsuming it under one of the per se rules. The latter route is naturally the more tempting; it is easier to classify a practice in a forbidden category than to demonstrate from the ground up, as it were, why it is against public policy and should be forbidden.

⁴⁶ Wood, *The 'Market Necessity' Defense in Antitrust: A New Limit on the Area For Application of Per Se Rules?*, 54 IND. L.J. 29 (1978-79).

⁴⁷ Many courts believe that the only way to evade application of the per se rule is to distinguish the challenged conduct from the type of conduct previously found to fall within a per se category. *CBS v. ASCAP*, 400 F. Supp. 737 (S.D.N.Y. 1975), is an example of this traditional approach.

⁴⁸ See, e.g., *Worthen Bank & Trust Co. v. National Bank Americard, Inc.*, 485 F.2d 119, 126 (8th Cir. 1973). In that case, the Court did not subject the group boycott provision of a credit card agreement among member banks to the per se rule. Instead, the Court applied rule of reason analysis since it was unfamiliar with credit card business requirements. For another example of a court deferring per se application to a novel restraint, see note 49 *infra*, on *White Motor*.

rule to a particular type of restraint.⁴⁹ Moreover, in 1979 the Supreme Court criticized the rigidity of the per se rule and refused to apply it to a challenged activity that was not "plainly anticompetitive and without redeeming virtue."⁵⁰ The preferred alternative to per se illegality is a careful assessment under the rule of reason.⁵¹

B. *The Rule of Reason*

[T]he court must ordinarily consider the facts peculiar to the business to which the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reason for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts.⁵²

The rule of reason is an extensive, factual investigation to determine whether a challenged activity promotes or suppresses competition.⁵³ It is the prevailing standard of antitrust analysis⁵⁴

⁴⁹ *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977).

In *White Motor Co. v. United States*, 372 U.S. 253 (1963), the Court refused to apply the per se rule because it was not certain of a territorial restraint's actual effect on competition. The Court emphasized the stringent test for per se illegality in *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958): there must be a clear "pernicious effect on competition" and a lack of any "redeeming virtue" for an activity to be per se illegal.

In an abrupt and largely unexplained departure from *White Motor*, the Court in *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967), applied the per se rule to the same type of restriction. Recently, however, in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), the Court reversed *Schwinn* for its premature application of the per se rule. The Court stressed that per se illegality is appropriate only when applied to conduct that is manifestly anticompetitive. "Departure from the rule of reason standard must be based upon demonstrable economic effect rather than—as in *Schwinn*—upon formalistic line drawing." *Id.* at 80.

⁵⁰ *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1, 8 (1979).

⁵¹ See generally Posner, *The Rule of Reason and the Economic Approach: Reflection on the Sylvania Decision*, 45 CHI. L. REV. 13 (1977).

⁵² *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918). These are the most frequently cited statements of the rule of reason. See, e.g., *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977); *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), *United States v. Arnold, Schwinn & Co.*, 388 U.S. 365 (1967); *White Motor Co. v. United States*, 372 U.S. 253 (1963).

⁵³ *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 691 (1978).

⁵⁴ *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36, 49 (1977): "Sec-

and applies to all restraints which are not per se unlawful.⁵⁵

The rule of reason focuses directly on the activity's impact on competition.⁵⁶ A court will carefully measure the actual and probable anticompetitive effects of the activity to determine "whether it will jeopardize the maintenance of healthy and vigorous competition in the market."⁵⁷ Activity is illegal under the rule of reason when the anticompetitive features predominate over the procompetitive benefits.⁵⁸

Rule of reason analysis provides the flexibility necessary for a court to consider the procompetitive benefits of small business cooperative activity.⁵⁹ An activity's impact on competition may be short or long-term. In general, "short-term losses are tolerable if outweighed by long-run benefits to the competitive process itself."⁶⁰ Some restrictive agreements, though eliminating certain

tion 1 of the SHERMAN ACT prohibits 'every contract, combination . . . , or conspiracy, in restraint of trade or commerce.' Since the early years of this century a judicial gloss on this statutory language has established the 'rule of reason' as the prevailing standard of analysis." See generally *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1 (1911).

⁵⁵ M. HANDLER, *ANTITRUST IN PERSPECTIVE* 26-27 (1957).

⁵⁶ *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 688 (1978).

⁵⁷ Handler, *supra* note 27, at 1373, referring to Brandeis' formulation of the test under the rule of reason in *Chicago Board of Trade v. United States*, 246 U.S. 231 (1917).

⁵⁸ *National Soc'y of Professional Engineers v. United States*, 435 U.S. 679, 691 (1978). Justice Stevens insisted that the restraint must invigorate market competition to be lawful:

From Mr. Justice Brandeis' opinion for the Court in *Chicago Board of Trade* to the Court opinion written by Mr. Justice Powell in *Continental T.V., Inc.*, the Court has adhered to the position that the inquiry mandated by the Rule of Reason is whether the challenged agreement is one that promotes competition or one that suppresses competition.

⁵⁹ See Handler, *supra* note 27.

⁶⁰ The courts have tolerated some anticompetitive effects which were outweighed by competitive advantages to the industry as a whole. In *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933), the Court permitted a coal selling cooperative to negotiate and set prices for its members. The Court weighed the short-term loss of competitive pricing against the beneficial restoration of a faltering industry. M. HANDLER, *ANTITRUST IN PERSPECTIVE* 26 (1957).

The interests of producers and consumers are interlinked. When industry is grievously hurt, when producing concerns fail, when unemployment mounts and communities dependent upon profitable

forms of competition between the parties, will in fact strengthen the overall forces of competition in the marketplace.⁶¹ Small business cooperative activity arguably affects such a salutary, long-run benefit because it enables small business to compete with market leaders.⁶²

III. IMPORTANT FACTORS IN ANTITRUST ANALYSIS USED TO DEFEND SMALL BUSINESS COOPERATIVE ACTIVITY

Courts emphasize four basic factors in antitrust analysis: the nature of the restraint; the relationship between the parties; the market structure; and the purpose of the activity.⁶³ When small

production are prostrated, the wells of commerce go dry. Handler, *supra* note 27, at 1371. This Depression case is the watermark for judicial tolerance of a traditionally per se illegal activity.

In a more recent case, *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), the Court acknowledged the benefits of certain kinds of competitive restraints. The Topco buying association precluded its members from competing with each other for suppliers of particular kinds of produce. The association also provided a private labeling program which offered advertising and other cut-rate services to Topco members. The Court recognized that Topco members no longer competed for advertising space, transportation or warehousing of their privately labelled goods. It concluded, however, that these cost economies to the membership:

[P]rovide many advantages. . . .: a store can offer national-brand products at the same price as other stores, while simultaneously offering a desirable, lower priced alternative; or, if the profit margin is sufficiently high on private-brand goods, national-brand products may be sold at reduced price.

Other advantages include: enabling a chain to bargain more favorably with national-brand manufacturers by creating a broader supply base of manufacturers, thereby decreasing dependence on a few, large national-brand manufacturers; enabling a chain to create a "price-mix" whereby prices on special items can be lowered to attract customers while profits are maintained on other items; and creation of general goodwill by offering lower priced, higher quality goods.

Id. at 599 note 3.

⁶¹ This strengthening of overall competition is precisely what happened in *Appalachian Coals, Inc. v. United States*, 288 U.S. 344 (1933) and *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918). In both cases the combination in fact promoted an industry which might have failed without some diminution of competition.

⁶² See note 10 *supra* and notes 63-94 and accompanying text *infra*.

⁶³ There is no discrete standard of antitrust legality. Courts weigh these factors to determine unreasonable injury to competition. These factors are not

business cooperative activity faces antitrust challenge, these factors must balance in favor of the activity in order for the court to sustain it. The following arguments should be useful in defense of small business cooperative activity.⁶⁴

A. Nature of the Restraint

Combinations or agreements by competing firms to fix prices, divide markets or engage in group boycotts are per se illegal.⁶⁵ However, recent cases indicate judicial reluctance to invalidate cooperative activity as per se illegal.⁶⁶ Thus, if there is any

necessary and sufficient conditions for a finding of legality. See generally Brodley, *supra* note 21.

⁶⁴ The small business attorney should weigh these factors differently at the planning stage than at the litigation stage of antitrust analysis. The planning stage calls for caution whereas the litigation stage calls for creativity.

At the planning stage, the attorney should conscientiously avoid recommending any activities which might invite antitrust challenge. One way to minimize the possibility of antitrust challenge is to pattern cooperative activity on judicially accepted forms. For example, in *United States v. Topco Associates, Inc.*, 414 U.S. 801 (1973) (per curiam), the Supreme Court approved numerous cooperative activities in the nature of territorial restraints. It approved: creating or eliminating areas or territories of prime responsibility of member firms; terminating member organizations which do not adequately promote Topco brands; designating the location of the place or places of business for which a trademark license is issued; determining warehouse locations to which Topco will ship products; and formulating and implementing pass-overs to provide reasonable compensation for Topco goodwill developed by a member within a particular geographic area. The attorney, however, should not recommend any judicially approved activity unless there is substantial factual similarity between the decided case and the client's situation.

In contrast, at the litigation stage, the small business attorney must engage in creative advocacy. This comment marshals the factors of antitrust analysis to defend small business cooperative activity.

⁶⁵ See note 38 and accompanying text *supra*.

⁶⁶ In 1973, the Supreme Court in *United States v. Topco Associates, Inc.*, 405 U.S. 596, appeared to foreclose small business cooperative activity from rule of reason analysis. The Court found objectionable the association's membership process which effectively rejected the application of any grocer whose business encroached on the territory of an existing member. The Court held that such market allocation was per se illegal.

To withstand antitrust challenge, the small business defendant must overcome *Topco's* per se approach to cooperative activity. *Topco* is the only Supreme Court decision that directly addressed the issue of the importance of small business in combating the dominance of market leaders. It is also the only case in which the Court evaluated, as a material issue, the appropriateness of using cooperative activity to prevent the concentration of economic power.

doubt that an activity falls within a per se prohibited class,⁶⁷

The Court refused to make special allowances for small business to engage in express per se restraints.

Fortunately, there are at least two reasons why *Topco* is probably no longer good law. First, the *Topco* Court itself never intended to apply per se illegality to all small business cooperative activity. See *U.S. v. Topco*, 414 U.S. 801 (1973); see note 64 *supra*. Second, recent cases attack *Topco's* refusal to use the rule of reason. Most notable among these cases are: *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), *Worthen Bank & Trust Co. v. National BankAmericard, Inc.*, 485 F.2d 119 (8th Cir. 1973); *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976).

For example, the Supreme Court ameliorated its initial resistance to the rule of reason in its decision reviewing the *Topco* decision on remand, 414 U.S. 801 (1973) (per curiam). The Supreme Court affirmed the lower court's express approval of several cooperative activities which indirectly lead to market allocation. See note 49 *supra*.

Moreover, *Topco* received a devastating blow from *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977). The Supreme Court held that the benefits to interbrand competition may justify the burdens on intrabrand competition from a franchisor restriction that its franchisees do business within predetermined geographical areas. This market allocation was directly analogous to the one held per se illegal in *Topco*. Yet, the *GTE Sylvania* Court sustained the restraint under the rule of reason.

There is another analysis of *GTE Sylvania* which also circumvents the *Topco* decision. See note 73 and accompanying text *infra* on partial integrations.

Furthermore, in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), the Supreme Court sustained under the rule of reason an indirect restraint on prices. The case involved an organization of musical composers (ASCAP) that licensed its members' compositions to radio stations, networks and performers. For a fixed fee, a licensee gained access to any of the copyrighted music in the association. This central licensing system was vastly superior to the individual bargaining for licenses that preceded it. The blanket license facilitated the national broadcasting of compositions; that is, it created a new product—mass music.

Two lower court cases followed this "product necessity" line of reasoning. In *Worthen Bank & Trust Co. v. National BankAmericard, Inc.*, 485 F.2d 119 (1973), the restraint required that member banks offer only BankAmericard to their customers. The Court sustained the restraint because it found that banks could not offer credit card service without exclusivity for product differentiation. In *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), the Court stated that restraints on the freedom of players to change teams may be necessary for the preservation of national football. Therefore, the Court refused to apply per se illegality. Rather, the Court used the rule of reason to examine the restraint's benefits. Although the Court ultimately rejected the restraint, the important point that refutes *Topco* is the Court's preference for the rule of reason over per se illegality. In short, *Topco* now probably only

modern courts tend to subject it to a careful assessment of competitive impact under the rule of reason.⁶⁸ The small business defendant should take advantage of the courts' approach by emphasizing the overall procompetitive effect of cooperative activity which enables small business to compete with market leaders. In fact, rule of reason analysis generally produces results favorable to antitrust defendants.⁶⁹

B. Relationship Between the Parties

The participants in a cooperative activity may relate to one another either horizontally or vertically. A horizontal relationship involves competitors on the same level of the distribution chain.⁷⁰ When horizontal parties cooperate to fix prices, divide markets or engage in group boycotts, per se illegality is inevitable.⁷¹

In contrast, a vertical relationship involves competitors on different levels of the distribution chain.⁷² When vertical parties cooperate, even in the nature of restraints within the per se pro-

prohibits express per se restraints in cooperative bylaws, articles, or similar directives.

⁶⁷ See note 38 and accompanying text *supra*.

⁶⁸ See note 49 and accompanying text *supra* for the most recent example of judicial preference for rule of reason analysis.

⁶⁹ See generally Posner, *The Rule of Reason and the Economic Approach: Reflections on the Sylvania Decision*, 45 CHI. L. REV. 13 (1977).

⁷⁰ An example of a purely horizontal relationship is a cartel of producers of a commodity such as oil. In general, commodity producers are on the same level of distribution since they provide essentially the same service, have almost identical business interests, and ostensibly compete with each other for customers.

⁷¹ These arrangements are the most disfavored of all. They are called "naked" restraints of trade because they entail no integration of productive or distributive functions that add to efficiency. When practiced by horizontal parties, price-fixing, division of markets and group boycotts operate only to curtail competition between the parties. Such activity does not enhance the market in any way. See generally *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958).

⁷² A purely vertical relationship exists when the parties do not provide the same services, do not have identical business concerns and do not compete for the same suppliers or customers. The best example of a vertical relationship is that between a manufacturer and a retailer. The verticality of a relationship is questionable if any of the three elements of a purely vertical situation are missing.

hibited classes, the rule of reason may still apply.⁷³ Modern courts are more willing to hear justifications for vertical restraints than for horizontal restraints.⁷⁴

⁷³ *Continental T. V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), offers a method of analysis which circumvents the *Topco* decision. *Continental T.V.* involved parties in a vertical relationship: a franchisor and its franchisees. As a vertical restraint, the market allocation received rule of reason analysis; see note 66 *supra*. In previous cases, courts also rejected the *per se* approach and opted to apply the rule of reason. These cases involved partial integrations by horizontal parties. That is, in each case, horizontal competitors sacrificed one aspect of their competition and allocated that activity to an association, composed of the horizontal competitors, formed to provide only that particular function.

For example, in the *ASCAP* case, *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979), the composers delegated their marketing responsibilities to the association. The composers continued to compete with each other in every other aspect of their businesses. This arrangement is a partial integration because it combines discrete responsibilities to one association which in turn dictates decisions regarding those responsibilities to the horizontal competitors below. These competitors compete in all other non-integrated aspects of their businesses. The Court characterized this arrangement as vertical because the member composers and the *ASCAP* association were on different levels of the distribution chain. This structural arrangement is very similar to the franchisor-franchisee arrangement in *GTE Sylvania*.

After *Continental T.V.*, a small business defendant may argue that its cooperative is vertically related to the horizontal competitors who make up its membership. This characterization should entitle the cooperative activity to the rule of reason analysis which tends to favor antitrust defendants.

⁷⁴ There are reasons why the courts are more willing to hear justifications for vertical restraints than for horizontal "naked" restraints. Horizontal restrictions restrain trade to inure benefits solely to the conspiracy members. In contrast, vertical restrictions promote overall competition by enabling business to achieve efficiencies throughout the distribution chain.

Economists identify numerous ways in which small business can use vertical restrictions to compete more effectively against large business. The Court in *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), discussed two of these benefits that vertical restraints offer to the economy as a whole:

- (1) . . . new manufacturers and manufacturers entering new markets can use the restrictions in order to induce competent and aggressive retailers to make the kind of investment of capital and labor that is often required in the distribution of products unknown to the consumer.
- (2) . . . established manufacturers can use them to induce retailers to engage in promotional activities or to provide service and repair facilities necessary to the efficient marketing of their products.

Id. at 55.

The *Continental T.V.* Court reinstated the rule of reason for vertical restraints in order to carefully weigh these benefits to the competitive process

Partial integration is a hybrid relationship. In order to achieve efficiencies, horizontal parties may cooperate to create a new entity to perform a single function which they previously could not perform or performed independently but inefficiently.⁷⁵ Modern courts tend to characterize partial integration as a form of vertical restraint despite the fact that the relationship of the parties is horizontal in every other non-integrated aspect of their businesses.⁷⁶ Such activity, when characterized as a vertical restraint, avoids per se illegality and obtains the more favorable rule of reason analysis.⁷⁷

There are two limitations, however, to the tendency of courts

against any anticompetitive effect. See note 49 and accompanying text *supra*. The Court assured that the rule of reason can adequately police the anticompetitive effects of vertical restraints and strongly rejected the per se rule.

⁷⁵ An example of a partial integration is the Topco Plan. In *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1973), a group of small grocery chain owners formed a cooperative to serve several functions. The cooperative acted in part as a buying agency for its members. The agency purchased food at reduced bulk rates, transported the produce from wholesalers to the cooperative warehouse at a lower rate and stored the items until Topco members could pick them up. The members previously purchased, transported and stored all of their produce themselves. The buying agency was a partial integration because most of the other normal grocer functions were still handled individually by each cooperative member.

Another way to illustrate partial integration is to distinguish it from a total integration. If two horizontal competitors are totally integrated, they would in fact merge to become one organization. All of their business decisions would be the same. Furthermore, the two businesses would cease to compete in any way. In a partial integration, however, the competitors only relinquish the right to make business decisions in limited and discrete areas to achieve economies of scale. The partially integrated businesses continue to compete in all other areas.

⁷⁶ Courts in several modern cases characterize partial integrations as vertical restraints. In *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1973), the Court implicitly concluded that the buying agency, a partial integration, contained the necessary elements of "verticality" to distinguish it from business engaged in a purely horizontal restraint of trade. Likewise, in *Smith v. Pro Football, Inc.*, 593 F.2d 1173 (D.C. Cir. 1978), the Court found the required vertical element in the partial integration of a pro football league. Also, in *Worthen Bank & Trust Co. v. National BankAmericard, Inc.*, 485 F.2d 119 (1973), the Court sustained a vertical organization among member banks because such a structure was necessary to provide effective credit card service.

⁷⁷ According to *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), *supra* note 73, vertical restraints are entitled to rule of reason analysis. The courts recognize the need for the benefits which partial integrations offer the marketplace and the consumer.

to treat partial integration as a vertical restraint. First, the parties in a partial integration must avoid spill-over collusion in their other non-integrated business functions.⁷⁸ Second, courts will "pierce" a partial integration when it aggregates restraints in the per se prohibited classes. That is, such a combination reveals itself to be a cover for a conspiracy to restrain trade among horizontal competitors which is per se illegal.⁷⁹

In general, however, small businesses achieve efficiencies through cooperation involving paradigm partial integrations. Joint ventures, trade associations and cooperative buying and selling agencies all involve the creation of a vertical entity to perform a single function previously not performed or performed inefficiently by the individual participants.⁸⁰ The small business defendant should characterize these cooperative activities as partial integrations to avoid per se illegality and receive favorable treatment under the rule of reason.⁸¹

C. Market Structure

Congressional concern with the antidemocratic tendencies of concentrated economic power⁸² renders market share an important factor in antitrust analysis. The parties' share of the market, either individually or in combination, affects the legality of their cooperative activity.⁸³ The concentration of economic

⁷⁸ In *United States v. Minnesota Mining and Mfg. Co.*, 92 F. Supp. 947, 963 (D. Mass. 1950), the Court stated that the "intimate association" of parent corporations in the operation of a joint venture might "inevitably reduce their zeal for competition *inter sese*."

⁷⁹ *United States v. Sealy, Inc.*, 388 U.S. 350, 354 (1967). The aggregation of several different types of restraints may preclude the use of the rule of reason analysis. Courts are suspicious of such agreements. *Id.* at 354-58.

⁸⁰ See notes 10 & 75 and accompanying text *supra*.

⁸¹ See note 76 and accompanying text *supra*.

⁸² See notes 22-30 and accompanying text *supra*.

⁸³ See *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1973), for an example of minor individual but major combined market share. The case involved a buying and selling cooperative consisting of approximately 25 small and medium-sized independent regional supermarket chains operating in 33 states. The range of market shares among the cooperative's members was from 1.5% to 16%, with the average being approximately 6%. However, the member's combined retail sales in 1967 were \$2.3 billion, a total exceeded by only three national grocery chains.

There are limits, however, to the argument that market share equals market power. A cooperative may have a market share equal to that of a market leader

power that results from small business cooperative activity, however, should withstand antitrust scrutiny because of its overall, procompetitive effect.

Small business possesses a minor share of market power.⁸⁴ Admittedly, when small businesses cooperate, a concentration of economic power may result.⁸⁵ However, this concentrated economic power does not lead to market dominance. Rather, it enhances overall competition by enabling small businesses to compete with market leaders whose dominance would otherwise go unchecked.⁸⁶

Moreover, the efficiencies achieved by small business cooperative activity are dispersed among the participants who in all other respects compete with one another.⁸⁷ In contrast, when a market leader obtains an economy of scale, it retains all the benefits of the efficiency for itself.⁸⁸

Therefore, small business cooperative activity may enable its

without necessarily having the leader's market power. As a partial integration, a cooperative is designed only for limited purposes. See note 75 and accompanying text *supra*.

Moreover, the market share of a cooperative should not be as significant a factor when the integration does not include or require any of the traditionally per se illegal activities such as price fixing, market allocation and group boycotts. Of course, the burden of proving the anticompetitive nature of the combination is greater when the combination does not fit neatly within the per se classifications.

⁸⁴ See note 1 *supra*.

⁸⁵ See note 83 and accompanying text *supra*.

⁸⁶ The protection of small business serves as a natural check on the dominance of market leaders. Despite the dogma that antitrust law protects competition and not competitors, the goals of antitrust law sometimes demand protection of competitors. One must amend that dogma to add at least the following qualification: "unless individual competitors must be protected in the interests of preserving competition." Schwartz, *Justice and Other Non-Economic Goals of Antitrust*, 127 U. PA. L. REV. 1076, 1078 (1976). Such protection serves "the very useful role of preventing abuse of power when the growth of power cannot be checked." *Id.* at 1076.

⁸⁷ For example, in *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1973), *supra* notes 66 & 75, when small grocers combined to purchase produce at preferential bulk rates, this benefit was shared by all the participants of the joint buying agency. The overall benefit derived by the single large purchasing agency was thereby diminished.

⁸⁸ In contrast to a cooperative, a market leader retains for itself all the benefits derived from an efficiency. It need not pass on the bulk rate, lower mass advertising rate or other savings to anyone but itself. Therefore, large business' efficiencies only enhance their dominant position in the marketplace.

participants to gain a share of the market comparable to that of a market leader. However, its corresponding market power creates no danger to competition. In fact, small business cooperative activity enhances the competitive process by facilitating competition with market leaders.

D. Purpose of the Activity

Courts routinely state that a legitimate business purpose is one factor used to determine the legality of a challenged activity.⁸⁹ However, a proper intent⁹⁰ will not legitimize an activity with an anticompetitive effect. Similarly, an improper intent will not invalidate an activity with a procompetitive effect.⁹¹ In practice, courts consider intent merely as one indicator of a restraint's actual effect on competition.⁹²

In order to withstand the scrutiny of an antitrust challenge, the small business defendant should emphasize the legitimate

⁸⁹ The "purpose or intent" test has been widely quoted without analysis by the federal courts. The test reputedly scrutinizes the parties' motivation in order to find evidence of an anti-competitive purpose or intent. *See, e.g., Evans v. S.S. Kresge Co.*, 544 F.2d 1184, 1193 (3d Cir. 1976), *cert. denied*, 433 U.S. 908 (1977); *American Motor Inns, Inc. v. Holiday Inns, Inc.* 521 F.2d 1230, 1248 (3d Cir. 1975); *Joseph E. Seagram & Sons, Inc. v. Hawaiian Oke & Liquors, Ltd.*, 416 F.2d 71, 78 (9th Cir. 1969), *cert. denied*, 396 U.S. 1062 (1970).

⁹⁰ "[I]t would be rare management that could not point to some efficiency-promoting or other legitimate purpose in a complex business arrangement such as a joint venture." Brodley, *supra* note 21, at 458-59.

⁹¹ As Judge Brandeis explained in *Chicago Board of Trade v. United States*, 246 U.S. 231, 238 (1918): "[A] good intention will [not] save an otherwise objectionable regulation or the reverse . . . [It is only relevant] because knowledge of intent may help the court to interpret facts and to predict consequences." Professor Handler noted the minimal importance that intent plays in antitrust cases. "Despite the monotonous and ritualistic reiteration of this [intent] principle, I am not aware of any case in which a court has found that a defendant was civilly liable under Section 1 because he had a bad intent where his actions did not rise to the level of an unreasonable restraint of trade." Handler, *supra* note 27, at 1401-02.

⁹² There is a common insight that a purpose to avoid competition is likely to lead to competitive injury.

The traditional rule . . . takes competition as the central value. But instead of seeking objective indicia of competitive injury solely in the price-cost relationship it gives credit to the common insight that a purpose to avoid competition by disposing of competitors is likely to lead to competitive injury.

Sullivan, *Economics and More Humanistic Disciplines: What Are The Sources Of Wisdom For Antitrust?* 125 U. PA. L. REV. 1214, 1229 (1977).

purpose of its cooperative activity. When small businesses cooperate to achieve efficiencies, they do not seek market dominance. Rather, they seek to match the capacity already possessed by market leaders to obtain economies of scale.⁹³ A legitimate purpose, combined with an overall, procompetitive effect, should validate cooperative activity.⁹⁴

CONCLUSION

Small business cooperative activity plays a vital role in maintaining a competitive marketplace. The promotion of small business enterprise through cooperative activity can help to achieve Congress' goal of decentralizing economic power in order to prevent the antidemocratic concentration of political power. Small business enterprise can prevent this dangerous concentration by competing with market leaders to disperse economic power.

Modern courts are receptive to arguments predicated on the need to preserve small business enterprise. They increasingly refuse to invalidate cooperative activity as per se illegal; instead, modern courts apply the rule of reason which tends to favor antitrust defendants. The courts will weigh the particular restraint's nature, the parties' relationship, the market structure, and the activity's purpose. This extensive, factual investigation should reveal that small business enterprise strengthens the overall competitive process by checking the dominance of market leaders. Since cooperative activity is necessary for the survival of small business enterprise, the courts should sustain it.⁹⁵

Concentrated economic power must lead irresistibly to some form of state collectivism. So much power will never be allowed to rest in private hands, and those who do not wish to take the road to the politically administered economy of socialism, must be prepared to take the steps back toward the restoration of the market economy of private competitive enterprise.⁹⁶

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⁹³ See notes 5, 7 & 10 and accompanying text *supra*.

⁹⁴ See notes 67-93 and accompanying text *supra*.

⁹⁵ However, the Court should only sustain cooperative activity that is genuinely necessary and procompetitive.

⁹⁶ 95 CONG. REC. 11, 486 (1949) (Representative Celler citing Walter Lippmann).