

An Overview Of Antitrust Law
by William A. Markham, San Diego Attorney © 2000

Ever since the federal government took on Microsoft, the public has become interested once again in antitrust law, which is perhaps the most misunderstood law of all.

What Is Antitrust Law?

Broadly speaking, antitrust laws seek to promote fair competition on the merits and to protect consumers and businesses from anti-competitive business practices -- practices undertaken in effort to undermine competitive commercial behavior in a given market or line of commerce.

The antitrust laws therefore forbid the wrongful acquisition of monopoly power, the abuse of monopoly power even if it was properly acquired in the first place, and other business practices that improperly stifle or suppress "competition on the merits" in our markets.

The Principal Antitrust Offenses

Antitrust law is the law of competition. It is concerned with wrongs committed against competition on the merits in a given line of commerce or market. It is never enough for a plaintiff to allege that it has been harmed by an unscrupulous defendant. Rather, an antitrust plaintiff must show that the defendant or defendants have undermined competition in a distinct market, and that this injury to competition in general has specifically harmed the plaintiff in particular. Thus a plaintiff in an antitrust case must make a showing of "antitrust harm" with ensuing "antitrust injury" to the plaintiff itself.

Allow me the following example to illustrate the point more vividly. If I own a restaurant in San Diego, and if I maliciously set fire to two other restaurants because I resent their flourishing success, I have clearly broken the law: I can be prosecuted criminally for arson and sued by the wronged, destroyed restaurants for intentional malfeasance, tortious interference, and very likely other civil wrongs. But my act, however evil, causes no harm to the thriving restaurant scene in San Diego. I have done nothing that even remotely upsets "competition on the merits" for restaurant dining in San Diego.

But suppose that my restaurant and the two other restaurants are all located on a remote island in the far away Pacific. If I burn them to the ground, then my restaurant alone will be the one restaurant remaining for the residents of this otherwise idyllic island. Suppose that I start charging them \$50 for a plate of eggs and potatoes, quipping that "if they don't like my service, they can eat at some other restaurant -- oh, I forgot, there are no other restaurants!" My act of arson, if done under such circumstances, has likely caused harm to competition on the merits for restaurant services on this island.

Let's suppose further that this remote Pacific Island is a territory of the United States and is therefore subject to U.S. antitrust law. When I am sued for redress under these laws, my clever antitrust attorneys will argue that, whatever else I might have done, I have not harmed competition on the merits because if I try to raise my prices for my restaurant

services, others will soon establish competing restaurants to sell to customers who are disenchanted with my prices. This is the stuff of antitrust law, not mere arson and malicious misconduct. In this case, I would likely lose and be forced to pay three times the value of the harm that my misconduct has caused to competitors and customers alike, assuming the customers started a class action and my two ruined competitors also brought their own suit for lost profits. This is because a successful plaintiff in an antitrust case is entitled to treble damages and attorney's fees and often can also obtain injunctive relief.

Suppose that I set the fire in San Diego, but I have done so because my restaurant and the two others are the only ones in the area that serve a rare delicacy cuisine known to its aficionados as "Fuji-style cooking". In such a case my erstwhile competitors might sue me under the antitrust laws for causing antitrust harm in the market for "Fuji-style cooking in the San Diego region".

In other words, antitrust law is the law of competition, and it exists to resist harm done to an entire market, not harm done merely to a particular business or consumer.

The antitrust laws are set forth in various federal statutes, most notably the Sherman Act and the Clayton Act. There are also copycat statutes in virtually every state. All of these statutes use conspicuously general language to proscribe "monopolization" and "restraints of trade", leaving to the courts the task of articulating what is meant by these terms. [Certain states might also have more specific competition statutes on the books. The author of this article, who litigates cases under federal and California antitrust law, knows only that virtually every state in the Union has codified the federal antitrust standards into state law.]

The two principal antitrust offenses are "monopolization" and "conspiracy to restrain trade". There is a third signal antitrust offense, "abuse of dominant position", which is not expressly forbidden under the U.S. laws, but which is proscribed by the competition laws of other jurisdictions, most notably the European Union and Canada. In the U.S., a plaintiff can assail this kind of offense by claiming misuse of existing monopoly power to establish a new monopoly (monopolization) or in an attempt to do so (attempted monopolization).

Monopolization

"Monopolization" occurs when one firm deliberately destroys or impairs its rivals, so that it can acquire "monopoly power" over a particular line of goods or services that it sells. Monopoly power means the power to raise prices or reduce output for an indefinite duration without fear of being undersold by a rival who can offer a substitute good or service. Not every instance of monopoly power is unlawful. Some firms acquire it by superior skill or from fortuitous circumstance. It is a violation of antitrust laws, however, for one firm to employ measures whose purpose is to destroy its rivals so that it can acquire monopoly power over a certain line of goods or services. To prove monopolization, it is usually necessary to prove the "relevant product and geographic market" in which the monopolization is alleged to have occurred.

It is likewise an offense for two firms to conspire together to monopolize a given market or line of commerce, or for a firm to attempt to monopolize a market or line of commerce. Attempted monopolization occurs when a firm employs predatory practices by which it aims to destroy rivals and acquire monopoly power, but only if there exists a "dangerous probability" that it will succeed in the endeavor unless it is checked by the antitrust laws.

These monopolization offenses are set forth in Section 2 of the Sherman Act and in the many cases that have interpreted this statute.

Conspiracies to Restrain Trade

In addition, it is unlawful for two or more firms to make a contract that restrains trade or otherwise act in concert or conspire to restrain trade in a given line of commerce. To prove such an offense, it is typically necessary to establish the "relevant product and geographic market" in which the conspiracy to restrain trade has been allegedly undertaken. The conspiracy need merely be a tacit understanding. Broadly speaking, a restraint of trade is a predatory practice undertaken by co-conspirators in order to sabotage "competition on the merits" in a given market, so that afterwards they will be free to impose higher prices without fear of being undersold by a rival.

Certain kinds of trade restraints are deemed per se violations (e.g. price-fixing, bid-rigging, horizontal market allocation). Others are deemed to violate antitrust law only if they are proven to be "unreasonable": This usually means that the plaintiff alleging the violation must show that the trade practice in question harms competition on the merits and allows its proponents to exclude rivals, and that the stated business purpose of the practice is a pretext or could be accomplished by less exclusionary means that do not have such a debilitating effect on competition.

The offense of conspiracy to restrain trade is set forth in Section 1 of the Sherman Act and in the voluminous case law that interprets this statute.

Monopolization and illegal trade restraints are usually said to occur only where one or more firms set out on purpose to destroy rival competitors, doing so in order to impose higher prices on a captive market that is powerless to turn to competitors to redress the wrong. Antitrust intervention is typically regarded as appropriate only where ordinary competitive processes cannot redress the attempt to impose higher prices.

It is therefore necessary to consider what good or service the alleged wrongdoer would seek to sell at higher prices after trying to ruin its rivals, and to consider what alternative goods or services can be offered by rival firms so as to provide relief from the attempted price gouging. If there are such alternatives, then ordinary competition will provide the necessary remedy. Otherwise, it is appropriate to have an antitrust intervention to check the abuse.

The Antitrust Statutes

The antitrust laws are codified into various statutes, the most important of which is the Sherman Act, which is a federal law that provides civil remedies and criminal penalties for the principal antitrust violations -- monopolization, attempted monopolization, abuse of monopoly power, and conspiracies to restrain trade. The Sherman Act is worded in broad, open-ended language so that clever competitors cannot elude its provisions by lawyerly evasions and obfuscation.

The Clayton Act is another federal statute, which imposes restrictions on proposed mergers, acquisitions, and other fusions, and which also serves as a supplement to the Sherman Act, providing an enumeration of specific practices that are anti-competitive and therefore forbidden. It usefully allows the courts to enjoin anti-competitive conduct before it actually causes harm. The Robinson-Patman Act, which is also a federal statute, prohibits specific business practices such as price-fixing, and does so in technical, specific language that makes it the very reverse of the Sherman Act. It serves as a supplement to both the Sherman and Clayton Acts and is sometimes invoked by civil litigants who have also brought claims under the other two Acts.

The Robinson-Patman Act was enacted during the Great Depression to offer protection to struggling small businesses. It is increasingly viewed by experts as anachronistic and problematic because of its overly technical requirements.

The Federal Trade Commission Act, yet another federal statute, established the Federal Trade Commission ("FTC"), which has regulatory authority to enforce the Sherman Act, the Clayton Act, and the Robinson-Patman Act. The FTC arguably has authority that exceeds the foregoing Acts and allows it to test the limits of antitrust policy (Section 5 of the FTC Act gives it enormous discretion).

In addition to these federal statutes, each state in the Union has its own antitrust statutes that forbid unfair competition in intrastate commerce. The state statutes tend to be modeled after the Sherman Act, which is the foremost and premier article of antitrust legislation.

The Courts and Antitrust Theory

Since the antitrust statutes are couched in general language (e.g. "it is an offense to conspire to restrain trade"), they have no practical meaning until the courts actually enforce them against the businesses accused of violating them. It is therefore impossible to understand antitrust law merely by reading the applicable statutes. It is necessary to know the cases as well as their underlying reasoning, and it is equally necessary to have a thorough grasp of antitrust theory (antitrust economics), which is elaborated and debated by economists and law professors across the country, and which is often referred to expressly in the cases.

Why Antitrust Law Matters

Antitrust law matters to consumers and businesses that have been either harmed by anti-competitive abuses or accused of employing them.

An antitrust offender sued in civil court risks paying treble damages (three times the value of proven harm caused by its offense), as well attorney's fees and costs, which include high fees for expensive experts. The alleged offender might also be ordered to curtail certain business practices during the lawsuit, then ordered to do so permanently if the suspended practices are deemed at trial to be antitrust violations. This is usually costly to the alleged offender, who must abruptly change its way of doing business while forfeiting a profitable commercial practice, and at the same time it suffers hurtful bad press (e.g., "Microsoft was today ordered to stop bundling its internet browser with its Windows operating system, since this practice will likely be shown to be harmful and unfair to purchasers of computing equipment").

In really egregious cases, the alleged offender might find itself the subject of a criminal prosecution, and its officers and directors may be personally indicted, tried, and convicted. Criminal prosecutions of antitrust law are done by the Antitrust Division of the United States Department of Justice ("DOJ"), as well as by state prosecutors. The FTC, as noted above, has strong regulatory powers and can readily refer matters to the DOJ or act in concert with it.

If a criminal conviction is obtained, jail is possible for directors and officers, steep fines are certain, and a ruinous succession of civil cases from competitors and customers becomes inevitable. In many instances, a criminal conviction for antitrust violations foretells the demise of the company that receives it. Criminal prosecutions tend to be undertaken only where the wrongdoing is either brazen or outrageous, or where the harm caused by the wrongdoing is exceptional. Much depends also on the political climate (e.g., during the Reagan-Bush years there were far fewer criminal prosecutions than there have been since President Clinton took office).

Antitrust Offenses

What exactly are antitrust offenses? It might be said that an antitrust offense is a tort committed against a market rather than against a particular business or person in the market. The classic antitrust offenses are (1) the obtaining of monopoly power by improper means, (2) the preservation or enlargement of monopoly power by improper means, (3) the abuse of monopoly power in one market to obtain monopoly power in another market, and (4) conspiring to sabotage "competition on the merits" by means of exclusionary or predatory "restraints of trade".

A monopoly is not necessarily evil, nor does its mere existence does it violate antitrust laws. Monopolies are deemed necessary or even useful in some markets: For example, it was thought until recently that electrical power could be best furnished by local monopolies, none of whom ever competed against the others (this circumstance finally might change because of recent developments in the relevant technologies).

Nevertheless, it is always a violation of antitrust law to use anti-competitive or predatory practices to acquire monopoly power in a particular market, or to use such methods to preserve or enlarge monopoly power, or to abuse monopoly power in one market in effort to obtain a monopoly in another market. This is the bread and butter of antitrust law.

Moreover, two competitors in a particular marketplace cannot usually merge together or otherwise have a fusion of their businesses if by the fusion they acquire either monopoly power or an overly dominant position that is deemed harmful to consumers. The question is typically decided by the FTC, to which the would-be business couple applies for approval in advance of the merger or acquisition.

Antitrust laws also forbid commercial conspiracies whose purpose is to impose improper restraints of trade. For example, competitors may not agree to fix the prices that they charge for their goods or service, nor may they pre-arrange a bidding process for a particular contract, nor may they gerrymander the market for their wares (horizontal market allocation). There are many other such practices which, if undertaken by two or more entities, are deemed to be unacceptable restraints upon trade, for which civil and sometimes criminal penalties are deemed appropriate.

The Origins of Antitrust Law, Briefly Stated

Antitrust law makes more sense if you have some understanding of its origins. What, for example, does "antitrust" mean? As with everything else, it all makes much more sense if you understand the first principles.

Antitrust law is really the law of competition. The term "antitrust" merely refers to the enormous "trusts" set up in the U.S. in the late 1800s by the infamous "robber baron" magnates. These trusts directly and indirectly controlled entire markets for petroleum production and transport, steel production, banking, railroad transport, and various related industries and services. These trusts imposed a stranglehold on competition in the different markets in which they operated and threatened to undermine the charter principles of free-market economics. If unchecked, they would have resulted in a society living at the mercy of a handful of monopolies and oligopolies that completely dominated all the key sectors of the economy. By their immense concentration of monopoly power and market power, they would have been able to raise prices, restrict output, and exclude competitors with impunity. The "antitrust laws" were enacted to redress this evil and to establish the law of competition in the United States.

Defending competition on the merits is the true aim of antitrust law. If a competitor merely employs a "sharp practice" that is harmful to a rival or its customer, the antitrust laws offer no relief. The antitrust laws take effect only where the predatory competitor excludes or undermines its rivals so as to undermine competition on the merits in a given market: Where this occurs, the predatory competitor has sabotaged competition precisely so that it can sell its goods or services at higher prices without fear that its customers can seek relief by purchasing substitute goods or services from a rival. Protecting "competition on the merits" and stopping predatory price abuses that cannot be redressed by ordinary competitive processes -- these are the proper aims of antitrust law, though not always the result.

The antitrust laws aim to accomplish these purposes, and to this end they are worded in remarkably open-ended language, so as to anticipate the sophistication and cunning of the predatory firms, which, if given the tiniest loophole, would exploit it perfectly.

The Inescapable Injustice of Antitrust Law

The courts have tried for nearly a century to give meaning to the broad standards enunciated in the principal antitrust statutes, and not surprisingly they have often contradicted one another in their rulings: Some courts have been disposed to find antitrust violations in every corner, while others have refused to see it in even the most brazen instances of predatory exclusions and anti-competitive conspiracies. It sometimes seems as though the many decisions, if considered as a whole, appear to be an unwieldy, incoherent hodge-podge of ad hoc improvisations that hopelessly contradict one another, if not in specific outcomes then in their underlying reasoning.

If laws should be generally understood in advance by the population whom they are supposed to govern, then the antitrust laws have largely been a failure, since their meaning and practical effect become clear only after the courts develop specific applications of the broad standards given in the underlying statutes -- which they do only when called upon by an aggrieved private litigant or a government prosecutor.

Thus one competitor might object to the business practices of its more successful rival. It then brings an antitrust suit, or complains about the matter to the DOJ. A civil antitrust case is brought, or, in some instances, a criminal proceeding is initiated. The court, having been thus summoned, now decides whether or not there has been an antitrust violation -- and this it does by applying the general formulas of the statutes to the specific business practices under challenge. Whether or not the practice is improper becomes known only after the court has ruled. This is inevitably followed by appeals made by the losing party, and then by further appeal. The entire process can last for years.

This is a very curious brand of law, and one that appears to fail the first test of all laws: Is it generally understood to forbid certain conduct in advance of the fact, or is its application unpredictable, unknowable, seemingly arbitrary, and therefore disruptive?

Even so, firms that set out to destroy competition on the merits tend to be skillful, subtle, and infinitely more pernicious to society than mere ordinary tortfeasors. The antitrust laws offer meaningful redress, sufficient incentives to private litigants to enforce the laws of competition, and real deterrence to those firms that might otherwise be inclined to seek profits by crushing competitive conditions in the markets in which they operate. The antitrust laws must be stated in general terms, or else they would be successfully eluded. The evil of these laws is therefore a necessary one in this author's opinion.

The Injustice Is Necessary

It is impossible to foresee every sort of business arrangement that might constitute an unfair practice that impedes the marketplace, and it is therefore impossible to enumerate the forbidden practices. Thus the antitrust laws limit themselves to the statement of general principles, and leave to the courts and regulatory authorities the difficult task of applying these principles to contested business practices. In effect, the antitrust statutes are a "constitution of the marketplace", setting forth the broad principles of how markets should operate. The civil and criminal penalties, including the onerous burden of treble damages, seem necessary because they deter anti-competitive behavior, and also because they give strong incentive to victims to come forward to complain of antitrust misconduct, which never could be adequately policed by the DOJ, the FTC, or state prosecutors without the active cooperation of the aggrieved competitors or customers whom the offender has run out of business or gouged into paying monopoly prices.

Litigating An Antitrust Case

The devil truly does lie in the details, and it cannot be emphasized enough how important it is to pay close attention to every item of communication sent or received by the concerned parties.

But none of this Spartan attention matters a whit, unless the person paying it has a well-formed theory of the case that he has set out to prove. In antitrust litigation, as in all other kinds of trial work, he who tells the better story wins the case. But the story will ring false, unless it is backed up by the facts, which can be culled only by a painstaking review of everything in sight and everything that is not in sight as well. You have to know what to ask for, whom to ask, what to look for once you have the requested materials, and how to organize it all.

Antitrust cases are won by perseverance, determination, unflagging attention to the trifles, and all of this in service to proving a larger theory of the case that will convince both judge and jury.

Article by William Markham, San Diego Attorney. © 2000.