INTRODUCTION TO ANTITRUST: HORIZONTAL RESTRAINTS OF TRADE

June 10, 2019

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Elements of Horizontal Restraints

- **15 U.S.C. § 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."
- **Concerted action**
  - Involves an agreement (*e.g.,* conspiracy) among two or more parties.
  - Conspirators need to be independent economic actors—a parent and wholly-owned subsidiary cannot "conspire."
  - Agreement need not be in writing—can be tacit or inferred from circumstantial evidence.
- **Restraint of trade**
  - Agreement must restrain *trade*—the exchange of goods or services.
- **Unreasonable**
  - Standard depends on nature of agreement.

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Per Se Unlawful

- Some agreements are always unreasonable—*per se* unlawful.
  - "[W]hether the practice facially appears to be one that would always or almost always tend to restrict competition and decrease output." *Broad Music, Inc. v. CBS*, 441 U.S. 1, 19-20 (1979).
- Absence of anticompetitive effects is not a defense.
- Examples of *per se* illegal conduct:
  - Price fixing
  - Bid rigging
  - Market allocations

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Per Se Unlawful Conduct

- **Price Fixing**
  - Any "combination formed for the purpose and with the effect of raising, depressing, fixing, pegging or stabilizing the price of a commodity." *United States v. Socony-Vacuum Oil*, 310 U.S. 150, 223 (1940).
  - May include arrangements among competitors affecting not only prices directly, but also profit margins, product and service offerings, delivery terms, discounts, and other terms or conditions of sale.
- **Bid Rigging**
- **Market Allocations**
  - Geographic or customer market divisions among competitors.

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Rule of Reason

- Not all agreements among competitors are unlawful.
- Majority of agreements are subject to "rule of reason" analysis.
- Rule of reason balances anticompetitive effects with procompetitive effects (sometimes termed "business justification").
- Examples of horizontal conduct that is viewed under the rule of reason:
  - Exchanges of price information among competitors
  - Ancillary price restraints
  - Agreements arising from joint ventures
  - Joint purchasing agreements
  - Covenants not to compete
- Truncated rule of reason analysis (called "quick look") will be applied to practices that are "inherently suspect" but may be justified under particular circumstances.

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Criminal Enforcement: DOJ Antitrust Division

- Violations of Sherman Act can be prosecuted criminally.
- Criminal antitrust enforcement (at the federal level) is the exclusive province of the Antitrust Division of the U.S. Department of Justice.
- DOJ Antitrust Division generally follows a policy of criminally prosecuting only *per se*, "hard core" antitrust violations (absent exceptional circumstances).
  - **Per Se Violations:** Price fixing, bid rigging, and market allocation are generally prosecuted criminally because they have been found to be unambiguously harmful.
  - **Statute of Limitations:** Five years for a Sherman Act offense, but the time period can be longer with continuing violations. 18 U.S.C. § 3282
  - Sherman Act reaches conspiracies outside the U.S. that substantially affect U.S. commerce.

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Proof of a Criminal Antitrust Conspiracy

- Antitrust offenses can be proven by direct or circumstantial evidence.
- DOJ typically issues federal grand jury subpoena to collect documents and testimony for the alleged conspiracy.
- Proof of an antitrust conspiracy can include:
  - Testimony of conspirators, *e.g.,* salespeople who have fixed prices with competitors;
  - Evidence of secret meetings or phone calls between competitors, *e.g.,* handwritten notes;
  - Price or customer lists showing coordination;
  - E-mail, faxes, memos, presentations reflecting competitor communications;
  - Monitoring/surveillance.

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Recent DOJ Criminal Investigations

- Criminal enforcement used to be quite vigorous.
- Recent investigations include:
  - Auto Parts
  - Air Cargo
  - Cathode Ray Tubes
  - Foreign Currency Exchange Rate
  - Liquid Crystal Display Panels
  - Municipal Bond Derivatives
  - Packaged Seafood
- Auto Parts Conspiracy
  - Ongoing investigation into price-fixing and bid-rigging cartel in the auto parts industry.
  - Largest criminal investigation ever conducted by DOJ.
  - As of January 2019, DOJ fined 46 companies over $2.9B and sentenced 32 executives.

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DOJ Antitrust Division: Leniency Program

- U.S. and other jurisdictions offer substantial incentives for companies and individuals to self-report criminal antitrust violations.
- Corporations and individuals who report their cartel activity and cooperate in the DOJ's investigation can qualify for leniency—*e.g.*, assurance of no criminal prosecution by the DOJ.
  - Zero dollars in fines.
  - No criminal indictments.
  - No jail time for cooperating executives.
  - Potential benefits in civil actions, such as "de-trebling" of civil damages and no joint and several liability.

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DOJ Leniency Program Requirements

- DOJ Leniency Program requires companies and individuals to be the "first in the door" to qualify for leniency.
- By requesting a "marker" from the DOJ, a would-be leniency applicant can hold its place at the front of the line.
- After a marker is granted, "perfecting" a leniency application requires that the leniency applicant meet several requirements, including:
  - No leadership in conspiracy and prompt efforts to terminate illegal conduct;
  - Corporate confession of wrongdoing;
  - Ongoing cooperation with the government's investigation; and
  - Efforts to make restitution to injured parties.

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DOJ: Negotiating a Plea Agreement

- If the DOJ decides to seek an indictment, plea agreements are common.
  - Company pleads guilty to an agreed-upon offense and provides cooperation in exchange for a negotiated penalty.
- Plea agreements can provide certainty as to scope of admission of wrongdoing and level of exposure.
  - However, unlike with amnesty, the DOJ typically will not agree to non-prosecution of individuals, and will frequently seek "carve-outs."
- Guilty pleas are admissible in subsequent civil or criminal proceedings.

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Private Civil Litigation

- Criminal investigations inevitably lead to civil litigation.

  When the DOJ or FTC start an antitrust investigation, or the DOJ files a criminal prosecution, private plaintiffs often bring their own civil cases to recover money and court-directed relief for antitrust victims.

  Examples of civil antitrust lawsuits:
  - Follow-on or stand-alone class actions.
  - "Indirect purchaser" lawsuits under certain state antitrust statutes.
  - *Parens patriae* lawsuits by state governments permitted in certain jurisdictions.

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Private Civil Litigation: Treble Damages

- Private parties are able to recover "treble damages" in civil antitrust suits.
- Since the enactment of the Sherman Act in 1890, private treble damage enforcement has been a part of the federal antitrust laws.
- Treble damages are meant not only to compensate, but also to punish and to deter.

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Private Civil Litigation: Antitrust Standing

- *Illinois Brick Co. v. Illinois*, 431 U.S. 720 (1977), limits standing under the federal antitrust laws to direct purchasers.
  - "[W]e conclude that the legislative purpose in creating a group of private attorneys general to enforce the antitrust laws . . . is better served by holding direct purchasers to be injured to the full extent of the overcharge paid by them than by attempting to apportion the overcharge among all that may have absorbed a part of it." *Id.* at 746.
- *Associated General Contractors*, 459 U.S. 519 (1983), five factor test:
  - (1) the causal connection between the antitrust violation and the harm to the plaintiff, and whether the harm was intended;
  - (2) the nature of the injury, including whether the plaintiff is a consumer or competitor in the relevant market;
  - (3) the directness of the injury, and whether the damages are too speculative;
  - (4) the potential for duplicative recovery, and whether the apportionment of damages would be too complex; and
  - (5) the existence of more direct victims.

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Private Civil Litigation: Class Actions

- **Class Certification**
  - Recent Supreme Court decisions make class certification increasingly fact-intensive.
    - *Wal-Mart Stores, Inc. v. Dukes*, 131 S. Ct. 2541 (2011).
      - District courts are required to conduct a rigorous analysis of whether the pre-requisites for class certification under FRCP 23 are satisfied. Such an analysis can involve an analysis of the merits of the case at the class certification stage.
    - *Comcast Corp. v. Behrend*, 133 S. Ct. 1426 (2013).
      - To achieve class certification, plaintiffs' damages model must be consistent with their theory of antitrust impact such that plaintiffs will be able to show that damages are capable of measurement on a class-wide basis.
  - Economic experts play an increasingly significant role in class certification in attempting to show predominant issues and class-wide damages.

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REWRITING THE ODDS

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