

## Antitrust Traps in the Hospitality Industry

February 3, 2010  
Houston, Texas

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## Presenters



- Banks Brown, Partner, McDermott Will & Emery, New York, NY
- General Counsel for the American Hotel & Lodging Association, the Hotel Association of New York City, Inc. and the Travel Business Roundtable.
- 2006 recipient of the Anthony G. Marshall Award for Pioneering and Continuous Contribution to Hospitality Law.
- Co-author of "Understanding Hospitality Law" (4th Ed. Educational Institute, AHLA).



- Amy Ralph Mudge, Counsel, Arnold & Porter LLP, Washington DC
- Antitrust & Consumer Protection lawyer, representing consumer products and service clients before the FTC, DOJ, state AGs and in private litigation.
- Significant experience establishing effective compliance programs and providing antitrust training to both lawyers and nonlawyers.
- Chair of Private Advertising Litigation Committee, Antitrust Section of ABA

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## Penalties and Enforcement

- Government and Private actors may enforce antitrust laws:
  - The DOJ and the FTC have primary federal jurisdiction over antitrust enforcement:
    - DOJ and FTC seek only injunctive relief for non hard-core violations
    - DOJ may prosecute hardcore violations (e.g. horizontal price fixing, bid rigging, market allocation, group boycott) criminally – up to 10 years in jail and \$100 million in fines or twice the gross gain or twice the gross loss" resulting from the violation (whichever is greater)
  - Private citizens/corporations also may sue for injuries caused by a violation:
    - 3 times the plaintiff's actual injury ("treble damages") with no upper limit
    - Plus attorneys' fees and costs
    - Injunctive relief
  - Each State and the District of Columbia also have jurisdiction to enforce both state and federal antitrust laws

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## Antitrust Laws

- Antitrust laws preserve and protect competition by making illegal those practices or transactions that unreasonably restrain competition
  - Protect consumers
  - Lower prices, more consumer choice
- Sherman Act primary antitrust statute
  - Sherman Act § 1 (unlawful agreements)
  - Sherman Act § 2 (monopolization)
- Sherman Act analysis revolves around the relationship of the parties involved, i.e. Horizontal vs. Vertical

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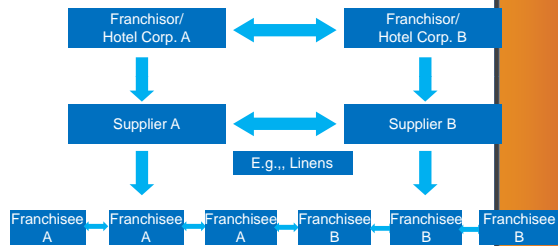
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## Horizontal

- Horizontal



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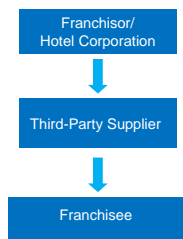
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## Vertical

- Vertical



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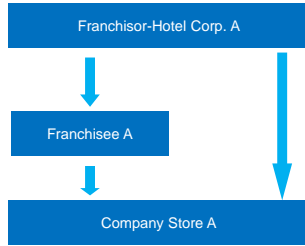
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## Dual Distribution

- Dual Distribution



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## Sherman Act § 1 Per Se Rule vs. Rule of Reason

- Section 1 of the Sherman Act applies to *agreements* between separate entities that “unreasonably” restrain trade
  - Per se rule applied to “naked restraints” and conduct is unlawful without regard for possible procompetitive justifications
  - Some conduct is so anticompetitive that life is too short to listen to justifications
- The antitrust “rule of reason” is applied to the “vast majority” of agreements
  - Rule of reason balances the competitive restraints against the procompetitive benefits to be gained from the restraints
  - Restrictions must be tailored (but not essential) to meet legitimate goals
  - In reality, defendants usually win (at least on appeal)

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- My Company needs information about what our competitors are doing to compete effectively? What are the ground rules for gathering competitive intelligence?

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- We participate in several trade associations. What advice should I give my folks who attend these meetings?

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- **COMPETITOR COLLABORATIONS**

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**What To Avoid**

- **Horizontal Competitors Should Not Discuss Price or Terms**
  - Discounts
  - Profits
  - Margins/Markups
  - Credits
  - Promotions
  - Costs
- **Competition in the market**
  - Market trends/Forecasts
  - Market shares
  - Relationships with other suppliers/customers

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Antitrust and Information Exchange by Competitors

- Antitrust recognizes that, in some cases, information exchanges between horizontal competitors can result in procompetitive benefits:
  - DOJ/FTC Antitrust Guidelines for Collaborations Among Competitors state that “[e]fficiency gains from competitor collaboration often stem from combination of different capabilities or resources.” § 3.36 (Apr. 2000).

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Antitrust and Information Exchange by Competitors, cont'd ....

- The DOJ/FTC Joint Information-Sharing Guidelines provide a “safe harbor” for horizontal competitor exchanges that conform to the following guidelines:
  - (1) the collection is managed by a **third party** (e.g., a purchaser or trade association);
  - (2) any information that is shared among or is available to the competing providers furnishing the data must be more than **three months old**; and
  - (3) there are at least **five providers** reporting data upon which each disseminated statistic is based, no individual provider's data may represent more than **25 percent on a weighted basis** of that statistic, and any information disseminated must be sufficiently aggregated such that it would not allow recipients to identify the prices charged by any individual provider.

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Antitrust and Information Exchange by Competitors, cont'd ....

- Regardless of whether the exchange falls within the safe harbor, there should **always** be a legitimate business justification for the exchange of information:
  - *Cement Mfg Protective Ass'n v. U.S.*, 268 U.S. 588 (1925) (upholding the competitor-defendants' exchange of information because it was done to help prevent instances of fraud)
  - *U.S. v. Container Corp. of Am.*, 393 U.S. 333, 335 (1969) (condemning defendants' information exchange because the exchange served no underlying purpose other than “to furnish price information whenever requested”)

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- Do lower costs, we are considering participating in a buying cooperative. How do I assess the risks?

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## Joint Purchasing

- Naked agreement between buyers on prices to be paid to suppliers illegal *per se*
- Legitimate joint purchasing blessed by DOJ/FTC
  - Demonstrated efficiencies
  - Joint purchases = > 35% of total sales of the purchased goods/services in a market
  - Cost of the jointly purchased goods/services = > 20% of total revenues from all goods/services

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- **VERTICAL ARRANGEMENTS**

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- Is it legal for a brand to set a price, either a minimum or a maximum, and require a location to comply?

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- Are there limitations on the terms a power buyer can require?

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### Distribution Restraints: Resale Price Maintenance

- Maximum RPM
  - Generally viewed as being good for consumers
  - Illegal per se until *State Oil v. Khan* (1997)
  - Not per se lawful, but difficult to see injury or standing unless it is a de facto minimum
- Minimum RPM
  - Consumer welfare effects ambiguous
  - Illegal per se under federal law until *Leegin* (2007)
  - Most definitely **not** de facto per se lawful
    - Market power (upstream or downstream)?
    - Requested by retailer?
    - Used by a majority of firms in the market?
  - States hate *Leegin*, Congress not thrilled

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## Non-Price Restraints

- Territorial or customer restrictions (e.g. *Continental TV v. GTE Sylvania*, 433 U.S. 36 (1977))
  - Rule of reason, but question of whether restriction is for the benefit of the supplier or the product of a horizontal conspiracy among customers
- Exclusive Dealing (e.g. *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984))
  - Rule of reason – legality depends upon the extent of foreclosure, length of the exclusive, and justification

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## Dual Distribution

- Dual Distribution occurs when a franchisor sells its franchise to independent franchisees but then also operates a brick-and-mortar store that may compete with the franchisees:
  - Thus, the franchisor sits in both a vertical and horizontal relationship to the franchisee

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## Dual Distribution, cont'd ...

- Courts generally treat nonprice territorial and customer restraints imposed in a dual distribution situation as vertical restraints, which then will be subject to the rule of reason
- Risks, however, increase when company-owned stores and independent franchisees engage in communications about resale prices or other competitively sensitive information.

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• **EVERYTHING ELSE (OR CLOSE TO IT)**

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## Sherman Act § 2

- Prohibits monopolization, attempts to monopolize, and conspiracies to monopolize
- Elements:
  - Dominant position (large market share)
    - 40-50% may be high enough for “attempt”
  - Exclusionary conduct
    - Limiting rival’s access to customers or suppliers
    - Below cost pricing
    - Disparaging rivals
  - Key cases:
    - Verizon Communs. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398, 407 (2004) (monopolization standard)
    - Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 456 (1993) (attempted monopolization standard)
- Market definition is critical

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## Robinson-Patman Act

- The Robinson-Patman Act prohibits price discrimination by a seller between competing buyers of goods of like grade and quality
- Nobody likes R-P, seriously
- Specifically, the elements of an R-P Act claim are:
  - Difference in Price (or Benefits)
  - Between Purchasers
  - Goods of “Like Grade and Quality”
  - Sold for Use or Resale in the U.S.
  - Which May Injure Competition or Competitors
  - Unless There is a Defense

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## Robinson-Patman Act, cont'd...

- R-P Act defenses include:
  - Meeting Competition
  - Cost Justification
  - Sales to Non-Profit or Governmental Entities
  - “For Own Use”
  - Functional Availability
  - Obsolete Goods

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**QUESTIONS?**

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