

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)

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

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

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

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* on 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

civil (e.g., FTC) versus criminal (e.g., DoJ): how delegate create a crime?

cease and desist order versus **consent decree****PRIVACY***reasonable expectation of privacy*USA *Constitution*: implied fundamental right of Individual under

via Amendment IX and Amendment X

USA State constitutions: express or implied fundamental right

federal and USA State statutes: express protection of privacy

Freedom of Information Act (FOIA) of 1966

do not collect, do reveal, and do correct

Government in the Sunshine Act of 1976

open notice and open hearing

on the web: USA is **opt-out** versus the EU is **opt-in**

- 1 **CHAPTER 44: Consumer Law**
2 consumer v. merchant:
3 objective v. subjective
4 knowing and voluntary
5 type of person: natural v. legal
6 type of knowledge: actual v. receipt of notice v. reason to know
7 *caveat emptor* v. good faith (C.L. v. UCC)
8 tort v. contract
9 fraud v. mistake v. duress v. undue influence
10 latent defect v. assumption of the risk v. misuse
11 free speech: political v. commercial
12 advertisement: offer v. puffery;
13
14 Police Power v. Commerce Clause:
15 **in** the body v. **on** the body v. **next to** the body v. use **away from** human body
16
17 Police Power v. Commerce Clause
18 Federal Trade Commission Act of 1914
19 unfair and deceptive trade practices
20 individual consumer or merchant v. system of competition
21 Postal Reorganization Act of 1970
22 unsolicited equals gift
23 FTC rule Mail Order Rule of 1975 (1992 amend)
24 time material; refund
25 Telemarketing and Consumer Fraud and Abuse Prevention Act of 1994
26 FTC rule Telemarketing Sales Rule of 1995
27 misrepresentation = illegal
28 FTC rule Do Not Call Registry of 2002 (made permanent in 2008)
29 **opt out**
30 FTC rule door-to-door sales
31 3 day **cooling off** before *holder in due course*
32
33 LABELING
34 relative position to know
35 types of defects
36 design v. manufacturing v. warning
37 latent defect v. assumption of the risk v. misuse

- 1 **continue Chapter 44: Consumer Law**
2
3 CREDIT
4
5 Consumer Credit Protection Act a.k.a. Truth-in-Lending Act of 1968 (amended 1995)
6 Fed's **Regulation Z**
7 clearly and conspicuously disclose material terms
8 APR Fair Credit Reporting Act of 1970:
9 consumer **access** and written demand for **correction**
10
11 Equal Credit Opportunity Act of 1974:
12 makes illegal discrimination not based on objective factors
13 **red lining**
14
15 Fair Debt Collection Practices Act of 1977
16 no harass; stop call; only truthful
17
18 Fair and Accurate Credit Transactions Act of 2003
19 identity theft
20
21 **garnishment**
22 varies widely by State: single continuing claim v. sequential claims
23
24
25
26 CONSUMER HEALTH AND SAFETY
27 Police Power v. Commerce Clause:
28 **in** the body v. **on** the body v. **next to** the body v. use **away from** human body
29
30 UCC-2 **merchantability**
31
32 Food and Drug Act of 1905
33 *recall Sinclair Lewis*
34 food must be *safe*
35 drugs must be *safe and effective*
36 *but note: neither food nor drug: alcohol & tobacco* (recall federal police of ATF)
37
38 Consumer Product Safety Act of 1972:
39 reporting from emergency rooms changes **what can be known**
40 product standards
41 product recall (i.e., remove from market)
42

CHAPTER 46: Antitrust Law

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

USA is a capitalist country:

big is not bad

but, how get big and how use big can be a felony

Minimum Efficient Size (MES)

natural monopoly

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])

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

$HHI = \sum m_i^2$

note difference if top 4 firms each 10% v. each 20%; & rest 1%

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

- 1 **CHAPTER 49: Insurance Law**
2 gambling
3 creates risk and allocates new risk upon chance for a price
4 insurance policy
5 pools existing risk
6 transfers that risk in exchange for average price premium
7
8 risk is the subject matter, thus all risk is material
9 but, incontestability clause
10
11 **adverse selection**
12
13 **moral hazard**
14 coinsurance clause prompted by moral hazard
15 **deductible** and **co-pay**
16 multiple policy coverage limited to maximum recovery of 100% of loss
17 **BUT**
18 *in NEB recovery limited to largest policy even in less than 100% of loss*
19
20 insurance **agent** has insurER as principal
21 insurance **broker** has insurED as principal
22 either an agent or a broker may issue a binder
23 liability for non-procurement of policy
24
25 **insurable interest** (see, p. 410 and p. 990)
26 differentiates gambling from insurance contract
27 recall UCC-2 identification and risk of loss
28 **property** insurance needs insurable interest at **time of loss**
29 **life** insurance needs insurable interest at **time of contract**
30
31 **subrogation**
32
33 by necessity, insurance contracts must be **adhesion contracts**
34 to pool risk and to do average pricing
35 ambiguities interpreted against the insurER: *always*
36
37
38 both parties to insurance contract bound by implied duty of good faith
39 **punitive damages** for insurer's bad faith
40

CHAPTER 50: Wills, Trusts, and Elder Law**capacity**

ability to grasp the natural consequences on one's actions
 crime > contract > tort > wills

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

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 v. 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 OF TRUSTS

express

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

implied

constructive (operation of law) v. resulting (acts of parties)

trustee is a fiduciary to the beneficiary

utmost good faith = honesty in fact and personalized objective

presume undue influence

spending down versus fraud

power of attorney v. living will