

CHAPTER 43: Administrative Law

separation of powers: I v G; F v S; L v E v J

both within the agency and outside of the agency (e.g., budget & appointment)

Constitution: implied (e.g., USA) versus express (e.g., Neb)

Regulatory Flexibility Act of 1980: small bus. costs & alternatives

Small Business Regulatory Fairness Act of 1996: Congressional 60 day review

ENABLING ACT

creates the agency

Article I, section 8, clause 18: make all laws necessary and proper

delegate jurisdiction

(e.g., FTC's **unfair and deceptive trade practices**)

civil (e.g., FTC) versus criminal (e.g., DoJ)

RULEMAKING

substantive due process versus procedural due process

Administrative Procedures Act of 1946: default unless Enabling Act differs

legislative rule (i.e., force of law binding an Art. III judge)

interpretive rule (i.e., only binds within agency)

notice (i.e., *Federal Register*) and hearing (e.g., comment period)

before final rule entered into *Code of Federal Regulations*

JUDICIAL REVIEW

both within and outside of agency

must *exhaust all administrative remedies* to obtain standing to sue in an Art. III court

recall: relationship between trial court and appellate court

INVESTIGATIONS: legislative versus executive

Amendment IV and Amendment V

natural person versus legal person

probable cause:

personal versus statistical

unregulated industry versus regulated industry

REMEDIES

cease and desist order versus **consent decree**

PRIVACY

implied via Amendment IX and Amendment X

express protections via statutes

Freedom of Information Act (FOIA) of 1966: do not collect, reveal, and correct

Government in the Sunshine Act of 1976: open notice and open hearing

CHAPTER 44: Consumer Law

consumer versus merchant: type of person and type of knowledge
 knowing and voluntary; objective v. subjective; good faith; tort v. contract;
 fraud v. mistake v. duress; *caveat emptor*;
 latent defect v. assumption of the risk; free speech: political v. commercial;
 advertisement: offer v. puffery; Police Power v. Commerce Clause
 Federal Trade Commission Act of 1914: unfair and deceptive trade practices
 Postal Reorganization Act of 1970: unsolicited equals gift
 FTC rule Mail Order Rule of 1975 (1992 amend): time material; refund
 Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994
 FTC rule Telemarketing Sales Rule of 1995: misrepresentation = illegal
 FTC rule Do Not Call Registry of 2002: **opt out**
 FTC rule door-to-door sales 3 day **cooling off** before *holder in due course*

LABELING

relative position to know: latent defect versus assumption of the risk
 Police Power versus Commerce Clause:
 in the body v. on the body v. next to the body v. use away from human body

CREDIT

Consumer Credit Protection Act a.k.a. Truth-in-Lending Act of 1968 (amended 1995)
 Fed's **Regulation Z**: clearly and conspicuously disclose material terms; APR
 Fair Credit Reporting Act of 1970:
 consumer **access** and written demand for **correction**
 Equal Credit Opportunity Act of 1974:
 makes illegal discrimination not based on objective factors: **red lining**
 Fair Debt Collection Practices Act of 1977: no harass; stop call; only truthful
 Fair and Accurate Credit Transactions Act of 2003: identity theft
garnishment:
 varies widely by State: single continuing claim versus sequential claims

CONSUMER HEALTH AND SAFETY

UCC-2 **merchantability**

Food and Drug Act of 1905:

recall Sinclair Lewis

food must be *safe*

drugs must be *safe and effective*

neither food nor drug: alcohol & tobacco (recall federal police of ATF)

Consumer Product Safety Act of 1972:

reporting from emergency rooms changes **what can be known**

product standards; recall (i.e., remove from market)

CHAPTER 46: Antitrust Law

big is not bad: but, how get big and how use big can be a felony

Minimum Efficient Size (MES)

natural monopoly

USA is a capitalist country:

USA *Constitution's* Amendment V and Amendment XIV life, liberty, and property

Sherman Act of 1890: felony to destroy competition

SHERMAN ACT of 1890

Section 1: restraint of trade

horizontal restraints (i.e. direct competitors [e.g., Ford v. GM])

versus

vertical restraints (i.e., competing systems [e.g., Ford v. dealers of Ford's])

RULE OF REASON

Any restraint is lawful if that restraint is

proportional to a firm's **legitimate business interest** is lawful.

proportional is measured by the restraint's:

purpose, intent, effect, and power conferred

PER SE UNREASONABLE

experience teaches that some restraints consistently are disproportionate

price fixing;

horizontal divisions of customers or territories;

group boycott;

tying

CLAYTON ACT of 1914

section 2: price discrimination

section 3: exclusive dealings (e.g., output and requirements contracts) and tying

section 4: **treble damages**

section 6: **exemptions** for labor (not an article of commerce)
agricultural co-ops (*countervailing power*)

section 7: mergers;

competition requires entry and exit; edge of market;

$HHI = \sum m_i^2$

section 8: interlocking directorates

Noerr-Pennington Doctrine

international antitrust law

USA extra-territorial application

EU versus USA: existence of and magnitude of legitimate business interests

Act of State

CHAPTER 49: Insurance Law

gambling creates risk and allocates that risk upon chance for a price

insurance policy

 pools existing risk and transfers risk in exchange for average price premium

adverse selection

moral hazard

risk is the subject matter, thus all risk is material

 but, incontestability clause

insurance **agent** has insurER as principal

insurance **broker** has insurED as principal

either an agent or a broker may issue a binder

 liability for non-procurement of policy

insurable interest (see, p. 410 and p. 990)

 differentiates gambling from insurance contract

 recall UCC-2 identification and risk of loss

property insurance needs insurable interest at **time of loss**

life insurance needs insurable interest at **time of contract**

coinsurance clause prompted by moral hazard

deductible and **co-pay**

 multiple policy coverage limited to maximum recovery of 100% of loss

BUT

in NEB recovery limited to largest policy even in less than 100% of loss

subrogation

by necessity, insurance contracts must be **adhesion contracts**

 to pool risk and to do average pricing

 ambiguities interpreted against the insurER: *always*

both parties to insurance contract bound by implied duty of good faith

punitive damages for insurer's bad faith

CHAPTER 50: Wills, Trusts, and Elder Law

capacity: crime > contract > tort > wills

ability to grasp the natural consequences on one's actions

wills:

statutory requirements

[1] capacity;

[a] understand sign; [b] property; and [c] natural objects of one's bounty

[2] intent to create a will and to sign;

[3] writing: (holographic; [but, nuncupative]);

[4] signature (i.e., any mark with the current intent to authenticate the will);

[5] witnesses (of the capacity and of the signature);

[6] publish.

revocation: writing (e.g., codicil) is best

probate:

informal versus formal

intestacy laws vary widely by State

Objectively, who do you love?

parents, surviving spouse, children, grandchildren

see, p. 1018, Ex. 50-2 *per stripes* (i.e., Neb.) versus Ex. 50-3 *per capita*

trusts

[1] grantor;

[2] corpus;

[3] trustee (gets legal title);

[4] title passes;

[5] actual delivery; and

[6] beneficiary (gets beneficial title)

TYPES

express: living; testamentary; charitable; spendthrift; Totten (grantor is trustee)

implied: constructive (operation of law) versus resulting (acts of parties)

trustee is a fiduciary to the beneficiary: utmost good faith

honesty in fact and personalized objective

presume undue influence

power of attorney versus living will

spending down versus fraud