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Recent Developments

Attorneys' Settlement Covenants Not to Accept Future Cases: Antitrust and Ethical Considerations

In an increasing number of [private antitrust] cases defendants have been insisting as a condition of settlement that the plaintiff's lawyer agree that neither he nor his associates will be involved in another case against the defendant for a five or ten-year period of time involving the same product In some cases, the request has been that plaintiff's lawyer agree not to bring *any* kind of case against the defendant . . . for a specified period¹ (Emphasis added.)

As an added condition to settlement, extraneous to the main litigation and binding on the attorney alone, it is his individual prerogative to agree to the condition and thereby limit his future practice. When his client is obtaining what he considers to be an advantageous settlement, refusal to accept the condition becomes especially unattractive. In such circumstances the attorney, with the welfare of his client in mind, is likely to agree to the condition.

What are the effects on the attorney who so agrees? Is such an agreement binding? Is he acting ethically when he agrees to so limit his future practice? Is the defendant's attorney who either suggests or includes the condition in the settlement acting properly?

Is the Attorney Bound?

The agreement by the plaintiff's attorney with the defendant is identical to the common law covenant not to compete. Absent any statutory considerations, is the attorney bound?

At common law covenants not to compete were categorized as: 1) ancillary, *i.e.*, a covenant subordinate to the main lawful purpose of a larger transaction (*e.g.*, employment or the sale of a business); and 2) nonancillary, *i.e.*, a "naked covenant not to compete."² The validity of the former was judged as to its reasonableness,³ while there was a diversity of opinion on the treatment of the latter.⁴ These defendant-plaintiff's attorney settlement covenants, not founded on any basic transaction between the at-

1. Alioto, *The Economics of a Treble Damage Case*, 32 A.B.A. ANTITRUST L.J. 87, 94 (1966).

2. S. OPPENHEIM & G. WESTON, *FEDERAL ANTITRUST LAWS* 4 (1968).

3. 6A A. CORBIN, *CONTRACTS* §§ 1379-96 (1962); 5 S. WILLISTON & G. THOMPSON, *CONTRACTS* §§ 1636-53 (1937); *RESTATEMENT OF CONTRACTS* §§ 514-15 (1932).

4. According to *Standard Oil Co. v. United States*, 221 U.S. 1, 54-55 (1911), at common law all covenants not to compete, including those nonancillary, were judged by their reasonableness. But *United States v. Addyston Pipe & Steel Co.*, 85 F. 271, 282-83 (6th Cir. 1898), *modified and aff'd*, 175 U.S. 211 (1899), says that reasonableness applied only to ancillary covenants; nonancillary, having nothing to justify or excuse them, were void.

torney and the defendant, are clearly nonancillary. Even if nonancillary covenants are to be judged by their reasonableness, these particular covenants are unreasonable and would be illegal at common law. Inquiry into reasonableness includes a consideration of the interests of the person seeking protection, of the person being restrained, and of the public. If the covenant reasonably protects the *valid* interests of these parties, it is allowed to stand.

Courts were established to allow redress to persons injured by others. Covenants not to accept future cases tend to insulate the defendant from liability to those he has wronged, thus protecting an invalid interest. The interest of the public is especially injured by the removal of counsel when his practice is highly specialized and there are few other practitioners in his area of expertise: all later claimants must duplicate the initial expenditures in preparing suit against the defendant. This results not only in a misallocation of resources, but also can effectively deprive the small claimant of legitimate redress. Since such a covenant does not protect any legitimate interest, unnecessarily restrains the attorney and cuts off the rightful redress of the small claimant, it can be viewed as void because contrary to public policy; under this view, such a covenant would not bind the agreeing plaintiff's attorney.

Antitrust Implications

Under Section 1 of the Sherman Act, "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is . . . illegal . . ."⁵

Contract, combination, or conspiracy. The initial agreement between a defendant and a plaintiff's attorney establishes the restraining contract. But, as the same defendant settles more suits and the settlement covenants proliferate, a more broad horizontal conspiracy among covenanting attorneys may appear. Such a conspiracy must be based on some agreement among the attorneys. To establish agreement it has been suggested that the nexus between horizontal conspirators may be provided by the individual seeking their agreement to the plan.⁶ "Acceptance by competitors, without previous agreement, of an invitation to participate in a plan, the necessary consequence of which, if carried out, is restraint of interstate commerce, is sufficient to establish an unlawful conspiracy under the Sherman Act."⁷ Such parallel, if not exactly duplicated, action by a group of attorneys becoming in fact a practice in the settlement of litigation may establish conspiracy.

Restraint. The Supreme Court, construing the Sherman Act in *Apex Hosiery Co. v. Leader*,⁸ reasoned: "[i]n seeking more effective protection of the public from the growing evils of restraints on the competitive system . . . the legislators found ready at their hand the common law concept of illegal restraints of trade or commerce. In enacting the Sherman law they took over that concept by condemning such [illegal]

5. 15 U.S.C. § 1 (1964).

6. Turner, *The Definition of Agreement Under the Sherman Act: Conscious Parallelism and Refusals to Deal*, 75 HARV. L. REV. 655, 701 (1962).

7. *Interstate Circuit, Inc. v. United States*, 306 U.S. 208, 227 (1939).

8. 310 U.S. 469 (1940).

restraints wherever they occur in or affect commerce between the states."⁹ Although Section 1 of the Sherman Act is literally all-encompassing, the courts have construed it to preclude only those contracts, covenants or conspiracies which unreasonably restrain trade or commerce.¹⁰ To be legal all covenants not to compete must be at least reasonable, *i.e.*, meet the "Rule of Reason."¹¹ Clearly the defendant who covenants with 20 attorneys who have represented clients against him imposes a significantly more unreasonable restraint on those seeking redress than 20 separate defendants who each bind one attorney. The binding of one attorney may be a restraint if it acts to limit access to his services; a finding of unreasonableness here, however, would require that a significant number of qualified attorneys in the area of expertise be restricted.

Yet the courts have come to recognize that some restraints are conclusively presumed to be unreasonable *per se* by their nature or necessary effects.¹² "Where such restraints are established, in purpose or in effect, inquiry under the Rule of Reason ends."¹³ The Supreme Court has applied the *per se* rule to concerted refusals to deal.¹⁴ As the number of attorneys agreeing to such settlement covenants with a defendant increases, the presence of a group refusal to deal with those persons excluded by the covenants appears. The unreasonableness of the covenant is magnified in any area of the law in which there is a tendency to specialize, where the removal of even a small number of attorneys is relatively significant. Presently these covenants abound in at least one such specialized area, that of litigation of private antitrust actions.¹⁵ Whether or not these nonancillary restraints should be placed among those classified as *per se* unreasonable,¹⁶ under these circumstances they should be found violative of the Rule of Reason.

Interstate trade or commerce. Illegality under the federal antitrust laws rests on restraint of interstate trade or commerce. In determining which activities constitute interstate trade or commerce, the initial inquiry must decide which activities constitute trade or commerce.

The Sherman Act applies to sales of both services and goods.¹⁷ Whether attorneys, in rendering professional services, are engaged in "trade" is an open question.¹⁸ In

9. *Id.* at 497-98. See also *Standard Oil Co. v. United States*, 221 U.S. 1, 54 (1911); *United States v. American Tobacco Co.*, 221 U.S. 106, 179 (1911).

10. *Northern Pac. Ry. v. United States*, 356 U.S. 1, 5 (1958).

11. The test is attributed to *Standard Oil Co. v. United States*, 221 U.S. 1 (1911).

12. The *per se* rule has been applied to agreements fixing prices, limiting production, dividing markets, establishing resale price maintenance, and setting up group boycotts and concerted refusals to deal. S. OPPENHEIM & G. WESTON, *supra* note 2, at 18.

13. REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 12 (1955).

14. *Klor's Inc. v. Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212 (1959); *Fashion Originators' Guild of America, Inc. v. FTC*, 312 U.S. 457, 467-68 (1941).

15. Alioto, *supra* note 1; A.B.A. COMM. ON PROFESSIONAL ETHICS [hereinafter cited as A.B.A. COMM.] INFORMAL OPINIONS, No. 1039 (1968).

16. See Comment, *Per Se Rules and Boycotts Under the Sherman Act: Some Reflections on the Klor's Case*, 45 VA. L. REV. 1165 (1959).

17. *United States v. National Ass'n of Real Estate Boards*, 339 U.S. 485, 489-92 (1950).

18. For a further discussion on the questionable nature of professional exemption from the antitrust laws, see Coleman, *The Learned Professions*, 33 A.B.A. ANTITRUST L.J. 48 (1967).

American Medical Association v. United States,¹⁹ the Supreme Court, upholding a conviction of the Association for conspiring to coerce practicing physicians from accepting employment by Group Health (government employees' medical risk-sharing plan), avoided deciding whether a physician's practice of medicine was "trade," focusing on the commercial dealings of Group Health. More recently, however, the Court affirmed a decision by the United States District Court for the District of Utah which held: "[t]he fact that a pharmacist in filling a prescription is engaged in . . . a learned profession does not immunize [him] from the application of . . . the Sherman Act."²⁰ From this it might be conjectured that the Court would view an attorney litigating a case under the same light.

It is not necessary, however, for the application of the antitrust laws to these covenants that the attorney be engaged in "trade;" also being restrained are those engaged in commerce who cannot obtain his services. As Group Health was restrained, so are future claimants in need of the legal services for suit against the settling defendant.

It is unquestionable that the scope of the Sherman Act extends to the constitutional limits of the commerce power.²¹ The interstate nature of trade or commerce restrained may be evidenced by the character of the activities of those seeking redress—the dealings of Group Health supplied the interstate factor necessary for the application of the Sherman Act in the *American Medical Association* case. Interstate character may also be established by widespread agreement to similar covenants by attorneys across the nation.

Illegality. The proliferation of such covenants creates an unreasonable restraint amounting to a concerted refusal to deal with a class of claimants needing professional service. When interstate in nature the conspiracy evidenced by parallel activity among attorneys comes within the boundaries of those contracts, combinations and conspiracies made illegal by the Sherman Act.

Ethical Considerations

The American Bar Association Committee on Professional Ethics has expressed significant concern for the ethical questions involved in these covenants.²² The Canons of Professional Ethics of the ABA have been adopted, with some variation, by every state.²³

The plaintiff's attorney. The attorney has the right to determine what cases he will

19. 317 U.S. 519 (1943).

20. *United States v. Utah Pharmaceutical Ass'n*, 201 F. Supp. 29, 33 (D. Utah), *aff'd mem.*, 371 U.S. 24 (1962).

21. *See United States v. South-Eastern Underwriters Ass'n*, 322 U.S. 533, *rehearing denied*, 323 U.S. 811 (1944).

22. A.B.A. COMM., INFORMAL OPINIONS, NO. 1039 (1968).

23. Wright, *Study of the Canons of Professional Ethics*, 11 CATH. LAW. 323, 325 (1965). Presently observed mainly as a disciplinary code rather than as positive standards, the Canons are now being revised by the ABA Special Committee on Evaluation of Ethical Standards. The need for revision is based on the difficulty in fitting the general principles first stated in 1908 into the context of present-day legal practice. Such difficulty, however, does not render the present Canons useless; their general standards are still applicable.

accept,²⁴ but the attorney with present clients has a duty to refrain from any action which may jeopardize their interests. The plaintiff's attorney owes a duty to his clients not to restrain the availability of his services. The attorney without present duties to the interests of other clients or potential clients still has a duty to his profession to refrain from illegal acts; this duty may extend to refraining from such covenants as the one under discussion. Furthermore, in agreeing to an illegal covenant to aid his client the attorney violates Canon 32: "No client . . . is entitled to receive nor should any lawyer render any service or advice involving disloyalty to the law . . ."²⁵

If one engaged in business acts unethically by making an agreement knowing it will not bind him or having no intention to abide by it, does the attorney act any less improperly in agreeing to a settlement condition knowing it to be void as against public policy? And is not knowledge of the unenforceability of such a covenant reasonably to be presumed to exist in the attorney, negating any claim of his lack of such knowledge?

The attorney who accepts additional consideration for the covenant opens himself to charges of double-dealing. For successful settlement of the suit he is paid by both litigants. If payment for the attorney's covenant becomes a practice, an unscrupulous attorney, motivated by an expectation of added consideration from the opposing party, might sacrifice his client's interest in advising settlement for less than the client should rightfully recover, in order to keep himself in good stead with the settling defendant.

The defendant's attorney. In aiding defendant to require the plaintiff's attorney to agree to this covenant, the defendant's attorney violates Canon 7, which condemns "[e]fforts, direct or indirect, in any way to encroach upon the professional employment of another lawyer . . ."²⁶ He is destroying the plaintiff's attorney's right to choose freely which clients he will represent and may be, in fact, destroying his practice. In addition, by suggesting, or including in the settlement at his client's request, the agreement of the plaintiff's attorney, the defendant's attorney may violate Canon 32 by rendering advice involving disloyalty to the law.

May the defendant's attorney request that the plaintiff's attorney give up his freedom when the reason for the request is the immunization of the defendant from suits in the public interest? The Ethics Committee has expressed the opinion that the answer to this question must be "no."²⁷

Conclusion

Both the attorney who requests and the attorney who agrees to the covenant herein discussed are acting beneath those standards which the legal profession has established to govern the conduct of its members. In so agreeing the plaintiff's attorney may be violating the antitrust laws and making himself liable to prosecution. The defendant himself is equally violating the antitrust laws. The wise, ethical attorney would do better for himself and his client to avoid the inclusion of such a condition in settlement agreements.

24. ABA CANONS OF PROFESSIONAL ETHICS No. 31.

25. *Id.* No. 32.

26. *Id.* No. 7.

27. A.B.A. COMM., INFORMAL OPINIONS, No. 1039 (1968).