ANTITRUST AND THE CONSTRUCTION PROFESSIONAL

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West Virginia Code sections 47-18-1 to 47-18-23 contain the West Virginia Antitrust Act. The most important provisions for our purposes are § 47-18-3 and 47-18-4, which lay out what actually constitutes a violation of the West Virginia Anti-Trust Act.

- (a) Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce in this state shall be unlawful.
- (b) Without limiting the effect of subsection (a) of this section, the following shall be deemed to restrain trade or commerce unreasonably and are unlawful:
  - (1) A contract, combination or conspiracy between two or more persons:
    - (A) for the purpose or with the effect of fixing, controlling, or maintaining the market price, rate or fee of any commodity or service; or
    - (B) fixing, controlling, maintaining, limiting or discontinuing the production, manufacture, mining, sale or supply of any commodity, or the sale or supply of any service, for the purpose or with the effect of fixing, controlling or maintaining the market price, rate or fee of the commodity or service; or
    - (C) allocating or dividing customers or markets, functional or geographic, for any commodity or service.
§47-18-3. Contracts and combinations in restraint of trade (continued).

(2) A contract, combination or conspiracy between two or more persons whereby, in the letting of any public or private contract:

(A) the price quotation of any bid is fixed or controlled; or

(B) one or more persons submits a bid intending it to be higher than another bid and thus complementary thereto, submits a bid intending it to be substantially identical to another bid, or refrains from the submission of a bid.

(3) A contract, combination or conspiracy between two or more persons refusing to deal with any other person or persons for the purpose of effecting any of the acts described in subdivisions (1) and (2) of this subsection.

§47-18-4. Establishment, maintenance or use of monopoly.
The establishment, maintenance or use of a monopoly or an attempt to establish a monopoly of trade or commerce, any part of which is within this state, by any persons for the purpose of excluding competition or controlling, fixing or maintaining prices is unlawful.

Other important sections include §47-18-5, which provides limited exemptions to the West Virginia Anti-Trust Act; §47-18-9, which provides for treble (threefold) damages to anyone who is injured by a violation of the provisions of the West Virginia Antitrust Act; and §47-18-11, which provides a four-year statute of limitations to bring claims under the West Virginia Anti-Trust Act.
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- CASE LAW INTERPRETING THE WEST VIRGINIA ANTI-TRUST ACT AND OTHER ANTITRUST LAW

West Virginia’s case law is very limited on the West Virginia Antitrust Act’s effects on the construction industry, but the following cases provide some guidance on issues that may face the industry and provide a safeguard from making business decisions that may violate the West Virginia Anti-Trust Act.

- **Reddy v. Cmty. Health Found. of Man, 171 W. Va. 368, 298 S.E.2d 906 (1982)**—in this case, the Supreme Court of Appeals of West Virginia determined that “[a] restrictive covenant or covenant not to compete was not per se violative of W. Va. Code, 47-18-3(a) [1978], the West Virginia Antitrust Act. *Id.* at Syl. pt 1. In coming to this decision, the Reddy court determined that it was “axiomatic that an employee’s covenant not to compete with his employer is not a per se violation of anti-trust law,” and that “there are situations in which enforceable restrictive covenants are essential to an effective marketplace.” *Id.* at 372, 910.

- Thus, in the conduct of your construction business, remember that you can enact a restrictive covenant or a covenant not to compete without running afoul of the West Virginia Antitrust Act in and of itself.
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- **Gray v. Marshall County Bd. of Educ., 179 W. Va. 282, 367 S.E.2d 751 (1988)**—in this case, the Supreme Court of Appeals of West Virginia determined that the officers of a single firm are not separate economic actors pursuing separate economic interests, so agreements among them do not suddenly bring together economic power that was previously pursuing divergent goals; accordingly, officers of employees of the same firm do not provide the plurality of actors imperative for an actionable conspiracy under *W. Va. Code, 47-18-3(a).*  
  
  Id. at Syl. pt. 1.  The *Gray* court also held that “[t]he courts of this state are directed by the legislature in *W. Va. Code, 47-18-16 [1978]* to apply the federal decisional law interpreting the Sherman Act, 15 U.S.C. ‘1, to our own parallel antitrust statute, *W. Va. Code, 47-18-3(a) [1978].”  
  
  Id. at Syl. pt. 2.

- In *Gray*, the plaintiff was a photographer who was blackballed by the principal of a high school in various ways from providing photographs to the students there.  
  
  Id. at 284, 753.  The plaintiff brought suit and was awarded damages based on an antitrust cause of action against the defendant school board and principal for what amounted to “a personal vendetta” by the principal against the photographer.  
  
  Id. In affirming the lower court’s granting of a new trial to the defendants, the *Gray* court determined that the principal’s actions with regard to the photographer “were not approved, condoned, or encouraged by the superintendent of schools or his direct subordinates.”  
  
  Id. The court also noted that the West Virginia Antitrust Act prohibits conspiracies between separate economic actors, and here, “it was the action of one entity—namely the board of education— and not the action of two entities conspiring with one another.”  
  
  Id.

- Thus, when conducting your business so as not to violate the West Virginia Antitrust Act, it is important to remember that federal cases interpreting the federal Sherman Act are to be applied when making decisions under the West Virginia Antitrust Act.

- It is also important to remember that an employee and an employer cannot create the conspiracy needed to lead to a violation of the West Virginia Antitrust Act. This is because an employer and its employee are not separate actors pursuing separate interests, and thus, what occurred in *Gray*, which was essentially a suit against an employee and employer, cannot be a violation of the West Virginia Antitrust Act.
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- **State ex rel. Palumbo v. Graley’s Body Shop, Inc., 188 W. Va. 501, 425 S.E.2d 177 (1992)**—in this case, which dealt mostly with the role of an Attorney General in the investigation of possible violations of the West Virginia Antitrust Act, the court determined that “[t]he proceedings conducted and the monetary penalties imposed under the West Virginia Antitrust Act, W. Va. Code, 47-18-1 to 47-18-23, as amended, are civil, and not quasi-criminal in nature, and therefore, suspected violators of the Antitrust Act do not have the right to be informed that they are targets of an investigation nor do they have the right to be informed that they may have counsel present at oral deposition. In subpoenas issued pursuant to an investigation under the Antitrust Act, the Attorney General should adequately inform suspected violators of the conduct constituting a violation of the Antitrust Act.” *Id.* at Syl. pt. 2.

- Thus, investigations and proceedings that occur under the West Virginia Antitrust Act are not considered criminal under West Virginia law, even if some parts of the federal Sherman Act do provide for criminal penalties in some instances.

• In *Kessel*, the lower court granted partial summary judgment to the defendants for all antitrust claims brought by several anesthesiologists who asserted that contracts between defendant hospital with two anesthesiology groups which provided the groups with exclusive service to defendant hospital was a restraint of trade in violation of the West Virginia Antitrust Act. *Id.* at 606, 370. On appeal, the Supreme Court of Appeal of West Virginia determined that the claims brought by the anesthesiologists should be analyzed under guidance from the federal law, including application of what the federal considers *per se* antitrust rules. *Id.* at 617, 381. The claims brought by the anesthesiologists were flawed from the beginning, because they relied on the position that federal antitrust was irrelevant to their claims. *Id.* at 620, 384. However, the *Kessel* court disagreed and found that the contracts did not include price fixing, market allocation, and refusal to deal. *Id.* at 620-21, 384-85. In terms of price fixing, the court found that the contracts between defendant hospital and the anesthesiology groups simply required the groups to set reasonable prices in light of prevailing market rates. *Id.* at 620, 384. “Illegal price-fixing requires more. It requires a power to control the market and fix arbitrary prices, including an interference with the setting prices by market forces.” *Id.* In terms of the market allocation theory, the *Kessel* court determined that use of the hospital as a relevant market is too narrow, and that such a narrow definition has been rejected by the Supreme Court. *Id.* In terms of refusal to deal, the court found that this argument must also fail as a matter of law because the refusal to deal refers to sections of the West Virginia Antitrust Act in which no violation was found. *Id.* at 621, 385. Thus, the refusal to deal argument fails as a matter of law. *Id.* Thus, the *Kessel* court found that summary judgment as to all of the appellants antitrust claims was appropriate. *Id.*

Thus, from Kessel, it must be remembered that a West Virginia state court will look to federal cases interpreting the Federal Sherman Act to decide questions on similar sections of the West Virginia Antitrust Act. An important aspect of Kessel is that the anesthesiologists who brought suit against the defendants based their case on the theory that federal law was irrelevant. Federal law, when used to interpret the West Virginia Antitrust Act, is relevant, and will be used when construing what are considered violations of the West Virginia Antitrust Act.

That is the extent of West Virginia law regarding antitrust.
Who says there is nothing funny about antitrust law?

Former U.S. Attorney General, Alberto Gonzales, that is.

In one of his least noted speeches of 2005, he reported that after a team of researchers worked furiously for days, he could “confidently report” “that there are no jokes about antitrust law.

But, we managed to find a few that could pass for antitrust jokes.

- AT&T is reportedly interested in buying America Online. If this occurs, federal regulators are concerned that the merged corporation will have a total monopoly on busy signals.
- The shopkeeper was dismayed when a brand new business much like his own opened up next door and erected a huge sign which read BEST DEALS. He was horrified when another competitor opened up on his right, and announced its arrival with an even larger sign, reading LOWEST PRICES. The shopkeeper was panicked, until he got an idea. He put the biggest sign of all over his own shop—it read... Main entrance.
- How many economists does it take to change a light bulb? None. If the light bulb needed changing, the market would have done it already.
"Let's just say there's one less company we have to contend with."
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SAFEeguarding yourself as a construction professional from antitrust violations

Antitrust issues currently affecting the construction industry

- Bid Rigging—an agreement among competitors to determine in advance who will submit the winning bid on a contract that requires competitive bidding. Bid rigging may take a variety of forms:
  - Bid suppression—one or more competitors who otherwise would be expected to bid, or who have previously bid, agree to refrain from bidding or withdraw a previously submitted bid so that the designated winning competitor’s bid will be accepted.
  - Complementary bidding—submitting bids that are either too high to be accepted or contain special terms that will not be acceptable to the buyer. These bids are not intended to ensure the contract, but are merely designed to give the appearance of genuine competitive bidding. This is the most common type of bid rigging.
  - Bid rotation—all competitors submit bids, but take turns being the low bidder.
  - Subcontracting—competitors who agree not to bid or to submit a losing bid receive subcontracts or supply contracts from the successful low bidder. In some schemes, a low bidder will agree to withdraw its bid in favor of the next low bidder, in exchange for a lucrative subcontract that divides the illegally obtained higher price between them.
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- Price Fixing—an agreement among competitors to raise, fix, or otherwise maintain the price at which goods or services are sold.

- Market Division—an agreement among competitors to divide markets among themselves. Competing firms may allocate specific customers or types of customers, products, or territories.
ENFORCEMENT OF ANTITRUST LAW—RED FLAGS

- Bid or price patterns that seem at odds with a competitive market.
  - The same company always wins a particular bid;
  - The same suppliers submit bids and each company seems to take turns being the low bidder;
  - Some bids are much higher than published price lists, previous bids by the same firms, or engineering cost estimates;
  - There are fewer than the normal number of competitors submitting bids;
  - A certain company appears to be bidding substantially higher on some bids than others, with no apparent cost difference to account for the difference;
  - The bid price drops whenever a new or infrequent bidder submits a bid;
  - The successful bidder subcontracts work to competitors that bid unsuccessfully on the same project; or
  - A company withdraws its successful bid and subsequently is subcontracted work by the new winning bidder.

- Identical prices may indicate a price fixing conspiracy, especially when:
  - Prices stay identical for a long time;
  - Prices previously differed; or
  - Price increases do not appear to be supported by increased costs.
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- Discounts are eliminated, especially in a market where discounts were typical.

- Suspicious statements or behavior:
  - Irregularities or similar handwriting, typeface, or stationery in the proposals or bid forms submitted by different bidders;
  - Bid or price documents contain whiteout or other physical alterations indicating last-minute price changes;
  - A bidder requests a bid package for itself and a competitor or submits its bids as well as a competitor’s bid;
  - A company brings multiple bids to a bid opening, but submits its bid only after determining who else is bidding;
  - A bidder or salesperson makes suspicious statements such as:
    - Reference to industry-wide price schedules;
    - Indication of advance notice of non-public pricing for a competitor;
    - Acknowledgement that a particular bid “belongs” to a certain competitor; or
    - Indication that competitors discussed pricing or have an understanding about prices.
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- EXAMPLES OF RECENT ENFORCEMENT ACTIONS IN THE CONSTRUCTION INDUSTRY (KEEP IN MIND, THESE HAVE TO DO WITH VIOLATIONS OF THE SHERMAN ACT, THE FEDERAL ANITRUST STATUTE. BUT, WEST VIRGINIA LAW, ALONG WITH THE LAW OF MOST OTHER STATES, USING FEDERAL ACTION AND REASONING IN THE ENFORCEMENT OF ITS OWN ANTITRUST LAW).

- THE MOST IMPORTANT DIFFERENCE TO REMEMBER IS THAT THE FEDERAL SHERMAN ACT HAS POSSIBLE CRIMINAL PENALTIES, UP TO AND INCLUDING JAIL TIME, AND THE WEST VIRGINIA ANTITRUST ACT DOES NOT.
United States v. Woodson & Associates (September 2005)—Woodson, a Florida electrical contractor, was indicted with conspiring to rig bids for contracts for a program supported by the United States Air Force. Specifically, the Department of Justice alleged that Woodson discussed bids with competitors and agreed not to compete on bids. Woodson agreed to plead guilty to a one-count felony charge and pay a criminal fine of $175,000.

United States v. APAC-Missouri, Inc. (August 2004)—APAC and its vice-president were indicted for conspiring to rig a $7.1 million bid submitted for a Missouri state highway construction project. According to the indictment, APAC agreed not to compete by designating that APAC would submit the low bid and the competitor would submit a higher complementary bid, with APAC subcontracting a portion of the project to the competitor after APAC won the contract. Following the Department of Justice’s indictment, the State of Missouri Department of Transportation prohibited APAC from bidding on any new work. A jury ultimately acquitted APAC of the charges.
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- United States v. Streu Construction Co., et al. (March 2004)—Streu, Vinton Construction, and James Cope & Sons, as well as several company executives, were indicted for conspiring to rig bids for highway construction projects from pre-1999 until January 13, 2004. According to the indictment, the defendants allocated highway construction projects among themselves, and then designated which one would submit the low bid, and which one would submit higher, complementary bids or no bid at all. The projects were worth more than $100 million. The government based its case in part on testimony and recorded conversations supplied by a cooperating witness. Streu, Vinton, and their executives were sentenced to pay a total of $3.1 million in fines and restitution. The executives of the companies involved also were sentenced to prison and made to pay fines.
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- SUBSIDIARIES’ ABILITY TO COLLUDE WITH EACH OTHER UNDER THE ANTITRUST LAWS
- Although the antitrust laws prohibit agreements that restrain trade, in 1984, the Supreme Court created an exception to this rule.
- In the case of *Copperweld Corp. v. Independence Tube Corp.* ("Copperweld"), the Supreme Court of the United States held that a parent corporation is incapable of conspiring with its wholly owned subsidiary, affiliated corporations, or unincorporated divisions.
- The Supreme Court based its reasoning on the fact that the parent and its subsidiary have a unity of economic interest.
- Most states have adopted Copperweld’s reasoning in applying state antitrust laws. West Virginia adopted Copperweld’s reasoning with the Supreme Court of Appeals of West Virginia’s decision in *Gray v. Marshall County Bd. of Educ.*, discussed above.
- Copperweld has been applied to numerous situations in which the courts have declined to find a conspiracy:
  - Agreement among two wholly-owned subsidiaries ("sister" corporations).
  - Agreement among two corporations with common ownership;
  - Agreement among a parent and its partially-owned subsidiary; and
  - Agreement among a wholly-owned subsidiary and a partially-owned subsidiary of the same parent.
PRACTICAL ANTITRUST GUIDELINES FOR YOUR BUSINESS (THESE GUIDELINES APPLY TO BOTH FORMAL AND INFORMAL MEETINGS AND DISCUSSIONS WITH COMPETITORS)

- Competitors should not discuss prices or features that can impact prices such as discounts, costs of common inputs, inventory and output levels, salaries, terms and conditions of sale, warranties, or profit margins.
  - Note that a price-fixing violation may be inferred from price-related discussions followed by parallel decisions on pricing by association members—even in the absence of an oral or written agreement on prices.
- Competitors should not agree to divide customers, markets, or territories.
- Competitors should not agree to uniform terms of sale, warranties, or contract provisions.
- Competitors should not share data concerning fees, prices, production, sales, bids, costs, salaries, customer credit, or other business practices with industry organizations unless the exchange is made pursuant to a well-considered plan that has been approved by legal counsel.
PRACTICAL ANTITRUST GUIDELINES FOR YOUR BUSINESS (THESE GUIDELINES APPLY TO BOTH FORMAL AND INFORMAL MEETINGS AND DISCUSSIONS WITH COMPETITORS) (continued)

- Competitors should not discuss their customers.
- Competitors should not agree to any industry-related association membership restrictions, standard-setting, certification, accreditation, or self-regulation programs without consultation and approval by legal counsel.
- Competitors should not agree to refuse to deal with certain suppliers, customers, or others.
- Competitors should ask for an agenda for any meeting, including trade association meetings, where other competitors will be present.
- Companies should request that counsel be present at any discussion that involves potentially competitively sensitive information.
- Companies should attend only those meetings that serve their legitimate business interest.
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- The End
- Questions?