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Thomas A. Piraino Jr.

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RECONCILING COMPETITION AND COOPERATION: A NEW ANTITRUST STANDARD FOR JOINT VENTURES

THOMAS A. PIRAINO, JR.*

People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.¹

Ford's Red Poling and Bob Stempel of GM and I walk into rooms arm-in-arm, hugging each other now We're in consortia; We have continual discussions on health care costs, on regulation, on trade matters, the three groups we set up a year and a half ago.²

I. THE NEED FOR A NEW ANTITRUST STANDARD

These observations of Adam Smith and Lee Iacocca highlight a central unresolved dilemma of American antitrust law Will this country's economic growth be enhanced more by encouraging rivals to cooperate or to compete? After more than a century of case law, the courts still cannot agree on how to reconcile the economic advantages of competition and cooperation.³

Traditionally, the courts have interpreted the Sherman Act⁴ as a mandate to protect the free market from agreements among competitors "in restraint of trade."⁵ Most courts have assumed

* Vice President—Law, Parker-Hannifin Corporation, Cleveland, Ohio. B.A., Allegheny College, 1971; J.D., Cornell Law School, 1974. The opinions expressed in this Article are the author's personal opinions and do not reflect the opinions of Parker-Hannifin Corporation.

1. ADAM SMITH, AN INQUIRY INTO THE NATURE AND CAUSES OF THE WEALTH OF NATIONS 144 (Edwin Cannan ed., Univ. of Chi. Press 1976).

2. *Iacocca: Lee's Parting Shots*, FORTUNE, Sept. 7, 1992, at 56, 57 (quoting Lee Iacocca, Chief Executive Officer, Chrysler Corporation).

3. Jonathan B. Baker, *Per Se Rules in the Antitrust Analysis of Horizontal Restraints*, 36 ANTITRUST BULL. 733, 735 (1991); see also Lawrence A. Sullivan, *The Viability of the Current Law on Horizontal Restraints*, 75 CAL. L. REV. 835, 841 (1987) (arguing that the courts have not yet resolved the problem of a restraint that confers both market power and efficiencies).

4. 15 U.S.C. §§ 1-7 (1988). The Sherman Act prohibits "[e]very contract, combination or conspiracy, in restraint of trade." *Id.* § 1.

5. See, e.g., *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679

that, under the antitrust laws, competition and cooperation are irreconcilable. When firms cooperate to achieve a common objective, competition among them, by definition, must be precluded. The courts thus have regarded competition as a value to be protected and cooperation (usually described pejoratively as "collusion") as an evil to be prevented.⁶ Under this view, cooperative arrangements among competitors have been treated harshly.⁷ Indeed, in the view of some antitrust commentators, collaboration among competitors is not unlike "the very trusts that the antitrust laws were enacted to prevent."⁸

During the last decade many American companies have concluded that they can succeed more effectively by cooperating

(1978) (noting the illegality of a ban on competitive bidding by a group of rival engineers); *United States v. Topco Assocs.* 405 U.S. 596 (1972) (holding territorial restrictions among a group of competing supermarkets illegal); *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951) (noting the illegality of territorial and price-fixing restrictions among the partners to a European joint venture).

6. See Paul T. Denis, *Market Power in Antitrust Merger Analysis: Refining the Collusion Hypothesis*, 60 ANTITRUST L.J. 829, 832 (1992); see also Thomas M. Jorde & David J. Teece, *Innovation, Cooperation and Antitrust*, 4 HIGH TECH. L.J. 1, 12 (1989) ("[I]n both the textbooks and in policy discussion among economists, cooperation among competitors is still primarily viewed as nefarious."). The Supreme Court set forth the traditional view against cooperation among competitors in *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1984):

Concerted activity deprives the marketplace of the independent centers of decisionmaking that competition assumes and demands. In any conspiracy, two or more entities that previously pursued their own interests separately are combining to act as one for their common benefit.

Id. at 768-69. In the merger area, the "collusion hypothesis" evolved as the traditional basis for analyzing business combinations. This approach assumes that firms have an anticompetitive purpose for mergers, that is, to facilitate collusion among the remaining firms in the market. See Denis, *supra*, at 829; Charles F. Rule & David L. Meyer, *Toward a Merger Policy That Maximizes Consumer Welfare: Enforcement by Careful Analysis, Not by the Numbers*, 35 ANTITRUST BULL. 251, 275 (1990). The Merger Guidelines issued by the United States Department of Justice and the Federal Trade Commission have adopted the collusion hypothesis. See *Merger Guidelines—1992*, 4 Trade Reg. Rep. (CCH) ¶ 13,104, § 2.1, at 20,573-6 (Apr. 7, 1992) [hereinafter *DOJ Merger Guidelines*] ("A merger may diminish competition by enabling firms selling in the relevant market more likely, more successfully, or more completely to engage in coordinated interaction [Coordinated interaction] includes tacit or express collusion").

7. The view has been that "no cooperation should be permitted, that it is best that we keep companies apart from one another." Jorde & Teece, *supra* note 6, at 18 & n.43 (quoting WILLIAM G. OUCHI, *THEORY Z* (1984)).

8. Baker, *supra* note 3, at 733.

rather than competing with their rivals. "Going it alone" is no longer an option for many American businesses.⁹ Intensified foreign competition, increased demands for new technologies, soaring capital and research and development costs, shortened product life cycles, and more stringent demands for quality and performance have all added to the risk of doing business.¹⁰ Many firms simply lack the capital, labor, or technology required to compete effectively in such an environment.¹¹ Their only alternative is to access such resources through cooperative efforts with their competitors.¹²

From basic industries such as automobiles and steel to high technology computer, electronic, and medical fields, American firms are forming strategic alliances with their competitors at an unprecedented rate. Indeed, the number of new strategic alliances in the United States has nearly doubled in each of the last ten years.¹³ In just a sixty-day period in mid-1993, the "Big Three" American automobile companies announced that they had won a joint patent for a manufacturing process which will replace steel with light weight material in automobiles;¹⁴ Time-

9. Jorde & Teece, *supra* note 6, at 33-34.

10. See *id.* at 5, 36; see also Stephen E. Almassy & E.B. Baatz, 455 *Electronics Execs Say Rugged Individualism Is Fading*, reprinted in ERNST & YOUNG, PROGRESSION OF AN INDUSTRY: ELECTRONICS 92: STRATEGIC ALLIANCE OUTLOOK (1992) (citing these elements as a primary reason for the growth of alliances between electronics companies).

11. Jorde & Teece, *supra* note 6, at 33-34; William J. Murphy, *Interfirm Cooperation in a Competitive Economic System*, 26 AM. BUS. L.J. 31, 31-32 (1988).

12. Jorde & Teece, *supra* note 6, at 34. The Cummins Engine Company and Komatsu Limited of Japan, for example, recently "joined the list of huge multinationals pooling their resources to manufacture existing products and develop new ones." Barnaby J. Feder, *Two Diesel Giants Set Alliance*, N.Y. TIMES, Feb. 17, 1993, at D1. The joint venture, which will manufacture diesel engines in Japan, "comes at a time when the pace of industrial cooperation is accelerating both domestically and across borders." *Id.* at D5. In commenting on the joint venture, Robert Aliber, Professor of International Economics and Finance at the University of Chicago's Graduate School of Business, stated, "I don't see any end to it." *Id.*

13. Jeremy Mann, *Making Global Alliances Work*, FORTUNE, Dec. 17, 1990, at 121, 126 ("Strategic alliances have become fundamental to doing business in the 1990's."). One author has described strategic alliances as "the competitive weapon of the 1990's." Jordan D. Lewis, *Competitive Alliances Redefine Companies*, MGMT. REV., Apr. 1991, at 14, 14.

14. Oscar Survis, *Big Three Win Joint Patent, Marking a First*, WALL ST. J., Apr. 13, 1993, at B1. The Big Three are now engaged in no less than 10 research and

Warner and U.S. West formed a joint venture to build an entertainment and communications network;¹⁵ AT&T entered into an alliance with several international telecommunications companies to provide a worldwide telephone system;¹⁶ and British Telecommunications and MCI countered by forming their own global joint venture.¹⁷

This trend toward strategic alliances "may even amount to a new chapter in the development of capitalism."¹⁸ During most of the twentieth century corporations have attempted to grow through acquisitions and internal expansion; in the current environment, however, American firms are finding it more profitable to enter new markets through strategic alliances with their competitors.¹⁹ By sharing critical assets and other resources, firms can reduce the costs and risks of developing new products or production processes. The joint research and development projects, purchasing alliances, and production joint ventures now being formed in several American industries amount to a uniquely American version of *Keiretsu*—groups of allied corporations that traditionally have dominated Japanese industry.²⁰

This emphasis on new cooperative forms of business organization is not limited to industrial corporations. The health care industry is on the threshold of a revolutionary change in organization. With a national health care bill in excess of \$800 billion a year, more than thirteen percent of the Gross Domestic Product, and with thirty-five to thirty-seven million Americans lacking health care coverage, a consensus is beginning to emerge on

development consortia. *Id.*

15. Mary Lu Carnevale et al., *U.S. West Move Puts Pressure on Its Rivals*, WALL ST. J., May 18, 1993, at B1.

16. *AT&T Plans to Establish Global Information System*, WALL ST. J., May 26, 1993, at B6.

17. John J. Keller & Mary Lu Carnevale, *MCI and BT Set a Counterstrike Against AT&T*, WALL ST. J., June 2, 1993, at A3.

18. Stephen K. Yoder & G. Pascal Zachary, *Digital Media Business Takes Form as a Battle of Complex Alliances*, WALL ST. J., July 14, 1993, at A1.

19. *Id.* As Time-Warner's Chief Executive, Gerald Levin, recently stated, "We decided to build the company not by the traditional macho American strategy of acquiring someone and controlling them." *Id.* at A4.

20. *Id.*

the need for health care reform.²¹ Changes in the means by which health care providers compete are likely to be the cornerstone of reform on both the federal and state level. Many reformers blame the current competitive environment for the inefficiencies in America's health care system. Some point out that competition "has led to a kind of medical arms race in which even small hospitals try to offer patients all the latest technology"²² Others note that the lack of competition among providers is to blame for the high cost of health care.²³ Because insurance companies cover most health care costs, consumers rarely make the effort to shop for health care services or to bargain with health care providers.²⁴ As a result, health care providers do not compete with each other on either price or quality.²⁵

The Clinton Administration's proposals for health care reform rely on a combination of competition and cooperation to reduce health care costs. The plan provides for the formation of large regional alliances which would buy health care insurance for individuals and small businesses.²⁶ With the bargaining power to extract price concessions from health care providers,²⁷ these health alliances would introduce competition into a system which traditionally has lacked it. At the same time, the Administration's plan would encourage greater cooperation among health care providers. In response to the demands of the health care purchasing alliances, hospitals and physicians are likely to

21. See *A Cure for Health Care*, *ECONOMIST*, Sept. 25, 1993, at 16 (unsigned editorial).

22. Edward Felsenthal, *New Rules Let Hospitals Start Joint Ventures*, *WALL ST. J.*, May 14, 1993, at B1, B5.

23. *Id.* (noting that the current "tenet of faith" is that more intense competition will reduce health care prices).

24. See Peter Passell, *Health Care's Fever: Not So High to Some*, *N.Y. TIMES*, May 16, 1993, § 4, at 3 (noting how consumers, because of insurance companies' reimbursement, are ill informed about health care costs).

25. *Id.* ("Sellers need not compete on quality because the consumers rarely understand what they're buying. Nor do they compete on price because insurance pays 90% of the bill so consumers treat health care as if it were free."); *A Cure for Health Care*, *supra* note 21, at 16.

26. See Robert Pear, *Clinton Offering Health Plan with Guarantee of Coverage and Curb on Private Spending*, *N.Y. TIMES*, Sept. 11, 1993, at A1, A9; Greg Steinmetz, *Clinton's Health Plans Are Likely to Step up the Switch to HMOs*, *WALL ST. J.*, May 18, 1993, at A1, A6.

27. Steinmetz, *supra* note 26, at A6.

form health maintenance organizations and other cooperative ventures that would provide more efficient health care services to consumers.²⁸ Such health care networks should be preferred by the purchasing alliances, because they permit the negotiation of a single contract providing for health care for all members of the alliance at a guaranteed price.²⁹

An antitrust model that posits all-out, unrestricted competition as the only acceptable mode of behavior disregards the economic advantages of the new cooperative forms of business organization which are now transforming American manufacturing, service, and health care industries. The courts must fashion a new antitrust approach which recognizes the economic effects of these new organizations. Such an approach should begin with a recognition that, in the joint venture context, competition and cooperation are not antithetical, but complementary, concepts.³⁰ A joint venture may allow its partners to achieve economic efficiencies that they could not have accomplished on their own. In the long run, such efficiencies may outweigh any restriction of competition caused by a joint venture. A joint venture among manufacturing firms for the development of a new product, for example, may eliminate competition among firms in the research and development phase but ultimately enhance competition when they begin to market the new product. An alliance among hospitals and physicians may reduce the health care alternatives available to consumers in a particular area but also

28. Indeed, in anticipation of health care reform, hospitals, doctors and insurance companies in several sections of the country already have begun to form health care networks that offer a full spectrum of care for a fixed price. See Robert Pear, *Health Industry Is Moving to Form Service Networks*, N.Y. TIMES, Aug. 21, 1993, at A1.

29. *Id.* at A8.

30. As Judge Easterbrook stated in *Polk Brothers, Inc. v. Forest City Enterprises*, 776 F.2d 185 (7th Cir. 1985):

Cooperation is the basis of productivity. It is necessary for people to cooperate in some respects before they may compete in others, and cooperation facilitates efficient production. The war of all against all is not a good model for 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.

Id. at 188; accord *Murphy*, *supra* note 11, at 33 ("Cooperative activity can enhance competition as well as diminish it.").

may permit those consumers to obtain higher quality care at a lower price.

Any effective antitrust approach to joint ventures must recognize the beneficial, as well as the anticompetitive, aspects of such arrangements. The courts' objective should be to insure neither pure competition nor complete cooperation but an appropriate blending of the two.³¹ In the most efficient markets, competition and cooperation coexist. When called upon to determine the legality of particular joint ventures, the courts should attempt to ensure that the forces of competition and cooperation are balanced properly.³²

In recent years some courts have developed new antitrust approaches to cooperative arrangements among competitors.

31. Such a balanced approach is consistent with the intent of the Sherman Act, 15 U.S.C. §§ 1-7 (1988). The statutory terms "restraint of trade" and "monopoly," which were included in § 1 and § 2 of the Act, derive from the common law, which had distinguished between power gained in the marketplace by legitimate means and power acquired through coercive tactics. In his comments during the congressional debates, Senator Sherman himself stated that the courts would have to "distinguish between lawful combinations in aid of production and unlawful combinations to prevent competition and in restraint of trade." 21 CONG. REC. 2456 (1890) (statement of Sen. Sherman).

In its early cases interpreting the Sherman Act, the Supreme Court recognized that Congress could not have intended to ban all cooperative activity but only that conduct which unreasonably restrains competition. *See, e.g., Standard Oil Co. v. United States*, 221 U.S. 1, 60, 66 (1911) (applying the "rule of reason" to determine whether a business combination constitutes an illegal restraint of trade). Firms, after all, must cooperate in certain ways in order to carry on any business at all. It would be absurd to construe the Sherman Act to prohibit ordinary and beneficial economic activity. Indeed, as Justice Brandeis pointed out in a 1917 case, the Act's prohibition against all restraints of trade could not be read literally, because "[e]very agreement concerning trade restrains" trade in some manner. *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 238 (1918). Justice Brandeis also implied that certain cooperative arrangements among competitors ultimately might promote competition: "The true test of legality is whether the restraint imposed is *such as merely regulates and perhaps thereby promotes competition* or whether it is such as may suppress or even destroy competition." *Id.* (emphasis added).

32. In debating the Sherman Act, one congressman described the need for balance: [T]here are two great forces working in human society in this country today, and they have been contending for the mastery on one side or the other for the last two generations. Those two great forces are competition and combination. They are correctives of each other, and both ought to exist. Both ought to be under restraint. Either of them, if allowed to be unrestrained, is destructive of the material interest of this country.

21 CONG. REC. 5956 (1890) (statement of Rep. Stewart).

These new approaches, however, have been largely piecemeal and contradictory and have failed to offer a unified method of analysis for joint ventures.³³ Their divergence has confused practitioners and business executives as to the proper antitrust standard for the analysis of cooperative arrangements. This confusion has deterred the formation of new joint ventures.³⁴ Such deterrence could have serious consequences for the American economy. Historically, advances in technology and productivity have generated growth in the United States.³⁵ Such growth could be threatened if the antitrust laws are interpreted to prevent firms from working with their competitors to develop improved means of producing, marketing, and delivering products and services.

Recent legislative attempts to clarify the antitrust standards for joint ventures have been just as unsuccessful. The federal laws passed during the last ten years deal with only a part of the problem, thereby perpetuating an inconsistent approach to

33. See *infra* notes 77-91 and accompanying text.

34. See Jorde & Teece, *supra* note 6, at 36 ("Current U.S. antitrust law needlessly inhibits strategic alliances designed to develop and commercialize new technology."); see also Panel Discussion, *Commentary: Antitrust and International Competitiveness in the 1990's*, 58 ANTITRUST L.J. 591, 603-07 (1989) (statement of panel participant U.S. Rep. Tom Campbell advocating change in antitrust laws for production joint ventures). Some commentators have argued, however, that the antitrust laws pose little, if any, deterrence to the formation of legitimate joint ventures. See, e.g., Joel B. Eisen, *Antitrust Reform for Joint Production Ventures*, 30 JURIMETRICS J. 253, 261 (1990) ("The antitrust laws are remarkably flexible in permitting joint activity. The antitrust laws are not a large barrier to consortia formation.").

35. See EDWARD F. DENNISON, *ACCOUNTING FOR UNITED STATES ECONOMIC GROWTH, 1929-1969*, at 131-37 (1974) (providing economic analysis of how advances in knowledge and output have fueled post-war economic growth); Thomas M. Jorde & David J. Teece, *Rule of Reason Analysis of Horizontal Arrangements: Agreements Designed to Advance Innovation and Commercialize Technology*, 61 ANTITRUST L.J. 579, 586 (1993) (discussing the link between technological change and economic growth); see also Louis Uchitelle, *Stanching the Loss of Good Jobs*, N.Y. TIMES, Jan. 31, 1993, § 3, at 1, 6 ("To generate jobs, the nation has traditionally relied on a dramatic new product, based on new American technology, that would be manufactured initially in American factories."); *The Outlook: Public Investment Offers No Magic*, WALL ST. J., Jan. 4, 1993, at A1 (stating that "productivity increases are made possible by technological discoveries"). During the last two decades, growth in productivity in the United States has lagged behind that of other industrial countries. See David E. Rosenbaum, *Taste of Harsh Medicine*, N.Y. TIMES, Feb. 18, 1993, at A1, A17.

the analysis of joint ventures. The Export Trading Company Act of 1982,³⁶ which grants an antitrust exemption to certain joint export activities, has a limited scope and does not even protect the joint manufacture of products for export.³⁷ The National Cooperative Research Act of 1984³⁸ was passed by Congress to encourage the formation of research and development joint ventures. The protection granted by this Act, however, is very limited. Although the Act exempts certain research and development ventures from treble damages, the parties to a venture still can be liable for regular damages.³⁹ The Act also does not extend to joint production and marketing or even to certain applied research.⁴⁰ The National Cooperative Production Amendments of 1993 extend the National Cooperative Research Act to certain production joint ventures.⁴¹ Many types of production ventures, however, would not be covered by the new law,⁴² and the law

36. Pub. L. No. 97-290, 96 Stat. 1233 (codified at 15 U.S.C. §§ 4001-4021 (1988) and scattered sections of 12 U.S.C.).

37. 15 U.S.C. §§ 4002, 4013 (1988). The Act applies to trading companies which are organized and operated principally for purposes of selling export goods or services. *Id.* § 4002.

38. Pub. L. No. 98-462, 98 Stat. 1815 (codified at 15 U.S.C. §§ 4301-4305 (1988)).

39. 15 U.S.C. § 4303 (1988).

40. Sara G. Zwart, *Innovate, Integrate, and Cooperate: Antitrust Changes and Challenges in the United States and the European Economic Community*, 1989 UTAH L. REV. 63, 89. The Act's distinction between "pure" research and its applications is artificial. In order to commercialize a product effectively, development engineers must receive feedback from the production and marketing stages. See Jorde & Teece, *supra* note 35, at 582, 589. Indeed, innovation in manufacturing processes may be just as important for the success of a new product as the design innovations conceived in the development stage. See Anthony L. Clapes, *Blinded by the Light: Antitrust Analysis of Computer Industry Alliances*, 61 ANTITRUST L.J., 899, 916 (1993).

41. 15 U.S.C.A. §§ 4301-4305 (West Supp. 1994). H.R. 1313 passed the House of Representatives on May 18, 1993. *House Passes Bill Easing Antitrust Law for Parties Involved in Joint Ventures*, 64 Antitrust & Trade Reg. Rep. (BNA) No. 1615, at 600 (May 20, 1993) [hereinafter *House Passes Bill*]. H.R. 1313 was approved by the Senate on May 28, 1993. *Official Actions: Congress*, 64 Antitrust & Trade Reg. Rep. (BNA) No. 1617, at 683 (June 3, 1993). The Bill was signed by President Clinton on June 10, 1993. See *Clinton Signs Bill Easing Antitrust Law for Parties in Joint Production Ventures*, 64 Antitrust & Trade Reg. Rep. (BNA) No. 1618, at 688:1 (June 10, 1993). The bill amended 15 U.S.C. §§ 4301-4305 (1988).

42. In order to be protected by the Act, a production joint venture must have its principal production facilities in the United States and the parties to the venture must be United States companies or must be incorporated in nations that treat United States companies fairly under their own antitrust laws governing production

would not protect any production joint ventures from single damage claims by third parties.⁴³

Instead of the piecemeal approach taken to date, the federal courts need to adopt a unified method of analyzing all cooperative ventures among competitors. Until the courts are able to devise a general theory that reconciles the advantages of competition and cooperation, American firms will continue to be deterred from entering into efficiency-enhancing joint ventures.

This Article proposes a unifying form of analysis for all cooperative arrangements among competitors. The proposed analysis is consistent with recent Supreme Court precedent and could be adopted by the federal courts without new legislation. The new approach described in this Article can be applied rather simply. The various types of cooperative arrangements can be arrayed along a continuum according to the degree to which they integrate their partners' operations. The amount of analysis necessary to determine the legality of a particular joint venture would depend upon its location on the continuum.

Such a continuum-based approach would conserve judicial resources and give better guidance to firms considering cooperative arrangements. The new approach would be particularly useful in the courts' analysis of the collectives likely to be formed by consumers, hospitals, and physicians in response to the Clinton Administration's health care reform program.

II. THE ECONOMIC CONSEQUENCES OF COOPERATION

Cooperative ventures among firms have the potential both to restrict competition and to enhance efficiency. Any effective antitrust approach to joint ventures should begin with an understanding of their pernicious as well as their beneficial aspects.

A. *Restriction of Competition*

An inevitable competitive loss occurs when parties who are rivals in a particular area suspend that rivalry in order to cooperate with each other. When rivals pool their resources in a

joint ventures. See *House Passes Bill*, *supra* note 41, at 600.

43. *Id.*

particular endeavor, they naturally will refrain from competing with each other within the scope of that endeavor. If the partners were in competition prior to the formation of the venture or, absent the venture, eventually would have competed with each other, the venture will eliminate competition between the parties that otherwise would have existed.⁴⁴ Thus joint ventures can limit the diversity of economic objectives that fosters innovation. At the research and development stage, for example, a joint venture deters the participating firms from pursuing parallel paths to develop a new technology.⁴⁵ Such a venture "conceivably could substitute a large and leisurely project for a number of smaller, more energetic ones."⁴⁶ In certain cases, firms' collaboration on research and development may result in lower total research spending in the relevant market.⁴⁷

At the downstream production and marketing stages, competitors' collaboration can have even more serious anticompetitive effects. Downstream ventures eliminate competition in the critical areas of pricing and output, which directly affect consumer welfare.⁴⁸ The production and marketing segments are also

44. As the Supreme Court stated in *United States v. Penn-Olin Chem. Corp.*, 378 U.S. 158 (1964), "If the parent companies are in competition, or might compete absent the joint venture, it may be assumed that neither will compete with the progeny in its line of commerce." *Id.* at 169; see also *Yamaha Motor Co. v. FTC*, 657 F.2d 971, 980 (8th Cir. 1981) (holding that a joint agreement between two corporations, one of which does not presently compete in the relevant market, might violate § 1 if the noncompetitor feasibly could enter the relevant market), *cert. denied*, 456 U.S. 915 (1982). But see Clapes, *supra* note 40, at 913 (arguing that in high technology industries, parent companies will continue to compete with their own research joint ventures because of the possibility that a venture's development efforts may fail).

45. Some commentators have argued that parallel research projects are not wasteful, but rather can hasten the pace of new discoveries. See, e.g., Joseph Kattan, *Antitrust Analysis of Technology Joint Ventures: Allocative Efficiency and the Rewards of Innovation*, 61 ANTITRUST L.J. 937, 944 (1993) (citing James Miller, *Research Joint Ventures, Antitrust and Industrial Innovation*, Remarks Before the Berlin Cartel Conference 6 (July 2, 1984)).

46. Murphy, *supra* note 11, at 46.

47. Sullivan, *supra* note 3, at 870. Moreover, if certain firms are excluded from such a joint venture, they may be competitively disadvantaged because they could not conduct research on the same scale as the members of the venture. LAWRENCE A. SULLIVAN, *HANDBOOK OF THE LAW OF ANTITRUST* 298-303 (1977). See *infra* notes 167-70 and accompanying text (discussing the anticompetitive effects of membership restrictions).

48. The Supreme Court traditionally has applied the per se rule to restraints on

likely to have fewer competitors than upstream research markets.⁴⁹ Thus partners' natural disinclination to compete with their own downstream joint ventures will have a greater adverse effect on competition in the relevant market.

In certain cases, restriction of competition may not simply be an inevitable result of a joint venture's formation. It may be the venture's *raison d'être*. Competitors may collaborate for pernicious as well as legitimate reasons. They may use joint ventures as a cloak to hide various anticompetitive schemes. In the early 1970's, for example, Kodak entered into a venture with two potential competitors, Sylvania and General Electric, to delay the development of improved flashcubes until Kodak began to make a matching camera.⁵⁰ The American automobile manufacturers formed a joint venture in the 1960's which the federal government successfully attacked as a conspiracy to delay the development of pollution control devices for automobiles.⁵¹ Firms should not escape antitrust liability simply by labeling such schemes joint ventures. Indeed, the Sherman Act was designed to prevent such cartel-like activity⁵²

Legitimate cooperative endeavors in one area of a particular market, in certain cases, may "spill over" and adversely affect competition in other areas.⁵³ For example, in the course of carrying out the limited objectives of a production joint venture, the partners may gain access to competitively sensitive information

pricing or output. See, e.g., *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459 (1986) (holding per se illegal a group refusal to supply desired customer service); *Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 356-57 (1982) (holding per se illegal maximum price fixing among competitors).

49. Kattan, *supra* note 45, at 953-54.

50. *Berkey Photo, Inc. v. Eastman Kodak Co.*, 603 F.2d 263, 302 (2d Cir. 1979), *cert. denied*, 444 U.S. 1093 (1980).

51. *United States v. Automobile Mfrs. Ass'n*, 1969 Trade Cas. (CCH) ¶ 72,907, at 87,456 (C.D. Cal. 1969).

52. Robin Carey, *The Sherman Act: What Did Congress Intend?*, 34 ANTITRUST BULL. 337, 352 (1989).

53. For example, in *United States v. Minnesota Mining & Manufacturing Co.*, 92 F Supp. 947 (D. Mass. 1950), *amended by* 96 F Supp. 356 (D. Mass. 1951), nine U.S. manufacturers of coated abrasives had formed a joint venture that dealt only in export sales. *Id.* at 951. Nevertheless, the court was concerned that "[t]he intimate association of the principal American producers in day-to-day manufacturing operations" might result in collusion by these competitors in the U.S. abrasives market. *Id.* at 963.

on prices, costs, customers, or marketing strategies. Such information gives partners the ability to coordinate pricing and output decisions in downstream marketing areas not covered by the venture.⁵⁴ Joint ventures also may include express restrictions on competition outside the bounds of the venture. Such "ancillary restraints" may extend the reach of a joint venture beyond its legitimate scope.⁵⁵ The parties to a research and development joint venture may agree not to compete against each other in the production or marketing of products developed by the venture, and participants in a production joint venture may agree on the prices to be charged for the output of the venture or on the customers or territories to which each participant can market such output.

B. Generation of Efficiencies

Cooperation among competitors does not result only in anticompetitive effects. By collaborating with their competitors, firms also can produce economic efficiencies which they could not achieve on their own. In certain cases, such efficiencies can be significant enough to outweigh the restriction of competition that results from a cooperative endeavor. Under such circumstances, a joint venture will produce a net economic gain. The critical task for the courts is to identify when such circumstances exist.

A cooperative arrangement among competitors is only capable of generating efficiencies when the parties have achieved a true integration of resources. No economic benefit is possible when

54. Such spillover effects can be eliminated by measures designed to insure that the parties do not obtain access to such information. See *Discussion of Joint Venture Hypothetical B*, 54 ANTITRUST L.J. 1197, 1208 (1985) [hereinafter *Hypothetical B*] (comments of A. Paul Victor). In approving a joint venture between General Motors and Toyota for the manufacture of a compact car in Fremont, California, the Federal Trade Commission restricted the types of information that could be exchanged by the parties. *In re General Motors Corp.*, 103 F.T.C. 374, 384 (1984); see also *United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 621 (W.D. Ky. 1985) (affirming a consent decree prohibiting parties from exchanging information on customers, terms or conditions of sale, or marketing plans). For a discussion of appropriate limitations on the exchange of information among joint venture partners, see *infra* notes 171-72.

55. See *Hypothetical B*, *supra* note 54, at 1204 (describing the rule of reason analysis by which restraints collateral to a joint venture typically are evaluated).

the parties' cooperation amounts to nothing more than a coordination of parallel activities. Partners' agreements, for example, merely to charge a particular price, produce a specified amount of product, or sell to a certain territory may enhance individual firms' profits, but they will not benefit consumers in any way. Indeed, such coordination is one of the essential features of a successful cartel.⁵⁶ In order to produce efficiencies, the partners to a joint venture must do more than simply coordinate their conduct; they must combine their resources and share the risks of the venture's success or failure. By virtue of such a combination, a joint venture becomes capable of producing efficiencies beyond the ability of any of its partners. Partners' contributions of complementary technologies to a research venture, for example, may allow the creation of an entirely new product. The parties' contribution of capital and other assets to a production joint venture may enable them to produce a product which no individual partner could have afforded to manufacture on its own.

Antitrust analysis, therefore, should be disposed more favorably toward integrated cooperative endeavors than unintegrated ones. Unintegrated efforts by competitors to coordinate their activities have anticompetitive effects only, and they can be deemed illegal after a minimal analysis. A truly integrated venture, however, has the potential to produce substantial efficiencies, and a court should weigh those efficiencies against the venture's anticompetitive effects before determining its legality.

The integration of resources that occurs in most modern strategic alliances is sufficient to create efficiencies similar to those that result from a merger. By virtue of their contributions to a joint venture, the partners are able to create a new entity with unique capabilities. These include reduction of risk, economies of scale, elimination of duplication, access to complementary resources and the enforcement of regulations necessary for the functioning of certain markets.⁵⁷

56. The profits of the members of the Organization of Petroleum Exporting Countries (OPEC), for example, depend upon the members' ability to coordinate each of their countries' crude oil production. See Floyd Norris, *Harking Back to the Days of Malaise*, N.Y. TIMES, Jan. 31, 1993, at F1.

57. See HERBERT HOVENKAMP, ECONOMICS AND FEDERAL ANTITRUST LAW 111-12

1. *Reduction of Risk*

Reduction of risk is one of the most significant efficiencies resulting from integrated joint ventures. Joint ventures allow small or undercapitalized firms to share with their competitors the costs of expensive research and development and new production facilities. Through a joint venture, such firms can participate in new markets which they could not have afforded to enter on their own. Nor are the risk-saving efficiencies of joint ventures limited to small firms. The costs associated with certain products are so high today that even America's largest companies can no longer afford to develop and produce such products on their own. Boeing, for example, recently entered into a joint venture with several European firms for the development of a new jumbo jet at a cost of more than \$10 billion. Both Boeing and Airbus (the European aerospace consortium) had considered building the new jet separately, but neither could raise the necessary capital on its own in the midst of a deep recession in the aerospace industry⁵⁸

The risk-sharing that occurs in a joint venture encourages firms to invest in innovative new processes and products. Firms are often deterred from risking their capital to develop a new technology out of fear that their competitors will be able to reverse engineer, at a much lower cost, any successful products which result from such technology. Integrated joint ventures eliminate the fear of such "free riding." The participants in a research and development venture can be assured that each partner will bear a fair share of the costs of developing a new product. If each partner is required to contribute its proportionate share, no participant will be able to copy the products of the joint venture and market them at a lower cost.⁵⁹ Thus, when

(1985); Carol Shapiro & Robert D. Willig, *On the Antitrust Treatment of Production Joint Ventures*, 4 J. ECON. PERSP. 113, 114 (1990). The Merger Guidelines of the U.S. Department of Justice recognize similar efficiencies for mergers. *DOJ Merger Guidelines*, *supra* note 6, at 20,573-11.

58. Jeff Cole, *Boeing and Two Members of Airbus Plan Jet Venture*, WALL ST. J., Jan. 5, 1993, at A3; Jeff Cole & Brian Coleman, *Boeing, Four Members of Airbus to Study Jointly Developing Jet*, WALL ST. J., Jan. 28, 1993, at A10.

59. See Kattan, *supra* note 45, at 953-54. In the absence of a joint venture, misappropriation of new technology is particularly likely, because intellectual property

several firms in the relevant market participate in a research and development venture, individual firms should feel more confident that their investments in new technologies will not be misappropriated by their competitors.

2. *Economies of Scale*

Joint ventures allow smaller firms to achieve the types of economies of scale usually available only to larger businesses. Such efficiencies ultimately may lead to lower prices for consumers. Small firms, for example, can pool their resources in joint purchasing organizations which give them the bargaining power to obtain quantity discounts and other concessions from large suppliers.⁶⁰ By forming production joint ventures, small businesses can achieve efficiencies from scales of manufacturing comparable to those of their larger competitors. At the marketing stage, strategic alliances permit local firms to engage in advertising and promotion on a national scale.⁶¹

3. *Elimination of Duplication*

The integration of partners' resources in a joint venture often eliminates wasteful redundancies. Competitors in high technology industries, for example, frequently pursue nearly identical paths for the development of a new product. By combining their research and development programs, they can avoid "shameful and needless duplication of effort."⁶² Joint ventures are capable of saving costs by combining competitors' duplicate facilities at any stage of the production process. Overlapping warehousing and purchasing functions, administrative services, production

laws in the United States provide only limited protection against copying by competitors. See Jorde & Teece, *supra* note 35, at 583.

60. In *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985), the Court concluded that the economies of scale resulting from a wholesale buying cooperative could reduce costs for the participants and eventually lead to lower prices for consumers. *Id.* at 295.

61. Kattan, *supra* note 45, at 939.

62. Thomas M. Jorde & David J. Teece, *Acceptable Cooperation Among Competitors in the Face of Growing International Competition*, 58 ANTITRUST L.J. 529, 538 n.28 (1989) (quoting Dwight B. Davis, *R&D Consortia*, HIGH TECH., Oct. 1985, at 42 (quoting William Norris, Chief Executive Officer, Control Data Corp.)).

facilities and sales organizations can all be eliminated through joint ventures which integrate competitors' previously separate operations. By integrating their operations, health care providers can reduce costs and improve their efficiency significantly. Doctors can eliminate overhead by sharing staff and billing systems. Hospitals can save costs by sharing specialized equipment and services such as data processing, accounting, and purchasing.⁶³

4. Access to Complementary Resources

In the modern global marketplace, firms have found it increasingly necessary to specialize within certain areas. Most firms do not have the resources to become experts in all of the technologies required of an effective global competitor. Many firms also lack sufficient capital to acquire all of the assets necessary to compete on a worldwide scale. In such a specialized marketplace, companies often must rely on their competitors to provide access to critical assets, technology, or areas of expertise. Joint ventures allow firms to access resources outside their areas of core competency⁶⁴ In such a way, technical expertise can be diffused throughout the relevant market. General Motors, for example, has been able to learn more efficient Japanese manufacturing techniques from a joint venture with Toyota for

63. See Sidney Marchasin, *In California, Merger Mania Afflicts Hospitals*, WALL ST. J., June 2, 1993, at A14; Rick Wartzman, *Health Care Proposals Based on Competition Are Viewed with Skepticism in Rural Areas*, WALL ST. J., Apr. 16, 1993, at A16.

64. Joint ventures allow firms to make complementary assets available to their competitors when a complete transfer of assets through a merger would not be feasible. Often a firm cannot sell an asset to a rival because it requires the asset in its current operations, but it can transfer the asset to a joint venture partner for a limited purpose. For example, E.I. DuPont de Nemours & Co. ("DuPont") requires its coatings technology for many of its current products. Phillips can utilize the technology in the production of compact disks. Because DuPont could not sell the technology to Phillips, the parties entered into a venture to utilize the technology jointly for producing compact disks. Edmund W. Kitch, *The Antitrust Economics of Joint Ventures*, 54 ANTITRUST L.J. 957, 965 (1985). Similarly, although hospitals cannot sell certain expensive diagnostic equipment (such as CAT-scanners or nuclear magnetic resonance imagers) to their competitors, they can share this equipment in a joint venture. Jonathan M. Joseph, Note, *Hospital Joint Ventures: Charting a Safe Course Through a Sea of Antitrust Regulations*, 13 AM. J.L. & MED. 621, 622 (1988).

the production of a new compact car in Fremont, California.⁶⁵ Indeed, General Motors currently uses such techniques as a central component of its multibillion dollar restructuring program.⁶⁶ For its own part, Toyota learned about the North American marketplace from General Motors, and it has used this knowledge in establishing its own production facility in Georgetown, Kentucky, to compete with the American automobile manufacturers.⁶⁷

Under certain circumstances, an asset made available through a joint venture may permit firms' entry into a market. The Associated Press, for example, is a type of joint venture that allows local newspapers access to the information required to compete with television, radio, and other mass media in the market for world news.⁶⁸ Similarly, multiple listing services allow brokers to obtain data on home sales necessary for them to compete in local real estate markets.⁶⁹

In certain cases a partner may contribute a critical competitive asset to a joint venture. Such joint ventures have a particularly beneficial effect. They take an essential asset from the monopoly control of a single firm and allow the asset to be shared among several firms in the relevant market. Such a joint venture may give a firm access to technology that bridges a critical gap necessary for the development of a new product. For

65. Paul Ingrassia & Joseph B. White, *Major Overhaul: Determined to Change, General Motors Is Said to Pick New Chairman*, WALL ST. J., Oct. 23, 1992, at A1, A4.

66. *Id.* "GM has struggled to achieve this goal for nearly a decade." *Id.* GM's ability to adopt Japanese manufacturing techniques will be critical to the success of its radical restructuring plan designed to reverse the over \$12 billion in losses incurred in 1990 and 1991. *Id.* Alumni of the GM-Toyota joint venture are being placed in key staff and operating jobs to oversee the restructuring. *Id.* at A4. In trying to adopt its Japanese partner's operating techniques, GM is following in the shoes of Chrysler, which has learned a new product development process from its joint ventures with Honda and Mitsubishi, and Ford, which has learned more efficient techniques for managing accounts payable from its own joint venture with Mazda. *Id.*, Jeremy Main, *How to Steal the Best Ideas Around*, FORTUNE, Oct. 19, 1992, at 102, 106.

67. See Paul C. Judge, *Toyota Plant Is Expected for Kentucky*, N.Y. TIMES, Nov. 27, 1990, at D4.

68. See *Associated Press v. United States*, 326 U.S. 1, 4 (1945).

69. See *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1355-57 (5th Cir. 1980).

example, until recently pharmaceutical companies were blocked from producing a "multi-valent" childhood vaccine which would be effective against several diseases because no single firm held patents to each of the necessary vaccines. The formation of a joint venture, however, gave each firm access to the necessary patents and enabled them to produce the new vaccine.⁷⁰

5. Regulation of Unique Markets

Some products and services could not exist without regulations concerning the manner in which they may be marketed. Joint ventures provide a vehicle by which all the participants in a market can coordinate the enforcement of such regulations. Such self-regulatory organizations are pro-competitive because they make unique products available to consumers. For example, in *Broadcast Music, Inc. v. CBS*,⁷¹ an association of musical composers had adopted rules concerning the conditions under which their copyrighted compositions could be licensed to third parties.⁷² The Supreme Court recognized that the musical compositions could not have been marketed in the absence of the venture's "integration of sales, monitoring and enforcement against unauthorized copyright use."⁷³ In collegiate and professional sports, leagues such as the NCAA, NFL, and NBA regulate team schedules, the eligibility of players, free agency, and

70. See Kattan, *supra* note 45, at 940 & n.18 (citing Request for Commission Approval of Proposed Joint Venture Between Pasteur Merieux Serums et Vaccins and Merck & Co., Inc. 2-6 (Federal Trade Commission, filed Oct. 10, 1991)). Apple Computer recently formed a joint venture called "General Magic Inc." with AT&T, Sony, Motorola, Phillips Electronics, and Matsushita for the development of a personal intelligent communicator, or "PIC." A PIC is a portable hand-held device that can act as a beeper, fax machine, cellular telephone, note taker, and personal computer. By making this technology available to Apple's competitors, the joint venture will hasten the creation of industry-wide standards that will allow each firm's devices to communicate effectively with each other. See G. Christian Hill & Ken Yamada, *Five Electronics Giants Hope General Magic Will Turn the Trick*, WALL ST. J., Feb. 8, 1993, at A1; see also *Electronics Giants to Work on New Device*, CLEVELAND PLAIN DEALER, Feb. 9, 1993, at G1. Apple's communications software is called "Telescript." Richard Shaffer, publisher of the *Computer Letter*, has stated, "If [General Magic] pulls this off, 'Telescript' will be the digital version of English." *Id.* at G7.

71. 441 U.S. 1 (1979).

72. *Id.* at 5.

73. *Id.* at 20.

revenue sharing. As the Court pointed out in *NCAA v. Board of Regents*,⁷⁴ such regulations "are essential if the product is to be available at all."⁷⁵ Licensing and ethical standards are necessary for the effective delivery of services by the legal, health, engineering, and accounting professions. Such standards could not be enforced in the absence of associations with authority over all the members of a particular profession. Similarly, in manufacturing industries, product safety codes would be ineffective without a venture among all the firms in the relevant market.⁷⁶

The cooperative arrangements being undertaken by American firms today thus have both beneficial and adverse competitive effects. Joint ventures among actual or potential competitors eliminate the type of rivalry that fosters price cutting and maximizes output in the short term. But at the same time, such ventures have the potential to enhance the productivity of their partners by reducing costs, encouraging risk taking and facilitating the production of new products and services. Over the long term, such efficiencies may lower prices and increase output more effectively than the rivalry which was eliminated as a consequence of the joint venture. The central challenge for the federal judiciary is to devise a means of determining when such beneficial effects outweigh the immediate anticompetitive impact of joint ventures.

74. 468 U.S. 85 (1984).

75. *Id.* at 101.

76. Such codes have not only contributed to public safety but have also made markets more competitive. The standardization of product quality tends to intensify price competition and lower barriers to entry. See Jack E. Brown, *Technology Joint Ventures to Set Standards or Define Interfaces*, 61 ANTITRUST L.J., 921, 922-23 (1993) (arguing that standardized products permit ready comparison, and that increased compatibility among products facilitates entry of new competitors into the market).

III. THE CURRENT JUDICIAL APPROACH TO COOPERATIVE ARRANGEMENTS

Many commentators, including this one,⁷⁷ have criticized the courts' inability to develop a unified theory for analyzing cooperative arrangements among competitors.⁷⁸ Indeed, the courts have adopted three different types of approaches to joint ventures. In a 1964 case, *United States v. Penn-Olin Chemical Co.*,⁷⁹ the Supreme Court used a merger-based approach to analyze a joint venture.⁸⁰ Such an approach requires an assessment of the market power of the parties to a cooperative arrangement.⁸¹

The *Penn-Olin* case is at odds with a series of cases in which, beginning in 1896, the Court applied a per se analysis to cooperative agreements among competitors. The Court refused in such cases to consider the market power of the defendants or any efficiency arguments advanced by them to justify the arrangement at issue.⁸²

77. See Thomas A. Pirano, Jr., *Beyond Per Se, Rule of Reason or Merger Analysis: A New Antitrust Standard for Joint Ventures*, 76 MINN. L. REV. 1 (1991).

78. *Id.* at 12-18.

79. 378 U.S. 158 (1964).

80. Two competitors in the sodium chlorate market, Pennsalt and Olin, had formed a joint venture for the manufacture and sale of sodium chlorate in the southeastern United States. *Id.* at 160. In analyzing the arrangement as a merger, the Court required a consideration of the specific market effects of the venture. *Id.* at 170, 176-77.

81. *Id.*

82. In *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897), the Court refused to consider whether a rate-fixing agreement among competing railroads would enhance the efficiency of cargo transfer and scheduling. *Id.* at 340-41. In *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951), overruled on other grounds, *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752 (1989), the Court held that territorial and price-fixing restraints among the partners to a European joint venture were per se illegal. *Id.* at 598. The Court summarily condemned, in *United States v. Sealy, Inc.*, 388 U.S. 350 (1967), territorial and price-fixing restraints among small bedding manufacturers. *Id.* at 357-58. In *Citizens Publishing Co. v. United States*, 394 U.S. 131 (1969), the Court found per se illegal a joint operating agreement between Arizona's two major newspapers that would have reduced the papers' operating costs. *Id.* at 135-36. The joint venture at issue in *United States v. Topco Associates*, 405 U.S. 596 (1972), was created by a group of small supermarkets attempting to market a private label food brand in competition with larger chain stores. *Id.* at 599. Despite the obvious efficiencies of the venture, the Court applied the per se rule to territorial restrictions which the defendants

In the late 1970's, the Supreme Court began to take a more permissive approach to cooperative arrangements among competitors. In 1979, in *Broadcast Music, Inc. v. CBS* ("BMP"),⁸³ the Court used the rule of reason to analyze the establishment, by an association of musical composers, of a uniform license fee for their copyrighted compositions.⁸⁴ The 1985 case of *Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*⁸⁵ also used the rule of reason to uphold the membership rules of a purchasing cooperative.⁸⁶ Unfortunately, however, the Court never explained in these cases exactly how the rule of reason analysis should be conducted and the circumstances in which it should apply.⁸⁷ Indeed, in several other recent cases, the Court ap-

argued were necessary for the effective marketing of the new brand. *Id.* at 608. Finally, in *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), the Court prohibited an engineering society from implementing a ban on competitive bidding that ostensibly was intended to promote the safety and quality of engineering on public projects. *Id.* at 698-99.

83. 441 U.S. 1 (1979).

84. The Court recognized that, because the licenses established an identical price for each of the copyrighted compositions, they constituted horizontal price fixing "in the literal sense." *Id.* at 8. The Court, however, concluded that "[j]oint ventures and other cooperative arrangements are also not usually unlawful, at least not as price-fixing schemes, where the agreement on price is necessary to market the product at all." *Id.* at 23.

85. 472 U.S. 284 (1985).

86. *Id.* at 298.

87. Indeed, the courts have never been able to determine what factors should be considered under the rule of reason and the relative weight that should be assigned to each factor. The classic formulation of the rule of reason, set forth in 1918 in *Chicago Board of Trade v. United States*, 246 U.S. 231 (1918), was open ended. Subsequent Supreme Court cases failed to refine the formula. In *Continental T.V., Inc. v. GTE Sylvania, Inc.*, 433 U.S. 36 (1977), for example, the Court cited the *Chicago Board of Trade* formulation without indicating the relevance or weight to be afforded any particular factor. *Id.* at 49 n.14. The courts have been split over whether market power must be considered in the rule of reason analysis of horizontal restraints. As the Eleventh Circuit has stated, "whether the court must weigh the market power of the antitrust defendant is a curiously confused and uncertain area of the law." *National Bancard Corp. v. VISA U.S.A., Inc.*, 779 F.2d 592, 603 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986). Because the relevant factors are so undefined, a traditional rule of reason approach is of little utility in the analysis of strategic alliances. Indeed, most judges and juries simply are not capable of making the economic decisions required by a full rule of reason analysis. *See Arizona v. Maricopa County Medical Soc'y*, 457 U.S. 332, 343 (1982) ("Judges often lack the expert understanding of industrial market structures and behavior to determine with any confidence a practice's effect on competition."). Economists themselves can argue

peared to revert to a per se approach to cooperative arrangements. In *Arizona v. Maricopa County Medical Society*,⁸⁸ the Court summarily prohibited a physicians' organization from establishing the maximum fees that its members could charge under an insurance plan. Similarly, in *FTC v. Indiana Federation of Dentists*,⁸⁹ the Court condemned, with little analysis, a dentist association's refusal to supply x-rays to insurance companies seeking to evaluate benefit claims.⁹⁰ Finally, in *NCAA v. Board of Regents*,⁹¹ the Court invalidated restrictions imposed by the NCAA on the frequency that its member colleges' sports teams could appear on television and the fees the colleges could receive from the networks.⁹²

When viewed on their face, these cases appear contradictory. The Court's refusal to articulate a general theory for analyzing cooperative arrangements among competitors has compounded the confusion among practitioners. A closer reading, however, indicates that the cases may be reconcilable. Indeed, one can argue legitimately that the Court implicitly was following a new approach to joint ventures in each of these cases. Several commentators and lower federal courts have concluded that the Court is moving toward a new synthesis for the analysis of all cooperative arrangements among competitors.⁹³

All of the recent Supreme Court cases dealing with cooperative arrangements among competitors can be reconciled rather simply by considering the degree to which the parties integrated

indefinitely over the single issue of what constitutes a proper product market in a rule of reason antitrust case. One commentator has concluded that the costs of such an analysis are not worth the effort. Frank H. Easterbrook, *Vertical Arrangements and the Rule of Reason*, 53 ANTITRUST L.J. 135, 153-54 (1984) ("[C]ourts are of limited utility in examining difficult economic problems [They are] ill-equipped and [ill-suited] for such decision-making [and cannot] analyze, interpret, and evaluate the myriad of competing interests and the endless data that would surely be brought to bear on such decisions") (quoting *Topco Assocs.*, 405 U.S. at 609-12).

88. 457 U.S. 332 (1982).

89. 476 U.S. 447 (1986).

90. *Id.* at 459.

91. 468 U.S. 85 (1984).

92. *Id.* at 120.

93. See, e.g., *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229 (D.C. Cir. 1986), cert. denied, 479 U.S. 1033 (1987); Sullivan, *supra* note 3, at 838.

their operations. In these cases the Court analyzed complete combinations of the parties' operations in a particular market, such as the sodium chlorate operations of Pennsalt and Olin in *Penn-Olin*,⁹⁴ in the same market-based manner as a merger. The Court used a different type of analysis, however, when the parties combined only a portion of their functions and remained free to compete with each other outside the limited bounds of their venture. In the case of such partial integrations, the Court concentrated on the parties' competitive purpose for the arrangement rather than on their market power. The Court was willing to allow horizontal restraints on competition that were related to partial integrations with a legitimate efficiency objective. Thus, in *BMI* the Court permitted the musical composers' price-fixing arrangement because it was an essential component of their targeted efforts to market their compositions on a collective basis. The Court pointed out that the composers were free to market their compositions outside the venture if they wished, and concluded that "[t]he blanket license, as we see it, is not a 'naked restrain[t] of trade with no purpose except stifling of competition' but rather accompanies the integration of sales, monitoring and enforcement against unauthorized copyright use."⁹⁵ Similarly, in *Northwest Stationers*, the cooperative's membership rules were exempted from a per se rule approach because they were necessary for the effectiveness of a limited venture designed to enhance the parties' purchasing efficiency.⁹⁶

On the other hand, the Court was willing to declare illegal any restrictions among competitors that could have no legitimate efficiency objective. The Court recognized that no efficiencies could be achieved when the parties had not integrated their resources in any manner. The physicians in *Maricopa*, for example, could not generate any real efficiencies because they had not

94. See *supra* notes 79-81 and accompanying text.

95. *BMI*, 441 U.S. at 20 (quoting *White Motor Co. v. United States*, 372 U.S. 253, 263 (1963)). Some commentators have argued, however, that the integration in *BMI* was minimal because the composers did not share risks or pool their capital. See, e.g., Kevin E. Grady, *A Framework for Antitrust Analysis of Health Care Joint Ventures*, 61 ANTITRUST L.J. 765, 774 (1993).

96. *Northwest Stationers*, 472 U.S. at 295, 298.

integrated their functions beyond those necessary to maintain a maximum fee schedule.⁹⁷ Similarly, the dentists in *Indiana Federation* had not combined their practices in any manner. They merely had promulgated a "work rule" forbidding the members of the association from submitting x-rays to dental insurers in conjunction with claim forms.⁹⁸ The Court also struck down horizontal competitive restrictions that were broader than required to accomplish the legitimate purpose of an integrated arrangement. Thus, the Court prohibited the NCAA's limitations on the number of games that could be televised and the amount which individual colleges could be paid for television rights because such restrictions went beyond what was necessary to preserve collegiate athletics.⁹⁹ In each of these cases, the Court appropriately prohibited horizontal restrictions on competition which were unrelated to the legitimate efficiency objectives of an integrated cooperative arrangement.

These recent cases indicate that the Supreme Court may have begun to look beyond the traditional merger, *per se*, and rule of reason standards to a new joint venture approach. The next Section describes a proposed approach which is compatible with this recent Supreme Court precedent.

IV A PROPOSED APPROACH

A. *The Continuum of Joint Venture Analysis*

The new approach proposed in this Article, like the analysis adopted implicitly in recent Supreme Court decisions, would turn on the degree of integration achieved by the parties in a joint venture. The outcome of the courts' analysis should depend

97. As the Court stated,

[The doctors' arrangements] are not analogous to partnerships or other joint arrangements in which persons who would otherwise be competitors pool their capital and share the risks of loss as well as the opportunities for profit [T]he fee agreements disclosed by the record are among independent competing entrepreneurs. They fit squarely into the horizontal price-fixing mold.

Maricopa, 457 U.S. at 356-57.

98. *Indiana Federation*, 476 U.S. at 451.

99. *NCAA*, 468 U.S. at 99-100.

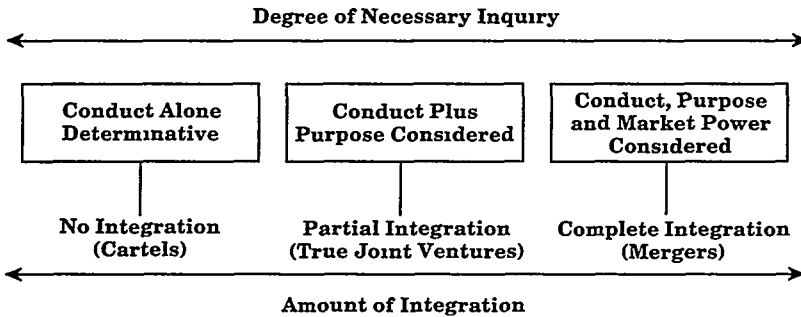
upon the extent to which the parties have combined their resources to accomplish a legitimate efficiency objective. Such integration reveals both the efficiencies and anticompetitive effects likely to be generated by a particular arrangement. Economies of scale, elimination of duplication, reduction of risk, access to complementary assets—none of these efficiencies can be accomplished unless the parties combine their resources in some manner. Firms cannot create new products or services, nor can they provide existing products or services more efficiently, if they do not achieve such integration.¹⁰⁰ At the same time, integration is also a proxy for anticompetitive effects. The greater the degree of integration present in a joint venture, the greater its potential to reduce competition. When the parties combine only a portion of their operations to accomplish a specific objective, (such as research and development, enhanced purchasing, or increased manufacturing efficiencies), not all competition among the parties will be eliminated. They remain free to continue to compete with each other outside the limited bounds of the venture. However, more integrated ventures that merge all of their partners' operations in the relevant market will eliminate all competition among the participants.

Integration, therefore, should be the critical factor in the courts' analysis of joint ventures. The courts can target their analysis most effectively by arraying the different types of cooperative arrangements along a continuum based upon the degree of integration achieved by the parties. The amount of analysis necessary to confirm the legality of a particular venture would depend upon its location on the continuum.

100. See *supra* notes 56-76 and accompanying text. The efficiencies resulting from integration are best illustrated by an example. If two competing hospitals simply agreed that Hospital "A" would provide one service, while Hospital "B" would provide another, the "venture" would do nothing more than restrict competition between the two hospitals. Such an arrangement lacks any integration of resources and should be treated harshly under the antitrust laws. However, if the hospitals agreed to a more complex arrangement under which they combined certain of their operations, they would have the ability to improve patient services. The hospitals, for example, could reduce their costs by merging their purchasing functions, or they could provide a broader range of care by sharing expensive diagnostic equipment. Antitrust law should be more hospitable toward such integrated cooperative arrangements than toward unintegrated ones.

Unintegrated joint ventures are organized in simple ways that make their competitive effects obvious. A court will have to engage in only a minimal inquiry into such arrangements. The courts need not consider their beneficial effects because they produce none. Such arrangements can be deemed illegal simply on the basis of the parties' conduct.

More integrated cooperative arrangements are structured in a more complex manner that obscures their competitive effects. The courts will have to engage in a more detailed balancing of such ventures' efficiencies and anticompetitive effects. For this reason, the amount of judicial analysis should increase along a spectrum of progressively more integrated joint ventures. Such a continuum can be visualized as follows:



Unintegrated cooperative arrangements would occupy the extreme left of the continuum and would require the least amount of inquiry. Because they do not combine the parties' operations in any manner, such arrangements are incapable of producing efficiencies. Their only effect is to restrict competition. The outcome of the analysis of unintegrated arrangements is obvious. Such arrangements are indistinguishable from cartels and should be deemed illegal on the basis of the parties' conduct alone.

Occupying the middle of the continuum would be true joint ventures in which the parties have partially integrated their resources to achieve a legitimate efficiency objective. This category would include most modern strategic alliances among manufacturing firms for the development or production of new products as well as most networks of health care consumers and providers. Partial integration makes such joint ventures unlike either a cartel or a merger. In contrast to a cartel, a true joint venture allows the parties to combine their resources to generate economic efficiencies which benefit consumers. And unlike a merger, a partially integrated joint venture achieves such efficiencies without completely eliminating competition between the parties.¹⁰¹

In light of these unique competitive characteristics, the courts should fashion a special approach for partially integrated joint ventures. Such an approach should center on a consideration of the parties' competitive purpose. If the parties propose to achieve an efficiency which they could not have reached on their

101. Thus it is appropriate for the courts and enforcement agencies to apply a more permissive approach to partial integrations than to complete integrations:

[J]oint ventures may pose less of a threat to competition than a merger involving the same parties. The antitrust enforcement agencies have permitted some joint ventures to proceed in circumstances in which they had or would have challenged a merger of the same parties. These decisions were grounded in the belief that restrictions on the scope and duration of joint ventures limit their anticompetitive effects. Unlike mergers, joint ventures may maintain the participants' status as independent competitors outside the framework of the collaborative effort.

PLI Conference Explores Ins and Outs of Federal Agencies' Antitrust Enforcement, 63 *Antitrust & Trade Reg. Rep. (BNA) No. 1591*, at 615, 623 (Nov. 19, 1992) [hereinafter *PLI Conference*] (comments of Joseph Kattan).

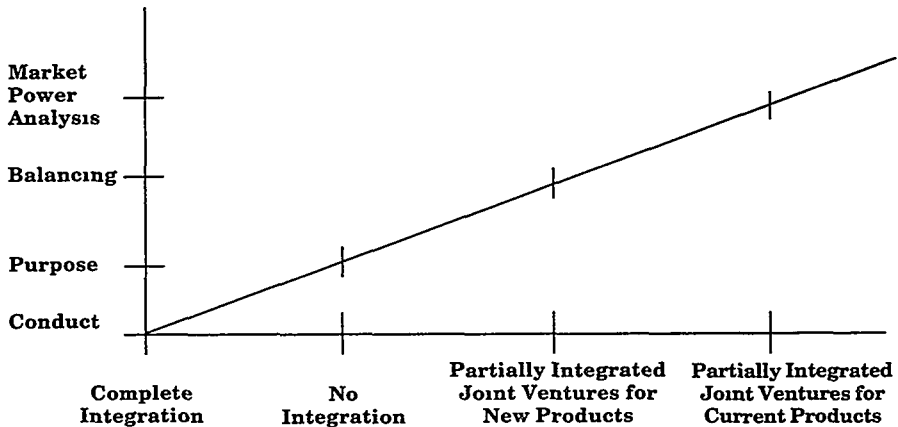
own, such as the creation of a new product or entry into a new market, courts should uphold the venture without any further balancing of its efficiencies and anticompetitive effects. Such arrangements clearly have a net beneficial effect. They promote long-term competitiveness by facilitating the parties' entry into new markets. Indeed, in the absence of such ventures, the parties would have been unable to participate in the new market. Such ventures also do not restrict rivalry in any manner, because they cover areas in which their partners otherwise could not have competed. If, however, the parties intend to use a joint venture to enhance their efficiency in markets in which they already operate, the venture will have certain adverse effects. Within the scope of the joint venture's operation, competition that formerly existed among the partners will be eliminated. In such a case the courts should balance such anticompetitive effects against the efficiencies that the venture is likely to generate.

An even fuller judicial inquiry is appropriate for completely integrated arrangements. When the parties contribute all of their operations in a particular market to a joint venture, all competition between them in that market will be eliminated. Indeed, completely integrated joint ventures have the same anticompetitive effects as mergers. Since these arrangements represent a complete fusion of their partners' operations, it is appropriate for the courts to consider the parties' market power as well as their competitive purpose. By determining the parties' share of the relevant market, a court can assess the potential anticompetitive effect of a fully integrated venture. It then can balance that adverse impact against the efficiencies that the venture is likely to generate.

Thus, the complete continuum of joint venture analysis would look as follows:

Type of Venture	No Integration	Partial Integration		Full Integration
		For New Markets	For Existing Markets	
Amount of Judicial Analysis	Conduct Only	Conduct + Purpose	Conduct + Purpose + Balancing	Conduct + Purpose + Balancing + Market Analysis

The increase in analysis required under the continuum for progressively more integrated joint ventures can be illustrated graphically:



B. *Placing Specific Ventures on the Continuum*

Courts should have little difficulty in determining where specific cooperative arrangements should lie on the continuum of joint venture analysis. At the unintegrated end of the continuum, the courts easily could identify naked arrangements with no legitimate efficiency objectives. Traditionally, the courts have been able to differentiate between legitimate and "sham" joint ventures.¹⁰² Naked horizontal agreements not to compete, worldwide divisions of territories effected through patent cross-licensing, joint sales agencies designed to fix competitors' prices, and agreements to forego competitive bidding have all been found per se illegal despite the defendants' arguments that they were engaged in a "joint venture."¹⁰³

At the other extreme of the joint venture continuum, complete integrations also could be identified easily. In order to achieve a complete integration, the parties must contribute all of their operations in the relevant market to the joint venture and cease all previous rivalry.

At the middle of the continuum, the distinction between unintegrated cartels and partially integrated joint ventures usually should be readily apparent. The easiest cases would be those in which the parties contribute assets such as technology, capital or facilities to a venture or when they jointly assume the financial risks of the venture. Under such circumstances, the parties clearly will have pooled their resources to establish a new competitive entity. In other cases, the parties may not con-

102. In *Timken Roller Bearing Co. v. United States*, 341 U.S. 593 (1951), for example, the aggregate of price fixing and territorial restraints between the parties made it clear that the parties' attempt "to suppress competition among themselves and others [could not] be justified by labeling the project a 'joint venture.'" *Id.* at 598.

103. See *National Soc'y of Professional Eng'rs v. United States*, 435 U.S. 679, 692-93 (1978) (holding the foregoing of competitive bidding per se illegal); *United States v. Dynaletric Co.*, 859 F.2d 1559, 1568-69 (11th Cir. 1988) (finding the foregoing of competitive bidding illegal), *cert. denied*, 490 U.S. 1006 (1989); *Virginia Excelsior Mills, Inc. v. Federal Trade Comm'n*, 256 F.2d 538, 540 (4th Cir. 1958) (finding a joint sales agency agreement per se illegal); *United States v. Capitol Serv. Inc.*, 568 F. Supp. 134, 153 (E.D. Wis. 1983) (deeming agreements not to compete among movie theaters per se illegal), *aff'd*, 756 F.2d 502 (7th Cir.), *cert. denied*, 474 U.S. 945 (1985); *United States v. National Lead Co.*, 63 F. Supp. 513, 527 (S.D.N.Y. 1945) (holding patent cross-licensing per se illegal).

tribute any assets to a venture or assume any identifiable risks, but simply may agree to coordinate their efforts in certain ways. A mere coordination of parallel activities, however, is not a form of integration sufficient to qualify for joint venture treatment. When competitors do nothing more than coordinate their behavior, there is no guarantee that their arrangement will generate efficiencies. Indeed, by coordinating their efforts, the parties may be attempting simply to insure the effectiveness of an anticompetitive scheme. The members of price-fixing cartels must agree on some minimum level of coordination and enforcement in order to be successful.¹⁰⁴ Thus, as the Department of Justice has recognized, a true joint venture must "involve some economic integration of the venture members' operations beyond the mere coordination of their pricing and output decisions."¹⁰⁵

In order to qualify as a partially integrated joint venture, a cooperative arrangement should include, at a minimum, the joining together of functions previously performed separately by the parties. Arrangements that combine their partners' purchasing, research, production, or marketing operations are capable of reducing costs, producing synergies, and achieving other efficiencies. Such arrangements, however, need not involve a significant contribution of assets or sharing of financial risk. The association of musical composers in *Broadcast Music, Inc. v. CBS*¹⁰⁶ was viewed as a legitimate joint venture simply because the individual copyright owners had joined their monitoring and enforcement efforts against unauthorized use of their musical compositions.¹⁰⁷ Similarly, under this standard, an agreement

104. Indeed, the courts often use such coordination and enforcement to infer the existence of a per se illegal price-fixing conspiracy. See *Albrecht v. Herald Co.*, 390 U.S. 145, 149-50 (1968) (inferring a price-fixing conspiracy when a newspaper hired outside agents to enforce maximum resale prices); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 45 (1960) (inferring an illegal conspiracy from wholesalers' policing and enforcement of suggested retail prices).

105. See *Antitrust Enforcement Guidelines for International Operations—1988*, 4 Trade Reg. Rep. (CCH) ¶ 13,109, at 20,621 (Apr. 14, 1992) (Illustrative Case 5).

106. 441 U.S. 1 (1979).

107. See *supra* notes 83-84 and accompanying text. In certain cases, however, the courts have been too permissive in their analysis of the minimum amount of integration necessary to classify a cooperative arrangement as a legitimate joint venture. For example, the court in *Polk Brothers, Inc. v. Forest City Enterprises*, 776 F.2d 185 (7th Cir. 1985), upheld a noncompetition covenant between two stores located

among physicians or hospitals to combine their purchasing, billing, or other administrative functions in order to reduce transaction costs should be analyzed as a joint venture rather than as a cartel.¹⁰⁸

V ANALYSIS AT THE MARGINS: NAKED ARRANGEMENTS AND MERGERS

Naked agreements to restrict competition and complete mergers of competitors' operations lie at opposite ends of the joint venture continuum. Naked agreements are the easiest cooperative arrangements to analyze because they generate no efficiencies. Completely integrated arrangements, on the other hand, require the most complex judicial inquiry because they produce substantial efficiencies while eliminating all competition among their partners.

A. *Unintegrated Arrangements*

The courts need not waste their resources in a detailed inquiry into the antitrust implications of cooperative arrangements unaccompanied by any form of integration. In the absence of integration, there are no economic efficiencies to balance against the restriction of competition caused by such arrangements. Naked restraints have no redeeming value; their only effect is to restrict competition. The outcome of the antitrust analysis of such restraints is obvious. The courts can confirm their illegality simply on the basis of the parties' conduct. Indeed, cartel-like conduct can be deemed illegal on its face under a traditional *per se* approach.¹⁰⁹ Naked price fixing, territorial allocations, and

next to each other in the same building. *Id.* at 195. There was not even a modicum of sharing by the stores' owners of assets, risks or operations. *Id.* at 187. It is difficult to distinguish such a "joint venture" from the garden variety naked agreement to allocate territories.

108. See Physician Agreements to Control Medical Prepayment Plans, 46 Fed. Reg. 48,982, 48,988 (1981).

109. As one commentator has pointed out:

[O]utside the context of some kind of joint venture activity, competitors have no legitimate reason for agreeing with one another about what course of action to follow and there is no need for courts to "set sail on a sea of doubt" about whether such agreements might create an un-

divisions of customers, for example, are so obviously anticompetitive and so devoid of efficiencies that they can be summarily prohibited.¹¹⁰ Agreements by buyers on the prices they will pay, without any integration of purchasing operations that will reduce the buyers' costs, create no cognizable efficiencies and should be deemed illegal without any further inquiry. Similarly, producers may organize for the simple purpose of resisting buyers' demands for discounts or other cost containment measures. Because such arrangements are not ancillary to any productive integration, they should be precluded after a minimal judicial inquiry.¹¹¹

B. Complete Integrations

At the other extreme of the joint venture continuum lie arrangements that are so integrated that they completely eliminate competition between the parties in the relevant market. Instead of contributing only a portion of their resources to a venture formed for a limited purpose, the parties may combine all of the resources which they use to operate in a particular market. A recent alliance between a domestic and a foreign airline provides a good example of such a fully integrated arrangement. Northwest Airlines and KLM Royal Dutch Airlines have asked the Department of Transportation to approve an agreement under which they would operate, in effect, as a single airline.¹¹² The two airlines would coordinate pricing, combine their sales forces, share information on seat availability, and share revenue.¹¹³ They might even fly under the same name.¹¹⁴ When competitors join their production and market-

reasonable restraint on competition.

George A. Hay, *Market Power in Antitrust*, 60 ANTITRUST L.J. 807, 810 (1992).

110. As the Supreme Court pointed out in *NCAA v. Board of Regents*, 468 U.S. 85 (1984), "[a]s a matter of law, the absence of proof of market power does not justify a naked restriction on price or output." *Id.* at 109.

111. See Mark J. Horoschak, *Antitrust Perspectives on Joint Ventures Among Health Care Providers*, Remarks Before Section of Antitrust Law, American Bar Ass'n, San Francisco, California 7-8, 13-14 (Aug. 11, 1992).

112. See Agis Salpukas, *Plan Set in Norwest KLM Link*, N.Y. TIMES, Sept. 10, 1992, at D1.

113. *Id.*

114. *Id.* at D17.

ing operations in such a complete manner, courts should analyze the arrangement like a merger.¹¹⁵ As in a merger, a single entity (the joint venture) takes the place of the former competitors in the relevant market. These transactions have the same competitive effect as an acquisition of one partner's business by the other, and they should be subject to the same antitrust standard: a market-based analysis to determine their specific impact on competition in the relevant market.

Fully integrated joint ventures, like mergers, may result in undue concentrations of market power which raise the risk of collusion among the remaining firms in the relevant market.¹¹⁶ Complete integrations among firms with substantial market shares also reduce overall competition in a market and limit the pressure on the remaining firms to improve and innovate.¹¹⁷ Thus, joint ventures which are just as integrated as mergers should not be permitted among firms with substantial market power. The market power tests adopted by the Department of Justice for mergers, which consider such factors as the parties'

115. Many courts have applied merger analysis to joint ventures that eliminate all commercial rivalry between their partners. In *Citizen Publishing Co. v. United States*, 394 U.S. 131 (1969), the combination of two newspapers' advertising and circulation functions precluded future competition. *Id.* at 134. In his concurring opinion, Justice Harlan noted that if the operating agreement between the two papers had provided that it would continue indefinitely "we would have had no choice but to treat the transaction in the same way we would treat a total corporate merger." *Id.* at 141 (Harlan, J., concurring). In *United States v. Paramount Pictures, Inc.*, 334 U.S. 131 (1948), competition was eliminated by a joint committee's pooling of the profits of formerly competitive movie theaters. *Id.* at 149. In *United States v. Ivaco, Inc.*, 704 F Supp. 1409 (W.D. Mich. 1989), the district court applied a merger analysis to a joint venture to which two manufacturers contributed their entire railroad track equipment business. *Id.* at 1414-30. The court distinguished its analysis from the more permissive approach that would have been appropriate if the companies merely had entered into a limited venture for research and development that left them free to compete in other areas of the railroad track equipment business. *Id.* at 1426.

116. See *DOJ Merger Guidelines*, *supra* note 6, ¶ 13,104, § 2.0, at 20,573-76.

117. Indeed, firms in concentrated domestic industries may lose the competitive edge necessary to be effective in export markets. A recent study by the Harvard Business School found that companies that are most successful in global competition "compete vigorously at home and pressure each other to improve and innovate." Richard Steuer, *Getting It Backward on Antitrust*, N.Y. TIMES, Dec. 6, 1992, at F13. Another study concluded that Japanese companies that had done well in export markets first "honed their teeth in fierce domestic competition." *Id.*

market shares, changes in industry concentration levels resulting from a merger, and ease of entry in the relevant market, are also appropriate for fully integrated joint ventures.¹¹⁸

In addition to concentrating market power, however, fully integrated ventures also generate substantial efficiencies. When the parties combine all of their operations in a particular market, waste and duplication of effort are eliminated, economies of scale are produced, and complementary assets are combined in ways that may produce entirely new products. If the parties to a joint venture do not have substantial market power, such efficiencies may outweigh the anticompetitive effects of the venture. Firms lacking market power cannot restrain competition unreasonably in the relevant market by combining their operations.¹¹⁹ Thus, the balance should shift in favor of the legality of complete integrations among firms with small market shares. The courts should establish a market share threshold for the legality of fully integrated joint ventures. Such joint ventures should be upheld when the parties' combined market shares are below a particular percentage.¹²⁰ Such a "safe harbor" approach would simplify market power analysis and give better guidance on the legality of particular joint ventures. Considerable precedent supports a market share threshold of twenty to twenty-five percent for "vertical" restraints between a supplier and its customers.¹²¹ Fully integrated joint ventures among competitors

118. See *DOJ Merger Guidelines*, *supra* note 6, ¶ 13,104, § 1, at 20,571; *id.* § 3, at 20,573-9; *id.* § 4, at 20,573-11.

119. Thomas Jorde, Remarks Before Section of Antitrust Law, American Bar Ass'n, San Francisco, California 2-3 (Aug. 11, 1992).

120. A few federal courts have held that joint ventures among firms that lack market power cannot be deemed illegal. See *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 229 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 923 (1987); see also *National Bancard Corp. v. VISA U.S.A., Inc.*, 779 F.2d 592, 604 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986).

121. The vertical restraint cases defining a market share threshold include *Assam Drug Co. v. Miller Brewing Co.*, 798 F.2d 311, 318 n.18 (8th Cir. 1986); *O.S.C. Corp. v. Apple Computer, Inc.*, 601 F. Supp. 1274, 1291 n.8 (C.D. Cal. 1985), *aff'd*, 792 F.2d 1464 (9th Cir. 1986); *Donald B. Rice Tire Co. v. Michelin Tire Corp.*, 483 F. Supp. 750, 761 (D. Md.), *aff'd*, 638 F.2d 15 (4th Cir.), *cert. denied*, 454 U.S. 864 (1981); see also *Ryco Mfg. Co. v. Eden Servs.*, 823 F.2d 1215, 1231-32 & n.14 (8th Cir. 1987) (discussing the applicable case law), *cert. denied*, 484 U.S. 1026 (1988); *Hand v. Central Transp., Inc.*, 779 F.2d 8, 11 (6th Cir. 1985) (agreeing with the concept of market share threshold); *Graphic Prods. Distribs. v. Itek Corp.*, 717 F.2d

who collectively do not possess more than such a share of the relevant market pose little, if any, competitive risk while producing substantial efficiencies, and therefore should be permitted.¹²²

The partners to fully integrated joint ventures may have market shares that are above the safe harbor threshold, but below the point at which substantial market power can be inferred. In such cases the courts should balance the efficiencies of the venture against its potential anticompetitive effects. The venture's adverse effects will be evident from the partners' collective market power. Relevant efficiencies will include factors such as cost savings, risk reduction, and synergies from the combination of complementary assets which will make the integrated entity a more effective long-term competitor than any of its partners could have been on their own.

VI. THE ANALYSIS OF PARTIALLY INTEGRATED JOINT VENTURES

Partially integrated cooperative arrangements are located at the midpoint of the continuum between naked agreements among competitors and complete mergers of competitors' operations. Partial integration is the defining characteristic of most strategic alliances which American firms undertake today. Such alliances are alternatives both to a "go it alone" and a merger strategy. Partial integrations allow firms to access their rivals' resources without losing their competitive independence. Such alliances are unlike naked agreements because the parties have an efficiency objective beyond the mere enhancement of their short-term profits. They are distinguished from mergers by the parties' ability to continue their separate operations outside the limited bounds of their venture. Because such partial integrations promote efficiency, they should not be precluded summarily in the manner of cartels. Because they permit continued competition between their partners, they should not be subject to a merger-based market analysis.

1560, 1568 & n.10 (11th Cir. 1983) (noting the applicable case law).

122. See *Jorde & Teece*, *supra* note 6, at 63.

The legality of partially integrated joint ventures should be determined on the basis of the parties' competitive purpose, rather than by a full market-based analysis. Market power analysis requires a fact-intensive assessment of the relevant product and geographic markets, each of the parties' shares of those markets, their competitors' market shares, and any increase in market concentration that will result from a transaction.¹²³ Such an approach is unnecessarily complicated for partial integrations. Indeed, market share analysis is unlikely to reveal the actual competitive effects of a partial integration. Such an analysis assumes that the parties to a transaction have completely fused their market power, as in a merger. However, such a fusion does not occur in most partial integrations, because the parties remain free to continue to compete with each other outside the limited bounds of the venture. IBM and Apple, for example, have formed an alliance to develop a new computer operating system, but their cooperation in this one area has not deterred them from continuing to compete aggressively in other computer markets.¹²⁴ General Motors and Toyota have contin-

123. See *DOJ Merger Guidelines*, *supra* note 6, ¶ 13,104, § 1, at 20,572 to 20,573-6 (defining product and geographic markets); see also PHILLIP AREEDA & DONALD F. TURNER, *ANTITRUST LAW* ¶ 907(a) (1978); Mary L. Azcuenaga, *Market Power as a Screen in Evaluating Horizontal Restraints*, 60 *ANTITRUST L.J.* 935, 940-41 (1992). These determinations are time consuming, and their outcome is difficult to predict. See Phillip Areeda, *The Changing Contours of the Per Se Rule*, 54 *ANTITRUST L.J.* 27, 28 (1985); see also Richard Markovits, *The American Antitrust Laws on the Centennial of the Sherman Act*, 38 *BUFF. L. REV.* 673, 752 (1990) (arguing that "market-oriented approaches are inevitably cost-ineffective"). The courts have not even been able to agree on a definition of what constitutes market power. In *United States v. E.I. DuPont de Nemours & Co.*, 351 U.S. 377 (1956), the Supreme Court stated that market power is the "power to control prices or exclude competition." *Id.* at 391 (emphasis added). Some lower courts, however, have adopted a test requiring that a firm "control prices and exclude competition." *White & White, Inc. v. American Hosp. Supply Corp.*, 723 F.2d 495, 507 (6th Cir. 1983) (quoting *Richter Concrete Corp. v. Hilltop Concrete Corp.*, 691 F.2d 818, 826 (6th Cir. 1982)) (emphasis added); *accord* *Borough of Lansdale v. Philadelphia Elec. Co.*, 692 F.2d 307, 311 (3rd Cir. 1982). The courts also have not succeeded in defining the market share threshold at which market power should be deemed to exist. See Hay, *supra* note 109, at 826.

124. Microsoft and Apple are currently in an alliance under which Microsoft supplies software for Apple's Macintosh computers. Stratford Sherman, *Are Strategic Alliances Working?*, *FORTUNE*, Sept. 21, 1992, at 78. This alliance has not prevented Apple from alleging in a lawsuit that Microsoft's "Windows" software was developed as a result of a theft of Apple's trade secrets. *Id.* As Steven Ballmer, Senior Vice-

ued to compete just as fiercely despite their joint venture for the production of a compact automobile.¹²⁵ If a merger-based approach had been used to analyze the GM-Toyota joint venture, this cooperative arrangement between the first and third largest automobile companies in the world certainly would have been prohibited. The joint venture demonstrates, however, that competition in the relevant market is not always substantially precluded by partial integrations among firms with large market shares.¹²⁶

President of Microsoft explained, "I feel fine about that. This is business. We're not allied with Apple out of love." *Id.*

Similarly, U.S. West's joint venture with Time-Warner for various telecommunications services in the United States has not prevented U.S. West from allying with other companies in foreign countries. As a U.S. West executive recently stated, "You very much have to accept that you are going to compete against a company in some places and cooperate in others." Yoder & Zachary, *supra* note 18, at A4.

125. GM has used knowledge acquired from the joint venture to hone its manufacturing techniques, and Toyota has used such knowledge to aid it in making automobiles at a new plant in Kentucky. *See supra* notes 66-67 and accompanying text. One commentator has explained:

Part of Japan's advantage is that it often does view the ventures as largely another form of competition. You shake hands with your right hand, while making a fist with your left. You learn everything you can from your Western partner while keeping as many of your own secrets to yourself. Then you strike out on your own, sometimes in the very market once controlled by your partner.

Bernard Wysocki, Jr., *Cross-Border Alliances Become Favorite Way to Crack New Markets*, WALL ST. J., Mar. 26, 1990, at A1.

126. Antitrust law, therefore, should be more hospitable to joint ventures than to mergers. Although the Supreme Court applied a merger-based analysis in *Penn-Olin*, it did acknowledge that joint ventures are not as anticompetitive as mergers:

This is not to say that the joint venture is controlled by the same criteria as the merger or conglomeration. The merger eliminates one of the participating corporations from the market while a joint venture creates a new competitive force therein.

United States v. Penn-Olin Chem. Corp., 378 U.S. 158, 170 (1964) (citations omitted).

A few lower federal courts have recognized that joint ventures have less of an anticompetitive effect than mergers. A joint venture between Alcan and Arco for the production of aluminum, for example, was approved as a less restrictive alternative to the complete merger of the aluminum production businesses of the two companies. *United States v. Alcan Aluminum Ltd.*, 1985-1 Trade Cas. (CCH) ¶ 66,427 (W.D. Ky. 1985). One commentator has concluded, however, that antitrust law treats joint ventures even more harshly than mergers. Professor Brodley argues that mergers usually are challenged only at their inception, while antitrust regulators can challenge joint ventures at any time while they remain in effect. Joseph F Brodley, *Antitrust*

A market power approach is also inappropriate for partial integrations because it is backward looking. Market power analysis measures the parties' historical shares of the relevant market, but it reveals nothing about new market conditions that may exist during and after the term of a joint venture.¹²⁷ Because partially integrated ventures promote long term efficiencies, their specific impact on the relevant market will not be determinable until some time in the future.¹²⁸ Indeed, some joint ventures may alter the contours of the market on their own, for they may make possible the introduction of entirely new products and services.¹²⁹

Unlike market power analysis, a purpose-based standard effectively reveals the future competitive effects which are likely to result from a partial integration. The parties' objectives for a venture should be a reliable indicator of the arrangement's prospective competitive effect.¹³⁰ Indeed, the parties' purpose for a

and Innovation Cooperation, J. ECON. PERSP., Summer-Fall 1990, at 97, 108; see also Kattan, *supra* note 45, at 947 (noting that joint ventures often pose less of a threat to competition than a merger).

127. See Hay, *supra* note 109, at 821.

128. *Discussion of Joint Venture Hypothetical A*, 54 ANTITRUST L.J. 1157, 1166 (1985) (comments of Don T. Hibner, Jr.).

129. One commentator has pointed out that market share evaluation may have little value in the case of research and development ventures because "R & D competition may involve the development of an entirely new product, in which case no competitor would have any market share." *PLI Conference*, *supra* note 101, at 624 (comments of Joseph Kattan).

130. Courts and commentators have recognized that the prospective market impact of horizontal restraints can often be inferred from the purpose of the parties to the restraints. See, e.g., *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 19 (1979) ("[O]ur inquiry must focus on whether the effect and, here because it tends to show effect the purpose of the practice are to threaten the proper operation of our predominantly free-market economy") (citation omitted); *Chicago Professional Sports, Ltd. v. National Basketball Ass'n*, 1991-1 Trade Cas. (CCH) ¶ 69,308, at 65,171 (N.D. Ill. 1991) ("Knowledge of intent may help the court to interpret facts and to predict consequences.") (citing *Chicago Bd. of Trade v. United States*, 246 U.S. 231, 239 (1918)); see also *New England Conference Finds More Reality than Rhetoric in Promises for Enforcement*, 59 Antitrust & Trade Reg. Rep. (BNA) No. 1490, at 663, 669 (Nov. 8, 1990) (comments of Eleanor Fox) ("Purpose is often a good key to determining probable effect."). Many antitrust commentators, however, believe that purpose is not a valid indicator of future competitive effects and that a market-based inquiry should be given greater priority. See, e.g., Robert Pitofsky, *A Framework for Antitrust Analysis of Joint Ventures*, 74 GEO. L.J. 1605, 1622 (1986) ("Purpose will be multifaceted and hard to determine.").

joint venture, by itself, often will reveal the ultimate competitive impact of the arrangement. If the parties intend to use a joint venture to produce a new product or enter a new market from which they were individually foreclosed, a court need not inquire further. The long-term beneficial effects of facilitating entry into a new market will outweigh any short-term restriction of competition that may occur. The analysis will be slightly more complicated for partial integrations whose purpose is to enhance the parties' efficiency in existing markets, yet it still should fall short of a full market power analysis. In such cases, in addition to the parties' purpose for a joint venture, the courts must weigh the specific efficiencies and anticompetitive effects likely to result from the cooperative arrangement. The net balance of efficiencies and anticompetitive effects, however, can be determined from easily identifiable factors such as the degree of integration achieved by the parties and the venture's relationship to the production and marketing stages of the product cycle.

A. *Joint Ventures Facilitating New Entry*

If a firm cannot participate in a market or produce a product other than through a joint venture, the venture will have an obvious beneficial effect. Such arrangements promote competition by permitting "the introduction of a new competitor that otherwise might never have come into being."¹³¹ Because these

131. Robert Pitofsky, *Joint Ventures Under the Antitrust Laws: Some Reflections on the Significance of Penn-Olin*, 82 HARV. L. REV. 1007, 1018 (1969). Indeed, one court has concluded that the distinguishing feature of a partially integrated joint venture is its "capability in terms of new productive capacity, new technology, a new product, or entry into a new market." *Compact v. Metropolitan Gov't*, 594 F Supp. 1567, 1574 (M.D. Tenn. 1984) (quoting Joseph F Brodley, *Joint Ventures and Antitrust Policy*, 95 HARV. L. REV. 1523, 1526 (1982)). Professor Brodley has defined a joint venture as

an integration between firms that involves a clear addition to productive capacity, as distinct from a mere union of existing operations. Thus, a joint venture is more than a marriage; it is a marriage that at the moment of consummation immediately produces a child. A convenient legal test is whether, as in *Broadcast Music*, the undertaking involves the creation of a new product or entry into a new market—or "a new competitive dimension."

Joseph F Brodley, *Analyzing Joint Ventures with Foreign Partners*, 53 ANTITRUST L.J. 73, 75 (1984) (quoting JAMES A. ATWOOD & KINGMAN BREWSTER, ANTITRUST

ventures cover areas in which their partners could not have competed in the absence of the venture, they also do not eliminate competition that otherwise would exist among their partners. The only effects of such arrangements are beneficial, and they should be upheld without any detailed balancing of efficiencies against anticompetitive effects.¹³² The courts' only inquiry need be whether the parties' purpose for the joint venture was to develop a new product or enter a new market from which they were individually foreclosed.

Under the continuum of joint venture analysis, many research and development ventures should qualify for a simple purpose-based determination of legality. Ventures that enable their partners to develop new products obviously benefit consumers, and further inquiry is unnecessary once a court has confirmed the parties' pro-competitive purpose. High technology research and development ventures such as the Semiconductor Research Corporation (a venture pursuing applied electronics research) or Sematech (an electronics consortium funded by private firms and the Department of Defense) should raise no antitrust issues because their purpose is to develop new electronics technologies which their partners could not develop on their own.¹³³ Simi-

AND AMERICAN BUSINESS ABROAD § 12.33 (2d ed. 1981), and citing *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 22-23 (1979)).

132. Certain Supreme Court decisions have recognized implicitly the legality of joint ventures that facilitate entry into new markets. In *Associated Press v. United States*, 326 U.S. 1 (1945), the Court did not question the legality of the venture itself because, according to one commentator, "few, if any, newspapers would have been sufficiently affluent to perform the news gathering services provided by the AP joint venture." Pitofsky, *supra* note 131, at 1057-58. In its per curiam decision following remand in *United States v. Penn-Olin Chemical Corp.*, 389 U.S. 308 (1967), *aff'g* 246 F. Supp. 917 (D. Del. 1965), the Supreme Court upheld the joint venture after the district court found that neither Pennsalt nor Olin was likely to have entered the sodium chlorate market in the Southeast in the absence of the joint venture. See *Penn-Olin*, 246 F. Supp. at 933. Similarly, the Court ruled in *Broadcast Music, Inc. v. CBS*, 441 U.S. 1 (1979), that the issuance of blanket licenses by the musical composers' association did not constitute a per se violation of antitrust laws because none of the composers could have marketed their music without the blanket license. *BMI*, 441 U.S. at 18-19. Finally, in *NCAA v. Board of Regents*, 468 U.S. 85 (1984), the Court did not challenge the legitimacy of the collegiate athletic organization itself because, in its absence, member colleges could not have participated effectively in amateur athletics. *Id.* at 101-02.

133. See *Jorde & Teece*, *supra* note 6, at 35.

larly, the current joint venture between IBM and Apple, aimed at challenging Microsoft in the development of a new generation of operating software for computers, has an obviously beneficial purpose and effect. The venture will permit the parties to combine the best characteristics of their current operating systems in order to produce an entirely different approach.¹³⁴ Certain production joint ventures also should be upheld after a similar truncated inquiry. Ventures that permit their partners to manufacture new products or expand capacity can only promote competition in the relevant market. Like research and development joint ventures for new products, capacity-enhancing production joint ventures increase the variety and quantity of products available to consumers. A recent joint venture between AT&T and NEC,¹³⁵ for example, clearly will have a beneficial effect in the computer industry. The venture will allow the parties to produce new types of computer chips by combining AT&T's computer aided design technology with NEC's technology for advanced logic chips.¹³⁶ In certain industries, manufacturing costs are so great that firms cannot afford to expand capacity other than through production joint ventures. New computer chip factories, which can cost up to \$500 million, are being constructed in the United States today only because of joint ventures among computer manufacturers.¹³⁷ Similarly, a joint venture among Boeing and several European aerospace manufacturers is making possible the production of a new jumbo jet.¹³⁸

In some cases, even downstream marketing joint ventures allow firms to enter new markets or produce new products. Indeed, certain unique products can be marketed only through a joint venture. A venture that allows the marketing of such a product cannot restrict competition because, in the absence of the venture, the relevant product would never have existed. In denying a *per se* approach in *BMI*, for example, the Supreme

134. The joint venture, called Taligent Inc., is ahead of schedule and plans to deliver its first operating system in 1994. See G. Pascal Zachary, *IBM-Apple Operating System, Taligent, Is Ahead of Schedule*, WALL ST. J., Jan. 12, 1993, at B12.

135. Wysocki, *supra* note 124, at A1.

136. *Id.*

137. Eisen, *supra* note 34, at 264.

138. See *supra* note 58 and accompanying text.

Court pointed out that the blanket license was a type of "different product" and that the composers' arrangement was "necessary to market the product at all."¹³⁹ Sports leagues also constitute a type of marketing joint venture necessary for the existence of a unique product. Neither collegiate nor professional athletics could operate without a league organization. Leagues regulate the various activities required to carry on a sport: the number of persons on a team, the rules of play, restrictions on player mobility, and revenue sharing. The Supreme Court recognized in the *NCAA* case that such league rules "are essential if the product is to be available at all."¹⁴⁰ Because they make possible the marketing of a unique product, amateur and professional sports leagues do not offend the antitrust laws.¹⁴¹ The only relevant antitrust issue for such leagues is whether their related restraints on competition are no broader than required to effect the legitimate interests of individual teams in maintaining the viability of the sport.¹⁴²

139. *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 22, 23 (1979).

140. *NCAA v. Board of Regents*, 468 U.S. 85, 101 (1984).

141. The Eighth Circuit, in *Mackey v. National Football League*, 543 F.2d 606 (8th Cir. 1976), *cert. denied*, 434 U.S. 801 (1977), concluded that "the NFL assumes some of the characteristics of a joint venture" and that "the unique nature of the business of professional football renders it inappropriate to mechanically apply per se illegality rules." *Id.* at 619. One commentator has pointed out that sports leagues have less of an anticompetitive potential than other types of joint ventures because the parties conduct no business activity independent of their joint enterprise; therefore, there is no risk of anticompetitive "spillover" effects outside the scope of the venture. See Gary R. Roberts, *The Antitrust Status of Sports Leagues Revisited*, 64 TUL. L. REV. 117, 129 (1989). Robert Bork has stated that "[s]ome activities can only be carried out jointly. Perhaps the leading example is league sports. When a league of professional lacrosse teams is formed, it would be pointless to declare their cooperation illegal on the ground that there are no other professional lacrosse teams." ROBERT H. BORK, *THE ANTITRUST PARADOX* 278 (1978).

142. The success of a sports league depends upon the maintenance of "competitive balance" among its various teams. *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462, 486 (E.D. Pa. 1972). In order to maintain such competitive balance, professional sports leagues must control not only the rules of the game but also player mobility and the financial capabilities of individual teams. If teams in large markets are able to become financially dominant and to attract the most competent players, the entire league will suffer from the resulting competitive imbalance. The courts still have not determined the specific types of restrictions on player movement and compensation that should be permitted to preserve competitive balance in professional sports. In *Mackey*, a court struck down the "Rozelle Rule," which required any team acquiring a free agent to compensate the

B. *Joint Ventures That Restrict Rivalry*

1. *The Need for a Balancing Approach*

Joint ventures which enable their partners to develop a new technology, produce a new product, expand capacity or market a unique item are so pro-competitive that they should be upheld without any inquiry beyond the parties' competitive purpose. Such ventures expand the total output of goods and services available to consumers. A more detailed balancing test is necessary, however, for joint ventures whose purpose is to enhance their partners' efficiencies in markets in which they are already competing. Joint ventures in existing markets restrict competition as well as enhance efficiency. Such ventures reduce the number of competitors in the market because the partners will refrain, in the natural course, from competing with their own affiliate.¹⁴³ The joint venture, in effect, will take the place of its partners within the scope of its operations. Whether or not the parties expressly agree not to compete with the joint venture, they usually will avoid competition that could harm their own affiliate.¹⁴⁴ For such ventures, a simple consideration of the parties' competitive purpose is not sufficient; in addition, the

player's original team with one or more other players. The court concluded that such a restrictive rule unduly deterred teams from bargaining with and signing free agents. *Mackey*, 543 F.2d at 620. However, the court also pointed out that certain reasonable restrictions on player mobility were necessary in view of the NFL's "strong and unique interest in maintaining competitive balance among its teams." *Id.* at 621. Restrictions such as a salary "cap" for each team, limitations on the players who may become "free agents," and rules governing the order in which professional teams may "draft" amateur players should be upheld as reasonable means of maintaining a competitive balance among all teams in the league. However, territorial restrictions on the ability of teams to move from one location to another have no bearing on competitive balance and should not be permitted. Such restraints simply insulate individual teams from potential commercial rivalry, "in essence allowing them to set monopoly prices to the detriment of the consuming public." *Los Angeles Memorial Coliseum Comm'n v. National Football League*, 726 F.2d 1381, 1395 (9th Cir.) (invalidating an NFL rule which prevented teams from moving into markets already served by another team), *cert. denied*, 469 U.S. 990 (1984).

143. A joint venture "reduces the parents' incentive for competition because whatever a parent might earn by making individual sales in the joint market is now offset by its lowered profit as a partner in the joint venture." Brodley, *supra* note 131, at 76.

144. *Id.*

courts must balance the "tradeoff between efficiency gains and the potential anticompetitive losses."¹⁴⁵

A balancing approach is appropriate not only when a joint venture restricts existing competition among its partners but also when it limits potential competition. Firms may form joint ventures for the purpose of enhancing their efficiency in a new market which one or more of the partners could have entered on their own. Such a venture forecloses the partners' individual entry into the relevant market. By virtue of the partners' participation in the joint venture, other competitors will no longer perceive them as potential entrants into the market. In making their decisions on pricing and output, the incumbent competitors will not feel constrained by the threat of individual entry by the joint venture partners.¹⁴⁶ Thus, the courts should balance the efficiencies and anticompetitive effects of joint ventures that cover areas in which their partners currently compete or, but for the joint venture, would have competed.

The balancing test for such joint ventures can be undertaken rather simply. The net balance of efficiencies and anticompetitive effects will be evident from extrinsic evidence. The degree of integration achieved in the venture will reveal the amount of efficiencies which the arrangement can generate. The potential adverse effects will be evident from the scope and duration of the venture and its relationship to the parties' downstream production and marketing operations.

145. Thomas L. Greaney & Jody L. Sindelar, *Physician-Sponsored Joint Ventures: An Antitrust Analysis of Preferred Provider Organizations*, 18 RUTGERS L.J. 513, 571 (1987). One commentator has characterized the Federal Trade Commission's analysis of the GM-Toyota joint venture as a balancing approach. See David A. Clanton, *Horizontal Agreements, the Rule of Reason and the General Motors-Toyota Joint Venture*, 30 WAYNE L. REV. 1239 (1984). Such an approach was appropriate for this partially integrated venture that covered an area, the production of compact cars, in which the two companies already competed.

146. The Supreme Court recognized in *United States v. Penn-Olin Chemical Corp.*, 378 U.S. 158 (1964) that such adverse consequences could result from a joint venture's elimination of potential competition. *Id.* at 173-74; see also *Yamaha Motor Co. v. FTC*, 657 F.2d 971 (8th Cir. 1981) (finding illegal a joint venture between a domestic outboard motor manufacturer and a foreign manufacturer that probably would have entered the U.S. market in the absence of the joint venture), *cert. denied*, 456 U.S. 915 (1982).

2. *Integration as a Proxy for Efficiency*

Antitrust practitioners and enforcement agencies have found it difficult to assess the merits of efficiency claims. Indeed, this difficulty has been one of the reasons for the courts' failure to adopt a balancing approach for partially integrated joint ventures.¹⁴⁷ By using integration as a proxy for efficiency, the courts can avoid this impediment to the adoption of a balancing analysis.

A cooperative arrangement must be at least partially integrated in order to qualify for a full balancing approach under the continuum of joint venture analysis.¹⁴⁸ A broad range of conduct, however, can be classified as a partial integration, ranging from mere agreements by competitors to pool their market power to substantial commitments by rivals to invest their resources in new enterprises. The specific degree of integration agreed to by the parties should be a reliable indicator of the potential efficiencies that can be achieved by the venture. As one commentator has pointed out, "the assumption that higher levels of integration are likely to be associated with more substantial efficiencies is a premise underlying all of antitrust."¹⁴⁹

The pro-competitive effects of a joint venture will be maximized when the parties integrate their resources to create a new competitive entity with capabilities beyond those of the individual partners. The amount of capital, technology, or other assets contributed to a strategic alliance demonstrates the extent of the

147. As certain commentators have pointed out, "efficiencies are easy to allege, hard to prove, and even harder to balance." Rule & Meyer, *supra* note 6, at 284 (footnote omitted). The Department of Justice has stated that it is difficult to prove the extent of the efficiencies likely to result from a merger. See *DOJ Merger Guidelines*, *supra* note 6, at 20,574; see also Azcuenaga, *supra* note 123, at 941 (noting that the identification and measurement of efficiencies is expensive and inexact). Professor Areeda has concluded that "[t]he coming battle will be how to assess efficiency claims." Phillip Areeda, *A Second Century of the Rule of Reason*, 59 ANTI-TRUST L.J. 143, 148-49 (1990).

148. Under the continuum, unintegrated arrangements would be precluded on their face, while fully integrated ventures would be analyzed under a merger-based market power approach. See *supra* notes 109-22 and accompanying text.

149. Pitofsky, *supra* note 130, at 1623. But see Greaney & Sindelar, *supra* note 145, at 523-24 n.37 (arguing that greater integration does not always lead to increased efficiency).

parties' commitment to achieve efficiencies through the joint venture that they could not have achieved on their own. Research and development joint ventures, for example, can achieve technical breakthroughs when partners are willing to assign to the venture all of their rights to relevant technology. Production joint ventures are most successful when the partners contribute a significant amount of capital to construct efficient new facilities. Conversely, when partners contribute few resources to joint ventures or assume little of the risk of a venture's success or failure, they are more likely to be acting for their own competitive benefit than to enhance economic efficiency. For example, an agreement under which firms agree to coordinate their buying decisions may enhance the profitability of the participants. However, if the parties do not share warehousing, ordering services, or means of transportation, inventory may be no more readily available to customers than if the parties had continued to purchase supplies separately.¹⁵⁰ Similarly, unintegrated marketing joint ventures do little more than enhance the parties' ability to coordinate their pricing decisions and raise their profit margins. Without a combination of their partners' distribution networks, marketing alliances cannot offer customers a broader product line or enhanced delivery or point-of-sale services.¹⁵¹

150. In denying a per se approach in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985), the Supreme Court pointed out that the integrated purchasing cooperative at issue allowed "participating retailers to achieve economies of scale in purchasing and warehousing that would otherwise be unavailable to them." *Id.* at 286-87.

151. Four foreign airlines, for example, are attempting to join with airlines in the United States to create "seamless international travel," which is the appearance, from a traveler's perspective, that he or she is traveling on a single airline from domestic to foreign destinations. Agis Salpukas, *The Big Foreign Push to Buy into U.S. Airlines*, N.Y. TIMES, Oct. 11, 1992, at F10. A rather complex integration of operations between domestic and foreign carriers is necessary to create such an appearance. Thus, under these arrangements, the airlines will coordinate route planning, ticket pricing, and maintenance, and will share the same identification numbers in computer reservation systems. *Id.*

3. *The Proxies for Anticompetitive Effects*

All joint ventures among current or potential rivals restrict competition to some degree.¹⁵² Under the balancing portion of the continuum, the courts should be able to assess the specific extent of such restriction from the duration and scope of a joint venture and its relationship to the marketing phase of its partners' operations.

The primary purpose of the Sherman Act is to prevent conspiracies among competitors that raise prices or restrict output.¹⁵³ The potential for such conspiracies "grows as a company moves closer to the marketplace."¹⁵⁴ Thus, the potential anti-competitive effects of strategic alliances can be judged according to their distance from the production and marketing stage. Joint ventures designed for research and development, joint purchasing, and other "inputs" into the production process have less of an anticompetitive potential than downstream production or marketing ventures.¹⁵⁵

152. See *supra* notes 44-54 and accompanying text.

153. See BORK, *supra* note 141, at 17, 20-21; Alan Fisher et al., *Price Effects of Horizontal Mergers*, 77 CAL. L. REV. 777, 785-86 (1989). The Supreme Court concluded in *BMI* that a court's principal inquiry under § 1 of the Sherman Act should be whether the restraint at issue "facially appears to be one that would always or almost always tend to restrict competition and decrease output." *Broadcast Music, Inc. v. CBS*, 441 U.S. 1, 19-20 (1979).

154. Eisen, *supra* note 34, at 263.

155. Clanton, *supra* note 145, at 1243 ("The risk of collusion is greatest in output-oriented ventures designed to jointly produce or distribute a product or service."); see also Grady, *supra* note 95, at 770 ("an 'input' venture raises little risk of anti-trust liability"); Kattan, *supra* note 45, at 946 ("Any joint venture that would restrict the independent decision-making of its participants with respect to price or output raises at least some of the competitive concerns that would be raised by a merger of the participants."); Sullivan, *supra* note 3, at 873 ("When the venture starts making hardware and moving merchandise, it enters those parts of the economy where the nation has trusted competition most and been served by it best."). Research and development joint ventures have been described as "pre-competitive" arrangements because they do not affect downstream competition among their partners. See Christopher Jensen, *Big 3 Work Together On Research*, CLEVELAND PLAIN DEALER, Feb. 28, 1993, at E1. In commenting on the research consortia among the Big Three automobile companies, which cover areas such as vehicle emissions, automobile safety features, and the development of an electric car, John P. McTague, Ford's Vice-President of Technical Affairs, stated, "The curious thing is that the three of us working together frees up resources for competitive issues. It makes us better able to compete with each other. That is the net result." *Id.*

The anticompetitive effects of joint ventures also depend upon their scope and duration. Strategic alliances which last for only a short period of time or cover a small portion of their partners' operations have a minimal anticompetitive potential. Ventures of such small scope give the parties a broad latitude to continue to compete with each other. As long as production joint ventures do not extend into the marketing phase, the partners will retain their incentive to compete with each other on pricing.¹⁵⁶ If the venture covers only one part of a broad product line, the parties may even use knowledge gained from the joint venture to compete more aggressively in other lines.¹⁵⁷ Joint ventures of short duration have a minimal anticompetitive effect because their partners are likely to be acutely aware that their self-interest lies in maintaining their ability to compete effectively after the venture terminates. The partners in such ventures tend to be concerned not with limiting competition among themselves but with securing a reasonable return on their investment by making the venture as efficient as possible.¹⁵⁸ If, on the other hand, a joint venture extends for an unlimited period, the partners will share a long-term mutuality of interests. They are likely to be less concerned about competing with each other and more inclined to consider explicit or tacit limitations on their competition.

4. *Applying the Balancing Approach to Specific Joint Ventures*

The use of proxies for both efficiencies and anticompetitive effects will simplify the courts' balancing approach to joint ventures which restrict rivalry among their partners. In most cases, the outcome of the balancing analysis will be readily apparent from the degree of integration achieved by the parties, the scope

156. If the partners purchase products from the joint venture for resale to their customers, they also will have an incentive to operate the production joint venture as efficiently as possible in order to insure the lowest possible supply price. See *Hypothetical B*, *supra* note 54, at 1202 (comments of James F. Rill).

157. Indeed, GM has used its joint venture with Toyota to learn Japanese manufacturing techniques that will make it a more efficient competitor against its domestic and foreign rivals. See *supra* notes 66-67 and accompanying text.

158. See *Hypothetical B*, *supra* note 54, at 1206-07 (comments of A. Paul Victor).

and duration of the venture, and its downstream or upstream nature.

Well integrated, upstream ventures of limited scope and duration almost always should be upheld under the balancing test. Such alliances have few anticompetitive effects and generate significant efficiencies. For example, a research and development joint venture to which the parties contribute substantial financial and technical resources is likely to lead to the production and marketing of a new product. The venture may limit the number and variety of competing technical paths taken to develop the product, but it will not prevent the parties from competing at the production and marketing stages. With such a clear beneficial effect and limited adverse impact, a well-integrated research and development venture should not be deemed illegal under the antitrust laws.

If a production joint venture is well-integrated and of limited scope and duration, it, too, should survive the balancing test rather easily. Such ventures usually result in significant efficiencies and have only limited anticompetitive effects. The General Motors-Toyota joint venture, for example, only covers the production of a single small car model. Because it permits the parties to continue to compete in the manufacture and sale of all other automobiles, it does not unduly limit competition in the domestic automobile market. At the same time, the substantial integration achieved in the venture has allowed personnel of General Motors and Toyota to work closely together to develop more efficient methods of manufacturing a small car. In upholding the venture, the Federal Trade Commission recognized that the adverse competitive impact of an arrangement of such narrow scope would be outweighed by its efficiency enhancing potential.¹⁵⁹

Some upstream joint ventures are so far removed from the production and marketing stages that they are incapable of causing significant anticompetitive effects. Thus they can be up-

159. See J. Fred Weston & Stanley I. Ornstein, *Efficiency Considerations in Joint Ventures*, 53 ANTITRUST L.J. 85, 91 (1984); *Hypothetical B*, *supra* note 54, at 1198 (comments of David Clanton); Lynn E. Eccleston, Note, *Antitrust Implications of a Joint Venture: Is an Efficiencies Justification Justifiable?*, 31 WAYNE L. REV. 1219, 1219-20 (1985).

held even in cases in which they are not substantially integrated. Purchasing cooperatives, for example, are not likely to increase the price or limit the availability of consumer end products. Indeed, if they affect the production and marketing stages at all, they are more likely to lower prices and increase output by reducing purchasers' costs. Buying cooperatives with no more integration than a combining of their members' purchasing operations therefore should be upheld in most cases.

On the other hand, downstream marketing joint ventures that are not substantially integrated usually should be precluded under a balancing approach. Such ventures limit competition in the critical areas of pricing and output.¹⁶⁰ In the absence of substantial integration, marketing joint ventures also create few efficiencies. Indeed, without a combination of the partners' marketing resources, the only "efficiency" resulting from a pooling of marketing power in a joint venture will be enhanced profits for the participants. Thus, if a marketing joint venture is not well integrated, it usually will be clear that the anticompetitive effects of such a downstream collaboration outweigh its efficiencies.

The efficiencies and potential anticompetitive effects of certain other types of joint ventures may be balanced more evenly. Production joint ventures of broad scope and well integrated marketing joint ventures, for example, have the capability both to generate significant efficiencies and to substantially limit competition. When no clear choice exists between the potential beneficial and adverse effects of a joint venture, the courts should give the benefit of the doubt to ventures conceived in good faith.¹⁶¹ The parties' private solutions to the challenge of enhancing their

160. See *supra* notes 48-49 and accompanying text.

161. Professor Areeda has stated, "[w]hen courts find that both detriment and redeeming virtue are present in more-or-less significant degree, I predict that the redeeming virtue will come increasingly to trump the detriment." Areeda, *supra* note 147, at 149. The Federal Trade Commission's "structured" rule of reason, however, does not make the parties' beneficial purpose the critical factor in the analysis: "a valid efficiency justification is not an affirmative defense but only a potential counterbalance to any anti-competitive effect" Kevin J. Arquit & Joseph Kattan, *Efficiency Considerations and Horizontal Restraints*, 36 ANTITRUST BULL. 717, 721 (1991).

efficiency usually will be preferable to the alternatives that the courts could devise.

Production joint ventures that extend for a long period of time are likely to reduce the total manufacturing capacity in the relevant market. This limitation of output may result in price increases in the marketing phase. However, if the parties have a valid efficiency objective for such a venture, the courts should give that objective significant weight in the balancing test. A production joint venture of broad scope, for example, may be the only means by which firms in certain markets can afford to replace obsolete facilities. Basic industries such as steel, aluminum, rubber, and automobiles currently are experiencing significant worldwide excess capacity¹⁶² Individual firms in such industries may be unable to absorb the costs of employee severance, pension plan terminations, environmental cleanup, and other liabilities that arise when old manufacturing facilities are closed. Joint ventures give firms the ability to generate the capital required to replace outdated plants with new facilities which can produce higher quality products at lower prices.¹⁶³ Such

162. In the tire industry, "15 to 20 percent of the worldwide tiremaking capacity needs to be shut down before supply and demand come into line." Jonathan P Hicks, *Chasing Few Buyers with Too Many Tires*, N.Y. TIMES, Feb. 3, 1991, at F5. In the automobile industry, worldwide excess production capacity totals 8.2 million cars and trucks a year, which is enough capacity for 33 assembly plants (more than General Motors has in all of North America). Krystal Miller et al., *Auto Industry Is Hit by a Global Shakeout*, WALL ST. J., Dec. 29, 1992, at A1.

163. Joint ventures in industries suffering from overcapacity may allow American companies "to close weak facilities, invest in strong ones, and keep production alive in the United States." Ira Millstein, *The Impact of the Antitrust Laws on America's Ability to Restructure Its Industries and Proposals for Change*, 47 U. PITT. L. REV. 713, 722 (1986). Joint ventures that combine production facilities but leave their partners free to market products separately would be preferable to the large mergers that occurred in basic American industries in the 1980's. See Hicks, *supra* note 162, at F5. Some service industries also are experiencing overcapacity, and joint ventures could lead to more efficient operations in such markets. For example, "[p]lounded by overcapacity the airline industry has sustained \$8 billion in losses since 1990." Bridget O'Brian, *Tired of Airline Losses, AMR Pushes Its Bid to Diversify Business*, WALL ST. J., Feb. 18, 1993, at A1. Joint ventures would allow airlines to eliminate costs, rationalize routes, finance the purchase of more fuel efficient aircraft, and provide better customer service. Responding to calls from some politicians and airline executives for increased regulation of the industry, Transportation Secretary Federico Pena has appointed a commission to study ways of aiding the airline industry. *Id.* A more permissive antitrust approach to joint ventures among

efficiencies should be given at least as much weight in the courts' balancing analysis as the short-term reduction in competition caused by the venture.

The efficiencies and anticompetitive effects of well-integrated marketing joint ventures may be just as closely balanced. Joint ventures at this sensitive downstream stage have a significant potential to restrict competition. But the partners to a marketing joint venture may integrate their resources in a way that significantly benefits consumers. For example, a marketing joint venture among consumer products companies, by combining its partners' disparate sales forces, may be able to provide customers with better advertising, a broader range of products, enhanced product explanations and warranties, and more effective delivery services. The efficiencies which result from these integrated marketing joint ventures should be considered at least as significant as any of their anticompetitive effects.

VII. ANCILLARY RESTRAINTS

Once a court determines the legality of a joint venture, it should consider the appropriateness of any ancillary restrictions on competition agreed to by the parties. Judge Taft's 1898 decision in *United States v. Addyston Pipe & Steel Co.*¹⁶⁴ sets forth an effective test for the legality of ancillary restraints. Under Judge Taft's approach, the parties' purpose for a joint venture would determine whether a particular ancillary restraint on competition is permitted.¹⁶⁵ The courts would uphold any restraint that is "reasonably necessary" to accomplish the legitimate purposes of a cooperative arrangement; restraints that are broader than required to effectuate such purposes would be void.¹⁶⁶

airlines would permit a free market, rather than a governmental, solution to the industry's overcapacity problem.

164. 85 F 271 (6th Cir. 1898), *aff'd as modified* by 175 U.S. 211 (1899).

165. Judge Taft stated that the purpose of a particular transaction "suggests the measure of protection needed, and furnishes a sufficiently uniform standard by which the validity of such restraints may be judicially determined." *Id.* at 282.

166. *Id.* at 281. Judge Bork recently interpreted Judge Taft's ancillary restraints analysis in a similar manner:

To be ancillary, and hence exempt from the per se rule, an agreement eliminating competition must be subordinate and collateral to a separate,

A. Membership Rules

Membership rules may limit competition by denying particular firms access to a joint venture that could enhance their efficiency in the relevant market. Such rules, however, usually should be upheld as ancillary to a joint venture. Most cooperative arrangements among competitors could not operate effectively without membership restrictions.¹⁶⁷ A joint venture could become unwieldy if open access by all interested parties was required. Joint venture partners also have a reasonable interest in ensuring that all participants can make a meaningful contribution to the venture. Rules setting forth minimum financial capabilities, technical qualifications, or academic or professional certifications for joint venture partners therefore should be upheld.

In certain cases, membership restrictions for joint ventures actually may promote competition in the relevant market. If a joint venture is not all-inclusive, the firms denied membership will be more likely to pursue an independent course in competition with the venture.¹⁶⁸ Firms that cannot access a research

legitimate transaction. The ancillary restraint is subordinate and collateral in the sense that it serves to make the main transaction more effective in accomplishing its purpose. Of course, the restraint imposed must be related to the efficiency sought to be achieved. If it is so broad that part of the restraint suppresses competition without creating efficiency, the restraint is, to that extent, not ancillary.

Rothery Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 224 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987). The Department of Justice has adopted essentially the same test for ancillary restraints: "The legality of collateral restraints is largely a function of the proximity of their relationship to the essential purposes of the joint research venture" *United States Department of Justice Antitrust Guidelines Concerning Research Joint Ventures*, 4 Trade Reg. Rep. (CCH) ¶ 13,120, at 20,656 (1988).

167. Thus the Supreme Court recognized in *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284 (1985), that membership restrictions should be upheld when they are "substantially related to the efficiency-enhancing or procompetitive purposes that otherwise justify the [venture's] practices." *Id.* at 296 n.7.

168. In *SCFC ILC, Inc. v. VISA U.S.A. Inc.*, 1993-1 Trade Cas. (CCH) ¶ 70,217 (D. Utah 1993), the court pointed out in dicta that it would have been preferable, from a competitive standpoint, for the Visa credit card system to have precluded Sears from membership, because Sears then would have been forced to continue marketing its own credit card in competition with Visa. *Id.* at 70,041.

and development venture, for example, may form competing ventures of their own, or they may decide to pursue development of the new technology independently

Courts should not allow membership limitations, however, when a joint venture controls an "essential facility" necessary to compete in the relevant market. Firms may not be able to manufacture or market a particular product without access to certain raw materials, information, technology, or means of production, and in order to compete in a particular industry, firms may need to become members of standards-setting organizations (such as stock exchanges or professional associations) which establish the rules of conduct for that industry.¹⁶⁹ When a joint venture controls such critical assets or services, its partners should not be allowed to preclude participation by third parties arbitrarily. Denial of a competitor's access to the joint venture in these circumstances would have the same effect as excluding it from the relevant market.¹⁷⁰

B. Restraints Affecting Competition Among Joint Venture Partners

Overly broad ancillary restraints can destroy a joint venture's most beneficial characteristic: its ability to promote efficiency while allowing its partners to continue to compete in other areas. Certain restraints ancillary to a joint venture may unduly restrict competition among the partners. "Spillover" effects in

169. The courts thus have required open membership rules for ventures which control such essential facilities or services. See *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963) (stock exchange); *Radiant Burners, Inc. v. Peoples Gas, Light & Coke Co.*, 364 U.S. 656 (1961) (industry standards-setting organization); *Associated Press v. United States*, 326 U.S. 1 (1945) (worldwide news-gathering service); *United States v. Terminal R.R. Ass'n*, 224 U.S. 383 (1912) (unified railroad terminal system); *MCI Communications Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081 (7th Cir.) (control of interconnection between long distance and local telephone service), *cert. denied*, 464 U.S. 891 (1983); *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351 (5th Cir. 1980) (multiple listing service for real estate).

170. The joint venture, however, should be permitted to establish reasonable qualifications (such as minimum financial and technical capabilities) and to charge reasonable membership fees. See *National Inst. on Joint Ventures, Questions and Answers to Overview: A Basic Foundation for Joint Venture Analysis*, 54 ANTITRUST L.J. 947, 948 (1985) (comments of Richard W. Pogue).

areas outside a joint venture's scope may result from partners' agreements to exchange competitive information, to fix the prices at which they can sell the products of a joint venture, or to establish the customers or territories to which particular partners can sell.

1. *Information Exchange*

Exchanges of confidential technical, production, and marketing information between the partners of a joint venture are often necessary for the effective operation of the venture. Research and development joint ventures could not operate without a free flow of technical information between partners. Production joint ventures may require data from their partners on manufacturing methods, raw material costs, capacity, and production schedules. Joint sales organizations necessitate the exchange of pricing and marketing information.

Courts, however, should prohibit the exchange of sensitive competitive information with uses beyond the specific objectives of a joint venture. It would be inappropriate, for example, for the partners in research and development or production joint ventures to disclose marketing information to each other.¹⁷¹ Such information could be used by the parties improperly to coordinate their decisions on pricing and output. In order to avoid inappropriate exchanges of information, sales or marketing personnel of the partners should be excluded from participating in research and development or production joint ventures.¹⁷² Even

171. Section 2(b)(1) of the National Cooperative Research Act of 1984 excludes from the Act's coverage the exchange of any information "that is not reasonably required to conduct the research and development that is the purpose of such venture." National Cooperative Research Act § 2(b)(1), 15 U.S.C. § 4301(b)(1) (1988). As a condition of approving the General Motors-Toyota joint venture, the Federal Trade Commission required detailed ongoing reporting requirements on the information to be exchanged by the parties. General Motors Corp., 103 F.T.C. 374, 385 (1984) (consent order). Similarly, the consent decree for an aluminum production joint venture between Alcan and Arco prohibited the parties from exchanging information on customers, terms or conditions of sale, or marketing plans. *United States v. Alcan Aluminum Ltd.*, 605 F. Supp. 619, 621 (W.D. Ky. 1985).

172. The Arco-Alcan consent decree required that the joint venture manufacturing company not include marketing employees of Alcan, with which the joint venture would be competing. *Id.* at 625.

in a joint marketing organization, exchanges of pricing information should be limited to the specific products covered by the venture.

2. Price Fixing

The legality of a price-fixing agreement among joint venture partners depends upon how integral the arrangement is to the operation of the venture. In *Broadcast Music, Inc. v. CBS*,¹⁷³ the Supreme Court refused to apply the per se rule to the price-fixing arrangement among the musical composers because it was an essential element of the blanket license, without which the product could not have been offered.¹⁷⁴ The establishment of uniform fees for the physicians who are members of a health maintenance organization (HMO) may be no less critical to such an organization's ability to market its health care services to cost-conscious consumers. It also has been argued that HMOs should be able to establish uniform charges for member physicians in order to prevent high-priced doctors from free riding on their more efficient colleagues.¹⁷⁵ However, price-fixing arrangements that are not necessary for the attainment of the legitimate objectives of a joint venture should be struck down on their face.¹⁷⁶ Agreements by the members of a production joint

173. 441 U.S. 1 (1979).

174. *Id.* at 20-23. Similarly, in *National Bancard Corp. v. VISA U.S.A., Inc.*, 779 F.2d 592 (11th Cir.), *cert. denied*, 479 U.S. 923 (1986), a national credit card venture established the fee to be paid to the card issuer's bank for processing credit transactions. The court concluded that a uniform fee was necessary because "individual price negotiations are impractical, would produce instability and higher fees, and could result in the demise of the product offered." *Id.* at 605.

175. *See* Arquit & Kattan, *supra* note 161, at 725. Others have argued, however, that HMOs can achieve the same result in a less restrictive fashion by granting price-setting authority to a third party or by having separate pricing agreements between each physician and the HMO. *See, e.g.*, Horoschak, *supra* note 111, at 17; *see also* Remarks of Terry Calvani, Chairman, Federal Trade Commission, *reported at* 6 Trade Reg. Rep. (CCH) ¶ 50,479, at 56,283 (Feb. 20, 1986) ("The FTC is interested in assuring that ventures do not serve as a vehicle for price fixing among the participating doctors.").

176. In the *NCAA* case, for example, the Supreme Court summarily condemned restrictions on price competition in the sale of television rights for college football games because the restrictions were not necessary to insure the quality of collegiate athletics. *NCAA v. Board of Regents*, 468 U.S. 85, 117-20 (1984).

venture on the prices at which the products of the venture are to be marketed, for example, exceed the legitimate scope of the venture and should be summarily condemned.¹⁷⁷

3. *Territorial or Customer Restraints*

Restrictions on the territories in which joint venture partners may market a product or the customers to whom they may sell are even more anticompetitive than price-fixing agreements. Such territorial and customer restraints often amount to agreements by the partners to avoid all competition with each other. When the partners to a joint venture agree to market a product at a particular price, they can at least continue to compete with each other in non-price areas such as customer service. When joint venture partners agree to sell only in different territories or to separate customers, however, all competition between the parties, whether price or non-price, will be eliminated.¹⁷⁸

In one circumstance, however, territorial or customer restrictions do not have such a severe adverse effect: when they limit competition that exists only as a consequence of a joint venture. Such restrictions have no incremental adverse effect in the case of a joint venture that makes possible the production of a new product or entry into a new market. Territorial and customer restrictions may be necessary to induce firms to invest in such risky ventures.¹⁷⁹ Under such circumstances, noncompetition

177. An agreement by the partners not to sell their own competitive products at prices lower than those for the products of the joint venture should be no less illegal. *See Roberts, supra* note 141, at 141.

178. The courts consistently have found horizontal market division agreements to be per se illegal because of their severe anticompetitive effects. *See, e.g.,* Timken Roller Bearing Co. v. United States, 341 U.S. 593, 597-98 (1951) (allocation of territories among affiliated companies in Europe); Eiberger v. Sony Corp. of America, 622 F.2d 1068, 1072 (2d Cir. 1980) (agreement to allocate territories for dictation machines); United States v. Cadillac Overall Supply Co., 568 F.2d 1078, 1087-90 (5th Cir.) (competitors' agreement not to solicit others' accounts), *cert. denied*, 437 U.S. 903 (1978); United States v. Pennsylvania Refuse Removal Ass'n, 357 F.2d 806, 807 (3d Cir.) (allocation among refuse pick-up customers), *cert. denied*, 384 U.S. 961 (1966).

179. For example, firms may not be willing to participate in a research and development joint venture in a high barrier market without being guaranteed an exclusive license of joint venture technology in a particular territory. Partners in marketing joint ventures for new products may require a guarantee of an exclusive right to

agreements among partners have no real anticompetitive effect because, in their absence, the relevant product would not have been available in any event.¹⁸⁰

It is, however, hard to conceive of a circumstance in which territorial or customer restraints would be necessary to induce firms to invest in joint ventures for the production or marketing of existing products. Joint ventures in existing markets are substantially less risky than ventures designed to produce new products. Less restrictive alternatives than customer or territorial restrictions should be sufficient to induce investments in ventures in current markets. The partners should not have to eliminate all competition between themselves in order to make their joint venture viable. For example, instead of absolutely prohibiting its partners from selling in other partners' territories, a joint venture may require the partners to concentrate their sales efforts in their own areas of primary responsibility.¹⁸¹ The partners also could be required to pay a fee for sales made outside of their areas of primary responsibility. The fee could be calculated to compensate the other partners for the costs of investing in the joint venture or providing desired services to customers in their own areas. Because less restrictive alternatives such as these are available, the courts should prohibit territorial allocations among the partners to production or marketing joint ventures that operate in existing markets.¹⁸²

sell the products in a particular territory or to certain customers. Exclusive territorial grants, however, should extend only for the period necessary to assure the partners that they can recoup their original investment and receive a reasonable return to compensate them for their up-front risks.

180. As one commentator has stated, "If the venture and the restraints together made the new competition possible, then, but for the restraints, the parties would have nothing to restrain." Martin B. Louis, *Restraints Ancillary to Joint Ventures and Licensing Agreements: Do Sealy and Topco Logically Survive Sylvania and Broadcast Music?*, 66 VA. L. REV. 879, 911 n.208 (1980).

181. The Supreme Court, in *United States v. Topco Associates, Inc.*, 414 U.S. 801 (1973) (mem.), affirmed the district court's decision which had allowed areas of primary responsibility and profit pass-over clauses as less restrictive alternatives to the exclusive territories which the Court had originally prohibited. See *United States v. Topco Assocs., Inc.*, 319 F Supp. 1031, 1043 (1970), *aff'd mem.*, 414 U.S. 801 (1973).

182. The courts generally have prohibited such ancillary restrictions. In its only decisions dealing with horizontal market division among joint venture partners, the Supreme Court has applied the per se rule. In *United States v. Sealy, Inc.*, 388 U.S. 350 (1967), and *United States v. Topco Associates, Inc.*, 405 U.S. 596 (1972), the

C. Agreements Not to Compete with the Joint Venture Itself

Joint venture partners have a legitimate interest in ensuring that all parties refrain from harming the venture by competing within its scope of operations. Unlike participating firms' agreements not to compete with each other, partners' agreements not to compete with the joint venture itself have few anticompetitive effects and usually should be upheld. Agreements by partners not to compete with each other are horizontal combinations which eliminate all actual or potential competition among the participants in the relevant market. Agreements by partners not to compete with their own joint venture, however, are vertical and only limit competition within the venture's sphere of activities.¹⁸³ Furthermore, such agreements do not

Court failed to find any legitimate rationale for the establishment of exclusive sales territories for joint venture partners. *Topco Assocs.*, 405 U.S. at 611; *Sealy*, 388 U.S. at 356-57. Some lower federal courts and commentators believe that the Supreme Court has overruled *Sealy* and *Topco* implicitly by its recent application of the rule of reason to horizontal restraints incidental to joint ventures. See *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 226 (D.C. Cir. 1986), *cert. denied*, 479 U.S. 1033 (1987); *Chicago Professional Sports Ltd. Partnership v. National Basketball Ass'n*, 754 F. Supp. 1336, 1357 (N.D. Ill. 1991), *affd*, 961 F.2d 667 (7th Cir. Ill.), *cert. denied*, 113 S. Ct. 409 (1992); Clanton, *supra* note 145, at 1245 n.30; Charles F. Rule, *The Administration's View on Joint Ventures*, 54 ANTITRUST L.J. 1121, 1123 (1985). However, the Supreme Court and the enforcement agencies continue to cite *Topco* with favor. See *Palmer v. BRG of Georgia, Inc.*, 498 U.S. 46, 49-50 (1990) (per curiam); *Business Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 734 (1988); see also J.P. McGrath, *Text of Remarks Prepared for Delivery Before the 18th Annual New England Antitrust Conference*, 5 Trade Reg. Rep. (CCH) ¶ 50,470, at 56,138 (Nov. 12, 1984). In fact, in *Palmer* the Court expressly reaffirmed the per se illegality of a horizontal market division among competitors. *Palmer*, 498 U.S. at 49-50. Some recent lower federal court cases also have cited *Topco* for the per se illegality of horizontal market allocation. See, e.g., *United States v. Capitol Serv., Inc.*, 568 F. Supp. 134, 154 (E.D. Wis. 1983), *affd*, 756 F.2d 502 (7th Cir.), *cert. denied*, 474 U.S. 945 (1985). Indeed, most lower federal courts have deemed illegal any grant of exclusive marketing territories to joint venture partners. See *Yamaha Motor Co. v. FTC*, 657 F.2d 971 (8th Cir. 1981) (invalidating division of territories between United States and export markets for outboard motors), *cert. denied*, 456 U.S. 915 (1982); *Engine Specialties, Inc. v. Bombardier, Ltd.*, 605 F.2d 1 (1st Cir. 1979) (division of territories between North American and foreign markets for motor-cycles), *reh'g granted*, 615 F.2d 575 (1st Cir. 1979), *cert. denied*, 446 U.S. 983, and *cert. denied*, 449 U.S. 890 (1980); *Compact v. Metropolitan Gov't*, 594 F. Supp. 1567, 1576 (M.D. Tenn. 1984) (elimination of competitive bidding for government contracts between members of joint venture).

183. In antitrust parlance, agreements among competitors are referred to as "hori-

limit any competition that otherwise would exist. The elimination of competition between a joint venture and its partners is a natural consequence of a joint venture's formation. Direct competition with a joint venture is contrary to the partners' interests because it reduces the profits of their own affiliate.¹⁸⁴ Regardless of whether they have entered into an express noncompetition agreement, the partners to a joint venture will avoid competing with their own joint venture because it is in their interest to do so. Noncompetition agreements between partners and their own joint venture therefore should be upheld because they do not extend competitive restrictions beyond the natural scope of the venture.¹⁸⁵

zontal," while agreements between a supplier and its customers are termed "vertical." See, e.g., *NCAA v. Board of Regents*, 468 U.S. 85, 99 (1984). The courts generally have treated horizontal agreements more severely than vertical agreements because they have more serious anticompetitive effects. See Thomas A. Pirano, Jr., *Sharp Dealing: The Horizontal/Vertical Dichotomy in Distributor Termination Cases*, 38 EMORY L.J. 311, 344-51 (1989); Thomas A. Pirano, Jr., *A Reformed Antitrust Approach to Distributor Terminations*, 68 NOTRE DAME L. REV. 271, 281-85 (1992).

184. The Supreme Court recognized in *United States v. Penn-Olin Chem. Corp.*, 378 U.S. 158 (1964), that "[r]ealistically, the parents would not compete with their progeny." *Id.* at 168.

185. Judge Taft held in *United States v. Addyston Pipe & Steel Co.*, 85 F.2d 271 (6th Cir. 1898), *aff'd*, 175 U.S. 211 (1899), that noncompetition agreements should be upheld as ancillary restraints because they are made "with a view of securing [each partner's] entire effort in the common enterprise." *Id.* at 280. Many courts and commentators have concluded that agreements by partners not to compete with their own joint venture should be upheld as ancillary restraints. See, e.g., *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210 (D.C. Cir. 1986) (upholding local carrier agents' agreement not to compete with national moving company); *Louis*, *supra* note 180, at 902-03. The Department of Justice and some courts, however, continue to believe that agreements by parties not to compete with their joint ventures are illegal. See, e.g., *Pennsylvania Water & Power Co. v. Consolidated Gas Elec. Light & Power Co.*, 97 F. Supp. 952, 955-56 (D. Md. 1951) (invalidating an agreement precluding competition between the parents and the joint venture in electrical generation market), *aff'd*, 194 F.2d 89 (4th Cir.), *cert. denied*, 343 U.S. 963 (1952); *U.S. Department of Justice Guidelines for Research Joint Ventures—1980*, 4 Trade Reg. Rep. (CCH) ¶ 13,120, at 20,656 (Nov. 1980) ("An agreement by the participants to forego independent research in competition with the joint venture may constitute an unreasonable competitive restraint.").

VIII. APPLYING THE PROPOSED ANALYSIS TO HEALTH CARE REFORM

The continuum-based approach proposed in this Article would facilitate the courts' analysis of the new types of cooperative arrangements likely to be formed in the health care industry in the next few years. The concept of "managed competition" has now been embraced as a means of health care reform by the Clinton Administration.¹⁸⁶ First enunciated by Professor A.C. Enthoven in 1988,¹⁸⁷ this approach proposes the creation of purchasing groups with enough bargaining power to convince hospitals and physicians to provide more cost-effective services.¹⁸⁸ Under the Clinton Administration's health care reform plan, each state must establish at least one regional health alliance that will be responsible for providing health care coverage to all residents of that state.¹⁸⁹ By joining the purchasing cooperatives, small employers and individuals could acquire the same leverage over providers as larger health care purchasers. The increased purchasing clout of the health care alliances should foster greater competition among health care providers, thereby restraining prices and enhancing the quality of care. In response to the demands of the new purchasing cooperatives, hospitals and physicians are expected to merge, form HMOs, and affiliate with each other in a variety of alliances designed to deliver more efficient health care. The antitrust issues raised by such collaboration among consumers at the purchasing level and health care providers at the supplier level can be resolved most effectively under a continuum-based analysis.

186. See Pear, *supra* note 26, at A9; Steinmetz, *supra* note 26, at A1, A11.

187. ALAIN C. ENTHOVEN, *THEORY AND PRACTICE OF MANAGED COMPETITION IN HEALTH CARE FINANCE* (1988). Over the past three years a group of academics, executives, and physicians (known as the "Jackson Hole Group") has promoted the concept. See Robin Toner, *Hillary Clinton's Potent Brain Trust on Health Reform*, N.Y. TIMES, Feb. 28, 1993, § 3, at 1; *The Answer: Managed Competition for America's Health*, N.Y. TIMES, Dec. 2, 1992, at A22.

188. ENTHOVEN, *supra* note 187, at 82.

189. See *Excerpts from Final Draft of Health Care Overhaul Proposal*, N.Y. TIMES, Sept. 11, 1993, at A8.

A. Health Care Purchasing Cooperatives

In many sections of the country, purchasing alliances among health care consumers already have succeeded in lowering the cost of health care.¹⁹⁰ In Cleveland, the Council of Smaller Enterprises, which negotiates coverage for 175,000 employees and dependents in more than 10,000 companies, limited total premium increases over a five-year period to only thirty-five percent, while health care premiums in Cleveland soared 150% during the same period.¹⁹¹ Purchasing alliances in California have reduced health care expenditures by more than \$1 billion during the last decade.¹⁹² In Minnesota, purchasing cooperatives have introduced the discipline of competition to the local health care community, which "in a blitz of mergers and alliances, is hustling to recast its jumble of independent doctors and hospitals into streamlined networks that compete much as Ford battles Toyota: on price, service and quality"¹⁹³

Most health care purchasing alliances should be upheld easily under the continuum of joint venture analysis, even when they include direct competitors. As partial integrations among competitors, such alliances would fall within the section of the continuum requiring a balancing analysis. Such balancing could be undertaken quite simply. As upstream ventures far removed from the production and marketing stages, health care purchasing alliances can have only minimal anticompetitive effects. At

190. The cooperatives have been able to reduce costs not only through their enhanced consumer clout but also by avoiding duplication of administrative effort. Doctors and hospitals, for example, have reduced their paperwork burden by submitting standardized claims forms to regional purchasing alliances. See John J. Polk, *Health Care Reform Isn't Just Theory*, N.Y. TIMES, Apr. 25, 1993, § 3, at 11.

191. *Id.* The Cleveland Council's administrative charges also average only 12% of premiums, as compared to 40% for small health insurers. *Id.*

192. Glenn Melnick, *Managed Competition Works*, WALL ST. J., June 2, 1993, at A14.

193. Ron Winslow, *Employers' Attack on Health Costs Spurs Change in Minnesota*, WALL ST. J., Feb. 26, 1993, at A1. Anticipating the advent of managed competition, health care providers in many sections of the country already have formed alliances to compete for the business of large health care purchasers. This trend is expected to accelerate within the next few years, as hundreds of hospitals become unable to go it alone under a more competitive health care system. See Milt Freudenheim, *Hospitals Begin Streamlining for a New World in Health Care*, N.Y. TIMES, June 20, 1993, § 3, at 12.

the same time, such ventures have a great potential to help consumers. By combining the health care purchasing power of individuals, small businesses, and larger employers, the cooperatives can induce suppliers to offer higher quality medical services at lower prices. The market power of purchasing alliances may be sufficient to convince doctors and hospitals to offer fixed fees for all health care required by an individual during a particular period of time.¹⁹⁴ Many consumers would prefer such arrangements to the traditional fee-for-service approach. In light of their significant pro-competitive potential and minimal anticompetitive effects, health care purchasing alliances should not require a significant amount of integration in order to survive the balancing test. Such ventures should be upheld whenever health care consumers have combined their purchasing operations for the legitimate purpose of extracting a more efficient delivery of services from health care providers.¹⁹⁵ Thus, a continuum-based judicial approach would obviate the need for new legislation to protect health care purchasing alliances from antitrust attack.

While the formation of health care purchasing alliances usually should not pose an antitrust problem, such alliances could engage in ancillary restraints which violate the antitrust laws. Membership in a regional health care purchasing cooperative, for example, is likely to be critical to the competitiveness of firms in the relevant area. A purchasing cooperative therefore should not be permitted to deny membership to any interested firms.¹⁹⁶ It is reasonable to require such open access because additional members are likely to add little to the administrative

194. In anticipation of the purchasing clout of the new health care alliances, doctors and hospitals in several areas of the country have already begun to form networks to provide such services. See Pear, *supra* note 28, at A7.

195. Thus, any integration beyond a simple coordination of buying policies should suffice to prove the legality of a health care purchasing alliance. As Kevin Arquit, a former Director of the FTC's Bureau of Competition, put it, "the prudent antitrust policy in most [health care] buying group situations is 'don't do something, just stand there.'" Grady, *supra* note 95, at 770.

196. Regional health care purchasing cooperatives may be deemed by the courts to be "essential facilities" to which access cannot be denied. See *supra* note 170 and accompanying text.

costs of a health care purchasing cooperative and, indeed, may enhance its buying power.

It would be inappropriate for health care purchasing alliances to permit the exchange among their members of market information which could be used for anticompetitive purposes unrelated to the objectives of the alliance. The members, for example, should have no need to disclose to each other any information on pricing, customers, or production and sales costs. A purchasing cooperative can fulfill its purpose of negotiating more favorable health care coverage without access to such sensitive competitive information.

By their nature, health care purchasing cooperatives will be able to exert substantial market power. A health care purchasing cooperative should not be able to use its market power for anticompetitive purposes. Efforts by a health care purchasing alliance to induce hospitals or physicians not to deal with another alliance should be found illegal on their face under traditional group boycott theories.¹⁹⁷ Some rural areas may have only a single health care purchasing alliance.¹⁹⁸ In such areas, the alliances will possess monopoly power. Health care purchasing alliances with monopoly power may have a duty to deal with all potential providers of health care within their region.¹⁹⁹ Such alliances should be precluded from using their market power to push prices so low as to exclude particular providers from the marketplace.²⁰⁰

B. Networks of Health Care Providers

As downstream joint ventures, health care provider networks raise more serious antitrust issues than do health care purchas-

197. See Hilary Stout, *Proposal for Health-Care Cooperatives Draws Criticism as Some See Growing Regulator Role*, WALL ST. J., May 10, 1993, at A12.

198. The Clinton Administration's health care reform plan only requires each state to establish a single health care purchasing alliance (although the states can establish additional alliances if they desire). See *Excerpts from Final Draft of Health Care Overhaul Proposal*, *supra* note 189, at A8.

199. See *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985) (imposing duty on monopolist to deal with competitor).

200. See *Experts Ponder Potential for Monopsony by Health Alliances Under Reform Plan*, 64 Antitrust & Trade Reg. Rep. (BNA) No. 1613, at 532-33 (May 6, 1993).

ing alliances. Collective activities by hospitals or physicians have the potential to affect pricing and output in a manner detrimental to consumers. Beginning in the late 1970's, for example, HMOs were established in the health care market. By replacing the traditional fee-for-service with a fixed fee approach, these organizations represented one of the best methods yet conceived for reducing health care costs.²⁰¹ Through various collective activities, such as the promulgation of "ethical rules" forbidding doctors from doing business with the HMOs, physicians nearly were able to block the development of these new organizations.²⁰² Vigorous antitrust enforcement in the late 1970's and early 1980's protected HMOs from such collusive boycotts.²⁰³

Because of their significant potential for anticompetitive effects, collective activities by health care providers should be subject to rigorous antitrust scrutiny. Under the continuum of joint venture analysis, certain unintegrated ventures among health care providers would be deemed illegal on their face. In the absence of real integration, the continuum would preclude any collective efforts by health care providers to negotiate prices or other terms of dealing with health care purchasing alliances.²⁰⁴ As the Supreme Court recognized in *Arizona v. Maricopa*

201. See George Anders, *Regulators Aim at Fees Doctors Charge HMOs*, WALL ST. J., May 14, 1993, at B1; Flynn, *supra* note 21, at 24. Under an HMO, health insurers pay a uniform annual or monthly sum, or capitation, for each member. This approach gives doctors and hospitals a financial interest in avoiding unnecessary tests and procedures. See Freudenheim, *supra* note 193, § 3, at 12.

202. See Flynn, *supra* note 21, at 24.

203. Senator Metzenbaum recently stated in a Senate hearing on health care reform, "if it had not been for vigorous antitrust enforcement, health care reform might not even be possible." *Witnesses Try to Convince Subcommittee Antitrust Is no Barrier to Health Reform*, 64 Antitrust & Trade Reg. Rep. (BNA) No. 1614, at 574 (May 13, 1993).

204. As an aide to Senator Metzenbaum recently stated, "Providers should not be able to contract collectively. It would turn on its head a lot of antitrust law. If managed competition is going to work, you have to have competition." *Experts Ponder Potential for Monopsony by Health Alliances Under Reform Plan*, 64 Antitrust & Trade Reg. Rep. (BNA) No. 1613, at 533 (May 6, 1993). The Department of Justice and Federal Trade Commission recently issued guidelines for antitrust enforcement activities against health care providers. *Department of Justice and Federal Trade Commission Antitrust Enforcement Policy Statements in the Health Care Area*, 64 Antitrust & Trade Reg. Rep. (BNA) No. 1631 (Spec. Supp.) [hereinafter *Federal*

*County Medical Society*²⁰⁵ and *FTC v. Indiana Federation of Dentists*,²⁰⁶ such naked alliances among physicians have no legitimate efficiency rationale.²⁰⁷ Unless health care providers have integrated their operations in an attempt to generate efficiencies, there is no justification for permitting them to ally for the purpose of countering the market power of health care purchasing alliances.²⁰⁸

Not all alliances among health care providers, however, should be precluded. In certain ventures providers may achieve sufficient integration to overcome the anticompetitive potential of the venture. By combining certain administrative functions, for example, hospitals and physicians can achieve cost-savings which can be passed along to consumers. By pooling their services in a health care network, physicians, hospitals, and insurers can provide consumers with a guarantee of complete medical care in exchange for a fixed fee.

Identifying the kinds of cooperative ventures among providers that should pass antitrust muster will be one of the most critical issues under the Clinton Administration's health care reform program.²⁰⁹ Little guidance has been available to health care providers on the standards by which their cooperative ventures will be judged, and this uncertainty has deterred them from developing more efficient means of delivering health care services to consumers.²¹⁰

Health Care Guidelines]. The Federal Health Care Guidelines provide an "antitrust safety zone" for certain joint ventures among health care providers. Unintegrated joint ventures would not qualify for the safety zone. *Id.* at S-15.

205. 457 U.S. 332 (1982).

206. 476 U.S. 447 (1986).

207. See *supra* notes 96-97 and accompanying text.

208. Health care providers currently are lobbying for a federal antitrust exemption that would permit them to form unintegrated organizations that could bargain with health care purchasing alliances. See Anders, *supra* note 201, at B1. Five states, Maine, Minnesota, Ohio, Washington, and Wisconsin, have passed laws exempting health care providers from antitrust laws, and similar legislation is pending in six other states. Felsenthal, *supra* note 22, at B1. The Federal Health Care Guidelines, however, do not provide such an exemption, stating that unintegrated ventures among health care providers should not qualify for an "antitrust safety zone." See *Federal Health Care Guidelines*, *supra* note 204, at S-15.

209. See Flynn, *supra* note 21, at 39.

210. See Anders, *supra* note 201, at B1; Robert J. Enders, *An Introduction to Special Antitrust Issues in Health Care Provider Joint Ventures*, 61 ANTITRUST L.J. 805,

The continuum-based approach described in this Article would give the courts a simple and effective standard by which to judge the legality of cooperative ventures among health care providers. When hospitals combine all of their operations in a single entity, the transaction would fall within the merger-based portion of the continuum. A complete analysis of the parties' purpose for the transaction, any efficiencies resulting from the arrangement, and the parties' market power would be appropriate in such a case. A more truncated inquiry, however, would be appropriate for partial integrations among competing health care providers. Under the continuum, the legality of such arrangements could be determined without a complete market analysis. The courts simply would consider whether the providers had a legitimate purpose for their cooperative arrangement and whether the efficiencies likely to result from the arrangement outweighed its potential anticompetitive effects.

The degree of integration achieved in any joint venture among health care providers would be decisive in the balancing analysis. In order for their conduct to be analyzed as a legitimate joint venture rather than as a cartel, physicians and hospitals would have to do more than simply coordinate their parallel activities. They would be required to combine previously separate functions in a manner that produced efficiencies for the benefit of health care consumers. Once the courts confirm the existence of such integration, they could determine easily whether it produced efficiencies sufficient to outweigh a particular venture's anticompetitive potential. HMOs, for example, inte-

810 (1993); Grady, *supra* note 95, at 767; Felsenthal, *supra* note 22, at B1, B5. The American Hospital Association has stated that the absence of clear guidance under the antitrust laws is a deterrent to the formation of health care joint ventures that would reduce costs for purchasers of health care services. See *The Structure of the Hospital Industry in the 21st Century: Hearings Before the Joint Economic Comm.*, 102d Cong., 2d Sess. 237-39 (1992) (Statement of D. Kirk Oglesby, Jr., Chairman, Board of Trustees, American Hospital Assoc.); *Clinton Presidency, Democratic Congress May Be Recipe for Antitrust Legislation*, 64 *Antitrust & Trade Reg. Rep.* (BNA) No. 1598, at 42 (Jan. 21, 1993). The Federal Health Care Guidelines have somewhat clarified the antitrust risks for joint ventures among health care providers, but their reliance on a rule of reason approach for many types of joint ventures leaves substantial questions as to the legality of particular alliances. See *Federal Health Care Guidelines*, *supra* note 204, at S-15.

grate providers' activities so completely that, like the musical association at issue in *BMI*, they are able to provide an entirely new product.²¹¹ The fixed-fee medical services made possible by HMOs are of such a benefit to consumers that they clearly outweigh any loss of competition among the members of an HMO. Other less integrated arrangements among health care providers also may make available new products that benefit consumers, such as utilization review and preferred provider discounts.²¹² The net pro-competitive effect will be less obvious for networks of health care providers that do not produce such new products but simply enhance providers' efficiency in delivering existing services. The courts, however, should give significant weight under the balancing approach to providers' attempts to generate cost-savings that can be passed along to consumers. Such savings may result from competing providers' combination of billing, data processing, purchasing, marketing, or other administrative functions which they previously had performed separately²¹³

211. For a description of the integrated nature of HMOs, see Frances E. Miller, *Vertical Restraints and Powerful Health Insurers: Exclusionary Conduct Masquerading as Managed Care?*, LAW & CONTEMP PROBS., Spring 1988, at 195, 200.

212. Former Assistant Attorney General Paul McGrath has stated that joint ventures among physicians should not be liable under a per se approach if they agree to make any of the following new services available to health care consumers: discounted fees, utilization review, joint marketing, or joint administration of claims. See Grady, *supra* note 95, at 783 & n.71 (quoting J. Paul McGrath, Remarks Before the 33d Annual American Bar Ass'n Spring Meeting (Mar. 22, 1985)).

213. The FTC's *Policy on Physician Agreements to Control Medical Prepayment Plans*, 46 Fed. Reg. 48,982 (1981), was one of the earliest policy statements to address "integration" among health care providers. It defined "integration" as the "joining together or coordination of functions (e.g., production, promotion, management, distribution, financing, debt collection) normally performed separately by discrete business entities." *Id.* at 48,988. Former Assistant Attorney General Charles Rule has indicated that the Department of Justice would permit rather loosely integrated ventures if their purpose was to provide more efficient health services:

The Department believes that [provider joint ventures] can achieve substantial competitive benefits through integration that falls far short of financial participation and sharing of risks. For example, integrative efficiencies can be realized through an agreement among physicians to give up some of their freedom in setting the terms of billing and treatment in order to reduce transaction costs and to offer discount fee levels.

Grady, *supra* note 95, at 783 & n.72 (quoting Charles Rule, Assistant Attorney General, Antitrust Div., Dep't of Justice, Remarks to Connecticut Health Lawyers' Ass'n 12-13 (Mar. 11, 1988)).

IX. CONCLUSION

Since its origin at the end of the nineteenth century, American antitrust law has been subject to the tension between the efficiencies that result from cooperative activity among competitors and the need to preserve a system of free competition. Most courts have been unable to resolve this conflict because they continue to view competition and cooperation as antithetical concepts. During the last decade, however, many American businesses have come to the realization that cooperation can be an effective means of promoting their competitiveness. Strategic alliances for the development and production of new and existing products are enhancing productivity in several domestic industries. Unfortunately, the Supreme Court and lower federal courts have not yet been able to develop a clear and consistent standard for analyzing such strategic alliances. As a result, American firms have been needlessly deterred from entering into additional joint ventures with legitimate efficiency objectives. The new standard for joint venture analysis proposed in this Article appropriately recognizes the beneficial as well as the anticompetitive aspects of such arrangements. The proposed analysis would be easy for the courts to apply and would give clear guidance to business executives contemplating new strategic alliances. A careful reading of recent Supreme Court cases reveals that this new approach can be adopted by the lower federal courts under existing precedent. By doing so, the courts would free American businesses to seek new means of cooperating to enhance their efficiency in the global marketplace.