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Antitrust Liability: Public Power Is Not Immune

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What We Will Cover

- Basic Antitrust Law
- The “Keough” or “Filed Rate Doctrine”
- Parker Immunity
- Municipal Immunity from federal antitrust damages claims
- The Collateral Order Doctrine

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The Sherman Act of 1890

Sen. John Sherman
(R Oh.)
("The Ohio Icicle")

- 15 U.S. Code § 1 - Prohibits Agreements in Restraint of Trade
  - "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."
- 15 U.S. Code § 2 - Prohibits Monopolization, Attempted Monopolization, Conspiracies to Monopolize
  - "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony . . . "

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The “Power” Requirement Under Section 2

- “Section 2 makes the conduct of a single firm unlawful only when it actually monopolizes or dangerously threatens to do so.”

— *Spectrum Sports v. McQuillan*, 506 U.S. 447, 459 (1993)

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Exclusionary Conduct

- "A firm violates § 2 only when it acquires or maintains, or attempts to acquire or maintain, a monopoly by engaging in exclusionary conduct. . . ."

— *U.S. v. Microsoft,* 253 F.3d 34, 58 (D.C. Cir. 2001), *cert. denied,* 534 U.S. 952 (2001)

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Sherman Act Section 2 (cont'd)

- Having monopoly power is not itself a violation
- Must have monopoly power and have acquired or maintained that power by "exclusionary" acts:
  - Predatory pricing
  - Exclusive supply or purchase agreements
  - Tying
  - Refusal to deal

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Multiparty Agreements in Restraint of Trade – Section 1

- Section I prohibits any agreement, express or implied that has the effect of unreasonably reducing competition.
- Unilateral or merely “parallel” conduct does not violate Section 1

  Depending on the nature of the conduct, it will either fall under a “**rule of reason**” or one of the **per se** categories the courts have identified over the years.

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Horizontal Restraints

- *A restraint of trade involving an agreement among **competitors** at the same level of the supply chain*

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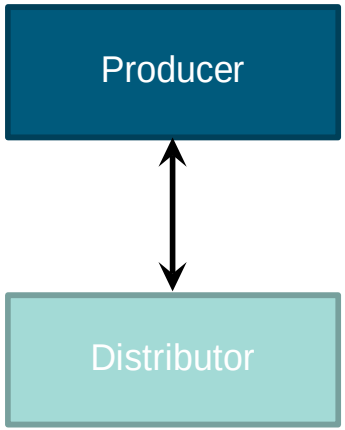
Vertical Restraints

- *A restraint of trade involving firms or individuals at different levels in the chain of distribution*



Common levels include:

- Manufacturer / Supplier
- Wholesaler
- Retailer
- Consumer

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Per Se Violations

Horizontal Price-Fixing:

- Horizontal Agreements to Limit Production or Output
- Horizontal Agreements to Divide Markets
- Bid Rigging
- Group Boycotts (sometimes)

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Per Se Violations (cont'd)

Horizontal Price-Fixing:

- *An agreement among competitors to raise, fix, or otherwise maintain the price at which goods or services are sold*.

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Per Se Violations (cont'd)

Horizontal Price-Fixing:

- Raise prices
- Hold prices firm
- Eliminate or reduce discounts.
- Adopt a standard formula for computing prices
- Maintain certain price differentials between different types, sizes, or quantities of products
- Adhere to a minimum fee or price schedule
- Assess fees
- Fix credit terms.
- Reduce supply for purposes of increasing price

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Per Se Violations (cont'd)

Market/Customer Allocation:

- *Agreements in which competitors allocate markets and/or customers among themselves*.
  - Competitors divide up specific customers or types of customers and agree to sell only to their allocated customer base.
  - Competitors allocate specific product markets among themselves.
  - Competitors divide up specific geographic areas and agree to sell only within their allocated geographic area.

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Per Se Violations (cont'd)

Bid Rigging:

- *Competitors agree in advance who will submit the winning bid on a contract being let through the competitive bidding process.*

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Per Se Violations (cont'd)

- Agreement need not be formal
  - Only need "conscious commitment to a common scheme"

— *Monsanto Co. v. Spray-Rite Svc. Corp.*, 465 U.S. 752, 764 (1984)

  - Forming a trade association does not shield joint activities from antitrust scrutiny: Dealings among competitors that violate the law would still violate the law even if they were done through a trade association.

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Rule of Reason

- Under the “rule of reason” the courts will look at whether the conduct has an independent business justification and whether it **unreasonably** restrains trade.

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Rule of Reason (cont'd)

Rule of Reason Cases:

- Mergers
- Exclusive Dealing Arrangements
- Tying agreements (sometimes)

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Rule of Reason (cont'd)

Vertical Restraints: Exclusive Dealing

- A seller or buyer may attempt to restrict or discourage a counterpart from dealing with a competitor
  - Requirements contracts
  - Pricing or other incentives
- Among the factors to consider are the degree of market foreclosure and ability to reach the market

Vertical Restraints: Tying

- Seller offers a "tying" product on the condition the buyer also purchases a "tied" product

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Rule of Reason/Per Se Overlap

Vertical Restraints: Tying

- Tying may be illegal “per se” when certain conditions are met:
  - Two separate products are involved
  - Sale of one product is conditioned on buying another
  - Seller has power in tying product market to restrain trade in tied product market
  - Interstate commerce in tied product market is affected

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Immunities and Limitations on Liability for Governmental Entities

Local Government Antitrust Act, 15 U.S.C. § 34-36

- *Bars Antitrust Damages Actions Against Local Governments*
  - The LGAA protects any "city, county, parish, town, township, village, or any other general function governmental unit established by State law" and "a school district, sanitary district, or any other special function governmental unit established by State law in one or more States."
  - Private persons also immune from damages for "official actions directed by a local government, or official or employee thereof acting in an official capacity."
  - The statute does not affect injunction actions or state antitrust law claims.

State Action Doctrine: "Federalism and State Sovereignty"

- "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."

— *Parker v. Brown*, 317 U.S. 341, 352 (1943).

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State Action Doctrine:
Legal Test Depends on the Entity Under Scrutiny

- State Legislature
- State's Highest Court
- Governor
- State Executive Departments
- Cities, Counties and Municipalities
- Private Parties Acting Pursuant to State Policy

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State Legislature – Clearly Exempt

- “State legislation and ‘decision[s] of state supreme court, acting legislatively rather than judicially,’” are “’exempt from the operation of the antitrust laws’ because they are an undoubted exercise of state sovereign authority.’”

— *North Carolina State Bd. Of Dental Examiners v. F.T.C.*, 135 S.Ct at 1110 (citing *Hoover v. Ronwin*, 466 U.S. 558, 567-68 (1984)).

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Municipal Action – “Clearly Articulated” Standard

- State action immunity attaches to the activities of local governmental entities only “if they undertaken pursuant to a ‘**clearly articulated and affirmatively expressed’ state policy to displace competition**.”

— *F.T.C. v. Phoebe Putney Health Systems, Inc*. 133 S.Ct. 1003, 1010-1011 (2013) (emphasis added) (citing *Community Communications Co. v. Boulder*, 455 U.S. 40, 52 (1982)).

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Private Action: “Clearly Articulated” State Policy and “Actively Supervised” by the State

- This rule “confirms that while a State may not confer antitrust immunity on private persons by fiat, it may displace competition with active state supervision if the displacement is both intended by the State and implemented in its specific details.”

— *F.T.C. v. Ticor Ins. Co.*, 504 U.S. 621, 633 (1992).

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Municipal Action Under the "Clear Articulation" Standard

- "'To pass the clear articulation test, a state legislature need not 'expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects. Rather…state action immunity applies if the anticompetitive effect was the 'foreseeable result' of what the state authorized."

— *F.T.C. v. Phoebe Putney Health Systems, Inc.* 133 S.Ct. 1003, 1011 (citing *Hallie v. Eau Claire*, 471 U.S. 34, 43 (1985)).

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The “Foreseeable Result” Test

- ***City of Columbia v. Omni Outdoor Advertising***
  499 U.S. 365 (1991)

Facts:

- City passed zoning ordinances that imposed moratorium on construction of new billboards, followed by restrictions on the size, location and spacing billboards.
- Ordinances obviously favored politically well-connected incumbent that already had its billboards in place, and hindered competitor.
- Jury found that city and incumbent conspired to restrain trade.

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The “Foreseeable Result” Test Under *Omni*

- City Immune from Liability under the State Action Doctrine
  - “We have rejected the contention that [the ‘clear articulation’] requirement can be met only if the delegating statute explicitly permits the displacement of competition”
  - “It is enough, we have held, if suppression of competition is the ‘foreseeable result’ of what the statute authorizes”
  - “The very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants”

The “Clear Articulation” Standard and Rate Regulation

- ***Southern Motor Carrier Rate Conference, Inc. v. U.S.*** 471 U.S. 48 (1985)
  - When a statute provides for a substate governmental entity to prescribe “just and reasonable” rates, it evidences the legislature’s intent that such rates “be determined by a regulatory agency, rather than by the market.”
  - The factors to be considered under the statute at issue bore “no discernible relationship to the prices that would be set by a perfectly efficient and unregulated market,” clearly indicating that the legislature “intended to displace competition.”

The “Clear Articulation” Standard and Rate Regulation (cont’d)

- Court referred to the practice of setting “just and reasonable rates” as “inherently anticompetitive.”
- Thus, to the extent the ratemaking activities at issue were anticompetitive, that conduct was undertaken “pursuant to a ‘clearly articulated state policy,’” and, accordingly, immune under the state action doctrine.

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Limitations of the State Action Doctrine

Recent Supreme Court decisions have underscored the limitations of the state action doctrine while observing that "state action immunity is disfavored."

- A state's theoretical right to disapprove filed rates will not satisfy the "active supervision" prong where the record shows there was no actual state review of the rates. *F.T.C. v. Ticor Ins. Co.*, 504 U.S. 621 (1990).
- A general grant of corporate powers does not establish a state policy to authorize anticompetitive mergers, *F.T.C. v. Phoebe Putney Health Systems, Inc.*, 133 S.Ct. 1003 (2013).
- A licensing board dominated by members of a profession will not be immune for unsupervised actions to drive out potential competitors. *North Carolina State Bd. Of Dental Examiners v. F.T.C.,* 135 S.Ct. 1101 (2015).

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Collateral Order Doctrine

- Definition
  - Doctrine allowing appeals from interlocutory rulings (i.e., preceding final judgment) provided those rulings conclusively decide an issue distinct from the merits of the case and that would be effectively unreviewable after final judgment.
- Overview
  - The collateral order doctrine, established in Cohen v. Beneficial Industrial Loan Corp., 337 U.S. 541 (1949), is a limited exception to the final-judgment rule. That rule requires parties to wait for final judgment before appealing any rulings. Appealable interlocutory orders are those that "finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." Id., 337 U.S. at 546.

Examples of Interlocutory Orders That May Be Appealed

- Absolute and qualified immunity for government officials
- Sovereign immunity for foreign countries and Indian tribes

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How Does the Collateral Order Doctrine Affect Municipal Utilities?

- ***Salt River Project v. Tesla Energy Operations, Inc.***, No. 17-368 presented the question whether a state or local government may appeal the denial of a motion to dismiss based on state-action immunity?
- Ninth Circuit had ruled that the collateral-order doctrine does not extend to the denials of motions to dismiss based on state-action immunity, because the latter doctrine only provides immunity from an ultimate finding of **liability**; it does not provide immunity from the **lawsuit**.
- The Supreme Court agreed to hear the case because there is a split in the Circuit Courts of Appeal whether the state action doctrine provides immunity from being sued or only immunity from ultimate liability.

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The Collateral Order Doctrine (cont'd)

A week before oral argument, the parties announced a tentative settlement, since concluded, and the oral argument was cancelled.

- Why does the issue raised by the case still matter?
  - A municipality that may ultimately prevail on a state action immunity claim – after trial – may have spent millions of dollars defending itself on the merits because the trial court would not decide the immunity claim until the case was over.

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Any Questions

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