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Will SCOTUS Tame the Exotic Beast?
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It is a pretty exciting time in the antitrust world. This, of course, is bad news for firms. SCOTUS will decide three antitrust cases this term, each offering a promising opportunity to clarify murky doctrine or undo an erroneous application of relatively clear antitrust principles. *Texaco v Dagher* falls into the latter category. The bulk of the commentary I've seen has been critical. For example, Christine Hurt at the Glom describes the plaintiff's theory "somewhat strained." Ron Davis goes a bit further, describing *Dagher* as â€œThe Worst Antitrust Case of the 21st Century." That is saying something. Yet, given the impact of the decision on integrative activity if affirmed, Iâ€™m inclined to agree.

I'll explain why below the fold.

The facts of *Dagher* are relatively straightforward. Some 23,000 Texaco and Shell brand service station dealers sued Texaco and Shell for price-fixing, alleging that the practice amounted to a per se violation of Section 1 of the Sherman Act. As many commentators have pointed out — there is a small hiccup in this theory of anticompetitive harm: Shell and Texaco were no longer in competition in the United States with respect to refining or marketing. Rather, Shell and Texaco had formed two joint ventures, Equilon in the western U.S. and Motiva in the east, to refine, transport, and market Shell and Texaco gasoline products. Shell and Texaco transferred all of their domestic downstream assets to the joint ventures — thereby ceasing to compete in the United States. Of course, such a combination is subject to antitrust scrutiny on its own. The FTC investigated the transaction, ultimately granting its blessing upon the divestiture of some downstream assets.

The district court granted the defendantsâ€™ summary judgment motion only to be reversed by the Ninth Circuit, which reasoned that Shell and Texacoâ€™s agreement to â€œunify pricesâ€? was a â€œnaked restraint.â€? Of course, this is antitrust-speak for â€œobviously anti-competitive.â€? If the agreement of the joint venture to set prices is a naked restraint, it is not protected by the ancillary restraints doctrine, which protects only those agreements which are reasonably related to promote otherwise legitimate goals of the joint venture. Finding no such evidence of legitimate purpose, the Ninth Circuit reversed.

The Ninth Circuitâ€™s analysis is wrong for two reasons. The first is that the ancillary restraints doctrine has no application here. That particular doctrine protects those restraints that restrict joint venture partnersâ€™ conduct outside the venture, but promote pro-competitive purposes of the integration, where the agreement might otherwise be construed as per se illegal. Here, the challenged restraint applies only to the joint

ventureâ€™s actions in the market. In other words, the pricing decision is simply not â€œancillary” to the venture.

The second error is that the per se rule, and Section 1 generally, is only properly applied to agreements between competitors. Shell and Texaco were no longer competitors once Equilon was formed. Judge Fernandezâ€™ dissent nails this one, noting that Equilon â€œran the refinery; it had the research facilities; it transported the products; and it dealt with the stations operators and other buyers. It also priced the products . . .. [N]othing more radical is afoot than the fact that an entity prices its own products.â€?

The Ninth Circuitâ€™s ruling will do much damage if not reversed. Joint venturers would face the burden of proving that each post-formation decision is reasonably necessary to achieve some pro-competitive purpose of the joint venture or else face per se illegality. The Section 1 suit would become a favorite weapon of inefficient competitors seeking to stay afloat. It is this point that Judge Fernandez colorfully illustrates in describing the entity created by the Ninth Circuitâ€™s rule:

> â€œWe now have an exotic beast, no less strange than a manticore, roaming the business world. This beast would otherwise be a true business, but when it acts like a true business â€“ sets price for its own goods â€“ it subjects its otherwise insulated members to the severe string of antitrust liability. While it has the head of a business man and the body of entrepreneurial lion, it has the tail of a liability scorpion. I suppose I am as taken with stories of exotic beasts as the next person, but I prefer to leave them in the realm of the unknown; I would rather not confront them in the marketplace.â€?

Well said, Judge Fernandez. My prediction? SCOTUS will, as expected, tame the exotic beast. But how? I am doubtful, like Professor Ghosh at AntitrustProf Blog, that the Court will attempt to articulate an extension of the *Copperweld* doctrine (which protects wholly-owned subsidiaries from charges of intra-enterprise conspiracy under Section 1) to joint ventures. The United States Amici brief supporting Shell and Texaco urges the Court to take another route, ruling that per se analysis should not apply to this type of agreement because it â€œcould not, and did not, itself eliminate competition.â€? That sounds right to me.

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