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CHAPTER 16

COLLECTIVE CREDITOR ACTIONS AND ANTITRUST LAW

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Chapter 16

Collective Creditor Actions and Antitrust Law

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§ 16:1 Chapter overview

Bankruptcy and antitrust laws intersect in multiple ways.

One of the most frequently discussed is the expedited review by the DOJ and FTC of sales of the assets of the bankrupt debtor, including under the Hart-Scott-Rodino act.[1] This Chapter will instead focus on the other major area of intersection between antitrust and bankruptcy laws: how the antitrust laws impact the collective actions of creditors. It is intended to guide creditors with antitrust concerns in maximizing their recoveries as creditors while minimizing their likelihood of violating antitrust laws. This chapter sets forth the protective and remedial actions creditors may take both individually and collectively in light of federal antitrust law.

Notwithstanding the significant benefits, there are limitations on the collective actions creditors may take. This article focuses on one such limitation: the federal antitrust laws. Although competitors may have sound business reasons for collaborating in their efforts to enforce creditor remedies against a common debtor, they must be mindful of federal antitrust laws.

§ 16:2 Antitrust principals and their impact on creditor rights

Antitrust laws limit the extent to which creditors may collaborate. As discussed in greater detail below, antitrust law precludes creditors from entering into agreements with competitors not to do business with a debtor or to deal with that debtor only on specified terms. Creditors are also prohibited from collectively deciding to stop goods already in transit or to refuse to deliver future shipments. Although creditors may make collective decisions, they are restricted from making collective pricing or credit decisions. Finally, any collective action to seek relief from a court must be made in good faith, i.e., there must be a genuine desire to obtain the relief sought rather than merely to harm a competitor or competition.

[Section 16:1]

[1]For a bankruptcy case discussing antitrust implications of the purchase of a bankrupt entity's assets in a Chapter 7 proceeding, *see Gulf States Reorganization Group, Inc. v. Nucor Corp.*, 466 F.3d 961, 2006-2 Trade Cas. (CCH) ¶ 75442 (11th Cir. 2006).

§ 16:3 The Sherman Act

The Sherman Act is the primary source of authority that a creditor must consider in determining if a particular creditor strategy is permissible. Section 1 of the Sherman Act prohibits any "contract, combination . . ., or conspiracy" that unreasonably restrains trade or commerce.[1] Section 1 does not require any formal written or unwritten agreement. All that is required is a conscious commitment to a common scheme.[2] Accordingly, creditors may not enter into agreements, written or unwritten, that unreasonably restrain trade or commerce.

Proof of an agreement or a common scheme can be direct, as where the parties have entered into a formal agreement, or circumstantial, where parallel conduct by competitors is coupled with evidence of certain "plus factors."[3] Such "plus factors" might include (i) conduct that would be contrary to a company's self-interest absent collusion and (ii) communications among competitors without any legitimate business justification.[4] If only circumstantial evidence of an agreement or scheme exists, the evidence must "tend[ ] to exclude the possibility that the alleged conspirators acted independently" rather than pursuant to an agreement or scheme.[5]

[Section 16:3]

[1] 15 U.S.C.A. § 1; *Standard Oil Co. of New Jersey v. U.S.*, 221 U.S. 1, 58, 31 S. Ct. 502, 55 L. Ed. 619 (1911); *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 49, 97 S. Ct. 2549, 53 L. Ed. 2d 568, 1977-1 Trade Cas. (CCH) ¶ 61488 (1977).

[2] *Monsanto Co. v. Spray-Rite Service Corp.*, 465 U.S. 752, 764, 104 S. Ct. 1464, 79 L. Ed. 2d 775, 1984-1 Trade Cas. (CCH) ¶ 65906 (1984).

[3] See, e.g., *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.*, 346 U.S. 537, 541, 74 S. Ct. 257, 98 L. Ed. 273 (1954); *American Tobacco Co. v. U.S.*, 328 U.S. 781, 810, 66 S. Ct. 1125, 90 L. Ed. 1575 (1946).

[4] See *Market Force Inc. v. Wauwatosa Realty Co.*, 906 F.2d 1167, 1172, 1990-2 Trade Cas. (CCH) ¶ 69094 (7th Cir. 1990); *Cayman Exploration Corp. v. United Gas Pipe Line Co.*, 873 F.2d 1357, 1361, R.I.C.O. Bus. Disp. Guide (CCH) P 7188, 1989-1 Trade Cas. (CCH) ¶ 68552, 13 Fed. R. Serv. 3d 723 (10th Cir. 1989); *Apex Oil Co. v. DiMauro*, 822 F.2d 246, 254, 1987-1 Trade Cas. (CCH) ¶ 67607 (2d Cir. 1987).

[5] *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 588, 106 S. Ct. 1348, 89 L. Ed. 2d 538, 7 Int'l Trade Rep. (BNA) 2057, 1986-1 Trade Cas. (CCH) ¶ 67004, 4 Fed. R. Serv. 3d 368 (1986).

§ 16:4 Rule of reason vs. Per se illegal restraints

As in other antitrust analyses, courts usually apply a "rule of reason" to determine whether an agreement or scheme among creditors violates Section 1 of the Sherman Act. The rule of reason is a flexible analytical approach under which the court will examine the reasonableness of the agreement among competitors in light of the industry involved, the proffered justification for the agreement, and the likely effect upon competition.[1]

However, some agreements, such as agreements to fix prices,[2] are deemed to be so pernicious that they will be found to be illegal regardless of the effect on competition or the business excuse for their use.[3] Such agreements are deemed "per se illegal."[4] Use of a per se analysis generally is limited to "conduct that is manifestly anticompetitive" or conduct "that would always or almost always tend to restrict competition and decrease output."[5] The per se rule avoids the "incredibly complicated and prolonged economic investigation into the entire history involved" attendant to the rule of reason and provides clear direction as to certain types of agreements that are clearly proscribed by Section 1 of the Sherman Act.[6]

[Section 16:4]

[1] *See, e.g., Standard Oil Co. of New Jersey v. U.S.*, 221 U.S. 1, 58, 31 S. Ct. 502, 55 L. Ed. 619 (1911).

[2] *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 212–13, 60 S. Ct. 811, 84 L. Ed. 1129 (1940).

[3] *Northern Pac. Ry. Co. v. U.S.*, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958).

[4] *Northern Pac. Ry. Co. v. U.S.*, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958).

[5] *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 108 S. Ct. 1515, 99 L. Ed. 2d 808, 1988-1 Trade Cas. (CCH) ¶ 67982 (1988).

[6] *See Northern Pac. Ry. Co. v. U.S.*, 356 U.S. 1, 5, 78 S. Ct. 514, 2 L. Ed. 2d 545 (1958). The following are examples of agreements that have been found to be per se illegal: agreements to fix prices or set maximum prices, *Arizona v. Maricopa County Medical Soc.*, 457 U.S. 332, 102 S. Ct. 2466, 73 L. Ed. 2d 48, 1982-2 Trade Cas. (CCH) ¶ 64792 (1982); *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1940); agreements to limit production or restrict output, *Hartford-Empire Co. v. U.S.*, 323 U.S. 386, 65 S. Ct. 373, 89 L. Ed. 322, 64 U.S.P.Q. 18 (1945), supplemented, 324 U.S. 570, 65 S. Ct. 815, 89 L. Ed. 1198, 65 U.S.P.Q. 1

§ 16:5 Group boycotts

Group boycotts would likely be an impermissible creditor strategy whether the debtor is in bankruptcy or is pre-bankruptcy. A number of courts have found group boycotts to be per se illegal. For example, in *Klor's, Inc. v. Broadway-Hale Stores*, the United States Supreme Court held that a boycott among an appliance manufacturer and certain distributors not to sell to a certain distributor, or to sell only on unfavorable terms, should be condemned regardless of the economic effect:

> Group boycotts, or concerted refusals by traders to deal with other traders, have long been held to be in the forbidden category. They have not been saved by allegations that they were reasonable in specific circumstances, nor by a failure to show that they "fixed or regulated prices, parceled out or limited production, or brought about a deterioration in quality." Even when they operated to lower prices or temporarily stimulate competition they were banned.[1]

Similarly, in *United States v. General Motors Corp.*, the Supreme Court held per se illegal an agreement where various automobile dealers, through their trade association,

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(1945); *U.S. v. American Linseed Oil Co.*, 262 U.S. 371, 43 S. Ct. 607, 67 L. Ed. 1035 (1923); agreements to divide markets, *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 111 S. Ct. 401, 112 L. Ed. 2d 349, 1990-2 Trade Cas. (CCH) ¶ 69250 (1990); *U.S. v. Topco Associates, Inc.*, 405 U.S. 596, 92 S. Ct. 1126, 31 L. Ed. 2d 515, 173 U.S.P.Q. 193, 1972 Trade Cas. (CCH) ¶ 73904 (1972); *U.S. v. Sealy, Inc.*, 388 U.S. 350, 87 S. Ct. 1847, 18 L. Ed. 2d 1238, 153 U.S.P.Q. 763 (1967); agreements to standardize credit terms, *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 100 S. Ct. 1925, 64 L. Ed. 2d 580, 1980-2 Trade Cas. (CCH) ¶ 63352 (1980) (holding that agreement among competing wholesalers to refuse to sell unless retailer makes payment in cash either in advance or on delivery is illegal per se because it is merely one form of price-fixing); and group boycotts intended to fix prices or harm competitors, *F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 110 S. Ct. 768, 107 L. Ed. 2d 851, 1990-1 Trade Cas. (CCH) ¶ 68895 (1990); *Silver v. New York Stock Exchange*, 373 U.S. 341, 83 S. Ct. 1246, 10 L. Ed. 2d 389 (1963); *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959); *Fashion Originators' Guild of America v. Federal Trade Commission*, 312 U.S. 457, 312 U.S. 668, 61 S. Ct. 703, 85 L. Ed. 949, 48 U.S.P.Q. 483 (1941).

[Section 16:5]

[1] *Klor's, Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 210, 79 S. Ct. 705, 3 L. Ed. 2d 741 (1959) (citations omitted) (quoting *Fashion Originators' Guild of America v. Federal Trade Commission*, 312 U.S. 457, 466, 312 U.S. 668, 61 S. Ct. 703, 85 L. Ed. 949, 48 U.S.P.Q. 483 (1941)).

persuaded General Motors to prevent certain dealers from selling to discount outlets.[2] The Supreme Court called the agreement "a classic conspiracy in restraint of trade" because it involved "joint collaborative action" by dealers and General Motors to "eliminate a class of competitor."[3] The Supreme Court further stated that "where businessmen concert their actions in order to deprive others of access to merchandise which the latter wish to sell to the public, we need not inquire into the economic motivation underlying their conduct."[4]

However, not all group boycotts are per se illegal.[5] Agreements between competitors, commonly known as "horizontal agreements,"[6] are more likely to be deemed per se illegal.[7] In contrast, "vertical agreements," agreements between entities at different levels of distribution, are less likely to be deemed per se illegal.[8] In *NYNEX Corp. v. Discon, Inc.*, the Supreme Court made clear that the per se rule against group boycotts and concerted refusals to deal does not apply to vertical agreements "in the absence of a horizontal agreement" on at least one level of the distribution chain.[9]

In *Northwest Wholesale Stationers, Inc. v. Pacific Station-*

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[2] *U.S. v. General Motors Corp.*, 384 U.S. 127, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966).

[3] *U.S. v. General Motors Corp.*, 384 U.S. 127, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966).

[4] *U.S. v. General Motors Corp.*, 384 U.S. 127, 140, 86 S. Ct. 1321, 16 L. Ed. 2d 415 (1966).

[5] *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 105 S. Ct. 2613, 86 L. Ed. 2d 202, 1985-1 Trade Cas. (CCH) ¶ 66640 (1985).

[6] *Business Electronics Corp. v. Sharp Electronics Corp.*, 485 U.S. 717, 730 n.4, 108 S. Ct. 1515, 99 L. Ed. 2d 808, 1988-1 Trade Cas. (CCH) ¶ 67982 (1988) ("[A] facially vertical restraint imposed by a manufacturer only because it had been coerced by a 'horizontal cartel' agreement among his distributors is in reality a horizontal restraint . . .. [A] restraint is not horizontal because it has horizontal effects, but because it is the product of a horizontal agreement.").

[7] *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 119 S. Ct. 493, 142 L. Ed. 2d 510, 1998-2 Trade Cas. (CCH) ¶ 72362 (1998).

[8] *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 119 S. Ct. 493, 142 L. Ed. 2d 510, 1998-2 Trade Cas. (CCH) ¶ 72362 (1998).

[9] *NYNEX Corp. v. Discon, Inc.*, 525 U.S. 128, 138, 119 S. Ct. 493, 142 L. Ed. 2d 510, 1998-2 Trade Cas. (CCH) ¶ 72362 (1998).

ary & Printing Co., the Supreme Court identified the class of group boycotts to which the per se rule should be limited:

> Cases to which this Court has applied the *per se* approach have generally involved joint efforts by a firm or firms to disadvantage competitors by "either directly denying or persuading or coercing suppliers or customers to deny relationships the competitors need in the competitive struggle." In these cases, the boycott often cut[s] off access to a supply, facility, or market necessary to enable the boycotted firms to compete, and frequently the boycotting firms possessed a dominant position in the relevant market. In addition, the practices were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive. Under such circumstances the likelihood of anticompetitive effects is clear and the possibility of countervailing procompetitive effects is remote.
>
> Although a concerted refusal to deal need not necessarily possess all of these traits to merit *per se* treatment, not every cooperative activity involving a restraint or exclusion will share with the *per se* forbidden boycotts the likelihood of predominantly anticompetitive consequences.[10]

Accordingly, the per se test will generally only apply where (i) a group boycott involves a joint effort by competitors to harm another competitor, (ii) the boycotting firms possess market power or exclusive access to products or services that the targeted firm needs to compete, and (iii) the boycott was not justified by plausible efficiency arguments that it was intended to enhance overall efficiency and make markets more competitive.[11] However, a group boycott will be per se illegal even in the absence of market power where the purpose of the boycott is to fix prices.[12] Generally speaking, even if a group boycott is not found to be violative of antitrust

[10] *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 293–95, 105 S. Ct. 2613, 86 L. Ed. 2d 202, 1985-1 Trade Cas. (CCH) ¶ 66640 (1985) (holding that expulsion of member of buying cooperative should be judged under rule of reason where cooperative was formed to increase economic efficiency and render markets more, rather than less, competitive and where there was no showing that cooperative possessed market power or exclusive access to an element essential to effective competition) (citations omitted).

[11] *Northwest Wholesale Stationers, Inc. v. Pacific Stationery and Printing Co.*, 472 U.S. 284, 293–95, 105 S. Ct. 2613, 86 L. Ed. 2d 202, 1985-1 Trade Cas. (CCH) ¶ 66640 (1985).

[12] *F.T.C. v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 110 S. Ct. 768, 107 L. Ed. 2d 851, 1990-1 Trade Cas. (CCH) ¶ 68895 (1990).

principals, it would likely be found violative of the automatic stay if it is intended to pressure a debtor in bankruptcy to pay a prepetition debt or to gain control over property of the debtor's estate.

§ 16:6 U.S. Department of Justice and Federal Trade Commission Guidelines

In 2000, the U.S. Department of Justice and the Federal Trade Commission ("FTC") (collectively, the "Agencies") developed guidelines pertaining to competitor collaboration (the "Guidelines"). The Guidelines state the antitrust enforcement policy of the Agencies with respect to competitor collaborations.[1] The Guidelines are intended to enable businesses to evaluate proposed transactions with greater understanding of antitrust concerns, thus encouraging procompetitive collaborations and deterring collaborations likely to harm competition and consumers.[2] The Guidelines are not binding on the courts.

For the purposes of the Guidelines, a competitor collaboration consists of a set of one or more agreements between or among competitors to engage in certain economic activity along with the resulting economic activity.[3] "In general, the Agencies assess the competitive effects of the overall collaboration and any individual agreement or set of agreements within the collaboration that may harm competition . . .. Two or more agreements are assessed together if their procompetitive benefits or anticompetitive harms are so in-

[Section 16:6]

[1]FTC & U.S. Dept. of Justice, Antitrust Guidelines for Collaborations Among Competitors (Apr. 2000), http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf, § 1.1.

[2]FTC & U.S. Dept. of Justice, Antitrust Guidelines for Collaborations Among Competitors (Apr. 2000), http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf, § 1.1, at Preamble.

[3]FTC & U.S. Dept. of Justice, Antitrust Guidelines for Collaborations Among Competitors (Apr. 2000), http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf, § 1.1, at § 2.3.

tertwined that they cannot meaningfully be isolated and attributed to any individual agreement."[4]

§ 16:7 U.S. Department of Justice and Federal Trade Commission Guidelines—Per se test

The Guidelines state that the per se test will generally be reserved for agreements not to compete on price or output.[1] The per se test will not be applied where (i) the purpose of collaboration is an efficiency-enhancing integration and (ii) integration is reasonably necessary to its procompetitive benefits.[2] The per se test would likely be applied to creditors' collective pricing or credit decisions.

§ 16:8 U.S. Department of Justice and Federal Trade Commission Guidelines—Rule of reason

If a creditor agreement is not challenged as per se illegal, it may be analyzed under the rule of reason to determine its

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[4]FTC & U.S. Dept. of Justice, Antitrust Guidelines for Collaborations Among Competitors (Apr. 2000), http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf, § 1.1.

[Section 16:7]

[1]FTC & U.S. Dept. of Justice, Antitrust Guidelines for Collaborations Among Competitors (Apr. 2000), http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf, § 1.1, at § 3.2.

[2]FTC & U.S. Dept. of Justice, Antitrust Guidelines for Collaborations Among Competitors (Apr. 2000), http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf, § 1.1. Permissible integration typically involves combinations of significant capital, technology, or other complimentary assets to achieve procompetitive benefits that could not have been achieved separately. Guidelines at § 3.2. "The mere coordination of decisions on price, output, customers, territories, and the like is not integration, and cost savings without integration are not a basis for avoiding per se condemnation." FTC & U.S. Dept. of Justice, Antitrust Guidelines for Collaborations Among Competitors (Apr. 2000), http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf, § 1.1. The integration must be of a type that plausibly would generate procompetitive benefits, which may enhance the participants' ability or incentives to compete and thus may offset an agreement's anticompetitive tendencies. FTC & U.S. Dept. of Justice, Antitrust Guidelines for Collaborations Among Competitors (Apr. 2000), http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf, § 1.1. Integration may be permissible without being essential, but an integration will not be permitted when there are comparable means of efficiency-enhancing integration that are significantly less restrictive. FTC & U.S. Dept. of Justice, Antitrust Guidelines for Collaborations Among Competitors (Apr. 2000), http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf, § 1.1.

overall competitive effect.[1] The rule of reason is a flexible inquiry focusing on whether an agreement harms competition.[2] "The central question is whether the relevant agreement likely harms competition by increasing the ability or incentive profitably to raise price above or reduce output, quality, service, or innovation below what likely would prevail in the absence of the relevant agreement."[3]

§ 16:9 U.S. Department of Justice and Federal Trade Commission Guidelines—Examples of potentially anticompetitive collaborations

Collaborations, including collaborations among creditors, regarding production, marketing, buying, or research and development may potentially result in anticompetitive harms. Nevertheless, under certain circumstances, these

[Section 16:8]

[1]FTC & U.S. Dept. of Justice, Antitrust Guidelines for Collaborations Among Competitors (Apr. 2000), http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf, § 1.1, at § 3.3.

[2]FTC & U.S. Dept. of Justice, Antitrust Guidelines for Collaborations A mong Competitors (Apr. 2000), http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf, § 1.1.

[3]FTC & U.S. Dept. of Justice, Antitrust Guidelines for Collaborations Among Competitors (Apr. 2000), http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf, § 1.1. Factors the Agencies will consider in the rule of reason analysis include (i) the nature of the agreement, (ii) the business purpose of the agreement, (iii) whether the agreement has caused anticompetitive harm, (iv) whether the parties to the agreement possess market power, (v) the extent to which the parties to the agreement have the ability and the incentive to compete independently, (vi) the duration of the agreement, (vii) whether entry into the market would be timely, likely, and sufficient to deter or counteract any anticompetitive harms, and (viii) any other market circumstances that may foster or impede anticompetitive harms. Guidelines at § 3.3. If the examination of these factors indicates no potential for anticompetitive harm, the Agencies end the investigation without considering procompetitive benefits. Guidelines at § 3.3. If investigation indicates anticompetitive harm, the Agencies examine whether the relevant agreement is reasonably necessary to achieve procompetitive benefits that likely would offset anticompetitive harms. Guidelines at § 3.3.

four types of collaborations may be considered procompetitive.[1]

§ 16:10 U.S. Department of Justice and Federal Trade Commission Guidelines—Safety zones

The Guidelines established safety zones to encourage competitor collaborations.[1] The safety zones are designed "to provide participants in a competitor collaboration with a degree of certainty in those situations in which anticompetitive effects are so unlikely that the [a]gencies presume the arrangement to be lawful without inquiring into the particu-

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[Section 16:9]

[1]First, production collaborations may be procompetitive where participants "combine complementary technologies, know-how, or other assets to enable the collaboration to produce a good more efficiently or to produce a good that no one participant alone could produce." FTC & U.S. Dept. of Justice, Antitrust Guidelines for Collaborations Among Competitors (Apr. 2000), http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf, § 1.1, at § 3.31(a). Second, marketing collaborations may be procompetitive "where a combination of complementary assets enables products more quickly and efficiently to reach the marketplace." FTC & U.S. Dept. of Justice, Antitrust Guidelines for Collaborations Among Competitors (Apr. 2000), http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf, § 1.1, at § 3.31(a). Third, buying collaborations may be procompetitive where they allow "participants to centralize ordering, to combine warehousing or distribution functions more efficiently, or to achieve other efficiencies." FTC & U.S. Dept. of Justice, Antitrust Guidelines for Collaborations Among Competitors (Apr. 2000), http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf, § 1.1, at § 3.31(a). Lastly, research and development collaborations are usually procompetitive where the combination of complementary assets, technology, or know-how enables participants "more quickly or more efficiently to research and develop new or improved goods, services, or production processes." FTC & U.S. Dept. of Justice, Antitrust Guidelines for Collaborations Among Competitors (Apr. 2000), http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf, § 1.1, at § 3.31(a).

[Section 16:10]

[1]FTC & U.S. Dept. of Justice, Antitrust Guidelines for Collaborations Among Competitors (Apr. 2000), http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf, § 1.1, at § 4.1.

lar circumstances."[2] The safety zones "are not intended to discourage collaborations that fall outside the safety zones."[3]

There are two safety zones outlined in the Guidelines. The first safety zone addresses competitor collaborations in general.[4] The second safety zone addresses research and development collaborations whose competitive effects are analyzed within an innovation market.[5] The safety zones do not apply to agreements that are per se illegal.[6]

§ 16:11 Noerr-Pennington Doctrine

The Noerr-Pennington Doctrine may be a source of protection for creditors acting collectively. The Noerr-Pennington

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[2]FTC & U.S. Dept. of Justice, Antitrust Guidelines for Collaborations Among Competitors (Apr. 2000), http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf, § 1.1.

[3]FTC & U.S. Dept. of Justice, Antitrust Guidelines for Collaborations Among Competitors (Apr. 2000), http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf, § 1.1.

[4]Absent extraordinary circumstances, the Agencies will not challenge competitor collaboration where the market shares of the participants account for no more than twenty percent of the relevant markets. FTC & U.S. Dept. of Justice, Antitrust Guidelines for Collaborations Among Competitors (Apr. 2000), http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf, § 1.1, at § 4.2.

[5]FTC & U.S. Dept. of Justice, Antitrust Guidelines for Collaborations Among Competitors (Apr. 2000), http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf, § 1.1,. at § 4.3. "Absent extraordinary circumstances, the Agencies [will] not challenge competitor collaboration on the basis of effects on competition in an innovation market, FTC & U.S. Dept. of Justice, Antitrust Guidelines for Collaborations Among Competitors (Apr. 2000), http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf, § 1.1, at § 3.32(c) ("An innovation market consists of the research and development directed to particular new or improved goods or processes and the close substitutes for that research and development. The Agencies define an innovation market only when the capabilities to engage in the relevant research and development can be associated with specialized assets or characteristics of specific firms."), where three or more independently controlled research efforts in addition to those of the collaboration possess the required specialized assets or characteristics and the incentive to engage in R&D that is a close substitute for the R&D activity of the collaboration.". FTC & U.S. Dept. of Justice, Antitrust Guidelines for Collaborations Among Competitors (Apr. 2000), http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf, § 1.1.

[6]FTC & U.S. Dept. of Justice, Antitrust Guidelines for Collaborations Among Competitors (Apr. 2000), http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf, § 1.1, at §§ 4.2, 4.3; *see also* Section I.D.1 herein.

Doctrine is an exception to the reach of antitrust laws that provides protection to entities that petition the government regardless of the potential anticompetitive effect.[1] In *City of Columbia v. Omni Outdoor Advertising Inc.*, the Supreme Court stated,

> The federal antitrust laws . . . do not regulate the conduct of private individuals in seeking anticompetitive action from the government. This doctrine . . . rests ultimately upon a recognition that the antitrust laws, "tailored as they are for the business world, are not at all appropriate for application in the political arena."[2]

The Noerr-Pennington Doctrine applies to petitions to each of the three branches of government, including the courts.[3] Courts have extended the Noerr-Pennington Doctrine to encompass concerted efforts incident to litigation, such as prelitigation "threat letters" and settlement offers.[4]

However, if the litigation is a "sham", an entity will not be entitled to the protections of the Noerr-Pennington Doctrine. Entities will not be entitled to the benefits of the Noerr-Pennington Doctrine where they improperly use the means of petitioning the government to reduce competition or injure

[Section 16:11]

[1] *Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961); *United Mine Workers of America v. Pennington*, 381 U.S. 657, 85 S. Ct. 1585, 14 L. Ed. 2d 626 (1965); see *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380, 111 S. Ct. 1344, 113 L. Ed. 2d 382, 1991-1 Trade Cas. (CCH) ¶ 69378 (1991).

[2] *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380, 111 S. Ct. 1344, 113 L. Ed. 2d 382, 1991-1 Trade Cas. (CCH) ¶ 69378 (1991).

[3] *See California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510–11, 92 S. Ct. 609, 30 L. Ed. 2d 642, 1972 Trade Cas. (CCH) ¶ 73795, 93 Pub. Util. Rep. 3d (PUR) 470 (1972); *Primetime 24 Joint Venture v. National Broadcasting, Co., Inc.*, 219 F.3d 92, 99–100, 28 Media L. Rep. (BNA) 1993, 55 U.S.P.Q.2d 1385, 2000-2 Trade Cas. (CCH) ¶ 72968 (2d Cir. 2000).

[4] *Primetime 24 Joint Venture v. National Broadcasting, Co., Inc.*, 219 F.3d 92, 100, 28 Media L. Rep. (BNA) 1993, 55 U.S.P.Q.2d 1385, 2000-2 Trade Cas. (CCH) ¶ 72968 (2d Cir. 2000).

a competitor.[5] To establish that administrative or judicial proceedings are a sham, a party must show that the litigation in question is: (i) "objectively baseless," and (ii) "an attempt to interfere directly with the business relationships of a competitor through use of the governmental process—as opposed to the outcome of that process—as an anticompetitive weapon."[6] "A sham situation involves a defendant whose activities are not genuinely aimed at procuring favorable governmental action at all, not one who genuinely seeks to achieve his governmental result, but does so through improper means."[7] The Noerr-Pennington Doctrine may protect a creditor who petitions a court seeking relief from a debtor, unless the litigation seeking such relief is determined to be a sham.

§ 16:12 Collective creditor action

The remedies available to a creditor may depend upon whether the debtor is in bankruptcy or not. The discussion of antitrust principals in Section I above makes clear that such remedies may be limited by antitrust law. Although a creditor is generally free to take unilateral action to enforce its individual creditor remedies without fear of violating Section 1 of the Sherman Act, a creditor's ability to act collectively to enforce its remedies, whether in or out of bankruptcy, are more limited.

In the bankruptcy context, a creditor acting alone has numerous options to maximize its leverage without fear of violating antitrust laws. Creditors acting collectively, though

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[5]See, e.g., *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 513, 92 S. Ct. 609, 30 L. Ed. 2d 642, 1972 Trade Cas. (CCH) ¶ 73795, 93 Pub. Util. Rep. 3d (PUR) 470 (1972); *Eastern R. R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 144, 81 S. Ct. 523, 5 L. Ed. 2d 464 (1961).

[6]*Professional Real Estate Investors, Inc. v. Columbia Pictures Industries, Inc.*, 508 U.S. 49, 60, 113 S. Ct. 1920, 123 L. Ed. 2d 611, 26 U.S.P.Q.2d 1641, 1993-1 Trade Cas. (CCH) ¶ 70207 (1993) (citations, internal quotation marks, and alterations omitted); *Primetime 24 Joint Venture v. National Broadcasting, Co., Inc.*, 219 F.3d 92, 100, 28 Media L. Rep. (BNA) 1993, 55 U.S.P.Q.2d 1385, 2000-2 Trade Cas. (CCH) ¶ 72968 (2d Cir. 2000).

[7]*City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380, 111 S. Ct. 1344, 113 L. Ed. 2d 382, 1991-1 Trade Cas. (CCH) ¶ 69378 (1991).

restricted by such laws, may be able to achieve significant results in a bankruptcy case which exceed the results that any single creditor could achieve.

§ 16:13 Collective creditor action—Protective measures available to creditors acting collectively

Collective actions that creditors may take to protect themselves from a debtor's financial distress include: (i) exchanging financial information about the debtor, (ii) helping to find a buyer for an underperforming business that will continue a customer's operations; (iii) proposing a debt for equity swap; (iv) requesting permission to speak with customer's lenders to reach an out of court workout; and (v) discussing formation of a distribution joint venture, which could ensure distribution of product in the event a customer goes out of business. These protective actions can be applicable both inside and outside of bankruptcy.

An example of an antitrust suit testing collective creditor actions is *Burtch v. Milberg Factors, Inc.*[1] The plaintiff was the trustee of a Chapter 7 debtor, a clothing retailer. The plaintiff alleged antitrust violations against the defendant factors, "who play a role in financing purchase and sale transactions between garment retailers, such as [plaintiff], and garment manufacturers."[2]

The complaint alleged that the defendants exchanged financial information about the debtor, unlawfully colluded as to what financing terms they would offer to the debtor, and worsened those terms at the same time, harming the debtor and eventually driving it into bankruptcy. Specifically, the plaintiff alleged that the defendants made the debtor's access to credit more costly and at times cut off credit altogether, which limited the debtor's ability to purchase clothes from garment manufacturers and resulted

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[Section 16:13]

[1]*Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 2011-2 Trade Cas. (CCH) ¶ 77660 (3d Cir. 2011), cert. denied, 132 S. Ct. 1861, 182 L. Ed. 2d 644 (2012).

[2]*Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 216, 2011-2 Trade Cas. (CCH) ¶ 77660 (3d Cir. 2011), cert. denied, 132 S. Ct. 1861, 182 L. Ed. 2d 644 (2012).

in the debtor's bankruptcy filing. The plaintiff argued that these actions constituted an illegal price-fixing scheme and group boycott under Section 1 of the Sherman Act.

The District Court dismissed the complaint, stating that the complaint did not rise to the level of plausibility of entitlement to relief required to survive a motion to dismiss. Specifically, the District Court adopted the findings of the Magistrate Judge that a Section 1 claim cannot be based just on allegations of parallel conduct, that bare assertions of an unlawful agreement are insufficient to withstand a motion to dismiss absent any statement of the factual contents of the agreement, and that the plaintiff failed to identify how the defendants' actions were any more likely the result of a conspiracy than each defendant's own economic evaluation of the debtor's financial condition.

The Third Circuit affirmed the dismissal of the complaint. The court held that "[e]xchanging information regarding the creditworthiness of customers does not violate the Sherman Act."[3] The court further held that the plaintiff's naked assertions that information was shared illegally were not entitled to the presumption of truth, and that the plaintiff did not plausibly allege the existence of an agreement or conspiracy, nor provide any direct or circumstantial evidence of such an agreement. The court specifically noted that each individual defendant acted according to its economic self-interest in limiting or refusing to provide credit to the fledgling debtor.[4]

§ 16:14 Collective creditor action—Collective creditor remedies: pre-bankruptcy

As previously stated, cooperation among creditors in negotiating with a debtor is commonly in the interest of all parties.[1] Further, such cooperation is not necessarily incon-

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[3] *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 222, 2011-2 Trade Cas. (CCH) ¶ 77660 (3d Cir. 2011), cert. denied, 132 S. Ct. 1861, 182 L. Ed. 2d 644 (2012).

[4] *Burtch v. Milberg Factors, Inc.*, 662 F.3d 212, 226–30, 2011-2 Trade Cas. (CCH) ¶ 77660 (3d Cir. 2011), cert. denied, 132 S. Ct. 1861, 182 L. Ed. 2d 644 (2012).

[Section 16:14]

[1] *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1052 (2d Cir. 1982).

sistent with the antitrust laws. As the Second Circuit has stated,

> If creditors were forced to act individually, each would be compelled to resort to the most extreme action available in order to protect its individual interest. Such an action, however, might well drive the debtor out of business thereby eliminating any opportunity for it to work out of present difficulties and ultimately satisfy the debts. Mutual forbearance by creditors, therefore, may be in the interests of both debtors and creditors in that it maximizes repayment and gives the debtor a chance of survival. That it entails concerted activity by creditors does not mean, however, that consumers are injured. To the contrary, by reducing both losses to creditors and transaction costs resulting from bankruptcy, such activity reduces the costs of borrowing and the costs of doing business, all of which is to the consumer's advantage.[2]

§ 16:15 Collective creditor action—Collective creditor remedies: pre-bankruptcy—Permissible actions

One of the remedies that competitors may collectively take to enforce their creditor remedies is to negotiate a composition or workout agreement, i.e., an agreement among creditors to scale down their claims and accept a lesser sum or forbear repayment for a period of time. A composition agreement, by definition, requires participation of at least two creditors to be valid. Accordingly, absent unusual circumstances, it is not likely such an agreement would violate Section 1 of the Sherman Act and would be consistent with the Guidelines.

The Noerr-Pennington Doctrine, as discussed above in Section I.E, protects creditor collaboration in the petition of the government regardless of the potential anticompetitive effect. The following remedies available to competitors collectively would likely be actions protected under the doctrine:[1] (i) jointly retaining legal counsel to represent the interests of the creditors in their effort to seek legal redress against a

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[2] *Sharon Steel Corp. v. Chase Manhattan Bank, N.A.*, 691 F.2d 1039, 1052 (2d Cir. 1982).

[Section 16:15]

[1] *Primetime 24 Joint Venture v. National Broadcasting, Co., Inc.*, 219 F.3d 92, 100, 28 Media L. Rep. (BNA) 1993, 55 U.S.P.Q.2d 1385, 2000-2 Trade Cas. (CCH) ¶ 72968 (2d Cir. 2000).

common debtor, (ii) demanding repayment of past due amounts, (iii) making a reclamation demand for the return of goods,[2] (iv) commencing a collection action, (v) seeking court appointment of a receiver, and (vi) commencing an involuntary Chapter 7 or 11 case.[3]

§ 16:16 Collective creditor action—Collective creditor remedies: pre-bankruptcy—Impermissible actions

Among the collection strategies that competitors may not collectively employ are the following:

a. Collectively boycott or refuse to engage in trade with debtor. Group boycotts may be per se illegal under Section 1 of the Sherman Act. (See Section I.C above.) Even if the purpose of such a boycott or refusal to deal were not with the intent to fix prices or to harm a competitor, there is substantial risk that such action would be found to violate the Sherman Act even under a rule of reason analysis.

b. Make collective pricing or credit decisions. As set forth in {Enter} Section I.D.1 above, collective pricing or credit decisions are likely illegal per se and, therefore, violative of the Guidelines.[1]

c. Collectively refuse delivery of future shipments. Such an action would likely be a violation of Section 1 of the

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[2]Under § 546(c), a vendor may assert a reclamation claim for goods received by the debtor during the 45 day period prior to the bankruptcy filing as long as the vendor asserts the claim within twenty days of the bankruptcy filing or within 45 days of the debtor's receipt of the goods, whichever is later. 11 U.S.C.A. § 546(c). This reclamation right is subject to a number of defenses, including that the goods sought to be reclaimed are subject to a prior lien. *Primetime 24 Joint Venture v. National Broadcasting, Co., Inc.*, 219 F.3d 92, 100, 28 Media L. Rep. (BNA) 1993, 55 U.S.P.Q.2d 1385, 2000-2 Trade Cas. (CCH) ¶ 72968 (2d Cir. 2000).

[3]If a debtor has more than twelve creditors, an involuntary chapter 7 or chapter 11 case may only be commenced if three or more creditors join in the petition. 11 U.S.C.A. § 303(b)(1).

[Section 16:16]

[1]*Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643, 100 S. Ct. 1925, 64 L. Ed. 2d 580, 1980-2 Trade Cas. (CCH) ¶ 63352 (1980) (holding that agreement among competing wholesalers to refuse to sell unless retailer makes payment in cash either in advance or on delivery is illegal per se because it is merely one form of price-fixing); *U.S. v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 60 S. Ct. 811, 84 L. Ed. 1129 (1940) (holding that agreements to fix prices are per se illegal).

Sherman Act as being a collective credit decision or a concerted refusal to deal.

§ 16:17 Collective creditor remedies: debtor in bankruptcy

The federal antitrust laws are not preempted by federal bankruptcy law. Generally, federal laws preempt inconsistent state laws,[1] but not other federal laws.[2] Accordingly, the two laws must be read in harmony where possible.[3]

Creditors or other parties-in-interest may violate Section 1 of the Sherman Act if they collude in a way that harms competition or injures a competitor. For example, the FTC has taken action where a company used its position on a creditors' committee to hurt a competitor who was in bankruptcy.[4] In *In re AMERCO*, the FTC prosecuted U-Haul, a member of a creditors' committee for Jartran, Inc., a competing company in bankruptcy. The grounds for prosecution were, in part, based on U-Haul's engagement in "acts and practices that . . . were inconsistent with U-Haul's legitimate interests as a creditor" and U-Haul's efforts to prevent Jartran's reorga-

[Section 16:17]

[1]See *National City Bank of IN v. Turnbaugh*, 463 F.3d 325, 330 (4th Cir. 2006); see also Jonathan I. Gleklen, Per Se Legality for Unilateral Refusals to License IP Is Correct As a Matter of Law and Policy, The Antitrust Source (July 2002) at 6 (citing *Hisquierdo v. Hisquierdo*, 439 U.S. 572, 582, 99 S. Ct. 802, 59 L. Ed. 2d 1, 1 Employee Benefits Cas. (BNA) 1421 (1979)).

[2]See *State of R.I. v. Narragansett Indian Tribe*, 19 F.3d 685, 703 (1st Cir. 1994) ("The doctrine of preemption . . . applies only to conflicts between federal provisions, on one hand, and state or local provisions, on the other hand.").

[3]See *State of R.I. v. Narragansett Indian Tribe*, 19 F.3d 685, 703, (1st Cir. 1994) ("[C]ourts should endeavor to read antagonistic statutes together in the manner that will minimize the aggregate disruption of congressional intent."); *Anderson v. Federal Deposit Ins. Corp.*, 918 F.2d 1139, 1143, 21 Bankr. Ct. Dec. (CRR) 63, 24 Collier Bankr. Cas. 2d (MB) 151, Bankr. L. Rep. (CCH) P 73678 (4th Cir. 1990) ("We believe the more appropriate rule of statutory construction is the principle that a court should, if possible, construe statutes harmoniously.").

[4]*IN THE MATTER OF AMERCO, ET AL.*, 109 F.T.C. 135, 1987 WL 874627 (1987).

nization as a competitor.[5] In the end, U-Haul agreed to a consent decree that restricted its ability to participate in future bankruptcy proceedings involving its competitors. Although the Noerr-Pennington Doctrine provides some protection to creditors who seek favorable action from the bankruptcy court, the sham exception will apply where the creditor's actions are not genuinely aimed at procuring favorable government action.[6]

§ 16:18 Collective creditor remedies: debtor in bankruptcy—Permissible actions

Among the remedies that competitors may collectively take to enforce their creditor rights in a bankruptcy case are (i) jointly retaining legal counsel[1] and (ii) joining the official or unofficial creditor committee.

The *AMERCO* case illustrates that the FTC will go after creditors who seek to abuse the bankruptcy process toward an unlawful end. Absent application of the sham exception, there is no reasonable basis to believe that the following collective actions would not be protected under the Noerr-Pennington Doctrine: (i) participating as a member of or seeking assistance from the creditors committee,[2] (ii) pursu-

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[5] *IN THE MATTER OF AMERCO, ET AL.*, 109 F.T.C. 135, 1987 WL 874627 (1987); see also David B. Stratton, et. al., Bankruptcy and Antitrust Law: What You Don't Know Can Hurt You, 23-Sep Am. Bankr. Inst. J. 34, 59 (Sept. 2004).

[6] See, e.g., *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 380, 111 S. Ct. 1344, 113 L. Ed. 2d 382, 1991-1 Trade Cas. (CCH) ¶ 69378 (1991).

[Section 16:18]

[1] As in the non-bankruptcy context, there is no reason why competitors should not be permitted to jointly retain legal counsel to represent the interests of the creditors in their effort to seek legal redress against a common debtor. In fact, such an action would likely be protected under the Noerr-Pennington Doctrine. See, e.g., *Primetime 24 Joint Venture v. National Broadcasting, Co., Inc.*, 219 F.3d 92, 100, 28 Media L. Rep. (BNA) 1993, 55 U.S.P.Q.2d 1385, 2000-2 Trade Cas. (CCH) ¶ 72968 (2d Cir. 2000) (citing cases).

[2] In most chapter 11 cases, an official committee of unsecured creditors is appointed by the United States trustee. 11 U.S.C.A. § 1102. The creditors committee is typically comprised of the creditors holding the seven largest unsecured claims willing to serve on the creditors committee. 11 U.S.C.A. § 1102(b)(1). The creditors committee is specifically autho-

ing reclamation remedies,[3] (iii) negotiating a Chapter 11 plan, (iv) seeking appointment of a trustee or examiner,[4] (v) objecting to motions that impair creditor rights, (vi) seeking to convert a Chapter 11 case to Chapter 7 or to dismiss the bankruptcy case,[5] and (vii) seeking to terminate a debtor's exclusive right to file a plan and/or file a competing plan.[6]

In *United Airlines v. US Bank N.A.*[7] the debtor airline was in possession of 175 airplanes which had been acquired via financing leases. These leases were subject to 11 U.S.C.A. § 1110, under which the debtor would have to pay the full amount of the leases, negotiate a workout, or, on the lessor's demand, return the airplanes.

When the debtor originally entered bankruptcy it negotiated reduced payments on the aircraft leases. However, over two years later, and shortly before the Thanksgiving holiday, a group of indentured trustees representing some of the lessors collectively demanded that the debtor resume full payments pursuant to the contract's original terms, or return 14 aircraft. Rather than complying, the debtor filed an ad-

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rized to consult with the debtor regarding the administration of the chapter 11 case, investigate the debtor's financial condition and the operation of its business, negotiate a chapter 11 plan, and communicate with other creditors regarding such matters. 11 U.S.C.A. §§ 1102(b)(3) and 1103(c).

[3]See 11 U.S.C.A. § 1102, note 51.

[4]Any party in interest may move for the appointment of a chapter 11 trustee or examiner for cause, including fraud, dishonesty, incompetence, or gross mismanagement of the affairs of the debtor by current management, or if such appointment is in the best interest of creditors and the debtor's estate. See 11 U.S.C.A. § 1104(a). Once appointed, creditors may elect a disinterested person to serve as the trustee. 11 U.S.C.A. § 1104(b).

[5]Any party in interest may move to convert the chapter 11 case to a case under chapter 7 or dismiss the chapter 11 case, whichever is in the best interests of creditors and the debtor's estate, upon the establishment of cause. 11 U.S.C.A. § 1112(b)(1).

[6]Only the debtor may file a chapter 11 plan during the first 120 days of the case. 11 U.S.C.A. § 1121 (b). The debtor's exclusive period to file a plan may be extended to 18 months by an order of the bankruptcy court upon a showing of cause. 11 U.S.C.A. § 1121(d)(2). Any party in interest may move to shorten or terminate the debtor's exclusive period to file a plan upon a showing of cause. 11 U.S.C.A. § 1121(d)(1).

[7]*United Airlines, Inc. v. U.S. Bank N.A.*, 406 F.3d 918, 44 Bankr. Ct. Dec. (CRR) 191, 54 Collier Bankr. Cas. 2d (MB) 291, Bankr. L. Rep. (CCH) P 80281, 2005-1 Trade Cas. (CCH) ¶ 74775 (7th Cir. 2005).

versary proceeding alleging collusion in violation of the antitrust laws and obtained a temporary restraining order from the bankruptcy court preventing the return of the aircraft. The temporary restraining order became a preliminary injunction on the passing of the 20-day period. The district court dismissed the trustees' appeal, and the trustees then appealed to the Seventh Circuit.

The Seventh Circuit reversed. The Court held that the alleged collusion by the indentured trustees was not an antitrust violation because, under both the Noerr-Pennington Doctrine and § 1110 of the Bankruptcy Code, "[n]egotiating discounts on products *already* sold at competitive prices is not a form of monopolization." (emphasis in original). The Court further stated:

> [C]ollaboration among creditors to formulate a position about how much of a haircut to accept has no effect unless the court approves the restructuring. By [debtor's] lights a prepackaged bankruptcy, in which all creditors negotiate to reach unanimous agreement before presenting a plan to a court, would be unlawful *per se*. What [debtor] is really complaining about is not the joint conduct of the lessors-which originally led to forbearance even though [debtor] stopped paying the agreed rentals-but the decision of some lenders to withdraw from that package deal and start acting on their own in order to get better prices from [debtor] (or, if that fails, lease the planes to someone else). That decision has the protection of both § 1110(a)(1) and the *Noerr-Pennington* doctrine.

The Court found that a contrary holding would raise antitrust concerns, as, absent having the opportunity to lease the aircraft on the open market the lessors would have to deal with the debtor-airline as a monopsonist, the sole potential consumer of the financing leases.[8]

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[8]The ruling has been criticized. See, Janaitis, Bankruptcy Collides With Antitrust: The Need for a Prohibition Against Using § 1110 Protections Collectively, 25 Emory Bankr. Dev. J. 1, 197 (2008). Janaitis argues that § 1110, when used collectively as it was in the United Airlines case, can be an antitrust violation, and finds the reasoning underlying the holding unpersuasive. He finds no express conflict between antitrust and bankruptcy, that § 1110 does not provide an exception to the prohibition on collusion, and that the Noerr-Pennington Doctrine was inapplicable to collective negotiations between the debtor and indentured trustees. He also argues that the debtor would not be in the position of being a monopsonist if the individual lessors were forced to negotiate individually,

§ 16:19 Collective creditor remedies: debtor in bankruptcy—Impermissible actions

a. Collectively boycott or refuse to engage in trade with debtor. As set forth in Section I.C above, group boycotts may be per se illegal under Section 1 of the Sherman Act. Even if the purpose of such a boycott or refusal to deal were not with the intent to fix prices or to harm a competitor, the risk is substantial that such action would be found to violate the Sherman Act even under a rule of reason analysis.

b. Make collective pricing or credit decisions. As set forth in Section I.D.1 above, collective pricing or credit decisions are likely illegal per se and, therefore, violative of the Guidelines.[1]

c. Collectively refuse delivery of future shipments. Such an action would likely be violative of Section 1 of the Sherman Act as being a collective credit decision or a concerted refusal to deal. It is also likely that such a refusal (at least where a contract existed) would violate the automatic stay, absent authorization of the bankruptcy court.

§ 16:20 Conclusion

The intersection between bankruptcy and antitrust laws is in many ways defined by the competing goals of these two doctrines. "Generally, the antitrust laws seek to encourage competition, eliminate monopolies and guard against transactions that create market power. . . . The bankruptcy laws, on the other hand, seek to maximize the value of the bankruptcy estate and to return the assets of the bankrupt entity to the marketplace as quickly as possible, regardless of its affect on competition."[1]

Despite these conflicting goals, creditors have a host of

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as the individual lessors could still demand the return of their aircraft. Janaitis also proposes amending § 1110 to expressly forbid collusion in restraint of trade.

[Section 16:19]

[1] See, Janaitis, Bankruptcy Collides With Antitrust: The Need for a Prohibition Against Using § 1110 Protections Collectively, 25 Emory Bankr. Dev. J. 1, 197 (2008), note 53.

[Section 16:20]

[1] Stratton, Bankruptcy and Antitrust Law: What You Don't Know Can Hurt You, 23-Sep Am. Bankr. Inst. J. 34 (Sept. 2004).

available strategies, including numerous collective actions, for protecting themselves from risks associated with a financially distressed debtor and for remedying a breach. In order for creditors to best protect themselves from the future bankruptcy of a debtor, and to maximize their return upon a debtor's breach of contract, creditors must take advantage of both individual and collective protective and remedial actions to the fullest extent possible. While many creditors are relatively well-versed in individual actions, collective actions are often overlooked or misunderstood. The individual and collective strategies discussed in this article may greatly decrease a creditor's risk exposure, but as discussed herein, actions taken collectively must always be carefully assessed in light of federal antitrust laws.