
# Antitrust Law Overview

Antitrust
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# What is antitrust?

## Antitrust – the substance

What is it?

- You could say: As the U.S. Constitution is to our government, federal antitrust law is to our economy.
- And you could say: As the Constitution is meant to provide us with a free democratic society where the best ideas about politics prevail, our antitrust laws are meant to provide us with a free market economy where the best products and services prevail.
- (But some would say it's just another way in which the government steps into the economy and messes it up.)

## Antitrust – the name

What's up with the name "antitrust" for this law?

- In most of the world, this subject is called "competition law."
- The most accurate name would probably be "anti-anti-competition law."
  - We'll spend a lot of time talking about whether something is "anti-competitive," and, if so, whether there's anything "pro-competitive" that outweighs it.
- Back in the day, a "trust" was a competition-squelching entity. Thus the name "antitrust" for this area of law.
  - But the word "trust" doesn't really come up in modern antitrust law.

# Why so much economics?

## Why so much economics?

- We will spend a lot of time studying and talking about economics. But why?
- Most of American antitrust law is § 1 and § 2 of the Sherman Act. Will spend most of our time on these.

# Sherman Act § 1

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

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You see what I mean about this being like Con Law? Almost all § 1 law is cases interpreting these three words.

## Sherman Act § 2

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

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Again: You see the Con Law thing - right? Almost all § 2 law is cases interpreting this one word.

## Why so much economics?

- We will spend a lot of time studying and talking about economics. But why?
- Most of American antitrust law is § 1 and § 2 of the Sherman Act. Will spend most of our time on these.
- § 1 prohibits unreasonable restraints of trade
  - Very important: Only "unreasonable" restraints are prohibited.
  - So what counts as "unreasonable"?
  - Something is unreasonable if the anticompetitive effects outweigh the procompetitive virtues.
  - Doing this analysis – identifying and weighing anticompetitive effects and procompetitive virtues – requires applying economics.
- § 2 prohibits firms with monopoly power from engaging in anticompetitive conduct
  - Determining monopoly power requires applying economic analysis
  - Determining anticompetitive conduct requires applying economic analysis

# Some key concepts …

## Competition vs. Cooperation

- People tend to think of businesses as rivals, always out to get one another ...
- but their natural affinity is to cooperate.
- Competition among businesses selling products and services doesn't help those businesses!
- It helps consumers who are buying!

## Horizontal vs. Vertical

**Horizontal**

- relationships (e.g., FedEx and UPS)
- agreements (e.g.,oil companies sharing a pipeline)
- mergers (e.g., Bass Pro and Cabela's)

**Vertical**

- relationships (e.g. Ford and Firestone)
- agreements (e.g., Amazon and UPS)
- mergers (e.g., CVS and Aetna)

## Rule of Reason vs. Per Se

- There are different approaches to analyzing whether a challenged restraint is "unreasonable."
- Per se rule
  - It's just illegal - no debating about it
  - Example: Horizontal price fixing
- Rule of reason
  - Case-by-case determination - the court will listen to alleged pro-competitive justifications
  - Example: Industry-wide safety standards
- By default, everything is looked at under the rule of reason. It's got to qualify under a particular category to get per-se treatment.
- There's also what courts call "quick look" analysis, which is a truncated rule-of-reason analysis for things that aren't per-se prohibited but that are obviously anticompetitive.

# History and Philosophy

## Historical context

Late 19th Century (late 1800s)

- America industrializes
- Massive trusts control economic inputs and outputs
- Era of trusts and robber barons

Sherman Antitrust Act passed in 1890

1920s to today

- Trend of lessening suspicion of business tactics and combinations and increasing reliance on economic theory and academic research

## Historical context

1990s to today

- Over last 20-30 years, there's been increasing acceptance in courts of Chicago School of economic thinking, which is distrustful of antitrust law, believing the market will provide for the most efficient solutions, with law only hindering competition

Recent

- Increasing current of voices to embrace a more commodious view of antitrust law, one more welcoming of enforcement and more skeptical of business tactics and combinations; increasing calls for antitrust to be a check on business such that it is also a check on political power

## What are antitrust law's goals?

Here are some possible goals:

- Competition, the free market
- Economic efficiency
- Checking the concentration of power
- Ensuring opportunity for market entrants

## What are antitrust law's goals?

- Competition, the free market
  - Both proponents and opponents of strong antitrust law claim to be in favor of unfettered competition

## What are antitrust law's goals?

- Economic efficiency
  - This is the most straightforward reason we desire competition, a free market. It creates economic efficiency, which necessarily increases societal wealth. This is widely accepted and is the theory engine that powers the legal doctrine.
  - The "Chicago School" view, shared among many, is that the purpose of antitrust law is to create economic efficiency.
  - The Chicago School also incorporates a distrustfulness of antitrust law, implying it's largely unnecessary and that the market can handle things on its own.

## What are antitrust law's goals?

- Checking the concentration of power
  - Prevent the concentration of wealth and economic power in too few hands.
  - When wealth and economic power is concentrated, it concentrates political power and undermines democracy.
  - This is called the "Populist View" or sometimes, derisively, "Hipster Antitrust."
  - This is controversial, disfavored by the Chicago School, but increasingly popular.

## What are antitrust law's goals?

- Ensuring opportunity for market entrants
  - A possible goal, but incompatible with Chicago-School-style thinking

**Here's an orientation to some of the people, places, and things you tend to find in antitrust cases ...**

## The courts ...

- Federal courts have exclusive jurisdiction over federal antitrust claims.
- The interpretation of the Sherman Act is done in an essentially common-law way by the U.S. Supreme Court.
- States have their own similar antitrust law.
- We'll concentrate on federal law, so the cases you read will almost all be in federal court.

## Remedies and consequences

- **Criminal**
- **Damages**
- **Injunctions**
- **Consent decrees**
  - A consent decree is a settlement that's agreed to by the parties and then entered as a order by the court.

## Criminal Enforcement

- Fines of up to $100 million for corporations, up to $1 million for individuals. (15 U.S.C. § 1&2)
  - Alternatively, if larger, twice wrongful gain or victims loss. (18 U.S.C. § 3571(d))
- Imprisonment up to 10 years. (15 U.S.C. § 1&2)
- Nearly all criminal prosecutions are for per-se illegal horizontal restraints like price fixing.
  - But there is no technical hurdle to prosecuting rule-of-reason violations, and this has happened!
- Criminal intent must be proved.
- Federal criminal enforcement is by the DOJ (litigating as "The United States of America" a/k/a "U.S.")

## Civil Enforcers

- Private plaintiffs, as individuals
- Private plaintiffs, as class actions
- Federal government
  - DOJ can enforce Sherman Act, and FTC can't.
  - FTC can enforce FTC Act.
  - But anything actionable under the Sherman Act is actionable as unfair competition under FTC Act § 5.
  - So FTC and DOJ work cooperatively to split workload.
  - Some agencies have special industry-specific jurisdictions (FCC, Federal Reserve Board, DOT, and Surface Transportation Board).
- State governments as parens patriae

## Civil Enforcers

For a lot of reasons, private plaintiffs don't have it that great in antitrust litigation. Damages are hard to get, and antitrust litigation can be super expensive. It can also take so long that an injunction may be pointless by the time you get it. There's also standing-type problems private plaintiffs face.

So you'll see a lot of government-brought suits. (FTC, states, U.S. (i.e., DOJ)). They've got a budget for litigation; they don't have to worry about recovering any damages; they have an easier time with standing-type issues; and they can be very patient.

Act is
§ 5.
and

## Damages

- Treble damages
  - Many believe this compensates for difficulty of proof and for lack of pre-suit interest so as to roughly properly calibrate deterrence.
- To get damages, must show:
  - actual causation ("material but-for cause" of P's injury)
  - P's injury flowed from anticompetitive effects
  - proximate causation
  - an amount of damages