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Antitrust Burden Heightened in Fourth Circuit for Prosecutors in Hybrid Horizontal-Vertical Relationships

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This week, the Supreme Court declined *cert* for the Fourth Circuit's *Brewbaker* decision, leaving undisturbed the ruling that heightens the burden on antitrust prosecutors when the target companies have a hybrid horizontal-vertical relationship.[1] The Fourth Circuit's decision diverges from other circuits, so companies should remain cautious when collaborating with competitors, regardless of the nature of their relationship.

In *United States v. Brewbaker*, the Fourth Circuit concluded that the rule of reason, not the *per se* rule, applies when the restraint involves a "hybrid" relationship that contains both vertical and horizontal components. A hybrid relationship might involve, for instance, companies that simultaneously bid on the same contracts and have a manufacturer-distributer relationship with each other.[2]

Courts and the government have long distinguished between horizontal and vertical restraints of trade under Section 1 of the Sherman Act. Vertical restraints are agreements between firms at different levels of distribution and are subject to the rule of reason. Courts applying the fact-intensive rule of reason must evaluate "surrounding circumstances" to determine whether the restraint at issue harms competition.[3] Horizontal restraints, on the other hand, are agreements between firms competing at the same level to fix prices, divide markets, or rig bids. Horizontal restraints are generally subject to the *per se* rule, meaning they are "necessarily illegal" without inquiry into the specific anticompetitive effects of an action.[4] The government generally reserves criminal prosecutions for *per se* violations, leaving other restraints of trade for civil enforcement.[5]

Brewbaker stemmed from an alleged scheme to rig bids for construction contracts awarded by a state agency. The agency paid contracted firms to build aluminum structures to prevent flooding, and Pomona Pipe Products and Contech Engineered Solutions regularly bid for those contracts as direct competitors. A federal grand jury indicted Contech and its sales manager, Brent Brewbaker, on one count of committing a *per se* violation of Section 1 of the Sherman Act by conspiring to rig bids. Prosecutors alleged that Pomona would share its planned bid price with Contech, and Contech would then submit a higher bid. Contech's inflated submission helped ensure that Pomona would win the contract. Pomona would then complete the construction projects, in part, using aluminum it purchased from Contech in a vertical supply relationship.

The Fourth Circuit explained that "the *relationship* of the parties, not just the nature of the limitation imposed" matters when determining whether a restraint is horizontal or vertical.[6] The court reasoned that a price-fixing agreement between two competing companies "produces different effects on competition" than one between

companies that "simultaneously compete and collaborate."[7] The court applied the rule of reason because the restraint alleged in the indictment "would not invariably lead to anticompetitive effects."[8] The court reasoned that if the restraint boosted Contech's sales of aluminum to Pomona, it could theoretically increase competition between Contech and other aluminum manufacturers.

The Justice Department had urged the Supreme Court to grant certiorari, noting the ubiquity of hybrid relationships in today's economy. It also pointed to the growing circuit split on the issue; the Second and Seventh Circuits have applied the *per se* rule to competing firms that agree on how they will compete, even when they simultaneously had vertical relationships.[9] Until the Supreme Court resolves the conflict, the Fourth Circuit's approach will be "far more accommodating to antitrust defendants," the Justice Department warned.[10]

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[1] *United States v. Brewbaker*, 87 F.4th 563 (4th Cir. 2023), *cert. denied*, No. 23-1365.

[2] *Brewbaker*, 87 F.4th at 576.

[3] *Standard Oil Co. of N.J. v. United States*, 221 U.S. 1, 58 (1911).

[4] *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007).

[5] U.S. Dep't of Justice, *Justice Manual* § 7-2.200.

[6] *Id.* at 577.

[7] *Id.*

[8] *Id.* at 582.

[9] *See, e.g.*, *United States v. Apple, Inc.*, 791 F.3d 290 (2d Cir. 2015); *Deslandes v. McDonald's USA, LLC*, 81 F.4th 699 (7th Cir. 2023).

[10] Petition for Writ of Certiorari at 18, *United States v. Brewbaker* (No. 23-1365).

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