FARELLA BRAUN + MARTEL LLP

Competing Fairly: Antitrust Law In The Marketplace

Rod Thompson
Andrew Leibnitz
Jessica Nall

November 8, 2011

Pop Quiz: Alcatraz Island in San Francisco Bay derives its name from the archaic Spanish word for what?

1. Rock
2. Fort
3. Gate
4. Pelican
5. Prison
6. The Spanish port city now known as Alicante

Competing Fairly:
Antitrust Law In The Marketplace

- Overview of Antitrust Laws & Enforcement
- Horizontal Restraints: Dealings with Competitors
- Vertical Restraints: Dealings with Suppliers and Customers
  - Case studies
- Monopoly: Single Firm Conduct
- Joint Ventures
- Criminal Antitrust Enforcement

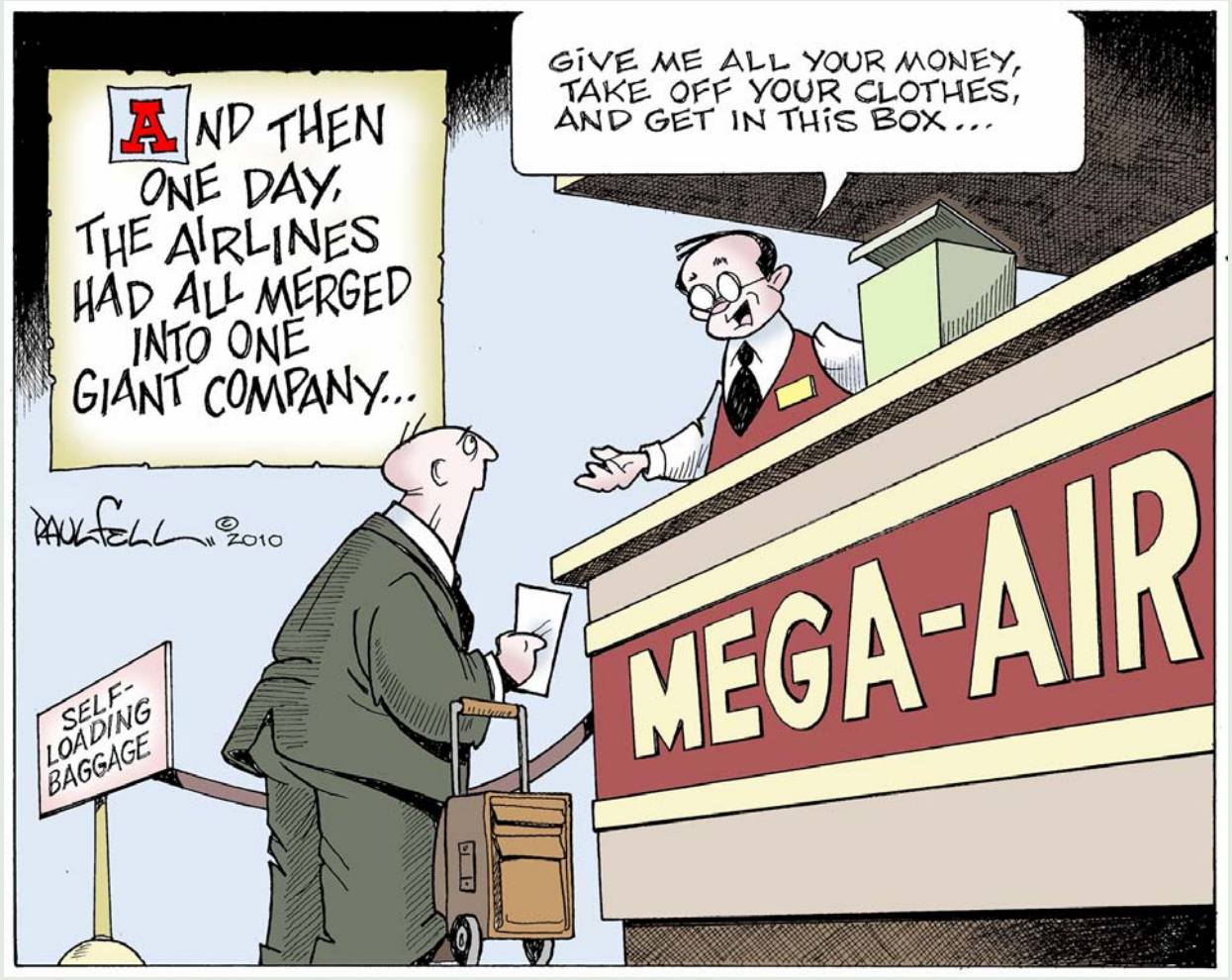
FARELLA BRAUN + MARTEL LLP

Antitrust Laws

What Laws Govern Antitrust?

Statutory Goals of Laws Governing Antitrust - Ensuring Healthy Competition

- Agreements/Conspiracy:
  - concerns with agreements that could restrain trade
- Monopoly:
  - concerns with large firm behavior that could result in monopolization
- Mergers:
  - concerns with merger and acquisitions that could dampen competition


AND THEN ONE DAY, THE AIRLINES HAD ALL MERGED INTO ONE GIANT COMPANY...
GIVE ME ALL YOUR MONEY, TAKE OFF YOUR CLOTHES, AND GET IN THIS BOX...
©2010
SELF-LOADING BAGGAGE
MEGA-AIR

Antitrust Statutes

- Sherman Act
  - Section 1 - Agreements and Conspiracy
  - Section 2 - Single Entity Actors & Monopolization
- Clayton Act
  - Filled in Gaps in Sherman Act
  - Mergers and Price Discrimination
  - Private Right of Action
- Federal Trade Commission (FTC) Act
  - Unfair Competition
- State Statutes

Sherman Act (1890) - Section 1 – Agreements & Conspiracy

- Forbids “every contract, combination, or conspiracy in restraint of trade….”
- Targets joint or concerted action
- which “unreasonably” restrains trade
- affecting interstate or foreign commerce

Sherman Act - Section 2 - Monopolization

- Forbids “monopolization, attempted monopolization, or conspiracy or combination to monopolize….”
- Requires the acquisition or maintenance of power to control prices or foreclose access to the market.
- No joint action is required.

Clayton Act (1914)

- Section 2: prohibits forms of price discrimination
- Section 3: prohibits certain tying (tie-ins) and exclusive dealing in the sale or lease of goods
- Section 4: provides for private cause of action, treble damages, and attorney's fees
- Section 7: prohibits certain mergers and requires pre-notification to regulators for large acquisitions or mergers
- Section 8: prohibits interlocking directorates among competing firms

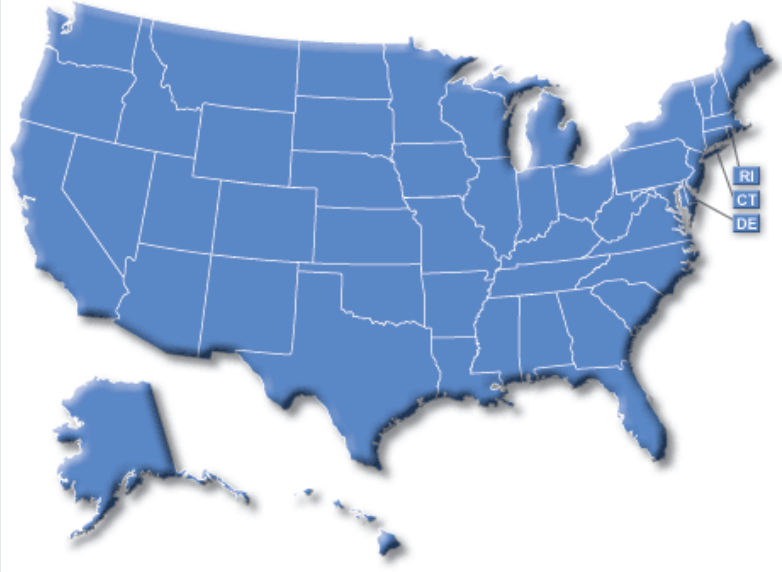
The Federal Trade Commission Act (1914)

- Section 5: bans "unfair methods of competition" and "unfair or deceptive acts or practices."

- All violations of the Sherman Act *also* violate the FTC Act, but the FTC Act is broader.

State Statutes

- Many states have “Little Sherman Acts” and/or “Baby FTC Acts” that compliment federal law, but may differ in application.



Pop Quiz: How Do The FTC and DOJ Divide Oversight Responsibilities Regarding Antitrust Matters?

1. By subject matter, according to historical expertise
2. Geographically
3. The first agency to open an investigation obtains primary responsibility
4. The agencies make no effort to avoid duplication of effort
5. Proposed transactions (such as mergers) are reviewed by the agency requested by the parties
6. None of the above

Pop Quiz: Which Is True Regarding Division Of Responsibility Between the FTC and DOJ?

1. The FTC claimed primary investigative responsibility over music downloads due to the FTC's expertise in intellectual property issues
2. The DOJ claimed primary investigative responsibility over music downloads due to the DOJ's expertise in distribution and marketing
3. The agencies fought over music downloads for almost one year while market practices continued
4. FTC handles cars, DOJ handles trucks
5. FTC handles electricity, DOJ handles petroleum and natural gas
6. All of the above
7. None of the above

Standards Used By Courts

- *Per Se* Violation – action is *per se* illegal.
  - No need to prove competition is actually reduced or injured.
- Rule of Reason – requires balancing of positive and negative effects of practice.
  - Relevant facts:
    - Intent to restrain competition?
    - Was public unreasonably deprived of access to competing goods or services?
    - Were there positive effects (*e.g.*, efficiencies) justifying the behavior?

FARELLA BRAUN + MARTEL LLP

Dealings With Competitors

Horizontal Restraints

Horizontal Restraints: Dealings with Competitors

- What is a Horizontal Restraint?
  - Can be competitors acting together to wield market power.

Pop Quiz: Which of the following horizontal agreements among competitors is *per se* unlawful?

1. Agreements to set prices;
2. Agreements to allocate customers;
3. Agreements to divide geographic sales territories;
4. Agreements not to sell to certain customers;
5. Agreements to set restrictions on output;
6. All of the above;
7. None of the above

Typical Horizontal Agreements & *Per Se* Violations

- Price Fixing
- Market Division or Customer Allocation
- Bid-Rigging
- Group Boycotts/Concerted Refusals to Deal

Price Fixing

- An agreement (written, verbal or inferred by conduct) among competitors that raises, lowers or stabilizes price or competitive terms.
  - Applies to terms that affect prices (*e.g.*, discounts, warranties, shipping fees, financing rates).
  - Monitoring/matching prices of competitors okay if independent action.
  - Supply: Because restrictions impact price, agreements to restrict output, production, or sales are indirect price fixing.
  - Look for: A pattern of identical price terms; and/or behavior with no legitimate business explanation.

Market Division or Customer Allocation

- Agreement among competitors to divide sales territories or allocate customers.
  - Sales may not be divided:
    - geographically;
    - by percentages of available business; or
    - by assignment of specific customers to each seller.

Bid-Rigging

- Competitors coordinating in submission of bids for goods or services procured through competitive bidding.
  - Applies to agreements to take turns being low bidder, sit out a round of bidding, provide unacceptable “cover” bids, or subcontract parts of main contract to losing bidders.
  - Can apply to formation of joint venture by competitors to submit single bid if arrangement fails to promote cost efficiencies.

Group Boycotts/Concerted Refusals to Deal

- Horizontal coordination among buyers or sellers to refuse to deal with certain players (esp. problematic if group boycott is used to discipline a price cutter).

- A business may still independently decide with whom and on what terms it will conduct business.

Group Boycotts/Concerted Refusals to Deal (Continued)

- Other forms of illegal boycotts may include:
  - agreements to prevent a new competitor from entering the market; or
  - agreements to deal with a firm at a discriminatory price or on unfavorable terms.

Pop Quiz: Antitrust Violation?

Which of the following would be a *per se* violation of antitrust laws?

1. Purchaser of Christa's Wonderful Market requires "non-compete agreement" where seller agrees not to open another corner grocery in neighborhood for one year
2. Shell and Chevron stations across the street from one another raise gas prices the same amount on the same day by observing each other's prices
3. Home Depot and Lowe's agree with each other not to carry Craftsman products
4. Amazon refuses to offer Microsoft Xbox 360 games on its site

Antitrust Violation?

- The *Wall Street Journal* reported recently that DOJ's probe into the "anti-employee-poaching" agreements between Google, Apple, Intel, Adobe Systems, Intuit, and Pixar is nearing an end. Is this pro- or anti-competitive? Subject to *per se* condemnation or rule of reason analysis?

Determine business strategies independently

- Never agree or negotiate with a competitor to:
  - establish the price or terms for any product
  - divide up customers
  - divide up lines of business
  - stay out of each other's territory
  - otherwise not compete
- Avoid statements or communications that may be viewed as "signaling" to competitors a desire to avoid competing.

Use caution when participating in industry conferences and meetings or other interactions with competitors.

- Meetings among competitors establish the apparent opportunity for anti-competitive agreements or collusion.
- “Benchmarking” is okay if limited to topics not related to competition.
- Make sure that there is a clear meeting agenda of topics not related to competition and that the meeting stays on topic.

Netflix litigation

- Management should not have meetings with management of a competitor at which any deal might be discussed without involving lawyers in advance;
- Exercise caution in discussing any transaction with a competitor relating to a business in which any party will have market power (e.g., a market share over 70 percent); and
- Do not make optimistic statements in the press or at internal meetings about business lines which are failing and in which there are not plans to invest resources.

FARELLA BRAUN + MARTEL LLP

Dealings with Suppliers and Customers

Vertical Restraints

Vertical Restraints

- What is a vertical restraint?
  - Restraints between firms at different levels in supply chain (*e.g.*, manufacturer-dealer, supplier-manufacturer, wholesaler-retailer).
- Typically analyzed under rule of reason standard.

Pop Quiz: Manufacturer of fashionable, high-end leather goods requires its dealers to agree not to sell below certain fixed minimum prices. This agreement is:

1. *Per se* unlawful – it is clearly an agreement in restraint of trade, as it explicitly attempts to fix prices
2. Lawful as a matter of course – having obtained vaunted reputation through fair competition, the antitrust laws have no place preventing companies from protecting against diminution of their brands
3. Subject to evaluation under a "rule of reason" standard

Manufacturer-Imposed Requirements

- *Reasonable* price, territory, and customer restrictions on dealers are legal.
  - Why? May promote interbrand competition even if limit intrabrand competition.
    - E.g., setting minimum "floor" price may encourage dealers to provide a minimum level of service and prevent cost-cutting dealers from getting a "free ride" on brand reputation created by others.

Resale Price Maintenance

- Manufacturer-imposed price restriction on dealers can be problematic.
- Resale price maintenance used to be *per se* illegal.
- Today, rule of reason standard applies.
- MAP Pricing: To avoid outright price floors, suppliers incentivized retailers to not "advertise" price below minimum level. Created distinction between *public* prices and those available to those who added an item to a cart online. The legal justification was that MAPs encourage competition by service-oriented retailers by preventing customers from free-riding on the service provided by a high-end retailer only to ultimately purchase goods from the discount retailer.

Disciplining/Terminating Dealers

- A manufacturer acting alone can typically terminate a dealer that violates manufacturer's resale price, territory, or customer restrictions.
- Antitrust concerns may be raised if:
  - suppliers or dealers act together to induce a manufacturer to impose restrictions; or
  - competing manufacturers act together to impose restrictions in the supply chain.

Exclusive Dealing/Requirements Contracts

- Exclusive dealing contracts: Distributor is precluded from selling products of a competing manufacturer.
- Requirements contracts: Manufacturer is precluded from buying components or inputs of a competing supplier.
- Analyzed under Rule of Reason standard.

Pop Quiz: Which of the following is/are likely unlawful?

1. Retailer refuses to offer Colgate because Colgate Palmolive has imposed minimum resale prices on all dealers
2. Hewlett Packard and Sony agree that each will refuse to pre-load Microsoft software on its computers unless Microsoft offers them a discount over Dell
3. Both of the above
4. Neither of the above

Refusal to Supply

Generally, a seller can choose its business partners/customers.

- However, antitrust concerns may be raised if:
  - there is a refusal to deal as part of agreement to exclude competition (concerted refusal); or
  - a predatory or exclusionary strategy is used to acquire or maintain monopoly power (single firm market power).

Themes

- Single firm conduct (absent monopoly) is typically less problematic than concerted conduct among multiple competing firms.
- Vertical agreements (among participants at different levels of the supply chain) are typically less problematic than horizontal agreements among competitors.
- Easy, right?

Problems With Themes

- It is often difficult to:
  - determine when conduct will be viewed as unilateral or concerted.
  - characterize an agreement as being solely vertical or solely horizontal.
- Form will not be elevated over substance.
  - If an agreement or conduct unreasonably restrains competition without legitimate business justification, it is suspect regardless of form.

The Single Entity Defense

- Because Section 1 only regulates concerted action among two or more independent actors; a single entity cannot violate Section 1.
  - Section 1 does not apply to conduct that is "wholly unilateral."
- If a joint venture is considered a single entity, agreements between the parties could be exempt.

American Needle, Inc. v. National Football League

Case Study: Single Entity Defense

The Single Entity Defense

- The Supreme Court held in 1984 that section 1 **does not apply to conduct that is "wholly unilateral."** *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 768 (1984). (**Parent corporation and its wholly owned subsidiary are "incapable of conspiring** with each other for purposes of §1 of the Sherman Act." (*Id., at 777))*

- §1 only regulates **concerted action among two or more independent actors;** a single entity cannot violate §1 .

The Single Entity Defense

- Agreements between a parent company and its wholly-owned subsidiary are not subject to §1, because both companies have a "unity of interest." *Id.* at 771.
- The Court has described this single entity as akin to separate horses pulling a single carriage in the same direction. *Id.*
- ***If a joint venture is considered a single entity, agreements between the parties could be exempt from section 1 scrutiny***.

American Needle, Inc. v. National Football League

Facts:

- In 1963, the NFL teams formed National Football League Properties (NFLP) to license their intellectual property.
- NFLP's revenues are given to charity or shared equally.
- Until 2000, NFLP granted non-exclusive licenses to venders, including American Needle.
- NFLP granted Reebok exclusive 10 year license to manufacture NFL headwear.
- American Needle sued the NFL, NFLP, and Reebok, claiming the exclusive license violated Sherman Act Sections 1 and 2.

American Needle, Inc. v. National Football League

Results at Seventh Circuit:

- NFL argued that the teams, NFL, and NFLP are incapable of conspiring under Section 1 because they are a single economic enterprise with respect to the conduct challenged.
- District Court and Seventh Circuit agreed.
- NFL then took the unusual step of joining American Needle in requesting Supreme Court review of the Seventh Circuit's holding.

Pop Quiz: American Needle, Inc. v. National Football League

Why did the NFL support Supreme Court review of its own victory?

1. To set new precedent on the Single Entity Defense
2. To give Justice Stevens a chance to author a unanimous antitrust decision
3. To obtain immunity from exposure to future §1 liability
4. To gain leverage with the NFL Player's Union in upcoming contract negotiations

American Needle, Inc. v. National Football League

Arguments that the NFL **IS** a single entity:

- Teams collectively produce one product—football games—that ***cannot be produced by one team on its own***.
- NFL teams' main ***economic*** competition is between the league as a whole and other forms of entertainment.
- Immunity should apply to functions related to common goals.
- Teams have marketed and licensed their IP jointly for almost fifty years.
- NFLP is a single legal entity. The teams might be individual businesses, but their joint venture is one entity.

American Needle, Inc. v. National Football League

Arguments that the NFL is ***NOT*** a single entity:

- Teams have individual business models, with individual profits, losses, properties, and policies.
- Teams set their own ticket prices, and compete independently for players, coaches, and fans.
- Teams can opt out of NFLP (the Raiders and the Dolphins have done so in the past).
- Teams retain many rights to their IP.
- Fact that NFLP is a separately formed legal entity should not matter.

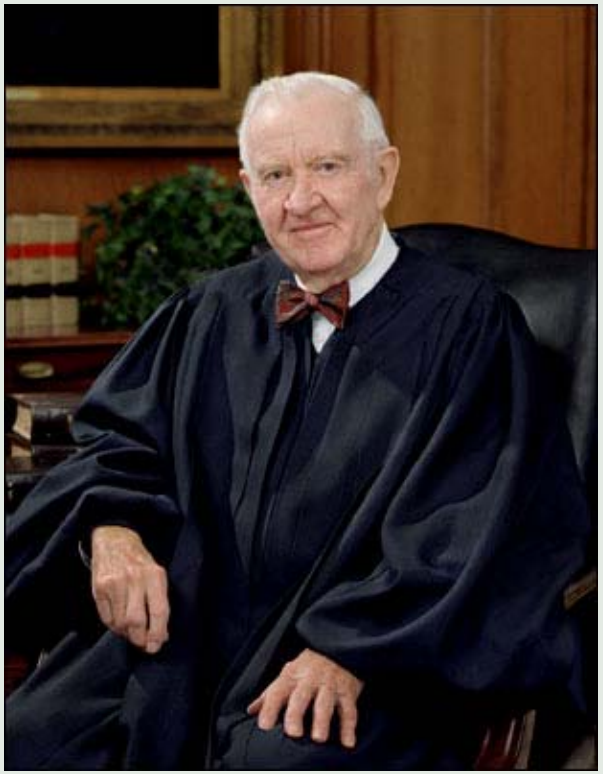
Pop Quiz: What did the Supreme Court decide?

1. By 5-4 split, the conservative majority sided with the NFL and held that the single entity defense applied
2. By unanimous decision, the Supreme Court rejected the NFL's argument and reversed, sending the case back for consideration on the merits
3. By unanimous decision, the Court sided with the NFL and held that the single entity defense applied
4. By 5-4 split, the conservative majority rejected the NFL's argument and reversed, sending the case back for consideration on the merits

American Needle, Inc. v. National Football League

The Supreme Court's Unanimous Decision:

- Inquiry should be **functional** = it is not determinative that the NFLP is a legally distinct entity.
- NFL teams do not possess the unitary decision-making quality characteristic of independent action.
- Each team is a substantial independently owned and independently managed business.
- The teams compete with each other in the market for intellectual property.



American Needle, Inc. v. National Football League

Takeaways:

- Functional analysis. Formalistic distinctions (creation of separate legal entities) will not insulate a venture from § 1.
- The justification for cooperation is not relevant to initial issue.
- Pro-competitive justifications for the venture considered in the rule of reason analysis not relevant to single entity inquiry.
- Though not a Single Entity, joint ventures can still justify their actions by pointing to pro-competitive effects.

Toys "R" Us, Inc. v. FTC, 221 F3d 928 (7th Cir. 2000)

Case Study: Horizontal Or Vertical Agreement?

Toys "R" Us v. Federal Trade Commission

Toys "R" Us Case Study

Background:

- Fearing growing competition from big box discounters such as Costco, Toys "R" Us approached various of its largest manufacturers and got them to agree not to sell certain products to big box discounters or to sell only on certain terms.
- No evidence of direct communication between manufacturers.
- But, each manufacturer agreed to stop sales to big box discounters only after assurance that Toys "R" Us would extract similar agreement from each other manufacturer.

Pop Quiz: The FTC's concern was?

1. Vertical restraint
2. Horizontal restraint
3. Both
4. Neither

Toys "R" Us Case Study (Continued)

- The FTC found that:
- (1) the vertical agreements between Toys "R" Us and each of its suppliers failed to pass muster under rule of reason analysis; and
- (2) Toys "R" Us facilitation was a *per se* illegal horizontal conspiracy among manufactures to boycott the big box stores (i.e., a concerted refusal to deal).

Toys "R" Us Case Study (Continued)

- Referred to as a "hub and spoke" conspiracy.
- Toys "R" Us is the hub of the wheel.
- The vertical agreements between Toys "R" Us and each of its separate manufacturers are spokes of the wheel.
- Tacit understandings between each manufacturer constitute the horizontal restraint and form the rim of the wheel.

Toys "R" Us Case Study (Continued)

- The Court found:
- (1) the manufacturers' agreement to restrict output was against their own self interest;
- (2) the effect of the agreements was to reduce the big box discounter's sales of toys; and
- (3) the defense asserted by Toys "R" Us that it was seeking to prevent "free riding" did not withstand scrutiny since advertising for toy products was subsidized by the manufacturers, not by Toys "R" Us.

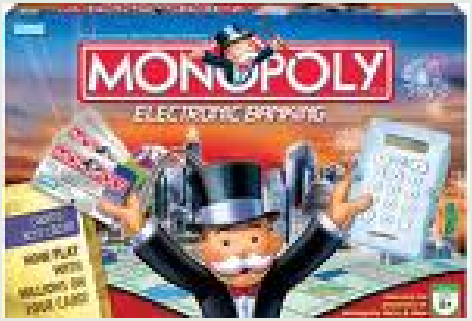
FARELLA BRAUN + MARTEL LLP

Monopolization

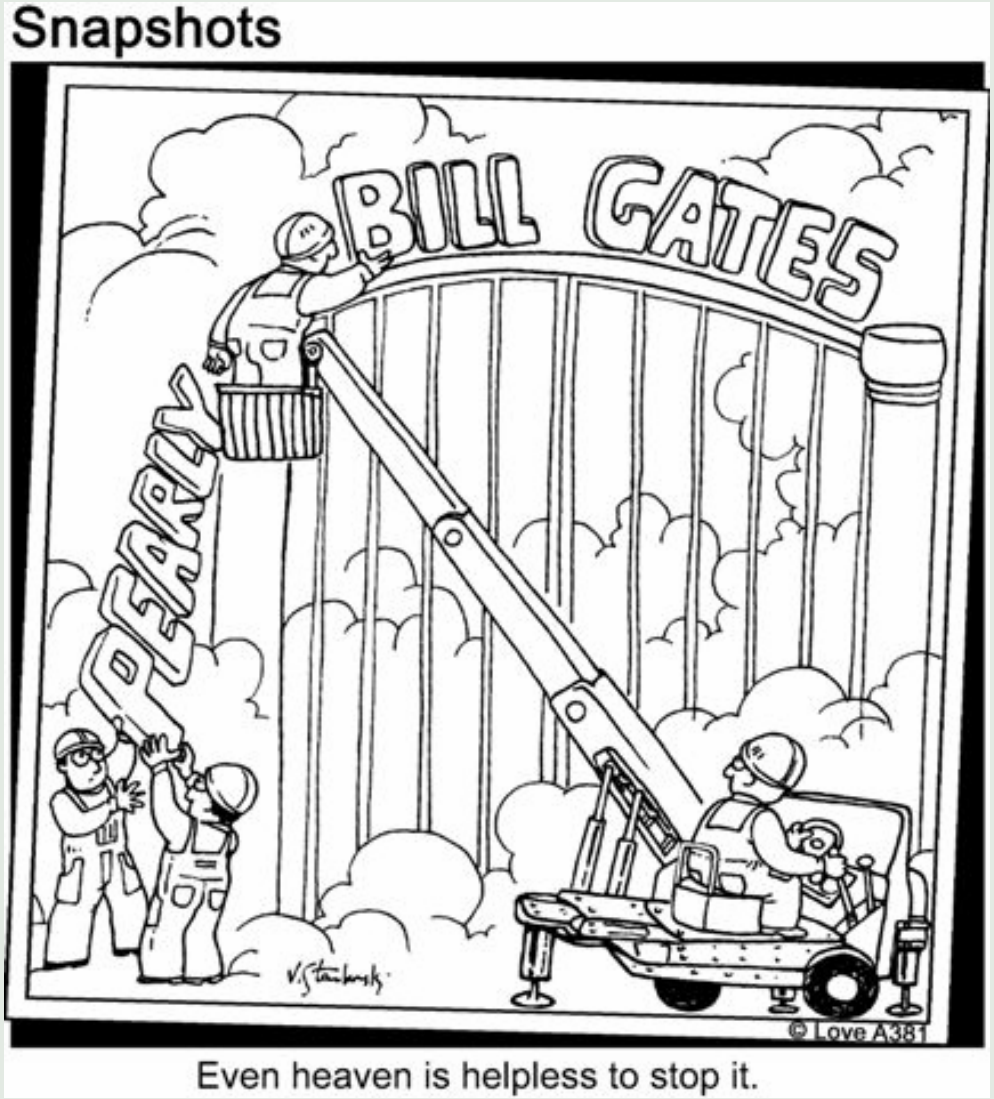
Single Firm Conduct

Sherman Act § 2

- "Every person who shall monopolize, or attempt to monopolize . . . shall be deemed guilty of a felony . . ." 15 U.S.C. § 2.
- Elements
  - Monopoly power in a relevant market
  - Willful acquisition or maintenance of monopoly power as distinguished from growth or development as a consequence of a superior product, business acumen, or historical accident.



Monopolization



Monopoly Power

- Defined as the power to “control prices or exclude competition” from the relevant market.
- Courts often rely on an inference of market power.
  - Inference can arise from the defendant’s share of the relevant market, but case law is mixed concerning what share will support an inference.

Pop Quiz: How much market share is widely considered by courts to be enough to support an inference of monopoly power?

1. 50%+
2. 70%
3. “All or essentially all”
4. None of the above

Monopoly Power: Market Definition

- Product Market
  - The products / services must be either identical or available substitutes.
    - *e.g.*, do music CDs compete with radio?
  - DOJ's Merger Guidelines articulated SSNIP test, involving determination of smallest product market in which participant could impose a small but significant and non-transitory increase in price ("SSNIP").
- Geographic Market
  - The geographic market is area in which competitors are typically willing to compete for customers.
    - *e.g.*, rural hospital
  - SSNIP relevant here as well.

Pop Quiz: Which Of The Following Statements Is Attributed To Bill Gates In Relation To DOJ's Microsoft Investigation?

1. "It depends upon what the meaning of the word 'is' is"
2. "The whole antitrust thing will blow over"
3. "The next bug [discovered in Windows] should be named after David Boies"
4. "If GM had kept up with technology like the computer industry has, we would all be driving $25 cars that got 1000 MPG"

Willful Acquisition Or Maintenance Of Monopoly Power

- **Mere possession of monopoly power is not only lawful**, but an important element of the free-market system.
- **Predatory or exclusionary acts** that have the effect of preventing or excluding competition within the relevant market are required.
  - Obtains or maintains monopoly on some basis other than the merits.
    - Microsoft's integration of IE with Windows in Oct. 1997
    - Modifying biopsy needle firing device so as to make incompatible with competitor's needles absent reason
  - Restrains competition in an unnecessarily restrictive way.
    - Dominant manufacturer of artificial teeth prohibited independent distributors from carrying competing brands.

Willful Acquisition Or Maintenance Of Monopoly Power

- Examples:
  - predatory pricing;
  - refusals to deal with “disloyal” customers or suppliers; and
  - denials of rivals’ requests for access to “essential facilities” necessary to compete.
    - AT&T unlawfully refused to allow MCI to connect its long-distance phone lines with AT&T’s nationwide local telephone network in 1983, preventing MCI from competing in the long distance business.

Predatory Pricing

- Defined as “pricing below an appropriate measure of cost for the purpose of eliminating competitors in the short run and reducing competition in the long run.”
- Elements
  - Pricing Below Cost
  - Recoupment
    - “dangerous probability” that defendant will recoup its investment in below-cost prices (including interest)

- *Brooke Group*, 509 U.S. 209 (1993)

Disfavored Nature Of Predatory Pricing Claims Under Sherman Act

- Court must tread carefully when evaluating predatory pricing claims under Section 2 because "cutting prices in order to increase business often is the very essence of competition. Thus, mistaken inferences in [these] cases . . . are especially costly, because they chill the very conduct the antitrust laws are designed to protect."
    - *Matsushita v. Zenith*, 475 U.S. 574, 594 (1986).
- "A firm's independent decision to reduce prices to a level below its own costs does not necessarily injure competition, and, in fact, may simply reflect particularly vigorous competition."
    - *FTC Fact Sheet (2008)*.

Pop Quiz: Below What Level Does Pricing Often Become Predatory Under Section 2?

1. **Below Average Total Cost**. Fixed costs (e.g., management costs, interest on debt, depreciation, property taxes) are included, raising the boundary and making it easier to prove predatory pricing.
2. **Below Marginal Cost**. By focusing on the incremental cost of producing one additional unit (marginal cost) or its proxy (average variable cost), we more narrowly target behavior which is so predatory as to more likely represent a threat to competition.

California's Unfair Practices Act

- Statute prohibits a vendor from selling or giving away a product "at less than the cost [to the] vendor . . . for the purpose of injuring competitors or destroying competition." Bus. & Prof. Code § 17043.

Case Study: Bay Area Guardian v. SF Weekly

- Competing newspapers in San Francisco.
- New Times Media purchased SF Weekly in 1995 and authorizes sales representatives to sell advertising at "below cost" if needed to attract businesses then advertising in Guardian.
- Guardian offered expert setting forth damages from $4M to $11.8M.
- SF Weekly defended on grounds that it lacked the requisite market power to drive out competition and benefit from its alleged scheme.

Pop Quiz: Who Won?

1. SF Weekly won a judgment for damages in the amount of $4M (the low end of plaintiff's expert's opinion)
2. SF Weekly won a judgment for damages in the amount of $11.8M (the high end of plaintiff's expert's opinion)
3. SF Weekly won a judgment, partially trebled, in the amount of $15.9M
4. SF Weekly won a judgment, fully trebled, in the amount of $35.4M
5. Guardian won because SF Weekly could not show any possibility of recoupment of below-cost pricing scheme
6. Guardian won because of lack of specific intent to harm competition

Refusals To Deal With "Disloyal" Customers Or Suppliers

- Apple reportedly possesses 70% share of U.S. retail digital download market
- In May 2010, news surfaced that Apple removed certain featured items from iTunes when the music studios (Universal, Sony, Warner) advertized their music as exclusive "Deal of the Day" at Amazon before it went on sale elsewhere
- What is the legitimate business reason for Apple's retaliation, if true? How does behavior benefit customers?

Retail Pricing – Below Cost
When setting aggressive retail prices, avoid "predatory pricing" or violation of state pricing laws.

- Aggressive below-cost pricing may be illegal as "predatory pricing" under federal or state law.
- Many states have restrictions on below cost pricing, some of which are more stringent than the federal "predatory" standard.
- Ordinary short-duration loss-leaders are okay in most states.

Success is based on better serving customers, NOT eliminating competition.

- A “monopoly” doesn’t require control of 100% of a market, merely enough market power to control prices or exclude competition.
- Although it is okay to obtain a monopoly by “winning” at fair competition, it may be illegal if achieved through unfair conduct.

FARELLA BRAUN + MARTEL LLP

Joint Ventures

Collaboration Among Competitors

What is a joint venture?

- **Any** collaborative undertaking
- aside from a **merger**
- by which two or more entities devote their resources to pursuing a **common objective**,
- while **maintaining competition in other areas**.

What are the antitrust concerns?

Pro-competitive justifications:

- lower costs,
- provide economies of scale,
- increase production capacity,
- pool research and development costs,
- commercialize new products,
- facilitate entry into new markets, etc.

Anti-competitive risks:

- ruse for price fixing,
- curtail competition between important competitors,
- facilitate collusion,
- control a third party rival's supply of a needed input,
- Method of retaining market control amongst small group of firms.

Agencies and courts will balance the efficiencies gained against the risks of anti-competitive harm.

Pro-competitive benefits will not be assumed. Collaborators must show how benefits will accrue.

Joint Venture Formation

Mergers vs. Joint Ventures

A **merger** effectively eliminates competition in the relevant market.

A **joint venture** preserves *actual current competition* between the participants, or at least preserves the future potential of competition.

Fully integrated joint ventures that are not sufficiently limited—in time or product area, for example—will be analyzed as a merger.

Types of Joint Ventures

Joint ventures that attract a lot of scrutiny:

- **Fully integrated joint ventures**:
  - Essentially a type of merger, so they attract the most scrutiny.
  - Present a risk of monopoly.

- **Marketing and distribution**:
  - Increased risk of price fixing.
  - Risk that participants will divide market, collude, etc.

Joint Venture Formation

Collateral restraints on competition (such as covenants not to compete) may mean the difference between approval and denial.

- The more integrated a joint venture is, the more section 7 scrutiny it will typically attract.

Why, then, do many joint ventures argue that they are fully integrated **single entities**?

Recall that the NFL—a Joint Venture--argued that it was so fully integrated that it should be treated as a Single Entity.

In Antitrust, Words Matter—The Whole Foods Blogger

February 2007, Whole Foods agreed to buy chief rival Wild Oats. CEO John Mackey gave his Board *Reasons to do this deal:*

- ***Elimination of an acquisition opportunity for a conventional supermarket*** *— our targeted company is the only existing company that has the brand and number of stores to be a meaningful springboard for another player to get into this space.* ***Eliminating them means eliminating this threat forever, or almost forever.***
- ***Elimination of a competitor*** *— they compete with us for sites, customers, and Team Members.*

In Antitrust, Words Matter—The Whole Foods Blogger

In a later email to his Board, CEO Mackey explained:

> OATS remains a relevant competitor. By buying them we will greatly enhance our comps over the next few years and **will avoid nasty price wars** in Portland (both Oregon and Maine), Boulder, Nashville, and several other cities which will harm our gross margins and profitability. **OATS may not be able to defeat us but they can still hurt us.** Furthermore we eliminate forever the possibility of Kroger, SuperValu, or Safeway using their brand equity to launch a competing national natural/organic food chain to rival us."

In Antitrust, Words Matter—The Whole Foods Blogger

- Based on Mackey's statements, FTC :
  - demanded more documents.
  - launched investigation of Oats purchase.

- CEO Mackey Continues with Blogging:
  - both under his name on Whole Foods site (of course FTC is right, "if we merge . . will no longer compete against each other").
  - under pseudonym "Rahodeb" at Yahoo Finance.
  - battles FTC and SEC publicly.

In Antitrust, Words Matter—The Whole Foods Blogger

- FTC found a relevant market for premium natural and organic markets separate from conventional supermarkets.
- June 2007, FTC sues to block Oats purchase.
- August, U.S. District Court rules for Whole Foods, finding that it competes “vigorously” with supermarkets.
- Deal did finally close.

Best Practices: Avoid Loaded Words

Avoid	Encourage
Market	Category; Segment; Product Line; Industry
Market Share	Sales
Leverage	Use; Utilize; Employ
Dominance	Substantial Sales Volumes; Significant Position
Preempt	
Exclude	Initiate; Act First; Achieve Business Objectives;
Block	
Foreclose	Pursue Opportunity
Cooperation with Competitors	Competition with Competitors
Price Leadership	Price Competition
Disciplining Competitors Signaling Competitors	Independent Pricing Decisions
Rational Behavior Irrational Competitor Destructive Pricing	Competitive Margins; Competitor Seeking Share Through Pricing

Best Practices: Avoid Loaded Words

Avoid	Encourage
Industry Price Structure Industry Price Movement "Umbrellas"	Individual Pricing Decisions
Coercing or Pressuring	Persuading or Convincing; Offering; Providing Incentives
Injuring Competitors	Benefitting Consumers
All Military and Pugilistic Terms	Plain, Straightforward, Low-Key Language
Raising Competitors' Costs	Superior Efficiency; Superior Quality; Lower Costs
"Disciplining" or "Sending Messages"	Increasing Our Sales; Responding to Competitive Initiatives
Below Cost Pricing	Reduced Profitability; Limited Profitability over Time Horizon; Introductory Discounts; Attempts to Minimize Losses
Beating Competition Undercutting Competitors	Meeting Competition
Targeting Specific Competitors (Especially Small Competitors)	Effective Sales and Marketing Efforts; Pursuing Marketing Opportunities

Best Practices: Avoid Loaded Words

Avoid	Encourage
Mergers/Acquisitions/Joint Ventures to:	**Mergers/Acquisitions/Joint Ventures to:**
Raise Prices	Reduce Costs
Protect Price Levels	Increase Sales
Eliminate Competitor Eliminate Potential Competitor	Generate Efficiencies
Defend Market Position	Increase Output
Eliminate Disruptive or Aggressive Firm	Reduce Or Share Risks Acquire Or Combine Complementary Technology; Lower Costs
Reduce Output Eliminate Overcapacity Rationalize Capacity	Generate Efficiencies
Increase Margins Enhance Profitability	Reduce Costs; Expand Sales; Develop New Products; Achieve Scale Economies
Preempt Rivals	Expand Capacity; Take Advantage of Growth Opportunity
Barriers To Entry	Competitive Marketplace; Intense Competition

Pop Quiz: Which does not contain a Loaded Antitrust Word?

1. Let's deliver a knock out punch to our competitor
2. Let's increase sales by offering better consumer value than our competition
3. Let's increase sales by targeting our chief competitor's inferior products
4. We dominate the competition in this area

Antitrust Do's and Don't's Industry Conferences and Trade Associations

- Meetings among competitors can give rise to the appearance of impropriety and provide an "opportunity to conspire."
- In general, in the context of a trade association meeting or anywhere else, it is best to avoid meeting with a competitor(s) outside of controlled environment.
- If a competitor brings up business topics of a prohibited nature, the dialogue should be cut short with a statement that you should not discuss such topics.
- If the competitor persists, leave the vicinity and report the incident to your Legal Department.

Pop Quiz: Which is Not an Antitrust "Don't" at an Industry Conference.

1. Do not have an unscheduled meeting with your counterpart at a rival firm
2. Do not discuss prices, costs, supply, or any non-public information with colleagues from competitive firms
3. Do not play golf with anyone outside Walmart
4. Do not continue to participate in a conversation where another raises prohibited antitrust topics

FARELLA BRAUN + MARTEL LLP

Criminal Violations of Antitrust Laws

Recent Price Fixing and Market Share Prosecutions

The Department of Justice has made investigating price fixing cartels “one of its highest priorities”

Recent fines include:

- $400 million against LG in 2009
- $300 million against British Airways in 2007
- $300 million against Samsung in 2006
- $84 million against Dow in 2005
- Over 70 fines above $10 million since the late 1990s

Pop Quiz: Criminal Antitrust Penalties

What are the potential criminal penalties for an antitrust violation for an individual?

1. One year in federal prison, $1000 fine
2. Five years in federal prison, $50,000 fine
3. Seven years in federal prison, $250,000 fine
4. Ten years in federal prison, $1,000,000.00 fine

DOJ Amnesty Program for Antitrust

- First company to come forward regarding violation is given a free pass (even if most guilty).
- Companies/individuals given credit for "cooperation."
- Plea deals involve "carve-outs."
- Individuals go to prison.

Price Fixing Case Study: How Do I Know if I am Price Fixing?

Video

Price Fixing Case Study: Lysine Cartel

- 5 companies (one American, two Japanese, two Korean) conspired to raise the prices of the food additive lysine.
- The American company, ADM paid a $70 million fine and three of its executives were indicted and convicted after jury trials.
  - They served terms of approximately three years each.
  - Both the fines and prison sentences were antitrust records at the time (1998).
- Additionally, Canadian and American lysine buyers sued the company and recovered between $80 million and $100 million in civil damages.
- ADM also paid $38 million to settle mismanagement suits by its shareholders in the wake of the antitrust investigation.


unbelievable
matt damon is
The Informant!
small medium large
high definition ipod
WWW.THEINFORMANTMOVIE.COM • TAKEPART.COM/THEINFORMANT
IN THEATERS SEPTEMBER, 2009
WARNER BROS. PICTURES PRESENTS
IN ASSOCIATION WITH PARTICIPANT MEDIA AND GROUNDSWELL PRODUCTIONS A SECTION EIGHT-JAFFE/BRAUNSTEIN ENTERPRISE MATT DAMON IN "THE INFORMANT!" SCOTT BAKULA JOEL McHALE MELANIE LYNSKEY
CASTING BY CARMEN CUBA MUSIC BY MARVIN HAMLISCH CO-PRODUCER MICHAEL POLAIRE EDITED BY STEPHEN MIRRIONE, A.C.E. PRODUCTION DESIGN BY DOUG MEERDINK EXECUTIVE PRODUCERS GEORGE CLOONEY JEFF SKOLL MICHAEL LONDON
BASED ON THE BOOK BY KURT EICHENWALD SCREENPLAY BY SCOTT Z. BURNS PRODUCED BY GREGORY JACOBS JENNIFER FOX MICHAEL JAFFE HOWARD BRAUNSTEIN KURT EICHENWALD DIRECTED BY STEVEN SODERBERGH
participant MEDIA
groundswell PRODUCTIONS
SECTION EIGHT
R RESTRICTED UNDER 17 REQUIRES ACCOMPANYING PARENT OR ADULT GUARDIAN LANGUAGE
www.theinformantmovie.com
takepart.com/theinformant
WARNER BROS. PICTURES

Pop Quiz: What happened to "the Informant" Mark Whitacre?

1. He became the CEO of ADM after the prior management went to prison for price-fixing
2. He received a Congressional Medal of Honor
3. He was sentenced to 30 months in prison for price-fixing
4. He spent 8 years and 8 months behind bars for federal crimes
5. Both 3 and 4
6. All of the above

Criminal antitrust action against retailers: Ongoing Prosecution of Milk/Tobacco Retailers

Supermarkets and dairy farmers prosecuted by British OFT for price fixing/anticompetitive behavior:

- Investigations have been ongoing for seven+ years.
- Retailers agreed to pay over £180 million in fines in milk investigation, £225 in tobacco investigation.
- Based on “indirect communications” re: price between producers using retailers as middlemen.

Violating Section Two: Individual Act or Conspiracy to Monopolize

What company is this court describing?

- "The wholesale warehouses and retail operation of the … system are divided up into divisions, units, and stores. The division presidents control the policy of the system."
- "On the whole, it is a well disciplined organization, from top to bottom."
- "It used its large buying power to coerce suppliers to sell to it at a lower price than to its competitors…."

Violating Section Two: Individual Act or Conspiracy to Monopolize

The dark side …

- "… it succeeded in obtaining preferential discounts through threats to boycott suppliers … and threats to go into the manufacturing and processing business itself. "
- "When [the company] did not get the preferential discount or allowance it demanded, it … served notice on the supplier that if that supplier did not meet the price dictated by [the company]… it would be put upon the unsatisfactory list or private blacklist."

Monopoly Case Study: The *A&P* Case

United States v. A&P, 173 F.2d 79 (7th Cir. 1949)

- Several A&P executives were convicted of violating Sherman Act Section 2.
- A&P fined $175,000 in 1949 dollars; antitrust fines now much higher.
- Current Justice Department guidelines indicate criminal prosecutions under Section 2 are rare, but future enforcement in this area is possible.

Monopoly Case Study: The *A&P* Case

Specific activities that led to criminal convictions in the *A&P* case:

- Threats to boycott if producer did not meet a set price.
- Threats to go into production to cut suppliers out.
- Threats against producers for cooperating with A&P competitors.
- The combination of these activities and A&P's size amounted to attempts to monopolize.

Concluding Thoughts

Why be wary of possible antitrust prosecutions?

- "Bigness is no crime, although 'size is itself an earmark of monopoly power. For size carries with it an opportunity for abuse.'"

-United States v. A&P (quoting *United States v. Paramount Pictures*, 334 U.S. 131, 174 (1948)).

Concluding Thoughts

Why should executives personally be wary of possible antitrust prosecutions?

- Department of Justice policy: “the most effective way to deter and punish cartel activity is to hold culpable individuals accountable by seeking jail sentences.”

Always keep in mind…

- Interactions with other companies (especially competitors) raise greater risks than independent actions.
- Our “competitors” may include any company with which we compete, or might expect to compete.
- Actions by firms with dominant market shares or other “market power” in a business present increased risks.
- An “agreement” need not be in writing or meet any particular formality.
- Be careful what you say or write! It’s not privileged and the subjective motivation behind an aggressive business practice may determine whether it is illegal.

FARELLA BRAUN + MARTEL LLP

CONCLUSION

Rod Thompson
Andrew Leibnitz
Jessica Nall

November 8, 2011