

ANTITRUST IN THE 90'S --
Back to the Future
by
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To paraphrase Mark Twain, reports of the demise of antitrust law appear to be greatly exaggerated. In fact, in the bright new decade of the 1990s antitrust may well be the single greatest growth area in the law.

During much of the 1980s, the federal government took a very "hands-off" approach to business practices. Nowhere was this attitude more prevalent than in antitrust enforcement. Mergers of previously unthinkable size took place in record numbers without so much as a second glance by federal authorities. Vertical cases (i.e., involving restraints of trade cutting across different levels of the product distribution chain) and price discrimination suits became things of the past for federal enforcers. Simultaneously, the so-called "Chicago School of economics" laissez faire approach to antitrust began to gain ascendancy in the courts. The resultant blurring of the lines between what was legal and illegal in the competitive arena resulted in antitrust litigation becoming even more uncertain, complex and time consuming than it previously had been.

From the foregoing, some might have thought that the close of the 1980s would witness the end of the 100-year rule of antitrust law as the regulator of the American competitive economic system. That has not come to pass, however. Instead, the States, through their Attorneys General (AGs), moved aggressively to fill what they perceived to be the void left by

federal retrenchment. State AGs began to bring cases against proposed mergers having anticompetitive effects in their states. Likewise, they brought nationwide vertical cases, recovering millions of dollars for overcharged consumers. Additionally, private litigants, seeing that they could hope for little in the way of federal assistance, became more reliant on their own litigation resources to right competitive wrongs. Moreover, empirical economists began to challenge Chicago School theorists in the economic literature and in court.

In this fashion, the fires of antitrust were kept burning throughout the 1980s.

Resurgence

Today, there is a new approach in Washington to complement increased state and private activism and the economic counter-revolution. Both the FTC and the Department of Justice (DOJ) have announced their intention of reinvigorating federal antitrust enforcement. Already this change of emphasis is being felt in the merger arena, where proposed acquisitions are more subject to challenge. Indeed, increased federal antitrust scrutiny is being listed as one reason for the apparent demise of the proposed Coors acquisition of Stroh in the beer industry. This heightened emphasis is also being felt in the airline industry, where DOJ has recently initiated an investigation into parallel pricing practices.

Furthermore, antitrust law is being increasingly applied by federal and state enforcers, and by private litigants in

previously untouched areas, such as health care. State AGs have, in recent years, been in the forefront of civil antitrust litigation there. DOJ is presently conducting three federal grand jury investigations into possible criminal antitrust violations in the health care industry. In addition, private parties recently have been seeking to vindicate their competitive rights in the health care field through litigation. The result is that health care constitutes the "cutting edge" of current antitrust practice.

Somewhat similarly, in the area of price discrimination, private litigants have been carrying the load for some time, due to federal abandonment and traditional state non-involvement. Despite the dearth of government action in this arena, it continues to constitute an active private battleground.

Prognosis

What does all this mean relative to current business practices? As a result of the 1980s cutback in federal enforcement and the rise of the Chicago School approach, businesses became much more aggressive in treading the fine line of possible antitrust violations. Now, however, state AGs and private litigants have moved into the breach, and federal authorities are returning to the field. As a result, those businesses and individuals continuing their borderline practices have, practically speaking, greatly increased antitrust exposure.

That exposure should be cause for significant concern. For one thing, antitrust violators are subject to felony prosecution

under both federal and Colorado law. Criminal penalties range up to several years imprisonment and a \$100,000 fine for individuals, and a fine of up to \$1 million for businesses. Additionally, antitrust violators are civilly liable for both treble damages and payment of the plaintiff's costs and attorneys' fees, to say nothing of being responsible for paying their own costs and attorneys' fees. Thus, testing the boundaries of the antitrust laws can be a very expensive proposition.

Conclusion

In light of the preceding, it is apparent that antitrust law is "alive, well and kicking" as it enters its second century. Companies and individuals would be well-advised to conform their business conduct to its dictates; to err on the side of conservatism in this regard is by far the wisest course. Consequently, every business in operation today should have an effective "Antitrust Compliance Program" in place as the 1990's dawn.

(Editor's Note: More information on Antitrust Compliance Programs will be contained in a forthcoming issue of Legal Briefs.)

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ANTITRUST IN THE 1990s PART II:

WHO NEEDS AN ANTITRUST COMPLIANCE PROGRAM, ANYWAY?

by

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Many if not most businesses do not have, and do not believe they need, an antitrust compliance program. If your business does not have such a program, or if you are of such a view, then, as it says in the commercial, "This one's for you."

The antitrust laws have been called the Magna Carta of the free enterprise system, as important to our economic liberty as the Bill of Rights is to our fundamental personal freedoms. Nevertheless, they are rife with traps for the unwary.

For one thing, the antitrust laws generally prohibit "contracts," "combinations" or "conspiracies" (i.e., joint agreement or concerted action) in restraint of trade. Few business people realize just how easy it is to become part of such an illegal trade restraint. For example, it is not necessary that there be an express agreement; an implied arrangement or understanding, as demonstrated by a course of conduct, can suffice. Thus, a simple discussion among competitors where participants make individual statements as to their own intended course of action can, if followed by parallel anticompetitive conduct, constitute illegal concerted action. Accordingly, even casual business contacts with competitors carry the seeds of potential antitrust liability.

Another difficulty with the antitrust laws is that it is possible to commit a violation unknowingly. With a few limited

exceptions, the conduct proscribed by the antitrust laws is not intuitively obvious. Moreover, by and large, the types of prohibited activity are not set forth in the antitrust statutes themselves. Rather, they are detailed in published judicial opinions. Thus, consultation with an antitrust lawyer may be necessary just to determine what conduct is outlawed.

Furthermore, as a general rule it is possible to commit even a criminal violation of the antitrust laws without specifically intending to do so. It is only necessary that one intend to perform the act which is undertaken, that such action be done in knowing cooperation with another, and that the resulting effect be reasonably foreseeable. If those requisites are met, and if the act and effect are of a type determined by judicial opinions to be per se or "automatically" violative of the antitrust laws, then the actor may be found guilty of a crime (as well as being subject to civil treble damage remedies).

The preceding should provide little, if any, comfort for businesses operating without a good understanding of, and without an organized approach for obedience to, the antitrust laws. The only way to obtain that understanding and approach on an ongoing basis is through an effective antitrust compliance program. Such a program will educate business personnel in the "do's" and "don't's" of the antitrust laws and will monitor their compliance with those laws.

INQUIRIES

The following series of questions emphasizes the need for an antitrust compliance program. These inquiries, covering differing areas of business endeavor, are designed to highlight situations which can occur in your own business practices and which very well could give rise to significant antitrust problems. An antitrust compliance program is designed to forestall such problems before they occur.

1. Do any of your personnel attend industry events where any of your competitors are present? If so, they can hardly avoid speaking to your competitors. But, a discussion of competitive issues in the industry can lead to trouble. For example, such discussions, if followed up by action, could support a finding of an implied agreement constituting the per se violation of price fixing or market allocation if any form or aspect of pricing information, or any information as to who will serve which customers or areas, is involved.

2. Does your company ever submit bids for contracts being let by governmental or private entities? If so, do your personnel ever have discussions with other actual or potential bidders? Such a discussion about bidding, if followed by conduct, could lead to a finding of an implied agreement constituting the per se violation of bidrigging.

3. Do you (or your suppliers) designate a price figure at which sales representatives, distributors or dealers shall sell products to customers? If you (or your suppliers) do anything more

than merely stating what the desired resale price is -- i.e., cajoling, threatening or otherwise enforcing the charging of that price -- that could constitute the per se violation of resale price maintenance.

4. Have one or more of your sales representatives, distributors or dealers ever complained to you about any existing or potential competitor of theirs and asked or suggested that you cease or avoid doing business with that competitor, or have you ever done so yourself? If the complaint, request or suggestion had anything to do with pricing, then termination could amount to the per se violation of resale price maintenance if certain other conditions are met.

5. Do any of your personnel ever have discussions, or enter into arrangements or even implied understandings, with any other party to jointly restrain the freedom of third parties to buy or sell goods or services in the open market? Such actions could take the form of jointly denying (either completely, or except upon certain terms and conditions) others access to desired merchandise or services which competitors wish to sell to the public or which customers wish to purchase. That could constitute boycotting, which can be a per se violation of the antitrust laws.

6. Have you ever conditioned the sale of one product or service desired by a customer upon the purchase of additional, undesired products or services by that customer, or have you ever been subjected to such an arrangement by another? If so, that

could constitute an illegal tying arrangement, which is a per se violation if certain conditions are met.

7. Have you ever sold a product or service to (or bought one from) one sales representative, distributor, dealer or customer on different terms or conditions, or for a greater or lesser price, than you have sold the same item to (or bought it from) another such person? If so, that could amount to illegal price discrimination unless the differences are justified based upon such matters as (i) differences in quantity or cost of manufacture, sale or delivery, or (ii) introductory or promotional allowances or the good faith meeting of a price of a competitor.

CONCLUSION

If you answered yes to any of the above questions, you should consult an antitrust attorney immediately, if not sooner. Even discussing such matters can subject the participants and your firm to an investigation which, at the very least, may be extensive, expensive and disruptive. Such discussion followed by action can make the participants and your company liable for felony criminal penalties and civil treble damages. The very best way to avoid such problems is by forestalling them through the existence and operation of an antitrust compliance program. It's as true today as ever -- an ounce of prevention is worth a pound of cure!

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