Antitrust Regulation

• And Creditors Remedies
Historical Perspective

- Late 1800s: Rockefeller creates the Standard Oil Trust, controlling the US oil market
- Railroads also began to form trusts to close the market
- Political, cultural, and philosophical issues at turn of the century led to the Sherman Act of 1890 to regulate competition
Historical Perspective

- 1911: Supreme Ct. ordered the breakup of Standard Oil (now Amoco, Chevron, Mobil, Exxon; now merged)
  - Key issue: has a competitor been harmed
- 1960s: the Chicago School of economists argued that issue was whether competition was harmed
- Post-Chicago School suggests that competition not enough to protect consumers
The Basic Laws

• **Sherman Act** prohibits all agreements “in restraint of trade” and “monopolization”

• **Clayton Act** prohibits anticompetitive mergers, tying arrangements, and exclusive dealing agreements

• **Robinson-Patman Act** prohibits price discrimination that reduces competition
The Violations

• 2 types: *per se* and *rule of reason*
  
  – *Per se violations* have no defense; subject to both civil and criminal penalties
  
  – *Rule of reason violations* are illegal only if they have an anticompetitive impact, thus some defenses exist; generally only civil penalties assessed
The Violations

- The Dept. of Justice (civil and criminal) and Federal Trade Commission (civil only) enforce antitrust laws; individuals also may file suit

Annual Shareholders’ Meeting of Wal-Mart
Potentially Illegal Strategies

- Strategies that may be illegal are either cooperative (companies work together for mutual advantage) or aggressive (plan to create advantage over competitors)

“Monopoly is a terrible thing, till you have it.”

Rupert Murdoch, 
_The New Yorker_ (1979)
Cooperative Strategies

• Horizontal agreements are among competitors
  – Efforts to divide the market (per se violation)
  – Price-fixing and bid-rigging (per se violation)
  – Refusals to Deal (rule of reason)

• Vertical agreements are among firms at different stages of production process
  – Reciprocal dealing agreements (rule of reason)
  – Price discrimination (Robinson-Patman Act; enforcement now virtually abandoned)
Cooperative Strategies

• Mergers and joint ventures combine competitors to strengthen advantage
  – Horizontal mergers involve firms in same market (e.g., Exxon-Mobil)
  – Vertical mergers involve firms at different stages of production (strategy for industry conglomerates)
  – JVs for single purpose are common and almost always permitted (e.g., Navistar & Caterpillar JV)
Cases

• **Toys “R” Us, Inc. v. FTC (2000):**
  – TRU felt competition from discount clubs
  – TRU asked major suppliers (Mattel, Hasbro, Fisher Price) to sell clubs only unique items or combo packs not sold to other customers, thus clubs wouldn’t have same items as TRU
  – Manufacturers reluctant, but agreed if all mfrs agreed
    • TRU acted as coordinator for manufacturer agreement
Cases

- **Toys “R” Us, Inc. v. FTC (2000):**
  - Result: share of market slipped for clubs and FTC ruled that TRU engaged in illegal boycott (refusal to deal)
  - Affirmed: TRU’s efforts anticompetitive and illegal
Cases

  - Waste Mgmt (WMI) acquired Texas Industrial Disposal (TIDI); both firms in refuse business
  - Acquisition resulted in almost 50% market share in Dallas, and generally such a large share is a *prima facie* illegality under prior case law
Cases

• **US v. Waste Management (1984):**
  – Issue: did WMI violate Clayton Act by acquisition?
  – Holding: *In this particular industry,* because of ease of entry into the market, the merger doesn’t violate the Clayton Act
Aggressive Strategies

- Monopolization
- Predatory pricing
- Tying arrangements
- Allocating customers/territory
- Exclusive dealing agreements
- Resale price maintenance (RPM)
- Price-fixing

AMD suing Intel for tying
Monopoly

• Three questions:
• What’s the market?
  – How high can your price go?
• Does the company control the market?
  – No monopoly unless you exclude competitors or control prices
• How did the company acquire control?
  – Possessing monopoly isn’t illegal, but using misconduct to acquire monopoly is illegal
Predatory Pricing & Tying

• *Predatory pricing* is when a firm lowers prices below cost to drive competitors out of market
  – International law calls this act “dumping,” a serious offense in international trade law

• *Tying* is an agreement to sell a product on the condition that the buyer must also purchase a different (tied) product
  – Franchisors routinely sued for tying arrangements
  – Film distributors have often been sued for tying
Eastman Kodak v. Image Technical Svcs

- Kodak tied service and parts & Image Tech & others filed an antitrust claim against Kodak
- Supreme Court held Kodak had the market power to raise prices and drive out after-market competitors, and remanded case to trial
- Unanimous jury returned verdict for plaintiffs of $23 M
- Clayton Act trebled damages, resulting in $71.7 million award
Controlling Distributors/Retailers

• Sup. Ct. has ruled that a *vertical allocation of customers or territory* is illegal only if it adversely affects competition in the market, thus it is a rule of reason violation
  – Common in the apparel and food processing industries (remember Nike and Federal Pants?)

• *Exclusive dealing contracts* require distributor or retailer to *not* carry products of any other supplier
Controlling Distributors/Retailers

- Resale price maintenance (RPM) or vertical minimum price fixing is when manufacturer sets minimum prices retailers may charge to (prevent discounts)
  - Per se illegal, but DOJ rarely pursues RPM cases, thus RPM is quite common
- Maximum price fixing, which benefits consumers, is a rule of reason violation
Controlling Distributors/Retailers

- **Horizontal price-fixing** is an attempt by competitors to alter market forces by price control and *per se* illegal.

*Denny's Marina, Inc. v. Renfro Productions, Inc.* is about price-fixing at boat shows.
Controlling Distributors/Retailers

• A boycott or refusal to deal often takes form of a manufacturer terminating a distributor for discounting, or a business association expelling a member for activities contrary to interests of group
  – Law unsettled whether these are per se illegal or rule of reason violations
U.S. v. Syufy (1990)

- Syufy entered cinema market in Las Vegas leading to bidding war and higher license fees; eventually competition sold out to Syufy with majority of market, but court held that Syufy did not engage in bad acts thus the rule of reason is that Syufy didn’t violate law

Syufy Bros. Century 25 theatre in Union City, CA
United States v. Microsoft

- **Legal Analysis & Holding:**
  - Court examined Microsoft’s anticompetitive conduct: restricting licenses, tying Internet Explorer and Windows, exclusive agreements, and other exclusionary conduct.
  - **Holding:** Microsoft engaged in anticompetitive conduct and therefore monopolization.
  - **Case remanded for appropriate remedies:**
    - As of Jan 06, lagged in payments for penalties.
    - Similar charges in EU.
Test Your Knowledge

- True=A, False=B
- The three antitrust laws are the Sherman Act, Clayton Act, and Pricing Act.
- Section 1 of the Sherman Act prohibits concerted action in restraint of trade.
- *Per se* violations are conclusively presumed to violate § 1 of the Sherman Act.
- Using a rule of reason approach, conduct violates § 1 if a minimum anticompetitive effect occurs.
Test Your Knowledge

• True=A, False=B

– If competitors alter market forces by horizontal price control, it is per se illegal.
– Agreements among competitors to divide up an available market by allocating territories is legal unless it destroys competition.
– A firm may refuse to deal with certain firms as a unilateral action.
– Having a monopoly is not illegal.
Test Your Knowledge

• Multiple Choice
  – Zyco will not sell to buyers unless they agree to buy their products exclusively from Zyco. Has Zyco violated antitrust law?
    • (a) No, since freedom of contract is allowed
    • (b) Zyco’s exclusive dealing agreement is illegal only if Zyco’s market power is anticompetitive
    • (c) Zyco’s exclusive dealing agreement is per se illegal
Test Your Knowledge

• **Multiple Choice**
  – The elements of monopolization include:
    • (a) Exclusive dealing agreements
    • (b) Monopoly power
    • (c) Willful anticompetitive conduct
    • (d) all of the above
    • (e) B and C only
Creditor’s Remedies
Laws Assisting Creditors

• Liens:
  – Consensual
  – Statutory
  – Judicial

• Suretyship and Guaranty
Consensual Liens

- Personal property as collateral (UCC Art. 9 UCC Secured Transactions)
- Real property as collateral (Mortgage)
  - Mortgagor (Debtor-Borrower)
  - Mortgagee (Creditor-Lender)
  - Debtor Defaults: Foreclosure - go through court to have sheriff seize, advertise, and sell property
Statutory Liens

- Statutory Liens
  - Mechanic’s Lien
    - Nonpossessory filed lien on real estate or real property for labor/services
  - Artisan’s Lien.
    - Possessory lien on personal property for labor done to property
Statutory Liens

- Innkeeper’s Lien
  - Possessory lien on baggage for unpaid hotel charges
- Landlord’s Lien
  - Possessory lien on household goods of renter for unpaid rental charges
Judicial Liens

- Court-ordered seizure/sale of property
- Attachments, Writs of Execution, Garnishment
Suretyship & Guaranty

- An agreement to answer for debt of another is called a “suretyship” and the obligor is called the “surety”
- Another agreement is called a “guaranty” and the obligor is the “guarantor”
Promise by a third person (Surety/Guarantor) to pay a debt owed by the Debtor in the event the Debtor does not pay.
Suretyship & Guaranty

- Person who owes the money (both types of agreements) is “principal”
- Person to whom debt is owed is “obligee” or “creditor”
Suretyship & Guaranty

• If principal defaults, the creditor may ask for payment by surety or guarantor, who must pay debt

• NOTE: Guaranty contract gen’ly a separate document from the primary contract!
Suretyship

• Express contract agreement among principal obligor, obligee, and surety; contract specifically between the surety and the creditor

• Surety is primarily or jointly liable with principal obligor and responsible if principal fails to perform
Suretyship

- Creditor can demand payment from surety at any time after debt is due
- Creditor need not exhaust all legal remedies against the debtor before holding the surety responsible
- Usually, surety bound with principal under same instrument
Guaranty

• Contract of guaranty is collateral to original contract, thus guarantor isn’t direct party to principal obligation

• Rather, guarantor is secondarily liable to creditor and promise to answer for debt of another becomes absolute only upon default of principal debtor
Guaranty

- Secondarily liable, debtor must default and the creditor must have attempted to collect from the debtor
- Statute of Frauds requires guaranty to be in writing
GMAC v. Daniels

- John Daniels agreed to buy car from Lindsay Cadillac
- Brother Seymoure agreed to cosign the installment sales contract on same page as Daniels
- Lindsay assigned contract to GMAC for financing
- John Daniels defaulted
GMAC v. Daniels

- GMAC sued Seymoure
- Seymoure used defense that he was only a guarantor, not a surety, and couldn’t be sued until GMAC brought suit against John
- Trial court held for Seymoure
- GMAC appealed on basis that Seymoure was a surety
GMAC v. Daniels

- Appellate Ct agreed with GMAC: Seymoure was surety, not guarantor
- Discussed distinction between suretyship and guaranty and noted that Seymoure was co-signer on original contract of purchase
- Contract clearly stated all buyers “jointly and severally liable,” so GMAC wasn’t required to sue Brother John first
- Bottom line: Seymour had to pay, then go after Brother John
DID THE SUPREME COURT GET INTO OUR MONOPOLY GAME?

SENTENCING:
GO DIRECTLY TO (GET OUT OF) JAIL (FREE)
DO NOT PASS GO, DO NOT COLLECT ($200; (£50) UNLESS (IF) YOU ROLL DOUBLES. (GUIDELINE, NOT MANDATORY.)

THAT'S NOW CALLED A 'CONSTITUTION' CARD.