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Much Ado About Nothing? The Antitrust Implications of Private Equity Club Deals

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NOTES

MUCH ADO ABOUT NOTHING? THE ANTITRUST IMPLICATIONS OF PRIVATE EQUITY CLUB DEALS

Jessica Jackson[*]

I. INTRODUCTION

In May 1976, with merely $120,000 and a few metal chairs left behind from a prior tenant, Kolberg Kravis Roberts & Co. (KKR) opened its doors.[1] Though few people outside Wall Street circles knew of this start-up

* J.D. 2008, University of Florida Levin College of Law. This Note is dedicated to my loving husband, Patrick Jackson, for all of his encouragement and support. I would also like to thank my parents, Robert and Margie Aronson, as well as my sister, Brittany Aronson, for always believing in me.

1. GEORGE ANDERS, MERCHANTS OF DEBT, at xv (1992).

company, by the 1980s its reputation as a takeover machine brought it notoriety.[2] One can only imagine what went on behind closed doors, but whatever happened, it worked. By 1989, KKR had become the largest client of accounting giant Deloitte & Touche, with General Motors following as a close second.[3] The "Age of Leverage" peaked in 1990 when KKR took over RJR Nabisco.[4] Until 2006, this takeover was the largest in history and is still considered one of the largest ever.[5] The deal almost ruined KKR,[6] yet KKR managed to acquire many other companies in the ensuing years.

In late February 2007, KKR and other private equity firms announced another record-breaking deal.[7] An investor group led by KKR and Texas Pacific Group (TPG) purchased TXU Corporation, a Texas-based energy company, for an unprecedented $45 billion.[8] GS Capital Partners, Lehman Brothers, Citigroup, and Morgan Stanley became equity partners at closing.[9]

An official statement explained that the new owners planned to have stronger environmental and climate stewardship policies, to invest in alternative energy, and to focus on the electric consumer market by delivering both price cuts and protection.[10] Although a deal of this volume may seem extraordinary, it is only one of the many mega-deals in the realm of private equity,[11] which has become a vital engine for investment in our economy.[12]

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2. *Id.* at xiv–xv.
3. *Id.* at xiv.
4. *Id.* at xx.
5. As of February 2007 the RJR Nabisco deal was still the third largest private equity deal. *See Private Equity Power List: Top Ten Deals*, CNNMONEY.COM, Feb. 23, 2007, http://money.cnn.com/2007/02/16/magazines/fortune/top10.fortune/index.htm (listing the most expensive private equity deals of all time).
6. ANDERS, *supra* note 1, at xx.
7. This is the largest private equity deal as of April 2008. *KKR, TPG-Led Consortium to Acquire TXU*, ALTASSETS, Feb. 26, 2007, http://www.altassets.com/news/arc/2007/nz10351.php.
8. *Id.*
9. *Id.*
10. News Release, TXU Corp., TXU to Set New Direction as Private Company (Feb. 26, 2007), *available at* http://www.txucorp.com/media/newsrel/detail.aspx?prid=1020.
11. *See supra* note 5; see also *infra* Part III.A for a thorough description of private equity. Briefly explained, "[p]rivate-equity firms solicit money from wealthy individuals and institutions such as pension funds and then buy companies—private firms or public ones that want to go private. They often use debt to help finance the purchases. They seek to fix operations and cut costs and then make a return by selling the companies or taking them public, usually a few years later." Rick Rothacker, *Private-Equity Firms Grow*, CHARLOTTE OBSERVER, Nov. 3, 2006, at 1D. As an aside, insider trading allegations arose with the TXU deal and at least one banker was convicted in a New York court. *See* Michael J. DeLa Merced, *Former Credit Suisse Banker Convicted of Insider Trading by U.S. Court*, INT'L HERALD TRIB., Feb. 5, 2008, http://www.iht.com/articles/2008/02/05/business/05insider.php.
12. Private equity has become a very important part of the economy because it has raised a

Generally, private equity is any equity investment that is not freely tradable on public stock markets.[13] A trend contributing to the success of private equity is a strategy known as "clubbing." Clubbing occurs when at least two buyout firms join forces to purchase a company.[14] Buyout firms cite many reasons for clubbing, such as spreading the risk of a single deal or amassing sufficient capital to acquire a huge corporate target.[15] But clubbing can carry negative consequences as well, especially if companies use the practice to inhibit competition. This concern apparently worried the Department of Justice (DOJ), which in October 2006 launched an inquiry into the potentially anticompetitive behavior of private equity firms—an inquiry that could unearth antitrust violations.[16]

The DOJ is examining the possibility of collusion among private equity firms and is trying to discover attempts by clubs to reduce purchase prices.[17] The inquiry started with a two-page letter sent to several of the

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tremendous amount of money, which allows private equity to do things that it could not do before. Ken MacFadyen, *2007: A Look Back Provides a 2007 Roadmap for the Private Equity and Private Placement Markets*, INVESTMENT DEALERS' DIG., Dec. 18, 2006, at 12, 14 (citing Mark Opel, Principal, American Capital Partners). MacFadyen stated that "2006 will be remembered as the year private equity came out of its shell." *Id.* at 12; *see also* Kit R. Roane, *The New Face of Capitalism*, U.S. NEWS & WORLD REP., Dec. 4, 2006, at 48, 48, 51 (explaining that club deals accounted for $414 billion in buyouts from December 2005 to December 2006 and listing some of the biggest brands that have now gone private including, "Clear Channel Communications, Cablevision, Reader's Digest, Dunkin' Donuts, SunGard Data Systems, Freescale Semiconductor, Toys "R" Us, Neiman Marcus, Metro-Goldwyn-Mayer, and hospital giant HCA, to note just a few").

13. Investor Words, Private Equity Definition, http://www.investorwords.com/3853/private_equity.html (last visited May 13, 2008).

14. Arleen Jacobius, *Club Deal Probe Could Be Good News for Investors*, PENSIONS & INVESTMENTS, Oct. 16, 2006, at 3.

15. *Id.*

16. Tom Bawden, *Buyout Firms in U.S. Cartel Inquiry*, TIMES (London), Oct. 11, 2006, at 44. The DOJ Antitrust Division and the Federal Trade Commission (FTC) both have public authority to enforce antitrust laws. The DOJ has jurisdiction pursuant to the Sherman Act and the FTC can exercise additional authority pursuant to the Federal Trade Commission Act. Although they have concurrent jurisdiction over some aspects of antitrust law, the DOJ has exclusive jurisdiction over criminal matters. Private civil enforcement can also be sought by those suffering antitrust injury, which may be difficult to prove. E. THOMAS SULLIVAN & JEFFREY L. HARRISON, UNDERSTANDING ANTITRUST AND ITS ECONOMIC IMPLICATIONS § 3.01, at 45 (4th ed. 2003). For information on private civil actions against private equity firms, see generally David B. Caruso, *Investors Sue Private Equity Firms*, ASSOCIATED PRESS, Nov. 15, 2006, *available at* http://www.whafh.com/modules/press_release/?action=view&id=60. Caruso's article discusses a lawsuit filed against thirteen companies that engaged in private equity club deals. *Id.*; *see also* Murphy v. Kohlberg Kravis Roberts & Co., No. 1:06-cv-13210 (S.D.N.Y. filed Nov. 15, 2006).

17. Bawden, *supra* note 16. The DOJ could be focusing on agreements between particular bidders. Joint bids may be difficult to attack for efficiency reasons. Red flags would be agreements to pull out of a bid, rewards for pulling out of bids, or rotating bids between deals. The DOJ would want to look at how deals go together by sequence. Questions that should be asked are those such as the circumstances of the particular deal, who is participating, and how the participants are

largest private equity firms seeking voluntary, general information about club deals since January 2003.[18] Although seemingly straightforward, the inquiry presents many complex issues that cannot be easily resolved.[19] Irrespective of the outcome, the private equity industry is paying attention.[20] Private equity will likely need to change if it wishes to continue assembling mega-deals like the TXU deal.

This Note addresses the antitrust issues that clubbing raises and argues that the antitrust laws should not restrict clubbing—absent some egregious conduct—and that courts should apply rule of reason analysis rather than per se rules to these sorts of antitrust claims. Part II provides a general background of antitrust law and the various standards that courts apply to private equity clubs. Part III explains private equity and fleshes out what a club deal is and how it works. Part IV discusses antitrust law within the context of joint ventures and sets out the varying standards that could apply to private equity clubs. Part V applies the antitrust analysis to private equity clubbing. Finally, Part VI concludes by suggesting ways to deal with antitrust problems and by examining some of the underlying issues.[21]

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chosen. Dan Slater, *Club Deals: Collusion or Illusion?*, THEDEAL.COM, Nov. 10, 2006, http://www.thedeal.com (available by subscription).

18. Letters seeking information such as bidder names and price changes were sent to KKR, Silver Lake Partners, The Carlyle Group, and Clayton, Dubilier & Rice. Dennis K. Berman & Henny Sender, *Private-Equity Firms Face Anticompetitive Probe; U.S.'s Informal Inquiries Have Gone to Major Players Such as KKR, Silver Lake,* WALL ST. J., Oct. 10, 2006, at A3; *see also* KKR & Co. L.P., Registration Statement (Form S-1A), at 38 (Nov. 13, 2007). This Note discusses the TXU deal merely as an example of the clubbing practice—the acquisition was separately approved and not under any investigation. *See* Elizabeth Souder, *Buyout Gets Final OK from Nuclear Regulators; Buyers Now Must Finish Getting the Financing in Place for the Deal*, DALLAS MORNING NEWS, Sept. 12, 2007, at 4D (explaining that TXU obtained the final approval that was required for the deal to close).

19. Tom Allchorne, *U.S. Department of Justice Launches PE Probe*, EUR. VENTURE CAP. J., Nov. 2006, at 48, 49 (estimating that it could take up to three years before the inquiry concludes); *see also* M. Cohn, *DOJ Probes Private Equity Firms*, RED HERRING, Oct. 10, 2006, http://www.redherring.com/Home/19112 (noting that because these parties are sophisticated and will not engage in facially illegal activities, it will be difficult to prove anything is wrong).

20. Richard L. Reinish & Ronan P. O'Brien, *Private Equity and Antitrust Law: Primer in the Face of the DOJ's Investigation of Possible Anticompetitive Behavior*, MGMT. ALERT (Seyfarth & Shaw LLP), Oct. 2006, http://www.seyfarth.com/dir_docs/news_item/8e851cfc-548f-4e8d-9258-a20fa0b6ed0c_documentupload.pdf. Many feel that unless the DOJ finds the "smoking gun—evidence of a meeting or meetings of the head honchos of the top firms to slice up the pie"—then there is not much to worry about. Allchorne, *supra* note 19, at 49. Certain authorities feel that clubs have been engaging in suspect behavior for a long time. *Id.* As of March 2008 it is uncertain whether the investigation is still ongoing. Arlene Jacobius, *Club Deals See Silver Lining in Federal Court Ruling*, PENSIONS & INVESTMENTS, Mar. 17, 2008, at 24.

21. Antitrust laws are theoretically designed to protect consumers, so literature often focuses on the effects on the ultimate consumer. *See, e.g.*, Jacqueline Dowd, Note, *Application of the Antitrust Laws to Newspaper Distribution Systems: The Sherman Act Turned on Its Head*, 38 U.

II. ANTITRUST LAW BACKGROUND

Antitrust law regulates competition and involves conflicting underlying policies and difficult facts. Despite policy differences,[22] commentators agree that the antitrust laws were written primarily to encourage competition.[23] Over the years, courts have used their discretionary power under § 1 of the Sherman Act to address antitrust issues, resulting in a rich and changing jurisprudence.[24] Section 1 of the Sherman Act states:

> Every 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 declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony . . . .[25]

Section 1 of the Act outlaws horizontal restraints that may affect trade or commerce.[26] Horizontal restraints occur "[w]hen competitors enter into an agreement which interferes with interstate commerce . . . [such as] price fixing, market divisions or concerted refusals to deal."[27] The Act seeks to prevent restraints that restrict output, increase prices, or in some other way exclude competition, but the Act has been applied differently depending largely on policies employed by the courts.[28] The next section follows the development of the two standards that courts have used when applying the Sherman Act: the rule of reason and the per se standard. The rule of reason strikes a balance between procompetitive and anticompetitive behavior, while the per se standard simply prohibits certain activities. The last section explains how the Supreme Court has recently blended the

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FLA. L. REV. 479 (1986) (addressing a prior version of law and arguing that the application of per se rules to newspaper price ceilings fails to protect consumers). A shift from a consumer-oriented focus to a shareholder-oriented focus may be required when looking at private equity clubs.

22. On one end of the spectrum, the principal goals of antitrust law are "[d]ispersing economic power and stimulating access to free markets." SULLIVAN & HARRISON, *supra* note 16, § 1.02, at 3. The other end of the spectrum rejects "this politically-centered, distributive-goal analysis . . . [and] conclude[s] that the main, if not the sole, purpose behind [antitrust law is] the promotion of economic efficiency." *Id.* at 4; *see also* Simon A. Rodell, Comment, *Antitrust Law: The Fall of the Morton Salt Rule in Secondary-Line Price Discrimination Cases*, 58 FLA. L. REV. 967, 968 (2006) (noting that the primary goals of the "antitrust laws were to limit inefficiencies . . . and protect consumers").

23. SULLIVAN & HARRISON, *supra* note 16, § 1.02, at 4.

24. Congress delegated to the courts broad authority to fill in the gaps. *Id.* at 6.

25. 15 U.S.C. § 1 (Supp. IV 2004).

26. SULLIVAN & HARRISON, *supra* note 16, § 4.01, at 115.

27. *Id.*

28. *Id.*

standards to evaluate activities on a continuum rather than as falling strictly within the rule of reason or per se standard.

A. *Development of Antitrust Standards*

The first case that the Court decided under the Sherman Act, *United States v. E.C. Knight Co.*,[29] narrowed the Act because the Court concluded that the defendant's actions, mere manufacturing, did not fall within the definition of interstate commerce.[30] This narrow interpretation of the Sherman Act would not last.

During the early stages of antitrust jurisprudence, the Court struggled with indirect restraints and developed what would become known as the ancillary restraints doctrine, which is still applied today.[31] In *United States v. Joint-Traffic Ass'n*,[32] the Court suggested that it would permit indirect restraints,[33] and formally announced this doctrine in *Addyston Pipe & Steel Co. v. United States*.[34] The doctrine essentially says that "all direct restraints are *ipso facto* unlawful, even when the outcome is unreasonable; ancillary restraints which are unreasonable are unlawful; and ancillary restraints that are reasonable are lawful."[35]

Standard Oil Co. v. United States[36] demonstrates the Court's struggle with interpreting § 1 of the Sherman Act and the breadth of the statutory language, as well as a change in the ancillary restraints doctrine.[37] In *Standard Oil*, the Court clarified that the rule of reason applied to both direct and ancillary restraints.[38] The Court not only advanced the rule of reason, but also recognized a per se standard.[39] In applying the rule of reason, the Court assessed the reasonableness of the agreement, whether ancillary or direct. However, certain types of agreements, such as price-fixing agreements, were presumptively illegal naked restraints.[40]

Early cases under the Sherman Act focused on small business.[41] In *United States v. Trans-Missouri Freight Ass'n*,[42] the Court worried that

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29. 156 U.S. 1 (1895).
30. *Id.* at 16–17.
31. SULLIVAN & HARRISON, *supra* note 16, § 4.04, at 124–25; *see infra* Part V.B.
32. 171 U.S. 505 (1898).
33. *Id.* at 568.
34. 175 U.S. 211, 228–29 (1899).
35. SULLIVAN & HARRISON, *supra* note 16, § 4.04, at 124.
36. 221 U.S. 1 (1911).
37. SULLIVAN & HARRISON, *supra* note 16, § 4.05, at 127.
38. *Standard Oil*, 221 U.S. at 66.
39. *See id.* at 66–67.
40. *See id.*; SULLIVAN & HARRISON, *supra* note 16, § 4.05, at 127 & n.75.
41. *See* Animesh Ballabh, *Antitrust Law: An Overview*, 88 J. PAT. & TRADEMARK OFF. SOC'Y 877, 885–88 (2006) (discussing the progression of antitrust law and the early concern over large business trusts).
42. 166 U.S. 290 (1897).

commodity price reductions might ruin small businesses; thus, the Court condemned fixing railroad rates by a cartel of several railroads.[43] The Court focused again on small business in *Chicago Board of Trade v. United States*,[44] where the Court demonstrated a desire to promote competitive equality and initially announced the rule of reason approach. At issue was the legality of an agreement, by members of the Board of Trade, that regulated after-hour grain prices.[45] The Court set forth a test to determine the legality of an agreement: whether the restraint was merely regulatory, thus promoting competition, or whether it was imposed to suppress and possibly destroy competition.[46] In applying this now-classic rule of reason test, the *Chicago Board* Court upheld the agreement because the agreement improved, rather than destroyed, market conditions.[47] Both *Trans-Missouri* and *Chicago Board* reflect the Court's concern for small competitors unable to compete against larger, more efficient firms.[48]

The Court continued expanding its interpretation of the Sherman Act in *Appalachian Coals, Inc. v. United States*[49] by "advanc[ing] a rule of broad discretion in favor of courts weighing competitive market factors before reaching antitrust conclusions."[50] Yet the Court did not abandon the per se standard for egregious behavior like price fixing. In *United States v. Trenton Potteries Co.*,[51] the Court developed the per se standard in more detail.[52] The Court indicated that an agreement would be per se unlawful only if it was effective but left open whether market power was necessary.[53] In *United States v. Socony-Vacuum Oil Co.*,[54] the Court answered this question, finding that market power was not a requirement for a per se violation of the Sherman Act.[55]

In developing antitrust law, the Warren Court used a structuralist approach to develop the per se standard and disregarded the rule of reason.[56] The Court explained in *Northern Pacific Railway Co. v. United*

43. *Id.* at 323–25.

44. 246 U.S. 231 (1918).

45. *Id.* at 237.

46. *Id.* at 238.

47. *Id.* at 240.

48. SULLIVAN & HARRISON, *supra* note 16, § 4.02, at 116.

49. 288 U.S. 344 (1933).

50. SULLIVAN & HARRISON, *supra* note 16, § 4.05, at 128; *see Appalachian Coals*, 288 U.S. at 360–61.

51. 273 U.S. 392 (1927).

52. *See id.* at 396–97; SULLIVAN & HARRISON, *supra* note 16, § 4.06, at 129.

53. SULLIVAN & HARRISON, *supra* note 16, § 4.06, at 130.

54. 310 U.S. 150 (1940); *see infra* note 173.

55. *Socony-Vacuum*, 310 U.S. at 224 n.59.

56. SULLIVAN & HARRISON, *supra* note 16, § 4.02, at 116. The Warren Court's structuralist approach "focused on the structure of markets, reasoning that normal market structures will yield competitive environments, at least in the absence of explicit horizontal price fixing," which led to

States[57] that the per se approach avoided conducting the complicated industry-specific analysis that the rule of reason required, "an inquiry so often wholly fruitless when undertaken."[58] During this time, the Warren Court would likely have found that groups acting in concert, like the firms in the TXU deal, and the surrounding restraints that these groups created were per se illegal.[59]

The Burger Court moved in, cast aside structural analysis, and focused on economic efficiency.[60] In *United States v. United States Gypsum Co.*,[61] the rule of reason analysis re-emerged.[62] The case clarified that the Court preferred to view antitrust cases with an affinity for economic efficiency.[63] The Court now preferred to weigh competitive harm against economic benefit, even when the conduct in question could directly affect prices, and consequently often chose a market solution over an antitrust intervention.[64] For example, in *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* (*BMI*),[65] the Court rejected a per se analysis and instead examined the redeeming qualities of the challenged practice.[66] Up to this point in the jurisprudence, two differing schools of thought created two vastly different categories. The rule of reason balancing test was distinct from the bright-line per se standard. Yet having two completely separate categories would soon be a thing of the past.

per se analysis application. *Id.*; *see* United States v. Container Corp. of Am., 393 U.S. 333, 335–37 (1969) (focusing on market structure and finding that "[t]he limitation or reduction of price competition brings the case within the ban [of § 1], for . . . interference with the setting of price by free market forces is unlawful per se" (citation omitted)).

57. 356 U.S. 1 (1958).

58. *Id.* at 5.

59. *See* David A. Balto, *The Rule of Reason: Tension in the Law of Joint Ventures*, *in* 45TH ANNUAL ADVANCED ANTITRUST SEMINAR: DISTRIBUTION AND MARKETING 181, 183, 188–89 (PLI Corp. Law & Practice, Course Handbook Series No. 8497, 2006). For examples of joint ventures perceived as cartel-type arrangements and struck down as per se illegal, see United States v. Topco Assocs., Inc., 405 U.S. 596, 608 (1972); United States v. Sealy, Inc., 388 U.S. 350, 357–58 (1967); Timken Roller Bearing Co. v. United States, 341 U.S. 593, 598 (1951), *overruled in part by* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).

60. SULLIVAN & HARRISON, *supra* note 16, § 4.06, at 117.

61. 438 U.S. 422 (1978).

62. *See id.* at 441–43.

63. SULLIVAN & HARRISON, *supra* note 16, § 4.06, at 118.

64. *Id.*

65. 441 U.S. 1 (1979); *see infra* Part IV.B.

66. *BMI*, 441 U.S. at 13.

B. *A Blending of the Legal Standards*

Historically, the Supreme Court tackled antitrust problems by applying either the rule of reason or the per se standard, but in recent years the Court has blurred the standards. The Court indicated in *National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma*[67] that in some circumstances a full rule of reason analysis may not be necessary.[68] In 1988, the Federal Trade Commission (FTC) articulated a new rule of reason. In *In re Massachusetts Board of Registration in Optometry*,[69] the FTC extended recent Supreme Court jurisprudence on horizontal restraints and set forth a three-step analysis to determine whether a restraint is unlawful.[70]

Under the new analysis, the FTC explained that courts should look first at whether a restraint is inherently suspect.[71] A court must determine whether a procompetitive justification or a theory of competitive harm, which would prove a defendant's market power, needs to be presented to win the case.[72] If the restraint is not inherently suspect, the traditional rule of reason applies. Courts must determine whether there is a plausible efficiency justification for the practice. If no credible justification exists, the practice is condemned.[73] If the justification is plausible, courts should examine whether the justification is valid.[74] If it is valid, the next step is a full-blown rule of reason analysis.[75] If not, the restraint is declared unlawful under the "quick-look" rule of reason,[76] and no further circumstantial inquiry is required.[77]

Several subsequent FTC decisions have employed this three-step approach.[78] Further, in *California Dental Ass'n v. FTC*,[79] the Supreme Court affirmed the quick-look analysis and indicated that a spectrum of analyses exists.[80] In stressing the flexibility of the rule of reason, the Court

67. 468 U.S. 85 (1984).

68. *Id.* at 110 n.42.

69. 110 F.T.C. 549 (1988), *available at* 1988 WL 1025476.

70. *Id.* at 8–13 (Commission opinion). The FTC has jurisdiction and authority to enforce the Sherman Act. *See* 15 U.S.C. § 21 (2000); 54A Am. Jur. 2d *Monopolies and Restraints of Trade* § 1234 (2008).

71. *Mass. Bd. of Registration*, 1988 WL 1025476, at 12.

72. *Id.*

73. *Id.*

74. *Id.* at 12–13.

75. *Id.* at 13.

76. Balto, *supra* note 59, at 190.

77. *Mass. Bd. of Registration*, 1988 WL 1025476, at 13 (Commission opinion).

78. *See* New England Motor Rate Bureau, Inc., 112 F.T.C. 200 (1989), *available at* 1989 WL 1126783, at 26–27 (Commission opinion); Detroit Auto Dealers Ass'n, 111 F.T.C. 417 (1989), *available at* 1989 WL 1126784, at 20–21 (Commission opinion).

79. 526 U.S. 756 (1999).

80. *Id.* at 780. Although the *California Dental* Court found this analysis inappropriate

stated: "[T]here is generally no categorical line to be drawn between restraints that give rise to an intuitively obvious inference of anticompetitive effect and those that call for more detailed treatment. What is required, rather, is . . . looking into the circumstances, details, and logic of the restraint."[81] Consequently, courts now approach horizontal-restraint problems by using a continuum rather than distinct categories, and the analysis is factually intensive.[82]

III. The Rise of Private Equity

A. *Defining Private Equity*

Although private equity is increasingly important in both the American and global economy, many people are unfamiliar with the industry.[83] The term private equity means any investment in an equity asset that does not trade on a public stock exchange.[84] Private equity firms are traditionally structured as limited partnerships that invest in target companies and

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because the anticompetitive effects were not obvious, the Court upheld the "quick look" analysis and noted: "'There is always something of a sliding scale in appraising reasonableness, but the sliding scale formula deceptively suggests greater precision than we can hope for . . . . Nevertheless, the quality of proof required should vary with the circumstances.'" *Id.* (quoting 7 Phillip E. Areeda, Antitrust Law ¶ 1507, at 402 (1st ed. 1986)); *see also* Cont'l Airlines, Inc. v. United Airlines, Inc., 277 F.3d 499, 508–09 (4th Cir. 2002) (discussing the three approaches and viewing them as a continuum depending on the suspiciousness or uniqueness of the restraint).

81. *Cal. Dental*, 526 U.S. at 780–81.

82. The most recent decision by the FTC that applies the newer rule of reason analysis is *In re Polygram Holding, Inc.* (*Three Tenors*), No. 9298, 2003 WL 21770765 (F.T.C. July 24, 2003). Although the FTC stated that it had a per se finding, it examined the facts in some detail. *See* Balto, *supra* note 59, at 199. This decision has been widely criticized partly because it would have made more sense to determine whether the joint venture was itself legitimate and then determine whether the restraints served a legitimate purpose. *Id.* Nonetheless, *Three Tenors* is a good demonstration of the newer approach. *Id.* Despite criticism, the D.C. Circuit affirmed this decision on appeal. Polygram Holding, Inc. v. FTC, 416 F.3d 29, 38–39 (D.C. Cir. 2005).

83. Josh Lerner et al., Venture Capital and Private Equity 1 (3d ed. 2005). Initially, private equity was an American phenomenon with its origins in small offices that managed the wealth of well-to-do families. *Id.* Growth was slow through the 1970s mostly because of reluctance from institutional investors. *Id.* at 2. In 1979, however, the Department of Labor clarified the "prudent man" rule for the Employee Retirement Income Security Act and "explicitly allowed pension managers to invest in high-risk assets, including private equity." *Id.* Starting in the 1980s, private equity did a lot of "leveraged buyouts," *id.*, which refer to acquiring other companies, breaking them up, and selling them off. This was an interesting time for private equity because funds packed some of the biggest high-tech companies, but commitments to the industry were mixed, and boom and bust occurred due to concentrated investments in certain industries. *Id.* By the 1990s, the industry began to recover, seeing dramatic growth and excellent returns. *Id.* at 3.

84. Investor Words, *supra* note 13.

obtain funding from passive institutional investors.[85] Firms can usually control the management of the target companies they purchase and often increase the value of the targets by bringing in new management.[86] KKR sought precisely this result by substituting new management at target TXU.[87]

Between 1980 and 2004, private equity funds grew from $5 billion to over $300 billion.[88] Despite this phenomenal growth, private equity still represents only $1 in the portfolio of U.S. institutional investors for every $25 of publicly traded equities.[89] One attractive aspect of private equity is its ability to make bold investments aimed at boosting earnings that public corporations cannot accomplish. John Altorelli of the law firm Reed Smith

85. The most commonly used entity form for venture capital investing is the limited partnership, but a recent trend uses the limited liability company (LLC). Mark J.P. Anson, *Chapter 30: Private Equity*, *in* THE THEORY AND PRACTICE OF INVESTMENT MANAGEMENT 815, 821–22 (Frank J. Fabozzi & Harry Markowitz eds., 2002). Both the limited partnership and the LLC accomplish the goal of pooling capital to make investments, but the limited partnership is better for raising funds from a large number of passive investors. *Id.* The LLC is preferable if the venture capitalist prefers to work with a small number of knowledgeable investors, such as pension funds and other institutional investors. *Id.* Categories of private equity investment include the leveraged buyout, venture capital, growth capital, angel investing, mezzanine capital, distressed debt, and others. *Id.* at 815. A leveraged buyout (LBO) is when a company acquires a target, or a large interest in the target, by using a large amount of borrowed funds. Investor Words, Leveraged Buyout Definition, http://www.investorwords.com/2787/Leveraged_Buyout.html (last visited May 13, 2008). The targets' assets usually serve as collateral for the borrowed money. *Id.* Venture capital provides a significant source of funding available for start-up firms or "small businesses with exceptional growth potential." Investor Words, Venture Capital Definition, http://www.investorwords.com/5236/venture_capital.html (last visited May 13, 2008). An angel investor provides capital in smaller, more personal arenas to start-up companies, and these investments are typically characterized by high levels of risk and potentially high returns. Investor Words, Angel Investor Definition, http://www.investorwords.com/212/angel_investor.html (last visited May 13, 2008). Mezzanine financing is venture capital that is usually acquired during the last stage of financing prior to an initial public offering (IPO). Investor Words, Mezzanine Financing Definition, http://www.investorwords.com/3047/mezzanine_financing.html (last visited May 13, 2008).

86. *See* Anson, *supra* note 85, at 816, 818–19. Private equity differs from other types of investments because it fills in a gap and finances investments that pose risks and uncertainties that would normally discourage others from investing. LERNER ET AL., *supra* note 83, at 4 ("The financing of young and restructuring firms is a risky business.").

87. *See generally supra* Part I (discussing KKR's acquisition of TXU).

88. *See* LERNER ET AL., *supra* note 83, at 1. By the late 1990s, investment in private equity reached record levels, and it outperformed just about every other financial product. *Id.* at 3. There is concern that the industry will need to address potential overgrowth—the industry's growth rate may be too high to be sustainable. Arleen Jacobius, *Jumbo Fund Returns May Be Large Cap in Disguise*, PENSIONS & INVESTMENTS, Dec. 11, 2006, at 3. Recent changes, such as "the establishment of affiliate funds . . . and the expansion of the funds offered by buyout funds to include real estate, mezzanine, and bond funds" have made the private equity market more competitive. LERNER ET AL., *supra* note 83, at 3.

89. LERNER ET AL., *supra* note 83, at 8 n.6.

LLP explains, "'You can take hits to earnings in the short run for long-term gains, such as shutting down plants.'"[90] But such strategies are troublesome for boards of public companies to explain to shareholders.[91] The TXU deal provides a perfect example. The buyers plan to reorganize the company to make TXU more innovative, environmentally friendly, and consumer-centric.[92] While shutting down eight coal-fired power plants may be a great solution for TXU's long-term value maximization, TXU could suffer in the short-term.[93]

Though the private equity industry has a wide variety of participants,[94] this Note focuses on the largest companies contacted by the DOJ in 2006 as part of an inquiry into the industry.[95] In the billion-dollar market segment, from 2001 to 2005 about sixty club deals occured involving U.S. targets.[96] The top ten private equity firms have recently raised an estimated $136 billion.[97] These firms include: The Blackstone Group, KKR, The Carlyle Group, TPG, Bain Capital, Providence Equity Partners, Apollo Advisors, Warburg Pincus, Cerberus, and Thomas H. Lee.[98]

B. *Why Join a Private Equity Club?*

Key to private equity success has been the consortium, or club, deal.[99] Firms cite many reasons for clubbing, but perhaps the principal ground has been that clubbing allows firms to go after larger targets than each firm could acquire individually.[100] Often, "no single fund has sufficient

90. Jacobius, *supra* note 88 (quoting Altorelli).

91. *Id.*

92. *KKR, TPG-Led Consortium to Acquire TXU*, *supra* note 7.

93. *See* Interview by Steve Inskeep, Nat'l Public Radio with Fred Krupp, President, Envtl. Def. Fund, (Feb. 27, 2007), *available at* http://www.npr.org/templates/story/story.php?storyId=7615616.

94. There are an estimated 900 venture capital firms that raise money from individual and institutional investors. The Private Equity Venture Capital Club, Private Equity and Venture Capital Industry Snapshot, Sept. 13, 2004, at 2, http://www0.gsb.columbia.edu/students/organizations/pevc/041112_PEVCIndustryInfo.pdf.

95. *See supra* Part I.

96. *See* Eric Schwartzman, *What It Takes to Make a Consortium Work*, INT'L FIN. L. REV. (SUPP.: 2006 GUIDE TO PRIVATE EQUITY & VENTURE CAP.), Jan. 2006, at 99, 99, *available at* http://www.iflr.com/?Page=17&ISS=21163&SID=605633.

97. Fortune, Private Equity Power List, http://money.cnn.com/galleries/2007/fortune/0702/gallery.powerlist.fortune/index.html (last visited May 13, 2008).

98. *Id.*

99. This Note uses club deal and consortium deal interchangeably.

100. James Westra, *Club Deals*, *in* 37TH ANNUAL INSTITUTE ON SECURITIES REGULATION 261, 263 (PLI Corp. Law & Practice, Course Handbook Series No. 6063, 2005). Eric Schwartzman explains, "the main criterion that makes deals ripe for potential buyers to form consortiums: they were all multibillion-dollar deals where no one private equity firm could have funded the entire equity piece or would have been willing to take the risk of doing so even if it could have funded

resources to write the entire equity check."[101] In the TXU deal, KKR and TPG each plan to invest $2 billion in cash and the remaining four participants each plan to invest $3 billion total from their private equity divisions.[102] Without taking on excessive risk, any of these firms would have difficulty providing the resources on their own.

In addition to not having the resources to compete on their own, investment restrictions often prevent firms from investing too large a percentage of their portfolios in one transaction because of the increased risk.[103] Clubs provide a solution to this problem because they tend to disperse risk.[104] KKR and TPG certainly lowered risk by investing only $2 billion of the required $8 billion of cash needed for the deal.[105]

Moreover, clubs can help to bolster debt financing. Obtaining bank loans or selling high-yield bonds becomes easier when firms can attach the names of several well-known sponsors to their deals.[106] Debt often plays a large role in these transactions and can be pivotal to winning bids.[107] In the TXU deal, GS Capital Partners, Lehman Brothers, Citigroup, and Morgan Stanley are providing $24 billion in new debt, and the buyer club is assuming $13 billion in old debt.[108] This new debt likely would not be available but for the club arrangement. Interestingly, this deal has a novel financing arrangement where JPMorgan Chase, Morgan Stanley, and Citigroup are providing an additional $1 billion of cash in the form of an equity bridge.[109] Providing the extra $1 billion was probably easier to

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the equity." *See* Schwartzman, *supra* note 96, at 99. *But see infra* notes 276–77 and accompanying text (discussing equity bridges).

101. Westra, *supra* note 100, at 263. Some suggest that these large targets are best suited to private equity purchase because they "typically have a deeper, more experienced management team, a more developed infrastructure, access to credit markets at lower rates, and, given the market's preference for larger IPO's, better access to public equity markets" all of which point to a potential for higher valuation gains over time. *Id.* at 263–64.

102. *See* Andrew Ross Sorkin, *Buyout of TXU Breaking Ground in Its Size and in Its Innovative Financing*, N.Y. TIMES, Feb. 27, 2007, at C1.

103. Schwartzman, *supra* note 96, at 99; *see also* Westra, *supra* note 100, at 264 ("Governing documents of private equity funds typically contain diversification requirements which limit the percentage of the respective funds' assets that may be invested in a single investment.").

104. Westra, *supra* note 100, at 264; Schwartzman, *supra* note 96, at 99 (explaining that a benefit of club deals is getting the chance to "share the burden and risk of writing a large equity cheque").

105. *See* Sorkin, *supra* note 102. The last $1 billion in cash comes from an "equity bridge." *See infra* note 109 and accompanying text.

106. Schwartzman, *supra* note 96, at 99.

107. Five out of the ten largest LBOs in 2005 were club deals. Mark B. Tresnowski & Annie S. Terry, *Private Equity Consortium Agreements*, *in* MERGERS AND ACQUISITIONS 2006: WHAT YOU NEED TO KNOW NOW 93, 95 (PLI Corp. Law & Practice, Course Handbook Series No. 10160, 2006).

108. Sorkin, *supra* note 102.

109. *Id.* With the "equity bridge," banks co-invest in equity with buyers. In the KKR–TPG

justify considering $4 billion has already been paid out by KKR and TPG, who have also convinced four private equity firms to sign on.[110]

Finally, management expertise provides a good reason for clubbing. Firms can "combine, enhance and supplement expertise, bringing the best resources to bear for the benefit of the investment, portfolio company and potential return."[111] Risk diminishes if firms join with other firms having a particular expertise, such as familiarity with a particular sector.[112] In the TXU deal, Henry Kravis offers an experienced management team and an ability to rally support from high-powered political figures to implement the long-term plan.[113] Thus, good reasons exist for firms to consider joining the club.[114]

C. *Private Equity Club Agreements*

Analyzing the mechanics of club deals is difficult because of the tremendous variation in club structure and the lack of public information about the deals.[115] The starting point for creating a club is drafting a club agreement—which can occur at any time during the transaction.[116] One commentator describes four different types of clubs based on timing: the traditional marriage, the shotgun marriage, the late-life marriage, and the arranged marriage.[117]

A traditional marriage occurs when firms join together at the beginning and work to submit and negotiate the bid together.[118] A shotgun marriage occurs when one firm has made significant progress and other firms join before submitting the actual bid.[119] A late-life marriage occurs when a firm

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deal, banks lent KKR and TPG $1 billion of their own cash, which enables private equity firms to come up with less cash. *Id.* Though these "equity bridges" are risky, they may provide an alternative to clubbing or may make deals even more competitive because more funds will be able to participate. *Id.*

110. *KKR, TPG-Led Consortium to Acquire TXU*, *supra* note 7.

111. Schwartzman, *supra* note 96, at 99.

112. Westra, *supra* note 100, at 264.

113. *KKR, TPG-Led Consortium to Acquire TXU*, *supra* note 7.

114. *See, e.g.*, Woodrow W. Campbell, Jr. & Paul S. Bird, *Private Equity: Current Topics*, *in* FIFTH ANNUAL PRIVATE EQUITY FORUM: LEGAL AND FINANCIAL STRATEGIES FOR DEALMAKING IN A NEW REGULATORY REGIME 7, 65–66 (PLI Corp. Law & Practice, Course Handbook Series No. B0-01YU, 2003) (explaining the benefits of joining a club).

115. The auction process is not public, and it is difficult to tell what goes into a consortium agreement. Slater, *supra* note 17.

116. Westra, *supra* note 100, at 263. "Clubs can be formed at any stage of the process—in the early stage of the bidding, shortly before the deal is won, when it becomes more apparent which funds remain interested at the winning price, and with increasing frequency, after the deal is won, when the winning bidder seeks to lay off economic risk." *Id.*

117. Schwartzman, *supra* note 96, at 100.

118. *Id.*

119. *Id.*

seeks other firms to help with the equity commitment post-signing.[120] Finally, an arranged marriage occurs when a seller determines which firms should join together for a consortium deal.[121]

Depending on the arrangement, one firm may take the lead, or all the firms may work together as equal partners.[122] The arrangement will affect how the firms deal with each other and negotiate agreements.[123] In the TXU deal it is difficult to tell if a clear leader exists. Some sources indicate that KKR and TPG lead the deal together; so it might have been either a traditional or shotgun marriage.[124]

Club agreements[125] should establish the rules of engagement among the firms.[126] When negotiating a club deal, participants should carefully consider the following: the exclusivity terms, bidding strategy, the role of management, financing structure, allocation of expenses, governance rights, board representation and committee membership, supermajority voting rights and veto rights, anti-dilution protection, information and observation rights, allocation of deal and management fees among club members, exit strategy, anti-diversifying effect, control investing, cross-ownership problems, management fees, and put and call rights.[127] Although a club agreement raises many issues, this Note focuses on a few of the most pertinent ones.

Pre-bid club agreements are ideal. Even absent an official written agreement at the pre-bid stage, participants should at least discuss and agree on terms such as exclusivity, expenses, confidentiality, and equity commitment terms.[128] These terms require participants to bid exclusively through the club regardless of whether they subsequently drop out.[129] Exclusivity commitments could potentially dampen competition by preventing a "dropout" from subsequently offering a higher bid.[130]

Moreover, club agreements usually require firms to share transaction costs. Trouble arises, however, when a bid is unsuccessful; thus, most agreements provide for more restrictive expense-sharing rules in the event

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120. *Id.*

121. *Id.*

122. *Id.*

123. *See id.*

124. *See, e.g.*, Terry Macalister, *Private Equity Firms Pledge Green Power from £23bn U.S. Deal*, THE GUARDIAN (London), Feb. 27, 2007, at 25, *available at* http://www.guardian.co.uk/business/2007/feb/27/privateequity.energy.

125. Consortium agreements have been referred to as "Consortium Agreements," "Inter-Sponsor Agreements," "Interim Investors Agreements" or unnamed letter agreements. Tresnowski & Terry, *supra* note 107, at 95.

126. *Id.* at 96.

127. For a more detailed discussion, see Campbell & Bird, *supra* note 114, at 65–73.

128. Tresnowski & Terry, *supra* note 107, at 96.

129. *Id.* at 96–97.

130. *Id.* at 97.

of failure.[131] Club agreements usually provide for a "normal break-up fee."[132] Conversely, these agreements also provide for a "reverse break-up fee" to be assessed when the club fails "to close under the acquisition agreement due to a breach or failure to obtain debt financing."[133]

Typically, participants must sign confidentiality agreements with the seller.[134] These agreements can potentially prohibit club formation or prohibit communication with potential club participants without the consent of the seller.[135] The club agreement will generally require each participant to sign its own confidentiality agreement with the seller and provide for a separate confidentiality agreement for the club as a whole.[136] Lastly, in the event that the firms do not sign a club agreement at the outset, clubs often have governing interim agreements.[137] If the firms subsequently sign an agreement, then they should review and renegotiate key terms in the club agreement.[138]

Overall, club agreements lay out the rules and provide restrictions that make it nearly impossible for an individual participant to compete outside of the club. The public does not know the terms of the KKR and TPG club agreement, but one can assume that these firms likely had an agreement early on that addressed break-up fees, confidentiality requirements, and management issues.

IV. JOINT VENTURE TREATMENT UNDER ANTITRUST LAW

A. *Classification of Private Equity Clubs*

In April 2000, the DOJ and the FTC published the *Antitrust Guidelines for Collaboration Among Competitors*, which broadly defined competitor collaborations as "one or more agreements, other than merger agreements, between or among competitors to engage in economic activity, and the economic activity resulting therefrom."[139] Private equity clubs could easily be considered competitor collaborations because firms engage in the purchasing of companies, an obvious economic activity. Thus, these *Guidelines* likely apply to clubs such as the KKR–TPG club.

131. *Id.*

132. A normal break-up fee is what the seller pays the consortium if the seller breaks the deal because the seller chose either to go in with another bidder or to bow out completely. *Id.* at 100.

133. *Id.*

134. *Id*. at 98.

135. *Id.*

136. *Id.* This helps clarify who is liable for a breach. *Id.*

137. Schwartzman, *supra* note 96, at 101.

138. *Id.*

139. FTC & DOJ, ANTITRUST GUIDELINES FOR COLLABORATIONS AMONG COMPETITORS 2 (2000), *available at* http://www.ftc.gov/os/2000/04/ftcdojguidelines.pdf.

Moreover, government authorities would likely consider private equity clubs to be joint ventures. A joint venture is "an enterprise formed by two or more entities for the purpose of carrying out anything from a *single consortium bid* to a permanent corporate enterprise."[140] Joint ventures fulfill a variety of legitimate business purposes, such as exploiting complementary skills, creating economies of scale, growing research and development, and spreading risk.[141]

Some joint ventures can be classified as cartels.[142] In a cartel, "competitors enter into a naked agreement to fix prices without integrating their operations in any manner."[143] Crucially, private equity clubs must avoid cartel classification because this classification could lead to legal action against the clubs. Factors that keep joint ventures out of the cartel category include integrating resources and sharing risk.[144] For example, in *Arizona v. Maricopa County Medical Society*,[145] the absence of risk sharing led to a per se condemnation of the venture.[146] Cartels raise antitrust concerns because the level of cooperation does not go beyond

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140. Balto, *supra* note 59, at 186 (emphasis added) (citation omitted). A joint venture can also be broadly described as something that "embraces any collaborative activity, short of a full merger, by which independent economic actors pool their resources to pursue a legitimate business objective." William Kolasky & Elizabeth de Luca, *Antitrust Treatment of Joint Ventures*, *in* 47TH ANNUAL ANTITRUST LAW INSTITUTE 179, 181 (PLI Corp. Law & Practice, Course Handbook Series No. 8736, 2006) (citing McElhinny v. Med. Protective Co., 549 F. Supp. 121, 131 n.7 (E.D. Ky. 1982)). Common types of joint ventures include joint purchasing agreements, where the parties pool their purchasing activities to achieve efficiencies in their purchasing operations. Balto, *supra* note 59, at 210. They can be structured as corporations, partnerships, or any other loosely based associations. *Id.* at 186.

141. Balto, *supra* note 59, at 186. The most important factors evidencing joint activity are the integration of resources and the spreading of risk. *See, e.g.*, Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 356–57 (1982) (finding no partnership or joint venture where the defendants did not "pool their capital and share the risks of loss"); Broad. Music, Inc. v. Columbia Broad. Sys., Inc. (*BMI*), 441 U.S. 1, 22–24 (1979); *cf.* Joseph F. Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1521, 1524–25 (1982). Brodley asserts that the above definition can be so broad that it may be analytically useless; he suggests focusing on the factors that make joint ventures distinctive, which are "the potential efficiency gains and anticompetitive risks of the joint enterprise." *Id.*

142. *See* Timken Roller Bearing Co. v. United States, 341 U.S. 593, 597–98 (1951) (opining that simply characterizing an agreement as a joint venture will not save it from being considered per se illegal where its only purpose is to eliminate the competition), *overruled in part by* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).

143. Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to Buyers' Competitive Conduct*, 56 HASTINGS L.J. 1121, 1151 (2005).

144. Balto, *supra* note 59, at 205.

145. 457 U.S. 332 (1982).

146. *Id.* at 354–56. "While it is not always clear when the degree of integration and risk sharing is sufficient to justify rule of reason review, it is clear that the total absence of any risk sharing or integration of resources by the participants will constitute grounds for speedy condemnation of the arrangements." Balto, *supra* note 59, at 206.

simple price coordination, and there is no possibility of generating economic efficiencies through the integration of resources.[147] In simpler terms, there is no good to offset the bad.

Joint ventures can also be classified as "purchasing joint ventures." Purchasing joint ventures include "arrangement[s] in which two or more purchasers of a good or service agree to make such purchases jointly."[148] These arrangements range from bid-rigging cartels to efficiency-enhancing arrangements that lower transaction costs.[149] Private equity clubs, such as the KKR–TPG club, would likely be considered purchasing joint ventures. Thus, joint venture and purchasing joint venture case law informs the analysis of such clubs.

B. *General Treatment of Joint Ventures*

Recently, courts have viewed joint ventures more favorably by recognizing that strategic alliances and joint ventures are integral parts of the twenty-first-century economy.[150] Beginning with *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.* (*BMI*),[151] the Supreme Court generally evaluated joint ventures under the rule of reason.[152] In *BMI*, Columbia Broadcasting System, Inc. challenged an agreement in which more than 40,000 authors, composers, and publishing companies granted nonexclusive rights to the American Society of Composers, Authors, and Publishers (ASCAP) and BMI,[153] and a blanket license for their musical compositions.[154]

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147. Piraino, *supra* note 143, at 1151.

148. Balto, *supra* note 59, at 210.

149. *Id.*

150. *Id.* at 183. A proponent of the law-and-economics school of thought, Judge Easterbrook has observed:

> Joint ventures . . . require extensive cooperation, and all are assessed under a Rule of Reason that focuses on market power and the ability of the cooperators to raise price by restricting output. The war of all against all is not a good model of any economy. Antitrust law is designed to ensure an appropriate blend of cooperation and competition, not to require all economic actors to compete full tilt at every moment. When cooperation contributes to productivity through integration of efforts, the Rule of Reason is the norm.

Polk Bros. v. Forest City Enters., Inc., 776 F.2d 185, 188 (7th Cir. 1985).

151. 441 U.S. 1 (1979).

152. *See id.* at 23–24. Congress has acted consistent with the case law, passing laws that encourage joint ventures. For example, The Export Trading Company Act of 1982 was designed to stimulate domestic firms jointly to strengthen their presence in foreign markets. *See* 15 U.S.C. § 4001(b) (2000).

153. *BMI*, 441 U.S. at 5–6.

154. *Id.* at 5.

The Court held that before condemning collaborative activity as per se illegal, a court must assess whether a legitimate business justification exists for the collaboration.[155] The Court found that the agreement had legitimate business justifications, which included substantial cost reduction, less delay in using compositions, and increased flexibility;[156] thus, the Court reversed the per se condemnation of the agreement.[157] The Court focused on whether the activity on its face appeared almost always to restrict competition and to decrease output, or whether the activity increased economic efficiency, thus rendering markets more, rather than less, competitive.[158]

Although courts favor the rule of reason approach when dealing with joint ventures, the per se approach still plays an important role.[159] If a joint venture is a complete sham, it can be considered per se illegal.[160] Simply labeling an agreement a joint venture will not automatically save it from antitrust violations.[161] Courts and enforcement agencies examine the purpose and actual effect of the joint venture.[162]

For example, in *Texaco, Inc. v. Dagher*,[163] the Court held that the per se analysis did not apply to a joint venture between two oil companies to refine and sell gasoline in the western United States. While the single entity's price setting for their distinct brands constituted price fixing in a "literal sense," it was not price fixing "in the antitrust sense."[164] In their joint venture, the companies pooled both their capital and their risk of loss.[165] While the plaintiff's failure to present a rule of reason analysis in the district court foreclosed relief on those grounds,[166] the Court held that

155. *Id.* at 19–20.

156. *Id.* at 21–22.

157. *Id.* at 24–25. The Court remanded for a determination of the agreement's validity pursuant to the rule of reason. *Id.* at 24.

158. *Id.* at 19–20.

159. *See* Freeman v. San Diego Ass'n of Realtors, 322 F.3d 1133, 1146–48 (9th Cir. 2003) (holding that the inherent cooperative aspects of a joint venture did not necessarily entitle the venture to deferential review and finding that the joint venture fixed prices at an ultra-competitive level without any legitimate justification—thus necessitating the per se analysis).

160. Addamax Corp. v. Open Software Found., Inc., 152 F.3d 48, 52 (1st Cir. 1998).

161. Engine Specialties, Inc. v. Bombardier Ltd., 605 F.2d 1, 11 (1st Cir. 1979) ("The talisman of 'joint venture' cannot save an agreement otherwise inherently illegal."). Indeed, the *Competitor Collaborations Guidelines* state that "'labeling an arrangement a 'joint venture' will not protect what is merely a device to raise price or restrict output; the nature of the conduct, not its designation, is determinative.'" Balto, *supra* note 59, at 185 (quoting FTC & DOJ, *supra* note 139, § 3.2, at 9).

162. *See, e.g.*, Timken Roller Bearing Co. v. United States, 341 U.S. 593, 597–98 (1951), *overruled in part by* Copperweld Corp. v. Independence Tube Corp., 467 U.S. 752 (1984).

163. 547 U.S. 1, 8 (2006).

164. *Id.* at 6.

165. *Id.*

166. *Id.* at 4.

the allegations did not fit within the narrow parameters for per se liability.[167] The Court also found that the ancillary restraints doctrine did not apply.[168] Thus, after *BMI*, most joint ventures should be evaluated under the rule of reason, but some would still be considered per se illegal.[169] Treatment under a *BMI*-type analysis would benefit the KKR–TPG club.

C. *Treatment of Purchasing Joint Ventures*

Purchasing joint ventures[170] can fall on either end of the antitrust continuum. Some courts have found purchasing joint ventures that engage in price-fixing per se illegal, while other courts have upheld other purchasing joint ventures that promote economic efficiency.[171]

Vogel v. American Society of Appraisers[172] provides a good example of per se illegal behavior with no efficiency-enhancing effects. In *Vogel*, the Seventh Circuit found that buyer cartels are per se illegal when the cartel forces suppliers to charge below-market prices to members of the cartel.[173] Bid-rigging venture groups are also per se illegal.[174] Bid rigging occurs when would-be competitors determine in advance the winner of the right to purchase.[175] Finally, buyer groups created for the purpose of using

167. *Id.* at 7.

168. *Id.*

169. The Supreme Court continued the path established by *BMI* in *National Collegiate Athletic Ass'n v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 100–01 (1984), and in *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 458–59 (1986).

170. *See supra* note 148 and accompanying text.

171. *See* SULLIVAN & HARRISON, *supra* note 16, § 4.11, at 152–53.

172. 744 F.2d 598 (7th Cir. 1984).

173. *Id.* at 601. Another example of illegal price fixing comes out of *United States v. Socony-Vacuum Oil Co.*, which branded as illegal an arrangement among a group of large oil companies involving the joint purchase of gasoline from refiners. 310 U.S. 150, 223 (1940). The Supreme Court rejected the defendants' argument that the purchasing of gasoline was necessary to avoid "ruinous competition" and found the practice to be per se illegal. *Id.* at 221. Notably, the only integration was the agreement to buy, and there was no integration of resources. Balto, *supra* note 59, at 210–11; *see also* Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co., 334 U.S. 219, 221–22 (1948). In *Mandeville*, the Court struck down an agreement among sugar refiners to pay a uniform price for sugar beets. *Id.* at 246. The Court found that "the agreement [was] the sort of combination condemned by the [Sherman] Act, even though the price-fixing was by purchasers, and the persons specifically injured . . . [were] sellers." *Id.* at 235 (footnotes omitted). Here, there was no price-fixing agreement among sellers, but the Court found illegal efforts to stabilize prices. *Id.* at 235, 241; *cf.* Nat'l Macaroni Mfrs. Ass'n v. FTC, 345 F.2d 421, 421–27 (7th Cir. 1965) (holding that an agreement among macaroni manufacturers that did not mention price but rather limited the export of a product and required trade association members to use a set percentage of the product in their macaroni had the purpose and effect of depressing price and was thus illegal).

174. ROGER D. BLAIR & JEFFREY L. HARRISON, MONOPSONY: ANTITRUST LAW AND ECONOMICS 28 (1993).

175. *Id.*; *see, e.g.*, Am. Tobacco Co. v. United States, 328 U.S. 781, 801–02 (1946) (holding

monopsony power[176] to eliminate competitors are also illegal.[177] In *Eastern States Retail Lumber Dealers' Ass'n v. United States*,[178] lumber retailers circulated a list of wholesalers who competed at a retail level so that other retailers would refuse to do business with those wholesalers.[179] Although the legitimate goal was protecting retailers from wholesaler interference, the plan was premised on buying-side power.[180] Thus, courts in several instances have found purchasing joint ventures to be per se illegal.

Yet some purchasing joint ventures are procompetitive because they enable "participants to centralize . . . functions more efficiently, or to achieve other efficiencies."[181] Purchasing joint ventures enhance efficiency when participants collaborate to perform business functions that benefit consumers, such as by increasing output, lowering prices, or improving quality and innovation.[182] Procompetitive efficiencies include "the creation of new products, scale economies, and risk sharing."[183] To enhance efficiency, buyers typically combine capital, technology, or complementary assets to achieve benefits that would be unachievable absent the collaboration.[184]

If legitimate reasons[185] exist for buyers to have a purchasing agreement, then courts will analyze the agreement under the rule of reason.[186] In *Northwest Wholesale Stationers, Inc. v. Pacific Stationary & Printing Co.*,[187] the Supreme Court reversed the lower court's application of per se analysis and analyzed a joint purchasing cooperative under the rule of

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illegal a conspiracy among three cigarette producers to eliminate competition in the purchase of tobacco leaves by agreeing prior to the auction on the maximum high bid); Reid Bros. Logging Co. v. Ketchikan Pulp Co., 699 F.2d 1292, 1297 (9th Cir. 1983) (finding agreements between two logging companies illegal because the companies refused to bid against each other for timber even during a shortage).

176. Monopsony power is when buyers combine to set prices or terms. SULLIVAN & HARRISON, *supra* note 16, § 2.06, at 43.

177. BLAIR & HARRISON, *supra* note 174, at 30.

178. 234 U.S. 600 (1914).

179. *Id.* at 606.

180. *Id.* at 608–09. In other words, the wholesalers could have ignored the threat but for the monopsony power.

181. FTC & DOJ, *supra* note 139, § 3.31(a), at 14.

182. Mary L. Azcuenaga, *Antitrust Guidelines for Collaborations Among Competitors: Federal Trade Commission*, *in* 46TH ANNUAL ADVANCED ANTITRUST SEMINAR: DISTRIBUTION & MARKETING 161,172–73 (PLI Corp. Law & Practice, Course Handbook Series No. 11014, 2007).

183. Balto, *supra* note 59, at 203.

184. Azcuenaga, *supra* note 182, at 172–73.

185. The DOJ and the FTC favor agreements that are reasonably necessary—that is, there is not another less restrictive way of achieving the efficiency-enhancing integration. *Id.* at 173.

186. SULLIVAN & HARRISON, *supra* note 16, § 4.13, at 164–65.

187. 472 U.S. 284 (1985).

reason.[188] The cooperative in *Northwest Wholesale* comprised approximately one hundred office supply retailers acting as a wholesaler to member retailers.[189] Members received rebates on purchases and the cooperative provided warehousing facilities.[190]

The cooperative denied membership to a plaintiff who changed its policy and began dealing as a wholesaler as well as a retailer.[191] The Court found that the cooperative was "'designed to increase economic efficiency and render markets more, rather than less, competitive.'"[192] The Court suggested that the per se analysis applies only where the joint arrangement unnaturally fostered "market power or exclusive access to an element essential to effective competition."[193] Per se analysis applies in these situations because the market would become less competitive.

V. ANTITRUST ANALYSIS OF PRIVATE EQUITY CLUBS

This Part analyzes the KKR–TPG club under current antitrust law. To gain favorable joint venture treatment rather than per se treatment, the KKR–TPG club must show that it did not form solely to exercise monopsony power or to rig bids, but rather that its purpose was to increase economic efficiency and make the market more competitive, and that the collaboration aided in that goal. Because the club likely falls closer to the rule of reason on the continuum, this is where the analysis focuses. This first section explores the various prongs of the rule of reason, and the second section discusses the ancillary restraints doctrine.

When courts address antitrust issues, the underlying policy of encouraging competition should be evident. Although this seems simple, the analysis can be complex. Purchasing joint ventures, which include private equity clubs, can fall at any point on the antitrust continuum. As long as firms are not complete shams that exercise buyer-side power for the sole purpose of excluding competition (as seen in *Retail Lumber Dealers*),[194] or for bid rigging (as seen in *American Tobacco*),[195] courts are unlikely to find clubs per se illegal.

If the club passes this "inherently suspect" hurdle, as articulated in *Massachusetts Board*, then the court will (1) take a "quick look" at the specific facts of the deal, (2) look for legitimate efficiency-enhancing

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188. *Id.* at 298.

189. *Id.* at 286.

190. *Id.*

191. *Id.* at 287.

192. *Id.* at 295 (quoting Broad. Music, Inc. v. Columbia Broad. Sys., Inc. (*BMI*), 441 U.S. 1, 20 (1979)).

193. *Id.* at 296.

194. E. States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 612 (1914).

195. BLAIR & HARRISON, *supra* note 174, at 28–29.

elements, and (3) determine if the efficiency justification is plausible. If the justification is implausible, the analysis stops, and the club will be considered illegal. But if the justification is plausible, the court may opt for a more in-depth rule of reason analysis.[196] If the court continues to a full-blown rule of reason analysis, then the court will examine all relevant facts to determine whether the challenged restraint "is one that promotes competition or one that suppresses competition."[197] Under this balancing approach, courts enjoy wide latitude in deciding the weight of each factor. Alternatively, the court may turn to the ancillary restraints doctrine to tackle the specific private equity club.

A private equity club, such as the KKR–TPG club, could be considered inherently suspect. To support that conclusion, the DOJ could show that KKR and TPG formed the club solely to avoid an auction, that the firms could have obtained good financing terms regardless of the club, that club members did not join to gain any expertise from other members, and that the purchase price could have been higher. In short, the DOJ would need to demonstrate that the KKR–TPG club's sole purpose was to reduce purchase price. The DOJ could also argue that the KKR–TPG club exercised buyer-side power by reducing its financing fees, thus preventing any other firm from competing. However, the deal could not happen without the club participants acting together to obtain this financing. Overall, the DOJ would likely struggle to prove a KKR–TPG club conspiracy at the outset because of the difficulty of showing direct evidence that the club was motivated purely to reduce the purchase price.

Because clubs will generally pass the inherently-suspect hurdle due to a lack of blatantly egregious conduct, the court will likely at least perform a quick-look analysis to determine whether the efficiency justifications offered by the firms are plausible. Given the variety of justifications offered, a court would likely perform an in-depth rule of reason analysis and balance all the justifications with the adverse effects. This Part addresses the many factors that a court would examine under a full-blown rule of reason balancing analysis of the KKR–TPG club, as well as how a court would scrutinize the KKR–TPG club under the ancillary restraints doctrine. A rule of reason balancing analysis is the most appropriate test for evaluating clubs because this method enables courts to take into account the many positive aspects of clubbing.

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196. *In re* Mass. Bd. of Registration in Optometry, 110 F.T.C. 549 (1988), *available at* 1988 WL 1025476, 12–13 (Commission opinion). *In re Polygram Holding, Inc.* (*Three Tenors*) indicates that even if the court could stop after a "quick look," it still might conduct a full rule of reason analysis, especially considering the novelty of this issue. No. 9298, 2003 WL 21770765 (F.T.C. July 24, 2003); *see supra* note 82.

197. Nat'l Soc'y of Prof'l Eng'rs v. United States, 435 U.S. 679, 691 (1978).

A. *Full-Blown Rule of Reason Analysis*

1. Market Power Factor

A club having too much market power[198] can tip the balance toward illegality.[199] Courts worry that a club with sufficient market power can restrain competition substantially.[200] Traditional literature discusses market power in the context of monopoly or oligopoly.[201] The flip side is oligopsony power, which exists "when a few firms, collectively controlling a significant share of the market for the purchase of a particular product, act in concert to reduce the price of that product."[202] In monopsony and oligopsony cases, the concern is that clubs, such as the KKR–TPG club, can exercise buying power and reduce prices below competitive market levels.[203] Although no clear-cut formula exists for precisely measuring market power, the DOJ looks to market share as the main indicator of buying power.[204] If market share is low, market power will likely be considered low.[205] However, large market share does not necessarily mean that a court will condemn a restraint.[206]

Defining the market is the first step in rule of reason balancing, and this definition often dictates the result.[207] As expected, plaintiffs typically argue

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198. Market power for a buyer is "the ability profitably to depress the price paid for a product below the competitive level for a significant period of time and thereby depress output." FTC & DOJ, *supra* note 139, § 3.3, at 11 n.30. For a discussion of market power, see Phillip Nelson, Principal, Economists Inc., Presentation at the FTC and DOJ Public Hearings on Section 2 of the Sherman Act: Single-Firm Conduct as Related to Competition: Monopoly Power, Market Definition, and the *Cellophane* Fallacy (Mar. 7, 2007), http://www.ftc.gov/os/sectiontwohearings/docs/0703PhilipNelsonpresentation.pdf.

199. FTC & DOJ, *supra* note 139, § 1.2, at 4.

200. Gen. Leaseways, Inc. v. Nat'l Truck Leasing Ass'n, 744 F.2d 588, 596 (7th Cir. 1984).

201. A perfect monopoly exists when only one producer has complete control of the market. SULLIVAN & HARRISON, *supra* note 16, § 2.03, at 21. An oligopoly exists when the market has only a few interdependent producers, thereby reducing competition. *Id.* § 2.05, at 25.

202. Piraino, *supra* note 143, at 1125. Monopsony is the same concept, but when there is only one firm. For examples of oligopsonies, see Oligopoly Watch, Oligopsonies, http://www.oligopolywatch.com/stories/2003/04/17/oligopsonies.html (last visited May 13, 2008).

203. BLAIR & HARRISON, *supra* note 174, at 47. The DOJ recognizes that "[t]he exercise of market power by buyers has wealth transfer and resource misallocation effects analogous to those associated with the exercise of market power by sellers." 1984 Merger Guidelines, 49 Fed. Reg. 26,823, 26,827 (June 29, 1984).

204. BLAIR & HARRISON, *supra* note 174, at 47.

205. Balto, *supra* note 59, at 201.

206. *See, e.g.*, Broad. Music, Inc. v. Columbia Broad. Sys., Inc. (*BMI*), 441 U.S. 1, 5, 24–25 (holding that the practice of offering blanket licenses by organizations representing nearly 100% of music composers and publishing houses was not a per se violation of the Sherman Act).

207. *See* SULLIVAN & HARRISON, *supra* note 16, § 2.06, at 43–44. In the context of the DOJ

for narrow definitions to keep the defendant's market share larger, and defendants argue for broad definitions to keep their share smaller.[208] In the monopsonistic or oligopsonistic context, courts define the market by asking "whether sellers could find alternative buyers for their goods or services [i.e., companies] or whether prices might be forced so low by the monopsonist [or oligopsonist] that new buyers would enter the market."[209] In short, the market definition depends on who can reasonably compete.[210]

After defining the market, the court must determine the market share. Market share can normally be measured through the buying-power index (BPI),[211] but for the sake of simplicity, this Note uses simple arithmetic fractions to determine each firm's share. Under the DOJ analysis, a buyer is not considered the dominant buyer until its market share reaches 35%, the critical value.[212]

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inquiry, timing is key in defining the market. Slater, *supra* note 17. Before the auction, the market is vast because of the capital available and the number of firms that are potentially able to bid. *Id.* It is hard to imagine distorting competition prior to an auction by limiting the quality or number of bids. *Id.* But once an auction has begun, the relevant competitors become limited, and the antitrust analysis changes. *Id.* The DOJ would likely focus on this second period and look for situations where firms start out competing head-to-head and then declare a truce and join forces. *Id.*

208. BLAIR & HARRISON, *supra* note 174, at 55. In general, the market is defined by looking at the sellers and buyers whose supply and demand decisions determine the equilibrium market price for goods or services. *Id.* From a product market perspective, market power analysis requires identifying geographic and product boundaries "that separate buyers and sellers whose actions influence price from buyers and sellers whose actions do not influence price." *Id.* In a product situation, market definition is determined by finding what goods are generally substitutes for the seller's product. *Id.* The market is then narrowed by determining which locations can *realistically* compete. *Id.* From the buyer's perspective, in a products market, we look to competing uses for the seller's "output." *Id.* at 55–56. If more "substitutable uses" exist, it is less likely that any one buyer can force prices below a competitive level. *Id.* at 56. Because geographic limitations on the definition concern whether sellers can ship to users, *id.*, geographic limitations seem less relevant for purposes of this Note.

209. SULLIVAN & HARRISON, *supra* note 16, § 2.06, at 43.

210. *See, e.g.*, Todd v. Exxon Corp., 275 F.3d 191, 202 (2d Cir. 2001) (explaining that the relevant market in a case where employees claimed that their employers had conspired to suppress wages included any substitute buyers for the employees that could impact the ability of the defendants to lower wages).

211. BLAIR & HARRISON, *supra* note 174, at 48–49. In a pure monopsonistic situation, the buying power index (BPI) can be defined as follows: "[T]o the extent that sellers can alter the quantity offered for sale in response to price changes, monopsony (buying) power declines." *Id.* at 49. The BPI for a dominant buyer (when there is not a pure monopsony) will depend on the overall elasticity of supply and the elasticity of demand for the fringe as well as the dominant buyer's market share. *Id.* at 51. For a more detailed and technical explanation of BPI, see *id.* at 48–49.

212. Jonathan M. Jacobson & Gary J. Dorman, *Joint Purchasing, Monopsony and Antitrust*, 36 ANTITRUST BULL. 1, 37 (1991).

Alternatively, courts may measure market power by focusing on a firm's ability to change prices from a competitive level.[213] In this sense, the focus shifts to showing market power by evidence of specific conduct indicating power to exclude competition or control prices, or by direct evidence of injury caused by market power, rather than simply looking at percentage of market share.[214] Under this approach, private equity clubs, such as the KKR–TPG club, have significant market power.

In the context of the TXU deal, the potential buyers of TXU define the market. The market can be narrowly described as private equity firms that can reasonably compete, and broadly described as both private equity firms and public corporate strategic buyers. Broad or narrow, the market should include all firms that would be interested in this type of deal and that can realistically compete, whether or not they actually participate.

It is difficult to glean from public information those firms that would or could bid. For simplicity's sake, this Note looks at the firms that would most likely be interested in such a deal—the top private equity firms. Under either a broad or narrow definition of the market of all potential bidders, no one private equity firm meets the 35% market threshold for the DOJ.[215] However, shifting the time frame to look at the actual competitors after bidding begins narrows the market definition and raises the market share, indicating more market power. The DOJ may shift the time frame, which would be less favorable to private equity.[216]

But market share is not necessarily the only indicator of market power. Under the alternative approach, clubs may be able to change prices from a competitive level, thus demonstrating tremendous market power. The central question is whether the exercise of buying power eliminates the competition, as was the case in *Retail Lumber Dealers*.[217] In the TXU deal, exercising market power may have led to lower financing costs. The lower costs may indicate that because the KKR–TPG club was so powerful and could obtain better financing, the other bidders simply could not compete. Thus, market power may be proven regardless of market share. Yet,

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213. SULLIVAN & HARRISON, *supra* note 16, § 2.06, at 26.

214. *See* K.M.B. Warehouse Distribs., Inc. v. Walker Mfg. Co., 61 F.3d 123, 129 (2d Cir. 1995); Rebel Oil Co. v. Atl. Richfield Co., 51 F.3d 1421, 1434 (9th Cir. 1995).

215. The following is a list of the recent buyout fundraising ability of the top ten private equity firms: The Blackstone Group ($23 billion); Kohlberg Kravis Roberts & Co. ($21.6 billion); The Carlyle Group ($18.3 billion); Texas Pacific Group ($15.2 billion); Bain Capital ($13 billion); Providence Equity Partners ($11 billion); Apollo Advisors ($10.1 billion); Warburg Pincus ($9.2 billion); Cerberus ($8 billion); and Thomas H. Lee ($7 billion). Fortune, Private Equity Power List, *supra* note 97. If the market is defined this way (all potential firms available to bid), then the Blackstone Group has the largest market share with 16.8%.

216. *See* Slater, *supra* note 17; *supra* notes 209–10 and accompanying text.

217. *See* E. States Retail Lumber Dealers' Ass'n v. United States, 234 U.S. 600, 606 (1914).

because the current market has had so much capital available, good financing terms have been easily available to numerous organizations.[218] Thus, obtaining good financing may not really reflect an exercise of market power.

In sum, private equity clubs undoubtedly exercise market power, but good arguments exist for whether or not clubs exercise excessive power. But market power alone cannot result in liability. Clubs like the KKR–TPG club make themselves more competitive by joining firms together to obtain better financing and other benefits, thus increasing their buyer power. However, these firms also arguably restrict competition because they position themselves such that no one can bid effectively against them, potentially resulting in too much power.

2. Competitive Harm Factor

After establishing market power, the next key step is to identify the harmed party and the extent of the injury. Anticompetitive harm refers to an agreement's adverse competitive consequences without taking into account the procompetitive benefits.[219] Traditionally, collaborations raised concerns because they may harm competition and consumers 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."[220] In the clubbing context, parties such as the TXU shareholders may be harmed by a lower selling price than would be possible absent the "collusive agreement," hurting both the shareholder and, ultimately, the market.[221]

In criminal antitrust cases, the DOJ must prove beyond a reasonable doubt that the defendants agreed not to compete.[222] In civil antitrust cases,

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218. Andrea Orr, *The Decline of the Club Deal*, THEDEAL.COM, July 2, 2007, http://www.thedeal.com/dealscape/2007/07/the_decline_of_the_club_deal.php; *see* Jim Zarroli, All Things Considered: Financing for Private Equity Deals Dries up, (Mar. 28, 2008), http://www.npr.org/templates/story/story.php?storyID=89194064 (discussing the credit crunch).

219. FTC & DOJ, *supra* note 139, § 1.1, at 2. Put simply, antitrust injury is "injury that results from a loss of competition." Jeffrey L. Harrison, *Trademark Law and Status Signaling: Tattoos for the Privileged*, 59 FLA. L. REV. 195, 215 (2007).

220. Azcuenaga, *supra* note 182, at 170. Collaborations may limit decision-making or reduce the ability to compete independently, facilitating explicit or tacit collusion, such as through the exchange of sensitive information. *Id.*

221. David B. Caruso, *Antitrust Suit Accuses Private Equity Firm of Bid Rigging in LBO Transactions*, ASSOCIATED PRESS, Nov. 15, 2006, *available at* http://www.whafh.com/modules/press_release/?action=view&id=60.

222. Slater, *supra* note 17. Criminal cases are usually limited to situations where there is an unjustifiable agreement on price (i.e., per se illegal agreements). *Id.* Thus, if it were looking at the TXU deal, the DOJ would likely pursue a civil action. *Id.*

in which the remedy is typically injunctive relief,[223] the DOJ or a private plaintiff must prove by a preponderance of the evidence that the defendants agreed not to compete.[224] Under either standard, competitive harm may be difficult to prove. The DOJ may attempt to meet the standard by offering proof that private equity firms split up the market through a particular firm's actions, such as declining to participate in certain auctions,[225] sharing information,[226] and failing to raise bids.[227] In short, the DOJ would need to present fairly clear evidence that there was a real possibility of achieving a higher selling price but for the club.[228]

Interestingly, some commentators argue that clubbing creates no competitive harm because more money available means higher bid prices, which drive down private equity returns.[229] Often "bidders [do] not get anything close to a discount on their purchases."[230] In the TXU deal, the KKR–TPG club offered $69.25 in cash for each share of common stock, which is 20% above the closing price on February 22, 2007, and represents a 25% premium over the average twenty-day price ending on February 22, the day the deal was announced.[231]

However, shareholders may suffer because big firms have figured out how to dampen competition. Although shareholders receive above-market prices for their shares, the shareholders still receive less than they could potentially receive if not for certain club restraints.[232] In particular, big problems arise for private equity firms claiming that they paid top dollar when deals occur without an auction, like the TXU and HCA deals.[233] In

223. *Id.* It would be difficult after the TXU deal to restore the market to its pre-deal condition.

224. *Id*.

225. This is the tit-for-tat strategy where one firm gets one deal, then another gets the next, and so on. Bradley C. Vaiana & Peter Nurnberg, *Club Deals and DOJ Investigation Considerations for Private Equity Investors*, PRIVATE EQUITY NEWSL. (Nixon Peabody LLP), Winter 2007, at 1, 1, *available at* http://www.nixonpeabody.com/linked_media/publications/PvtEqLBO_eIss1_Winter07.pdf.

226. There may be information-sharing issues, but rivals are unlikely to share information about the target company. Slater, *supra* note 17.

227. Bid jumping occurs when another party enters an auction after a deal has been negotiated. *Id*. Bid jumping is rare in private equity, and some commentators justify bid jumping by pointing to high break-up fees, which reduce incentives for equity bidders to jump ship. *Id.*

228. This Note does not address the private standing of shareholders. For information on current private suits, see Caruso, *supra* note 16; Jacobius, *supra* note 20.

229. *Private Equity: Clubby Capitalism*, ECONOMIST, Apr. 2, 2005, at 31.

230. Vipal Monga, *What Price Collusion?*, DAILY DEAL, Oct. 23, 2006, *available at* 2006 WLNR 18294707. One private equity partner commented, "Collusion at 13 times cash flow? . . . At those levels, you'd think the sellers would want to see more collusion." *Id.*

231. *KKR, TPG-Led Consortium to Acquire TXU*, *supra* note 7.

232. For example, a firm in a club that would like to break away and offer a higher bid sometimes cannot because of exclusivity agreements. *See supra* notes 131–33 and accompanying text.

233. David Carey, *PE Bid Collusion Hard to Prove*, DAILY DEAL, Oct. 12, 2006, *available*

the HCA deal, there were reports that Blackstone and others considered a counter bid yet declined to make an offer.[234] Although collusive intent could be to blame, private equity offers another explanation.

Firms often limit their bids because of access to similar debt financing packages.[235] Factors that do not bode well for clubs such as the KKR–TPG club include the presence of exclusivity agreements or break-up fees. If these factors were present in the TXU deal, shareholders may have a strong argument that the price could have been higher but for these restraints because the restraints discourage members from exiting the club and submitting counter bids. Regardless, in the HCA deal, even though HCA did not get a counter bid, it still evaluated the KKR, Bain Capital, and Merrill Lynch bids, and obtained a fairness opinion from two separate banks.[236] In addition, the TXU merger agreement allowed TXU to solicit bids until April 16, which could have created a bidding war.[237]

Things look much more competitive in deals such as the Equity Office buyout where Blackstone fought fiercely with Vornado Realty Trust to acquire the target before Vornado finally gave up.[238] Thus, whether a higher price could have been obtained seems to be deal specific. Absent an auction, shareholders cannot easily show that a higher price could have been obtained, yet the lack of an auction does not provide conclusive evidence that shareholders suffered harm.

3. Economic-Efficiency-Enhancement Factor

Collaborations can provide benefits stemming from incorporating different capabilities and resources to facilitate goals such as attaining economies of scale beyond the reach of a single buyer.[239] In efficiency-enhancing buyer cooperatives, both buyers and seller gain; thus, antitrust trouble is unlikely in such cooperatives.[240] Efficiencies render markets more, rather than less, competitive.

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at 2006 WLNR 17665468. For an interesting perspective on auction design, see generally Joseph P. Cook, *Auction Design and Collusion*, ANTITRUST, Summer 2006, at 89, 89.

234. Carey, *supra* note 233.

235. *Id.*

236. *Id.*

237. Andrew Ross Sorkin, *A $45 Billion Buyout Deal with Many Shades of Green*, N.Y. TIMES, Feb. 26, 2007, at A19. Because TXU had fifty days to review rival bids, a bidding war could have developed. Interview with Fred Krupp, *supra* note 93.

238. David Cho, *Blackstone Wins Buyout Fight for Equity Office As Vornado Exits*, WASH. POST, Feb. 8, 2007, at D01, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2007/02/07/AR2007020700951.html?nav=rss_business/personalfinance. Note that this was not a club deal, and Blackstone was forced to pay an additional $3 billion to close the deal after bidding commenced. *See Private Equity Power List: Top Ten Deals*, *supra* note 5.

239. *See* BLAIR & HARRISON, *supra* note 174, at 94.

240. *Id.* at 96.

The TXU deal provides many efficiency-enhancing justifications. Unlike the entities in *Maricopa County*,[241] KKR and TPG shared the risk of a $45 billion purchase of TXU.[242] KKR and TPG also likely received better financing by pooling their resources. Moreover, the KKR–TPG club gained management expertise from KKR.[243] Thus, there are plausible justifications for KKR and TPG to form a club. However, more facts would be required to answer determinatively whether these justifications outweigh overabundant market power or shareholder harm resulting from a lower purchase price.

Although better financing through clubbing may provide a plausible justification for clubbing, recent market developments have weakened this justification. As mentioned previously, the current market has offered buyers a variety of financing solutions, and with the abundance of cheap capital, firms may find themselves in a position where clubbing is unnecessary.[244] In recent months, clubbing has declined slightly because firms have turned to investment banks, who act as behind-the-scenes "shadow partners" to provide equity bridges that enable firms to provide less up-front capital.[245] Thus, firms have been more and more capable of financing a deal on their own.

A better justification that is more difficult to refute is risk sharing. The DOJ would likely struggle to persuade a court that only one firm in the KKR–TPG club should bear the risk of a $45 billion deal. Moreover, despite the availability of money, lenders may still want more than one firm signed onto the deal to lower the risk.

Expertise is yet another justification that is hard to refute. In the TXU deal, TPG can accomplish more of its goals by bringing in KKR and Henry Kravis, who are influential and bring specific industry knowledge.[246] This addition furthers the KKR–TPG club's goals for turning TXU around—the whole reason for purchasing TXU in the first place.

Interestingly, empirical evidence suggests that private equity markets have become more competitive in the last two years.[247] Dealogic, a consulting company and online business news source, reported multiple

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241. *See* Arizona v. Maricopa County Med. Soc'y, 457 U.S. 332, 356–57 (1982) (noting that in the absence of a risk-sharing partnership or joint venture agreement, price fixing among competing entrepreneurs was improper).

242. *See KKR, TPG-Led Consortium to Acquire TXU*, *supra* note 7.

243. *Id*.

244. Orr, *supra* note 218.

245. *Dealwatch: PE Clubs*, THEDEAL.COM, Mar. 9, 2007, http://www.thedeal.com/dealscape/2007/03/dealwatch_pe_clubs.php.

246. *KKR, TPG-Led Consortium to Acquire TXU*, *supra* note 7.

247. Steve Rosenbush, *Private Equity Slugfest*, BUS. WK. ONLINE, Feb. 13, 2007, http://www.businessweek.com/bwdaily/dnflash/content/feb2007/db20070212_956645.htm.

bids for 29% of private equity buyouts in 2006. In early 2007, 70% of buyouts had multiple bids.[248] One commentator has stated that "'[t]here are many more competitive bids right now, and that is because so much more money [has been] going around.'"[249] Thus, investment banks have—until the recent credit crunch[250]—arguably been more inclined to lend to clubs because of risk spreading, and clubs like the KKR–TPG club have actually made the market more competitive.

In sum, there are many plausible justifications for clubbing, some more persuasive than others. With clubs, firms can achieve better financing, share and reduce risk, and employ better management teams—all excellent reasons to permit clubbing. However, with market changes, such as equity bridges, some justifications may not look as persuasive as they did in the past. From a larger economic perspective, when companies are in private equity hands, firms can do things to achieve higher returns than could be achieved in public markets, so encouraging privatization may be efficient for the economy as a whole.[251] As mentioned previously, more aggressive management of companies, such as TXU, can create lasting value, which can be realized when the companies are subsequently sold. Thus, there are also arguably more benefits in permitting club takeovers than simply increasing shareholder returns.

4. Rule of Reason Balancing of the Factors

If a court performs a full-blown rule of reason analysis, after assessing all of the factors, the court will need to balance the procompetitive benefits against the anticompetitive harm to find the overall competitive effect.[252] Analysis of deals such as the TXU deal could go either way, depending on how a court weighs the factors. The courts could consider the following factors: the club's economic power and financing ability, the actual price paid for TXU,[253] the lack of an auction,[254] the potential price that could have been paid if the DOJ can show that but for the club another firm would have competed, the lack or presence of an exclusivity agreement, KKR's management and industry expertise, and risk sharing.

That no one else bid against the club for TXU does not bode well for the KKR–TPG club. This lack of alternative bids possibly indicates that the KKR–TPG club exercised market power that eliminated the competition. Yet this is a deal of unprecedented size, and even if one firm

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248. *Id.*

249. *Id.* (quoting Robert Profusek, co-head of the mergers and acquisitions practice at the law firm Jones Day).

250. *See* Zarroli, *supra* note 218.

251. *See infra* text accompanying note 278.

252. FTC & DOJ, *supra* note 139, § 1.1, at 2.

253. *See supra* text accompanying notes 230–31.

254. *See supra* text accompanying note 233.

could obtain the financing, the risk of such a deal would be tremendous. Based on the little public information available, the TXU deal should survive the rule of reason analysis if it is scrutinized because the positive factors seem to far outweigh the negative ones.

In analyzing club deals, the DOJ will need to perform a fact-specific analysis and determine how to balance the factors so that the result promotes competition. The analysis is further complicated because club deals vary tremendously, and a court may view clubbing in the aggregate or may look at specific practices in specific deals. Banning specific practices, such as engaging in exclusivity agreements or break-up fees, rather than banning clubbing altogether, would be the best-case scenario for firms if the DOJ decides to attack a club deal.

B. *Alternative Analysis: Ancillary Restraints Doctrine*

Courts have found that a cooperative may be analyzed under the rule of reason, even if the cooperative affects price, so long as the agreement is reasonably necessary to achieve a procompetitive benefit.[255] Thus, even if an agreement affects price, an otherwise per se illegal collaboration may still be analyzed under the rule of reason and the ancillary restraints doctrine.[256] The ancillary restraints doctrine was conceived to circumvent the broad language of § 1 of the Sherman Act, so that every partnership formation would not be considered illegal.[257] The doctrine is exemplified in the *BMI* case,[258] which held that an agreement involving actual price fixing should be evaluated under the rule of reason because the price fixing was ancillary to a lawful joint-marketing arrangement.[259]

Under the ancillary restraints doctrine, courts should allow firms to enter into agreements that are required to carry out legitimate venture objectives.[260] The doctrine applies if "(1) the agreement is ultimately

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255. Azcuenaga, *supra* note 182, at 172.

256. *See supra* Part II.B. For an illustration of the ancillary restraints doctrine, see Harry S. Gerla, *Competition on the Merits—A Sound Industrial Policy for Antitrust Law*, 36 U. FLA. L. REV. 553, 567 (1984). Gerla's article posits that if several firms enter into a joint venture to develop a new product, then none of the firms have resources to develop it independently. The rule of reason may apply even though competition might be dampened. If the firms sign an ancillary agreement not to license the new process, the firms can claim that the restriction is necessary to entice the other firms to participate in the venture. In short, the firms are demonstrating that there are no other alternatives that will protect the members' incentive to join the venture, and this would likely be sufficient under the ancillary restraints doctrine. *Id.*

257. BLAIR & HARRISON, *supra* note 174, at 100.

258. *See supra* text accompanying notes 151–58.

259. BLAIR & HARRISON, *supra* note 174, at 101. Consider that if the procompetitive efficiencies can be achieved without exerting monopsony power, the use of the monopsony buying power should be eliminated because the potential benefits could be even greater without it. *Id.* at 98–99.

260. Piraino, *supra* note 143, at 1152.

procompetitive, (2) the anticompetitive agreement makes the procompetitive results possible, and (3) the anticompetitive agreement is no more restrictive than necessary."[261]

First, clubs could argue that the clubbing agreement is procompetitive because it enables more potential buyers to compete for the target company even if there was the potential for a higher price but for a restraint. In the TXU case, suppose that KKR would like to offer to buy TXU. Three private equity firms, including TPG also wish to compete but cannot due to lack of resources, high risk, or both. If these firms combine forces, there are now one or two potential buyers for TXU, which increases market competitiveness. This aspect of the doctrine, however, would seem more persuasive in an auction situation. TXU would struggle to argue that more buyers could have potentially competed because there was only one bidder.[262] This argument is more persuasive in deals like the Equity Office deal, where there were multiple bidders.[263] For clubs to win on this point, the focus must be on potential competitors, not actual competitors.

Second, the "anticompetitive" clubbing agreement must make the procompetitive results possible. Private equity clubs arguably create a new market, the mega-deal market. Many potential buyers could never afford to purchase certain target companies without joining with other firms in a club.[264] It is doubtful that many buyers could afford the financing or the risk of the $45-billion price required for the TXU deal; so there may never have been even one bid but for the KKR–TPG club.[265] Again, however, clubs such as KKR–TPG may have a difficult time arguing this point because of a lack of an auction.

Finally, clubs may argue that the agreement is no more restrictive than necessary. They must show that clubbing presents the only way to achieve the results: they could not buy without obtaining capital at a good rate and spreading risk. Although it may be easier to obtain the capital in a liquid market, the risk of one firm taking on a mega-deal is still tremendous. Even a mammoth organization like KKR would have trouble with it. Yet, with solutions such as equity bridges, it may be harder to argue that clubbing is the least restrictive method. In sum, the ancillary restraints doctrine may be an alternative way for clubs like the KKR–TPG club to pass antitrust muster, but the arguments seem difficult when there is no auction. The arguments become more persuasive if courts focus on who *could* compete, rather than who *does* compete.

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261. BLAIR & HARRISON, *supra* note 174, at 102.
262. *KKR, TPG-Led Consortium to Acquire TXU*, *supra* note 7.
263. *See supra* text accompanying note 238.
264. *See supra* Part III.B.
265. *See supra* text accompanying note 7.

VI. CONCLUSION

It is no surprise that private equity has been in the media as of late. Until recently, debt markets were increasingly favorable, allowing private equity firms to raise over $200 billion in 2006 alone.[266] Given the volume of money changing hands, some feel it is not surprising that firms like KKR have attracted the attention of regulators and shareholders alike.[267] Yet the private equity public-relations problem is nothing new.[268]

Some say the industry has outgrown the name private equity—Steve Pagliuca of Bain Capital prefers the term "alternative capital markets."[269] Perhaps because of this growth, private equity markets should move toward transparency. Although it would be difficult for the DOJ to prove anticompetitive behavior,[270] the recent inquiry should serve as a signal to private equity firms, such as KKR, to make changes.[271] In an effort to be more transparent, some of the largest firms have formed the Private Equity Council, which purports to lobby policymakers and help increase public understanding of the industry.[272] Increased transparency will bolster trust and confidence in the industry, and will help private equity continue to grow.

Many consider the American public markets a secure place to invest because of the regulations imposed on the markets, but there is something to be said for investment opportunities that can bring a higher return

266. Grace Wong, *Private Equity's PR problem*, CNNMONEY.COM, Feb. 6, 2007, http://money.cnn.com/2007/02/06/markets/pe_image/index.htm?postversion=2007020614. In late 2007, the credit crunch began to affect the private equity industry and financing has become more difficult to obtain. *See, e.g.*, Zarroli, *supra* note 218.

267. Wong, *supra* note 266. *But see* Slater, *supra* note 17 (arguing that the inquiry is really about irritated sellers because the DOJ is not engaging in the inquiry for window dressing and [Morgenstern] cannot imagine the DOJ officials saying: "'Gee, people are making a lot of money in private equity, so we need to make a splash in *The New York Times* about investigating them'" (formatting added) (quoting Saul Morgenstern, an antitrust litigator at the law firm Kaye Scholer LLP)).

268. John Gapper, *The Case for Barbarity in Private Equity*, FIN. TIMES (London), Oct. 16, 2006, at 19.

269. Brent Shearer, *Leading the M&A Pack: Private Equity's Part Is in Full Swing . . . But for How Much Longer?*, MERGERS & ACQUISITIONS, Nov. 2006, at 28, 30.

270. *See supra* Part V.A.2.

271. Interestingly, the United Kingdom views club deals differently. The Financial Services Authority does not find club deals to be anticompetitive because shareholders are not obligated to accept the bids that are offered and clubs offer many procompetitive justifications for clubbing. Regardless, a bad decision by the DOJ could create a ripple effect in the private equity community. Vaiana & Nurnberg, *supra* note 225, at 1.

272. Wong, *supra* note 266. The United Kingdom already has a lobbying group known as the British Private Equity and Venture Capitalist Association (BVCA). *See* BVCA Homepage, http://www.bvca.co.uk/ (last visited May 13, 2008).

because of the ability to do things that public markets restrict, such as taking short-term profit hits and making significant strategic decisions without the cumbersome shareholder approval process. If firms like KKR and TPG want to continue flourishing, they need to gain public confidence.[273] Perhaps implementing industry deal standards could provide a solution.[274] The Private Equity Council should implement some of the best practices and require these practices in future deals like the TXU deal so that the public is more aware and confident about the private equity market.

Several good practices would help lower the suspicion of collusive activities. Written consortium agreements executed at the outset, instead of oral agreements, will ensure that everyone is playing by the rules. Within the agreements, clubs should clearly spell out the reasons for club formation. Clubs should also make clear how sensitive information is to be handled and make sure to openly discuss issues with the seller. Moreover, private equity firms like KKR and TPG might want to consider alternatives to clubbing. Though clubs have become popular for a variety of reasons, the relationships among club participants have yet to be tested, and good reasons exists for avoiding becoming a "member of the club."[275]

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273. As an aside, Blackstone completed an IPO, which gives regular investors an opportunity to invest in this exclusive company. Adam Lashinsky, *Blackstone's IPO, Thick with Irony*, CNNMONEY.COM, Mar. 22, 2007, http://money.cnn.com/2007/03/22/magazines/fortune/pluggedin_lashinsky_blackstone.fortune/index.htm; *see also* David Weidner, *Blackstone Tacks on 13% Gain in Debut*, MARKETWATCH.COM, June 22, 2007, http://www.marketwatch.com/news/story/blackstones-ipo-opens-3645-share/story.aspx?guid=%7BEA17B8B5-6ED8-46A4-AAAF-7764615DFD09%7D.

274. Two commentators suggest the following guidelines for private equity funds to follow: (1) clubs should demonstrate legitimate business purposes, (2) clubs should adopt internal controls to limit or prohibit information sharing,(3) a fund should take heed in switching to a winning club if its club has lost an auction, (4) clubs should be formed as early as possible if funds know they cannot win on their own, (5) funds should try to find other ways to win without teaming up with the competition. Vaiana & Nurnberg, *supra* note 225, at 2.

275. Schwartzman, *supra* note 96, at 101. Because clubs involve sharing opportunities, members must agree on issues like corporate governance and exit strategies, among other details. Agreeing on terms can be difficult, as evidenced by the SunGard deal, which almost fell apart at the last minute because the seven group members had trouble agreeing on price. Andrew Ross Sorkin, *Do Too Many Cooks Spoil the Takeover Deal?*, N.Y. TIMES, Apr. 3, 2005, at 34. Recent literature suggests that clubs may not be as appealing as they first seem. *Id.* Institutional investors that pay hefty fees expect a large return. *Id.* As private equity funds engage in more and more club dealing, they lose their differentiation and offer little more than a big bank account. *Id.* Finding a hidden return in a $10 billion company is harder than looking to other types of investments. *Id.*

For example, equity bridges[276] may provide adequate financing, allowing firms to bid on their own, which may make for smoother deals.[277]

Although private equity is succeeding domestically, investment in foreign markets may be important to the continued success of firms like KKR and TPG. Until now, the best firms have earned returns as high as 25% a year, but these results may not be sustainable as debt markets tighten up.[278] Legitimizing private equity at home will facilitate worldwide opportunities. Currently, the reputation of private equity abroad is not ideal. In Germany, firms have been called "locusts," and in South Korea they are called "*moktui*," which means "eat and run."[279] Perhaps positive domestic changes will improve the worldwide perception of the industry. Private equity is still small by global standards, and there is room to grow.[280]

Emerging markets that afford opportunities include parts of Europe, Asia, and India.[281] Literature suggests that there is plentiful capital available for investment in Asia because "[t]he risk–reward calculus is such that the high growth, increasingly affluent, large economies of Asia, and the increasing number of attractive investment opportunities within those economies, outweigh the perceived risks and challenges of running an Asian buyout business."[282] By creating a more transparent industry with better standards, private equity could position itself to grow on a worldwide scale and to continue to bring in high returns. Whatever the outcome, the DOJ probe might actually spur changes for the better.

Private equity has become an integral part of our economy and has achieved tremendous growth in the last several years. But setbacks often

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276. Sorkin, *supra* note 102.

277. *Id.* The use of the equity bridges in future deals may spur private equity firms to be more competitive in bidding because the firms would not need to forge temporary alliances of convenience with rivals to mount large bids. *Id.*

278. Roane, *supra* note 12, at 50, 54. The compensation scheme for collecting fees seemed to work well when the industry was smaller, but as the industry grows, the scheme seems like overcharging especially when the fund invests in rudimentary debt instruments. Shearer, *supra* note 269, at 32.

279. Roane, *supra* note 12, at 52.

280. Kevin M. Schmidt, *Private Equity: Current M&A Topics*, *in* SEVENTH ANNUAL PRIVATE EQUITY FORUM 41, 76–78 (PLI Corp. Law & Practice Series No. 8449, 2006).

281. The ACG/Thomson Mid-Year 2006 DealMaker's Survey shows high confidence in M&A and ranks geographic regions with the greatest potential for private equity investments as follows: United States (44%), China (18%), India (9%), Western Europe (7%), and Eastern Europe (7%). ACG/Thomson Mid-Year 2006 DealMaker's Survey, June 20, 2006, http://www.rcbg.com/news/ACG_Thomson_DealMakers_2006_Survey.pdf. Although emerging markets present opportunities, there are numerous challenges involved in these high-risk investments—private equity firms must adapt to be successful. For a discussion of private equity's role in developing markets, see ROBERT E. LITAN ET AL., THE FUTURE OF DOMESTIC CAPITAL MARKETS IN DEVELOPING COUNTRIES 457–68 (2003).

282. Schmidt, *supra* note 280, at 82.

accompany growth, and this industry now faces calls to adapt to its ever-increasing size. If the DOJ attacks private equity clubs like the KKR–TPG club, the DOJ would be unlikely to succeed. Under the rule of reason, there are many positive factors that clubs can offer to counter-balance any negatives that come with clubbing, and many elements can be hard for plaintiffs to prove.

A case in February 2008 offers an example of the difficulties of proving an antitrust claim against a club. In that case, a district court in the Western District of Washington granted a motion to dismiss a claim against two funds that allegedly conspired to join bids to acquire a publicly traded company.[283] The court concluded that per se analysis did not apply[284] and found that the allegations could not stand under the rule of reason.[285] Key to the analysis was a broad definition of the market, in which the court found that the funds did not have sufficient power over the seller.[286] Although the decision may be appealed, it is a victory for private equity funds.[287] In the future, there may be more cases like this. The DOJ inquiry may be much ado about nothing, but it certainly raises some valid concerns and has spurred firms to take positive actions.

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283. *See* Pa. Ave. Funds v. Borey, No. C06-1737RAJ, 2008 U.S. Dist. LEXIS 13398, at *3–5, *22 (W.D. Wash. Feb. 21, 2008).

284. *Id.* at *15.

285. *Id.* at *19.

286. *Id.*

287. For further discussion of the case, see Petter Lattman, *Club Deal Gets Judge's Boost*, WALL ST. J., Feb. 25, 2008, at C3.