

UNIVERSITY OF CINCINNATI COLLEGE OF LAW

ANTITRUST LAW (LASSITER) WINTER/SPRING 2011

Professor: Christo Lassiter Office: Rm 403 Telephone: 556-0096. Hours: After class

Secretary: Toni McGuire Office: Rm 400 Telephone: 556-0090.

Required reading: (Copies on reserve).

1. Daniel J. Gifford & Leo J. Raskind, *FEDERAL ANTITRUST LAW: CASES AND MATERIALS*, (2nd ed. 2002) [hereinafter GIFFORD & RASKIND] (assignments indicated below).
2. Handouts #1-40.

Recommended reading:

1. Herbert Hovenkamp, *FEDERAL ANTITRUST POLICY*, (1994) [hereinafter HOVENKAMP].

Class room: Rm 204. Time: TWR 1110-1205.

Course Objective: The purpose of this course is to engaged students in a disciplined inquiry of the role of the market place in maximizing consumer welfare and producer welfare from commerce. “The Antitrust laws. . . are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free enterprise system as the Bill of Rights is to the protection of our fundamental freedoms.” *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610 (1972)(Marshall, J., majority opinion). The fundamental goal of antitrust law is to promote competition in the market place for goods and services. The economic rationale for relying on competition is that competition maximizes consumer welfare in the allocation of precious resources (*i.e.*, allocative efficiency). The political rationale is that competition avoids human bias and minimizes concentration of economic power and its abuses. The social rationale is that competition promotes the virtues of character upon which the human species depends for its betterment, indeed survival. Somewhat surprisingly, the present day influence of economic analysis in antitrust law is rather late in coming. Thus, as a matter of historical development, we will spend a good deal of time on the social and political underpinnings which shaped antitrust law. However, our primary engine of analysis in this course will be economics. The statutes studied in this course are: The Sherman Antitrust Act §1 (combinations in restraint of trade); and §2 (monopolies) [15 U.S.C.A. §§1-11, generally]; the Clayton Act §2 (price discrimination) as amended by the Robinson-Patman Act of 1936; §3 (tying and exclusive dealing contracts); §7 (stock acquisitions) as amended by the Celler-Kefauver Act of 1950; §8 (interlocking directorates) [15 U.S.C.A. §§12-27, generally]; the Federal Trade Commission Act §5 (unfair competition), [15 U.S.C. §41-58, generally]. In the final analysis, we critically examine the objectives and the various analyzes employed by enforcement agencies, courts, and commentators concerned with implementing a federal policy of supporting competitive markets.

Class Attendance: Prompt class attendance is mandatory. Students seeking an excused absence may do so by submitting a signed, typewritten/e-mail request to me in advance of class, circumstances permitting, or after class otherwise. The sanction for absences and tardiness range from grade reduction to exam disqualification. Hand written notes may compromise anonymity in exam grading and therefore will not be accepted.

Teaching Methodology: Lecture to be supplemented by the discussion method.

Exam: Closed book Date: TBA Time: TBA.

Structure of exam: Economic theory and antitrust doctrinal questions: 60 minutes; Essay problem--competitive market: 60 minutes. Essay problem--monopoly market: 60 minutes.

Exam Objective: The pedagogical aim of my examination is to generate a dialogue between you and me on questions of federal antitrust law with particular reference to economic analysis. To the extent that your end of the dialogue demonstrates an appreciation of antitrust law and how to address them using an acceptable level of legal analysis based upon American trends in statutory law and case law, you will score points. Exam performance will be measured by the extent to which you demonstrate an advance on antitrust jurisprudence beyond that of a hypothetical reasonable person positioned to sit for the exam without benefit of this course, *i.e.*, your client. Thus you should write your exam answers with the same realism and insight that you would expect to use in advising a client.

Grades: There will be a series of problem sets that offered to assist students in upward grading and to otherwise lessen the anxiety over a one-shot final. Grades otherwise will be based on the final examination. Outstanding class participation and attendance may be taken into account where exam scores fall significantly below demonstrated performance in class. I will post final grades no later than 31 May 2011. In addition, I will post a comprehensive diagnostic analysis of the exam, which will be available at Toni's desk. The exam memorandum will contain a statistical analysis of the class scoring, a discussion of general flaws in examsmanship, and my model answers. The best student answers may be included.

Class Assignments:

1. 18 Jan **PART ONE: INTRODUCTION TO ANTITRUST LAW**

I. The Antitrust Statutes and Enforcement Agencies

- A. Section 1 of the Sherman Antitrust Act.
- B. Section 2 of the Sherman Antitrust Act.
- C. Section 3 Clayton Act.
- D. Section 7 and 7A of the Clayton Act.
- E. Section 7(a) of the Clayton Act (Hart-Scott-Rodino Act).
- F. Section 8 of the Clayton Act.
- G. Federal Trade Commission Act.

GIFFORD & RASKIND at 1-40. Handout #01: Selected Federal Antitrust Statutes.

2. 19 Jan II. Common Law Restraint of Trade

- A. The Case of Monopolies.
- B. Imports.
- C. Covenants Not to Compete.
- D. Conspiracy.
- E. Limiting Corporate Powers.

Handout #02: Common Law Antecedents to the Sherman Antitrust Act; Handout #03: Covenants Not to Compete. Recommended reading: HOVENKAMP at 48-77; SCHERER at Ch. 1.

3. 20 Jan **No Class. Reschedule TBA.**

III Legislative History of the Sherman Antitrust Act and Related Acts

- A. Consumer Welfare and Economic Efficiency.
- B. Small Businesses.
- C. Deconcentration.
- D. Political Values.

Handout #04: Goals of Antitrust. Recommended reading: HOVENKAMP at 48-77; Scherer at Ch. 1.

Question: What are the modern goals of the antitrust statutes?

4. 25 Jan **PART TWO: DOCTRINAL DEVELOPMENT OF SUBSTANTIVE ANTITRUST LAW: *PER SE* ANALYSIS AND THE RULE OF REASON**

I. The Literalist Position

A. The Railroad Cases.

1. *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290 (1897)(Peckham)(Originally, the Supreme Court construed the SAT's prohibition of "every" combination in restraint of trade literally).
2. *United States v. Joint Traffic Ass'n*, 171 U.S. 505 (1898) reaffirmed *Trans-Missouri* (Peckham).

B. Price Fixing in Industries With Large Fixed Costs.

Handout #05: "Ruinous Competition" and the Rail Industry.

5. 26 Jan II. The Rule of Reason

A. Review.

B. Case Development.

1. *United States v. Addyston Pipe & Steel Co.* 85 F. 271 CA6 1898 (Taft), *affirmed, with modification of the decree*, 175 U.S. 211 (1899)(ancillary restraints).
2. *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911)(White, C.J.)(rule of reason).
3. *United States v. Trenton Potteries Co.*, 273 U.S. 392 (1927)(Stone)(affirmance of the rule of reason in price fixing).

GIFFORD & RASKIND at 41-45. Christo Lassiter, *A Call to the Arts*:

Exploring New Means of Jurisprudential Expression, 14 CARDOZO JOURNAL OF ART AND ENTERTAINMENT LAW, 387 (1996).

Recommended reading for the serious students of antitrust law: *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1 (1911). This case also sets out the intellectual formulary of antitrust law, namely, the "rule of reason" and "*per se*" analysis. *Standard Oil of New Jersey* is a quintessential antitrust case. It is complicated and involves issues of statutory interpretation, economics, sociology, politics, common law history and constitutional roles of the three branches of government. The development of Standard Oil involved extensive government review and several Court rulings. For those interested in antitrust as a career, take a stab at reading the whole case. It is an excellent example of what a typical antitrust case looks like.

6. 27 Jan III. The Deviant Strand

GIFFORD & RASKIND at 58-64 (Discussion of *Chicago Board of Trade* and *Appalachian Coals*). Handout #06: *Chicago Board of Trade*: Paradigm Lost.

7 01 Feb IV. The *Per Se* Rule

A. Review.

B. Development of the *Per Se* Rule.

1. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 (1940).
2. *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958).
3. *NCAA v. Board of Regents*, 468 U.S. 85, 104, n. 26 (1984).
4. *Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984)(O'Connor, J., concurring).

GIFFORD & RASKIND at 46-58. Handout #07: "Distress Oil" and

Socony-Vacuum (under construction).

8. 02 Feb V. The Rule of Reason Properly Understood. . .And Misunderstood

A. The Rule of Reason Properly Understood..

1. *Broadcast Music, Inc. v. Columbia Broadcasting System, Inc.*, 441 U.S. 1 (1979) (White, J.)(economies of integration is a pro-competitive effect, which justifies the anti-competitive effect of a joint licensing agreement).

Handout #08: *BMI* and the Economics from Partial Integration (under construction).

B. And Misunderstood (Or Wither the Deviant Strand?).

1. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, (1975)(Burger, C.J.)(county bar association fixed prices unlawfully by suggesting fees with intimation that undercutting would be grounds for discipline).
2. *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978)(Stevens, J.)(Court will not entertain argument that competition itself is unreasonable).
3. *Arizona v. Maricopa County Medical Society*, 457 U.S. 332 (1982) (Stevens, J.)(max fee schedule).
4. *National Collegiate Athletic Association v. Board of Regents of the University of Oklahoma*, 468 U.S. 85, 104, n. 26 (1984)(White, J.)(*"there is often no bright line separating per se from Rule of Reason analysis"*)¹

¹Some commentators have argued that the Supreme Court in the last several years has been moving toward a "middle-tier" or "quick look" analysis, involving rule-of-reason analysis which does not necessarily require detailed market analysis or proof of actual anticompetitive effect and *per se* rules which require analysis of market conditions to justify a presumption of anticompetitive effect. See, e.g., Pasahow, *"Erosion of The Per Se Rule: Trend in the Law of Horizontal Restraints,"* 2 Antitrust 22 (Fall, 1987); Goldschmid, H., *"Horizontal Restraints in Antitrust: Current Treatment and Future Needs,"* 75 Cal. L. Rev. 925 (1987). This "new

5. *F.T.C. v. Superior Court Trial Lawyers Ass'n.*, 493 U.S. 411 (1990) (beneficial effects on improved criminal representation caused by group boycott irrelevant).
6. *United States v. Massachusetts Institute of Technology*, 805 F. Supp. 288 (E.D. PA. 1992)(Bechtel, J.)(settlement struck down collusion among academically elite schools on scholarship awards).
7. *Massachusetts School of Law at Andover, Inc. v. American Bar Association* (E.D. Pa. 1994)(settlement struck down collusion among law professors who held accreditation hostage to salary hikes and job perks).
8. *California Dental Association v. FTC*, 526 U.S. 756 (1999).

GIFFORD & RASKIND at 64-104. Handout #08: BMI and the Economies from Partial Integration (under construction).

9. 03 Feb VI. Review of Antitrust Doctrinal Analysis

Read: Handout #09: *Per Se* Analysis Compared to The Rule of Reason.

10. 08 Feb **PART THREE: BASIC ECONOMIC ANALYSIS**

- I. Basic Economic Concepts and Assumptions.

Read Handout #10: Basic Economic Concepts and Assumptions.

analysis" has been expressed most explicitly in horizontal restraint cases, notably *NCAA and Vogel v. American Society of Appraisers*, 744 F.2d 598 (7th Cir. 1984). *See also Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 594-5 (1st Cir. 1993). *But see Jefferson Parish Hospital District No. 2 v. Hyde*, 466 U.S. 2 (1984)(O'Connor), which emphasized that a concrete showing of market power, forcing the foreclosure of a substantial volume of commerce, must be made before a tying arrangement is condemned under a "*per se*" analysis. In her concurring opinion, Justice O'Connor commented that the majority's required showing was tantamount to a rule of reason analysis. *Jefferson Parish*, 466 U.S. at 34.

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| 11. | 09 Feb | II. | The Laws of Demand |
| | | | Read Handout #11: Economics 101: The Laws of Demand. |
| 12. | 10 Feb | III. | Competitive Equilibrium |
| | | | Read Handout #12:: Economics 101: Competitive Equilibrium. |
| 13. | 15 Feb | IV. | Monopoly Equilibrium |
| | | | Read Handout #13: Economics 101: Monopoly Equilibrium. |
| 14. | 16 Feb | V. | Market Definition and Price Elasticities and Cross-Elasticities |
| | | | Read Handout #14: Economics 101: Market Definition and Price Elasticities and Cross-Elasticities. |
| 15. | 17 Feb | VI. | Middlemen |
| | | | Read Handout #15: Economics 101: Middlemen. |
| 16 | 22 Feb | VII. | Market Failure |
| | | | Read Handout #16: Market Failure. |
| 17. | 23 Feb | VIII. | \$1000 Reward Offered. |
| | | | Read Handout #17: Economics 101: \$1000 Reward Offered. |
| 18 | 24 Feb | IX. | Proving the First Law of Demand |
| | | | Read Handout #18: The Island People Get a Boat; Handout #19: Political Values Expressed in the Market Place; Picking Winners; Handout #21:Catastrophic Prices. |

19. 1 Mar **PART FOUR: HORIZONTAL RESTRAINTS: COLLABORATION AMONG COMPETITORS**
- I. The Agreement Requirement
- A. Conspiracy.
- GIFFORD & RASKIND at 315-357.
20. 2 Mar B. Facilitating Practices.
1. Trade Associations and Data Dissemination.
2. Point-Base Pricing.
- GIFFORD & RASKIND at 357-372. Handout #22: The Agreement Requirement Under Sherman Antitrust Act §1.
21. 3 Mar II. Economic Analysis of Cartels
- A. Cartel Justifications.
- B. Cartel Performance, Practices, and Structure.
1. Conscious Parallelism.
2. Burdens of Proof and Economic Theories.
- GIFFORD & RASKIND at 373-390. Handout #23: Interdependent Conduct Under Section 1 of the Sherman Antitrust Act and Section 5 of the Federal Trade Commission Act.
22. 8 Mar III. Cartel Activities--*Per se* Rules
- A. Price Fixing.
- B. Supply Restrictions.
- C. Parallel Pricing.
- Parts I & II of Handout #24: Horizontal Restraints. Review GIFFORD & RASKIND at 46-104.
23. 9 Mar IV. Cartel Activities--Rule of Reason
- D. Joint Ventures.

Part III of Handout #24: Horizontal Restraints.

24. 10 Mar V. Cartel Activities Subject to Mixed Rules.
- A. Market Division.
- GIFFORD & RASKIND at 105-117.
- B. Concerted Refusals to Deal.
- GIFFORD & RASKIND at 117-53. Part IV of Handout #24: Horizontal Restraints.
25. 15 Mar .VI. Exceptions to Antitrust Collaboration
- A. Dealings with Self--Intra enterprise Doctrine.
- Handout #25: The Intra enterprise Doctrine.
- B. Dealings With Government--Exercising The Right to Petition Government.
- Handout #26: Dealings with Government.
26. 16 Mar C. Political Action.
- D. State Immunity Doctrine.
- Handout #27: Antitrust Immunity for Preemption By State Government.
- E. General Exemptions.
- Handout #28: General Exemptions in Substantive Antitrust Law.
27. 17 Mar Handout #28: Outline of Horizontal Restraints.
- 21-25 Mar **SPRING BREAK**

28. 29 Mar **PART FIVE: VERTICAL RESTRICTIONS AND THEIR DOCTRINAL DEVELOPMENT**
- I. Free Trade Doctrine
- A. *Per se* analysis of vertical RPMs.
 - B. Agency Exception to *Dr. Miles*: Consignment Contracts as a Means to Control Price.
 - C. Failure of Agreement Exception to *Dr. Miles*: Unilateral Refusal to Deal.
- GIFFORD & RASKIND at 155-199.
29. 30 Mar II. Free Rider Doctrine
- Handout #29: The Road From Free Trade to Free Rider Doctrine;
Review Handout #18: Middlemen
30. 31 Mar III. Free Trade vs. Free Rider Doctrine
- Handout #30: Resale Price Maintenance: Interbrand Procompetitive Effects vs. Intrabrand Anticompetitive Effects.
31. 05 Apr *Leegin Creative Leather products, Inc. V. PSKS, Inc.* 551 U.S. 877 (2007); *State Oil Co. V. Khan*, 522 U.S. 3 (1997); and *Business Electronics Corp. V. Sharp Electronics Corp.*, 485 U.S. 717 (1988).
32. 06 Apr IV. Vertical Restraints.
- A. Resale Price Maintenance.
 - B. Unilateral Refusals to Deal.
 - C. Territorial and Customer Restraints.
 - D. Dual Distribution Systems.
 - E. Dealer Termination.
- GIFFORD & RASKIND at 199-234. Handout #32: Outline of Vertical Restraints.

33. 07 Apr F. Exclusive Dealership.
Handout #33: Exclusive Dealing.
34. 08 Apr G. Tying Arrangements.
1. Package Licensing.
2. Full Line Forcing.
GIFFORD & RASKIND at 235-266. Handout #34: Tie-ins.
35. 12 Apr **Monopoly**
I. Introduction
II. Monopolistic Behavior
III. Monopoly Leveraging
GIFFORD & RASKIND at 391-436.
36. 13 Apr The Microsoft case.
Handout #50 Microsoft Presents a Macro-hard Problem.
37. 14 Apr IV. Predatory Pricing
GIFFORD & RASKIND at 509-544.
38. 19 Apr IV. Business Justification Defense
GIFFORD & RASKIND at 436-451.
V. Tying as Monopolization
GIFFORD & RASKIND at 451-480.
40. 20 Apr **Attempts to Monopolize**

- I. Origins and Contours of the Attempt Offense
GIFFORD & RASKIND at 481-485.
 - II. Modern Application of the Attempt Offense.
GIFFORD & RASKIND at 481-508.

- 41. 21 Apr Merger and Acquisitions
 - I. Economics of Mergers
 - II. After 1950 Mergers: Horizontal, Vertical and Conglomerate Mergers
GIFFORD & RASKIND at 545-561.

- 42. 26 Apr
 - III. After 1980: The Guidelines
GIFFORD & RASKIND at 565-605.

- 43. 27 Apr Price Discrimination and the Robinson-Patnam Act
 - I. Price Discrimination Provisions of Robinson-Patnam Act
 - II. Primary Line Discrimination Effects
 - III. Secondary Line Discrimination
 - IV. Price Discrimination Involving Brands or Labels
GIFFORD & RASKIND at 633-671.