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Enforcement Aspects of American Antitrust Law

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Principal American Antitrust Laws

- 1890 – Sherman Act (15 USC § 1 et seq)
- 1914 – Clayton Act
- 1914 – Federal Trade Commission Act
- 1936 – Robinson-Patman Price Discrimination Act
- 1950 – Cellar-Kefauver Act (mergers and acquisitions)
- 1982 – Foreign Trade Antitrust Improvements Act (FTAIA)
Purposes of Antitrust Laws

- Promotion of Competition
- Increasing economic efficiency
- Advancement of Consumer Welfare
  - What does that mean?
- Importance of protection of individual competitors?
- To what extent might these goals be inconsistent? If they are, which should prevail?
Means by which antitrust laws advance these goals

- Prohibition of certain forms of conduct
  - Horizontal
  - Vertical
  - Price discrimination
- Preservation, achievement or deterrence of certain market structures
  - Monopolization
  - Attempt to monopolize
  - Mergers
  - No "abuse of dominant position" prohibition
- Common law nature of antitrust
Content of Antitrust Laws

Sherman Act Section 1

“Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony....”
Content of Antitrust Laws

Sherman Act Section 1

• Requirement of plurality
• Horizontal restraints
  ◦ Price fixing
  ◦ Market divisions
  ◦ Concerted refusal to deal
• Vertical restraints
• Methodology of analyzing conduct
  ◦ Per se rule
  ◦ Rule of Reason
Content of Antitrust Laws

Sherman Act Section 2

“Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a felony....”

- Monopolization
- Attempt to Monopolize
- Conspiracy to Monopolize
Content of Antitrust Laws

Clayton Act – Substantive Provisions

- Section 2
  - Makes unlawful certain discriminations in price
  - More limited prohibition in original statute
  - Replaced by Robinson-Patman Act (1936)

- Section 3
  - Tying arrangements
  - Exclusive dealing arrangements

- Section 7 – Mergers and acquisitions (amended in 1950 by Cellar-Kefauver Act)
Content of Antitrust Laws

- Federal Trade Commission Act § 5 (15 USC § 45)
- Prohibits ...
  - Unfair methods of competition
    - Includes all violations of antitrust laws, and perhaps also incipient antitrust violations
  - Unfair or deceptive acts or practices
    - Prohibition on behavior harmful to consumers
      - False or deceptive advertising
      - Deceptive sales practices
      - Misrepresentations regarding quality, efficacy, etc
Enforcement of Antitrust Laws

- Criminal and Civil
  - Criminal
    - Violation is felony
    - Reserved for clear violations
    - Differing standards of proof
    - Brought only by Department of Justice
    - Penalties – Imprisonment and/or fines
Enforcement of Antitrust Laws

- Criminal and Civil
  - Civil
    - Parties
      - Government
        - Department of Justice
        - Federal Trade Commission
      - Private parties
        - Competitors
        - Consumers
      - Domestic and non-US
Enforcement of Antitrust Laws by Government

- Federal Trade Commission
  - Actions under antitrust statutes
  - Sole enforcer of § 5 of FTC Act
- Department of Justice Antitrust Division
  - Both civil and criminal
- Long history of dual enforcement
Enforcement of Antitrust Laws by “Private” Parties

- “Persons” -- individuals, companies, etc.
  - Monetary relief – Clayton § 4
    - Automatic treble damages and Award of attorneys fees and costs
  - Injunctive relief – Clayton § 16
  - Class Actions – FRCP 23

- State and Local Governmental Bodies
  - In individual capacity, as consumers
  - As representatives of a class of other governmental bodies
  - As representatives of a class of individual consumers
  - As parens patriae, pursuant to Clayton §§ 4C-4H
Private Enforcement of Antitrust Laws

Clayton Act

- Section 4 – Monetary Relief

“Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States... and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”
Private Enforcement of Antitrust Laws

Clayton Act

- Section 16 – Injunctions
  "Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief ... against threatened loss or damage by a violation of the antitrust laws...."
Reach of Antitrust Laws

Interstate commerce

• Antitrust laws enacted pursuant to Commerce Clause (Art. I, § 8, cl. 3) of U.S. Constitution
• “The Congress shall have Power ... To Regulate Commerce with Foreign Nations, and among the Several States....
• Caselaw indicates that the scope of the Sherman Act reaches to full extent of Commerce Clause Power
Reach of Antitrust Laws

Foreign commerce

- Liability of companies and individuals, for their acts abroad, which have effects in U.S.
  
  Compare...
  
  - *American Banana*
  - *Hartford Fire*
  - *Nippon Paper*

- Limitations on federal court’s jurisdiction
  
  - Foreign Trade Antitrust Improvements Act (FTAIA) of 1982

- Liability of companies for their acts in U.S., which only have anti-competitive effects abroad
Reach of Antitrust Laws

Foreign Commerce

- Practical concerns
  - To what extent should American antitrust laws police foreign defendants and/or foreign behavior?
  - Limited ability of American courts to obtain jurisdiction over foreign companies
  - Limited ability of plaintiffs to enforce any judgment obtained, either in US or in foreign courts
  - Sensitivities and interests of foreign governments; deference based on comity considerations
- Possibilities of sovereign immunity
Private Enforcement of Antitrust Laws

Why have private enforcement?

- Compensation of victims of anti-competitive behavior
- Increase deterrence
- Limited resources of governmental agencies (private attorneys general)
- Private parties may be more likely to detect violations
Private Enforcement of Antitrust Laws

Clayton Act Section 4 – Monetary Relief

“Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States... and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney’s fee.”
Private Enforcement of Antitrust Laws

Requirements for successful claim

1. Antitrust injury
2. Standing
3. Causation
Antitrust Injury

- Plaintiff must not only show that it suffered an “injury.” It must prove that the injury is “of the type the antitrust laws were intended to prevent and that flows from that which makes defendants’ acts unlawful.”


Standing Requirements for Private Enforcement


1. Was the harm to the plaintiff the sort that the antitrust laws are designed to protect?
2. Was the injury “direct” or “indirect”?
3. How speculative was the injury?
4. How likely is it that a trial would be burdensome or complex?
5. How likely is it that there might be duplicative recoveries, with difficulties of apportionment?
6. Are there more direct victims of the alleged wrongful act who are equally likely to bring suit?
7. Absent this lawsuit, is the wrong likely to go unchallenged or unremedied?
Indirect Purchaser Rule

Potentially conflicting policies underlying antitrust enforcement....

• Compensation and deterrence
  Versus
• Reducing complexity and expense of litigation
Indirect Purchaser Rule

• *Hanover Shoe v. United Shoe Mach.*, 392 U.S. 481 (1968)

- Overcharge of 2¢ per pair of shoes because of USM’s monopoly power

- Competitive price $25.00
  Price charged by manufacturer to retailer, with overcharge = $25.03

- Competitive price $35.00
  Price charged by retailer to consumer, with overcharge = $35.07

- Who should have cause of action? Shoe Manufacturer? Retailer? Consumer?
- Overcharge of 2¢ per 100 bricks because of price fixing conspiracy

- Competitive price $25.00
  Price to brick subcontractor, with overcharge = $25.03

- Competitive price $35.00
  Price to State, with overcharge = $35.07

- Who should have cause of action? Brick Subcontractor? General Contractor? Ultimate Consumer (State)?
Antitrust Enforcement and Federal Rules of Civil Procedure

- Background and history of Federal Rules of Civil Procedure

- Rules of particular importance to antitrust enforcement
  - Pleading – Rules 8 and 12
  - Class Actions – Rule 23
  - Pre-trial discovery – Rule 26-37
  - Settlements – Rule 23
Pleading Requirements

- Central procedural issue: What are the standards regarding the sufficiency of pleading an antitrust claim, consistent with the requirements of the Federal Rules?
  - FRCP Rule 8(a)(2) requires the complaint to contain “a short and plain statement of the claim showing that the pleader is entitled to relief”
- Antitrust issue: When the plaintiff alleges a violation of Sherman §1, what are the pleading standards, regarding the allegations which would support inferences of agreement/plurality?
Twombly -- Holding

- Requirement for sufficient pleading of a § 1 claim: “A complaint with enough *factual matter* (taken as true) to suggest that an agreement was made.”

- Ultimate conclusion: “We do not require heightened fact pleading of specifics, but only *enough facts* to state a claim to relief that is plausible on its face. Because the plaintiffs have not nudged their claims across the line from conceivable to plausible, their complaint must be dismissed.”
Twombly -- Competing Views of Nature of Antitrust Litigation

- Concerns Animating Majority’s Holding
  - Private litigation is expensive and time-consuming
    - Particularly problematic in case like this
      - Class action, millions of plaintiffs
      - Multiple defendants, large market share
  - Cases are difficult for triers of facts (particularly juries, which are available when plaintiffs seek treble damages)
    - Risk of false positives
    - Inconsistency of outcomes
  - Mere threat of suit (or filing of complaint) imposes burdens on defendants, and may lead to choice of settling as way of avoiding expenses and uncertainties of litigation
Twombly -- Competing Views of Nature of Antitrust Litigation

- Concerns of dissent
  - Antitrust laws are designed to deter/punish anti-competitive conduct, which harm consumers by raising prices, limiting choice, etc., and to compensate victims
  - Bulk of evidence of actual conduct is initially in hands of defendants, and is unavailable at pleading stage.
  - Pre-trial discovery is usual, normative way of obtaining that evidence.
  - Trial judges have numerous vehicles available to handle complex cases
Class Actions

- FRCP Rule 23 -- Basic Requirements:
  - **Rule 23(a)**
    - Numerosity of plaintiffs
    - Common questions of law or fact
    - Claims of representative are typical of claims of class
    - Representative will fairly and adequately protect interests of class
  - **Rule 23(b)**
    - Common questions of law or fact predominate
    - Class action is superior method of adjudicating dispute
Class Actions

- FRCP Rule 23(c)
  - Notice to class members
  - Opt-out opportunity
- Preclusive effect of judgment on all class members who did not opt out

- FRCP Rule 23(e)
  - Settlements must be approved by court

- FRCP Rule 23(h)
  - Court must approve award of attorneys fees and costs
Pre-trial discovery

- **Rule 26(b):**
  - “The scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter.”

- **Forms of Discovery:**
  - Depositions
  - Interrogatories
  - Production and inspection of documents and other property
  - Requests for admission
Pre-trial Discovery

Potential use of American courts, to provide discovery for non-U.S. based litigation:

- “The district court of the district in which a person resides or is found may order him to give his testimony or statement or to produce a document or other thing for use in a proceeding in a foreign or international tribunal....” 28 U.S.C. § 1782.
Right to trial by Jury

- U.S. Constitution, Seventh Amendment:
  “In suits at common law, ... the right of trial by jury shall be preserved....”

- Affording trial by jury, at option of either party, when plaintiff seeks monetary relief.

- Therefore, even extended and complicated antitrust claims can be heard by jury.