CHAPTER 4

Trade and Commerce Laws

IN GENERAL

All aspects of our federal and state trade and commerce laws apply to any and all business and professions (including actuaries) except that such application must not intrude in or compromise any professional standards.

The following outline sets forth the logic by which this subject is presented and discussed:

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Antitrust and Restraint of Trade
- Essential Nature of the Sherman Antitrust Act
- Clayton Act
- Federal Laws Specifically Regulatory
- State Antitrust Laws

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INTRODUCTION

In the early years of the twentieth century, a few landmark federal laws clarified what our founding fathers had in mind with respect to the Commerce Clause of the Constitution. These laws were known as the Sherman Antitrust Act, the Clayton Act, the Robinson-Patman Act and the FTC Act. The significance of these Acts was enhanced by a plethora of Supreme Court decisions that amplified and/or clarified them.

What these laws and decisions tell is in this; the Commerce Clause *obligates* us to both (a) avoid restraining trade but also (b) embrace free competition. That is:

- The Commerce Clause rests on economic liberty.
- The so-called commerce laws are to protect free and unfettered competition as a rule of trade.
- Unrestrained interaction of competitive forces will yield the best allocation of our economic resources.
- The goals should be the lowest price, the highest quality and the greatest material progress all done in a fair manner.
- The principles and goals are consistent with our social and political institutions.

Finding its *marching orders* from this historical perspective, this Text and companion Website are motivated for positive political, professional, social and economic reasons to "build a better and cheaper product or service and do so fairly." Tools readily at hand to achieve this goal include the following:

1. Electronic transmission via the internet.
2. Embedding computational models (i.e., a robot) in a Website.
3. Realigning data-handling responsibilities and the roles of vendors.
4. Pre-determining, with specificity, the definition of professional liability.

ANTITRUST AND RESTRAINT OF TRADE

Essential Nature of the Sherman Antitrust Act

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 anti monopolistic practices are matters of public interest.
11. Public inquiry with respect to anticompetitive activities, even if only a threat is proper.
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 that restrain may be either good or bad; they are forbidden either event.
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. However, such activity may or may not be an antitrust infraction.
19. Commerce, as intended by the Constitution, and the memorializing of free 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 the 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.

Federal Laws That Regulate

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

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- 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 states' 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.

PRICE DISCRIMINATION

Introduction

Two major pieces of federal legislation deal with the numerous aspects of price discrimination:

1. Clayton Act (1914)
2. Robinson-Patman Act (1936).

Clayton Act

The Clayton Act was enacted in 1914 and amended the Sherman Antitrust Act which was earlier enacted in 1890. The Clayton Act was then amended in 1936 by the Robinson-Patman Act and codified at 15USC§13. The essence of the law is three-pronged:

1. There shall be no discrimination in price of services among individuals, business or trusts...
2. Where restraint of trade is goal or a result...
3. Unless such price/services differential has an economic justification...
4. With a good faith defense being acceptable.

Robinson-Patman Act

The Clayton Act amended the Sherman Act by forbidding price discrimination in commodities unless there was (a) cost justification and (b) absence of trade restraint and (c) absence of the rule of reason rationale. This Act dealt with powerful sellers. The Robinson-Patman Act did in effect the same thing except it related to powerful buyers. The Act has been criticized fro being vague and difficult to administer. Only the FTC will typically use it as a regulatory tool.

This Act was passed in 1936 during the deep depression following the emergence of large and very successful food chains. The small family-owned grocery stores lobbied Congress for legislative relief. The actual draft of the Act was provided by the US Wholesale Grocers Association.

UNFAIR TRADE PRACTICES

Introduction

Empowered by our Trade and Commerce laws (15 USC), the Federal Trade Commission (FTC) is concerned primarily with purely private businesses and the entire gamut of their economic activities. If a citizen is upset with unfair trade practices it finds relief with the FTC — not with the federal courts; thus, Congress gave remedial relief only to the FTC.

Statutory Background

The Commerce Clause gave Congress the power to regulate unfair competition in commerce. People who quarrel with the vague words *unfair methods of competition* have no grounds:

- Words are of common use and meaning.
- They are analogous to similar words in commonly-used statutes.

An elaborate federal statutory definition is not needed.

State Laws

To the extent that state laws interfere or *blunt* the federal law, such state law is preempted. In providing its review, the FTC will not refer to any state laws. The state law that permits such competition does not become a factor in the court's review process.

Where there is diversity or where the dispute involves pendant jurisdiction, the federal court is free to look to state law rules. State law applies where such is not in conflict with federal law.

Where the activity des not involve interstate commerce states are free to apply their own rules. What must never occur is for the state law to conflict with, control, thwart, supersede or serve as an obstacle to the full purposes and objectives of the federal laws.

COMMERCE CLAUSE – IMPLIED OBLIGATION

In the Home Page of this Web Site, the writer asserts that we all have an *obligation* to "build the better and cheaper product or service in a fair manner". This admonition is not imagined but is found in several federal court decisions that deal with our family of trade and commerce laws. Consider the following four:

1. ***Gough v. Rossman Corp., 487 F.2d 373 (9th Cir. 1973)***
   Congress, in enacting the Sherman Act, intended to extend substantive prohibitions of such Act to *farthest reaches of its power* under the Commerce Clause, thereby mandating the nation's competitive business economy to the full extent that Congress could do so under its constitutional power to regulate interstate and foreign commerce.

2. **U.S. v. National Lead Co. 332 U.S. 319 (1947)**
   Economic theory underlying Sherman Act is that in long run competition is more effective to production and more a trustworthy regulator of prices that even an enlightened regulation.

3. **Northwestern Oil Co. v. Scocony-Vacuum Oil Co., 321 U.S. 792 (1944)**
   Sherman Act was intended to advance public welfare by promoting free competition and preventing undue restriction of trade and commerce.

4. **Northern P.R. Co. v. U.S. 78 S. Ct. S 14 (1958)**
   Sherman Act was designed to be comprehensive charter of economic liberty aimed at preserving free and unfettered competition as rule of trade; it rests on premise that unrestrained interaction of competitive forces will yield the best allocation of our economic resources, lowest prices, highest quality, and greatest material

> progress, while at the same time providing environment conducive to the preservation of our democratic political and social institutions.

It is quite true that the majority of our Commerce Laws are written in the "thou shall not" mode; (do not create monopolies, do not restrain trade, do not conspire, do not practice unfair trade practices, etc.). However some jurists do put a positive tone to the law: do practice fair trade, do compete, etc.).

ACTUARY AND TRADE AND COMMERCE LAWS

To the degree that actuarial professional standards are not compromised the actuary, as any business must abide by the letter and spirit of our federal and state trade and commercial laws. Some might reason that the actuary has an *obligation* to “seek and provide the better cheaper service and do so fairly.”

One of the primary motives of this text and its companion Website (www.awpse.com) is the belief of its sponsors that we, as actuaries, have such obligation.