
United States Commercial Law Seminar

Masaryk University

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***Lecture Five: Federal 'Business Torts: Antitrust and RICO
(Racketeer Influenced and Corrupt Organizations Act)***

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ANTITRUST STATUTES

- Sherman Act, Section 1
 - Concerted Action
 - Unreasonable Restraints of Trade
- Sherman Act, Section 2
 - Unilateral Conduct
 - Monopolization and Related Offenses
- Clayton Act, Section 7
 - Mergers & Acquisitions
 - Joint Ventures

ANTITRUST STATUTES

- FTC Act, Section 5
 - Unfair Methods of Competition

- Robinson-Patman Act
 - Price Discrimination
 - Promotional Allowances
 - Brokerage

RESTRAINTS OF TRADE UNDER SECTION 1

- Contract, Combination or Conspiracy
 - Express agreement or inference
 - Key case re horizontal agreement
 - *Matsushita Electric Industrial Co. v. Zenith Radio*,
475 U.S. 574 (1986)
 - Key case re vertical agreement
 - *Monsanto Co. v. Spray-Rite Service Corp.*
465 U.S. 752 (1984)

VERTICAL NON-PRICE RESTRAINTS ON DISTRIBUTION

□ Exclusive distributorships

- Rule of reason – *U.S. v. Arnold, Schwinn & Co.*, 388 U.S. 36J (1967)
- Territorial and customer restrictions
- Rule of reason – *Continental T.V. Inc. v. GTE Sylvania*, 433 U.S. 36 (1977)

□ Factors

- Purpose of restraint
- Market share of supplier

VERTICAL NON-PRICE RESTRAINTS IN PURCHASING

- Tying Agreements
 - Agreement to sell product conditioned on purchase of a different product
 - Per se illegal
 - Separate products
 - Sufficient economic power in market for tying product – *Jefferson Parish Hosp. District v. Hyde*, 466 U.S. 2 (1984)

- Rule of reason may be applied if pro-competitive efficiencies –integration
 - *U.S. v. Microsoft Comp.*, 253 F.3d 34 (D.C. Cir. 2001) – software bundling

- Separate availability is a defense
 - Package discounts
 - Coercion

SHERMAN ACT SECTION 2 – MONOPOLIZATION AND ATTEMPTED MONOPOLIZATION

- ❑ Monopolization – willful acquisition of monopoly power
- ❑ Attempted monopolization- specific intent to monopolize and dangerous probability of success
- ❑ Predatory conduct – not better product or superior business acumen

MONOPOLY POWER

- Relevant product market
 - Reasonable interchangeability of use (demand substitutability)
 - Cross elasticity of demand - extent to which consumers will change in response to price increase – *Eastman Kodak v. Image Tutorial Services*, 504 U.S. 451 (1992)
 - Merger Guidelines – Effect of small non-transitory price increase – 5%

- Relevant geographic market
 - Area of effective competition
 - Price relationships, transportation costs, governmental licenses, tariffs

- Expert economic analysis

MONOPOLY POWER

- Monopolization – 70% = prima facie evidence

- Attempted monopolization: 40 – 50% +

- Other evidence of market power
 - Entry barriers
 - Natural advantages
 - IP rights
 - Brand name recognition
 - Size and strength of competitors
 - Potential competition

PREDATORY CONDUCT

- Predatory pricing
- Refusals to deal
- Monopoly leveraging
- Sham litigation
- New product introduction

PREDATORY PRICING

- ❑ Below “appropriate measure of cost” – average variable or marginal
- ❑ Defendant must have dangerous probability of recouping losses. *Brooke Group Ltd. v. Brain & Williamson*, 509 U.S. 209 (1993)
- ❑ Not predatory if meeting competition
- ❑ Package pricing – not predatory if price of package exceeds combined cost of constituent products – *Ortho Diagnostics v. Abbott Laboratories*, 920 F. Supp. 455 (1996)

Eastman Kodak case

- Initial market: sale of photocopiers
- Aftermarket:
 - Sale of replacement parts (e.g., toners)
 - Copier service
- Case brought by Independent Service Organizations (“ISO’s”) challenging exclusion from the aftermarket

Kodak Case: Alleged Predatory Conduct

- ❑ In 1985 and 1986, Kodak implemented a policy of selling replacement parts for micrographic and copying machines only to buyers of Kodak equipment who use Kodak service or repair their own machines.
- ❑ As part of the same policy, Kodak sought to limit ISO access to other sources of Kodak parts
 - Kodak and the OEM's agreed that the OEM's would not sell parts that fit Kodak equipment to anyone other than Kodak.
 - Kodak also pressured Kodak equipment owners and independent parts distributors not to sell Kodak parts to ISO's.
 - In addition, Kodak took steps to restrict the availability of used machines.

Kodak Case: Key Findings

- Consumers didn't realize when they purchased Kodak copiers that they were going to be locked in
 - and would pay supracompetitive prices)
 - Market was too complex for most purchasers to do life cycle cost analysis
- Application to Nespresso machines?
 - Everyone knows that you buy the machine, the coffee capsules are expensive –
 - And that you have to buy from them?

RICO Statute

- Racketeer Influenced and Corrupt Organizations Act
- Enacted in 1970
- Named for “Little Caesar”?
- Designed to combat organized crime
- Both civil and criminal provisions

Elements of a RICO Claim

1. The existence of an **enterprise** affecting interstate commerce;
2. That the Defendants participated, directly or indirectly, in **conducting the affairs** of the enterprise;
3. That the Defendants participated through a **pattern**
4. of **racketeering activity**

“Racketeering Activity”

- State felonies punishable by imprisonment of more than a year
 - murder
 - kidnapping
 - extortion
- More than thirty federal crimes
 - drug offenses
 - obstruction of justice
 - mail fraud
 - wire fraud
 - bribery
 - securities fraud

Newcal v. IKON and GE

- Five plaintiffs (Newcal et al.) – small copier lessors
- Two defendants:
 - IKON (leases copiers)
 - GE (finances leases)
- In 2004, GE acquired portfolio of IKON leases – \$985 million
- Challenged practice: “flexing” of leases
- Alleged markets:
 - Initial market = initial lease
 - Aftermarket = replacement copiers and service
 - Submarket = “flexed” IKON customers
- Alleged damages: \$350 million (treble damages)

**Case involves both “aftermarket”
and “submarket”**

Newcal: Procedural History

- June 2004: lawsuit filed
 - Antitrust claims (Sherman Act 1, 2)
 - RICO claims
- 2005: dismissed by federal District Court
- April 2007: Oral argument in 9th Circuit
- January 2008: 9th Circuit reverses
- June 2008: Petition for review to U.S. Supreme Court denied
- December 2010: new judge assigned in District Court

Newcal: Key Issues

- Is there really an “aftermarket” for replacement copiers and service?
 - How is that different from the alleged initial market?
 - Other than start-up companies
- Is there really a “submarket” consisting only of IKON customers?
 - Contrast women’s shoes (or children’s shoes)
 - Turns on supposed fraud/deception
 - Did customers know they were extending leases?

Oh No, Another Lawsuit!

- JBC manufactures forks for mountain bikes
- JBC forks sell for \$400 to \$650 each
- There is lots of competition for initial fork sales
- JBC forks have proprietary elastomers which you can only buy from JBC
 - We sell them to authorized repair shops
 - Price is \$30; our cost is only \$10
 - ISO's have tried, and failed, to duplicate the elastomers
- We don't want replacement elastomers used
 - Degrades performance
 - Can cause leaks, other problems

BBC v. JBC Lawsuit

- Antitrust lawsuit is filed against JBC by 5 independent bike shops (ISO's)
 - Lead plaintiff is Becca's Bike Co. (BBC)
 - Alleges JBC is monopolizing the aftermarket for service and supplies for JBC forks
- Claimed damages: \$10MM (\$30 MM trebled)
 - Our estimate of damages: \$5MM (\$15MM trebled)
- Anticipated defense cost: \$4-5 million
 - Attorney's fees
 - Expert fees
- Probability of JBC win: 60% or greater
 - Case valuation: $\$15\text{MM} \times .40 = \6MM
- At least 12 other, smaller ISO's are potential plaintiffs

ISO's v. JBC: Settlement Demand

- Stipulate to injunction mandating that JBC sell elastomers to 5 plaintiff ISO's
 - Five year term
 - Price to be no more than amount charged to authorized dealers
- Pay ISO's damages of \$12 million
- Publish new policy on website that elastomers will be sold to all qualified ISO's
 - Arbitrate any dispute over whether particular ISO is qualified
- Pay attorney's fees in amount to be negotiated