

## Antitrust Legal Traps in Trade and Monopolization: A Primer for Local and Global Managers

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### Abstract

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The modern world of business is increasingly more complex than ever before and globalization adds further legal challenges for business managers and expatriates. One area presenting complexity for competitiveness is the antitrust laws which impact all firms and managers doing business in the United States and most other developed nations. The goal of the antitrust law is to enhance competition while also prohibiting unfair restraints of trade and unlawful monopolies. Overall, antitrust laws are designed to provide consumers with better quality products and services as well as lower prices. In this article, we explain the important elements of antitrust laws, including the Sherman Antitrust Act, monopolization legal traps, and price discrimination regulations to make managers aware of their responsibilities. We also provide a global perspective by reviewing antitrust laws in China, Japan, the European Union, and other jurisdictions so expatriate managers can be proactive in being aligned with local regulations. Finally, specific compliance recommendations are provided for all firms and managers.

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**Keywords:** Antitrust laws, trade restraint, monopoly, monopolization, Sherman Antitrust Act legal liability, Doctrine of Conscious Parallelism, and price discrimination.

### Introduction

Antitrust law in the United States is designed to protect and promote competition and consequently prohibits unreasonable restraints of trade and unlawful monopolies (Cavico and Mujtaba, 2014). This important body of a law, however, is a large, complex, and at times vaguely defined one. Anti-trust laws involve significant U.S. statutes as well as case law interpreting these statutes. Moreover, not only legal principles are “at play” in antitrust decision-making, but also marketing determinations, economic calculations, and effective management practices are critical to resolving anti-trust legal disputes (Cheesman, 2016; Mujtaba, 2014; Clarkson, Miller, and Cross, 2012).

The purpose of this article is to examine certain key aspects of anti-trust law and to make business managers keenly aware of their rights and responsibilities there under, and especially to warn them of certain legal “traps” in this body of law.

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This article is a “primer” on anti-trust law, that is, a work designed not necessarily for a legal audience but for business managers (though the material herein will be a good review for attorneys who have not been exposed to anti-trust law since law school days). This article commences with an overview of U.S. antitrust law. Next, the article analyzes three key, as well as problematic, anti-trust laws, to wit: Restraint of Trade law pursuant to Section 1 of the Sherman Antitrust Act of 1890; Monopolization law pursuant to Section 2 of the Sherman Act; and Price Discrimination law pursuant to the Clayton Act of 1914 (as amended by the Robinson-Patman Act of 1936). These laws will be examined, explained, and illustrated by actual case law as well as practical examples. The authors will concentrate on those aspects of the law that can present legal pitfalls for business managers – pitfalls that can trap the unwary manager into legal liability – and liability which has criminal as well as civil consequences. As will be seen, antitrust law, like most of U.S. regulatory laws, draws certain lines between legal and illegal conduct. As such, the authors will differentiate the “lines” between agreements to restrain trade and the Doctrine of Conscious Parallelism, between horizontal and vertical restraints of trade, between having a monopoly and monopolization, and between price discrimination and market price justifications.

Most importantly, from a practical perspective, the authors next provide several recommendations to business managers to be aware of anti-trust situations, the pitfalls therein, the lines the law draws, and accordingly how to avoid legal liability under anti-trust laws. The advice and suggestions supplied by the authors as well as the legal explication and illustration of the laws herein will also help business managers to communicate more effectively with legal counsel. The article concludes with a brief summary and conclusion.

### **Antitrust Law – An Overview**

Antitrust law emerged in the post-Civil War period as a response to the growth of very large businesses, corporations, and trusts which began to engage in unethical monopolistic and anti-competitive practices, such as fixing prices and dividing up markets. The U.S. government became concerned with this unchecked growth of economic power, and not only because of the harm to other smaller businesses and entrepreneurs but also because of a fear that such immense economic power would “translate” into political power thereby harming our democratic way of government. Initially the states in the U.S. began to legislate to curb these anti-competitive practices but the need became apparent for legislation on the national level, thereby resulting in the Interstate Commerce Act of 1887, the Sherman Antitrust Act of 1890, and the Clayton Act of 1914 (Cheesman, 2016; Cavico and Mujtaba, 2014; Clarkson, Miller, and Cross, 2012). The purposes of the aforementioned laws and other antitrust laws are to protect competition and accordingly to benefit consumers; but not necessarily to protect competitors as is the case with European Antitrust law. Thus, in the U.S. a basic element of antitrust law is the need to show harm or threat of harm to the consumer or, conversely, benefits ultimately to the consumer. Protecting competition and thus benefitting consumers by lower prices and more choices, as well as protecting economic freedom, private enterprise, and the democratic form of government are fundamental rationales underpinning U.S. antitrust law (Cheesman, 2016; Cavico and Mujtaba, 2014; Clarkson, Miller, and Cross, 2012).

Like other illegal actions, violations of antitrust law include criminal sanctions, including imprisonment for felony offenses, civil penalties such as monetary fines and divestment, as well as lawsuits by private parties who can recover treble damages and attorneys’ fees in successful (Cavico, Mujtaba and Muffler, 2014). Finally, it should be noted that there are exemptions to antitrust law, for example, labor unions, utilities, and (for historical reasons) baseball (Cheesman, 2016; Cavico and Mujtaba, 2014; Clarkson, Miller, and Cross, 2012). A discussion of these exemptions is beyond the purposes of this article. Moreover, since global companies must be concerned with the antitrust laws of the European Union as well as other foreign jurisdictions where they do business the article provides some succinct treatment of these aspects of international business law.

### **Sherman Act – General Provisions**

In 1890, the U.S. Congress promulgated the most important antitrust law in the United States – the Sherman Antitrust Act, specifically called “An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies.” There are two major sections to the Sherman Act which reflect the two components in the law’s exact title.

Section 1 of the Sherman Act holds that every agreement, contract, combination, trust, or conspiracy in restraint of trade or commerce is illegal. Section 2 holds that monopolizing trade or commerce, attempting to monopolize, or combining to monopolize trade or commerce is illegal. Initially, it is critical to point out the key distinction between the two sections. That is, Section 1 is based on an agreement to restrain trade; and thus two or more parties and the requisite evidence are necessary for a violation; whereas with Section 2 all one needs is a sufficiently large entity (the monopoly) that has abused its monopoly power. So, to be colloquial, for Section 1, one needs “two to tango”; and for Section 2 one needs one “big” and “bad” company (Cheesman, 2016; Cavico and Mujtaba, 2014; Clarkson, Miller, and Cross, 2012).

### **I. Section 1 - Restraints of Trade - Agreement to Restrain Trade v. The Doctrine of Conscious Parallelism**

Initially, it is important to distinguish an agreement to restrain trade, which may be illegal under the Sherman Act, from the Doctrine of Conscious Parallelism. An agreement to restrain trade is a necessary predicate for antitrust liability under Section 1 of the Act. Agreements can be express, by words – written or oral – implied by conduct (such as a wink, nod, or handshake), or inferred from the facts and circumstances of a particular case. However, there is no legal liability for conduct that is protected pursuant to the Doctrine of Conscious Parallelism (Cheesman, 2016; Cavico and Mujtaba, 2014; Clarkson, Miller, and Cross, 2012). This legal doctrine allows a competitor to track the pricing and other practices of its competitors, utilizing public and other proper sources of information, of course, and then to follow those prices. Conscious Parallelism is also known as Parallel Pricing (Devlin, 2007). One sees this lawful competitive activity unfold in the “burger wars,” the airline industry ticket sales, the competing gas stations on the corner where one industry participant’s price point fluctuations are closely “matched” by other competitors in that market. Such parallel conduct is natural in a competitive marketplace and, absent evidence of collusion to do so this “follow the leader” pricing method is perfectly legal. However, the ultimate pricing determination must be independently arrived at; as such, any “hint” of collusion in pricing or otherwise might trigger an antitrust investigation (Cheesman, 2016; Cavico and Mujtaba, 2014; Clarkson, Miller, and Cross, 2012).

As business managers might expect, it is very difficult to find the “smoking gun” that rival competitors “consciously” and purposefully colluded to raise prices to avoid plaintiffs’ anti-trust actions from being dispatched in pre-trial phases. Such was the case when the four major wireless network providers, AT & T, Verizon, Sprint, and T-Mobile, and their trade association, were facing allegations they were conspiring with each other to increase one kind of price for text messaging service — price per use (PPU), each “use” being a message, separately priced (*In re Text Messaging Anti-trust Litigation*, 2015). After three years of evidentiary discovery, there was no hard evidence uncovered that such an agreement existed in violation of Section 1 of the Sherman Act (15 U.S.C. §§ 1 *et seq.*) between these competitors and the defendants’ summary judgment motions were upheld on appeal. The appellate court attempted to educate practitioners in this area at the end of their written opinion by stating:

It is of course difficult to prove illegal collusion without witnesses to an agreement. In addition, there are no such witnesses in this case. We can, moreover, without suspecting illegal collusion, expect competing firms to keep close track of each other’s pricing and other market behavior and often to find it in their self-interest to imitate that behavior rather than try to undermine it — the latter being a risky strategy, prone to invite retaliation. The plaintiffs have presented circumstantial evidence consistent with an inference of collusion, but that evidence is equally consistent with independent parallel behavior. We hope this opinion will help lawyers understand the risks of invoking “collusion” without being precise about what they mean. Tacit collusion, also known as conscious parallelism, does not violate section 1 of the Sherman Act. Collusion is illegal only when based on agreement. Agreement can be proved by circumstantial evidence, and the plaintiffs were permitted to conduct and did conduct full pretrial discovery of such evidence. Yet their search failed to find sufficient evidence of express collusion to make a prima facie case. The district court had therefore no alternative to granting summary judgment in favor of the defendants (*In re Text Messaging Anti-trust Litigation*, 2015, p. 879).

### **II. Sherman Act Section 1 - Restraints of Trade – The Rule of Reason v. The *Per Se* Doctrine**

The Sherman Act, as noted, initially maintained that any agreement in restraint of trade or commerce was illegal pursuant to antitrust law.

However, it soon became apparent that not all agreements to restrain trade could be illegal. For example, when two sole proprietors combined to form a partnership there was a restraint of trade as they were no longer competing. Similarly, when an employee signed a contract with an employer containing a covenant-not-to-compete there also was a restraint on trade. The Sherman Act could not possibly make partners and covenant contracting parties antitrust felons, could it? Accordingly, when the U.S. Supreme Court first interpreted the Sherman Act it interposed on the statute a very significant limiting doctrine called the Rule of Reason in the seminal case of *Standard Oil Company of New Jersey v. United States* (1911).

Pursuant to the Rule of Reason not all anti-competitive agreements that restrain trade or commerce are illegal; rather, only those agreements that *unreasonably* restrain trade are illegal (*Standard Oil Company of New Jersey v. United States*, 1911; Cheesman, 2016; Cavico and Mujtaba, 2014; Clarkson, Miller, and Cross, 2012). In essence, the critical “reasonableness” determination is whether a restraint of trade is ultimately good for the consumer. That is, do the pro-competition and pro-consumer beneficial consequences outweigh the anti-competitive effects? If so, the result, though seemingly paradoxical, is that one can have a reasonable, good, legal restraint of trade agreement!

However, later Supreme Courts came to believe that the Rule of Reason was too ambiguous and thus too much of a “loop-hole” to the Sherman Act. As such, the Supreme Court and federal courts began to rule that some restraints of trade are so inherently anti-competitive and anti-consumer that they have been deemed to be *per se* violations of the Sherman Act. That is, pursuant to the *Per Se* doctrine they are automatic violations of the Sherman Act and subject to civil and criminal sanctions. The Rule of Reason or the “reasonableness” of the agreement is not a defense in a *per se* case; and thus a court in a *per se* situation is precluded from weighing the benefits compared to the detriments to the consumer. The leading price-fixing case is the U.S. Supreme Court case of *United States v. Socony-Vacuum Oil Co.* (1940) where neither the fact that the price fix was indirect nor that there were arguable benefits to the consumer changed the *per se* nature of the violation.

One, therefore, is guilty criminally or liable civilly – period (assuming sufficient evidence, of course) (Cheesman, 2016; Cavico and Mujtaba, 2014; Clarkson, Miller, and Cross, 2012). Accordingly, a critical issue in anti-trust law is to determine which restraints of trade are automatic *per se* ones and thus automatic legal violations and which are “merely” governed by the Rule of Reason meaning that the agreeing parties have an arguable defense, to wit, their restraint of trade is a reasonable one. The “best” (though not “fool-proof”) way to determine which restraints are horizontal as opposed to vertical is to ascertain whether a restraint is a horizontal one or a vertical one because most (though not all) horizontal restraints are governed by the *Per Se* doctrine; whereas vertical restraints are governed by the Rule of Reason where the “reasonableness” of the restraint is a defense. In the next section of the article the authors will examine the three major horizontal restraints, all of which are governed by the *Per Se* doctrine, as well as the three main vertical restraints, all of which are governed by the Rule of Reason.

## **Horizontal v. Vertical Restraints**

### **Horizontal Restraints**

A horizontal restraint is one between competitors at the same level on the marketing chain, that is, an agreement between or among manufacturers, or between or among wholesalers, distributors, or retailers. Whereas a vertical restraint is one between or among parties at different levels of the marketing, chain, for example, an agreement between a manufacturer and a retailer. The three main horizontal restraints, the violations of which are automatic *per se* antitrust violations under the Sherman Act Section 1, are: price-fixing, territorial or customer divisions, and group boycotts (Cheesman, 2016; Cavico and Mujtaba, 2014; Clarkson, Miller, and Cross, 2012).

First, an agreement between or among competitors at the same level on the marketing chain to fix prices either directly or indirectly (for example, by restricting output or limiting supplies) is a *per se* violation of antitrust law. An allegation of price-fixing was the focus of the Federal Third Circuit Appeals Court in the 2015 case of *In Re Chocolate Confectionary Antitrust Litigation* pitting chocolate related resellers against the three major chocolate manufacturers in the U.S. which, according to the court, constituted an oligopoly.

Hershey controlling approximately 42%, Mars controlling approximately 28%, and Nestlé USA controlling roughly 8% of the USA market, were sued and the federal appeals court scrutinized their conduct under the per se legal test (*In Re Chocolate Confectionary Antitrust Litigation*, 2015, p. 391). The Federal Third District Court of Appeals explained that the plaintiffs were unable to prevail against these chocolate manufacturers, since the plaintiffs could not prove that the competing chocolate manufactures conspired among each other and that this conspiracy was the proximate cause of the plaintiff's injury. Without proof of concerted action, the chocolate reseller's claims failed because their claim fell short in proving the very essence of a section 1 Sherman Anti-trust claim which required proof of the existence of an agreement of some sort between the chocolate manufacturers (*In Re Chocolate Confectionary Antitrust Litigation*, 2015, pp. 395-396).

The Apple's iBook store conspiracy case is another example of the application of the "per se" rule to antitrust price-fixing by horizontal competitors conduct (*United States vs. Apple, Inc.*, 2015). The United States Department of Justice and 33 states and territories filed suit in the United States District Court for the Southern District of New York, alleging that Apple had conspired with various book publishers to raise prices across the nascent ebook market which resulted in noticeable increases in e-books prices on Amazon's Kindle reader. All five publishing companies settled and signed consent decrees which prohibited them, for a period, from restricting ebook retailers' ability to set prices. However, Apple Inc. elected to fight the charges and after a three-week bench trial, the district court concluded that Apple orchestrated a conspiracy among the publisher defendants to raise the price of ebooks. Apple Inc. did so by inducing the publisher defendants to participate in the iBook store and to avoid the necessity of Apple Inc. itself competing with Amazon over the retail price of ebooks. On appeal, the Third Circuit Court of Appeals affirmed that the proper test to such conduct was the "per se" legal test and upheld the lower court's finding that Apple conspired to violate the Section 1 of the Sherman Antitrust Act (*United States v. Apple Inc.*, 2015).

As noted, an explicit agreement is not required; rather, agreements can be implied or inferred from the facts or circumstances of a case. However, as explained in the *Chocolate Confectionary Anti-trust Litigation*, the plaintiffs' lacked direct evidence of a chocolate conspiracy to fix prices, and thus their reliance on circumstantial evidence fell short in their efforts to create a reasonable inference that the Chocolate Manufacturers more likely than not conspired to fix prices in the U.S. chocolate market (*In Re Chocolate Confectionary Antitrust Litigation*, 2015). It is important for business managers to understand that independent parallel conduct, or even conduct among competitors that is consciously parallel, on its own, will fail to establish the required proof of a contract, combination, or conspiracy to commit price-fixing. Neither will conduct that is consistent with other, equally plausible explanations give rise to an inference of conspiracy, as explained in the case of *In Re: Pool Products Distribution Market* (2016), where the circumstantial evidence fell short to prove that pool supply companies conspired to set the "trigger levels" of free shipping to consumers after purchasers reached a certain order value.

Second, when competitors at the same level divide up territories or allocate customers they commit a *per se* violation. The U.S. Supreme Court has long held this steadfast principle by explaining that: One of the classic examples of a per se violation of § 1 is an agreement between competitors at the same level of the market structure to allocate territories in order to minimize competition.... This Court has reiterated time and time again that '[h]orizontal territorial limitations... are naked restraints of trade with no purpose except stifling of competition.' Such limitations are per se violations of the Sherman Act (*United States v. Topco Associates, Inc.*, 1972).

In June 2015, the United States Department of Justice (USDOJ) filed a civil antitrust complaint alleging that four competing Michigan hospitals, unlawfully allocate territories for the marketing of competing healthcare services and to limited competition between them (*United States v. Hillsdale Community Health Center et. al.*, 2016). Specifically, according to the Complaint, the medical centers entered into agreements with each other to limit marketing of competing healthcare services. According to the USDOJ, the agreements eliminated a significant form of competition to attract patients and overall substantially diminished competition in south-central Michigan. The USDOJ has taken the position that the defendants' agreements to allocate territories for marketing are per se illegal under Section 1 of the Sherman Act (15 U.S.C. § 1) and Section 2 of the Michigan Antitrust Reform Act (MCL 445.772). Three of the four medical centers immediately entered into a joint agreed upon judgment that would prevent them from conspiring with any healthcare provider to prohibit or limit marketing or to allocate geographic markets or territories.

The settling defendants are also prohibited from communicating with any other defendant about each other's marketing efforts, subject to certain narrow exceptions.

Finally, a group boycott is also an automatic violation of the Sherman Act. A group boycott is based on an agreement, typically between two or more manufacturers or sellers, to refuse to deal with certain businesses or persons, usually because they are selling the manufacturers' or sellers' goods too cheaply (Cheesman, 2016; Cavico and Mujtaba, 2014; Clarkson, Miller, and Cross, 2012). However, it must be noted that there is nothing inherently legally wrong with businesses having a trade association where competitors in the same field meet for joint informational, educational, marketing and advertising, and lobbying activities as well as the setting of industry or business standards. These activities can have very beneficial effects for the consumer; nonetheless, participants at such trade association meetings must be very careful that their discussions do not degenerate into illegal *per se* agreements pursuant to Section 1 of the Sherman Act.

The U.S. Supreme Court has explained that the category of restraints classed as group boycotts should not be expanded indiscriminately; and accordingly the *per se* approach generally has been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor (*FTC v. Indiana Federation of Dentists*, 1986). Appropriate suggestions will be offered by the authors in the "Recommendations" sections of this article on how to avoid legal liability for *per se* horizontal restraints.

### Vertical Restraints

The four main vertical restraints, all governed by the Rule of Reason, are: territorial or customer divisions, price-fixing as to the maximum price of goods, price-fixing as to the minimum price of goods, and unilateral refusals to deal. Vertical price-fixing agreements are also known as resale price maintenance agreements. As such, there is an agreement usually between a manufacturer and a wholesaler, distributor, or retailer which fixes the price that the manufacturer's goods must be sold. These businesses – manufacturers, wholesalers, and retailers – are, as noted, on different levels on the marketing chain and thus not in direct competition with one another, which are critical points.

Accordingly, vertical agreements that divide territories or allocate customers may be upheld pursuant to the Rule of Reason if there can be shown legitimate pro-competition and pro-consumer consequences stemming from the vertical agreement (*Continental T.V., Inc. v. GTE Sylvania, Inc.*, 1977). Typically, manufacturers want to insulate their dealers from direct competition with other retailers or manufacturers may wish to prohibit wholesalers from reselling their products to certain retailers and/or within certain territories. These arrangements have been upheld under the Rule of Reason on grounds of efficiency in the distribution and sale of products as well as the additional benefits to the consumer of having the manufacturer's products sold at "approved" retailers who presumably have knowledge of the product as well as good consumer service (*Continental T.V., Inc. v. GTE Sylvania, Inc.*, 1977; Cheesman, 2016; Cavico and Mujtaba, 2014; Clarkson, Miller, and Cross, 2012).

Secondly, vertical agreements that fix the maximum price of goods may be upheld on the Rule of Reason because they allow consumers to choose among brands, especially lower cost ones, and they can prevent "price-gouging" of the consumer in times of short supply of goods (*State Oil Co. v. Khan*, 1997; Cheesman, 2016; Cavico and Mujtaba, 2014; Clarkson, Miller, and Cross, 2012). The next major vertical restraint is price-fixing as to the minimum price of goods. For many years the U.S. Supreme Court had construed such an agreement to be so anti-competitive as to be a *per se* Sherman Act Section 1 violation, even if vertical. However, the Supreme Court, in 2007, in *Leegin v. PSKS, Inc.* (2007) made a very important decision regarding vertical price-fixing as to the minimum price of goods which completely overturned past precedent. Since 2011 based on a Supreme Court precedent such price-fixing, even though vertical, was regarded as a *per se* violation of antitrust law. Now, based on the *Leegin* decision, vertical price-fixing is governed by the Rule of Reason. As such, the legality of price-setting agreements between a manufacturer and retailer or between other parties on the vertical marketing chain is determined on a case-by-case basis to determine if they ultimately benefit the consumer or are unreasonably anti-competitive. That is, to have a legal agreement the pro-competitive and pro-consumer consequences outweigh the negative ones. Apple Inc. characterized its agreements with e-book publishers as a vertical arrangement setting a minimum price point for e-books and thus claimed that the "rule of reason" test applied (*United States v. Apple Inc.*, 2015).

If the individual contracts were truly independent of each other and a product of market forces and not purposefully bundled into a collective strategy by Apple Inc. to raise prices of the books to the public, the “rule of reason” test would apply. However, the court pointed out that the only other real competitor in the market, Amazon’s Kindle Reader, would be charged the same escalated fixed price by the publishers per their agreements with Apple Inc. The court explained that the *per se* test applied to Apple Inc.’s conduct as:

Faced with downward pressure on prices but unconvinced that withholding books from Amazon was a viable strategy, the Publisher Defendants — their coordination orchestrated by Apple — combined forces to grab control over price...Apple used the publishers’ frustration with Amazon’s \$9.99 pricing as a bargaining chip in its negotiations and structured its Contracts to coordinate their push to raise prices throughout the industry. A coordinated effort to raise prices across the relevant market was present in every chapter of this story (*United States v. Apple Inc.*, 2015, pp. 327-328).

Vertical price fixes are defended on several grounds, to wit: protecting the status of “high-end” brands and the brand conscious consumer since the products cannot be sold beneath a certain (presumably “cheap”) minimum price; affording the opportunity for better service to the consumer; making it easier for a new producer to enter the market since there would be a better chance of recouping an investment in the manufacturing, marketing, and distribution, and sale of a product; and thereby promoting competition to the benefit of the consumer (Pereira, 2008; Labston, 2007; McWilliams, White, and Bravin, 2007). The antitrust trap for managers is *not* to assume that based on the *Leegin* case that a vertical price-fix as to minimum price of goods is automatically legal; rather, the agreement or “fix” is “merely” governed by the Rule of Reason and consequently a company, typically a manufacturer, must demonstrate to federal regulators and perhaps ultimately to the courts that its agreement, typically with a retailer, as to the minimum price the retailer can sell its goods is in fact good ultimately for the consumer.

The final vertical restraint of trade to examine is a refusal to deal. A horizontal group or joint refusal to deal or group boycott is a Sherman Act Section 1 *per se* violation. However, here the situation is vertical and there is no concerted action; and thus a single manufacturer can unilaterally refuse to deal with certain wholesalers or retailers, which would be those that cut prices, either directly or indirectly by means of sales give-a-ways and promotions, below the manufacturer’s suggested amount. This legal principle is known as the Colgate Doctrine based on the seminal U.S. Supreme Court decision in *United States v. Colgate & Co.* (1919). Thus, a manufacturer has the legal latitude to “merely” suggest the prices at which its products are to be sold and then unilaterally refuse to deal with anyone who does not adhere to those prices (Cheesman, 2016; Cavico and Mujtaba, 2014; Clarkson, Miller, and Cross, 2012). The “trap” here is that the retailer may be so big and widespread that the manufacturer needs the retailer to sell its products even at prices below what the manufacturer suggested. Or perhaps the retailer really needs the manufacturer’s products because they are highly desirable items. So, does Mattel need Toys-R-Us more to sell Barbie dolls or does the retailer need the manufacturer’s “stellar” product more? Similarly, does the Coca Cola Company need Costco more, or vice versa? These questions will be decided by which company has dominant economic power.

An example of this type of litigation involved two competing travel agencies that specialized in selling bulk amounts of first class and business airline travel tickets (*Planetarium Travel, Inc. v. Altour International Inc.*, 2015). Planetarium Travel, Inc. (“Planetarium”) had an association with American Express American Express Travel Related Services Company, Inc. (“Amex”), to sell tickets to Amex customers for many years via this Amex ‘network’ of ticket suppliers. A rival company, Altour International Inc. (“Altour”), entered an exclusive agreement with Amex to provide this service to Amex. As part of their agreement, Altour negotiated subservient “host agreements” with the other travel agencies in which these members agreed to exclusively purchase discounted airline tickets from Altour. Planetarium objected to this arrangement which required Planetarium, to remain in the Amex “network” to deal with Altour and not Amex directly anymore. Amex terminated its relationship with Planetarium for not agreeing to these new instituted rules and Planetarium was banished from the Amex “network”. Planetarium sued alleging, in part that Altour and Amex engaged in a group boycott of Planetarium as it was no longer allowed in the Amex network of providers. This allegation was summarily dismissed by the federal court of the Southern District of New York. In doing so, it explained that Planetarium’s group boycott and exclusive dealing allegations did not amount to an antitrust violation under the ‘rule of reason’ test. The court explained:

First, Planetarium cannot make out a per se claim because the arrangements at issue are vertical, and the per se rule does not apply. Planetarium has a franchise agreement with Amex and is permitted to supply discounted airline tickets to the Amex Network and to Amex Cardholders. Planetarium does not compete with Amex to sell discounted airline tickets. Any restraints placed on Planetarium by Amex are vertical ...Altour is a direct competitor to Planetarium and is similarly situated with respect to Amex. Thus, any restraint between Altour and Amex is also vertical. Given the vertical nature of the agreements at issue, the per se rule is inappropriate, and the rule of reason applies (*Planetarium Travel, Inc. v. Altour International Inc.*, 2015, p. 431.) The federal court went on to conclude that even if the “network” or group association was established and Altour acted as the gatekeeper that other competitors had to go through to reach Amex customers, this resulting business structure had no adverse effect on competition. In reaching this conclusion, the court rationalized that:

Amex Network members, Amex Cardholders and the general public are not required to purchase discounted first and business class tickets through Amex or from Altour. If Altour were to raise its prices on discounted airline tickets, all customer groups would have less incentive to purchase tickets through Amex—undermining, if not killing, Amex's and Altour's business—and customers would still be able to purchase airline tickets from the myriad other travel agencies and websites available. Neither Amex nor Altour has the ability to foreclose competition or raise prices in the market for discounted first and business class airline tickets. Because an arrangement between Amex and Altour that excludes Planetarium will not inhibit the ability of consumers to purchase airline tickets, there can be no adverse effect on any market (*Planetarium Travel, Inc. v. Altour International Inc.*, 2015, pp. 432-433). To conclude the discussion on restraints of trade the authors must emphasize the automatic nature of the Per Se doctrine; that is, the violation will lead to liability assuming adequate evidence; and the courts will not countenance any such purported defense that the horizontal restraint is somehow ultimately good for consumers. In addition, as to vertical restraints the principal pitfall is to assume that vertical restraints are legal; they are not legal in and of themselves; rather, they are only legal if the agreeing parties can show that they pass the Rule of Reason and thus that competition and consumers will eventually benefit from the vertical agreement to restrain trade. In the next section of the article, the authors will examine monopolization law pursuant to Section 2 of the Sherman Antitrust Act.

### **Sherman Act Section 2 - Monopoly v. Monopolization**

What's wrong with having a monopoly? Nothing actually! Even though the term “monopoly” has a pejorative meaning, there is nothing inherently legally wrong about having a monopoly (assuming one achieves it by lawful means, of course). One can have what the law deems to be “natural” monopolies or monopolies that are “thrust on” one, that is, those that are achieved by one's knowledge, skills, hard-work, inventiveness, foresight, and entrepreneurship, as well as perhaps by geography (for example, a small town that can support only one gas station). So, one has achieved a monopoly; but now one must be very careful because there is an anti-trust legal wrong – with criminal as well as civil ramifications, including private lawsuits with triple damages, called monopolization of trade or commerce (or monopolizing trade or commerce). And this is where the pitfall begins with this aspect of anti-trust law. The key statute is Section 2 of the Sherman Anti-trust Act of 1890 which makes monopolization a legal wrong. The Act as interpreted by the U.S. Supreme Court maintains that two requirements are necessary to commit a monopolization offense: first, one must have a monopoly; second, there must be evidence of intentional wrongful conduct in acquiring, maintaining, or expanding the monopoly. These two requirements are at times called the “structure” and “conduct” elements (*United States v. Grinnell Corp.*, 1966; Cheesman, 2016; Cavico and Mujtaba, 2014; Clarkson, Miller, and Cross, 2012).

First, the monopoly is absolutely necessary. It cannot be emphasized enough that without a monopoly one cannot be liable for monopolization – period. One's misconduct may bring other legal consequences but not monopolization. So, how does one get to have a monopoly? First, one needs a “market.” Ascertain the relevant market (product, service, geographic) is THE critical factor to ascertaining if a monopoly exists. Determine the market, decide the case! In addition, the broader the market is, the more difficult it will be for the government, or a private party plaintiff to demonstrate that one has a monopoly. Once the market is determined, the next step is to see if a particular company dominates or controls that market. That step is called “market share”; and though there is no precise formulation, a control of 70% or more of a market will be a monopoly-like percentage (Cheesman, 2016; Cavico and Mujtaba, 2014; Clarkson, Miller, and Cross, 2012).



Yet the numbers are not completely governing on this finding, as there is one more step – “market power.” Market power is defined as being so dominant in a market that one can raise or lower prices at will, and so powerful that no other business would dare contemplate entering that market, like the Standard Oil Trust in the good-old days (bad-old days, perhaps). Another more recent example involves Gatorade. At one time Gator Aide had about 83% of the sports drink market, but it did not have a monopoly. Why? Because there were two other “players” in the market – Coke and Pepsi, each having its own sports-drink.

Consequently, even though Gatorade had a monopoly-like percentage, it did not have “market power” due to the two very strong competitors in the market. In another famous case, one person at one time owned all the movie theatres in Las Vegas, but he did not have a monopoly, though 100% control of a market sure seems like a monopoly. Why? Again, because there were very strong potential competitors in the form of big national movie chains who could readily enter the market and thus the element of “market power” was lacking (Cheesman, 2016; Cavico and Mujtaba, 2014; Clarkson, Miller, and Cross, 2012)? So, to sum up, market + market share + market power = a monopoly.

\*\*\**Monopoly = market + market share + market power*\*\*\*

So what? So there is a monopoly - big deal! Because, as emphasized, there is nothing inherently wrong about having a monopoly. For the legal wrong of monopolization to occur, we need the monopoly, of course, and the second requirement – intentional wrongful conduct in acquiring, maintaining, or expanding the monopoly. The intentional requirement means that evidence of purposeful conduct, like the famous/infamous Microsoft “kill the baby” e-mail, referring to the Netscape Navigator, which the company pressured manufacturers to exclude from Windows so as to sustain its Internet Explores; and which conduct resulted in Microsoft being deemed to be an illegal monopolizing company (as it had a monopoly at the time in operating systems) (*United States v. Microsoft Corp.*, 2001; Cheesman, 2016; Cavico and Mujtaba, 2014; Clarkson, Miller, and Cross, 2012). Wrongful conduct can of course be illegal conduct, like bribery, price-fixing, trade disparagement, intentional interference with contract, or for that matter arson. Yet “wrongful” conduct can also encompass quite legal conduct but conduct the law nonetheless regards as abusive, predatory, or unethical (Cheesman, 2016; Cavico and Mujtaba, 2014; Clarkson, Miller, and Cross, 2012).

To illustrate, take the airline example of “bracketing.” Bracketing commences when a new, “upstart,” entrepreneurial, “good” little airline dares to compete against a big, “bad,” established airline. Say the big airline has a daily flight at 3:00 in the afternoon from Detroit to Philadelphia for \$299. In comes little airline with a similar flight at that time for \$99. So what does big airline do? First, they drop the price to \$99, and then they bracket, which means that big airline will add another flight at 2:45 and move its other flight to 3:15 in the afternoon. That’s the bracket! In addition, what would you expect the result to be – the flying public will choose the big airline they are more familiar with and whose frequent-flyer program they participate in. Consequently, what happens to the little airline – gone, gone with the wind (and bracket). Oh, once the little airline has been removed as a competitor, the big airline goes back to just one flight, and at what price - \$399, as the big airline has to make up those losses, and it is easy to do so if one, like the original Rockefeller of Standard Oil Trust fame/infamy, has a monopoly.

However, does big airline have a monopoly? What is the market? Is it the Detroit or Philadelphia hubs? Is it the Northeast corridor, the country, the world? If there is no monopoly, then there can be no monopolization legal wrong. As goes the market, so goes the anti-trust lawsuit! Yet, assuming that big airline has a monopoly, there is nothing wrong with giving the consumer more service or products at reduced prices, is there? Similarly, there is nothing wrong with big coffee company giving away free coffee in front of a Mom-and-Pop coffee store in Seattle, is there? Getting better “stuff,” more “stuff,” and free “stuff” are legal, right (assuming no controlled substances, etc.)? Yet even though these pro-consumer (at least initially!) practices are legal, pursuant to anti-trust monopolization law, they may be deemed predatory, abusive, or unethical, and thus fulfill the second legal requirement to the legal wrong of monopolization. Accordingly, if one has a “monopoly,” what is “good” may in fact be “bad”; and that paradox is a major trap in anti-trust law. The second element of the monopolization test thus has emerged as problematic are for the courts and accordingly requires further explication. The second element has been defined by the courts as the “willful acquisition or maintenance” of monopoly power “as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident” (*Eastman Kodak Co. v. Image Technical Servs., Inc.*, 1992, p. 481; *United States v. Grinnell Corp.*, 1966, p. 571; *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, p. 370, 2003).

Moreover, Conduct that merely has the consequence of shutting out competition does not rise to the level of anticompetitive behavior subject to antitrust liability; the monopolist must have acted with the intent to prevent competitors from entering the market (*Cavalier Tel., LLC v. Verizon Va., Inc.*, 2003, p. 183; see *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 1985, p. 602 (explaining that intent is a necessary element of claims under Section 2 of the Act)).

Some courts have referred to improper methods of acquiring or maintaining monopoly power as "exclusionary conduct," defined as "conduct, other than competition on the merits or restraints reasonably "necessary" to competition on the merits, that reasonably appears capable of making a significant contribution to creating or maintaining monopoly power" (*Concord v. Boston Edison Co.*, 1990, p. 21; *Barry Wright Corp. v. ITT Grinnell Corp.*, 1983, p. 230). A number of other cases have defined anticompetitive conduct as "conduct without a legitimate business purpose that makes sense only because it eliminates competition" (*La. Wholesale Drug Co. v. Shire LLC (In re Adderall XR Antitrust Litig.)*, 2014, p. 133; *Port Dock & Stone Corp. v. Oldcastle Ne., Inc.*, 2007, p. 124).

Further, courts require more than just proof of intent; they require proof of exclusionary or anticompetitive effects. For example, in a 2010 case involving pineapple producers, the competitor plaintiffs argued that the defendants improperly monopolized the market for fresh, whole, extra-sweet pineapples by (i) sending false and misleading threat letters to the competitors and others giving the impression that the Fresh Del Monte Gold TM pineapple (the MD-2 pineapple) was patented by the defendants, and (ii) initiating sham patent litigation in order to deter competition (*Am. Banana Co. v. J. Bonafede Co.*, 2010). In analyzing the requirement of intentionality, the court stated that: the second element requires "[p]roof of willful intent and unreasonable exclusionary or anticompetitive effects" so that a trier of fact may distinguish "between conduct that defeats a competitor because of efficiency and consumer satisfaction, and conduct that 'not only (1) tends to impair the opportunities of rivals, but also (2) either does not further competition on the merits or does so in an unnecessarily restrictive way'" (*Am. Banana Co. v. J. Bonafede Co.*, 2010, p. 522 (quoting *Trans Sport, Inc. v. Starter Sportswear, Inc.*, 1992, pp. 188-89 and *U.S. Football League v. Nat'l Football League*, 1988, p. 1359)).

The court found that the plaintiffs could not show that either the threat letters or alleged sham litigation had the anticompetitive effect of delaying competitors' entry into the market, or as such, they failed to meet the second requirement. In its analysis of the supposed sham litigation, the court explained that even assuming the litigation was a sham, the record did "not indicate how this litigation involving the CO-2 pineapple, which was commenced after Dole Food Company ("Dole") had entered the MD-2 market, could have caused anticompetitive effects in a market that was, according to plaintiffs, entirely distinct from the market containing the CO-2 pineapple." With regard to the threat letters, the court reasoned that although the record did show that the competitors were confused as to whether the pineapple was patented, the plaintiffs failed to also show, as required, that such confusion was a "material cause" of delayed or deterred entry into the market (*Am. Banana Co. v. J. Bonafede Co.*, 2010, pp. 522-523; see *Blue Tree Hotels Inv. (Canada), Ltd. v. Starwood Hotels & Resorts Worldwide, Inc.*, 2004, p. 220).

Similarly, in *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, the court held that the defendant did not violate Section 2 of the Sherman Anti-Trust Act by sending out mass mailings praising its qualities and criticizing its rivals, even if such mailings were misleading, because the negative impact of the statements could be remedied relatively easily by the plaintiff through a mailing or direct contact. In its opinion, the court acknowledged that "false advertising cannot help consumers, and hence cannot be defended as beneficial to competition." Nevertheless, actual evidence of the second element was "required because even false advertising would not damage competition and hence be a violation of the Sherman Act unless it was so difficult for the plaintiff to counter that it could potentially exclude competition. Monopoly power is the power to exclude competition or control prices" (*Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 2003, pp. 368-372).

The court went on to explain that "isolated business torts, such as falsely disparaging another's product, do not typically rise to the level of a section 2 violation unless there is a harm to competition itself" (*Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 2003, p. 372). Further, there can be no harm to competition, such as the exclusion of competitors, when the victims of false advertising are easily able to counter it. As the Supreme Court has emphasized, the Sherman Act protects competition, not competitors.

*Spectrum Sports, Inc. v. Mc Quillan*, 506 U.S. 447, 458, 122 L. Ed. 2d 247, 113 S. Ct. 884 (1993) ("The law directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself."); cf. *Houser v. Fox Theatres Mgmt. Corp.*, 845 F.2d 1225, 1230-31 (3d Cir. 1988) (rejecting section 2 claim regarding defendant's disparagement of plaintiff's box office potential because defendant's conduct was "consistent with legitimate competitive conduct") (*Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 2003, pp. 368-372 ). Likewise, in *Cavalier Tel., LLC v. Verizon Va., Inc.*, Cavalier Telephone, LLC sued Verizon Virginia, Inc., claiming that Verizon had violated the Telecommunications Act in an attempt to exclude Cavalier as a competitor, and as such, was in violation of Section 2 of the Sherman Act. The background is as follows: Cavalier had entered the local telecommunications service business pursuant to an interconnection agreement with Verizon, the area's incumbent telecommunications services provider. Pursuant to the agreement, Verizon's lines and facilities were made available to Cavalier. This action was required by the Telecommunications Act. Nevertheless, there were problems in the operation of the interconnection agreement, and Cavalier argued that these problems were intentionally created by Verizon in order to exclude Cavalier as a competitor.

The court found that even if such problems were intentionally created by Verizon in violation of the Telecommunications Act, Verizon's actions did not violate the Sherman Act, because the Sherman Act itself did not require that Verizon make lines and facilities available to Cavalier. The court stated that: the Sherman Act continues to apply in its own traditional domain, applying as it did before the Telecommunications Act, and the Telecommunications Act imposes new duties that may be enforced in accordance with its own provisions but not under the Sherman Act unless the conduct otherwise would have supported a claim under the Sherman Act absent the authority of the Telecommunications Act (*Cavalier Tel., LLC v. Verizon Va., Inc.*, 2003, p. 190).

However, it should be noted that the court did acknowledge that there may be cases where breaking a law could constitute violation of Section 2 (*Cavalier Tel., LLC v. Verizon Va., Inc.*, 2003, p. 190). From these cases, one can see that the second component requires more than just bad or even illegal behavior. Plaintiffs need to make a showing of both anticompetitive intent and impact. Further, if plaintiffs could have combated the ill effects of the defendant's actions, the court is unlikely to find that there has been an anti-trust violation. As the court explained, "monopoly power is the power to exclude competition or control prices" (*Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 2003, p. 372). If the competitor has the ability to stop the monopolizing, then the defendant does not have true monopoly power. In the next section of the article, the authors examine another problematic area of antitrust law – price discrimination pursuant to the Clayton Antitrust Act as well as the Robinson-Patman Act.

### **Clayton Act Section 2 - Price Discrimination v. Market Price Justifications**

Price discrimination by the sellers of goods is prohibited by Section 2 of the Clayton Act as amended by the Robinson-Patman Act (the "RPA"). Pursuant to these statutes it is illegal for a seller to discriminate in prices between different purchasers of substantially similar goods (in grade and quality) if the result is to substantially lessen competition, or injure, destroy, or prevent competition, or tends to create a monopoly. That is, as a general rule it is illegal for a seller to sell identical (or nearly identical) goods at contemporaneous times to different, though competitive, buyers at different prices (*Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 1993, pp. 219-220; *Federal Trade Comm'n v. Morton Salt Co.*, 1948, p. 45; *FTC v. Anheuser-Busch, Inc.*, 1960; Cheesman, 2016; Cavico and Mujtaba, 2014; Clarkson, Miller, and Cross, 2012). However, price discrimination law is a difficult area for analysis and one filled with pitfalls because of the many exceptions to the law, that is, situations where a seller can discriminate in price, which can be raised as defenses.

The principal exemptions are as follows: 1) granting legitimate rebates to favored customers; 2) giving cost savings to customers, for example, for large quantity orders or lower transportation costs; 3) reducing prices to certain customers as a response to meeting the lower prices of a competitor; 4) and changing prices due to changing market conditions, for example, due to seasonal, perishable, or obsolescent goods (Cheesman, 2016; Cavico and Mujtaba, 2014; Clarkson, Miller, and Cross, 2012). Moreover, certain states, for example, California, also have price discrimination laws which parallel the federal statute (Schmitt, 1997, p. B8).

The antitrust trap in these laws is that these defenses are not clearly delineated in the statutes and thus a seller risks an antitrust lawsuit unless the evidence clearly indicates the pricing discrimination falls within an exemption. As such, the *Wall Street Journal* has noted that "for years, price discrimination lawsuits have been criticized as anti-consumer" because "...they ultimately lead to higher prices – that manufacturers when challenged on giving certain discounts to selected distributors will simply raise prices as a solution" (Schmitt, 1997, p. B8). Price discrimination is of particular interest today, as technological advances have made it easier to price discriminate. Companies can utilize data-mining to collect and analyze large amounts of demographic information on potential customers. As such, firms have access to not only online shopping behavior, but also internet surfing and pre-purchasing behavior. With this information, merchants can get a sense of purchasers' willingness to pay for items and thus practice targeted marketing and pricing. Moreover, differential pricing is difficult to recognize online, making people vulnerable in a way they were not vulnerable before the technology age. In a brick and mortar store, each customer sees the same display and local norms apply. On the Internet, in contrast, consumers of the same product may be viewing different virtual stores. As a result, people are susceptible to differential pricing (or what has sometimes been termed, "sucker surcharges") (Edwards, 2006, pp. 571-572).

The Supreme Court has made clear that under the RPA, the term "price discrimination" is read to mean any difference in price (*Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 1993, pp. 219-220; *Texaco Inc. v. Hasbrouck*, 1990, p. 558; *FTC v. Anheuser-Busch, Inc.*, 1960, p. 549). Nevertheless, the RPA "condemns price discrimination only to the extent that it threatens to injure competition" (*Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 1993, p. 220).

Further, there are limitations in the RPA's application: (i) the provision covers the sale of only commodities (not services); (ii) as mentioned, the RPA contains exemptions allowing price discrimination in a number of circumstances, such as if the discrimination is based upon cost differences or changing market conditions; and (iii) the RPA contains a strict interstate commerce jurisdictional requirement and, as a result, excludes many intrastate sales (which, consequently, restricts the RPA's reach as compared to other antitrust laws) (Edwards, 2006, pp. 576-577; see *Able Sales Co. v. Compania de Azucar*, 2005, pp. 62-65; see also *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 1993, p. 220; *FTC v. Anheuser-Busch, Inc.*, 1960, p. 549). RPA cases are classified based upon the distribution level of the competitor who claims harm. The most common types are "primary-line" and "secondary-line" cases. Primary-line cases center on competitors of the seller; secondary-line cases center on competitors of the favored purchasers who buy from the seller (Third-line cases, which are more rare, cover customers of the seller's customers, and fourth-line cases also exist) (Hansen, 1983, p. 1133; see e.g. *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 1993; see also *Utah Pie Co. v. Continental Baking Co.*, 1967, p. 702; *FTC v. Morton Salt Co.*, 1948, p. 45).

In 1993, the Supreme Court analyzed a primary-line case within the cigarette industry. The plaintiff, a cigarette manufacturer, had increased its share of the market by introducing a line of unbranded "black and white" generic cigarettes at a list price well below those of branded cigarettes. The defendant lost market share as result, and responded by introducing its own black and white cigarettes and other discounted cigarettes. The defendant beat the plaintiff's prices and volume discounts, and gave wholesalers larger rebates than the plaintiff give gave, both at first and throughout an ensuing rebate war. The plaintiff sued in court, alleging, among other things, that the defendant had violated the Clayton Act as amended by the RPA. The plaintiff reasoned that the defendant's "discriminatory volume rebates were integral to a scheme of predatory pricing," in which the defendant "reduced its net prices for generic cigarettes below average variable costs" (*Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 1993, p. 212-217).

In its analysis, the court first explained that although price discrimination within the meaning of the statute is defined merely as a price difference, "the statute as a practical matter could not, and does not, bans all price differences" (Id., p. 220). In addition, the court stated that: the availability of statutory defenses permitting price discrimination when it is based on differences in costs, ... changing conditions affecting the market for or the marketability of the goods concerned ... or conduct undertaken in good faith to meet an equally low price of a competitor... confirms that Congress did not intend to outlaw price differences that result from or further the forces of competition. Thus, "the Robinson-Patman Act should be construed consistently with broader policies of the antitrust laws"(Id., p. 220 (quoting *Great Atlantic & Pacific Tea Co. v. FTC*, 1979).

The court reviewed the plaintiff's claim that the defendant's "discriminatory volume rebates to wholesalers threatened substantial competitive injury by furthering a predatory pricing scheme designed to purge competition from the economy segment of the cigarette market," and explained that this "type of injury, which harms direct competitors of the discriminating seller, is known as primary-line injury" (Id., p. 220). The court went on to clarify that a mere showing that the defendant intended to harm competition or produced a declining price structure was not sufficient to win a primary-line price discrimination case, to wit:

Whether the claim alleges predatory pricing under § 2 of the Sherman Act or primary-line price discrimination under the Robinson-Patman Act, two prerequisites to recovery remain the same. First, a plaintiff seeking to establish competitive injury resulting from a rival's low prices must prove that the prices complained of are below an appropriate measure of its rival's costs (Id., p. 222).

The court also noted: "Second, the plaintiff must show that the defendant had a reasonable prospect of recouping its investment in below-cost prices" (Id., p. 224). The court further explained: Recoupment is the ultimate object of an unlawful predatory pricing scheme; it is the means by which a predator profits from predation. Without it, predatory pricing produces lower aggregate prices in the market, and consumer welfare is enhanced. Although unsuccessful predatory pricing may encourage some inefficient substitution toward the product being sold at less than its cost, unsuccessful predation is in general a boon to consumers (Id., p. 224).

For recoupment to occur, below-cost pricing must be capable, as a threshold matter, of producing the intended effects on the firm's rivals, whether driving them from the market, or, as was alleged to be the goal here, causing them to raise their prices to supracompetitive levels within a disciplined oligopoly (Id., p. 225). If circumstances indicate that below-cost pricing could likely produce its intended effect on the target, there is still the further question whether it would likely injure competition in the relevant market? The plaintiff must demonstrate that there is likelihood that the predatory scheme alleged would cause a rise in prices above a competitive level that would be sufficient to compensate for the amounts expended on the predation, including the time value of the money invested in it (Id.). The court found that even if the defendant had intended to recoup its losses, an inference of recoupment was impossible because there was no evidence to suggest that the defendant was likely to obtain the power to raise the prices for generic cigarettes above a competitive level (Id., p. 232).

Similarly, in 2006, the Supreme Court found that the plaintiffs had failed to establish injury to competition in a secondary-line price discrimination case (i.e., price discrimination that injures competition among the discriminating seller's customers). *Reeder-Simco GMC*, a Volvo dealer, brought suit against Volvo, alleging that its sales and profits had declined because Volvo had offered other dealers more favorable price concessions than those offered to Reeder. The Court ruled for Volvo, finding that a manufacturer offering its dealers different wholesale prices will not be held liable for price discrimination under the RPA without showing that the manufacturer discriminated between dealers who were contemporaneously competing to resell to the same retail customer (*Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 2006, p. 169).

The Supreme Court explained that in secondary-line cases, a hallmark of the requisite competitive injury, is "the diversion of sales or profits from a disfavored purchaser to a favored purchaser" (Id., 2006, p. 177). To make this showing, Reeder had provided three types of evidence: (1) comparisons between concessions that Reeder had received for four successful bids against non-Volvo dealers and concessions that other successful Volvo dealers had received for different sales on which Reeder did not bid (purchase-to-purchase comparisons); (2) comparisons between concessions that had been offered to Reeder in connection with several unsuccessful bids against non-Volvo dealers and concessions that had been provided to other Volvo dealers who competed successfully for different sales on which Reeder did not bid (offer-to-purchase comparisons); and (3) evidence of two occasions on which the Reeder bid against another Volvo dealer (head-to-head comparisons). Although the Court of Appeals concluded that Reeder had established competitive injury under the RPA, the Supreme Court found differently (Id., 2006, pp. 177-178).

Both the purchase-to-purchase and the offer-to-purchase comparisons fall short, for in none of the discrete instances on which Reeder relied did Reeder compete with beneficiaries of the alleged discrimination for the same customer. Nor did Reeder even attempt to show that the compared dealers were consistently favored vis-a-vis Reeder.

Reeder simply paired occasions on which it competed with non-Volvo dealers for a sale to Customer A with instances in which other Volvo dealers competed with non-Volvo dealers for a sale to Customer B. The compared incidents were tied to no systematic study and were separated in time by as many as seven months. We decline to permit an inference of competitive injury from evidence of such a mix-and-match, manipulable quality (Id., 2006, p. 178). In essence, the Court found that there was no liability under the RPA because Reeder had failed to identify any differentially priced transaction in which it was both a purchaser under the RPA and in actual competition with a favored purchaser for the same customer. Nevertheless, the Court did say that “a permissible inference of competitive injury may arise from evidence that a favored competitor received a significant price reduction over a substantial period of time” (Id., 2006, p. 177).

As can be seen, winning a claim under the RPA is not an easy feat. The plaintiff must have real and convincing evidence of injury to competition, as outlined by the *Brooke Group* test (the *Brooke Group* case established that the two requirements for predatory pricing are below-cost retail pricing and a dangerous probability that the defendant will recoup lost profits) (*Pac. Bell Tel. Co. v. Link Line Comms., Inc.*, 2009, p. 439; *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 1993, pp. 222-224). And injury to competitor does not mean injury to competition (*Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 2006, p. 181 (“we would resist interpretation geared more to the protection of existing competitors than to the stimulation of competition”); *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 1993, p. 224 (“That below-cost pricing may impose painful losses on its target is of no moment to the antitrust laws if competition is not injured:

It is axiomatic that the antitrust laws were passed for the protection of competition, not competitors”). That being said, there have been cases where the Court found sufficient evidence (*Falls City Industries, Inc. v. Vanco Beverage, Inc.*, 460 U.S. 428, 437-438 (1983) (complaint “supported by direct evidence of diverted sales”); *FTC v. Sun Oil Co.*, 371 U.S. 505, 518-519 (1963) (evidence showed patronage shifted from disfavored dealers to favored dealers). Further, a plaintiff may have other recourse in state laws (see *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 2006, p. 169 (finding that state law designed to protect franchisees provided a remedy for Volvo dealer plaintiff, even though the Robinson-Patman Act did not)).

### **Global Overview of Antitrust Laws**

The United States does not have a monopoly on antitrust laws; and foreign regulatory legislation and jurisprudence have evolved within some of the United States major trading country partners. The global marketplace is diverse and even more complex than local regulations (Mujtaba, 2010); as such, it is important to have a brief comment and reflection on the transnational application of U.S. anti-trust laws and a sampling of foreign jurisdictional regulations in this area of business law. Although a complete review of antitrust laws around the globe is not practical in this publication, a broad global tour of this topic is worth a business manager’s attention.

The United States has, on occasion, asserted extraterritorial application of its anti-trust law to overseas conduct by way of the passage of the Foreign Trade Anti-trust Improvements Act in 1982 (Cavico and Mujtaba, 2014). This act is codified in 15 United States Code, Section 6 (a) and provides that U.S. antitrust law does not apply to overseas conduct unless “direct, substantial and reasonably foreseeable effect” on U.S. Commerce or on the business of a person engaged in exporting goods from the United States to foreign Nations. However, some countries considered such an overreach as offensive to notions of sovereignty or refuse to recognize the punitive or treble damage awards that are called for by US antitrust laws. Germany was one nation that has refused in the past to enforce U.S. antitrust judgments carrying punitive damages (Bundesgerichtshof, June 4, 1992).

Some countries even went further in the global tit-for-tat spat that ensued by passing their own “blocking statutes,” “claw back laws,” and in some cases allowing their courts to issue “anti-suit” injunctions. Blocking statutes are those foreign state laws that prevent the participation of a country’s legal system and its citizens and business entities from cooperating in the collection of evidence related to an anti-trust lawsuit pending in the U.S. court system against that foreign state’s companies or citizens. Surprisingly, some of the United States’ friendliest nations like Canada, Australia, France, the Netherlands, Switzerland, Germany, and the United Kingdom erected such barriers by passing domestic blocking statutes in an effort to combat the U.S. Justice Department’s antitrust actions against the global uranium production industry which was allegedly violating U.S. antitrust laws (Schaffer, 2012).

“Claw back laws” are foreign legislative enactments that entitle a foreign business entity or person facing a pending US anti-trust judgment against them to recapture or ‘claw back’ and recover the judgment’s value, in whole or in part, from the US plaintiff who holds the subject US judgment.

These are separate retaliatory judicial actions that are commenced after the perceived “offensive” U.S. anti-trust laws were applied to a foreigner for their activities overseas resulting in a US judgment against the foreigner (Schaffer, 2012). Finally, some courts will allow for a preemptive lawsuit in a foreign jurisdiction against a prospective U.S. plaintiff to allow the foreign company or person to enjoin the filing of such anti-trust actions in the U.S. court system. This was the case in Laker Airlines’ 1982 lawsuit against several American and European rivals which alleged violations of the Clayton Act.

In that litigation, both the U.S. and the United Kingdom judicial courts issued dueling “anti-suit” injunctions against the litigants commanding them to continue their case only in their respective domestic court systems. This caused two “parallel” and simultaneous judicial forums rendering opposite, conflicting court orders commanding the various litigants to cease litigating their anti-trust case in the opposing venues (Libow, 1986). Although USA’s transnational overreach in this area can cause diplomatic friction between the two involved countries, the U.S. Supreme Court rejected this international ‘comity’ based affirmative defense in preventing international antitrust claims from proceeding in the US judicial court system. In a landmark case of *Hartford Fire Insurance Co. v. California* (1993), the U.S. Supreme Court recognized the value of international “comity” principles, but held that such principles do not prevent a Californian court’s jurisdiction over overseas London re-insurers who were allegedly committing unfair trade practices in the global insurance agency (*Hartford Fire Insurance Co. v. California*, 1993).

Notwithstanding the forgoing, other countries do have laws that prevent unfair trade practices or deceptive acts sometimes referred to as “sharp practices” in the global marketplace. The European Community’s “competition laws” were originally rooted in Articles 81 and 82 of the Treaty of Rome and later adopted in the new Articles 101 and 102 of the Treaty on the Functioning of the European Union (EU). Article 101 of this EU treaty is most closely aligned with Section 1 of the USA Sherman anti-trust law and prohibits “all agreements between undertakings, decisions by associations of undertakings and concerted practices which might affect trade between the Member States and which have as their object or effect the prevention, restriction, or distortion of competition within the Common Market.”

Article 2 of the treaty aims at eliminating unlawful monopolies much like Section 2 of the USA Sherman Act. U.S. companies and their managers cannot turn a blind eye to these EU competition provisions. Microsoft would attest to this cautionary note, when it was ordered by the EU to cease its practice of mandatory bundling of its Windows Media Player with the Windows Client PC Operating System in the EU (*Microsoft Corp. v. Commission of the European Communities*, 2007). Finally, it is worth noting that in 2004 the EU updated its merger regulations when it formally adopted the merger Regulation 139/2004. This EU regulation provides for procedural post-merger reviews and provides for a substantive test for merger analysis addressing the “Community Dimension” (i.e., effects of the merger on the EU marketplace) and whether the merger will “significantly impede effective competition, in particular as a result of the creation or strengthening of a dominant position” (Regulation 139/2004). If there is a pending merger where assets of the involved business entities are found in both the USA and the EU, business managers will need to seek the approval of both jurisdictions prior to commencing the merger. This cautionary advice is best exemplified by the *General Electric Co. v. Commission European Communities* litigation. Here the U.S. FTC approved the merger of General Electric and Honeywell, but in 2001 the EU Commissions Merger Task Force blocked the merger and the entire transactional was halted in both jurisdictions and the two companies were forced to dis-engage themselves.

Although the Japanese culture generally encourages the collaboration and networking of competitors in the business market place, Japan has a version of formidable unfair trade practice laws. The Japanese Fair Trade Commission (JFTC) regulates anti-competitive acts. The JFTC was created in 1947 and has the authority to enforce the 1947 Antimonopoly Act and the 1956 Subcontract Act (JFTC website 2016). The JFTC can issue cease-and-desist letters to those businesses participating in conducting anti-competitive and “surcharge payment orders” against those who are found in violation of these laws (Wolff and Nottage, 2015).

These laws, like US antitrust laws, allow for private enforcement where plaintiffs can seek injunctions and monetary damages (Wolff and Nottage, 2015). These laws also allow for criminal charges to be filed against violators upon referral by the JFTC to the Public Prosecutor's Office, but such criminal filings are rare (Wolff and Nottage, 2015).

China has recently codified a patchwork of domestic antitrust laws and consolidated them in the Anti-Monopoly Law of the People's Republic of China which took effect in 2008. This law is very similar to EU's version of targeting anti-competitive acts in the market place and requires pre-merger notice and evaluation by China's Anti-Monopoly Enforcement Agency which jointly administers unfair restraints of trade legislation with the Chinese Anti-Monopoly Commission. China's main enforcement focus has been to combat price fixing and the practice of restricting the minimum price for resale to a third party, and has spent less time on investigating and taking actions against vertical non-price restrictions, such as vertical territorial and customer restrictions (Zhiying and Feng, 2015). China's governmental enforcement arm in this area is known as the National Development and Reform Commission (NDRC) which is tasked with investigating price-related anticompetitive like cartels, and "resale price maintenance," and other abuses related to market share dominance (Allen and Overy, 2015).

In 2015, Qualcomm Inc. negotiated a record breaking penal settlement with the NDRC to end an investigation into its alleged unfair trade practices by agreeing to pay almost one billion dollars (Clark, 2015). Qualcomm Inc., which sells more Smartphone chips than any other manufacturer in the world, was under investigation by the NDRC since 2013 for its alleged anticompetitive conduct in China for allegedly abusing its market position in licensing its intellectual property rights (Clark, 2015). The NDRC has the ability to impose fines against companies and individuals and works closely with its related sister agency, the Anti-Monopoly Bureau of the Ministry of Commerce (MOFCOM), which scrutinizes proposed mergers and joint ventures and its pre-merger authorization must be secured by domestic and foreign firms prior to completing their proposed consolidation. There has been a notable increase in the MOFCOM flexing its enforcement powers, causing one leading international law firm to state:

MOFCOM has shown increasing levels of confidence and sophistication in its decisions, and willingness to chart its own course.... MOFCOM has not hesitated to intervene in global transactions and impose remedies, including some that diverge from the positions taken by its more mature peers in the EU and US, particularly if Chinese interests are at stake. Its unique "hold-separate" remedies, which require merging parties to remain independent post-transaction until such time that MOFCOM authorizes full integration, are rarely seen in other parts of the world (Fresh fields Brukhaus Deringer, LLP, 2015) The forging samplings of foreign nations' antitrust laws should alert business managers to overseas anticompetitive regulations which may apply to their global or regional business activities.

### **General Recommendations for Managers**

A company of course should promulgate and implement a corporate code of conduct or corporate code of ethics with a concomitant legal compliance program. A section on the company's antitrust policy and legal compliance is perforce a necessary component to avoid the "traps" explicated herein. Generally, the policy should have the following elements: 1) clear written legal compliance standards based on U.S. federal antitrust law (though a mention should be made as to the existence of possible state and international antitrust laws too); 2) communication of the policy and standards to all employees, including education and training; 3) continual monitoring and auditing of antitrust compliance; 4) enforcement of the policy and standards, including sanctions for violations; 5) an ombudsman, ethics center, and/or ethics "hot-lines" for employees to report violations as well as an assurance that "whistleblowers" will not be retaliated against and their anonymity and privacy will be maintained to the fullest extent possible; and 6) responsibility for the policy and its development, modification, communication, and enforcement being given to high-level executives in the company (Ravikoff and Barroso, 2007).

Company executives and management must emphasize to the employees how serious the company is concerning the enforcement of the policy and compliance standards and that the employees must be alert to violations. Naturally, the employees must be encouraged to ask questions and to express concerns about the policy and its implementation to their supervisors, managers, executives, and the legal department.



The aforementioned suggestions are of a general nature, of course; whereas in the next section of the article we provide specific recommendations for definitions, standards, and criteria to be used in the legal compliance component to the firm's antitrust policy.

### Specific Compliance Recommendations

We now supply specific recommendations to ensure the employees' and firm's compliance with antitrust law; and the authors also emphasize that these recommendations apply to U.S. domestic marketplaces and to many overseas forums. The recommendations are divided into three main areas: price agreements, territorial divisions and customer allocation, and price discrimination. Moreover, suggestions are also provided for appropriate conduct in trade association meetings.

First, regarding price agreements, the policy and compliance manual clearly must state the following:

- Any agreement with a competitor to set prices, directly or indirectly, except for a legitimate buy-sell transaction, is automatically illegal.
- There is no defense to an agreement with a competitor to set prices. This is a *per se* antitrust violation. Even if prices are reasonable, stabilized, or decreased, and thus the consumer arguably benefits the agreement is still illegal.
- Agreements to set prices can be based on express agreements in words – written or oral – or implied from actions, such as a nod or handshake.
- While a business can track the prices of a competitor by legal means a business must set its own prices independently.
- Never discuss pricing policies with a competitor (aside from a legitimate buy-sell transaction) and if a discussion as to fixing prices arises terminate the discussion immediately, object to it if in a meeting (and get the objection on the record), and contact the company's compliance officer and legal counsel immediately.

Second, regarding territorial divisions and customer allocations, the policy and compliance manual must clearly state the following:

- It is an illegal *per se* antitrust violation for competitors to agree to divide up or allocate territories in which they will sell. The fact that such an agreement might allow the companies to compete better against other competitors in the territory is no defense.
- Never agree with a competitor to sell or not to sell in any area. This is a *per se* antitrust violation.
- Never agree with a competitor to sell or not to sell to any customers or class of customers. This is a *per se* antitrust violation.
- Never agree to divide or share a customer's or potential customer's business with a competitor. This is a *per se* antitrust violation.
- An agreement between or among competitors not to sell or buy from certain persons or business is illegal. This is known as a "group boycott" or "refusal to deal" and is a *per se* antitrust violation.
- Any decision as to who to buy from or sell to, or who not to buy from or sell to, must be arrived at independently.

Third, regarding pricing policies, the policy and compliance manual must clearly state the following:

- A company is allowed to bargain for and to receive the lowest lawful prices it can obtain for goods and services.
- An agreement between a retailer and a supplier or a manufacturer to set a price, either a minimum or a maximum price, at which a product is to be sold, may be illegal under the Sherman Act.
- The Clayton and Robinson-Patman Acts may prohibit the sale of the same or similar product to competing customers at different prices.

- The law may permit discrimination in price based on several factors: cost savings to the seller, such as volume discounts for purchases; added services; changes in the market for, or marketability of, a product, for example, meeting the prices of a competitor.
- Since dealings involving pricing are fraught with legal peril pricing determinations should be discussed with the company's legal and compliance departments.

Finally, regarding trade association meetings, the policy and compliance manual must clearly state the following:

- Employees must be particularly careful of words, communications, and/or conduct at trade association meetings with competitors that could be construed as legally problematic pursuant to antitrust laws.
- As such, company employees should not participate in, or even remain present at, any meeting where there is a discussion between or among competitors about prices, factors influencing prices, division of territories, allocation of customers, and/or refusals to deal with customers or suppliers/distributors.
- If any of the aforementioned discussions should occur the employees are advised to object to the discussion, attempt to stop it, register the objection on the record, leave the meeting, and then immediately contact the company's compliance officer and/or legal department.

The goal of the preceding recommendations is for the employees to observe both the "letter and the spirit" of antitrust law and for the company to attain a reputation as a legal and ethical organization.

## Conclusion

This article was a primer on anti-trust law designed to educate business managers as to certain fundamental legal principles and to make them keenly aware of some of the legal traps inherent in anti-trust law. The article covered two seminal anti-trust statutes – the Sherman Act and the Clayton Act. In the Sherman Act the authors focused on four problem areas: distinguishing agreements to restrain trade from the Doctrine of Conscious parallelism; differentiating horizontal v. vertical restraints (and thereby reasonable v. unreasonable restraints of trade); and differentiating between possessing a monopoly. Under the Clayton Act, the authors focused on distinguishing between price discrimination v. market-based price justifications.

As indicated and emphasized in this article, the area of anti-trust law is a large and complex one full of legal traps for the unwary. Anti-trust law also draws certain lines (and at times not too precisely) between permissible and prohibited conduct. Accordingly, a major purpose of this article was to make managers fully cognizant of the legal pitfalls in anti-trust law and thus to help managers and their businesses stay on the "legal side" of the law. Aggressive, "tough," and "hard-hitting" competition is allowed under anti-trust law. Unreasonably, restraining trade and monopolizing commerce are not. These are "distinctions with a difference," to use the old maxim, and, therefore, business managers must be fully cognizant of and educated on these critical legal principles and distinctions. In order to avoid antitrust lawsuits the authors recommended that a company adopt an antitrust policy and legal compliance program. Accordingly, recommendations were provided as to general elements as well as specific standards for such a program. The authors trust that this anti-trust "primer" has helped to achieve important educational as well as practical objectives and thus will aid a company to attain a reputation as a legal and ethical one.

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