Jack Stout

INTERFACE

Antitrust and You

An Overview of the Sherman Antitrust Laws

By George E. Leonard

"Can So!" reasoned the city attorney.
"Cannot!" argued the county counsel.
"Can so!" parried the city attorney.
"Cannot!" countered the county counsel.
"I've got my rights!" chorused the patients, the taxpayers, the workers and the owners large and small . . . not in harmony. Once again, the design of an entire prehospital care system is more heavily influenced by technical interpretation of antitrust law than by concern for efficiency, stability, or even patient care. And often as not, those technical interpretations of antitrust issues are wrong.

Over the past several years, I have been blessed with opportunities to experience firsthand the actual – not hypothetical – application of antitrust law within the prehospital care industry. I have read countless laws, briefs, opinions and depositions. I have testified and critiqued the testimony of others. I have invested more than a hundred (fascinating, really) hours in conferences with antitrust experts. Here is what I have learned:

1. *Until you've obtained the advice of an attorney who is both an antitrust specialist* and *intimately familiar with the workings of the prehospital care industry, assume nothing. For example, such practices as call rotation and zone allocation – often thought of as ways to avoid antitrust trouble – may actually increase risks of antitrust violations and tort claims as well.*

2. *The "state action exemption" may not be the only defense for an efficient, patient-oriented system design incorporating a "reasonable" restraint of trade or a more economically effective restructured form of competition.*

3. *When the design of a prehospital care system sacrifices the interests of patient care, or true economic efficiency, due to fear of antitrust litigation, Sherman himself rolls over in his grave.*

Attorney George Leonard has specialized in antitrust work since the late '60s when he joined the Kansas City-based law firm of Shugart, Thomson and Kilroy, specialists in litigation. Leonard has represented both plaintiffs and defendants in diverse industries, and during the past 10 years, has been involved with antitrust issues in the health care industry, including two such cases which went to the U.S. Supreme Court.

I became acquainted with Leonard when he successfully defended Kansas City's public utility model system, and me personally. Though he resists the claim, Leonard knows more about the economic impact of various prehospital system designs than do many of our industry's experts.

I am honored that Leonard has agreed to serve as guest "Interface" columnist with a three-part series on antitrust laws and the prehospital care industry, beginning with the following overview of the Sherman Antitrust Laws. – Jack Stout

A number of judicial decisions in the last few years have shattered the myth that "learned professions" (for example, medicine or law) were somehow exempt from coverage of the antitrust laws of the U.S. The medical profession, particularly, has been rudely jolted by application of antitrust laws to situations undreamed of even a decade ago. Doctors have been found to have engaged in illegal price fixing (through a county medical society whose goal was to hold costs down), and illegal group boycotts in excluding osteopaths from hospital staffs.

Prehospital emergency medical services have also been challenged and accused of violating the antitrust laws in a number of cases.

At the same time, antitrust attacks on local governments' decision-making were mounting. These reached such avalanche proportions that Congress finally reacted, passing the Local Government Act of 1984. This act exempted cities and counties from paying triple damages for a violation of the antitrust laws.

However, significant antitrust issues still exist when a city decides to restructure its ambulance system. Serious challenges from entrenched (and possibly to-be-excluded) private sector operators can, and are, being made. The challenges are directed at both local governments and competitors who have, or may obtain, the franchise or license awards.

The purpose of this article (and those which will follow) is to try to present a brief overview of the antitrust laws. Hopefully the articles will be basic enough to be understandable to a layman, and if they are too basic for some, I apologize.

The articles will be organized as follows:

1. This article will present a layman's view of Sections 1 and 2 of the Sherman Act, and explain something about each of them;
2. Next month, an examination of various immunities and exemptions from the antitrust laws, available to either governmental or private sector actors will be presented.
3. Finally, the third in this series of articles will examine some specific situations, with comment (or advice) on the legality of the action or proposed action. Also to be included will be a checklist of some potential antitrust traps or pitfalls, which are lurking in the emergency medical systems of many of our communities.

The Federal Antitrust Laws

Section 1 of the Sherman Act deals with restraints of trade. It provides, in part, *Every contract, combination or conspiracy . . . in restraint of trade . . . among the states . . . is illegal.*

Section 2 of the Sherman Act deals with monopolies. It provides, in part, *Every person who shall monopolize, or attempt to monopolize, or conspire with any person . . . to monopolize any part of the trade or commerce among the several states . . . shall be deemed guilty of a felony . . .*

Section 4 of the Clayton Act gives persons, who are injured in their business or property by a violation of the antitrust laws, a cause of action for triple damages, plus costs, and payment of reasonable attorneys' fees. Section 16 of the Clayton Act provides for injunctive relief and reasonable attorneys' fees for a threatened violation of the antitrust laws.

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*If you have a question, a problem, or a solution related to the public/private interface in prehospital care, address your letter to: "Interface" **jems**, P.O. Box 1026, Solana Beach, CA 92075.*

A. Interstate Commerce

The threshold jurisdictional issue, under either Section 1 or 2 of the Sherman Act, is whether interstate trade or commerce has been affected. The courts adopt an expansive interpretation on this question, and these articles will assume that the courts will find a sufficient impact on interstate trade or commerce to call the federal antitrust laws into play.

B. Relevant Market

The plaintiff in an antitrust case has the burden of establishing that the restraint (Sec. 1) or the monopoly (Sec. 2) has an impact on a *market*. Thus, after the issue of interstate commerce is determined, the courts examine the factors involved to determine what "relevant product" and "relevant geographic" markets are involved in the lawsuit.

The broader the definition of the relevant product market, and the larger the area of the relevant geographic market, the less likely it is that a court will find either that the action unreasonably restrained trade (Sec.1) or constituted a monopoly (Sec.2).

1. Relevant Product Market

A properly defined relevant product market encompasses all of the products that are presently available, and the potential entrants into that market which are reasonably interchangeable, or which are perceived as reasonable substitutes for the product by consumers. This is called "cross-electricity of demand."

2. Relevant Geographic Market

The relevant geographic market is defined as that area to which the buyer can reasonably turn to seek alternative sources of supply. The focus is upon the area of effective competition.

C. Sherman Act, Section 1.

1. "Contract, Combination or Conspiracy" Requirement

The next element a plaintiff has to prove in order to establish a Sherman 1 violation is that there was a "combination, contract or conspiracy." Under general antitrust law, an officer cannot combine or conspire with the company for which he works, nor can a corporation be guilty of combining or conspiring with a wholly owned subsidiary – the two companies are treated as one economic unit. Courts have recognized a narrow exception to the general rule that no violation occurs when a corporation conspires only with its officers, agents or employees. This exception provides that a violation can occur if the officer, agent or employee has an independent, personal stake in achieving the object of the conspiracy.

Cities and their employees, elected representatives or consultants are treated as a single entity or unit.

2. Standard of Review

The courts have recognized on many occasions that a literal reading of Sherman 1 would render illegal "every" contract that affected interstate commerce, and that this was not a result which Congress intended.

Thus, only contracts or combinations which have been found to *unreasonably* restrain trade are illegal. The courts have, over the years, found certain types of business practices to be so unreasonable as to be *per se* illegal (this means "in and of itself" illegal). Thus, the next step in analyzing a Sherman 1 case is to determine whether a particular restraint is subject to the "per se" rule of illegality.

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D. The "Per Se" Rule of Illegality

The most common type of conduct which is uniformly condemned as "per se" illegal is price fixing between competitors. Other types of practices which are "per se" illegal include division of customers or markets between competitors. Some forms of group boycotts, too, have been held to be per se illegal. The courts have imposed a per se rule of antitrust analysis to members of "learned professions," in cases dealing with prices and group boycotts. *Per se* treatment is *almost invariably* given only to arrangements or agreements among competitors ("horizontal"), and is almost never given to arrangements or agreements between buyers and sellers ("vertical").

The effect of a ruling that an arrangement is a "per se" illegal one is very significant. The plaintiff is relieved of his burden of proving that the conduct unreasonably restrained trade, and is further relieved of his obligation of establishing a relevant product or geographic market. The court *conclusively presumes* that 1) the conduct unreasonably restrained trade, 2) in a recognized product and geographic market.

Moreover, the defendant is *absolutely* prohibited from offering evidence to justify or explain his reasons for the conduct. In short, *no matter what the reasons,* if the defendant did the act, he is guilty. It is just that simple.

However, arrangements between buyers and sellers (vertical) are almost universally not per se illegal arrangements. Thus they are examined under another standard.

E. Rule of Reason Analysis

The courts have been reluctant to apply per se analysis to arrangements until the judiciary has had considerable experience with the arrangement. This caution results from the courts' desire to avoid prohibiting or chilling beneficial business relationships, and from the courts' recognition that it is often very difficult to predict the competitive impact of a given type of business conduct in each of the multitude of factual situations that our complex economy presents. Therefore, courts prefer to approach most cases by examining the particular circumstances and weighing all the factors under a "Rule of Reason" analysis. This is especially true of buyer-seller relationships.

Plaintiffs have a heavy burden in a Rule of Reason case. They must estab-

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lish that the restraint substantially affected, or lessened, competition in the relevant product and geographic market. Further, in defense, the defendant is allowed to explain, rationalize or justify the pro-competitive effects of the restraint. Only if the finder of fact finds that the restraint was one which lessened competition can the plaintiff prevail.

To determine that question, the court must ordinarily consider the facts peculiar to the business to which the restraint is applied; its condition before and after the restraint was imposed; the nature of the restraint and its effect, actual or probable. The history of the restraint, the evil believed to exist, the reasons for adopting the particular remedy, the purpose or end sought to be attained, are all relevant facts. This is not because a good intention will save an otherwise objectionable arrangement, but because knowledge of intent may help the court interpret facts and predict consequences.

The ultimate issue which the court must decide in a Rule of Reason case is "whether the challenged agreement is one that promotes competition or one that suppresses competition."

F. Section 2 of the Sherman Act

There are three separate, distinct, but related, theories of liability under Sec. 2 of the Sherman Act. Those are 1) monopolization, 2) attempt to monopolize and 3) conspiracy to monopolize. A plaintiff is required to establish a relevant product and geographic market for any of the three. The same issues as described above, are applicable for a Sec. 2 relevant market definition.

1. Monopolization

The elements of a Sec. 2 monopolization claim are: 1) "the possession of monopoly power in the relevant market and 2) the willful acquisition or maintenance of that power, as distinguished from growth or development as a consequence of a superior product, business acumen or historic accident."

a. Monopoly Power

Monopoly power is defined as the "ability to control price in, or to exclude or restrict competition from" a relevant geographic market. If a party has a sufficient percentage share of the market, this power may be inferred. The cases are uniform that a 40 percent market share is not sufficient to establish monopoly power. Shares in the 60 percent to 70 percent range are sufficient to be monopolies, and shares in the 40 percent to 60 percent range are examined on an individual basis. Courts consider other factors, including the size and strength of competing firms, freedom of entry into the field, pricing trends and pricing practices in the industry and that monopoly power is an issue of fact.

b. Willful Acquisition or Maintenance of Monopoly Power

The plaintiff must also show that the defendant "willfully acquired or maintained" monopoly power over the relevant market.

2. Attempt to Monopolize

The essential elements of an attempt to monopolize are 1) a "specific intent" to monopolize the relevant markets and 2) "dangerous probability of success."

3. Conspiracy to Monopolize

The essential elements of a conspiracy to monopolize are 1) an agreement between two or more economic entities, 2) a specific intent to monopolize the market, and 3) commission of an overt act in furtherance of the conspiracy. This is certainly a lower burden of proof than under either of the other Sec. 2 violations, and clearly moves over into the area of a Sec. 1 violation, i.e. a conspiracy to restrain trade.

Sec. 2 cases are not nearly as common as Sec. 1 cases, and are usually more difficult to prove. Moreover, because a principal focus of these articles is on cities and their procurement policies, one line of cases will primarily eliminate our need to dwell on Sec. 2.

Courts have generally ruled that in order to violate Section 2, the defendant must be a competitor in the market. Thus, if we are examining a local government's right to regulate or exclude competitors (for example, through a licensing or bidding process), Sec. 2 will not be applicable to the government, because the governmental unit is not a competitor.

Thus, although helpful to know about, Sec. 2 is not of as much concern to the thrust of these articles as is Sec. 1. □

Next month, we will examine various statutory and judicially created exemptions or defenses to the antitrust laws.