

This is not a case in which the territorial restraints were ancillary to a lawful business transaction. Such ancillary restraints are not illegal when reasonably necessary to protect the purchaser of the full enjoyment of the legitimate fruits of the contract. *Addyston Pipe & Steel*, 85 F. at 283. The Antitrust Division examines the substance, rather than the form, of the parties' agreement in evaluating its potential effect. When the restraints of trade are reasonably ancillary to the agreement's central pro-competitive purposes, then the Division will analyze the restraints under the rule-of-reason standard. Where the central purpose of the parties' agreement, however, is to unreasonably restrain competition by allocating territories and terminating competition among themselves and by preventing any significant entrant from competing, then the entire agreement will be treated as *per se* illegal. As Judge (later Mr. Chief Justice) Taft noted over 100 years ago, "[t]here is in such contracts no main lawful purpose, to subvert which partial restraint is permitted, and by which its reasonableness is measured, but the sole object is to restrain trade in order to avoid the competition which it has always been the policy of the common law to foster." *Id.*

That is the case, here, where the central purpose and effect of the defendants' agreement were to unreasonably restrain competition, by allocating the only two markets in which they compete, so that after swapping these markets, defendants would face no significant direct competitor. Five factors support this conclusion.

First, this was not a case where the underlying agreement created a distinctive product, and thereby increased competition in the alternative newsweekly industry generally, or in Cleveland or Los Angeles, specifically.¹ The defendants' restraints on competition were not essential for, or even beneficial to, the products, which in this case are alternative newsweeklies, to be made available in the first place. After all, before their market allocation agreement, defendants vigorously competed through their own alternative newsweeklies. As a direct result of the defendants' agreement to withdraw from each other's market, advertisers and readers were left with fewer meaningful options and the prospect of higher advertising rates.

Consequently, the defendants' agreement on its face did not promote enterprise and productivity at the time it was adopted.

Second, the clear intent and explicit design of the defendants' contractual provisions were to eliminate competition in these markets and prevent others from meaningfully entering. Village Voice Media agreed to shut down its Cleveland alternative newsweekly, solely on the condition that New Times shuts down its newsweekly in Los Angeles. The contracts' essentially identical "non-competition" clauses prevented each defendant from publishing an alternative newsweekly in the other defendant's market for at least 10 years. Each defendant also agreed not to solicit or attempt to induce any advertiser to advertise in a competing publication over the next decade. Defendants restrained each other from meaningfully using the closed papers' logos and prevented anyone else from using these valuable assets in connection with any current or future publication in the Los Angeles or Cleveland areas. Furthermore, each defendant agreed not to sell or otherwise make available the fixed assets associated with its closed publication to any of its former employees, consultants or independent contractors, who might seek to rejuvenate the closed alternative newsweekly, and restore competition in the marketplace.

Third, The anticompetitive restraints at issue cannot be said to be ancillary to the sale of assets, given that so few assets were actually transferred. None of the assets associated with the actual operations and goodwill of the defendants' two shuttered newsweeklies were sold or integrated into the other defendant's newsweekly. The assets defendants actually transferred (which were mainly the accounts receivable of the shuttered paper) were of little value, even by defendants' own calculations.

Fourth, the anticompetitive purpose of the defendants' agreements is evident from the defendants' documents, which confirm that they entered into this agreement to end their competitive war, and grant each another a monopoly in the respective markets. The defendants' documents are replete with evidence that shows—and the testimony of the defendants' former employees and current advertisers confirms—that the defendants' market allocation agreement will end all meaningful competition, and enable each remaining alternative newsweekly, as the "only game in town," to raise advertising rates by a significant, non-cost based, amount.

Fifth, the fact that defendants planned to, and in some cases did, implement such rate hikes after allocating markets on October 2, 2002, confirms that the defendants' agreement was formed for the purpose, and with the effect, of raising advertising rates.

II. Explanation of the Proposed Final Judgment

The proposed final judgment requires divestiture that will restore the editorial and advertising competition in alternative newsweeklies published and distributed in Cleveland, Ohio and Los Angeles, California. Within 30 calendar days after January 27, 2003, the date the complaint was filed, defendants must divest the assets used in the publication of New Times's alternative newsweekly, the New Times LA, and Village Voice Media's alternative newsweekly, the Cleveland Free Times, to an acquirer or acquirers that, in the United States' sole judgment, has the intent and capability (including the necessary managerial, operational, technical, and financial capability) of competing effectively in the alternative newsweekly business.² This relief has been tailored to ensure that the ordered divestitures restore the competition that has been eliminated as a result of the defendants' market allocation agreement and further prevent either defendant from exercising market power in the Cleveland or Los Angeles markets.

Given that defendants has closed the Cleveland Free Times and New Times LA in October 2002, a quick and effective remedy was necessary to reestablish competition. Consequently, defendants must use their best efforts to divest assets within 30 days. The proposed final judgment provides that the assets be divested in such a way as to satisfy the United States, in its sole discretion, that the acquirer can and will use the assets as part of a viable, ongoing business engaged in the publication of an alternative newsweekly in Cleveland, Ohio and Los Angeles, California. Until the ordered divestitures take place, defendants must

² The assets to be divested are defined and described in section II of the proposed final judgment as the "New Times LA Assets" and "Cleveland Free Times Assets." Defendants in essence must divest all assets that were formerly employed in the publication of the New Times LA and Cleveland Free Times alternative newsweeklies, including, but not limited to, all rights to the New Times LA, LA Reader, LA View and Cleveland Free Times names (including any derivations thereof); all rights to the New Times LA and Cleveland Free Times website; all rights to the print and electronic archives of New Times LA and Cleveland Free Times publications and articles on a non-exclusive basis; and all other tangible and intangible assets used in the publication of the New Times LA and Cleveland Free Times.

¹ See, e.g., *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1 (1979)(challenged agreement created distinctive product of access to vast musical repertoire).