

ANTITRUST LAW: CASE DEVELOPMENT AND LITIGATION STRATEGY

LAW 1396
Georgetown University Law Center
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Tuesdays, 3:30 pm - 5:30 pm
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Class 6: The Private Cause of Action (Unit 3)

We will use the *Boyle* complaint to organize our discussion, so be sure to bring a copy to class.

Commencing civil actions. *Boyle* is the first of many follow-on private actions against the members of the Indianapolis ready-mix price-fixing conspiracy. It illustrates a garden-variety private antitrust price-fixing complaint seeking treble damages and injunctive relief. Please read it carefully (and bring a copy to class). That said, do not concern yourself with the paragraphs containing the class action allegations, as we will cover them in detail when we start the class action unit in Week 9.

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, and we will discuss it in some detail in class.

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 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 3-15). This section will also introduce the three key features of private antitrust treble damages litigation: treble damages, joint and several liability, and the absence of a right of contribution.

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 subject matter jurisdiction section in the reading materials (pp. 42-51) and the associated class notes (slides 16-26). When reading Paragraph 5 of the complaint, be sure you know the role of each of the four statutory provisions cited in the paragraph.

The FTAIA and Noerr-Pennington doctrine. The Foreign Trade Antitrust Improvements Act and the Noerr-Pennington doctrine, while not part of the law of subject matter jurisdiction, are tangentially related in that they address the substantive reach of the antitrust laws. You should know that these areas of the law exist, but you need only skim the reading materials on these topics.

FTAIA. You should know that the almost unintelligible Section 6a of the Sherman Act, better known as the Foreign Trade Antitrust Improvements Act (FTAIA) exists (p. 52).¹ Enacted in 1982, the FTAIA limits the extraterritorial reach of the Sherman Act by providing that the Act does not apply to conduct involving trade or commerce with foreign nations unless that conduct (1) has a

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

“direct, substantial, and reasonably foreseeable effect” on domestic commerce, import commerce, or certain export commerce, and (2) that effect gives rise to the antitrust claim. In other words, the statute creates a general exclusion of foreign commercial activity from Sherman Act coverage and then carves out a narrow exception when the foreign conduct spills over into the U.S. market in a sufficiently significant way. Courts and commentators have struggled with the statute’s structure and language. Hopefully, the notes in the required reading will be helpful (pp. 52-55).

The Noerr-Pennington doctrine. The *Noerr-Pennington* doctrine holds that private parties who petition the government for action favorable to them are immune from antitrust liability, even if the desired government action would restrain or eliminate competition. In *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127 (1961), the defendant railroads funded a publicity campaign to persuade the legislature to adopt policies harmful to the trucking industry (see pp. 56-58). The Court held that efforts to influence legislation cannot violate the Sherman Act, grounding its reasoning in the First Amendment right to petition. In *United Mine Workers of America v. Pennington*, 381 U.S. 657 (1965), the Court extended this immunity to efforts directed at executive officials, holding that a campaign to persuade the Secretary of Labor to set wage levels that would disadvantage smaller competitors was likewise protected (pp. 59-63). Together, these cases establish that genuine petitioning of any branch of government lies beyond antitrust reach. This rule was later qualified by the “sham” exception in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508 (1972) (not in the reading materials). Under the sham exception, *Noerr-Pennington* immunity is forfeited when a party’s petitioning activity is not genuinely aimed at obtaining a favorable government outcome but is instead a mere pretext to impose the costs and burdens of the governmental process itself on a competitor. The usual examples are the filing of baseless lawsuits or regulatory proceedings with no realistic expectation of success, solely to harass or delay a rival.

Personal jurisdiction and venue. Personal jurisdiction is not explicitly addressed in 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. I suggest you skim the statutes (pp. 65-67), read the class notes carefully (slides 27-44), and then read the statutes again. After that, read the *Microsemi* case (pp. 68-79), 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.

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