

# Principles of Business Credit

Eighth Edition

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# STATUTES THAT CONTROL ANTITRUST ACTIVITIES

- **The Sherman Antitrust Act of 1890**
  - **Prohibits contracts, combinations and conspiracies in restraint of trade in interstate commerce or with foreign nations.**
  - **Felony to conspire to *restrain trade*; or to *monopolize* (or attempt to monopolize).**

# **SHERMAN ANTITRUST ACT OF 1890**

- **Created to break up monopolies by corporate giants, including railroads and banks**
- **Created to control unfair trade practices and price fixing**
- **Created to preserve freedom of trade**
- **Created to alleviate negative effects on small businesses**

# **PRICE FIXING (SHERMAN ANTITRUST ACT)**

- **Definition (per the FTC)**
  - **An agreement, written, verbal or implied (express or implied) among competitors that raises, lowers, or stabilizes prices or competitive terms**

# CREDIT TERMS = PRICE

## ➤ Catalano Inc. v Target Sales (Supreme Court 1980)

**“Extending interest-free credit for a period of time is equivalent to giving a discount equal to the value of the use of the purchase price for that period of time. Thus, credit terms must be characterized as an inseparable part of the price.”**

# **RESTRAINT OF TRADE**

## **(Unfair Competition, Price Fixing, Group Boycott)**

- **“Restraint of trade” = unreasonable**
  - **per se unreasonable (did the incident occur?); or**
  - **in violation of the “rule of reason” (judged by actual or potential effect on competitive marketplace).**

# **“PER SE” UNREASONABLE**

- **Blatant agreement to fix prices**
- **Clear agreement to divide markets**
- **Agreement to rig bids**

## RESTRAINT OF TRADE (cont'd)

- “Combination/Conspiracy” – 4 elements:
  1. Knowledge by all parties
  2. Common purpose
  3. *Actual* restraint, not merely *facilitating*
  4. Intent to restrain trade
  
- “Conspiracy” = unity of purpose, common design, meeting of minds re: unlawful purpose



# PRICE FIXING ISSUES FOR CREDIT GRANTORS

- Discussion *beyond* a “mere announcement”
  - Agreement to *maintain prices*, with an enforcement mechanism (manufacturers/distributors.)
  - Agreement to fix or set *payment terms*

# **BID RIGGING**

- **Bids manipulated so one competitor is given an unfair advantage over others**
- **Example: trading favors with a competitor in one area or deal, in exchange for reciprocal consideration in a later situation**

# GROUP BOYCOTTING

- Concept of *sufficient market power*
- Hallmarks of illegal group boycott:
  1. Denial of access to a competitively useful commodity or service
  2. *Collective* refusal to deal
    - An involuntary petition in bankruptcy may be considered a group boycott
- Group boycotting can exist even through action of only one party

# STATUTES (cont'd)

- **The Clayton Act of 1914**
  - Passed to “correct” defects in Sherman Act
  - Unlawful to enter into any of several specified types of prohibited transactions whose purpose or effect would be to restrain trade or injure a competitor
  - Governs mergers and acquisitions

# THE CLAYTON ACT OF 1914

- Unlawful to enter into
  - Leases or sales requiring lessee or purchaser to refrain from dealing in the goods of a competitor
  - Exclusive dealing arrangements
  - Tying arrangements
    - An agreement by a party to sell one product but only on the condition that the buyer also purchases a different (tied) product
      - E.g. “you can buy my refrigerators but only if you also buy my stoves”

# **ROBINSON PATMAN ACT (1936)**

- **The Robinson-Patman Act was designed to prevent discriminatory practices adversely affecting free competitive enterprise, to preserve competition generally, and to protect small businesses which are usually unable to buy in quantity against large competitors**
- **Equally unlawful for any person engaged in commerce to “knowingly induce or receive a discrimination in price”**

# ROBINSON PATMAN ACT (1936)

- The Robinson-Patman Act of 1936 makes it
  - Unlawful to “discriminate in price between different purchasers of commodities of like grade and quality” ... where the effect of such discrimination may be substantially
    - To lessen competition – or
    - Tend to create a monopoly – or
    - To injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with the customers of either of them

# **PRICE DISCRIMINATION UNDER THE ROBINSON PATMAN ACT**

- **No necessity for agreement, combination, association or conspiracy – only needs one entity**
- **At least two transactions must have occurred**
- **Price Discrimination includes:**
  - **Different price to different purchasers of commodities**
  - **Differences in terms and conditions of sale**
  - **Preferential credit terms [Credit Terms Equals Price]**



# **PRICE DISCRIMINATION UNDER THE ROBINSON PATMAN ACT**

- **Only applicable to sale of tangible goods**
- **Not applicable to services or other intangible items**
- **Not applicable to transportation or broadcast since neither transportation nor broadcast services are tangible goods and therefore not commodities**

# **NOT PROHIBITED UNDER THE ROBINSON PATMAN ACT**

- **The Robinson-Patman Act does NOT prohibit**
  - **Price changes from time to time resulting from**
    - **Changing conditions affecting the market or marketability of the goods**
      - E.g. Perishable goods, obsolescence of seasonal goods
    - **Distress sales under court process**
    - **Sales in good faith in discontinuance of business in the goods concerned**

# REBUTTAL TO A CLAIM OF PRICE DISCRIMINATION

- A Seller can rebut a prima-facie case of price discrimination by
  - Showing that the same price/credit terms are offered to all customers
    - Buying the same goods
    - Who are identical

# REBUTTAL TO A CLAIM OF PRICE DISCRIMINATION (cont'd.)

- A Seller can also rebut a prima-facie case of price discrimination by
  - Showing that his lower price to any purchaser or purchasers
    - Was made in good faith
    - To meet an equally low price of a competitor

# DEFENSE TO A CLAIM OF PRICE DISCRIMINATION

- Defense is available
  - Payments or services offered on an area-wide basis
  - To new as well as existing customers
  - Whether or not the discrimination has been caused by a decrease or an increase in the payments or services offered

# PRICE DISCRIMINATION DEFENSE CRITERIA

- Criteria which must be met
  - Price being met by seller is lawful (not predatory or the result of collusion)
  - Defense is not available if seller knew or should have known “as a reasonably prudent businessman” that the price was unlawfully discriminatory under the Act.

# **PREFERENTIAL CREDIT OR CREDIT DENIAL PERMITTED IN SPECIFIC INSTANCES**

- Legitimate business reasons
- History of late payments
- Financial difficulty
- Superior credit records
- Meeting competition

# MEETING COMPETITION

- Discriminatory price allowed when offered “in good faith” to meet an equally low price of a competitor
- Verify existence of competitor’s offer
- Do not exceed competitor’s offer in size, duration or scope
- Refuse to meet competitor’s offer if illegal



# **GOOD FAITH STANDARD FOR MEETING COMPETITION DEFENSE**

- Reasonable belief the situation is of competitive necessity
- Belief that granting a lower price would meet the lower price of a competitor
- Substantial efforts must be made to verify actual price/offer

# **GOOD FAITH GUIDELINES ESTABLISHED BY CASE LAW**

- **Casual reliance on uncorroborated reports of buyers or sales representatives without further investigation may not be sufficient to make the requisite showing of good faith**
- **Defense can be satisfied by efforts falling short of inter-seller verification**
  - **Do NOT contact competitor**

# GOOD FAITH CRITERIA

- Seller must prove that it had good reason to believe in good faith that it is meeting an equal price (or credit term)
- Standard of proof is that of a prudent business person responding simply and fairly to what is reasonably believable
- Existence of sufficient facts concerning the nature, time and duration of the lower competitive offer which “would lead a reasonable and prudent person to believe that the granting of a lower price would in fact meet the equally low price of a competitor”

# VERIFYING COMPETITIVE OFFERS

- **Some bases by which to verify a competitor's offer include**
  - **Reports from other customers of similar discounts**
  - **Threats to terminate purchases if the discounts were not met**
  - **Efforts to corroborate by seeking documentary evidence**
  - **Appraising its reasonableness in terms of available market data**
  - **Past experience of the seller with the buyer**

# **RECORDS TO SUPPORT “GOOD FAITH”**

- **The date of competitor’s offer**
- **The name of the competitor making the offer**
- **The name of the customer**
- **The terms and conditions of the offer**
- **The source of the information**
- **A statement as to why you believe your source**
- **Details as to what investigation was conducted**

# **DOCUMENTATION TO SUPPORT “GOOD FAITH”**

- Website or other medium where offer is stated
- Written terms and conditions of offer
- Any and all records relating to threats to cut off the business
- Reports from other customers of similar discounts
- Efforts to corroborate by seeking documentary evidence
- Documentation as to an appraisal of the reasonableness of the competitor’s offer in terms of available market data

# **OTHER LEGITIMATE REASONS TO GRANT DIFFERENT CREDIT TERMS OR CHARGE A DIFFERENT PRICE**

- **Cost Justification** – based on differences in the cost of manufacturing, sales or delivery
- **Market Conditions** – e.g. deterioration of products, seasonal goods, discontinued items
- **Superior Credit History or Records**

# PROMOTIONAL ALLOWANCES

- Proportionally equal terms
- Dollar volume or quantity purchased during specific period of time
- Equal rate per unit or amount purchased
- Specified part or percentage of local advertising



# THE FEDERAL TRADE COMMISSION ACT

- **Broadest of the antitrust statutes; includes:**
  - **Mergers & acquisitions**
  - **Unfair trade practices**
  - **Unfair arrangements between suppliers & dealers**
  - **Deceptive sales approaches**
  - **Discrimination in price, services or facilities**
  - **False advertising, and**
  - **Any other practice to deceive the public**

# **THE ANTITRUST PROCEDURE & PENALTIES ACT OF 1976**

- Gives the federal government new disclosure powers
- Permits a State Attorney General to sue for damages on behalf of a state's citizens
- Requires companies of a certain size to file pre-merger notices

# STATE ANTITRUST STATUTES

- Almost every state has independent laws prohibiting monopolies, contracts, conspiracies and combinations in restraint of trade

# GOVERNANCE OVER ANTITRUST VIOLATIONS

## ➤ CIVIL ACTIONS

- Punitive damages
- Class action
- Injunctions and damages
  - State Attorney General
  - Antitrust Division of U.S .Department of Justice
  - Federal Trade Commission

# GOVERNANCE & PENALTIES

## ➤ CRIMINAL ACTIONS

- Antitrust Division of the U.S. Department of Justice
  - Fines against businesses and individuals
  - Jail terms for individuals
- Other Enforcement Agencies
- Injunctions and damages
  - FCC for *telecommunications* entities
  - Federal Reserve Board for *banks*
  - Federal Trade Commission for *all other* matters

# LEGALITY OF INFORMATION EXCHANGE

- **“Procuring and dissemination” of credit data is legal [Cement Mfrs Protective Assn. v. U.S. 1925]**

## **– CITING**

- **Creditors are not restrained “from establishing and maintaining rules for the giving of credit to dealers where such rules in good faith are calculated solely to protect the defendants against dishonest or irresponsible dealers.” [Swift & Co. v. U.S. 1905]**

## **LEGALITY OF INFORMATION EXCHANGE (cont'd)**

- **“... the dissemination to competitors of information concerning the creditworthiness of customers aids sellers in gaining information necessary to protect themselves against fraudulent or insolvent customers.” [Michelman v. Clark-Schwebel 3<sup>rd</sup> Cir. 1976]**
- **Exchanging information regarding the creditworthiness of customers does not violate the Sherman Act. [Burtch v. Milberg 3<sup>rd</sup> Cir. 2011 – citing Cement, Michelman & Catalano]**

# GUIDELINES FOR TRADE ASSOCIATION MEETINGS

## ➤ Antitrust Compliance Statement

Members should be reminded that the account discussions about to take place will be conducted in accordance with Federal Antitrust guidelines. Therefore, there can be no discussion of any prices, terms, company policies or credit lines. Remarks must be confined to present and completed transactions only, with no mention of any future plans of action. All of the information obtained from the Group is strictly confidential and may not be disclosed to anyone other than the members' own credit department.



# TRADE ASSOCIATION MEETINGS FORMAT

- Independent representative present
- Written agenda followed
- Minutes of all meetings maintained
- No discussions outside the meeting

# PERMISSIBLE/REPORTABLE INFORMATION

- Delinquent account reports – NO discussion of *future* (i.e. intent)
- Exchange of factual credit information
- Reports of placement for collection
- Reports of initiation/continuation of lawsuit
- Reports of judgment obtained
- Reports of other factual information provided by customer
- Exchange of contact information

# NON-PERMISSIBLE DISCUSSIONS

- **Credit terms**
- **Production limits or pricing**
- **Group Boycott**
  - **Whether or not to do business with a particular customer**
  - **Involuntary Petition in Bankruptcy**
- **Price Fixing (key phrases could be misconstrued)**
- **Market or Territory Allocation**
- **Future Intention**

# NON-PERMISSIBLE ACTIVITIES

- Side conversations among a few members
- Extraneous comments
- Laughter
- Hand gestures
- Whispering
- Cell phone sharing

# **PERMISSIBLE ACTIVITIES**

## **[in your own office]**

- **Credit term changes**
- **Refusal to deal**
  - **Must be unilateral**
  - **Must be independent decision even if based, in part, on information obtained at credit group meeting**
- **Price changes to meet competition, etc.**
  - **As explained above, must be well-documented**
- **Placement of account for collection or suit**

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