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Cooperation Agreements Under Fire: Two New Lawsuits Allege Creditor Coordination Violates Antitrust Laws & Breach Contractual Commitments

Case Law on Joint Negotiation by Creditors and General Antitrust Principles Provide Guidance for the Development of Cooperation Agreements

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Cooperation agreements—agreements among a group of lenders to act collectively in the negotiation of a debt restructuring—are now a staple of lenders' preparation for restructuring events. Parties to a cooperation agreement often agree to support, vote for and consent to transactions in concert with one another, as long as they do not adversely affect the rights or interests of the parties.

Lenders argue cooperation agreements protect individual lenders by limiting each lender's ability to exploit loopholes in financing documents for the lender's own benefit at the expense of its fellow lenders. Excluded lenders argue they receive unfavorable terms in a workout between the borrower and members of the cooperative, with the co-op parties and borrower agreeing to bypass (or revise) credit provisions meant to safeguard minority rights. Borrowers complain that cooperation agreements limit their ability to lower their cost of borrowing through a restructuring by artificially limiting parties' ability to provide the best credit terms to borrowers. At times, borrowers and excluded lenders have argued that cooperation agreements violate the Sherman Act's prohibition on unreasonable restraints of trade. These concerns have become more pointed as cooperation agreements sometimes require acceptance of potential restructuring terms as a condition to participate in the cooperative. Two new lawsuits bring these concerns to the fore.

The Complaints

In *Deltroit Directional Opportunities et al. v. Selecta Group B.V. et al.* 1:25-cv-08956-LAK (S.D.N.Y. Oct. 28, 2025), minority lenders excluded from a cooperative allege that an *ad hoc* majority group of creditors worked in concert to carry out a reorganization that eliminated the rights and recovery of lenders excluded from the restructuring. According to the complaint, the co-op parties "colluded with one another to artificially devalue the interests of the excluded holders [in

certain debt of Selecta] and capture for themselves returns that would otherwise have been spread across all holders."

The co-op parties' cooperation agreement, according to the excluded holders, is a *per se* illegal restraint of trade (or, in the alternative, illegal under a "quick-look" analysis), and violates federal law as well as N.Y. State's antitrust law, the Donnelly Act (N.Y. Gen. Bus. Law §340). The excluded holders allege, too, that the restructuring agreement between Selecta and the favored holders was effected through a series of "anticompetitive collusive agreements" that were the "direct and proximate" cause of the "diminution and/or elimination of value of [their debt holdings]." The excluded holders allege that these agreements are an illegal restraint of trade, either *per se* or under the rule of reason, and violate both federal and N.Y. State antitrust law.

In *Optimum Communications, Inc. et al. v. Apollo Capital Management L.P. et al.* 1:25-cv-09785 (S.D.N.Y Nov. 25, 2025), Optimum, the borrower, alleges that nearly all of its lenders have entered a cooperation agreement, which the lenders are using to force the company into a transaction on terms favorable to the co-op parties but detrimental to Optimum. According to the complaint, in 2015 Optimum raised billions of dollars in low-interest covenant-light loans; the credit agreements and indentures permitted non-ratable creditor treatment with majority consent. When Optimum considered restructuring in 2024, lenders formed the Optimum Co-op, which, according to the company, bars lenders from restructuring their debt with Optimum unless a two-thirds supermajority of the Co-op approves. Optimum alleges that the Co-op and the cooperation agreement "constitute a concerted refusal to deal with Optimum" and "a horizontal agreement to fix the price of Optimum's debt." Optimum alleges these agreements are *per se* illegal restraints of trade (or, in the alternative, illegal under the rule of reason) and violate both the Sherman Act and N.Y. State's Donnelly Act.

In addition to its antitrust claims, Optimum is pursuing a claim for breach of contract and the implied covenant of good faith and fair dealing. Optimum alleges that the defendants are bound by the pre-existing Credit Agreement and Indentures, which permit Optimum "to negotiate and transact with individual creditors who are parties to those contracts without the consent of other creditors." Optimum alleges that pursuant to the Credit Agreement and Indentures, it was also free to "amend the contracts with the consent of creditors holding a simple majority of Optimum's debt governed by that contract," as opposed to the two-thirds supermajority required by the cooperation agreement.

Antitrust Framework for Evaluation of Agreements Alleged to Restrain Trade

U.S. antitrust law prohibits agreements among firms that *unreasonably* restrain trade. The rule of reason is the default legal framework for determining whether restraints are unreasonable. Certain restraints–price fixing, bid rigging, and market or customer division agreements between horizontal competitors–are treated as *per se* illegal. Agreements among competitors not to deal with a third

party or to deal only on specified terms–a group boycott or concerted refusal to deal–may be condemned as *per se* illegal, although the Supreme Court has "expressed reluctance to adopt *per se* rules... where the economic impact of certain practices is not immediately obvious." When evaluating restraints under the rule of reason, courts "conduct a fact-specific assessment of market power and market structure to assess a challenged restraint's actual effect on competition."

Antitrust Case Law Suggests Properly Tailored Cooperative Agreements Will Be Evaluated Under the Rule of Reason

In *United Airlines v. U.S. Bank*, 406 F.3d 918 (7th Cir. 2005), the air carrier, having declared bankruptcy, alleged that an agreement among indenture trustees demanding the return of leased aircraft unless the airline cured all defaults and resumed full rental payments, was an illegal restraint of trade. According to the Seventh Circuit, "cooperation in an effort to collect as much as possible of the amounts due under competitively determined contracts is not the sort of activity with which the antitrust laws are concerned." The agreement at issue did not eliminate competition among the lenders to provide better terms (or accept worse terms) because "competition [for terms of the debt] comes at the time loans are made."

In *Sharon Steel Corp. v. Chase Manhattan Bank*, 691 F.2d 1039 (2nd Cir. 1982) the Second Circuit described plaintiff's antitrust claim–that two indenture trustees "conspired to force [the debtors] to redeem debentures [on agreed common terms] in violation of Section 1 of the Sherman Act"–as "border[ing] on the frivolous." According to the court, "the indenture trustees were faced with a common breach of the indenture agreements. . .and their seeking to arrive at, and arriving at, a common position as to that breach is not anti-competitive."

In *Catalano, Inc. v. Target Sales, Inc.*, 446 U.S. 643 (1980), the Supreme Court held that an agreement among wholesale beer suppliers not to extend credit to beer retailers was *per se* illegal, characterizing credit terms, and willingness to extend credit, as a price term. While neither *United Airlines* nor *Sharon Steel* discussed *Catalano*, one district court has rejected application of *Catalano* to an allegation of a conspiracy among credit holders to inflate the price of a debtor's notes. In *CompuCredit Holdings v. Akanthos Capital Management, LLC*, 916 F. Supp. 2d 1326 (N.D. Ga. 2011), the plaintiff claimed that a group of defendants holding 70% of its notes collectively refused to tender those notes in response to a repurchase offer because they sought to force plaintiff to repurchase at a higher price. The court found the claim "squarely within the principles articulated in *United Airlines* and *Sharon Steel*" and rejected plaintiff's reliance on *Catalano*, noting that *Catalano* involved an agreement with respect to *future* credit, and not existing debt.

The Requirement to Show Antitrust Injury

An antitrust plaintiff must have suffered *antitrust injury*–"injury of the type the antitrust laws were intended to prevent and that flows from that which makes the defendant's acts unlawful"–and not

just injury to itself. Where a defendant's conduct harms the plaintiff, but not competition, the plaintiff has likely failed to show antitrust injury. The Seventh Circuit in *United Airlines* suggested that the complained-of injury was not injury the antitrust laws protected: "cooperation in an effort to collect as much as possible of the amounts due under competitively determined contracts is not the sort of activity with which the antitrust laws are concerned."

Takeaways

- The rulings in *United Airlines* and *Sha*ron Steel may render the plaintiffs' arguments difficult to prove out–especially given Sharon Steel is binding Second Circuit precedent.
- However, antitrust case law suggests attention to a few principles for parties entering into Cooperation Agreements):
    - A Cooperation Agreement between two or more persons with respect to the commercial terms of *new* or *to-be-issued* debt could create issues with respect to Section 1's prohibition on unreasonable restraints of trade.
    - Thus, a Cooperation Agreement between two or more persons who hold the debt of an issuer and that restricts parties to the agreement from negotiating with the issuer, purchasing or selling the debt of the issuer, or imposes conditions on any person from doing the same, should be reviewed carefully by counsel. Parties to the Cooperation Agreement should be prepared to identify the procompetitive justification for the scope of the agreement.

- Parties to a Cooperation Agreement should pay careful attention to the terms of any existing credit agreement to which they are a party and tailor the terms of any Cooperation Agreement to avoid any violation of the express terms of the existing debt agreement.

- Parties to a Cooperation Agreement should pay attention to possible spillover effects of the agreement that may implicate the antitrust laws such as the sharing of competitively sensitive information.

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