

## The Power of Antitrust

Using Antitrust Laws to Protect:

1. Company
2. Individual

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## The Antitrust Laws

- Antitrust Laws Relating to Sales & Credit Management
  - **Sherman Act\***
  - Clayton Act
  - **Robinson-Patman Act\***
  - FTC (Federal Trade Commission) Act

\*Denotes laws that relate to credit management and sales personnel and becomes the basis for this presentation.

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## Areas of Jeopardy

- Exchange of credit information
- Pricing/bidding
- Territories and exclusivity in dealings
- Meetings, conferences, conventions and wherever competitors convene – bars, restaurants, other social events or functions

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## Antitrust – Sales & Credit:

### Interminably Tied

- Sales Department
  - Pricing & Terms of Sale
  - Market Division or Allocation
  - Bid Rigging

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## Antitrust – Sales & Credit

- Credit Department
  - Gathering/Exchanging Information
  - Conspiracy/Collusion
  - Restraint of Trade

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## Recognizing Antitrust Implications

- Who Should Know the Rules and Implications?
  - Owners/Officers/Key Management Personnel
  - Sales Management/Administration/Personnel
  - Credit Management/Administration/Personnel

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## Constructive Antitrust

- Federal and State Antitrust Laws Allow Companies to:
  - Exchange Credit Information with Competitors
    - The Legal Right to exchange information among competitors is based on legal decisions. Two (2) of the most prominent and cited cases for credit personnel are:
      - *Cement Manufacturers Protective Association vs. United States*, U.S. Supreme Court,
      - *Michelman vs. Clark Schwebel Fibre Glass Corp.*, U.S. Court of Appeals, NY

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## Existence of Power

### Case Law: U.S. Supreme Court

*Cement Manufacturers Protective Association vs. United States*, 268 US 588, 603–604

“... The gathering and dissemination of information which will enable sellers to prevent a perpetration of fraud upon them, which information they are free to act upon or not as they choose, cannot be held to be an unlawful restraint upon commerce . . .” . . . AND . . .

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## Existence of Power

### U.S. Court of Appeals, NY case:

- *Michelman vs. Clark Schwebel Fibre Glass Corp.*, 534 F2d 1036

- “...Unlike exchanges regarding prices which usually serve no purpose other than to suppress competition, and hence fall within the ban of the Sherman Act...”
- “...the dissemination of information concerning the creditworthiness of customers aids sellers in gaining information necessary to protect themselves against fraudulent or insolvent customers...Given the legitimate function of such data, it is not a violation of the Sherman Act to exchange such information, provided that any action taken in reliance upon it is the result of each firm’s independent judgment, and not of agreement.”

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## Antitrust & Credit Investigation- Essential and Dangerous

- The legal right and privilege to gather and disseminate credit information under *Cement Manufacturers* and *Michelman* is granted to:
  - Commercial credit grantors
  - NOT consumer credit grantors

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## Exchange of Credit Information

- **Antitrust in credit investigation**
  - **Conspiracy, Restraint of Trade, Joint Actions**

*Care should be taken that no agreements are made for any common action, nor should there be any effort made to influence the credit decision of another company. Any joint action can have the effect of eliminating the element of competition from the marketplace.*

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## Antitrust & Credit Investigation

### Facts

“... actual experience or present knowledge ... [of] ... past and completed transactions ...” means the credit grantor must limit comments to the history of the customer’s account, e.g.;

- How long has the subject of the inquiry been a customer?
- What has been the highest amount of credit given/allowed?
- What were the credit terms offered to the customer?
- Does the customer owe money now? How much of what the customer owes is current? Past due 30 days, 60, 90 or longer?
- How did/does the customer usually pay the account?
- What has been the experience with this customer regarding credit dealings and transactions?

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## Antitrust & Credit Investigation

**Recommendation** (express or implied) that (a) credit relationship be conducted or modified in any way:

- Credit grantor(s) may not recommend either directly or inadvertently to another creditor that credit;
  - Be either extended or denied.
  - A creditor may not appear to suggest any form of agreement to sell or not to sell to a customer or to extend credit under certain conditions
  - Each creditor must make an independent (unilateral) decision to extend credit or not and in accordance with their own company policy
  - Examples of comments which could be considered a conspiracy in restraint of trade and potential violation of the Sherman Act:
    - "I wouldn't sell (customer) on credit if I were you";
    - "If we (all) sell (customer) on COD terms . . .";
    - "Maybe we should . . ."

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## Antitrust & Credit Investigation

### Agreement . . .

- *To determine . . .*
  - to whom sales should be made or credit extended.
- *To Establish . . .*
  - Joint or uniform prices, terms or conditions under which sales should be made or credit extended.

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## Antitrust & Credit Investigation

### Future Actions

*" . . . (Creditor(s) may not plan with another or report any future actions or policies . . ."*

- credit grantors' may not reach agreement to do business with certain customers according to certain terms or conditions (conspiracy in restraint of trade).

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## Antitrust & Credit Investigation

### Future Actions (continued)

Nor may they report something that has not yet occurred or been acted upon, e.g.; “We will never sell this customer on open account terms again”; “This customer is permanent COD”; “We are going to file suit”; “We are filing liens today”.

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## Exchange of Credit Information

### □ Future Action

- Credit Hold vs. COD
- Terms
- Wink, Nod, Innuendo

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## Antitrust & Credit Investigation

*“ . . . give advice . . . or attempt to influence the independent judgment of other [creditor(s)] in the extension of credit . . . ”*

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## Exchange of Credit Information More to the Story

- Defamation
- Ethical Considerations
- Confidentiality
- To be discussed in series

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