



SILICON VALLEY ANTITRUST
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§1 OF THE SHERMAN ACT

1. Agreement
 - More than parallel conduct
 - Between two independent entities (e.g., not parent/sub)
2. In "unreasonable" restraint of trade
 - Modern default standard: ROR (AE > PE)
 - Slight, but important mismatch
 - AE = "bad for the competitive process"
 - PE = "good for consumers"

DEFAULT: ROR

- Applies to horizontal and vertical agreements (see below)
 - The ROR is a play in three acts
1. Plaintiff: AE
 - Market power in relevant market
 - Anticompetitive effects
 2. Defendant: PE
 - Restraint benefits consumers
 - Also: Attack Plaintiff's AE allegations
 3. Plaintiff: AE > PE
 - AE > PE; or
 - Restraint is not reasonably necessary for PE

EXCEPTION: PER SE ILLEGALITY

"[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." *Northern Pacific Railway Comp., v. U.S.*, 356 U.S. 1, 5 (1958).

- Only applies to horizontal agreements (see below)
- Irrebuttable presumption of AE; no PE; AE > PE
- Category approach: per se (instead of ROR) if:
 - price fixing
 - market allocation
 - bid rigging
 - (group boycott)
- Problem: False positives
- DOJ commonly prosecutes criminally if "hardcore":
 - clandestine
 - concealed
 - clear knowledge of wrongful nature

EXCEPTIONS TO THE EXCEPTION: LIMITING THE PER SE RULE, BACK TO ROR

- Only relevant in the context of horizontal agreements

1. Ancillary restraint (= ROR) = far and away the most important exception to the exception

- a. Underlying procompetitive venture ("sale of bakery")
- b. Restraint ("non-compete")
- c. (b) is reasonably necessary to promote (a)

2. Insufficient judicial experience with the practice (= ROR)

- AE/PE may be considered in re-drawing the boundaries of the per se categories

3. "Quick look" categories + business justification (= ROR)

- (Some) non-commercial motivations (Brown)
- "Learned professions" (Cal. Dental)
- Inherent restrictions (NCAA)

CLASSIFICATION OF AGREEMENTS (VERTICAL/HORIZONTAL)

- Goods flow "downstream" from raw material to finished product
- Money flows upstream
- Vertical agreements are normal and not in a suspect class; as a result, the ROR applies to all vertical agreements
- Horizontal agreements are unusual and in a suspect class; the ROR and the per se rules apply

SUMMARY

