

ANTITRUST LAW: CASE DEVELOPMENT AND LITIGATION STRATEGY

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NYU School of Law
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Mondays, 4:10-6:00 pm
FH 316
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Note: There is no class on Monday, February 19. Rather, class will meet on Tuesday (a legislative Monday) at the usual time and the usual place. Enjoy the three-day holiday.

Week 5: The Private Right of Action (Unit 4)

This week we will start the unit on the private antitrust actions. We will organize our discussion around the *Boyle* complaint, so be sure to bring a copy to class.

Half of the reading was assigned last week. Should you review these materials. Here is a copy of the applicable reading guidance:

After a brief discussion of the role of private litigation in the scheme of U.S. antitrust enforcement and the elements of a private cause of action, we will turn to the high-level requirements for a bringing a private cause of action. These include—

1. A *private right of action*, which enables the plaintiff to bring the case to the court for adjudication (Clayton Act §§ 4(a), 16).
2. *Subject matter jurisdiction*, which gives the court the power to adjudicate the subject matter of the dispute (28 U.S.C. §§ 1331, 1337).
3. *Personal jurisdiction* over the defendant, which empowers the adjudicating court to bind the defendant to the judgment (28 U.S.C. § 1391; Clayton Act §§ 4(a), 16, 22).¹
4. The rules of *venue*, which determine in which federal district court (forum) the case may be brought and adjudicated.

The Unit 4 class notes through slide 37 will be helpful in guiding you through these introductory topics.

Commencing civil actions. With these broad requirements of subject matter jurisdiction, private right of action, personal jurisdiction, and venue in mind, we will dissect the *Boyle* complaint (Unit 4 pp. 8-16). *Boyle* is the first of the follow-on private actions against the members of the Indianapolis ready-mix price-fixing conspiracy. It represents a standard form of a garden variety private antitrust price-fixing complaint for treble damages and injunctive relief. We will organize much of the class in Weeks 4-6 around the *Boyle* complaint, so read it carefully (and bring a copy to class). That said, do not concern yourself with the paragraphs containing the class action allegations, since we will cover those in detail when we start the class action unit in Week 7.

As you read the *Boyle* complaint, ask yourself paragraph by paragraph (or sentence by sentence) why the plaintiffs included it. Review Federal Rules of Civil Procedure (FRCP) 2, 3, 7, 8, 10, and 11 to get a sense of the general rules of pleading (pp. 17-21). Pay particular attention to Rule 11—it plays a critical role in all federal private actions.

The private cause of action. Paragraph 4 of the *Boyle* complaint invokes the Clayton Act's private cause of action for treble damages under Section 4 and for injunctive relief under Section 16. Read the private cause of action section in the required reading (pp. 23-40) and the associated class notes (slides 4-11). This section will also introduce the three key features of private antitrust treble damages litigation: treble damages, joint and several liability, and no right of contribution.

¹ As a quick aside, personal jurisdiction over the plaintiff is essentially automatic, since the plaintiff's appearance in court upon the filing of its complaint gives the court jurisdiction over the plaintiff.

Subject matter jurisdiction and the reach of the Sherman Act. Paragraph 5 of the *Boyle* complaint alleges the grounds for the court’s subject matter jurisdiction. We are going to look at subject matter jurisdiction broadly in three parts:

1. The constitutional authority for the federal government to regulate anticompetitive conduct through the antitrust laws.
2. The constitutional authority for the federal courts to adjudicate generally cases arising under the federal antitrust laws (this is what Paragraph 5 addresses).
3. The constitutional authority of a court to adjudicate the particular antitrust case before it.

These topics are addressed in the sections on subject matter jurisdiction and the modern reach of the Sherman Act in the required reading (pp. 42-50) and the associated class notes (slides 12-21). When reading Paragraph 5 of the complaint, be sure that you know the role of each of the four statutory provisions cited in the paragraph.

Also, we will briefly discuss the almost unintelligible Section 6a of the Sherman Act, better known as the Foreign Trade Antitrust Improvements Act or FTAIA. The early view of the courts was that the FTAIA was a subject matter restriction on the reach of the Sherman Act, but the modern view is that the FTAIA does not go to subject matter jurisdiction but rather sets out elements of the prima facie case. (See if you can see why this difference matters.) Good luck trying to parse the FTAIA. It is some of the worse drafted legislative language I have ever seen. You can find it on page 51 of the required reading.² Hopefully, the notes in the reading materials (pp. 51-54) will be helpful.

Personal jurisdiction and venue. Personal is not explicitly addressed in this section of the *Boyle* complaint, but Paragraph 6 of the complaint covers the closely related topic of venue. We will talk about both personal jurisdiction and venue in the context of Paragraph 6. Try to understand the role of each of the cited statutes in Paragraph 6. My suggestion is to skim the statutes (pp. 56-58), then read the class notes on slides 22-37 carefully, and then go back and read the statutes again. After that, read the *Microsemi* case (pp. 59-70), which hopefully will help pull things together. This is a complicated area of the law, especially for those who have not studied personal jurisdiction and venue in civil procedure or federal courts. But do not obsess over these materials—we will cover what you need to know in class.

Constitutional and prudential standing limitations. Paragraphs 8-10 identify the parties in this litigation. We are going to use these paragraphs as the point of departure for discussing constitutional and prudential standing limitations.

The “case or controversy” requirement of Article III of the Constitution should be familiar to most of you.

Prudential standing is a judicial construct that limits the domain of persons that are entitled to invoke a private cause of action to those who Congress intended to protect. In antitrust law, this is commonly called “antitrust standing,” and includes the requirement that a plaintiff sustain “antitrust injury” (or be at least threatened with antitrust injury in an injunctive action) and be a “proper party” to bring the action. It also precludes indirect purchasers from bringing treble damage cases, although there are a few, rarely invoked exceptions. I suspect that you at least touched upon prudential standing (although you may not have used that term) as it is applied to antitrust causes of action in the survey course. If so, this will all be old news. If not, it is important to know.

The introduction in the required reading (pp. 72-83) will give you the basics on both constitutional and prudential standing limitations. The propositions that come out of the cases are important, so pay attention to the chart on p. 83 in the reading and slides 38-44 in the class notes. The seminal cases themselves are complicated and confusing, so you only need to skim the summaries in the required reading (pp. 84-99 and 110-115). Read with somewhat more care *Salveson* (pp. 100-109) and *Plasma-Derivative Protein Therapies* (pp. 116-123), two recent cases that should help clarify the application of prudential standing in practice.

² For anyone who is interested, Unit 26 on AppliedAntitrust.com has more materials and cases on extraterritoriality.

As always, send me an email if you have any questions.

Dale