

## Chapter 2

# Antitrust and Restraint of Trade

## Introduction

This brief critique gives the reader the meanings and interpretations that are provided by the courts of the sparse words in this Act. The material is offered under these headings:

1. Essential Nature of Section 1
2. Constitutionality and Construction
3. **Sherman-Section 1 and other Laws**
  - a. **Federal Laws – Treated Individually**
    - i. Section 1 and Section 2 of the Sherman Act Distinguished
    - ii. Clayton Act
    - iii. Robinson-Patman Act
    - iv. FTC Act
    - v. McCarran-Ferguson Act
  - b. Federal Laws – Treated *En Masse*.
  - c. State Antitrust Laws
4. **Contracts, Combinations and Conspiracies**
  - a. Meanings
  - b. Parties
  - c. Activities.

## Essential Nature of Sherman Section 1

1. Is to be comprehensive in scope.
2. Is to deal with all manner of conspiracies and combinations.
3. Activities include monopolization and trade restraint.
4. Activity may be only an *attempt* (i.e., an unrealized plan) at such monopolization.
5. Actual or threatened harm to an individual or to the general public is illegal.
6. Act is to be preemptive in its enforcement and proscription.
7. Contemplated evils are the targets of the Act.
8. Infractions must be undue, unreasonable or significant.
9. Monopolistic efforts are deemed to be subversive and corrosive.
10. Competition and antimonopolistic practices are deemed to be in the public interest.
11. Public inquiry from anticompetitive activities, even if only a threat, must be stopped.

12. Unethical or immoral acts that are not anticompetitive or monopolistic are not the topic of the Act; the Act is not a panacea for evils.
13. All persons who are affected by, or contribute to, the miscreant activity are subject to the Act.
14. The Act is no *cookie-cutter* solution; each activity is judged by its own facts and circumstances.
15. Trusts or combinations may be either good or bad; they are forbidden either way.
16. Activity must affect commerce directly or immediately; or threaten same.
17. Activity must be interstate in nature.
18. An activity that is monopolistic or in restraint of trade is an unfair or deceptive act or practice; an unfair or deceptive act or practice, however, may or may not be an antitrust infraction.
19. Commerce, as intended by the Constitution, and the memorializing of competition as a virtue. are the same.
20. The Act is not to interfere with the intelligent conduct of business.
21. The Act is to protect, not destroy, property rights.
22. Section 1 infractions must be unilateral in nature.
23. Size, power and expansion are not bad so long as they are used legitimately.
24. Contracts, conspiracies or combinations may be merely *agreements* without any contractual or financial structure.
25. An activity may be an infraction if only threatening in nature. That is, role of FTC *preemptive strikes* exists.
26. Competition is the best method of regulating commerce.
27. Both private and public remedies are available under the Act.
28. Act applies to both professions and businesses with equal vigor but in different ways.
29. The degree or extent or volume of competition must not be controlled or diminished.
30. Act targets any trust or combination which suppresses or controls competition in the marketing of products or services.
31. Whether an activity is an infraction rests on the market dominance of the entity.

## Constitutionality and Construction

### Constitutionality

The Sherman Act is constitutional even though (a) the vague language amounts to the Act delegating some of its powers to the judiciary and (b) the Act directly affects legally-drawn private contracts. Regulating the business of publishing is not in conflict with the First Amendment, e.g.

### Construction

The Act should be construed so as to effectuate its legislative purpose. The words in the Act were taken nearly verbatim from *common law* thereby reducing the likelihood of a *Babel of Tongues*. The Act reflects the Commerce Clause; it is not emboldened beyond such clause. To properly interpret the Act, one must visit the turn of the century economic, social and political environment. Congress in effect, directed the judiciary to make its rulings relevant to time and circumstances. The Act does not upset existing contract common law. The *learned* profession safe harbor argument is *dubious*, at best, and has been eroded over the decades.

## Sherman-Section 1 and Other Laws

In this Section, the relationship with Section 1 of the Sherman Act and other laws are examined as follows:

### 1. Federal Laws Treated Individually

- Sherman Act (Section 1 and Section 2) Distinguished
- Clayton Act
- Robinson-Patman Act
- FTC Act
- McCarran-Ferguson Act.

### 2. Federal Laws Treated *En Masse*

There are the special purpose acts relating to aviation, banking, agriculture, unions, commodities, securities, communications, criminality energy, transportation, health care, intellectual property, power, shipping, foreign trade, e.g.

### 3. State Antitrust Laws

These may complement but not preempt federal law.

## Section 1 and Section 2 Distinguished

A clear distinction between Section 1 and Section 2 of the Sherman Act is needed.

- **Section 1 (Infraction is Structural) (Means-Related)**  
Every contract, combination, conspiracy, trust or otherwise, which restrains trade is illegal.
- **Section 2 (Infraction is Personal) (Result-Related)**  
Any person who monopolizes or restrains trade, or attempts thereof by combination or conspiracy, is guilty of a felony.

Section 1 and Section 2 infractions are legally distinct but they do overlap in that

- Section 2 is a monopoly.
- Is a special class of Section 1 trade restraint.

It must be noted that:

- Conspiracy in restraint of trade may not rise to the level of a monopoly.

- Conspiracy to monopolize may not be content with trade restraint short of monopoly.

It is a Section 2 infraction when (a) a person with monopoly power (b) commits an unreasonable restraint of trade in violation of Section 1.

A Section 1 infraction is easier to prove than a Section 2 infraction because:

- Section 1 infraction is based on (a) unreasonably non-competitive rates rather than out-and-out monopoly.
- Conduct may be presumed to be non-competitive under Section 1 in accordance with the *per se* doctrine.

An infraction of Section 1 must involve a contract, combination or conspiracy. It is not material whether a complaint is filed under Section 1 or Section 2 of the Sherman Act.

Consider a claim under Section 1 for monopolization. If (a) the activity is not *exclusionary* by Section 2, it is not *unreasonable* under Section 2.

The rules for Section 1 and Section 2 differ:

- **Section 1**  
*Broadly* prohibits all activities that reasonably restrain trade.
- **Section 2**  
*Narrowly* prohibits the exercise of monopoly power.

## Clayton Act

The Sherman and Clayton Acts are related, consistent and complementary. The Clayton Act is violated when competition is curtailed by tying arrangements where seller has market power to raise prices or levy on the seller burdensome terms. For there to be a Clayton infraction, competition must be significantly lessened. If an activity is legal under the Clayton Act, it is also legal under the Sherman Act; the reverse is not the case, however. A Sherman offense must be an actual restraint; a Clayton offense need only to substantially lesser competition or *tend* toward a monopoly. Interlocking directorates violate the Clayton Act if the *end game* is to set prices or territories

## Federal Laws Treated En Masse

Numerous industries and/or activities are federally-regulated by specific laws:

- Aviation – Federal Aviation Act  
Civil Aeronautics Act
- Banking – Bank Merger Act  
Bank Holding Company Act
- Discrimination – Civil Right Acts
- Communication – Communications Act
- Criminal – RICO

- Energy – Emergency Petroleum Allocation Act
- Mortgages – Home Owners Loan Act
- Health – National Health Planning and Resources Development Act
- Labor – Norris-LaGuardia Act
- Power – Federal Power Act
- Securities – Commodity Exchange Act  
- Securities Exchange Act
- Transportation – Interstate Commerce Act  
- Shipping Act of 1916
- Foreign Trade – Webb – Pomerence Act.

Each of these federal laws in some way *clash* with the antitrust laws; over the decades, the courts have reconciled these two families of federal law. Some of the discernable principles enunciated by the courts in this accommodation process are as follows:

- Most of the industry-specific federal laws afford such industry limited immunity from the antitrust laws.
- None of these federal laws permit the underlying and pervasive principles of the antitrust laws to be thwarted.
- Some of these laws offer significant safe harbors for some activities; e.g., labor related activities are immune from antitrust laws (so long as commerce is not directly affected).
- The overall goal of the court decisions has been to accommodate these two families of laws so that the antitrust principles are not compromised, except reasonably so, to the industry-specific facts and circumstances.

## State Antitrust Laws

The rules set forth by the courts as to how the Sherman Act relates to state laws are summarized as follows:

- Local commerce issues which violate state antitrust laws may be prosecuted in state courts.
- Local rent control ordinances are not infractions of antitrust laws if they are not conspiratorial and are uniformly applied.
- State antitrust laws are presumed to be constitutional unless clearly unreasonable.
- Where the state antitrust language is the same, or similar, to the federal, the federal case law should be applied.
- Some state antitrust are flawed in that they emphasize the *ethical* and deemphasize the *economic*.
- State laws which only peripherally effect antitrust issues are not preempt; this is the case even if the effect is to *slightly* reduce competition.

## Contracts Combination and Conspiracies

## Meanings

These undefined words in the Sherman Act are to be given this common law meaning. The word *every* is applied *only* to those contracts, combinations and conspiracies which actually restrain trade or tend toward monopolization; other arrangements which do not do so are not an antitrust infraction, however egregious.

## Contract

Any agreement implied or express, will constitute a contract. Formal, traditional or *textbook* requirements need not be met; e.g., formal agreement consideration is not a requirement. Two contractual arrangements do not meet the definition:

- Unenforced Contract
- Negotiations toward a contract.

## Combination

Any combination in whichever form (trust, general understanding, e.g.) which stifles competition or tends toward monopolization is illegal. There must be a pattern or practice and not merely an isolated act of services used by combinations to accomplish their illegal purpose include:

- Price-fixing
- Boycotts
- Market-dividing
- Tying agreements.

## Conspiracy

A conspiracy is defined as follows:

1. A joint undertaking
2. Extending over a period of time
3. Commodity of purpose and design and goal
4. Resulting from a contract or combination
5. Express or implied
6. **To accomplish either of the following:**
  - An illegal result
  - A legal result by illegal means.

Conspiracy is suggestive of but not dispositive to of an antitrust infraction. A conspiracy must be viewed in its totality and not as separate parts.

## Persons

Persons include all manner of individuals, trusts, corporations, etc., excepting only churches under the separation clause. Most importantly, persons include governmental entities (at least municipalities).

## **Parties**

Determining the parties thereto is a fact and circumstances matter. Such party need not be a business entity or business party.

Human labor is neither a commodity nor an article of commerce. A single party cannot make a combination; a single or unitized corporation cannot make a combination.

A corporate officer can be found guilty of an antitrust infraction if such officer was knowingly involved or was significant to the miscreant activity. The multiple party rule is not met by having them under contract or non-independent. A principal and agent are deemed to be the same for purpose of conspiracy.

For other parties to be involved in a conspiracy it is necessary to show independence, conflicted interests and desire for a competitive advantage. For there to be a conspiracy, there must be co-conspirators. Controlled corporations can conspire if (a) ownership is weak, (b) close sharing of staff, facilities, etc., (c) historical patterns of cooperation and (d) historical patterns of competition.

Where there is no effect on competition, mergers are generally treated as an acceptable activity.

Two non-competing firms may conspire to restrain the trade of a third party and are thereby guilty of an antitrust infraction. The facts and circumstances must be carefully examined to determine the ability to conspire of such parties. Controlled corporations will be guilty in conspiracy if they are, in effect, competitors. Absent, hoped-for financial gain is needed for there to be a conspiracy.

## **Conspiracy Issues – Medical Providers**

### **Who May Be Conspirators?**

The general rules are as follows:

Controlled corporations, acting individually, are able to conspire even though they are unified for most purposes.

Usually a corporation and its employees cannot conspire but an important exception is where (a) the employees have a personal financial interest in the outcome or (b) act outside the scope of their authority.

## Practitioner Antitrust Immunity

Where physicians are concerned, it is most important to remember that:

- As practitioners they are immune from antitrust laws.
- As business people, they are not so immune.

Also, medical practices are deemed to be trade or commerce for antitrust purposes.

## Interstate Issue

For there to be a conspiracy, there must be interstate commerce. For health care providers such is interstate in nature if these rules are met:

- Trade was restrained.
- Equipment of providers was purchased interstate.
- Fees were paid by Medicare or third party payers.
- Patients came from other states.
- Provider had offices in other states.
- Volume of out-of-state purchases (Rx, e.g.) was significance.

## Acceptable Tying Agreements

Hospitals can make economical side-deals to cut costs without such being antitrust infractions. There must be certain conditions met, however:

- Not an unreasonable restraint of trade by rule of reason; market power evidence.
- No financial conflicted interest

## What is an Antitrust Infraction?

Where a provider is *offended* by the actions of others so as to deny it any economic advantages (e.g., hospital expansions, hospital staff privileges, access to referrals) there may be infraction.

Issues which may support or deny the allegation having any standing as an antitrust infraction are as follows:

- Is the logic of the physician's claim supportable by economic evidence?
- Are issues of price-fixing involved?
- Is there solid evidence that trade was restrained?
- Is the activity of recent or old-standing and *vintage*?
- Did the decision-makers behind the decisions have a personal financial stake in the outcome?



- Was the provider demonstrably harmed in terms of profitability or market share:
- Were the basic reasons for the actions against the providers cost containment, regulatory or routine in nature?
- What is the size and scope of the activity alleged to be antitrust?
- Is there any intent to monopolize?
- Is the issue commercial-trade in nature or are other issues (crime, labor, social, e.g.) involved?

## **Manner of Conspiring**

There is no conspiracy where the parties did not act so as to further such; or where there was no agreement among the parties to conspire, either express or implied. However, a conspiracy may exist even if not formalized so long as the parties knew that such activity would have the effect of being a conspiracy.

## **Implied Conspiracy Agreements**

An express agreement does not have to be shown in order for there to be a conspiracy. All that is needed are the following:

- Common design or uniform participation.
- Meeting of the minds or common knowledge.
- Acting in concert..
- General business behavior.
- Words and actions may count more than contractual terms.

Once a conspiracy is established, it yet must be shown to have restrained trade.

## **Conspiracy and Circumstantial Evidence**

Instances of conspiracy by circumstance include the following:

- Fierce competitive bidding suddenly evaporates at the same time industry meeting occur.
- Causal relationship is shown.
- Mere protocol, recommendation, rules, etc. fairly administered fail to show conspiracy.
- Association – related price discussions are suspect.
- Proof of conspiracy typically rests on showing an overall strategy, absent any formal structure.