Locke Lord LLP

2015 ANTITRUST LAW UPDATE

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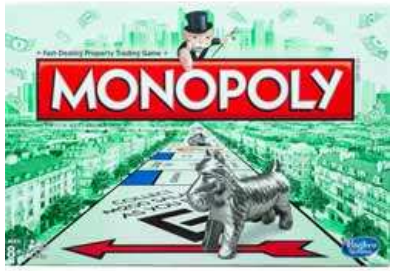
Basic Concepts

What do Antitrust laws prohibit?

Antitrust laws prohibit two basic kinds of conduct:

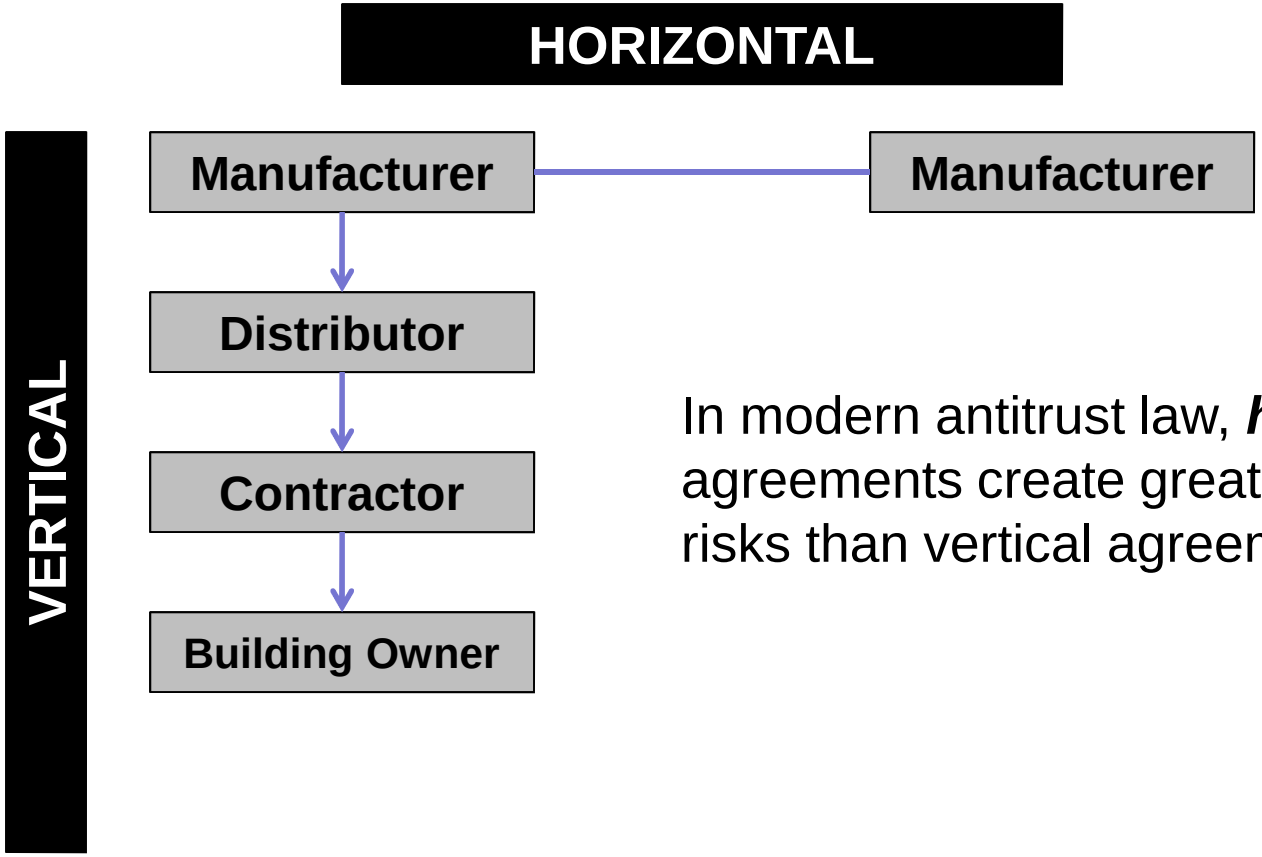
- ***Agreements*** that unreasonably restrain competition (Section 1 violations) AND
- Abuse of large market share by a ***single firm*** (Section 2 violations)



Illegal Agreements

Antitrust laws are primarily concerned with ***horizontal*** agreements among competitors that reduce competition

Horizontal vs. Vertical Relationships



In modern antitrust law, ***horizontal*** agreements create greater antitrust risks than vertical agreements.

Agreement OR No Agreement

- In many Section 1 cases, the critical fact issue is whether the defendants entered into an agreement
- Agreements do not need to be in writing to be illegal
- Agreements can be inferred from facts and circumstances in the case

The "*Chocolate*" Case

801 F.3d 383 (3rd Cir. 2015)

- This was a price-fixing case against Hershey Company, Mars, and Nestlé USA
- Plaintiffs alleged that Defendants conspired to raise list prices on chocolate candy products in the U.S. on three occasions between 2002 and 2007

The "*Chocolate*" Case
(Continued)

- The three price increases demonstrated a leader-follower pattern: one manufacturer announced a list price increase, and within days its competitors matched the increase
- After months of discovery, Plaintiffs could not identify any "direct" evidence proving that Defendants had an agreement to increase prices

The "*Chocolate*" Case
(Continued)

- The district court granted the Defendants' motion for summary judgment on the grounds that Plaintiffs could not produce sufficient evidence that would allow a jury to infer the existence of a conspiracy
- The Third Circuit affirmed the district court's decision in an opinion that is now widely cited by defendants in similar cases

The "*Chocolate*" Case
Takeaways

- A plaintiff relying on ambiguous evidence alone cannot raise a reasonable inference of a conspiracy sufficient to survive summary judgment
- Courts must be cautious in evaluating circumstantial evidence in a parallel pricing case against "oligopolists" because of the economic theory of interdependence

The "*Chocolate*" Case
Takeaways

- Gathering competitive price information can be just as consistent with lawful inter-dependence as with an illegal conspiracy where there is no evidence the price information came directly from a competitor
- Evidence that company executives were in the same place at the same time is insufficient to support a reasonable inference of a conspiracy

"Per Se" vs. "Rule of Reason"

- The *Per Se* standard automatically presumes competitive harm and does not require an analysis of the competitive effects on a market
- The "Rule of Reason" test requires a detailed analysis of the market and considers whether the anti-competitive effects of a defendant's conduct outweigh any pro-competitive benefits

Per Se Offenses (these can send you to jail)

Conduct that is *per se* illegal:

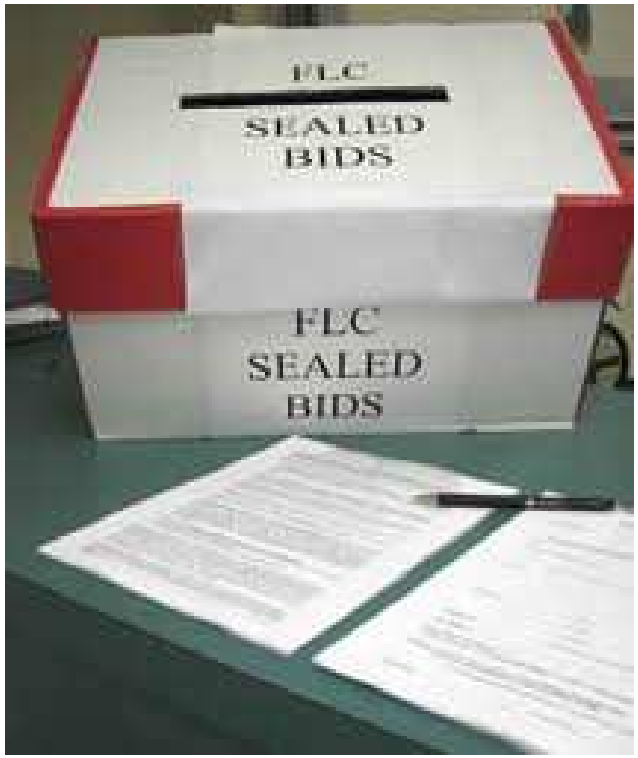
- Price Fixing
- Bid Rigging
- Market Allocation

Price-Fixing Agreements

- ✓ 2+ competitors agree on prices (or terms of sale) to customers
- ✓ Can also relate to factors that affect prices, like restricting capacity or output

Bid Rigging

- ✓ 2+ Competitors Agree on Who Will Win a Bid
- ✓ It also is a violation to agree not to submit a bid or to submit a knowingly high bid



Market/Customer Allocation Agreements

2+ competitors agree on how to divide their business activities:

- By customers or customer segments
- By geographic areas
- By products or services

Group Boycotts

- An agreement between competitors not to do business with targeted companies or individuals
- Group boycotts are in a gray area as to whether they are *Per Se* violations
- Some courts have refused to apply the *Per Se* standard if the conduct doesn't fit a "classic" boycott pattern

MM Steel v. JSW Steel

No. 14-20267 (5th Cir., Nov. 25, 2015)

- This was a group boycott case that was tried to a federal jury in Houston
- Plaintiff (MM Steel) was a new steel distributor that alleged its supply of steel was thwarted by a group boycott that involved both a horizontal agreement among MM's competitors and vertical agreements with steel manufacturers

MM Steel v. JSW Steel
(Continued)

- American Alloy (AA) and Chapel Steel were steel distributors in competition with MM
- JSW Steel and Nucor were steel manufacturers that supplied steel to distributors, including AA and Chapel

MM Steel v. JSW Steel
(Continued)

- At trial, the jury found that (a) AA and Chapel agreed to pressure JSW and Nucor to refrain from selling steel to MM, and (b) both manufacturers knowingly joined the distributor-led conspiracy
- The jury awarded damages of $52 million, which were trebled to $156 million, and the Defendants appealed

MM Steel v. JSW Steel
(Continued)

On appeal, JSW and Nucor argued that:

(a) there was insufficient evidence to support the jury's verdict that JSW and Nucor joined the distributors' conspiracy, and

(b) the alleged group boycott should have been analyzed under the Rule of Reason, not the *Per Se* standard

MM Steel v. JSW Steel
(Continued)

- The Fifth Circuit found sufficient evidence to support the jury's finding that JSW joined the conspiracy, but insufficient evidence as to Nucor
- The Fifth Circuit also found that the alleged boycott was the sort of "classic" boycott that routinely has been judged under the *Per Se* standard because it involved joint efforts by firms to cut off a competitor's supplies

MM Steel v. JSW Steel
(Continued)

Distinctions between JSW and Nucor:

- JSW initially entered a contract to sell steel to MM, but breached the contract after AA and Chapel threatened not to buy from JSW if it sold steel to MM
- Nucor declined to sell steel to MM both before and after AA and Chapel made threats to Nucor; thus, unlike JSW, Nucor was not reversing course after the threats

MM Steel v. JSW Steel
Takeaways

- Vertical agreements, such as the one found by the jury between the distributors and JSW, can form the basis for a *Per Se* group boycott
- Prohibited antitrust agreements can be established by circumstantial evidence and inferences
- Businesses face antitrust risks for knowingly joining an agreement orchestrated by others

State-Action Immunity

Premised on the idea that Congress – in passing the Sherman Act – did not intend to prohibit all state economic regulation that displaces competition

State-Action Immunity
(Continued)

Under *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 105 (1980), entities can be protected by state-action immunity, but only if their conduct is:

1. taken pursuant to "clearly articulated and affirmatively expressed … state policy" and
2. "actively supervised by the State itself."

North Carolina State Board of Dental Examiners
135 S.Ct. 1101 (2015)

- The North Carolina State Board of Dental Examiners (the Board) is a state-created agency tasked with licensing dentists and bringing actions against people suspected of practicing dentistry without a license
- Six of its eight members were required to be practicing dentists and were elected by other dentists

North Carolina State Board of Dental Examiners (Continued)

- The Board sent cease-and-desist letters to non-dentists who were providing teeth-whitening procedures without a license
- The campaign was effective and non-dentists left the teeth-whitening market
- The FTC brought an administrative action against the Board alleging that it engaged in unfair methods of competition

North Carolina State Board of Dental Examiners (Continued)

- The Board moved to dismiss the action, claiming it was protected by state-action antitrust immunity
- The motion was denied and the FTC issued an order finding that the Board was engaged unfair methods of competition
- The FTC's order was appealed, and the Fourth Circuit affirmed on the basis that the Board was a "private actor"

North Carolina State Board of Dental Examiners (Continued)

- The case went to the Supreme Court and it affirmed the Fourth Circuit's decision
- The Court declined to apply the state-action immunity to the Board's cease-and-desist letter campaign
- The Court also held that the Board must be treated like a private actor and was subject to *Midcal's* "active supervision" requirement

North Carolina State Board of Dental Examiners Takeaways

States now must rethink how they delegate their police powers over many occupations that are largely self-regulated. The may:

- change the makeup of boards so active market participants don't control them
- provide more active supervision over the boards' conduct
- take no further action, thereby subjecting some boards' conduct to antitrust law

Thanks!

Any questions?