

ANTITRUST LAW

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REVIEW

CONTACTS
TORTS
and
CRIMES

BEFORE START ANTITRUST LAW

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ANTITRUST LAW

COMMON LAW OF TRADE RESTRICTIONS

unlawful, as against public policy,
unless
ancillary to a legitimate business purpose

sale of GOODWILL

COVENANT NOT TO COMPETE
reasonable time and area

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**STATUTORY EVOLUTION
OF ANTITRUST LAW BECAUSE**

- 1) criminal: void for vagueness
- 2) detailed rules for specific problems
- 3) criminal v. civil burden of proof
beyond a reasonable doubt
v.
preponderance of the evidence
- 4) governmental standing

Sherman Act (SA) is a criminal statute.
The Department of Justice (DoJ) enforces the SA.

**STATUTORY EVOLUTION
OF ANTITRUST LAW BECAUSE**

Sherman Act (SA) is a criminal statute.
The Department of Justice (DoJ) enforces the SA.

Clayton Act (CA) is both
criminal and civil statute.
The DoJ has authority to enforce the criminal
provisions of the CA. The DoJ rarely does so.

The Federal Trade Commission (FTC) and the DoJ
have the authority to enforce the civil provisions of
the CA. Both the FTC and the DoJ do so.

ANTITRUST STATUTORY EVOLUTION

Year	Law	Topic
1890	SA Section 1	contract, combination, or conspiracy in restraint of trade
	SA Section 2	monopolization, or attempt to monopolize
1914	CA Section 3	tying and exclusive dealings
	CA Section 4	treble damages
	CA Section 6	antitrust exemptions labor, unions and agricultural cooperatives

ANTITRUST STATUTORY EVOLUTION

Year	Law	Topic
1914	CA Sec. 7	mergers, stock
	FTC Sec. 5	unfair competition system of competition
1936	CA(RPA) Sec. 2	price discrimination
1938	FTC Section 5	unfair or deceptive trade practices competitors and consumers
1957	CA Section 7	mergers, stock or asset

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Sherman Act § 1: restraint of trade

Test for reasonableness along a continuum, with "Per Se Unreasonable" at one end and the "Rule of Reason" at the other end.

RULE OF REASON

ANY restraint is legal
IF the restraint is

proportional to a	4.)
legitimate	3.)
business	2.)
interest	1.)

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PER SE UNREASONABLE

Only use Per Se if experience indicates the restraint always destroys competition (i.e., is not proportional to the legitimate business interest).

Use the Per Se test so the law will be predictable.

Measure proportionality by the restraint's

1. purpose
2. intent
3. effect
4. power conferred

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Sherman Act § 1: restraint of trade
CONTRACT, COMBINATION, or CONSPIRACY
AGREEMENT
intraenterprise: need two
substance over form
conscious parallelism
independent business judgment

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HORIZONTAL: direct competition
VERTICAL: distribution chain

INTRABRAND
v.
INTERBRAND COMPETITION
legitimate business interests
more and larger
opportunity
effect
power conferred

U.S.A. favors intrabrand;
Europe favors interbrand competition.

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PER SE UNREASONABLE ACTS

- PRICE FIXING**
terms of trade affecting the buyer
- HORIZONTAL DIVISION OF TERRITORIES**
- GROUP BOYCOTT**
- TYING**

Do any one of these things and you will go to jail.

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PER SE UNREASONABLE ACTS

1) PRICE FIXING

terms of trade affecting the buyer

horizontal

always

vertical

history of treatment of

vertical price fixing

per se

rule of reason

per se

Court

Congress 1935

Congress 1975

PER SE UNREASONABLE ACTS

2) HORIZONTAL DIVISION OF TERRITORIES

but not vertical

history of treatment of vertical divisions

RoR

court

White

per se

court

Schwinn

RoR

court

Sylvania

PER SE UNREASONABLE ACTS

3) GROUP BOYCOTT

horizontal and/or vertical

businesses' ethics equal a felony?

political speech is not commerce

Radical difference between SA and RICO.

4) TYING

transfer of monopoly power

must first have monopoly power

i.e., ability to act independently
of competitive forces

PER SE UNREASONABLE ACTS

4) **TYING**

COMPARE(SA1 or SA2) versus **CA3**
under CA3 need
commodities
over 33% market share
products v. commodities
two separate products

QUESTIONS:

legal monopoly = monopoly power?
trademark = commodity AND monopoly power?

RULE OF REASON ACTS

Anything
proportional to
a firm's
legitimate
business
interest
is
legal.

Everything
that is not per se unreasonable
is
tested by the rule of reason.

MONOPOLIZATION: Rule of Reason: SA Section 2
I. + II. + III. + IV. = MONOPOLIZATION

- I. **Intent**
- II. **Relevant Market**
reasonably interchangeable
- III. **Monopoly Power**
- IV. **Lack of Defense**

MONOPOLIZATION: Rule of Reason: SA Section 2

I. Intent

General Intent

reasonably foreseeable consequences

Specific Intent

act to get result
must use for ATTEMPT to monopolize

MONOPOLIZATION: Rule of Reason: SA Section 2

II. Relevant Market: reasonably interchangeable

A. Product

1. **Producer: CAN DO**
technological cost
2. **Consumer: DOES DO**
price
use
quality

B. Geographic

1. **Producer**
transportation cost
2. **Consumer**
actual behavior

MONOPOLIZATION: Rule of Reason: SA Section 2

III. Monopoly Power

ability to act
independently of
competitive forces

market share

- 85% = yes
- 84 to 50% = maybe
- below 49% = no

MONOPOLIZATION: Rule of Reason: SA Section 2

IV. Lack of Defense

DEFENSES TO MONOPOLIZATION

- (a) **THRUST UPON**
 - natural monopoly
 - market demand = MES
 - government grant
 - e.g., trademark, patent, copyright
 - legal monopoly, yes
 - economic monopoly, ?
- (b) **SUPERIOR PRODUCT**
 - submarket
 - objective
- (c) **SUPERIOR BUSINESS ACUMEN**
 - more subjective

MERGERS: CA Section 7: Control of productive assets

The Clayton Act section 7 prohibits mergers, by stock or asset acquisition, but excluding natural persons and excluding corporations buying solely for investment, when, at the time of suit, there is a reasonable likelihood of a substantial lessening of a not insubstantial amount of competition in any line of commerce (i.e., relevant product market) or in any section of the country (i.e., relevant geographic market): such a lessening may be arrested in its incipency.

CA §7: MERGERS: control of productive assets

HORIZONTAL

- direct competitors
- market share

VERTICAL

- distribution chain
- foreclosure

CONGLOMERATE

- unrelated
- foreclosure and/or reciprocity

potential competition, especially edge of market

entrenchment mergers

v.

toehold mergers

STOCK OR ASSET ACQUISITION
 fixed to liquid assets

$[A_{\text{fixed} + \text{cash}} + B_{\text{fixed}}] = [A_{\text{fixed} + \text{fixed}} + B_{\text{cash}}]$

NATURAL PERSONS
 constitutionally protected right to own property
 must use eminent domain

no need to bother for one person

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BUYING SOLELY FOR INVESTMENT

fewer constitutional rights

stock rights

- 1) income
- 2) voting = control
- 3) assets

if solely for investment,
 then sell voting rights to max. ROI

portfolio theory and
 more competition in the securities market
 are
 legitimate business interests

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WHEN, AT TIME OF SUIT,

effectively, **NO statute of limitations**
 post merger evidence
 convict, but not acquit

behave until statute of limitations runs

REASONABLE LIKELIHOOD

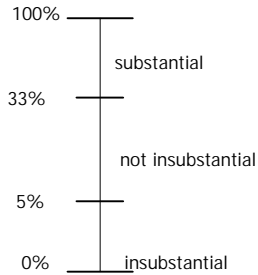
predicting the less objective future

reasonable estimate
 likely, not certain

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SUBSTANTIAL LESSENING
must be sufficient for **objective** lessening

SUBSTANTIALLY CONTINUUM



$$\begin{aligned} .33 \times .05 &= .0165 \\ .05 - .0165 &= \text{not insubstantial?} \end{aligned}$$

NOT INSUBSTANTIAL AMOUNT OF COMPETITION
jurisdictional requirement for Congress
commerce clause, post 1937
close & substantial affect

note how small the "substantial" lessening
is
when compared to "not substantial"

RELEVANT MARKETS
submarkets: significant competitor

focus first on
product or geographic,
then
narrow the other

SA Section 2 market shares that are small
become large under CA Section 7

includes **edge of market**

INCIPIENCY
 stop a trend at beginning
 modifies reasonable likelihood

DEFENSES to CA Sec. 7 Merger violation

- 1) **failing company**
 will fail with reasonable certainty
 ALLOW EXIT
 RATHER THAN
 ALLOW ENTRY
 do not allow purchase of monopoly power
- 2) **Efficiency**
 within the acquired market
 hard to prove

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PRICE DISCRIMINATION CA (RPA) Section 2
 protects competitors, not competition

Section 2a

1. DIFFERENT PRICES
2. TWO SALES
3. CLOSE IN TIME
4. SAME SELLER
5. COMMODITIES
6. LIKE GRADE AND QUALITY
7. COMPETITIVE INJURY
- AND**
8. INTERSTATE COMMERCE

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PRICE DISCRIMINATION CA (RPA) Section 2
Section 2a

1. **DIFFERENT PRICES**
 illegal price discrimination
 $P_a \neq P_b$
 economic price discrimination
 $(P_a/MC_a) \neq (P_b/MC_b)$
2. **TWO SALES**
 not consignments
 completed sales
3. **CLOSE IN TIME**
 seconds to years: depends on market

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PRICE DISCRIMINATION CA (RPA) Section 2
Section 2a

- 4. **SAME SELLER** (versus competition)
intraenterprise?
- 5. **COMMODITIES**
objective, unlike services
- 6. **LIKE GRADE AND QUALITY**
grade is grosser
functionally similar; slight differences
consumer preference
does not equal unlike
(since competitive injury
is a requirement)

PRICE DISCRIMINATION CA (RPA) Section 2
Section 2a

- 7. **COMPETITIVE INJURY**
any line of commerce

AND

- 8. **INTERSTATE COMMERCE**
 - A) violation
 - B) discriminatory practice and
 - C) ONE sale

DEFENSES TO CHARGE OF
CA (RPA) 2a OF PRICE DISCRIMINATION

- 1) **CA (RPA) Section 2b Good Faith Meeting**
not Beating competition
allow market to quickly correct
the discriminatory practice

Illegal v. Economic Price Discrimination

- 2) **CHANGING CONDITIONS**
close in time?
beyond seller's control

**DEFENSES TO CHARGE OF
CA (RPA) 2a OF PRICE DISCRIMINATION**

3) COST JUSTIFICATION

known before price differences
full cost study
manufacturing and/or distribution
quantity based

NOT AVAILABLE FOR SECTIONS

2c brokerage payments
2d services, or
2e fees

protect competitor, not competition

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