

Areas in which public policy is most effective, and in which others, the least

Law



1. Areas in which public policy is most effective, and in which others, the least. Public policy is most effective in terms of identifying those which unreasonably restrains trade as that provided for in Section 1 of the Sherman Act. As provided for in Section 1 of the said act, " Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal," In interpreting the said provision being couched in broad terms, it was said that such a provision of law was held to be adaptable to change especially in the emergence of different types of commercial production and distribution Because the said provision of law of the Sherman Act is couched in broad terms, it is adaptable to the changing types of commercial production and distribution which have evolved since its passage, U. S. v. E. I. du Pont de Nemours & Co., 351 U. S. 377 (1956). Under this policy, as interpreted by courts contracts that unreasonably restrain trade or those contracts that prevent competition on price, being void and against public policy (Baumer and Poindexter 614), is that which have been the guide in effectively determining violations of antitrust laws. Common law was further more replete with precedents so as to serve as guidance and hence served as effective in its determination of violations under the antitrust laws (Baumer and Poindexter 614).

The provision, however under Section 2 of the Sherman Act which provides liability in cases of attempting to monopolize may not be an effective public policy in curbing antitrust violations as compared to other provisions of law. As opined by Baumer and Poindexter, " in the real world it is not easy to distinguish vigorous competition from attempts to monopolize," (631). Hence

often, courts look into the market share of each case (631). Courts often hold that it is most likely that a firm would be liable in attempting to monopolize if it has a larger market share especially if it appears to have excluded most of its competition, which may be actual or potential (631). Being an ambiguous and uncertain provision, most often than not, Department of Justice officials would likely not bring criminal charges against those responsible for such violations (640). A relevant example cited would be the charges against Microsoft at the time the DOJ brought an action for violation of Section 2 of the Sherman Act was said to be “not a target of criminal violation claim,” (Baumer and Poindexter 640).

Section 2 of the Clayton Act, which makes price discrimination that has the effect of substantially lessening the competition or tend to create monopoly, was said to have a problem in terms of enforcement as there is difficulty in distinguishing whether such price discrimination is truly illegal or only a result of a very strong price competition (Baumer and Poindexter 632). It was said that the said Section is considered a nuisance as government rarely initiates such lawsuits because of the problem on the true determination of an illegal price discrimination (Baumer and Poindexter 632). Hence public policy is least effective in these areas where ambiguity as to the interpretation and enforcement exists.

2. Appropriate goals of antitrust policy in the United States

The very goal of antitrust policy in the United States is the protection and encouragement of competition (Barnes, Dworkin and Richards 866). With the development and growth of national markets, many of these large entities engaged in business practiced acts which were targeted to destroy their

competitors (Barnes, Dworkin and Richards 866). Through the passage of Sherman Act, Clayton Act and the Robinson-Patman Act, said legislations aimed to preserve competitive market structures and prevent the concentration of such a great economic power in a few firms, and the primary goal is protecting consumers from such anticompetitive conduct (Barnes, Dworkin and Richards 866).

Hence, in the case of *US v. Microsoft Corporation*, 253 F. 3d 34, 346 U. S. App. D. C. 330 (2001), found efforts by Microsoft to maintain its position of monopoly power in the operating system market through means which is other than competition on the merits but through the application of barriers to entry (*US v. Microsoft Corporation* 34). Hence in citing *Spectrum Sports, Inc. v. McQuillan*, 506 U. S. 447, 458, 113 S. Ct. 884, 122 L. Ed. 2d 247 (1993), the Court held that such barriers to entry is a conduct which “unfairly tends to destroy competition itself,” *Spectrum Sports, Inc. v. McQuillan* 447).

In *FTC v. Procter and Gamble Co.*, 386 U. S. 568 (1967), the Court held that a merger which, substantially lessened competition was the very intention of Section 7 of the Clayton Act having an anticompetitive effect on the market power (*FTC v. Procter and Gamble Co.* 568). In *Brook Group LTD v. Brown and Williamson Tobacco*, 509 U. S. 209 (1993), lowering of prices does not automatically mean of a violation of the Robinson-Patman Act but there must be the existence of both the harmful effect against the competitor or firm’s rival and a below cost price which would injure competition as well (*Brook Group LTD v. Brown and Williamson Tobacco* 209).

3. Is it appropriate to pursue and attempt to control a Microsoft type activity

under our nations antitrust laws? Why?

In my opinion, it is not appropriate to pursue nor attempt to control a Microsoft type of activity as such industry involving technological progress should allow for innovation and freer market rather than government intrusion (Friedman 16). Same legal standard should still apply in such type of industries or activities and should not be treated differently with other firms in the market (Cass and Hylton 1). A change in antitrust standard in such kind of industry mainly because of a possibility or speculation that investment may be discouraged and innovation reduced, is an unwise as it would reduce even more the intellectual property protections generally which promote innovation (Cass and Hylton 1). There must be substantial reasons to justify the control of such type of activity.

4. What do you think will or should be the resolution of the emerging conflict between the US and E. U. antitrust policy?

The study of Brett Frischmann and Spencer Weber Waller would provide a better solution to the emerging conflict regarding control as to types of industries or resources which may either be private or in need of government control. According to Frischmann and Waller, determining and defining the essential facilities would enable courts and institutions establish rights of access and the legal liabilities in case of denial of such an access (Frischmann and Waller 1). It would resolve debates regarding antitrust based on the nature of such property and open access (Frischmann and Waller 1).

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