

ANTITRUST LAW: CASE DEVELOPMENT AND LITIGATION STRATEGY

LAWG/J-1396-07
Georgetown University Law Center
Spring 2017

Tuesdays, 5:45 pm - 7:45 pm
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Week 5: The Private Right of Action (Unit 4)

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

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.¹ 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

¹ For anyone who is interested, Unit 26 on AppliedAntitrust.com has more materials and cases on extraterritoriality.

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.

Trade and commerce. Paragraph 11 of the *Boyle* complaint alleges, among other things, that the business activities of the conspirators substantially affected interstate trade and commerce. We touched this earlier when we discussed subject matter jurisdiction. The federal power to regulate anticompetitive activity comes from the Commerce Clause of the U.S. Constitution. As a result, the restrictions that the Sherman Act reaches must involve trade or commerce. While once this was a severe limitation on the reach of the Sherman Act, under current Supreme Court jurisprudence almost all commercial activity is subject to federal regulation.

Class action allegations. Paragraphs 12 through 19 of the *Boyle* complaint contains allegations to predicate bringing the complaint as a representative or class action. You can skip this section for now. We will examine class actions in some detail in Weeks 7 and 8.

Violations alleged and effects. Paragraphs 20 through 25 of the *Boyle* complaint are straightforward and we are not going to spend any time on them. Here is a question for you to consider: If the essence of a Section 1 is the conspiracy (the agreement) and not the acts in furtherance of it, why did Boyle include Paragraph 22?

Collateral estoppel. Paragraph 23 alleges that on June 29, 2005, the DOJ announced that IMI had agreed to plead guilty and pay a \$29.2 million criminal fine for conspiring to fix the price of ready-mixed concrete in violation of the Sherman Act. What are two possible reasons for Boyle including Paragraph 23? One reason is undoubtedly offensive collateral estoppel. Collateral estoppel, perhaps better known today as *issue preclusion*, prevents a party from relitigating in a new litigation an issue of law or fact that had been decided against that party in a prior litigation. Say plaintiff A and defendant B were involved in a prior litigation in which an issue was decided against B. Later, A and B are involved in a new litigation (it does not matter who sues whom in the second litigation) involving a new claim in which the same issue is raised. Under collateral estoppel, A can assert that B is precluded from relitigating the issue in the new action and is stuck with the resolution of that issue in the prior litigation. This is called *defensive collateral estoppel*. But say that the new litigation involves plaintiff C—who was not a party to the prior litigation—and defendant B. Can C assert *offensive collateral estoppel* against B to preclude B from relitigating an issue—say, B's participation in a price-fixing conspiracy—that was decided against B in the prior case? First read the class notes (slides 45-56), which give a quick overview of the statutory and common law doctrines of offensive collateral estoppel used in antitrust cases. Then skim the reading materials (pp. 125-145) for Clayton Act § 5(a) and two opinions applying the doctrines in the *Microsoft* case.

Statute of limitations/tolling doctrines. I strongly suspect that we will not make it this far, but if you want to read ahead we will use Paragraphs 26 through 29 as our point of departure to discuss the antitrust statute of limitations and two of the three major doctrines for tolling (suspending) the running of the statute of limitations period.² The Clayton Act imposes a four-year statute of limitations on private treble damage actions. Consistent with tradition, there is no statute of limitations for private injunctive actions, which instead use the equity doctrine of laches. While in theory laches is quite flexible, in practice courts tend to use four years as a cut-off point to make things consistent with the limitation on treble damage actions. The statute of limitations is subject to equitable tolling, the most important of which is the doctrine of fraudulent concealment. Section 5(i) of the Clayton Act also tolls the running of the statute of limitations

² The third tolling doctrine relates to class actions, which we will cover in Unit 5.

during the pendency of a related government action plus one additional year. Slides 57-63 should give you a good summary of the area and the required reading contains the statute and a quick application (pp. 147-155).

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

Dale